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L&E Newsletter

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A Message from the Chair

As this is my first opportunity to write to all of you as Section Chair, I would like to begin by thanking Janet McEneaney, our *Newsletter* editor, for all her effort and dedication in putting this issue together. Thanks also to all of this issue's authors for their time and work in preparing articles on a number of relevant legal issues. On behalf of everyone, I would like to acknowledge the contributions of outgoing Section Chair Richard Zuckerman and former Section Secretary Elena Cacavas. I would also like to welcome Chair-Elect Robert Kingsley ("Kayo") Hull and our new Secretary, Robert Simmelkjaer. A special word of thanks is also in order to CLE Chair Alan Koral for putting together terrific programs (sometimes twice) over the last year. And, of course, our continuing thanks to the entire NYSBA Meetings Staff, and especially Meetings Coordinator and Section Liaison Linda Castilla, for planning and coordinating social events that made the meetings both enjoyable and memorable.

The Section held its 30th Anniversary Meeting March 19-23 at the Longboat Key Club, Longboat Key, Florida. Eighty-nine members attended together with nineteen spouses and guests and eight children (a very good turnout considering that this was a rescheduling of the Fall 2005 Program due to Hurricane Wilma). Summarized in a dozen words, the meeting had: beautiful weather, a beautiful setting, great programs, and CLE credits in abundance.

Attendees received 10.5 MCLE credit hours, including 1 hour on ethics. The four plenary sessions and nine separate workshops covered a wide array of labor and employment law topics. As befitting a 30th Anniversary meeting, many of the program moderators and

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speakers were former Section Chairs—the list included Mike Bernstein, Evan Spelfogel, Pearl Zuchlewski, Lou DiLorenzo, Bruce Millman, Mona Glanzer, Margery Gootnick, John Canoni, Jim Sandner, and Ike Perlman. Thank you to them and all the other participants for content-filled and well-presented programs. There were also a number of special guests in attendance, including A. Vincent Buzard, Esq., President of the New York State Bar Association, who spoke at the Executive Committee Dinner on Monday evening. The keynote speaker at Tuesday's 30th Anniversary Celebration banquet was legendary Arbitrator Richard Mittenthal.

Super Sleuth Adam Oliver, who was the only person to solve the Murder Mystery.

In May, I (together with Chair-Elect Kayo Hull) attended a NYSBA Leadership Conference for Section leaders. This is the second time I have attended the conference, which I found very useful. In addition to presentations by NYSBA staff to inform us of resources available to the Sections, NYSBA-elected officers and speakers spoke of the inner workings and objectives of the Association. The shared experiences of former Section Chairs were most helpful, particularly with regard to membership matters and improvement of services for members.

A meeting of the Section's Executive Committee took place on May 23. A number of Section leadership positions were filled or extended: Mairead Connor was appointed to serve as Co-Chair of the Diversity & Leadership Development Committee, Norma Meacham was appointed Representative to the Fourth District, and Paul Sweeney was appointed Representative to the Sixth District. Additionally, the following Committee Chairs were extended through May 31, 2007: Robert Boreanaz (Chair, Union Administration & Procedure); Peter Conrad (Co-Chair, Labor Relations Law & Procedure); Howard Edelman (Co-Chair, Legislation); Kayo Hull (Chair, Finance); and Deborah Skanadore Reisdorph (Co-Chair, Equal Employment Opportunity Law). Congratulations, all.

Also at the Executive Committee meeting, outgoing Chair Rich Zuckerman described his experience over the last year and praised the Committee Chairs as "the lifeline" of the Section. The work of the Committees is indeed crucial to the success of the Section as a whole. The Committees—which focus on areas of interest to the Section's different constituencies—often develop our Fall and Annual meeting programs. Many of the Committees met in conjunction with our Fall Meeting and will meet again at the Annual Meeting in January. If you are not yet an active Committee member, I urge you to attend the Meeting and explore the Committees' activities. Chair-Elect Kayo Hull, any of our Committee Chairs and Co-Chairs and I would be happy to answer any questions that you may have about Committee membership.

On September 15 through 17, the Section held its Fall Meeting—which was co-sponsored with the Municipal Law Section—at the Gideon Putnam Hotel in Saratoga Springs, New York. There was a wonderful turnout, with 169 attorneys, 37 spouses and guests, and three children (including David and Adam Oliver) attending. Reflecting the co-sponsorship of the program, there were plenary sessions and workshops on Friday addressing issues of shared interest for Labor and Employment Law and Municipal Law practitioners. On Saturday, there was a separate Labor and Employment Law Section track of plenary sessions and workshops. In all, Section members were able to earn 11.5 MCLE credit hours, including 3 credit hours in ethics. Program Chair Alan Koral, with the help of the CLE Committee and numerous Committee Chairs, developed a rich and interesting program which was noted by many with great approval and requests for more of the same in the future. On Friday evening, we were treated to a delicious dinner and both entertained and challenged in trying to solve the interactive "Murder Mystery Theatre" performance that took place between salad and dessert. After a few raindrops on Friday, we enjoyed a beautiful Fall day on Saturday, which permitted golf and tennis events and a perfect day for strolling, antiquing and shopping in the Saratoga area for Section members and their guests.

At its meeting on Sunday morning, the Section's Executive Committee voted to reorganize the Section's Arbitrator Mentoring Program to enhance its utility and efficiency. There were also affirmative measures taken toward increasing Section membership among young attorneys and exploring sponsorship of some locally based programs through the District Representatives.

Finally, work is already well underway on the program for our Annual Meeting that will be held at the New Yorker Hotel in New York City on January 26, 2007. Alan Koral and the CLE Committee met during the last week of September and have developed a program which promises to be both thought provoking and informative. I hope to see you there.

Donald D. Oliver

From the Editor

In a computer disaster of great proportions, I recently lost all my files and e-mail. Fortunately, the files were backed up and were reconstructed almost byte by byte; the e-mail, unfortunately, remains among the missing. I am fairly certain all the *Newsletter* files were recovered. However, if any of you reading this were supposed to have an article in this issue that did not appear, please let me know.

My thanks to all the authors who have submitted articles for this long-awaited issue. I particularly want to mention Sheila Hatami and David Zwerin, authors of the article about Title VII in this issue. This article was the first-prize winner in our Section's 2005 Stein Memorial Writing Competition and the authors were students at Hofstra University Law School at the time it was written. The other 2005 prize winners will be published in the next edition of the Newsletter.

The National Labor Relations Board is up to its full complement of members again and has decided or is considering some important cases. In this issue, I'll write about several of them.

Mandatory Arbitration Policies and ULPs

In a recent decision, the Board held that an employer's mandatory arbitration policy violated the National Labor Relations Act because it did not expressly exclude unfair labor practice charges under the NLRA.[1]

In the *U-Haul* case, the employer's mandatory arbitration policy covered all employees and was a condition of employment. The policy covered all disputes relating to or arising out of employment with the company or the termination of that employment. It did not mention the NLRA or expressly restrict the filing of charges under the Act.

The company's policy covered:

> claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations.

The Board concluded that the company's policy violated the Act because it would unreasonably inhibit employees from filing unfair labor practice charges with the NLRB. Specifically, they found that the phrase "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" encompassed the filing of unfair labor practice charges, and thus employees could reasonably believe that they were precluded from filing them.

The ruling compared rights under the arbitration policy with an employee's right to file charges with the Equal Employment Opportunity Commission, which may not be waived. It noted that mandatory arbitration provisions that attempt to restrict such rights are void and invalid as a matter of public policy.

As a remedy, the company was ordered to rescind its arbitration policy; post a remedial notice; remove from its files all unlawful waivers of the right to take legal action executed by its employees; and notify in writing each present or former employee who executed such a waiver that the waiver will not be used.

Wright Line Applies to Successor Employer Cases

In *Planned Building Services, Inc.*,[2] the Board clarified the standard to be used when a successor employee allegedly avoids a duty to bargain by failing to hire the predecessor's employees. The Board held that the correct standard in such cases is identical to the standard promulgated in *Wright Line* for discriminatory discharge cases.[3]

The employer in this case was the successor to four cleaning service contracts in Manhattan. Each of the four predecessor employers had collective bargaining agreements with local 32BJ, SEIU. The company retained some of the unionized staff at each location, but brought in other non-unionized workers who became the majority of the workforce under each service contract.

Among other evidence of discriminatory intent, the employer admitted it followed this policy to avoid recognizing the union as the employee's bargaining representative. Based on a recent NLRB case, the ALJ found that the successor employer was motivated by the desire to avoid the successorship obligation.[4] In cases such as the FES case, where there is an allegation of discriminatory failure to hire, the burden was on the General Counsel not only to demonstrate unlawful motive, but also to show that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; and that the applicants had experience or training relevant to the

positions for which the employer was hiring, or that the stated qualifications were not consistently followed by the employer, or the discrimination was otherwise pretextual. The employer then had the burden of showing it would not have hired the applicants even in the absence of their union affiliation or protected activity.

On appeal, the Board upheld the ALJ decision on grounds other than a reliance on the FES line of cases. The Board found that because the successor continues the predecessor's business, there is no need to demonstrate that the predecessor's employees have the experience necessary to do the same jobs. In addition, because the successor employer must have a workforce in place to continue the predecessor's business, the General Counsel need not demonstrate that the employer was hiring. The Board found it more appropriate to apply the burden-shifting analysis set forth in *Wright Line.* This means the General Counsel need only prove the employer's actions were the result of animus toward union or protected activity. Once that is established, the employer must show that the same action would have been taken even in the absence of protected activity.

No Duty to Bargain About a Gift to Employees

In this case, the employer's parent corporation made a one-time gift of 100 shares of stock to all employees at its facilities, including hourly employees, supervisors and managers. The occasion was the initial public offering of the employer's stock and each gift had a value of about $1,450. In order to receive the stock, employees at all levels had to have been employed for six months before the gift and remain employed for six months afterward.

The Union asserted the stocks were wages or a term and condition of employment; since they were given unilaterally and without notice to the Union, it claimed the employer had violated Section 8(a)(5) by refusing to bargain.

The Board found that the stock was a gift to employees, not wages. It said the award was not tied to employee remuneration; the size of the award was established without regard to any employment-related factors, including work performance, wages, hours worked, seniority, or productivity; the value of the award was determined solely by market demand for equity shares in the company; all employees at all facilities received the same amount of stock; and it was a one-time gift with no promise or prospect of being repeated.

The Board explained that "[i]f the ostensible gifts are so tied to the remuneration which employees receive for their work that they are in fact a part of remuneration, they are in reality wages and subject to the statute's mandatory duty to bargain." The NLRB concluded that was not the case here, notwithstanding that the employer withheld taxes from the stock award. That factor, standing alone, was not dispositive. In fact, the Board found, gifts need not be only of token value. Furthermore, the condition of six months more service with the company did not run afoul of the Board's usual gift analysis theories.

Hospital May Ban a Union Button

During negotiations, a union representing nurses at the Sacred Heart Medical Center in Spokane, Washington, distributed buttons to its members that read "RNs Demand Safe Staffing." The hospital banned the buttons in all areas open to patients and their families, on the grounds that the union's message would frighten or disturb them.

In the past, the NLRB limited the right of hospital employees to wear union-related buttons. Employers were allowed to ban them in acute patient care areas; however, when a hospital wanted to restrict their use outside patient care areas, it was required to show "special circumstances," in other words, that doing so would prevent disruption of patient care. In *Sacred Heart Medical Center*,[5] the Board expanded the exception outside acute patient care areas. It held that an employer satisfied the "special circumstances" exception if the button's message related clearly and directly to issues of patient care and hospital safety.

The union filed unfair labor practice charges and was upheld by the ALJ. On appeal, the Board found that a reasonable person would believe the button's message was a claim that the hospital's staffing levels were unsafe. This, in turn, would disturb patients and lead them to believe their health was jeopardized. The hospital, the Board found, was justified in banning the buttons in all areas open to patients or their families and did not act out of anti-union animus. The Board noted that the United States Supreme Court ruled that evidence of actual disturbance is not required in order to prove "special circumstances."

Janet McEneaney

Endnotes

1. *U-Haul Co. of California*, 347 N.L.R.B. No. 34 (2006).
2. 347 N.L.R.B. No. 64 (7/31/06).
3. *Wright Line*, 251 N.L.R.B. 1083 (1980).
4. *FES*, 331 N.L.R.B. 9 (2000).
5. 347 N.L.R.B. No. 48 (2006).

New York State Enacts Military Spouse Leave Law

By Michael J. Sciotti and Lindsey H. Hazelton

On August 16, 2006, New York State enacted a new leave law which has been made part of the New York State Labor Law. Specifically, the new law adds a new section, § 202-i, which addresses unpaid leaves of absences for spouses of certain military personnel. The new law has immediate implications on covered employers, as this law was made effective the day the governor signed it into law.

What "employers" are covered? The law does not cover all employers. Rather, it only covers those employers that employ twenty (20) "or more employees at at least one site." The term "employer" includes individuals, corporations, counties, towns, cities, school districts, public authorities and all other governmental subdivisions no matter what type.

Who is a covered "employee"? Assuming you are a covered employer, not every employee will be covered. The act defines an employee as a "person who performs service for hire for an employer, for an average of twenty (20) or more hours per week." It includes "all individuals employed at any site owned or operated by the employer." As with other labor and employment laws, all independent contractors are excluded.

What are the requirements for the spouse? A covered employee must have a spouse who is "a member of the armed forces of the United States, national guard or reserves who has been deployed during a period of military conflict, to a combat theater or combat zone of operations" and that person must be on leave "from the armed forces of the United States, national guard or reserves while deployed during a period of military conflict to a combat theater or combat zone of operations."

What is a "period of military conflict"? The term military conflict means "a period of war declared by the United States Congress, or in which a member of a reserve component of the armed services is ordered to active duty" pursuant to various provisions of federal law (i.e., 10 U.S.C. §§ 12301 and 12302).

What leave is the employee entitled to? The employee is entitled to "up to ten days unpaid leave by their employer."

What notice must an employee give their employer? Unfortunately, the new law does not provide for any advance notice provision to the employer.

What if the employer is too busy to grant the leave or the employee is too important to be granted the leave? The new law does not have any exceptions to granting the leave to an employee who has met all the requirements.

How does the new law protect employees? The new law contains an anti-retaliation provision which prohibits employers from retaliating "against an employee for requesting or obtaining a leave of absence." The new law is silent as to what damages an aggrieved employee could obtain from an employer.

Can an employer grant additional leave to applicable employees? Yes. As with most other labor and employment laws, the new law does not "prevent an employer from providing leave for military spouses" beyond which is required by this new law.

Does the new law take away an employee's ability to use other leave to which they may be entitled? No. The new law has no impact on "an employee's rights with respect to any other employee benefit provided by law."

Does the new law have any posting requirements? No.

Does the new law require that employers modify their employee handbook in any manner? No. However, employers may wish to consider adding a provision to the handbook which accurately describes the new law. Employers may want to request "as much notice as possible" of the leave for scheduling purposes. However, employers must realize that employees do not have to give notice of their intent to use this leave, and the failure to give notice cannot be a basis for denying the leave.

Does the new law prohibit employers from asking for supporting documentation to substantiate the leave request? The new law does not prohibit an employer from asking for documentation from an employee to support their leave request. It may be advisable to alert employees to this fact by addressing it in your employee handbook. For example, you could tell employees that: "The company reserves the right to ask for documentation to substantiate the leave request."

Practical Pointers

- Make sure managers and supervisors are acquainted with this new law so that they do not inadvertently deny a leave request or retaliate against employees for exercising their rights under this new law, as the law has no exceptions to granting leave and no notice requirements.
- Request some type of supporting documentation to ascertain whether the leave is appropriate.
- Employers may wish to insert provisions concerning this new leave law into their employee handbooks.

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The Empire Strikes Back: How UK Employment Law Can Affect U.S. Clients

By Joanna Blackburn and James Libson

Employment law in the UK is governed by three principal sources of law:

1. Common law, which includes the law of contract.
2. Statute, which operates outside the contract and in some circumstances, which are discussed more fully below, can override the provisions agreed to between the parties in contract.
3. European legislation and judgments of the European Court of Justice.

This article will address the territorial scope of UK employment law in respect to hearing unfair dismissal and discrimination claims in relation to both a UK employee working overseas and an employee coming from abroad to work in the UK. The article will consider the constraints and limitations placed on the ability of the employer to freely contract and will consider when and how to establish European and UK works councils.

Jurisdiction of UK Courts and Tribunals in Relation to Unfair Dismissal Claims

An employer who dismisses an employee without good reason or without following a fair procedure may be liable under the Employment Rights Act 1996 ("ERA 1996") to a claim for unfair dismissal. The employer must establish that the reason for the dismissal falls within one of the five fair reasons for dismissal (s98 ERA 1996). If the employer fails to establish a fair reason, then the dismissal will be unfair. If the employer establishes a fair reason for the dismissal, the Employment Tribunal must decide whether the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee (s98(4) ERA 1996) and followed a fair procedure in effecting the dismissal.

The Jurisdictional Reach of UK Employment Law Overseas

When an employee is working overseas, the issue of the jurisdiction of UK Courts and Tribunals to hear a claim for unfair dismissal from the overseas post may arise. The Court or Tribunal must satisfy itself that it has the requisite jurisdiction to determine the matter. Section 32(3) of the Employment Relations Act 1999 removed the territorial limits which had been placed on the ERA 1996 under Section 196, leaving the courts to decide any issue of jurisdiction which may arise.

The leading case in this matter is *Lawson v. Serco Limited*[1] ("*Serco*"). In *Serco*, the claimant, who was a UK national and domiciled in the UK, had been engaged in the UK by a UK company to undertake security work at an RAF base in the Ascension Islands. The Ascension Islands have no indigenous population and so are entirely manned by RAF and RAF-related staff. After the termination of his employment, Mr. Lawson sought to claim for unfair dismissal. Serco defended the claim on the basis that, as he was not employed in Great Britain, he could not have a valid claim. It was agreed by the parties that even though there was no longer an express provision determining territorial jurisdiction for unfair dismissal, the scope of Section 94(1) ERA 1996 must have implied territorial limits.

The case came before the House of Lords in November 2005. In the Court judgment, delivered in February 2006, Lord Hoffmann stated that what Parliament intended as the "standard case" in an unfair dismissal claim was the employee who was working in Great Britain at the time that he was employed.

However, it was recognized that in some other cases, the right not to be unfairly dismissed might extend to those working outside Great Britain. Included in this are "peripatetic" employers which included airline pilots, international consultants and salespeople. Lord Hoffmann held that such employees would only be able to bring a claim under Section 94(1) ERA 1996 if their base is Great Britain. The base must be determined by what actually happened in practice, rather than the terms of employees' contracts.

More difficult to deal with are employees termed by Lord Hoffmann as "expatriate" employees. These are employees who both work and are based abroad. Lord Hoffmann made it clear that such employees could not normally bring claims for unfair dismissal and the fact that the employer is British or even if they are recruited in Britain "should not be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary." Lord Hoffmann went on to deal with cases in which employees could exceptionally bring a claim, notwithstanding that they work and are based abroad at the time of dismissal. He gave two specific examples:

1. The employee who is posted abroad by a British employer for the purposes of business carried on in Great Britain. He stated that he had in mind representatives of businesses conducted at home, such as a foreign correspondent on the staff of a British newspaper.

2. An expatriate employee of a British employer who's operating in what amounts to an "extra territorial British enclave in a foreign country." Lord Hoffmann found that Mr. Lawson, who was employed in the Ascension Islands, a British protectorate with no local community, did fall within this exception and therefore was allowed to bring his unfair dismissal claim.

Jurisdiction of UK Courts and Tribunals in Relation to Discrimination Claims

The five[2] areas of discrimination currently governed by UK statute are:

(i) Disability under the Disability Discrimination Act 1995 ("DDA 1995")

(ii) Race under the Race Relations Act 1976 ("RRA 1976")

(iii) Religion and Belief under the Employment Equality (Religion or Belief) Regulations 2003 ("RBR 2003")

(iv) Sex under the Sex Discrimination Act 1975 ("SDA 1975")

(v) Sexual Orientation under the Employment Equality (Sexual Orientation) (Amendment) Regulations 2003 ("SOR 2003")

Protection against these forms of discrimination is afforded only in relation to employment at an establishment in Great Britain (SDA 1975 Section 6(1); RRA 1976, Section 4(1); RBR 2003, Reg. 6(2); SOR 2003, Reg. 6(2); DDA 1995 s4(6)). Employment is to be regarded as being at an establishment in Great Britain where an employee does his work wholly or partly in Great Britain.

When considering whether or not work is done wholly or partly in Great Britain, the Court will look at the position by considering the period of appointment as a whole and not by focusing solely at a point in time in which the act of discrimination occurred. This was the decision made in *Saggar v. Ministry of Defence*.[3] In this case, the employee was of Indian ethnic origin and served in the Royal Army Medical Corps. During the period from May 1982 to September 1998, he worked in Great Britain, save for some work done by him in Bosnia, the Gulf, Germany and Northern Ireland. In September 1998, he was posted to Cyprus, which was where he claimed he suffered racial discrimination.

The Employment Tribunal found that as at all material times Mr. Saggar was not employed by an establishment in Great Britain within the meaning of Section 8(1) RRA 1976, it had no jurisdiction to hear the complaint. The employee appealed and on appeal it was held that the true construction of Section 8(1) RRA 1976 was that the relevant period for determining whether the employee did his work wholly or mainly outside Great Britain was the whole period of employment, not just the period of time to which the complaint of discrimination related.

That approach was indicated by the opening words of Section 8(1) RRA 1976: "employment is to be regarded as *being* at an establishment in Great Britain if the employee does his work wholly or partly in Great Britain," under which employment is held to have a continued existence. A continuing location ("at an establishment in Great Britain") also indicates that the whole period of the employment relationship, not just the limited period during which discrimination is alleged to have occurred, was the yardstick by which it was determined whether, at the time of the alleged discrimination, the employee wholly or mainly did his work outside Great Britain.

Even where the complainant does his work entirely outside Great Britain, his employment will nevertheless be regarded as being at an establishment in Great Britain if:

(i) the employer has a place of business at an establishment in Great Britain;

(ii) the work is for the purposes of the business carried on at that establishment; and

(iii) the employee is ordinarily resident in Great Britain:

  (a) at the time when he applies for or is offered the employment, or

  (b) at any time during the course of the employment.

It may be difficult to establish that work has been done for "the purposes of the business carried on at that establishment." This phrase is not easy to apply across international corporate groups since a senior executive may be based in Germany, but his efforts may benefit the company in the UK if it has its main listing on the London Stock Exchange.

Where work is not done at an establishment but each worker is sent out on an assignment, e.g., plumbers, the work is treated as done at the establishment from which the workers are sent out. If the employees neither work at nor from a particular establishment, such as market researchers who work from their homes, the work will be considered to be done at the establishment with which it has the closest connection (SDA 1975, s10(4); RRA 1976, s8(3); RBR 2003, Reg. 9(3)(a); SOR 2003, Reg. 9(3)).

The meaning of "ordinarily resident" may be clarified by the comments in *Carver v. Saudi Arabian Airlines*.[4] Ward LJ referred to the phrase as referring to "a person's abode in a particular place or country which he had adopted voluntarily and for settled purposes, as part of the regular order of his life for the time being, whether of short or long duration." The problem with this interpretation is

that some workers may live in more than one jurisdiction on a settled and regular basis.

Secondees to the UK

Where an employee is seconded to a business operating in Great Britain, the employee can bring a case of discrimination under all five grounds immediately upon arrival in Great Britain as the employment will be considered to be wholly or mainly at an establishment in Great Britain.

In the case of a claim of unfair dismissal for an employee seconded to Great Britain, the main hurdle will be fulfilling the requirement to have been continuously employed for a period of not less than one year (ERA 1996 s108(1)). Normally to be considered continuous employment there must be only one employer (ERA 1996 s218(1)). However, under Section 218(6) ERA 1996, if an employee transfers his employment and both his new and previous employers are "associated" then:

(a) the employee's period of employment at that time counts as a period of employment with the second employer; and

(b) the change of employer does not break the continuity of the period of employment.

Under Section 231 ERA 1996 any two employers shall be treated as associated if:

(a) one is a company of which the other (directly or indirectly) has control; or

(b) both the companies of which a third person (directly or indirectly) has control.

As such, group companies will be associated employers.

Where Statutory Law Interferes with an Employer's Ability to Freely Contract

Section 1 ERA 1996

A contract of employment may be either written or oral, or a mixture of the two. There is no legal requirement for the contract of employment to be in writing but parties to an employment relationship will often, but not always, put the terms and conditions which govern a relationship into writing. However, an employer is under a duty to give employees particulars in writing of certain important terms of their contracts (ERA 1996 s1). These written terms must be given to each employee not later than two months after the beginning of the employment.

The statement may be given in installments during the two-month period (ERA 1996 Section 1(1)), although certain of the particulars must be included in a single document. These are the names of the parties, the dates when employment and continuous employment began, the particulars of remuneration, hours and holidays, the job title or description, and the place of work (ERA 1996 Section 2(4)).

By the end of the two-month period, the employer must have given the employee a written statement of terms and conditions relating to the following particulars:

(a) identity of the parties;

(b) date employment began;

(c) date continuous employment began;

(d) scale or rate of remuneration and intervals of pay;

(e) hours of work;

(f) any terms relating to:

  (i) holidays and holiday pay;

  (ii) sickness and sick pay;

  (iii) pensions and pension schemes;

(g) length of notice required to determine the contract;

(h) in the case of non-permanent employment, a period for which it is expected to continue or, if it is a fixed term, the date it is to end;

(i) job title or a brief description of the work;

(j) place or places of work;

(k) particulars of any collective agreements which directly affect the terms and conditions of employment;

(l) where employees are required to work outside of the UK for a period of more than one month, the period of such work, currency in which payment is made, benefits provided and terms relating to the return to the UK;

(m) details of the disciplinary and dismissal rules and GP including any statutory procedures (to avoid the procedures becoming contractual in nature, the Section 1 statement should make it clear that they are not). These can be set out in the body of the particulars, or reference may be made to another reasonably accessible document;

(n) whether a contracting out certificate is in force under the Pension Schemes Act 1993.

If there are no particulars being entered into under any of the heads above, that fact must be stated (ERA 1996 Section 2(1)) and any changes in the terms of employment must be notified by the employer in writing within one month of the change (ERA 1996 Section 4).

No written statement needs to be given to any employee if his employment continues for less than

one month. Further, if the contract of employment is in writing and contains all the particulars that need to be referred to under Section 1 ERA 1996, no separate written statement of terms needs to be given to the employee (ERA 1996 Section 7A).

The written terms which must be given by an employer under Section 1 ERA 1996 merely state what the contract terms are; it is not a contract itself.[5]

By Section 11 of the ERA 1996, where the employer fails to give the employee a written statement as required or where dispute arises out of its accuracy, either party may refer the matter to an Employment Tribunal.

Working Time Directive

The Working Time Directive was implemented in Britain by the Working Time Regulations 1998 (SI 1998/1833) ("WTR 1998"), which came into force on 1 October 1998.

Workers covered by the 1998 Regulations include employees working under a contract of employment and other individuals who personally perform work or provide services for the employer.

The WTR 1998 provide that, in relation to a worker, "Working Time" (as defined in Reg. 2(1)) means:

(a) any period during which he is working, at his employer's disposal and carrying out his activities or duties;

(b) any period during which he is receiving "relevant training"; and

(c) any additional period which is to be treated as working time under a relevant agreement.

The Regulations, with the exception of some provisions which are specific to young workers, do not apply at present:

(a) to various sectors of activity (air, rail, road, sea, inland waterway and lake transport, sea fishing and other work at sea);

(b) to activities with doctors in training; or

(c) where characteristics peculiar to certain specified services such as the Armed Forces or the Police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of the Regulations.

Limits on Working Time

In a rolling seventeen-week reference period, no worker is permitted to work more than an average of forty-eight hours per week. The reference period may be extended to 26 weeks for certain workers. An employer is under a positive duty to take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that this limit is not exceeded. A worker may agree in writing with his employer that the forty-eight hour limit on average working time does not apply to him (WTR 1998, Reg. 4(1)). Such an agreement may either relate to a specified period of time or last indefinitely. The agreement shall always be terminable by the worker by giving not less than seven days notice to his employer in writing. Such an "opt-out agreement" will only be binding if the employer keeps up-to-date records of the workers who have agreed to opt out (WTR 1998, Reg. 4(2)).

In addition to the forty-eight hour weekly limit, the following regulations apply to adult workers:

1. Daily rest period of eleven consecutive hours rest in every twenty-four hour period (WRT 1998, Reg. 10(1)). This entitlement is subject to exceptions.
2. Uninterrupted rest period of at least twenty-four hours in each seven-day period in addition to the daily rest period.
3. Twenty-minute rest breaks if the working day is longer than six hours (WTR 1998, Reg. 12 (1)-(3)). The rest entitlements provided by the Regulations differ depending on whether a person is a worker or a young worker. The rest entitlements provided for young workers are more than those provided for workers.
4. Paid leave of four weeks in any leave year. The leave may be taken only in the leave year in respect of which it is due and a worker's leave entitlement may not be replaced by a payment in lieu (except where the worker's employment is terminated). A worker does not have the right to take leave at any time he chooses and is required to give written notice to his employer specifying the dates.

The Regulations enable workers and employers to enter into an agreement to establish the way in which some of the Working Time Rules apply to their own workplaces.

Common Implied Terms

Even where there is a written statement or a written contract, certain terms will be implied into the contract.

Terms implied are the employee's duty of:

(a) fidelity;

(b) obedience;

(c) working with due diligence and care;

(d) not disclosing the employer's trade secrets or confidential information; and the employer's duty:

(e) not to destroy the relationship of trust and confidence between the employer and the employee;

(f) to take care for the employee's health and safety;

and the duty of both parties:

(g) to give a reasonable period of notice of termination, when no specific notice has been agreed.

Employees' Duties

The employee shall not make use of or disclose for the benefit of a competing business, information acquired by the employee about his employer's business in the course of the former's employment.[6] In that case, an employee during his course of employment made a list of the names and addresses of his employer's clients and, following the termination of his employment, used that list to canvas, for his own rival business, the clients of the former employer. The employee was held to have breached the implied duty of confidentiality in so acting and was ordered to hand over the list and pay damages. The defendant contended that the information contained on the list was information that could be obtained from sources within the public domain. The trial judge did not accept this but added that even were that true, the employee had nonetheless acted in breach of his duty in creating a convenient compilation of material for the purpose of assisting an intended competitor.

The law concerning the implied duty of confidence has been revisited since this case and can be stated as follows:

1. During the currency of the employment contract, the employee is bound by his implied obligation not to disclose or make use of the mass of information he acquires about his employer's business. The information covered by that obligation is limited so as to exclude only information which is trivial or in the public domain. It should be noted that if the employee draws up lists of customers from the records of his employer, the identity of which might otherwise have been sourced in the public domain, he will nevertheless have breached the implied obligation of confidentiality during his employment contract.

2. After the contract comes to an end, the employee is subject to an implied obligation not to disclose, or make use for the benefit of a competitor, information which constitutes protectable confidential information (i.e., information which has the status of a trade secret or its equivalent). The protection afforded is limited as it does not prevent the employee from going to work for a rival. Once within a rival's business, it is impossible for the previous employer to monitor whether or not the employee is disclosing or making use of the information.

Employer's Duties

It is now well established that there is a term implied into a contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee. This implied term was approved by the House of Lords in the landmark decision of *Malik v. BCCI SA (in liquidation)*.[7] The conduct of the employer must be such as to destroy or seriously damage the relationship, and there must have been no reasonable and proper cause for the conduct.[8]

The implied term that the employer will not act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence is capable of being relevant to a very wide range of circumstances. It is important to bear in mind that the obligation relates to the maintenance of the trust and confidence which should exist in an employment relationship. There is no implied obligation on the employer to act reasonably.[9]

The contract of employment will also be held to include an implied term that the employer will take reasonable steps to ensure the employee's safety.[10] This covers providing a safe system of work and ensuring that employers take reasonable care not to cause psychiatric harm to an employee by reason of the volume or character of work imposed on the employee. The standard of care depends on what is reasonable conduct for a person in the employer's position and will cover issues such as the nature of the relationship, the magnitude of the risk of injury that was reasonably foreseeable, the seriousness of the consequences for the employee if that injury should occur and the cost and practicability of preventing the risk.[11]

Duty of Both Parties

In the absence of any express term governing the notice required to be given to terminate the contract, it is an implied term that reasonable notice of termination will be given. Reasonable notice will not be implied if to do so would contradict an express term. Neither the express nor the implied term may contradict the statutory minimum period of notice. The contractual or implied notice may be longer but may not provide for less than the statutory rules which are as follows:

1. An employee who has been continuously employed for one month or more but less than two years is entitled to not less than one week's notice;

2. An employee who has been continuously employed for two years or more but less than twelve years is entitled to one week's notice for each year of continuous employment;

3. Any employee who has been employed for twelve years or more is entitled to not less than twelve weeks' notice (ERA 1996 s86(1)).

In addition, specific terms can be implied into the contract. The general rule is that a term will be implied into a contract if it is so obvious that both parties regarded it as a term even though they had not expressly stated it as a term or if it is necessary to imply the term in order to give the contract business efficacy.[12]

Terms may also be implied if they are customary in the trade or calling, or form the usual practice of the particular employer, if it is sufficiently well known. It was held in *Bond v. CAV Limited*[13] that such a custom or practice must be "reasonable, certain and notorious." In order to become an implied term, a custom must be followed with some regularity so that it is legitimate to infer that the parties follow the practice because they regard it as a legal obligation rather than that the practice is followed as a matter of policy.[14] However, terms implied by custom and practice have a habit of catching out the unwary employer, particularly in relation to formulaic calculation of termination payments, which can quickly become custom and practice.

Dispute Resolution

The Employment Act 2002 ("EA 2002"), Part 3, and the (Dispute Resolution) Regulations 2004 (SI 2004/752) ("DRR 2004"), which came into force on 1 October 2004, introduced provisions designed to encourage employers and employees to resolve disputes without attending an Employment Tribunal. They lay down minimum procedures to be followed before dismissing employees, and minimum procedures to be followed in the case of grievances. Only in limited circumstances will these procedures not apply.

Non-compliance with the statutory dismissal and disciplinary procedures renders a dismissal automatically unfair. Non-compliance with the statutory grievance procedure may result in an employee being barred from presenting a complaint before an Employment Tribunal. In both cases, non-compliance with either procedure may result in an increase or decrease in compensation.

As mentioned in relation to the written statement of terms required by s1 ERA 1996, details of the disciplinary and dismissal rules and GPs should be set out either in the body of the particulars, or reference should be made to another reasonably accessible document.

Dismissal and Disciplinary Procedures ("DDPs")

There are two types of DDPs; standard and modified.

The standard DDP is set out in paragraphs 1 to 3 of Schedule 2 EA 2002 and follows a three-stage process:

1. The employer must set out in writing and send to the employee the grounds which have caused him to consider dismissing or taking disciplinary action against the employee, and invite him to a meeting to discuss the matter.
2. The employer must hold a meeting which must take place before any disciplinary action (except suspension) is taken, and must not take place until the employer has explained the reasons for the proceedings and the employee has been given a reasonable opportunity to consider his response. After the meeting, the employer must inform the employee of his decision and his right to appeal.
3. Appeal—the employee must inform the employer of his decision to appeal, and the employer must invite the employee to a further meeting. This meeting can take place after the dismissal or disciplinary action has taken effect.

The standard DDP must be followed with certain exceptions, as set out below, wherever an employer contemplates dismissing or taking relevant disciplinary action against an employee (DRR 2004, Reg. 3(1)). Dismissal in the context of the Regulations includes any termination by the employer of an employment contract with or without notice and expiry of a limited term contract, but does not include constructive dismissal (DRR 2004, Reg. 1(2)). Relevant disciplinary action is defined in DRR 2004, Reg. 2(1) to mean any action, short of dismissal, which the employer claims is based wholly or mainly on the employee's conduct or capability.

The modified DDP will apply where the employer dismisses the employee on the basis that the employee's conduct is gross misconduct which constitutes a repudiatory breach of contract. The employer must dismiss the employee at the time, or immediately after, he becomes aware of the conduct and it must be reasonable for him to dismiss before inquiring into the circumstance in which the conduct took place. (DRR 2004, Reg. 3(2)(a) to (d)). It is unlikely that an employer will be able to satisfy these requirements, save in the most exceptional case. The procedure is set out in paragraphs 4 and 5 of Schedule 2 to EA 2002:

1. The employer sets out in writing and sends the employee details of the alleged misconduct which has led to dismissal, and the basis for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct.
2. Appeal—if the employee wishes to appeal, he must inform his employer, who must then invite him to a meeting.

In relation to both the standard and modified procedures, each step and action must be taken without unreasonable delay; the timing and location of meetings must be reasonable; meetings must be conducted in a manner which enables both employer and employee to explain their cases and; if possible, appeals against a decision should be heard by a more senior manager (EA 2002, Schedule 2, paras. 11-13).

Grievance Procedures ("GPs")

The GPs must be followed in relation to any grievance about any action or proposed actions by the employer that could form the basis of a complaint by an employee to an Employment Tribunal (DRR 2004, Reg. 6(1)).

There are two types of GP: standard and modified.

The standard GP is set out in paragraphs 6 to 8 of Schedule 2 EA 2002. As for the DDP, it provides for a three-stage process:

1. The employee must set out the grievance in writing and send a copy to the employer (para. 6).
2. The employer must invite the employee to a meeting to discuss the grievance (para. 7(1)). The meeting must not take place unless the employee has informed the employer of the basis for his grievance and the employer has had a reasonable opportunity to consider his response (para. 7(2)). After the meeting, the employer must inform the employee of his response to the grievance and notify him of his right of appeal (para. 7(4)).
3. If the employee wishes to appeal, he must inform the employer, who must then invite him to a further meeting (para. 8(1) and(2)).

The standard procedure applies to all grievances unless the employee is no longer employed by the employer, the employer was unaware of the grievance before the employment ceased or the standard procedure was not commenced or completed before the last day of the employee's employment and the parties have agreed in writing in relation to the particular grievance that the modified procedure should apply, in which case the modified procedure applies (DRR 2004, Reg. 6(3)).

The modified procedure provides for a two-stage process:

1. The employee must set out in writing the grievance, the basis for it and send a copy to his employer; and
2. The employer must set out his response in writing and send a copy to the employee.

Neither the modified nor the standard GP need be followed where:

(a) the grievance is that the employer has dismissed or is contemplating dismissing the employee (DRR 2004, Reg. 6(5));

(b) the grievance in question is that the employer has taken or is contemplating taking "relevant disciplinary action" defined at Regulation 2 as "action short of dismissal, which the employer asserts to be based wholly or mainly on the employee's conduct or capability, other than suspension on full pay or the issuing of warnings." Where relevant disciplinary action occurs, the standard DDP applies.

However, where an employee is dissatisfied with relevant disciplinary action taken or contemplated by the employer, the statutory GPs will apply if the reason for the employee's grievance is that:

(i) the relevant disciplinary action amounted to or would amount to unlawful discrimination (Reg. 7(1)(a));

(ii) the relevant disciplinary action was or would be taken on a ground other than that which the employer was asserting.

Where the GPs do apply in cases of relevant disciplinary action, the parties will be treated as having complied with the entire applicable procedure if the employee sends the Step 1 statement of grievance to the employer before the appeal stage of the DDP (if the statutory DDP is being followed) or before the employee presents a tribunal claim arising out of the grievance in a case where no statutory DDP is being followed.

(c) the employee has ceased to be employed by the employer, neither procedure has been commenced and since the employment ceased it has not been reasonably practicable for him to set out his grievance in writing and send a copy to his employer (DRR 2004, Reg. 6(4)).

European and UK Works Councils

European Works Councils

The European Works Council ("EWC") Directive applied in EEA states except the UK from 22 September 1996. The Directive was extended to the UK by Directive 97/74 and has now been implemented in national legislation by the Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323) ("TICE 1999") from 15 January 2000.

For the purposes of informing and consulting employees, the Directive requires the establishment of a European level information and consultation procedure or works council in all undertakings employing at least 1,000 workers with at least 150 in each of at least two member states.

In order to determine whether an undertaking has the necessary number of employees for the purposes of the Directive and TICE Regulations, an average is taken of the two years preceding the relevant date (TICE 1999, Reg. 6). For UK employees, this means adding together monthly numbers over a two-year period and dividing by twenty-four (TICE 1999, Reg. 6(2)).

Central management situated in the UK is required to initiate negotiations for the establishment of an EWC if it receives either:-

(a) a valid request from 100 employees or from employees' representatives; or

(b) separate requests by employees or employees' representatives which, taken together, mean that 100 employees or employees' representatives have made requests in at least two establishments in at least two different member states.

Such requests must be in writing, dated and sent to central or local management (TICE 1999, Reg. 9(3)).

A "Special Negotiating Body" ("SNB") represents employees in negotiations with management on the setting up of an EWC. The SNB will consist of representatives of employees from all EEA states in which the organisation operates. UK members of the SNB are to be elected by a ballot of UK employees. For a UK based undertaking, there must be at least one representative for each of the member states in which the organisation operates plus:

(a) one additional member from a country where 25% but under 50% of the workforce are employed;

(b) two additional members from countries where 50% but under 75% are employed; and

(c) three additional members from countries employing 75% or more of the EEA workforce.

(TICE 1999, Reg. 12)

In order to reach an EWC agreement, central management must convene a meeting with the SNB, informing local management. SNBs are to take decisions by a majority vote, except that two-thirds of the votes are needed on a decision not to open, or to terminate, negotiations. The SNB may be assisted in these negotiations by experts. The reasonable expenses of the SNB are to be borne by central management, including the expenses of one expert where applicable (TICE, Reg. 16).

Where the SNB and central management agree to establish an EWC, the agreement must specify:

(a) the undertakings and establishments covered;

(b) composition of the EWC, number of members, allocation of seats and term of office of the members;

(c) functions and procedure for information consultation;

(d) venue, frequency and duration of meetings;

(e) financial and material resources allocated to the EWC;

(f) duration of the agreement and procedure for its renegotiation.

(TICE 1999, Reg. 17(4))

A statutory EWC will be set up if:

(a) the parties agree;

(b) central management refuses to start negotiations within six months of the date on which a valid request is made; or

(c) no agreement has been concluded within three years of the request being made, provided the SNB has not taken a decision to terminate (or not to start) negotiations.

(TICE 1999, Reg. 18)

The Employment Appeal Tribunal will rule on disputes about the operation of an EWC or the failure to establish an EWC. The Employment Appeal Tribunal may make an Order requiring central management to take appropriate steps by a specified day or in appropriate cases may issue a penalty notice requiring central management to pay an amount to the Secretary of State.

Members of SNBs, EWCs and candidates for election are entitled to take reasonable time off work, with pay, to carry out their functions (TICE 1999, Regs. 25 to 27). It is automatically unfair under TICE Reg. 28 to dismiss an individual for his or her involvement with SNBs or EWCs.

National Works Councils

Council Directive 2002/14/EC established a general framework for informing and consulting employees within the European Community. The directive was implemented in the UK by the Information and Consultation of Employees Regulations 2004 ("ICE 2004"), which came into force on 6 April 2005.

ICE 2004 sets out a regime whereby UK employees in organisations with, currently, 150 or more employees have a right to be informed and consulted on a regular basis about issues in the organisation they work for. From April 2007, the relevant number of employees will drop to 100 and from April 2008, to 50 employees.

In comparison to the European Works Councils discussed above, the ICE Regulations do not require the setting up of a "works council" and the parties are free to agree to their own arrangements. This may involve a number of different methods of communication instead of, or as well as, a company-wide assembly.

Furthermore, if a "works council" model is adopted as part of the process, there does not have to be just one council operating at a "national" level. Different councils can exist for different sites or business units and there may be a hierarchy of consultative bodies. The key is that

all the employees in an "undertaking," meaning a legal entity such as a company, must be covered somehow by the arrangements.

ICE 2004 will apply to an "undertaking" that carries out an economic activity, whether or not for profit, that has its registered or head office or principal place of business in Great Britain (ICE 2004, Reg.2).

Even once it is ascertained that the employer has sufficient employees and ICE 2004 in principle applies, the obligations to inform and consult do not apply automatically, but have to be initiated either by the employer or the employee.

For a request for an Information and Consultation agreement to be valid, it must be made by at least 10% of the employees in an undertaking. The request must be in writing, must specify the date on which it was sent and must not be made within three years of a previous employee request, which has resulted either in a negotiated agreement or the rejection of a request by the workforce.

Alternatively, an employer may take the initiative in entering into negotiations for an agreement without waiting for a request from the employees.

If a valid employee request to negotiate an agreement is made, but there is a pre-existing agreement which:

(a) is in writing;

(b) sets out how the employer is to give information to the employees or their representatives;

(c) covers all the employees of the undertaking;

(d) and has been approved by the employees; the employer may, instead of initiating negotiations, hold a ballot of the workforce to endorse or reject the request. If 40% of all employees and a majority of employees voting endorse the request, then the employer must commence negotiations with the employee representatives. If, however, fewer than 40% of all employees or less than a majority of employees voting endorse the request, the pre-existing agreement will continue for as long as specified and no further employee requests may be submitted for at least three years.

An EWC will not constitute a valid pre-existing arrangement for the purposes of ICE 2004, even if it does cover all employees of an undertaking. The EWC's focus should be on trans-national not national issues. ICE 2004 is concerned only with issues of a domestic nature.

Where a valid employees' request or employer notification has been made and there is no pre-existing arrangement, the employer must, as soon as reasonably practicable (but in any event within three months), take the necessary steps to begin negotiations for an agreement. These steps include:

1. Making arrangements for the employees to appoint or elect negotiation representatives;
2. Informing employees who have been elected or appointed;
3. Inviting the representatives to negotiate.

(ICE 2004, Reg.14(1))

The arrangements for the elections of representatives must ensure that all employees are represented by at least one representative and that all employees have been entitled to take part in the election process (ICE 2004, Reg. 14(2)).

The negotiated agreement must comply with the requirements in Regulation 16:

1. Set out the circumstances in which the employer will inform and consult with employees;
2. Be in writing and dated;
3. Cover all employees of the undertakings;
4. Be signed by, or on behalf of, the employer;
5. Be approved on the employee's behalf;
6. Provide for the appointment of ICE representatives to whom the employer must supply information and with whom the employer must consult on matters within the scope of the agreement, or provide that the employer must supply information to all its employees and consult with them directly.

Where no arrangements are agreed, standard provisions will automatically apply from six months after the date on which negotiations should have started (if they do not start) or on which the negotiation period ended (if agreement was not reached) (ICE 2004, Reg. 18(1)).

The standard provisions are set out in Regulation 20 and require the employer:

1. To provide the representatives with information on:
   - 1.1 The recent and probable development of the undertaking's activities and economic situation. The only obligation is to inform the ICE representatives, not to consult with them.
   - 1.2 The situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking. The employer must inform and consult with the representatives.
   - 1.3 Decisions likely to lead to substantial changes in work organisation or in contractual rela-

tions, including decisions covered by the legislation on collective redundancies and transfers of undertakings. The employer must inform and consult with a view to reaching agreement with the representatives.

2. To consult the representatives as to developments, threats and changes to employment within the undertaking (ICE 2004, Reg. 20(3));

3. To ensure that the timing, method and content of the consultation are appropriate, that it takes place with the appropriate level of management and that a reasoned response is given by the employer (ICE 2004, Reg. 20(4)).

Whenever the standard provisions are going to apply, there is an obligation on the employer to arrange for the holding of a ballot of its employees to elect the representatives.

In practice, it is more common for parties to agree on what they will discuss and how frequently they will meet because it is usually in the best interests of the employer to agree to the basis of consultation, rather than be left with the statutory position, which is far from clear and couched in "Euro-speak."

However, what is more clear than anything else is that the UK employment market is not one that embraces the concept of collective representation. The take-up on national works councils has been low, consistent with a market where employees feel that they are best served by fighting their own battles as individuals. This is actually arguably a loss for employers, as the experience of those businesses, including ours, which have set up national works councils, has been overwhelmingly positive, particularly where the employer has initiated the process. As ICE 2004 applies to more employers over the next two years, we will have to see if the take-up levels increase.

Endnotes

1. [2004] EWCA Civ 12.
2. Note that age discrimination legislation comes into force on 1 October 2006.
3. [2005] EWCA Civ 413.
4. [1999] ICR 991.
5. *Lovett v. Wigan Metropolitan Borough Council* [2001] EWCA Civ 12.
6. *Robb v. Green* [1895] 2 QB 1.
7. [1997] 3 All ER 1.
8. *Gogay v. Hertfordshire County Council* [2000] IRLR 703.
9. *Post Office v. Roberts* [1980] IRLR 347.
10. *Johnstone v. Bloomsbury Health Authority* [1992] 2 All ER 293.
11. *Walker v. Northumberland County Council* [1995] 1 All ER 737.
12. *Scally v. Southern Health and Social Services Board* [1991] 4 All ER 563.
13. [1983] IRLR 360.
14. *Solectron Scotland Limited v. Roper* [2004] IRLR 4.

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This article serves as an update to the article published in the last newsletter concerning the criminal history record check regulations promulgated in April 2005. After that article was submitted for publication, a new state law was enacted which modified the Department of Health regulations.

Criminal History Record Checks Law for Nursing Homes and Home Care Services

By Michael J. Sciotti and Jennifer M. Reschke Bolster

In response to the original criminal history record check ("CHRC") regulations promulgated for nursing homes and home care services, effective April 2005, Governor Pataki signed legislation on February 3, 2006, allowing for the creation of a statewide record check system to be run through the Division of Criminal Justice Services ("DCJS").[1]

The original New York State Department of Health ("NYSDOH") regulations were enacted pursuant to federal law, 28 U.S.C. § 534, and required nursing homes and home care services to perform and pay for criminal history record checks for every prospective employee and to make the determination as to an individual's employability.[2] The new Article 28-E of the New York State Public Health Law ("NYSPHL") provides for the creation of a statewide registry of criminal history information and allows health care providers to submit a request for review to the NYSDOH.[3] The NYSDOH is required to make a determination of the suitability of the prospective employee based upon the CHRC.[4] The legislation also amends Executive Law § 845-b, which is currently related to the CHRC provisions for Office of Mental Health facilities, to provide similar requirements for nursing homes and home care services.

1. Employers' Obligations

Pursuant to the new legislation, nursing homes, home care agencies and temporary employment agencies must submit a prospective employee's personal information and fingerprints to the NYSDOH for a CHRC.[5] The NYSDOH will first check the permanent registry for the prospective employee's criminal history information. If no permanent record exists the NYSDOH will forward the information to the DCJS for an FBI check, the fee for which may be charged to the provider.[6]

As with the original NYSDOH regulations, the employer must inform the prospective employee in writing of the CHRC requirements and that he has the right to obtain, review and seek correction of his CHRC information. The prospective employee must give informed written consent to the CHRC, indicating he/she has been informed of the reason for the CHRC, his/her right to review the CHRC and request correction.[7] The employer must also request from a prospective employee a sworn statement disclosing any prior finding of patient or resident abuse or a criminal conviction in this state or any other jurisdiction.[8]

2. Provisional Employment

The employer may offer provisional employment to prospective employees while the CHRC is pending, provided that the employer conducts appropriate direct observation and evaluation of the temporary employee and the care recipient. The employer shall utilize an individual employed by the employer with a minimum of one year's experience working in an agency certified, licensed or approved under Article 36 of the NYSPHL to conduct the observation. [9]

3. Statewide Permanent Record Registry

The statewide permanent registry of criminal history information eliminates the need for duplicative checks by employers that are required by the original NYSDOH regulations. The NYSDOH will create a permanent record for all individuals with a CHRC, update the information and make such records available to employers.[10] The registry can be used for subsequent record checks. Any NYSDOH determination made upon a prospective employee may be reviewed by the employer at such times as the prospective employee presents himself for employment. If the prospective employee has a permanent record with the NYSDOH, such information must be made available to the employer within one business day.[11]

4. Results of Criminal History Record Check

The NYSDOH is responsible for determining the employability of the individual within five days of receipt of the information from the DCJS. The NYSDOH must deny employability for any individual convicted of the following offenses:

A. Any Class A felony defined in the Penal Law;

B. Any Class B or C felony defined in the Penal Law occurring within ten years preceding the date of the criminal history record check;

C. Any Class D or E felony listed in Article 120, Article 130, Article 155, Article 160, Article 178 or Article 220 of the Penal Law occurring within ten years preceding the date of the criminal history record check;

D. Any crime defined in §§ 260.32 or 260.34 of the Penal Law occurring within ten years preceding the date of the criminal history record check; and

E. Any comparable offense in any other jurisdiction.[12]

These are the same offenses identified for denial of employment in the original NYSDOH regulations.[13]

If the CHRC reveals a conviction for any other offense, it is within the NYSDOH's discretion to deny employment in accordance with Article 23-A of the New York State Correction Law.[14] If the prospective employee has any felony charges pending the NYSDOH must hold the application in abeyance until the charge is resolved. If the prospective employee has any misdemeanor charges pending the NYSDOH may hold the application in abeyance.[15] Prior to making any determination to deny an application, the NYSDOH must afford the prospective employee an opportunity to explain in writing why it should not be denied.[16] Any notification of denial submitted to an employer must include a summary of the criminal history information provided by the division.[17] The employer must notify the prospective employee that the criminal history information is the basis for the denial.[18]

5. Conclusion

In summary, the creation of a statewide CHRC system will provide nursing homes and home care agencies with easy access to a prospective employee's employability based on the CHRC determination made by the NYSDOH. The new system is a more efficient method that shifts the burden of the CHRC process in large part to the NYSDOH.

Endnotes

1. 10 N.Y.C.R.R. § 400.23.
2. *Id.*
3. NYS PHL § 2899 et al.
4. Executive Law § 845-b(5).
5. NYS PHL § 2899-a; Executive Law § 845-b.
6. NYS PHL § 2899-a(1).
7. Executive Law § 845-b(3).
8. NYS PHL § 2899-a(2).
9. NYS PHL § 2899-a(10).
10. NYS PHL § 2899-a(7).
11. NYS PHL § 2899-a(8).
12. Executive Law § 845-b(5).
13. 10 N.Y.C.R.R. § 400.23.
14. Executive Law § 845-b(5).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

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Third Party Retaliation Claims: Closing a Potential Loophole or Opening a Can of Worms?

By John F. Fullerton III

I. Introduction

Third party retaliation—also known as "association" or "relationship" retaliation—involves claims of adverse employment action against the spouse, relatives, or even friends of an employee in retaliation for the employee's protected activity under various employment statutes, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA) and Americans with Disabilities Act (ADA). Under the plain meaning of the anti-retaliation provisions of these statutes, however, the individual who complains of retaliatory treatment must be the same individual who has engaged in protected activity. On that basis, several federal circuit courts of appeal have held that third party retaliation claims are foreclosed, and that it is up to Congress to broaden the scope of the existing provisions if it sees fit.

The alternative argument, supported by other courts and the Equal Employment Opportunity Commission (EEOC), is that the broad purpose of the anti-retaliation provisions is to prevent employers from chilling, in any manner, the pursuit of rights guaranteed by the statutes. The provisions must therefore be interpreted broadly and consistently with the spirit of congressional intent rather than with a wooden application of the "plain meaning" theory of interpretation. As the Second Circuit has observed in a different context, courts "must interpret Title VII's anti-retaliation provision in light of Title VII's overall remedial purpose."[1] In addition to the courts that have adopted this position, one student commentator has argued in favor of permitting third party retaliation claims, reasoning that they are within the spirit of the anti-retaliation provisions.[2] There do not appear to be any scholarly pieces currently taking the opposing viewpoint.

Does the refusal to recognize third party retaliation claims indeed create a loophole through which employers may attempt to chill rights when they receive an employment discrimination charge by retaliating freely against *other* employees? Or does such refusal simply obey the plain language of the statutory anti-retaliation provisions and prevent a deluge of frivolous litigation with no bright-line rule as to who qualifies as a protected "third party"? This topic is interesting not only for its ramifications for employment law, but because it presents the more general debate between the letter versus the spirit of a statute: between its plain meaning and its underlying policy objectives. But from a practical perspective, the issue is important because it arises with surprising—and arguably increasing—frequency. Many companies place no, or only limited, restrictions on the hiring of relatives (such as that one not report to the other). Further, the Society for Human Resource Management recently published the results of a survey which found that only about 25% of employers have policies addressing intra-office dating, and only 9% ban such relationships.[3] Thus, there appears to be ample opportunity for employees to work with relatives or develop the kind of "close relationships" that in some instances have created fertile ground for potential third party retaliation claims.

Finally, the issue warrants attention because it continues to percolate through the courts with mixed results and no definitive resolution. Significantly, while several district courts in New York have taken up the issue, and in some instances permitted third party retaliation claims to proceed, the Second Circuit has yet to rule on it.[4]

II. Relevant Federal Statutory Provisions

The relevant statutes all seem pretty clearly to limit protection from retaliation to the individual who engaged in protected activity. Title VII's anti-retaliation provision states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because *he has opposed* any practice made an unlawful employment practice by this subchapter, or because *he has made* a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this sub-chapter.[5]

The language of the ADEA is similar but not identical:

> It shall be an unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because *such individual*, member or applicant for membership has opposed any practice made unlawful by this section, or because *such individual,* member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.[6]

The ADA's anti-retaliation provision states:

> No person shall discriminate against an individual because *such individual* has opposed any act or practice made unlawful by this chapter or because *such individual* made a charge, testified, assisted, or

> participated in any manner in an investigation, proceeding or hearing under this chapter.[7]

The ADA, however, has an additional, arguably broader anti-retaliation provision:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.[8]

III. A Split in Authority

A. Background

"True" third party retaliation claims arise in two basic ways: (i) the plaintiff is the person who suffers an adverse employment action because a friend or relative engaged in protected activity; or (ii) the plaintiff who engages in the protected activity includes a claim that he or she also suffered retaliation because their friend or relative was subjected to an adverse employment action. In either case, the usual sequence of protected activity followed by adverse employment action is split between two individuals, neither of whom suffers both. In other cases, plaintiffs have unsuccessfully attempted to portray as "third party" retaliation claims that do not fit either of these categories.[9]

Several circuit courts have applied a "plain language" or "plain meaning" interpretation of Title VII and the other anti-discrimination statutes and denied attempts by plaintiffs to claim that they were retaliated against because of the protected activity of their spouses or other family members who worked for the same employer.[10] Plaintiffs frequently cite several other circuit and district court decisions to support the proposition that the anti-retaliation provisions of Title VII and other statutes prohibit retaliation against third parties as well as those who engage in the protected activity themselves.[11]

In addition, the EEOC unequivocally supports the position that third party reprisals lead to cognizable claims in their own right. In recognizing third party retaliation claims, the EEOC takes the position that retaliation means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity."[12] Thus, the Compliance Manual states that Title VII "prohibits retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights."[13] Significantly, the Supreme Court has instructed generally that the EEOC's interpretation of Title VII "is entitled to great deference."[14]

Arguably, one problem with the EEOC's approach is that courts will be forced on a case-by-case basis to determine whether the alleged target of an adverse action was sufficiently "closely related or associated with" the person engaging in protected activity, without any kind of bright-line definition of the types of relationships that will or will not satisfy the standard. In *Milstein v. Henske*,[15] the court decided that third party retaliation claims must be based on *some* relationship between the individuals, and rejected an employee's attempt to pursue such a claim where he was neither related to nor involved in a personal friendship with a second employee who engaged in protected activity. The court refused to condone what would have been an "unprecedented expansion of the definition of 'third party.'"[16] In addition, the EEOC's position has been criticized as "not being based on a thorough consideration of the issues" and "lacking extensive analysis."[17]

One commentator nevertheless has argued that the strongest support "for a broad interpretation of Title VII comes from the Supreme Court's ruling in *Robinson v. Shell Oil Co.* [519 U.S. 337 (1997)] where it held that former employees are covered by the anti-retaliation provision."[18] There, "the Court relied heavily on the EEOC's position that to disallow claims by former employees would allow 'an employer to be able to retaliate with impunity against terminated employees.'"[19]

Last year, however, a federal judge of the District of Maryland opined, to the contrary, that dicta from the Supreme Court's more recent decision in *Jackson v. Birmingham Bd. of Educ.*[20] suggests that the Fifth and Eighth Circuits reached the correct result and that third party retaliation claims will ultimately be rejected by the Supreme Court.[21] In *Jackson*, the Supreme Court held that Title IX of the Educational Amendments of 1972 "does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint."[22] The Court then observed, however, that if the Title IX provision at issue had tracked Title VII's anti-retaliation language, it would have accepted the Board of Education's position that an "indirect victim" of retaliation could not state a cause of action.[23]

B. Third Circuit's *Fogleman* Decision Is the Leading Case

The most frequently cited case in the last five years on the topic of third party retaliation—whether it is followed, distinguished, criticized, or rejected—is the Third Circuit's decision in *Fogleman v. Mercy Hosp., Inc.*[24] In the preamble to his opinion for the court, Judge Edward Becker noted that the case presented "a modern rendition of the age-old parable of a son being punished for the sins of his father."[25] The plaintiff sued under the ADEA, ADA and state law after his discharge as a security guard, a position he had held with the defendant hospital for 18 years. He did not sue, however, based on his age or any alleged disability of his own. The plaintiff's father, who had worked

for the hospital for 17 years, had filed a separate lawsuit alleging age and disability discrimination. The plaintiff contended that the real reason for his discharge related to his father's lawsuit. In certain respects, he was successful in that argument.

The plaintiff's claim was based on three distinct theories, that he had been retaliated against because: (i) his father sued the hospital (i.e., the pure third party retaliation claim); (ii) the hospital *perceived* that he had assisted his father in his lawsuit, even though he had not; and (iii) he had refused to cooperate with the hospital in its investigation of his father's claim.[26] The district court rejected all three theories and dismissed the lawsuit, but the Third Circuit reversed and remanded with respect to the first theory under the ADA's Section 12203(b), and with respect to the "perception" theory. The court rejected the third party retaliation claim under the ADEA, and dismissed the third retaliation theory as plainly lacking merit.

In its analysis, the court first explored the split in authority on third party retaliation claims and acknowledged the conflict between the plain meaning of the statutory anti-retaliation provisions and the underlying policy objectives. On the one hand, "the statutes are unambiguous—indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity."[27] On the other hand, "an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights."[28]

Notwithstanding this tension, the court decided that the "plain meaning" interpretation of the ADEA and the similarly worded Section 12203(a) of the ADA did not lead to an absurd result that would contravene any clearly expressed congressional intent, because Congress (i) may have recognized that a close friend or family member would in many cases "assist" or "participate" in the claim, and thus, find protection under the statute; and (ii) may have been concerned about preventing frivolous lawsuits that would interfere with the employer's right to discharge at-will employees.[29]

The ADA, however, also contains the second anti-retaliation provision, Section 12203(b), quoted above. The Third Circuit observed that this broader provision does not, as does Section 12203(a), expressly limit a cause of action to the employee who actually engaged in protected activity.[30] Relying on similar language in Section 8(a)(1) of the National Labor Relations Act,[31] and cases decided thereunder, regarding coercion of employees in the enjoyment of rights guaranteed under that statute, the court held that the discharge of a "close relative" could have a coercive effect on employees' willingness to engage in protected activity. Thus, the court permitted the plaintiff's third party retaliation claim to proceed under Section 12203(b) of the ADA. It is worth noting the court's express use of the term "close relative," which presents the possibility that the court would not have ruled similarly if the third party had been merely a close friend.[32]

Finally, the Third Circuit allowed the plaintiff's "perception" theory of retaliation to proceed, finding that retaliation based on a mistaken belief of "assistance" or "participation" is covered by the anti-retaliation provisions. The case was therefore remanded to give the plaintiff an opportunity to attempt to prove that he was terminated because the hospital thought that he was assisting his father, even if he was not.[33]

C. Other Cases Rejecting Third Party Retaliation Claims

Even before the *Fogleman* decision, the Fifth and Eighth Circuits had already firmly rejected attempts to pursue third party retaliation claims under the ADEA and Title VII, respectively. In *Holt v. JTM Indus., Inc.*,[34] the plaintiff alleged that he had been placed on administrative leave and was subsequently removed from his position as plant manager after his wife, who had worked for the same employer prior to her termination, filed a claim under the ADEA. The plaintiff had not participated in any way in his wife's charge and was, according to the court, a passive observer of her complaint. The court followed the plain language of the statute: "When an individual, spouse or otherwise, has not participated 'in any manner' in conduct that is protected by the ADEA, we hold that he does not have automatic standing to sue for retaliation under § 623(d) simply because his spouse has engaged in protected activity."[35]

In *Smith v. Riceland Foods, Inc.*,[36] the plaintiff's live-in girlfriend (and co-plaintiff) had filed race and gender discrimination charges after her termination. The plaintiff, who was also discharged shortly thereafter, had apparently assisted his girlfriend in filing the charge, but conceded that there was no direct evidence that the employer knew that he had done so.[37] The court expressly agreed with the Fifth Circuit's "plain language" interpretation of the ADEA and rejected the plaintiff's argument that a Title VII "plaintiff bringing a retaliation claim need not have personally engaged in statutorily protected activity if his or her spouse or significant other, who works for the same employer, has done so."[38]

Several district courts have also expressly followed the "plain meaning" reasoning of *Fogleman* and rejected third party claims to the extent that they were based solely on family relationship.[39]

All of the cases discussed in the preceding paragraphs involved claims that fit the first category of third party retaliation claim defined above: the plaintiff allegedly suffered an adverse employment action because a spouse or relative engaged in protected activity. In *Miller v. Bed, Bath & Beyond, Inc.*,[40] the court considered—and rejected—a

claim that fit the second category of third party retaliation: the plaintiff sought to maintain a claim that she had suffered an adverse employment action by virtue of the employer's termination of her daughter in retaliation for the plaintiff's EEOC charge. The court concluded that, although such evidence might be relevant to a claim that the plaintiff was subjected to a retaliatory hostile work environment, "injury done to another, even if a family member, does not itself constitute an adverse employment action for which Plaintiff might recover."[41]

The *Miller* court's view that terminating a relative does not constitute an "adverse employment action" against the plaintiff sufficient to state a Title VII retaliation claim does not, of course, square with the EEOC's position, because the latter takes the position that retaliation means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity."[42] The second category of third party retaliation fits this definition, unless the courts become convinced that the target of the "adverse treatment" must be the plaintiff. A plaintiff would argue, first, that "any adverse treatment" means *any at all*, regardless at whom it is directed; and second, even if that were not the case, terminating a relative counts as emotional "treatment"—or mistreatment—of the plaintiff. The Supreme Court may support this argument or take it away, depending on how it decides what counts as a retaliatory adverse employment action, which it should do in *White v. Burlington Northern & Sante Fe Ry.*,[43] to be argued this term.

D. Cases Adopting (or at least Arguably Supporting) the Third Party Retaliation Theory

Although it is most frequently cited by plaintiffs as supporting the legitimacy of all third party retaliation claims, *EEOC v. Ohio Edison Co.*[44] does not—and did not need to—go quite so far. In *Ohio Edison*, after the plaintiff was terminated and the company subsequently offered to reinstate him, he brought another employee to a reinstatement meeting to represent him. The "representative" argued that the plaintiff had been poorly treated based on his race and was contemplating filing a claim. Thereafter, the company withdrew the offer of reinstatement. The Sixth Circuit upheld the plaintiff's claim that he had been retaliated against because of his fellow employee's comments, reasoning that "tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII" and rejecting the district court's conclusion "that third parties, who have not actually engaged in protected activities themselves, can never sue under 42 U.SC. § 2000e-3(a)."[45] Although that language suggests broad support for third party retaliation claims, other courts have correctly observed that a co-employee "representative" speaking *on behalf of* the plaintiff was tantamount to the employee himself engaging in protected activity—which arguably does not implicate third party retaliation at all.[46]

The Eleventh Circuit's decision in *Wu v. Thomas*[47] is also frequently cited as a decision that recognized third party retaliation claims. While it is true that the case permitted such a claim to go forward, it did not squarely address the issue. Rather, the issue in that case was whether the plaintiff, a university professor, could proceed with his claim that he had been retaliated against by his removal as chair of his academic department following his wife's sexual harassment charge against the same university, in the absence of the filing of his own administrative charge. Without acknowledging that there was no allegation that the professor himself had engaged in any protected activity, or otherwise commenting on the third party issue, the court, relying on class action and multi-plaintiff cases, found that the claims were sufficiently related to permit the professor to proceed with his claim.[48] Thus, *Wu* may be distinguished on the ground that it assumed without properly deciding that third party retaliation claims are viable.

Several district courts, however, have squarely decided the issue in favor of third party claims. In *EEOC v. Nalbandian Sales, Inc.*,[49] the plaintiff sued his "seasonal" employer after it refused to hire him for the 1995 season, arguing that the refusal was in retaliation for the filing of a discrimination charge against the company by his sister, a former employee. It was undisputed that the plaintiff did not himself engage in any protected activity under Title VII. Nevertheless, the court reasoned that Title VII's anti-retaliation provision is ambiguous in light of its "textual context" and "the broad remedial underpinning of Title VII."[50] Relying heavily upon policy considerations and the EEOC's position, and exercising its "authority to broadly interpret federal remedial legislation in order to effectuate the statute's overarching purposes," the court permitted the third party retaliation claim to proceed.[51] There have been several other district court decisions over the years that have expressly permitted third party relation claims.[52]

Although, as noted at the outset, the Second Circuit has yet to weigh in, several district court decisions in New York have also explicitly recognized and permitted plaintiffs to proceed with third party retaliation claims. In *Murphy v. Cadillac Rubber & Plastics, Inc.*,[53] a husband and wife sued the employer, claiming, among other things, that the husband had been retaliated against in violation of Title VII because of his wife's complaints to management of discrimination. The court, relying on *Ohio Edison*, *Wu*, and several of the district court decisions cited above, found that the husband stated a cause of action for third party retaliation by alleging "protected activity by a *close relative*, disadvantageous employment action, and a timeframe indicating a causal connection between the two."[54] Curiously, the court *rejected* the husband's attempt to amend the complaint to include allegations that he engaged directly

in protected activity by "support[ing] and assist[ing]" his wife in her complaints of discrimination.[55]

More recently, in *Gonzalez v. N.Y. State Dep't of Corr. Servs. Fishkill Corr. Facility*,[56] the court held that a wife had standing to assert a retaliation claim based solely on the allegation that she was subjected to a pattern of harassment by her supervisor after her husband, a fellow employee, submitted an "affirmative action" report to the employer complaining that the supervisor had created a hostile work environment based on race, color and national origin. The court acknowledged the contrary precedents, but decided that "[i]n the relatively rare situation where a husband and wife work together, prohibiting the retaliated against spouse from maintaining an action would provide a means for an employer to circumvent Title VII's remedial scheme. Title VII should not be construed so narrowly."[57]

Cleary, in light of the many cases discussed in this article, the court's conclusion that a husband and wife working together is a "rare situation" is a dubious assumption and not one upon which a decision should be based.

In any event, not every third party retaliation claim involves spouses. In *Thomas v. American Horse Shows Ass'n, Inc.*,[58] the plaintiff claimed, among other things, that she had been denied a promotion and ultimately terminated, in part, because her sister had filed a race discrimination charge the previous year against the same employer after her own termination. Noting that other circuits had permitted such third party retaliation claims, relying on *Ohio Edison*, *Wu*, and *Murphy*, among other cases—and without any recognition of contrary precedent—the court concluded that "Plaintiff's third-party retaliation claim involving her sister, a close relative, is . . . properly before this Court."[59] The court then proceeded to grant summary judgment in favor of the employer on that claim because the plaintiff failed to establish the necessary causal connection between her sister's charge and the employer's actions with respect to the plaintiff.[60] The Second Circuit, noting that it had "not yet decided whether a cause of action exists under Title VII for third-party retaliation claims," affirmed the decision on the ground "that even if such a cause of action exists, Thomas has not adduced sufficient facts to establish a prima facie case of retaliation."[61]

E. Assuming the Existence of the Cause of Action, but Rejecting the Claim on the Merits

In the last few years, several courts, after acknowledging the split in authority on the issue, have assumed without deciding that third party retaliation is covered by Title VII, and proceeded to dispose of the claims on other grounds. In *Genao v. N.Y. City Dep't of Parks & Rec.*,[62] the plaintiff and his brother worked for the Parks Department. The plaintiff's brother filed a claim of race discrimination in September 2001. The plaintiff claimed that, thereafter and as a result, in addition to his own claim of discrimination on the basis of race, religion and national origin, the Parks Department retaliated against him by holding his use of sick days against him in refusing to hire him for a permanent position; offering him less temporary work in 2003 than in prior years; and rejecting his request for additional work. The Parks Department moved to dismiss.

The court observed that Title VII does not address the situation in which the employer allegedly retaliates against someone other than the employee who has filed a charge, and that the Second Circuit has not yet ruled on the issue.[63] After noting the circuit split and articulating the arguments on both sides of the issue, the court determined that it need not decide whether Title VII prohibits third party retaliation because, even assuming it does, the plaintiff failed to state a claim under such cause of action.[64] The court found that none of the alleged acts of retaliation constituted adverse employment actions, and further, that the plaintiff had not sufficiently pled a causal connection between his brother's EEOC complaint filed two years earlier and the actions allegedly taken against him.[65]

Similarly, in *Reiter v. Metropolitan Transp. Authority*,[66] the court assumed that third party retaliation claims were viable without deciding the issue, and proceeded to reject the claim based on the facts in that case. The plaintiff alleged, among other things, that he had been retaliated against because his wife, a fellow employee, had filed a discrimination complaint with the EEOC. The court found that although the plaintiff's receipt of a "marginal" performance review several months later could constitute an adverse employment action because it deprived the plaintiff of a salary increase, no reasonable jury could conclude that there was any causal connection between the review and his wife's charge.[67]

Recent cases outside New York have taken a similar approach. In *Hithon v. Tyson Foods, Inc.*,[68] the plaintiff alleged in support of her retaliation claim that her protected activity was her husband's lawsuit against Tyson, although she did not personally participate in that claim. The Eleventh Circuit—without reference to its earlier decision in *Wu*—noted that the Third, Fifth and Eighth Circuits had all rejected similar claims. It then passed on the issue, finding that, even if the plaintiff had established a prima facie case of retaliation, she had failed to demonstrate that Tyson's legitimate, non-discriminatory explanation for refusing to promote her to a desired position was pretextual.[69] The court affirmed the district court's grant of summary judgment on that basis.

In *McKenzie v. Comcast Cable Communications, Inc.*,[70] discussed above, the plaintiff alleged that the defendant refused to hire her to produce a television show in retaliation for the filing of a complaint of racial discrimination

by her husband against defendant, for whom she worked. The court reviewed the split of authority on the issue of third party retaliation claims and, as described above, expressed deep skepticism about the ultimate viability of the cause of action. But the court concluded that the issue was only "interesting as an academic matter" in that case because the plaintiff was not and never had been a statutory "employee," but instead, was an independent contractor and would have remained so had she been retained by the defendant to produce the television show in question.[71]

IV. New York State Law on the Issue Is Sparse

The New York State Human Rights Law provides two different anti-retaliation provisions, both of which contain limiting language similar to that in the federal statutes:

> It shall be an unlawful discriminatory practice . . . [f]or any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because *he or she has opposed* any practices forbidden under this article or because *he or she has filed* a complaint, testified or assisted in any proceeding under this article.[72]

> It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because *he or she has opposed* any practices forbidden under this article or because *he or she has filed* a complaint, testified or assisted in any proceeding under this article.[73]

There appears to be only one publicized New York state court decision regarding third party retaliation, *Zwickler v. Island Tennis*, and it applied a "plain text" analysis of Section 296 in rejecting the claim.[74] There, the plaintiff claimed that she was terminated in retaliation for her brother's pending lawsuit against the company. Justice Peter B. Skelos noted the dearth of state appellate authority, and relied instead on "persuasive" federal law—and *Fogleman* specifically—in finding that because the plaintiff was not the person who engaged in protected activity, she could not state a cause of action for retaliation.

V. The "Assistance" and "Participation" Clauses Already Provide Sufficient Protection

The appropriate resolution to this issue—one that is in keeping with the plain language of the anti-retaliation provisions, pays due deference to the broad remedial spirit underlying the statute, and avoids a potential Pandora's box of frivolous mischief—is that third party retaliation claims based solely upon association or relationship to another employee should be rejected. Instead, the third party should be required to make a showing that (i) they themselves engaged in some concrete protected activity, by, at the very least, assisting or participating in their friend's, relative's or spouse's claim; (ii) they suffered an adverse employment action themselves as a result; and (ii) there was a causal connection between that participation and the alleged adverse employment action.

There is no dispute that an employee will state a cause of action if she can concretely demonstrate that she has "assisted" or "participated"—"in any manner"—in protected activity, such as by supporting the investigation into a friend's or relative's claim.[75] Thus, it is perfectly reasonable to conclude that Congress has already considered this issue and drew the line at requiring *some* act by the alleged victim of retaliation, beyond mere relationship to the person who has engaged in the threshold protected activity. That was the position taken by the courts in *Fogelman* and *Holt*, where there was no such participation.[76]

Further support for the proposition that the anti-retaliation provisions already contemplate and accommodate the tension between the plain meaning of the statute and its broad remedial purpose can be found in distinctions in how "oppos[ing] any practice made an unlawful employment practice" and "assist[ing] or participat[ing] in any manner" are interpreted. As it is, the "participation" clause is interpreted very broadly, much more broadly than the "opposition" clause.[77] Thus, as the Eighth Circuit has observed, a pure, relationship-based third party retaliation cause of action is not only beyond the plain meaning of Title VII, it is simply not necessary as a means of protecting spouses or significant others from retaliation.[78]

Significantly, both *Holt* and *Smith* involved spouses or cohabiting significant others—relationships with the strongest claim for entitlement to protection from third party retaliation or to a presumption that assistance was rendered in the filing of a charge. Yet the courts refused to recognize such claims. Employers should be aware, however, that courts can and some will stretch the participation or assistance provisions to extreme lengths to circumvent the holding of cases such as *Fogelman*, *Holt* and *Smith.* Indeed, it is worth being prepared for attempts to merge the "perception" theory of retaliation accepted in *Fogleman* and other decisions and/or the "anticipatory" theory of retaliation with the third party retaliation theory.

Plaintiffs may argue that just as the "perception" that the plaintiff has engaged in protected activity before actually doing so is sufficient to state a cause of action for retaliation, the "perception" that family members or even close friends of the individual who engaged in protected activity probably assisted or even participated in the activity in some way simply by virtue of the relationship, even if they have not, is sufficient to state a retaliation claim. *Fogleman* allowed the son's claim to proceed on that basis, on a direct retaliation claim based on the perception that

the son had in fact assisted his father's own claim, although he had not.[79]

"Anticipatory" retaliation prohibits an employer from taking retaliatory action against an employee whom it fears will later file a charge or assist in an investigation.[80] Thus, plaintiffs may also argue that it is sufficient to allege facts tending to show that an employer "anticipated" that, as a relative or close friend of another employee who has engaged in protected activity, the plaintiff would *likely* assist or participate in that activity at some point.

Indeed, in *EEOC v. Bojangles Restaurants, Inc.*,[81] for example, the court ostensibly found more persuasive those courts that have rejected third party retaliation claims on a plain language reading of the statute. But the court then went to great lengths to resurrect plaintiff's claim by reading the allegations in such a way that there was a "reasonable inference" that the employer could have both perceived and anticipated that the plaintiff was rendering or would render "assistance" to the discrimination claims of her fiancé by serving as the financial support for the two of them while the fiancé pursued his claims.[82]

In sum, given the existence of the "participation" and "assistance" clauses in the anti-retaliation provisions of Title VII, ADEA and ADA, and given the dramatic—if questionable—extent to which these provisions may be expanded to provide a cause of action for family members and friends of fellow employees who engage in protected activity, there is no justification for interpreting the plain meaning of these provisions to include third party retaliation claims based solely on association or relationship to another employee.

Endnotes

1. *Deravin v. Kerik*, 335 F.3d 195, 203-04 (2d Cir. 2003).
2. Anita Schausten, Comment, *Retaliation Against Third Parties: A Potential Loophole in Title VII's Discrimination Protection*, 37 Marshall L. Rev. 1313 (Summer 2004).
3. http://www.shrm.org/hrnews_published/archives/CMS_015775.asp.
4. *See Thomas v. American Horse Shows Ass'n, Inc.*, 205 F.3d 1324, 2000 U.S. App. LEXIS 904 (2d Cir. 2000) (unpublished opinion).
5. 42 U.S.C. § 2000e-3(a) (emphasis added).
6. 29 U.S.C. § 623(d) (emphasis added).
7. 42 U.S.C. § 12203(a) (emphasis added).
8. 42 U.S.C. § 12203(b).
9. *See, e.g., Gore v. Trustees of Deerfield Academy*, 385 F. Supp. 2d 65 (D. Mass. 2005) (where plaintiff alleged that school, her short-lived employer, denied admission to her daughter in retaliation for plaintiff's own claims of sexual harassment and disability discrimination, court rejected as inapposite her reliance on cases recognizing third party retaliation claims).
10. *See, e.g., Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 570 (3d Cir.), *cert. denied*, 537 U.S. 824 (2002) (ADA and ADEA); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (Title VII); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) (ADEA).
11. *See EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993); *DeMedina v. Reinhardt*, 444 F. Supp. 573 (D.D.C. 1978), *aff'd in relevant part*, 686 F.2d 997 (D.C. Cir. 1982); *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1210-12 (E.D. Cal. 1998); *Gonzalez v. N.Y. State Dep't of Corr. Servs. Fishkill Corr. Facility*, 122 F. Supp. 2d 335, 346-47 (N.D.N.Y. 2000).
12. EEOC Compliance Manual § 8, "Retaliation," P8008 (1998).
13. *Id.* at 8-9.
14. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).
15. 722 A.2d 850 (D.C. 1999).
16. *Id.* at 851.
17. *Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129, 1137 (M.D. Fla. 2005).
18. Schausten, *supra* note 2, at 1332.
19. *Id.* (citing *Robinson*, 519 U.S. at 346).
20. 544 U.S. 167, 125 S. Ct. 1497 (2005).
21. *McKenzie v. Comcast Cable Commc'ns., Inc.*, 393 F. Supp. 2d. 362 (D. Md. 2005).
22. 125 S. Ct. at 1507.
23. *Id.*; *McKenzie*, 393 F. Supp. 2d at 380 n.2.
24. 283 F.3d 561 (3d Cir.), *cert. denied*, 537 U.S. 824 (2002).
25. *Id.* at 564.
26. *Id.* at 564.
27. *Id.* at 568.
28. *Id.* at 568-69 (citing *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987) ("To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations.")).
29. *Id.* at 569.
30. *Id.* at 570.
31. 29 U.S.C. § 158(a)(1).
32. At least one court following *Fogleman* has so held. *See Wychock v. Coordinated Health Sys.*, 01 Civ. 3873, 2003 U.S. Dist. LEXIS 3376, at *17 (E.D. Pa. Mar. 4, 2003) (rejecting third party retaliation claim under Section 12203(b) because plaintiff had no familial relationship to third party).
33. *Fogleman*, 283 F.3d at 571-72.
34. 89 F.3d 1224, 1227 (5th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997).
35. *Id.* at 1227.
36. 151 F.3d 813 (8th Cir. 1998).
37. *Id.* at 818-19.
38. *Id.* at 819.
39. *See Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129, 1138 (M.D. Fla. 2005) (finding, after thorough examination of the issues and relevant precedents, that "Plaintiff does not have a cause of action for retaliation based solely on his close association with his wife who engaged in protected activity"); *Higgins v. TJX Cos.*, 328 F. Supp. 2d 122, 124 (D. Me. 2004) (rejecting plaintiff's claim that defendant refused to hire him because of his cousin's pending sexual harassment lawsuit against defendant, finding that although there is a "compelling policy argument to be made in favor of permitting third party retaliation claims," Congress clearly required "that the person retaliated against also be the person who engaged in the protected activity"); *Horizon Holdings v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1143-44 (D. Kan. 2002) (rejecting third party retaliation claim based on wife's and father-in-law's protected activity where it was undisputed that plaintiff had not engaged in any protected activity himself); *Lyons v. Premium Armored Servs., Inc.*, 02 Civ. 3779, 2002 U.S. Dist. LEXIS

24475, at *8 (N.D. Ill. Dec. 18, 2002) (rejecting third party retaliation claim asserted by plaintiff under state workers compensation law alleging that she had been discharged because her co-employee husband filed a worker's compensation claim against the employer); *Pope v. Motel 6*, 114 P.3d 277, 282 (Nev. 2005) (rejecting third party retaliation claim under state anti-retaliation provision similar to Title VII's because plaintiff did not participate in her husband's discrimination charge against the same employer).

40. 185 F. Supp. 2d 1253 (N.D. Ala. 2002).
41. *Id.* at 1274.
42. EEOC Compliance Manual § 8, "Retaliation," P8008 (1998).
43. 364 F.3d 789 (6th Cir. 2004) (*en banc*), *cert. granted*, 126 S. Ct. 797 (2005).
44. 7 F.3d 541, 543 (6th Cir. 1993).
45. *Id.* at 543, 544.
46. *See*, *e.g.*, *Holt*, 89 F.3d at 1227 n.2.
47. 863 F.2d 1543 (11th Cir.), *cert. denied*, 490 U.S. 1006 (1989).
48. *Id.* at 1547-48 (citing *Crawford v. U.S. Steel Corp.*, 660 F.2d 663 (5th Cir. 1981) and *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968)).
49. 36 F. Supp. 2d 1206 (E.D. Cal. 1998).
50. *Id.* at 1209.
51. *Id.* at 1210-12.
52. *See Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934, 941 (N.D. Ga. 1994); *Mandia v. ARCO Chemical Co.*, 618 F. Supp 1248, 1250 (W.D. Pa. 1985); *Asklar v. Honeywell, Inc.*, 95 F.R.D. 419, 424 (D. Conn. 1982); *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978) (reasoning that a plain language interpretation of Title VII would yield "absurd and unjust results"), *aff'd in relevant part*, 686 F.2d 997 (D.C. Cir. 1982).
53. 946 F. Supp. 1108 (W.D.N.Y. 1996).
54. *Id.* at 1118 (emphasis added).
55. *Id.*
56. 122 F. Supp. 2d 335 (N.D.N.Y. 2000).
57. *Id.* at 347.
58. 97 Civ. 3513, 1999 U.S. Dist. LEXIS 6625 (E.D.N.Y. Apr. 23, 1999).
59. *Id.* at *37.
60. *Id.* at *39.
61. *Thomas v. American Horse Shows Ass'n, Inc.*, 205 F.3d 1324, 2000 U.S. App. LEXIS 904, at *2 (2d Cir. Jan. 25, 2000) (unpublished opinion).
62. 04 Civ. 2893, 2005 U.S. Dist LEXIS 10871 (E.D.N.Y. May 23, 2005).
63. *Id.* at *18.
64. *Id.* at *21.
65. *Id.* at *22-28.
66. 01 Civ. 2762, 2002 U.S. Dist. LEXIS 18537, at *23 (S.D.N.Y. Sept. 30, 2002).
67. *Id.* at *25.
68. 144 Fed. Appx. 795, 2005 U.S. App. LEXIS 16222 (11th Cir. Aug. 3, 2005), *cert. denied*, __ S. Ct. __, 2006 U.S. LEXIS 1148 (Feb. 21, 2006).
69. 2005 U.S. App. LEXIS 16222 at *12-13.
70. 393 F. Supp. 2d 362 (D. Md. 2005).
71. *Id.* at 381-82.
72. N.Y. Exec. Law § 296(1)(e) (emphasis added).
73. N.Y. Exec. Law § 296(7) (emphasis added).
74. Index. No. 16303/00 (Sup. Ct., Nassau County 2003) (NYLJ, Jan. 7, 2003) (the decision is not available on either Lexis or Westlaw).
75. *See* 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a); *see also* 42 U.S.C. § 12203(b).
76. *Fogleman*, 238 F.3d at 569; *Holt*, 89 F.3d at 1227 and n.2 (distinguishing *Ohio Edison* on the ground that, there, the co-employee's protected activity had in fact been engaged in on behalf of the plaintiff, and thus, the plaintiff had participated in protected activity by engaging a "representative" on his behalf); *see also Baird v. Rose*, 192 F.3d 462, 471 n.10 (4th Cir. 1999) (rejecting school's argument that, if anything, the alleged retaliation against plaintiff was a result of protected conduct engaged in by her mother, not plaintiff herself, finding that "it is clear that Baird's mother was acting on Baird's behalf in complaining of what she perceived to be conduct by school officials violating the ADA"); *compare Sacay v. Research Found. of the City Univ. of N.Y.*, 193 F. Supp. 2d 611, 633-34 (E.D.N.Y. 2002) (acknowledging the split in authority on third party retaliation claims but finding that the court need not resolve the issue because the plaintiff, the daughter of another employee who had made complaints of disability discrimination, wrote a letter to the employer, after her involuntary transfer to another position, referring in a supportive manner to her mother's claims, which was itself sufficient evidence of her own protected activity).
77. *See*, *e.g.*, *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) ("Courts have consistently recognized [that] the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations."); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (noting that "courts have generally granted less protection for opposition than for participation" and that the participation clause offers "exceptionally broad protection"); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (stating that the opposition clause serves "a more limited purpose" and is narrower than the participation clause); *Pettway v. American Cast Iron Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969 (noting that the participation clause provides "exceptionally broad" protection for employees covered by Title VII).
78. *See Smith*, 151 F.3d at 819; *see also Singh*, 390 F. Supp. 2d at 1139 (permitting retaliation claim to proceed, notwithstanding rejection of third party retaliation claim based solely on marital relationship, in light of evidence that plaintiff-husband himself had engaged in protected activity by, on numerous occasions, objecting to discriminatory treatment of wife).
79. *Fogleman*, 238 F.3d at 571-72; *see also Grosso v. City Univ. of N.Y.*, 03 Civ. 2619, 2005 U.S. Dist. LEXIS 4089, at *5-7 (E.D.N.Y. Mar. 14, 2005) (accepting "perception theory" and denying motion to dismiss claim that plaintiff was subjected to a hostile work environment because his employer believed that he had assisted his co-plaintiffs in their Title VII action against the same employer, even before he had in fact done so).
80. *See Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993) (action taken out of concern that individual would soon file a charge falls within scope of retaliation clause).
81. 284 F. Supp. 2d 320, 326 (M.D.N.C. 2003).
82. *Id.* at 329; *but see Attieh v. Univ. of Texas at Austin*, 03-04-450 CV, 2005 Tex. App. LEXIS 4662 (Tex. App. June 16, 2005) (rejecting both perception and anticipatory retaliation theories under Texas' anti-retaliation provision which, the court held, required actual engagement in protected activity).

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How Employment Agreements and Settlements of Employment Disputes May Affect Pension Benefits

By Albert Feuer

> ERISA was enacted to restrict employers' and employees' freedom of contract when bargaining over pensions.
>
> *Esden v. Bank of Boston*[1]

Employers often wish to establish rights to employee benefits in individual employment agreements. In particular, they often wish to settle all obligations, including employee benefit obligations, when an employee's employment terminates. Similarly, they often wish to avoid employee-benefit obligations at the outset of an employee's employment. Employers try to achieve both aims by having individuals waive their rights to claim employee benefits. This article discusses the stringent limits that the Employee Retirement Income Security Act of 1974 ("ERISA") places on the effectiveness of pension- benefit waivers in employment agreements and settlements of employment disputes.

Waivers of claims to pension benefits are generally prohibited. Three federal circuits, including the Second Circuit, have held that ERISA prohibits the waiver of claims to entitlements to accrued pension benefits. The Fifth Circuit, the only other circuit to consider waivers that are part of employment agreements or settlements of employment disputes, has held that ERISA permits such waivers but rejected a waiver because the agreement failed to address a *bona fide* pension dispute. However, several Second Circuit district courts have disregarded their Circuit's prohibition of such waivers. Those courts have instead applied a totality-of-circumstances analysis that they have used in cases involving waivers of claims of discrimination under Title VII of the Civil Rights Act of 1964.

Waivers of claims to pension-plan rights at the start of employment are permissible but generally ineffective.[2] The Second Circuit, the only circuit to consider the issue, has held that the right to participate in a pension plan may be waived under circumstances similar to those of Title VII waivers, although the Second Circuit did not find such a showing in any of its three reported decisions on this point. It is often unclear in these cases why the employer did not simply amend the plan to exclude an individual before he or she satisfied the eligibility criteria of the plan, thereby eliminating the waiver issue.

I. ERISA Basics

Pension-plan claims differ in five significant ways from most other employment-related claims.

First, ERISA governs both the claim and the effectiveness of any waiver. For simplicity, we will confine this discussion to those pension plans subject to the ERISA rules respecting anti-alienation, trust assets, vesting and fiduciary conduct, which are described below.[3] Thus, we will not consider most supplemental employee retirement plans or other executive compensation plans, which are not generally subject to those ERISA provisions.

Second, ERISA requires that pension plan assets be kept in a trust, individual retirement accounts, or in insurance contracts distinct from employer assets.[4] Thus, the employer is not directly responsible for paying any pension claims, although plan benefits are often funded by its contributions. Instead, the participants must look to the trust, individual retirement accounts, or the insurance contracts, which contain the plan assets, for the payment of their benefits. Consequently, effective pension-plan waivers must include as released parties not only the employer, its affiliates and agents but also the plan.

Third, ERISA treats persons who manage and administer ERISA plans as fiduciaries.[5] ERISA fiduciaries include persons who determine whether to approve and pay benefit claims. ERISA fiduciaries must act solely in the interests of the plan beneficiaries and participants.[6] Consequently, when acting as a fiduciary, a person may not act as an agent of the employer. Thus, an effective pension-plan waiver must include as released parties not only the plan, the employer, its affiliates and agents but also the plan fiduciaries responsible for approving and paying benefit claims.

Fourth, ERISA prohibits pension benefits from being assigned or alienated.[7] The anti-alienation provision can "be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement."[8]

Fifth, ERISA prohibits the forfeiture of accrued pension benefits if a participant has worked a statutory minimum of time, which is generally at most seven years.[9] Accrued benefits are not always non-forfeitable, i.e., vested. For example, a participant who has completed four years of service may have accrued a pension benefit of, say, $300 per month, but his vested pension benefit may only be $120 per month. On termination of employment a participant is entitled only to his vested accrued benefits. In the prior example if the participant terminated employment after four years, the participant would thus be entitled to a pension of $120 per month. However, after seven years of service ERISA requires that a participant's

accrued benefits be non-forfeitable.[10] Those benefits are thus called fully vested.

For simplicity, we will not consider waivers of claims for pension benefits that are not part of employment agreements or settlements of employment disputes. Nor will we consider waivers of claims for non-pension benefits. Finally, we will describe the case law but not alternative approaches. For example, it may be argued that a person seeking a waiver of ERISA plan benefits is subject to the responsibilities of an ERISA fiduciary, which are "the highest known to law."[11] These duties are thus far more demanding than those applicable to employers seeking Title VII waivers.[12]

II. The D.C. Circuit Prohibits Waivers of ERISA Rights Such as ERISA Vesting Rights

In *Holt v. Winpisinger*,[13] the D.C. Circuit held that a former employee was entitled to vesting credit for her initial year of service even though the plan alleged she had waived such credit by agreeing to be treated for such year as an independent contractor rather than an employee. Without the credit, the plaintiff would have been entitled to none of her accrued pension benefits. With the credit, the plaintiff's benefits would have been fully vested; thus, she would have been entitled to all those benefits. The court found that the latter was the case because an individual may not waive certain ERISA rights, such as the right to vesting service credits. However, the court also stated that unspecified rights that arise from a plan's terms, rather than from ERISA terms, may be waived.

III. The Seventh Circuit Voids Waivers of Accrued Pension Benefits but Permits Individuals to Waive Pension Benefits Indirectly by Choosing a Form of Payment in Settlement of Non-Pension Disputes That Is Not Associated with Pension Benefits

The Seventh Circuit held that pension benefits that have accrued before the execution of a waiver may not be waived. The courts, however, first held that individuals settling non-pension disputes may in effect waive pension benefits by waiving the right to choose a form of payment other than one set forth in the settlement agreement if under a careful contract analysis it is shown that the waiver of the pension benefits was knowing. Such analysis does not consider only the face of the waiver agreement. Consideration is given to the circumstances of the execution, particularly whether the participant negotiated the agreement and had the assistance of legal counsel.

In *Fair v. International Flavors & Fragrances*,[14] the court upheld a judgment that precluded a former executive from claiming that a lump sum payment of $85,000 should be included in her compensation for purposes of determining her pension benefits. This payment and the payment of eighteen months of an enhanced salary while she was not required to perform additional services were made pursuant to an agreement by the plaintiff (i) to terminate her sex discrimination litigation and (ii) not to institute any claim against her employer for any matter arising out of her employment. The court held the plaintiff's release in the settlement agreement of the right to bring an action relating to her employment constituted a waiver of the pension-benefit claim at issue,[15] and stated that the plaintiff had not presented any reason why ERIS prohibited such a waiver.

In *Licciardi v. Kropp Forge Division Employees Retirement Plan*,[16] the court again considered what it characterized as a waiver of a pension-benefit claim, which also pertained to the pension benefits associated with a lump sum payment pursuant to a settlement of a non-pension dispute. The court upheld the dismissal of a participant's claim that his pension benefits should take into account a lump sum payment of $650,000 that he received in exchange for resigning as company president and releasing all claims he might have had against the company. In the course of its contract analysis, the court observed that the participant, a former plan administrator, could have been expected to be aware that the lump sum payment was excluded from the pension computation and was waiving any claim to the contrary. As was the case with the *Fair* plaintiff the *Licciardi* plaintiff could have increased his pension benefits if he had negotiated for a different form of settlement payments. The *Licciardi* court held that ERISA prevented the waiver of those pension benefits that were determined by the terms of the pension plan, which it called "incontestable benefits." The claim at issue was, however, waivable because the benefits at issue, which it called "contestable benefits, were determined by the terms of a settlement agreement."

This *Licciardi* court distinction creates ambiguity because all pension benefits are determined by plan terms, and settlements may refer to pension plan terms. Moreover, unlike the *Fair* court, the *Licciardi* court did not refer to any settlement payment, which was associated with pension plan benefits and thus was presumably "incontestable." The court's next decision, however, introduced new terminology and clarified the distinction and the conditions under which a contestable claim may be effectively waived.

In *Lynn v. CSX Transportation, Inc.*,[17] the court reversed and remanded a lower court decision that a waiver precluded an employee from pursuing a claim that a pension plan's terms entitled him to credits for the time he was in the military.[18] The employee, like many of his colleagues, had accepted an early retirement package that enhanced his retirement plan benefits in exchange for a form agreement not to assert any claims that resulted from his employment.

The *Lynn* court stated at 975 (emphasis added and internal citations omitted) that:

> *Pension entitlements are, without exception, subject to the anti-alienation provision of ERISA [§ 206(d)]*. Contested pension claims, on the other hand, are "simply outside the realm of the provision." The distinction between these two categories is a critical one, and, if the decision of the district court is any indication, one that has not yet been drawn with sufficient clarity. A pension entitlement arises under the terms of the pension plan itself. A contested pension claim, by contrast, arises under a settlement agreement. *A release may prevent a plan participant from asserting claims based on a settlement agreement, but may not bar claims based on pension entitlements*.

Fair, *Licciardi*, and *Lynn* in concert show the meaning of non-waivable "pension entitlements." Pension entitlements are pension benefits that accrued before the execution of the waiver, such as the military service credits of the *Lynn* plaintiff, and arise under the pension plan terms. Thus, the *Lynn* plaintiff's claim to such benefits could not be waived. By contrast, waivers are permitted of the right to recharacterize the form of settlement payments of non-pension claims following the termination of employment so that more pension benefits would be associated with those payments, such as occurred with the *Fair* and *Licciardi* plaintiffs. However, as the *Licciardi* court stated, no explicit provision is needed in a settlement agreement to assure that a participant's pension benefits are paid pursuant to the plan terms (*Licciardi*, 990 F.2d at 982). Thus, one would expect that by agreeing to accept payments characterized as salary for which no additional services are required, the *Fair* plaintiff acquired a non-waivable right to the pension plan benefits associated under the plan with those benefits.

The *Lynn* court discussed the conditions under which those pension benefits that may be waived, i. e., contestable benefits, are effectively waived. The court defined a contested claim as a contestable claim whose waiver is effective, which requires the individual to have "actual or constructive knowledge" of the waived claim. In particular, the court distinguished the *Lynn* plaintiff from those in *Fair* and *Licciardi*. Even if the *Lynn* plaintiff's claim had been based on the settlement agreement and thus contestable, i.e., could be waived, it was not contested because the *Lynn* plaintiff lacked the requisite knowledge. He was an ordinary worker who the court stated could not have been "reasonably" expected to understand the pension claim allegedly being waived under the form agreement with which he was presented. By contrast, the *Fair* and *Licciardi* plaintiffs were executives who had negotiated individualized settlements with the assistance of counsel. Thus, the court stated they could have been "reasonably" expected to understand the pension claims thereby being waived.

IV. The Second Circuit Voids Waivers of Vested Pension Benefits but Permits Waivers of the Right to Participate in Pension Plans

The Second Circuit determined that pension benefits vested before the execution of the waiver may not be waived. There is no real distinction between vested benefits and accrued benefits for pension benefits at the termination of employment, because the only accrued benefits to which the employee is entitled are those that are vested at such termination. Thus, the Seventh Circuit (which focuses on accrued benefits) and the Second Circuit (which focuses on vested benefits) agree that accrued pension benefits may not be waived.

Both circuits permit waivers of benefits accrued after the execution of the waiver. Such waivers are subject to a careful analysis, which is not confined to the face of the waiver agreement. The Second Circuit decisions have been confined to cases where the services required to earn the pension benefits were performed after the execution of the waiver. The Seventh Circuit decisions have been confined to cases where different pension benefits are associated with different forms of payments that are made after the execution of the agreement settling a non-pension dispute.

In *Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan*,[19] the court denied summary judgment to a pension plan that claimed a tool-and-die maker had waived his right to participate in the plan. The court first ruled at 1364 that a right to participate in a pension plan may be waived because ERISA did not require universal participation in pension plans. The court stated, at 1368, that, "[t]he essential question is a pragmatic one: whether, in the totality of the circumstances, the individual's waiver of his right can be characterized as 'knowing and voluntary.'" Those circumstances could be analyzed with factors similar to those the court had used to analyze the effectiveness of waivers under the Age Discrimination in Employment Act of 1967 ("ADEA") in *Bormann v. AT & T Communications*:[20] (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the agreement before signing it; (3) the role of plaintiff in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney (as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so); and (6) whether the consideration given in exchange for the waiver exceeds employee

benefits to which the employee was already entitled by contract or law.

In particular, the *Laniok* waiver, which stated that participation rights in the named plan were being waived, was not upheld because the plan had not shown that at the time of the execution the plaintiff (1) knew the terms of the plan; (2) had access to counsel; (3) received consideration for the waiver; or (4) could have obtained the job without executing the waiver. The Second Circuit also looked beyond the face of the agreement in two other employee-benefit cases in which it explicitly used the *Laniok* analysis. In both cases, the court refused to uphold waivers of plan participation.[21]

The *Laniok* court also stated, at 1366, that "[o]ur decision should by no means be interpreted as approving the individual waiver of [unspecified] pension plan standards that ERISA does mandate."

In *Finz v. Schlesinger*,[22] the court upheld a waiver by a retired judge of his claim to benefits under a pension plan operated by a law firm of which he was a name partner. The waiver was part of a separation agreement between the plaintiff and his former law firm. The plaintiff's sole focus appeared to be the lack of full disclosure of the plan terms when he executed the agreement. He did not appear to have challenged the waivability of his claim for accrued pension benefits. The court used the *Laniok* criteria for a voluntary and knowing waiver to reach its decision. However, the court did not discuss the preliminary question posed by the *Laniok* court. Did the agreement violate any ERISA pension standards, such as the ERISA prohibition on the forfeiture of pension benefits previously applied in *Holt v. Winpisinger*?[23]

By contrast, in *Esden v. Bank of Boston*,[24] the court identified a pension standard that may not be waived, when it declared, at 173, that "[a] participant may not elect a forfeiture [of vested pension benefits]." The court rejected, at 163-164, the plan's claim that the participant's consent permitted the plan to pay a participant a lump sum amount smaller than the value of his pension annuity benefit. The *Esden* court further declared, at 172-173, (emphasis added):

> *ERISA was enacted to restrict employers' and employees' freedom of contract when bargaining over pensions*. Employers do not have to provide pension plans, but when they do, those plans must comply with Title I of ERISA [entitled "Protection of Employee Rights"] . . . . The Plan is correct that a pension benefit is defined according to the terms of the plan; but ERISA is quite explicit that those terms are circumscribed by statutory requirements and restrictions. *The Plan cannot contract around the statute.*

V. The Fifth Circuit Voids Waivers of Accrued Pension Benefits Based Solely on General Releases but Permits Such Waivers in Termination Agreements Settling *Bona Fide* Pension Disputes

In *Carrabba v. Randalls Food Markets*,[25] the court affirmed a decision that employees had not effectively waived their claims to benefits from a pension plan that terminated two years before they executed a general release in a severance agreement. The employees therein released their employer "from all claims, liabilities, demands and causes of action, known or unknown, fixed or contingent, which [they might] have or claim to have against [defendant] as a result of [their] employment and this termination."[26] The court found that there was no evidence other than the face of the agreement that either the employees or their employer had any idea that the waiver pertained to the claims under a pension plan terminated two years before the execution of the waiver.[27] Thus, the Fifth Circuit, like the Second and Seventh Circuits, looks beyond the face of the agreement as part of its careful review of those pension waivers that it permits.

By contrast, in *Rhoades v. Casey*,[28] the Fifth Circuit upheld a waiver of a claim for accrued pension benefits, which was part of a settlement of a *bona fide* pension plan dispute. In particular, the court held that a former CEO of a bank, and sole trustee of its pension plan, could be required to waive his pension benefit rights pursuant to a settlement he concluded with the banking authorities regarding his alleged misbehavior as both a bank officer and plan trustee.

The court asserted that three circuits had held that the ERISA prohibition on the assignment or alienation of pension benefits did not void knowing and voluntary waivers of claims for pension benefits as parts of settlements.[29] However, all the cited decisions are distinguishable from *Rhoades*. *Finz*, the first one, did not consider the applicability of the prohibition against the non-forfeitability of pension benefits, which *Esden* later found prohibited such waivers. The discussion of the ERISA prohibition against alienation in *Lynn* dealt with the second cited case, *Lumpkin*, which did not deal with participant's benefit entitlement but an employer's contribution obligation to a pension plan. *Stobnicki*, the final one, did not consider a participant's benefit entitlement but rather the effectiveness of waiver in a settlement of a dispute about who was entitled to the participant's survivor benefits. The last decision contains, at 1462, an often cited proposition:

> We held that courts "will not ascribe to Congress the intent of making unreasonable law—one requiring terminal [*sic*] litigation rather than settlements as does the general law," and therefore the apparent statutory bar against alienation of pension benefits should yield to reason and

allow benefits to be voluntarily waived for settlement purposes.

The above *Stobnicki* proposition has one basic flaw. There are no implicit exceptions to the anti-assignment prohibition of ERISA.[30] Furthermore, no explicit exception includes the settlement at issue in *Rhoades*.[31]

VI. The Second and Seventh Circuit District Courts

Seventh Circuit district courts follow the *Lynn* prohibition on the waiver of claims to accrued (vested) benefits. By contrast, Second Circuit district courts have applied the *Laniok* analysis without any consideration or mention of the *Esden* prohibition against a waiver of claims to vested pension benefits.

Two Seventh Circuit district courts applied the prohibition against the alienation of pension benefits to dismiss waiver defenses to class-action claims for vested pension benefits.[32] The Seventh Circuit affirmed the subsequent judgment of the latter district court that the class of plaintiffs was owed in excess of $300 million by the plan, which was a cash balance plan.[33]

On the other hand, Second Circuit district courts denied two class certifications with respect to claims for vested pension benefits because the court held that the totality of the circumstances of the waivers had to be individually reviewed to determine their effectiveness.[34] In *Krackow v. Dr. Jack Kern Profit Sharing Plan*,[35] the court, however, correctly distinguished two waivers of the right to participate in a profit-sharing plan. It disregarded a wavier by a dentist at the outset of his employment of the right to participate when he had no idea of the benefits to which he was entitled, but upheld a later waiver of three years of future contributions, in which the waived amounts were specified at the time of the execution and were credited against a debt the dentist owed his employer. Similarly, a Second Circuit district court, which applied the *Laniok* analysis to a claim for severance plan benefits, rather than pension benefits, held there had been no showing that the waiver was voluntary and knowing when it looked beyond the face of the contract.[36]

By contrast, a district court in the Second Circuit dismissed a claim for accrued pension benefits on the basis of a waiver.[37] The court asserted that it had applied the *Laniok* analysis, but unlike the *Carrabba* court, failed to look beyond the face of the agreement for any evidence that either the employee or his employer had any idea that the waiver pertained to the claims under a pension plan, which had also been terminated a considerable time before the execution of the waiver. Moreover, the court held that there was no need for the agreement to include either the pension plan or its fiduciaries as released parties.

VII. Conclusion

The Circuits have generally held that ERISA prohibits waivers of claims to vested pension benefits. The Fifth Circuit, which permits such waivers, has only upheld a waiver in an employment termination agreement when the agreement addressed a *bona fide* pension dispute. The Seventh Circuit does not permit such waivers, but allows individuals to settle non-pension disputes by choosing settlement payments which may not have the most favorable associated pension plan benefits. The Second Circuit, which also does not permit the waiver of vested benefits, has found that waivers of the right to participate in pension plans may be effective. In all three circuits the courts do not look merely at the face of the agreement in order to determine if the execution of the agreement was voluntary and knowing. However, even though the Second Circuit has held that ERISA prohibits waivers of vested pension benefits, a number of its district courts have permitted such waivers.

Endnotes

1. 229 F.3d 154 at 172 (2d Cir. 2000).
2. Unlike 401(k) waivers, the waivers under consideration are not being made pursuant to the explicit terms of a pension plan.
3. 9 U.S.C. §§ 1051, 1101(a), ERISA §§ 201 and 401(a).
4. 29 U.S.C. § 1103(a), ERISA § 403(a).
5. 29 U.S.C. § 1002(21), ERISA § 3(21).
6. 29 U.S.C. § 1104(a), ERISA § 404(a).
7. 29 U.S.C. § 1056(d), ERISA § 206(d).
8. *Boggs v. Boggs*, 520 U.S. 833 at 851 (1997) (citations omitted).
9. 29 U.S.C. § 1056, ERISA § 203.
10. ERISA contains a number of vesting requirements, some of which require that accrued benefits be non-forfeitable considerably before a participant is credited with seven years of service. 29 U.S.C. § 1056(a), ERISA § 203(a).
11. *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).
12. Those topics are discussed in Albert Feuer, "When Are Releases of Claims for ERISA Plan Benefits Effective?" 38 John Marshall L. Rev. 773 (Spring 2005), http://ssrn.com/abstract=827885.
13. 811 F.2d 1532 (D.C. Cir. 1987).
14. 905 F.2d 1114 (7th Cir. 1990).
15. By contrast, there was no issue that under the pension plan terms the eighteen months of enhanced salary were included in the plan's definition of compensation. The court below had found that the lump sum was not included in the plan definition. *Fair* at 1116. Thus, the plaintiff could have increased her pension benefits by negotiating an increase in the portion of the settlement paid as salary.
16. 990 F.2d 979 (7th Cir. 1993).
17. 84 F.3d 970 (7th Cir. 1996).
18. The plaintiff's pension claim was, however, rejected on remand. *Lynn v. CSX Transportation, Inc.*, 1997 U.S. Dist. LEXIS 7342 (N.D. Ill.).
19. 935 F.2d 1360 (2d Cir. 1991).

20. 875 F.2d 399 (2d Cir. 1989). The special ADEA waiver rules in the Older Workers Benefit Protection Act were enacted in the following year of 1990.
21. *Sharkey v. Ultramar*, 70 F.3d 226 (2d Cir. 1995); and *Yak v. Bank Brussells Lambert*, 252 F.3d 127 (2d Cir. 2001). In the latter case, the plaintiff's benefit claim was, however, rejected on remand. *Yak v. Bank Brussels*, 2002 U. S. Dist. LEXIS 18091.
22. 957 F.2d 78 (2d Cir. 1992).
23. 811 F.2d 1532 (D.C. Cir. 1987).
24. 229 F.3d 154 (2d Cir. 2000).
25. 145 F. Supp. 2d 763 (N.D. Tex. 2000), *aff'd*, 252 F.3d 721 (5th Cir. 2001).
26. *Carrabba* at 771 (alteration in original).
27. The court did not have to consider the failure to name the pension plan as a released party because the employer had held the assets directly because it had incorrectly believed the plan was an executive compensation plan not subject to the ERISA requirement that pension assets be held in trust.
28. 196 F.3d 592 (5th Cir. 1999).
29. *Finz v. Schlesinger*, 957 F.2d 78 (2d Cir. 1992); *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449 (7th Cir. 1991); and *Stobnicki v. Textron*, 868 F.2d 1460 (5th Cir. 1989).
30. *See generally Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990); and *Boggs v. Boggs*, 520 U.S. 833 (1997).
31. The exception in 29 U.S.C. § 1056(d)(4), ERISA § 206(d)(4) was enacted after the facts at issue and is inapplicable in any case because neither the United States Department of Labor nor the Pension Benefit Guaranty Corporation was a party to the settlement agreement.
32. *Malloy v. Ameritech Pension Plan*, 2000 U.S. Dist. LEXIS 20490 (S.D. Ill.); and *Berger & Tsupros v. Xerox Corporation Retirement Income Guarantee Plan*, 2001 U.S. Dist. LEXIS (11638 S.D. Ill).
33. *Berger & Tsupros v. Xerox Corporation Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003).
34. *Spann v. AOL Time Warner*, 2003 U.S. Dist. LEXIS 23006 (S.D.N.Y.); and *Walker v. Asea Brown Boveri Inc. Cash Balance Pension Plan*, 2003 U.S. Dist LEXIS 3454 (D.C. Cir).
35. 2002 U.S. Dist LEXIS 20524 (E.D.N.Y.).
36. *De Pace v. Matsushita Electric Corp.*, 257 F. Supp. 2d 543 (E.D.N.Y. 2003) and 2004 U.S. Dist. LEXIS 13316 (E.D.N.Y.).
37. *Yablon v. Stroock & Stroock & Lavan Retirement Plan and Trust et al.*, 2002 U.S. Dist. LEXIS 10528 (S.D.N.Y.) *aff'd*, *Yablon v. Stroock & Stroock & Lavan Retirement Plan*, 93 Fed. Appx. 329 (2d Cir. 2004).

Implementing Early Retirement Incentive Programs: A Step-by-Step Guide

By Heidi S. Hayden and Diane M. Pfadenhauer

Introduction

At different times in the life of an organization, business leaders find themselves in the position of having to reduce their workforce. While saving money is the typical reason for this need, there are many other more positive business strategies designed to enhance profits or improve services or products that could be behind a reduction. When it comes to reducing the workforce, organizations have typically used the approach of an involuntary reduction-in-force. This approach, however, brings about a host of concerns, including reduction in productivity, poor employee morale, and the threat of lawsuits.

"[V]oluntary programs are a cooperative way for organizations to achieve their goals and objectives while supporting those employees who desire to move into retirement, giving employees a feeling of control over their futures."

In the current business environment, we need to be smarter and look for solutions that minimize risks and support business initiatives. When thinking about reducing staff, we should begin to turn toward an approach that would support not just the organization but also its employees. One such approach is the use of voluntary programs. While they may not work in all circumstances that warrant a reduction in staff, there are many circumstances in which they could be very successful.

A voluntary program takes time to develop and while it may involve a lengthier process than involuntary programs, it has some distinct advantages. Employees who voluntarily leave employment are less likely to raise claims; and, if the program is structured properly, individuals are required to sign a release of claims that would protect the organization from litigation. This approach may also reduce or eliminate the need for involuntary layoffs, which would help support positive employee morale. Overall, voluntary programs are a cooperative way for organizations to achieve their goals and objectives while supporting those employees who desire to move into retirement, giving employees a feeling of control over their futures. The very notion that employees make well-informed decisions empowers them to take responsibility for their futures. This positions both the employer and employee in a much less adversarial relationship at the time of the employee's departure.

Some organizations will think beyond traditional layoffs and seek other innovative ways to reduce costs. Typically these programs, such as job sharing, reduction of hours, furloughing, and wage freezes, often do not have the desired financial impact that the organization may require. The disruption and adverse effects on morale often outweigh any positive benefits. Employers typically shy away from voluntary programs, such as the type described in this article, because they view it is a lengthy, difficult and daunting task. Little guidance is available in this area, which touches upon significant business, legal, actuarial, financial and human resources considerations. As a result, human resources practitioners typically do not have a great deal of experience in this area even though voluntary programs may be the most appropriate solution to a variety of business challenges.

While there are a number of voluntary programs an organization can consider, this article will focus on one such program, an Early Retirement Incentive Program (ERIP). An ERIP is a carefully designed program that provides incentives geared toward encouraging employees who are approaching or at retirement age to voluntarily retire earlier than they might have otherwise. An ERIP can be used to support a number of organizational objectives, including headcount reduction, replacement of higher salaried employees with lower salaried employees or to support plans or programs designed to further the organization's goals and missions.

The purpose of this article is to provide a step-by-step framework for the development of an ERIP. We will explore the business and legal issues that must be considered when undertaking this type of program and we will bring you through the steps of putting a program together including the release, eligibility, window, incentives, costs and announcement. While each business is unique, the guidance that follows should be suitable for many organizations and can be modified to suit the needs of any organization.

Considerations

1. Business Considerations

When considering whether you want to take a traditional approach to reducing headcount by using an involuntary reduction-in-force or if a voluntary ERIP will work for your organization, you should focus on why the reduction is necessary. Will an ERIP program support the organization's immediate needs as well as long-term goals? Will it target those individuals or areas that need

to be impacted? Which individuals will this potentially impact and will this have a negative impact on business operations? If so, would an involuntary reduction-in-force, which may rely on lay-off criteria such as length of service or rating, be a better way to go?

To provide an example of a situation where an ERIP might work well, let's consider a large service provider who upgrades to an automated telephone answering system. The new system, which is able to record and process customer orders automatically, has reduced the number of customer service representatives needed to answer the balance of the customer phone calls that do not require any specialized knowledge or understanding. After analyzing the flow and number of calls, it is determined that headcount must be reduced. Currently, the position of customer service representative is filled by individuals who have varying years of service, a broad range of salaries and a number of individuals who are at or close to retirement. Additionally, all representatives are currently rated at meeting or exceeding their accountabilities and there are a number of individuals who have been with the organization for many years who are being paid the top of the market salary for this type of position.

If you took an involuntary reduction-in-force approach and used years of service and/or evaluation rating as your basis, you would most likely impact the newer employees who are at the lower end of the salary range. If you utilized a voluntary ERIP to address this, however, you would be able to offer those individuals who had been with the organization for an extended period of time, who are presumably at the higher end of the salary scale, the opportunity to retire with incentives. The remaining employees would be at the lower end of the salary range and, as specialized knowledge and understanding is not needed to handle the calls, service would not be impacted by the loss of the more tenured representatives. In the end, you could achieve your headcount reduction objectives, retain employees at the lower-end of the salary scale and reward your longer service employees.

2. Legal Considerations

Whether you use a voluntary or involuntary approach to a reduction- in-force, these events come along with a number of legal considerations. While we will discuss some of those on the federal level, it is prudent to look at any additional laws or regulations on a state and local level that may be applicable to an organization.

The following are some of the laws you will want to become familiar with before you begin to formalize an ERIP.

Worker Adjustment and Retraining Notification Act (WARN)—This Act applies to employers who employ 100 or more full-time employees or 100 full- or part-time workers who, in the aggregate, work at least 4,000 hours per week, exclusive of overtime.[1]

If you have a "plant closing" or "mass layoff" occurring at a single site of employment, there are a number of obligations to be aware of under the WARN Act. One is the requirement to provide at least 60 calendars days' prior written notice of the lay-off or plant closing. This notification must be given to all non-union employees, representatives of any unionized employees, as well as designated state and local government officials.[2]

Age Discrimination in Employment Act (ADEA)—This Act bars employment discrimination on the basis of age, and applies to individuals who are age 40 and above.

If an individual is asked to sign a release, this must be voluntary and there are a number of factors you can address so it is viewed as such. These include:

The Older Worker's Benefit Protection Act (OWBPA)—The ADEA does not prohibit the use of an ERIP, however, the OWBPA, which amended ADEA, imposes requirements on any employment release that purports to waive age discrimination claims under the ADEA. Some of these requirements include: that the individual signing the release must receive something of value to which they were not already entitled (called "consideration"); the release be voluntary and be part of an agreement between the employee and employer; that the release be in plain English; state that the employee is waiving his/her rights under the ADEA; and, in addition, must be limited to claims or rights that arose before its execution. The individual must also be advised to seek counsel. In the case of a group termination under an ERIP, OWBPA requires individuals be given a 45-day period in which to consider any written agreement and an additional seven-day revocation period (individual terminations require only 21 days to consider, with the same revocation period). An additional group requirement is to provide, in writing, the job titles and ages of all individuals eligible for the program.[3] In other words, ensure the person has adequate time to make a decision, give eligible individuals accurate and complete information, and do not threaten or coerce individuals into signing the release.

Employee Retirement Income Security Act (ERISA)—ERISA governs employee benefit plans and one of the characteristics of an ERISA plan is an ongoing administrative scheme to pay benefits and, in general, a severance arrangement would be considered an ERISA plan if the arrangement was ongoing. As it is a one-time severance program providing a limited window for participation in conjunction with a reduction-in-force, an ERIP may not be subject to ERISA depending on all the facts and circumstances.[4]

The above are just a few of the legal considerations to keep in mind when developing and implementing

an ERIP. It is in an organization's interest to seek advice from an employment and/or benefits attorney during the formulation and announcement of such a program.

Steps to Develop an ERIP

We've outlined what an ERIP is, why it makes good business sense and provided a brief understanding of some of the business and legal considerations. Now, let's proceed, step-by-step, through the implementation.

1. Determining the Eligibility Group

The eligibility group is the set of individuals that will be offered the opportunity to participate in the ERIP. When determining eligibility, consider your business objectives. What are you trying to achieve? Is there a certain job title, department or geographic location that you need to reduce headcount in? Will only certain classes of employees be eligible? You may choose to set a minimum age and/or minimum number of years of service to participate. You may offer to all employees or limit to a subset. This could be done by position (managers, non-exempt, and secretaries), departments (accounting, production) or geographic location (New York, Los Angeles). Are there particular skill sets of employees within your organization that have become obsolete or that are particularly valuable? What would be the impact on your business of the departure of these employees?

As this is a retirement incentive program, it is recommended that you consult your applicable benefit plan documents, such as pension and/or health insurance plans, before you begin looking at this to see if there are any criteria that may influence your decision regarding the eligibility group. If, for example, your pension plan has a five-year vesting provision or stipulates that a retirement pension cannot be drawn prior to a certain age, you may want to incorporate these requirements into your eligibility.

Once you have reviewed the applicable plan documents that will provide you a better view of the group of individuals you may consider for eligibility, gather a list of employees who may meet these requirements. The number of individuals you need to reduce head-count by and the number of individuals on the list will help you begin to more narrowly define your eligibility criteria.

Let's look at an example of the process of defining eligibility. Based on business objectives and needs, you have determined that you need to reduce your headcount by ten within a certain job title. To begin, develop a list that provides the names of all individuals within this group. Then, based on what you discovered when reviewing applicable plan documents, begin reducing this list. If, for example, your pension plan allows those who are at least 60 years of age and have at least five years of service to begin collecting their pension, narrow the list to just these individuals. Based on the number of potentially eligible individuals on the list, you need to make an educated guess if more or less than ten of them would accept the package. If the list has 40 people, chances are good that you may end up with more than ten accepting. If the list has twenty, your chances are better you may meet, and not exceed, your target of ten. If you think more individuals than you want to reduce will accept, then you would consider setting your eligibility at an age and/or years higher than 60 and five years of service. Remember, this process is not an exact science. You may get more people than you anticipated accepting or you may get fewer. If you target your eligibility correctly, however, you should be able to minimize the mystery.

Whatever you decide, the criteria should be strictly objective, support the business objectives set for the program and make sound business sense. Additionally, you need to be careful not to expose your organization to any legal claims, including discrimination.

Sample Eligibility Requirement: All full-time non-management staff members who, on the date of the announcement, are classified as Customer Service Representatives and have at least five years of service and will be at least 60 years of age on the Retirement Effective Date.

2. Retirement Effective Date

The Retirement Effective Date is the date the retirement will be effective and, typically, will be the individual's last workday. When determining this date, look at your business needs and the amount of time that will be needed to exit individuals once their acceptance of the package becomes effective after the OWBPA consideration and revocation periods. This may be as little as two weeks but could go as high as four to six depending on your internal processes and needs. It is recommended that the period of time between the end of the window and the Retirement Effective Date be kept as short as possible. This will help both departing and remaining employees to stay positive through the transition and allow you to reach your business objectives as quickly as possible.

3. Retirement Incentive Window

The Retirement Incentive Window is the period of time you will give individuals to consider participating in the program. Individuals should be given a period of time to decide; this "window" should be sufficient enough in length for them to properly consider the offerings. Generally, the window period is finite and begins with the announcement and ends on a date decided by the organization. While the length of this period is not mandated, it is recommended, that at a minimum, the guidelines set forth in the OWBPA be followed. As such, a minimum window of 45 days should be used.

One consideration for the length of the window is that of timing, and whether other business needs and requirements will interfere with or be impacted by the announcement date and/or subsequent Retirement Effective Date. You may need to confer with others within your organization to more fully explore this.

You must be prepared, on or before the first day of the window, to announce the program and provide eligible individuals with all the documentation necessary for consideration. This would include a written announcement, the release agreement and other materials, such as projected pension calculations. On the day the window closes, you should be prepared to begin the necessary paperwork to exit those accepting the package properly.

Sample Retirement Incentive Window: October 31, 2005 through December 16, 2005 (Note this is a few days greater than 45 so as to allow the minimum 45 days we discussed earlier).

4. Program Offerings

As mentioned earlier, an ERIP provides an opportunity for the organization to meets its goals and objectives by providing employees an incentive to retire. The program will not be successful, however, unless it sufficiently motivates an individual to participate. The incentives must be structured in a way that attracts participants but is not cost prohibitive to the organization. The cost of such a program is an integral part of your consideration to move forward with this type of program and, as such, we will discuss how to determine and analyze the costs of an ERIP in Step 5.

Offerings typically include incentives such as severance, continuation of health insurance coverage, and pension enhancements. Although not usual for those looking to retire, ERIP's may also include outplacement services. Whatever offerings you decide on, keep in mind that to be successful, the employees must deem them worthwhile.

a. Pension Plan

Voluntary programs typically provide pension plan incentives, such as adding years to an individual's age and/or service so as to increase the value of the individual's pension. Some also provide the ability to collect on a pension prior to normal retirement age without reduction for withdrawals prior to normal retirement age.

It is recommended that you work closely with your Plan Administrator to determine pension incentives. Even if you know your plan, it is important to have your Administrator involved early in the process to ensure your plan allows for these types of incentives, and determine whether the plan needs to be amended accordingly. Additionally, the Administrator will need to perform the actuarial calculations of the incentives to determine the cost of the offerings.

Depending on the provisions of your pension plan, you may wish to consider one or more of the following:

Age Credit: Under a typical pension plan, an individual's age may be used to determine the amount of the benefit at retirement. By adding years to an individual's age, benefits under the pension plan may increase and/or an individual may be entitled to begin collecting under a pension plan earlier than he/she otherwise might have been entitled.

Employment Credit: Under a typical pension plan, an individual's compensation and/or years of credited service may be used to determine the amount of the benefit at retirement and, by adding years of employment credit, the individual's benefits under the pension plan may increase.

Commonly, age 65 is considered "normal" retirement age, with some plans providing the ability to retire early. If an individual chooses to collect his/her pension earlier, there are often actuarial reductions of the benefit level to account for the early commencement of payments.

Compensation Adjustment: If offering employment credit, you may want to provide an assumed compensation increase for each of these years as, presumably, the individuals would have continued to receive increases had they remained employed. This could be determined by using the target increase percentage of your organization, historical increase percentages for your organization or historical market percentage increases based on external survey data. If you choose to offer this, you should identify the date the increase would be effective, as this will be needed to project your program costs as well as provide more accurate pension calculations.

When deciding upon pension enhancements, your Plan Administrator should provide you with preliminary calculations on a number of incentive alternatives you are considering. This will help you decide on the final incentive offerings by providing you an opportunity to view the cost differences of these options. These differences will help guide you by providing an understanding of the cost of the incentive, as well as the value of the offering to the eligible individual.

When calculations are performed on the final incentives, have them completed assuming: (1) the employee retires at normal retirement age and (2) that the employee accepts and retires on the Retirement Effective Date. These two calculations will be important to the eligible individuals, as they will be able to make an informed decision regarding the value of the offerings by comparing the benefit available under the ERIP to the benefit which would be available at normal retirement.

Sample Pension Offerings: Employees will receive an additional three years of credited service and age under the pension formula and the organization will assume

a 3% increase in salary, compounded annually, which would have been granted January 1 for each of these years.

b. Health Insurance

One of the major factors that prohibits individuals from retiring prior to age 65 is health insurance. While the Social Security Administration provides Medicare Part A to cover hospital insurance and Medicare Part B to provide major medical coverage, these programs are not available until an individual reaches age 65. If your organization provides for retiree benefits, this may not be an issue. If the organization does not provide retiree health benefits, however, this will be critical to the outcome of the program, as it will likely only be successful if it closes this gap.

If you are considering an incentive to continue coverage under your group health plan after retirement and you do not currently provide retiree health insurance coverage, consult with the providing carrier(s). You will want to ensure they will allow for any exceptions to your plan eligibility requirements should you desire to offer continuation under any of the group plans.

To determine the incentive, you may want to consider the length of time individuals may need the benefit. Will you coordinate this time with COBRA coverage? What level of benefits do you want to offer? Will you pay all or part of COBRA premiums if you do not want or cannot cover them under your group plans? If continuing them under your group plan, will they be responsible for any participant contributions? Will this be a fixed amount for the duration of time they will have coverage or could/will this amount increase over time?

Sample Health Insurance Offerings: If currently enrolled, eligible employees will be able to continue their current level of participation in the organization's medical and dental plans at the applicable participant contribution rates until the end of the month in which they turn 65 years of age.

c. Termination Incentive Bonus

Although not legally required, similar to a severance payment an individual might receive upon leaving an organization involuntarily, it is a customary practice to provide a termination incentive bonus in the form of a lump-sum payment or payable in installments, which occur over time.

While termination incentive bonus amounts vary, general guidelines for the number of weeks for each year of service you may want to follow are:

- Non-exempt—One week with a minimum of four weeks to a maximum of two months.
- Exempt—two or three weeks with a minimum of two to a maximum of nine months.
- Vice President/Officer—three weeks for each year of service with a minimum of four months to maximum of one year.

Depending on the time of the year this program may be offered and the amount of the incentive payment, you may want to consider the timing of the payment in regard to tax implications. If the individual worked a significant portion of the year and will be eligible to receive an incentive bonus, the tax implications may make the ERIP offerings less desirable to them.

If you consider providing payments in installments, refer to The American Jobs Creation Act of 2004, which restricts decisions regarding the timing and frequency of deferred compensation distributions.

Sample Incentive Bonus Offering: Employees will receive a termination incentive payment equal to two weeks of salary for each year of service, subject to applicable taxes and withholdings, up to a maximum of thirty weeks. This payment will be paid on the Retirement Effective Date of December 31, 2005.

5. Program Costs

To ensure the ERIP will meet its financial objectives, it is important that the costs and savings of the program be thoroughly analyzed, as it would not make sense to introduce a program that would not save money or that would be too costly for the organization.

To analyze the costs effectively, it is recommended that you create a spreadsheet which outlines the costs and savings of a hypothetical program. Begin by gathering the following information and data:

- Cost of all incentive offerings including pension, health and any incentive bonus
- Salaries and hire dates of all eligible individuals
- Cost of benefits within your organization[5]
- If any positions need to be replaced, the salaries at which they will be replaced
- Attorney fees associated with the program
- Pension Administrator fees associated with the program

Once you gather this data, you can start to develop the spreadsheet. Remember the following as you begin to enter the data and calculate your costs:

- The analysis should be structured so as to look at the costs and savings on an annual basis, as well as the recurring costs and savings over each of the

upcoming years. It is necessary to look at the costs and savings in the upcoming years as pension credits, continuation of health benefits and termination incentive bonuses will be incurred over time and not all within the first year.

- When projecting costs and savings into the future, remember to apply an increase percentage to those items that you can reasonably assume will increase (health benefits, salaries, etc.). Items such as health benefits and compensation will almost always be higher in subsequent years. Additionally, remember to include the average cost of benefits (typically 35-38%) on top of an individual's base compensation.
- Your analysis should include the costs associated with implementing the program, such as utilization of outside attorneys, pension plan administrator or actuarial costs.
- To properly evaluate the effectiveness and cost savings of the proposed program, it is necessary to consider the possibility that every eligible individual accepts the incentive offer.
- If every eligible individual participates, determine if any of these individuals will need to be replaced. If so, will they be replaced at a comparable, lower or higher salary than the incumbent? What will the timing of the replacement be and will there be any recruiting costs associated with the replacement?

Once you have decided on your eligibility criteria and program offerings and have calculated the cost savings of the ERIP, it is important to weigh the program objectives against this to ensure they support each other. Once you are sufficiently assured you can reach organizational goals and objectives with this approach, you are ready to move forward.

6. Release

In return for the benefits and other consideration included in the incentive package that will be offered, an organization should require all individuals who elect to participate in the program to sign a waiver. The waiver releases the organization from any and all claims by departing employees resulting from their employment prior to the time the waiver was signed and, among other things, confirms their agreement not to file any legal actions or claims against the organization. As a release waives all claims up to the date of execution, you may wish to have them sign the release on the Retirement Effective Date.

An employment release should be written by or under the direction of an employment attorney to ensure it sufficiently describes the offerings, as well as contains all legally required language. As discussed earlier, the ADEA, as amended by OWBPA, contains a number of requirements and procedures that must be included when drafting the release.

7. Preparing for the Announcement

Once you have decided on the eligibility criteria and the program offerings, analyzed costs, and gotten the "go ahead" from your attorney, you are ready to begin drafting the announcement and release agreement, as well as having the final actuarial calculations performed. Typically, the release will be drafted by an attorney, but at a minimum, the release and announcement should be reviewed by an employment attorney.

When drafting the announcement, take care to touch on the areas of eligibility criteria, an explanation of program offerings, other benefits that may be affected, and any appropriate OWBPA requirements. It should include a statement that the organization has no current plans to offer other programs of this type in the future but reserves the right to do so. It should also be made clear that if eligible employees choose not to take the ERIP, that their decision not to participate will not affect their employment status or benefits in any way. We need to understand and communicate, however, that continued employment is never guaranteed. As mentioned earlier, if an ERIP does not provide sufficient departures, an involuntary approach may be needed and this could impact their employment.

Be sure to address how eligible employees accept or decline participation. It is recommended that you have them respond in writing. While an executed release is sufficient for those accepting, consider requiring those declining to document their decision so there are no misunderstandings.

8. The Announcement

Once the announcement, release and pension calculation statements are ready, it is important to consider how the announcement will be made. To ensure consistency in the information provided, you may want to have one individual conduct all the meetings. You should ensure that all packages are ready prior to the announcement date and, if any of the individuals will not be at work on the announcement date, make appropriate arrangements to contact them at home or meet with them immediately upon their return. Be sure, however, that you provide sufficient time for them to consider the offering. For individuals who may be housed in other locations, you may want to send the announcement packages out earlier and have them held by local management pending further instructions.

It is advisable to prepare a script, in advance of the conversations, so all eligible employees are given a consistent message. The announcement and package contents should be discussed individually with each person.

Eligible employees should know what they are expected to do and whom they can speak with should they have questions. This may be emotional for some employees, so you should be prepared for this. The most important advice is to have open communication and dialogue with the employees. If they feel anything is being hidden, they will become defensive and this could adversely impact the success of the program. Supervisors and managers should also be warned against telling any employee that if he/she does not take the ERIP and the ERIP does not achieve the targeted goal, he/she will be one of the employees who will be subject to a subsequent involuntary layoff.

Conclusion

The development of an ERIP is a lengthy process that takes a good deal of thought and effort. Practitioners often overlook the opportunity to implement an ERIP based on the mistaken belief that it is difficult and costly. Approached in a methodical and analytical manner, the ERIP represents a viable alternative for organizations seeking to reduce staff. In order for the ERIP to be successful, the program coordinator must understand the business objectives and goals that the organization is trying to obtain, provide a desirable incentive package to eligible employees and perform a thorough cost-savings analysis. If all of these steps are completed, a carefully crafted announcement and positive communication with eligible employees should ensure its success. At the end of the day, the organization will have been successful at empowering employees to take control of their futures and reducing the potential for litigation all while meeting business objectives.

Endnotes

1. 29 C.F.R. § 639.9 (1989).
2. 29 C.F.R. § 639.2 to .6 (1989).
3. For a more detailed discussion of informational requirements in connection with notice to groups, *see* 29 C.F.R. § 1625.22(f), *available at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/cfr-2002/julqtr 29cfr1625.22.htm (last visited July 23, 2005).
4. 29 C.F.R. § 1625.22(f)(iii)(D) (2002).
5. Karyn-Siobhan Robinson, Benefits Surpass 42 Percent of Payroll Costs, U.S. Chamber Reports, *available at* http://www.shrm.org/hrnews-published/archivesCMS-007198.asp. Research in this area varies considerably. We, therefore, suggest that you consider your own actual benefit costs in this calculation.

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He Said, She Said: Verifying Unwitnessed Harassment

By Ruth Moscovitch

Jason and Jessica work in the same office

George and Georgia are partners in their squad car.

Sandy is a student in Mr. Sampson's Social Studies class.

One day Jason walks in and files a complaint of sexual harassment;

Georgia files a complaint that George created a hostile environment due to her race;

Sandy claims her poor grade is due to Professor Sampson's bias against her religion.

What really happened?

Only the two know for sure.

Maybe Jessica, Jason's supervisor, asked for sexual favors in return for a raise; maybe she didn't.

Maybe George made repeated comments about Georgia's race; maybe he just wanted to end a romantic relationship with her. They were the only ones in that squad car.

Maybe Professor Sampson gave Sandy a low grade because of her religion; maybe when she came to his office hours, he simply discussed current events that involved religion.

So many times, with allegations of sexual harassment or discrimination, the "encounter" is an unwitnessed conversation between two individuals who describe the event very differently. Sometimes the two will agree on the words that were spoken, but have completely different interpretations of the conversation.

How is an employer or a union grievance rep to decide what really happened? Unfortunately, all too often everyone throws up their hands and says, "This is a 'he said, she said' situation; I can't tell what happened, so I'm going to treat the allegation as unsubstantiated."

That can be a big mistake. Why?

- If the harasser really did what is alleged, it is likely that he will do something inappropriate again. Next time, the victim may be angrier and less apt to settle the case quietly. And, the employer and the union may both have greater liability because they had notice of a problem and didn't act to correct it;.
- If the harasser didn't do what is alleged, and her name is never cleared, hostility and resentment between the co-workers can build up and undermine morale in the workplace.
- In a school situation, where there are allegations between, for example, students and teachers, the situation can be even trickier. Teenagers are quick to distrust adults anyway. And if they get their parents involved, what may have been a "small" problem can suddenly escalate—when parents start leafleting the school or calling the local newspaper columnist it may be even harder to get at the truth.

"How is an employer or a union grievance rep to decide what really happened? Unfortunately, all too often everyone throws up their hands and says, 'This is a 'he said, she said' situation; I can't tell what happened, so I'm going to treat the allegation as unsubstantiated.' That can be a big mistake."

Is it really impossible to find out what happened?

No. In fact, more often than not, a careful investigator can figure out what happened. More importantly, a careful investigator can gather good, solid evidence that will support a determination of credibility. And a judgment made on the basis of a good investigation that yields clear, well-articulated facts will stand up to judicial or arbitral scrutiny.

How does a careful investigator verify the unwitnessed event? By digging deeper.

Promptly Order a Detailed Investigation

Step one. Strike while the case is hot and memories are fresh. Promptly conduct a thorough and detailed interview of both of the parties. Solicit plenty of details that can be verified. For example:

- Just what happened that day: get all of the details—the who, what, when and where—not just of the harmful conversation, but of all of the events on the day in question.
  - What else occurred that day at work?
  - Who came by right before or after?
  - What was everyone wearing?

- If the witness cannot remember details, help him narrow it down
  - What month? What time of day?
  - Who is usually around?
- Widen the inquiry
  - Did either of them tell anyone else about the conversation? About the relationship?
  - Did either of them write anything about the event or the relationship? Notes? Letters? E-mails? Journals?
  - Is the victim aware of other times when the alleged harasser said inappropriate things to others? Who, what, where, when?
- Learn more about the relationship between the two of them
  - Were there other interactions between the two? Again, get plenty of detail about other interactions, whether pleasant or uncomfortable.
  - What exactly is the nature and scope of their professional interactions?
  - Has their relationship—either personal or professional—changed over time? Why?
- Always ask one more question: Is there anything else you want to tell me about this person?

Don't forget: For each and every line of questioning, always ask: Who, what, where, when?

Details make or break a case. It is amazing how many cases fall apart over the most basic facts. Maybe the harasser was not even at work on the day in question!

By moving quickly, you get the benefit of fresh recollections. And, most importantly, all of the employees know that you are taking the matter seriously.

Step two. Interview a broader circle of co-workers, friends and family members.

- From the wealth of detail solicited from the two main witnesses, there is always something that can be verified by talking to others. Maybe it is something seemingly minor, like the time of day when the incident could have occurred. Maybe it is something major, like a confidence shared that same day.
- Don't be afraid to move beyond the workplace. Many victims will confide in friends or family.
- Talk to *everyone* the two principals identify: they both will appreciate that you have listened to them and taken them seriously.
- Be thorough. Talk to others who work in the same area or department.
  - Many co-workers will have observed signs of inappropriate intimacy—whether between these two, or one of the principals and some one else in the workplace.
  - There can be signs as subtle as a person's body language, or as overt as outright flirting; one person may observe touching like hugs or friendly pats on the back; another may have overheard bits of conversation.

Typically, after interviewing 4 to 10 witnesses, the investigator knows whom to believe. More importantly, the investigator can articulate in *detail* why she believes one person more than the other.

Step Three. Obtain a written investigation report.

Expert opinions, even from a seasoned investigator, have little use to management or union unless they are documented in a formal, written report.

- A good report is thorough. It need not be sophisticated or lengthy, but every question raised should be answered.
- The report should list the date and time and name and contact information for every witness interviewed. If a witness was not available, the report should say why.
- The report should report the facts learned: who said what to the investigator.
- The report should also contain opinions on the credibility of the witnesses. A good investigator is not afraid to draw conclusions and *always describes in detail the basis for each conclusion.*
- The investigation can be performed under the direction of counsel and the report can be directed to counsel to preserve confidentiality. Upon review of the report, if there are additional questions, follow-up can be done and documented in a supplemental report.

Consider Using an Outside, Independent Fact-Finder

Often an organization will assign one employee to investigate charges of discrimination and harassment. This employee may have a formal title, like EEO Officer, or Investigator, or may simply be a trusted and respected employee. Sometimes the employer's counsel will handle the investigation.

On the other hand, sometimes it is best to bring in an outside fact-finder. Using an independent fact-finder can be particularly advantageous:

- When there is a great deal of hostility and mistrust between the parties, an outsider may have more credibility than anyone in-house. The parties may feel more comfortable discussing uncomfortable events with someone they do not have to face again.
- If litigation is likely, the outsider can be used as a witness. This protects the employer from being put in the difficult position of having counsel also serve as a key witness.
- As noted above, even if counsel engages the service of the independent investigator or fact-finder, the report can be protected by attorney-client privilege until a decision is made to use the information in litigation.

Summary

Conducting prompt, high quality, independent investigations of harassment and discrimination complaints can pay off for the employer or the union, not only in the difficult cases, but by giving employees confidence that the employer or union listens to them and takes their complaints seriously. The innocent party who is exonerated will appreciate the careful investigation every bit as much as the victim who is vindicated.

And, a quick, credible determination generally leads to a better outcome: where discrimination or harassment is found, timely action can remediate the situation, usually with more satisfaction and less financial outlay than when justice is delayed. On the other hand, where the allegations are not sustained, the accuser at least feels that he or she has been treated with respect and dignity, and the accused feels vindicated. Everyone can put the matter behind them and get back to work.

"The innocent party who is exonerated will appreciate the careful investigation every bit as much as the victim who is vindicated."

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Anything You Say (in Your FMLA) May Be Used Against You: The Second Circuit Weakens Federal Protection of Disabled Employees from Intrusive Medical Inquiries

By Eric L. Lane

In *Gajda v. Manhattan and Bronx*,[1] the Court of Appeals for the Second Circuit substantially weakened the Americans with Disabilities Act ("ADA" or "Act") protections against an employer's unwarranted medical inquiries of disabled employees and cast doubt on the applicability of its controlling precedent on the business necessity provision of the ADA. The court permitted an employee's admission of a disability in an application for medical leave under the Family and Medical Leave Act ("FMLA") to be used against him in dismissing his claims under the ADA.[2] In particular, the court found that the employee's statement opened the door to his employer's medical inquiries.[3] Moreover, the court appeared to relieve Douglas Gajda's employer, the Manhattan and Bronx Surface Transit Operating Authority ("MaBSTOA" or "Authority"), from at least part of its burden of proving that the challenged medical inquiries comported with the business necessity defense under the ADA.

Under *Conroy v. New York State*,[4] the controlling Second Circuit precedent, MaBSTOA had to show that its inquiries genuinely served the purpose of determining Gajda's ability to perform his job duties and that they were no broader or more intrusive than necessary.[5] The record contained substantial evidence that the employer's inquiries were not targeted to assessing Gajda's fitness to perform the duties of his job and that there were effective, less intrusive alternatives available. Nevertheless, the court held the inquiries to be justified because they were a "reasonably effective method" of evaluating Gajda's ability to perform his job.[6] Thus, despite ample evidence of less intrusive alternatives, the Second Circuit found the defendant had sustained its burden of proving the business necessity defense because the challenged inquiry was a reasonably effective method of achieving its goal. This holding has, at best, clouded the meaning of the intrusiveness prong of the *Conroy* business necessity test and, at worst, swallowed this part of the test altogether.

Douglas Gajda was a bus operator for MaBSTOA. In 1996, Gajda discovered that he was HIV-positive.[7] Between 1996 and 2002, MaBSTOA never asked Gajda about his HIV status, and Gajda never volunteered this information to his employer.[8] Throughout this period, Gajda continued to work as a bus operator, apparently passing the periodic physical examinations required for certification under the New York state motor and vehicle laws and regulations. In March 2002, Gajda applied for medical leave under the FMLA for conditions related to HIV. In his application, he stated that he was "HIV+" and that he would be "unable to perform the functions of [his] position" and would need "intermittent leave at undetermined times for [his] lifetime."[9]

In light of this revelation, MaBSTOA required Gajda to see a staff physician, who withdrew Gajda's certification to operate a bus and put him on restricted work status with pay, pending delivery of certain medical information including laboratory data.[10] Over the next several months, MaBSTOA physicians repeatedly requested the laboratory data, and Gajda repeatedly insisted that he was entitled to withhold it. Gajda submitted letters from his personal physician and his attorney in support of his position.[11] For most of this period, Gajda remained on restricted work status with pay. Eventually, however, MaBSTOA physicians refused to provide him with any work status, which prevented Gajda from receiving his salary.[12] After several months without pay, Gajda capitulated and provided MaBSTOA with the requested information. He was recertified and allowed to return to work as a bus operator.[13]

Gajda brought suit under the ADA, alleging, *inter alia*, that MaBSTOA's requests for laboratory data violated the business necessity provision of the Act, which states:

> Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.[14]

MaBSTOA moved for summary judgment, asserting that its statutory obligation to conduct its operations in "the interest of public safety" legally justified its requests. Specifically, MaBSTOA asserted the statutory affirmative defense that the inquiry was "job-related and consistent with business necessity":

> It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria, that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished as required under this title.[15]

The court granted MaBSTOA's motion for summary judgment. In a Memorandum Order, the district court (Rakoff, J.) held that MaBSTOA's medical inquiries fell within the authority's "broad discretion to determine the medical qualifications and standards necessary to operate its vehicles."[16] The court cited *Conroy*, the controlling Second Circuit precedent on the business necessity provision of the ADA. *Conroy* observed that courts generally find a business necessity where the inquiry is necessary to determine "whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties…."[17]

Under *Conroy*, an employer seeking to prove that its examinations or inquiries comport with this provision must first show that the asserted business necessity is vital to its business.[18] A valid business necessity could be reducing workplace absenteeism or ensuring public safety.[19] Upon establishing the import of the particular business necessity, the employer must then meet a two-part test to successfully assert this affirmative defense. First, the employer must show that the "examination or inquiry genuinely serves the asserted business necessity."[20] That is, where the asserted business necessity is public safety, the challenged inquiries must be used to assess whether an employee can safely perform his or her job-related duties. Second, the challenged examination or inquiry may be no "broader or more intrusive than necessary."[21] However, an exception to the intrusiveness prong provides that the employer need not show that the inquiry is the only way of achieving the business necessity. Rather, the inquiry must be only a "reasonably effective method of achieving the employer's goal."[22]

The district court declined to address the question of whether MaBSTOA's medical inquiries were "broader or more intrusive than necessary" under the *Conroy* test because Gajda admitted on his FMLA application that he was disabled and that his disability affected his ability to perform his job:

> Whether in some cases this requirement might be "broader or more intrusive than necessary," is a question the Court need not reach here. For in applying for FMLA intermittent leave, Gajda certified that he would be "unable to perform the functions of [his] position" on a predictable basis throughout his entire life, see Sheridan Declaration, Ex. I ("Request for Family and Medical Leave"), and the only reason he gave for this on the form was that he was "HIV+."[23]

Gajda's statements, the district court explained, gave MaBSTOA "every right" to request additional information to assess Gajda's fitness to operate a bus.[24]

Gajda appealed, arguing that the district court erred in finding MaBSTOA's requests for his laboratory data consistent with business necessity. Specifically, Gajda argued that the district court's failure to address the question of whether MaBSTOA's inquiries were "broader or more intrusive than necessary" was a legal error.[25] Gajda's opening appeal brief pointed out that business necessity is an affirmative defense for which the defendant bears the burden of proof and argued that neither public safety concerns nor Gajda's concealment of, or statements about, his HIV status relieved MaBSTOA of that burden.[26] Finally, Gajda contended that disposition of the case on summary judgment was inappropriate in light of evidence in the record that the requested laboratory data was not essential to the MaBSTOA physicians' determination of an HIV-positive bus operator's fitness to drive an Authority bus.[27]

On this last point, Gajda offered, *inter alia*, deposition testimony from MaBSTOA physicians that the information on virus count or viral load they were seeking in the laboratory data would not suffice to disqualify a bus operator from driving for MaBSTOA. MaBSTOA's Dr. Clarke-Belgrave testified to this effect:

> Q: The status of the illness itself, meaning the AIDS or HIV alone, not opportunistic infections or other things that come along with AIDS and HIV, but just the status of the HIV, the viral load, et cetera, that itself, that alone does not disqualify someone from driving a bus for Transit?
>
> A: That alone, no.[28]

Gajda offered additional testimony from Dr. Johnson, another MaBSTOA physician, that even if an individual's viral load numbers were bad, the individual would be passed for bus service if his physical examination revealed no opportunistic infections or other problems. Dr. Johnson explained that it is the consequences or symptomatology of the virus, not the virus itself, that concerns the MaBSTOA doctors:

> Q: So [the lab results] come[] back and there are no communicable illnesses and the person has a precariously low viral load, or whatever, it doesn't look good for the person, they have got full blown AIDS, they are clearly at a low level of viral load, but they are asymptomatic. Does that person get passed for passenger service?
>
> Q: You would pass such a person for passenger service; is that correct?
>
> A: Yes.
>
> Q: So the lab work related to the virus, even if it's looking pretty bad for the

patient, is not the determining factor in whether or not they get passed for passenger service, but whether or not they pose a danger to the public as a consequence of related illnesses or symptoms; isn't that right?

A: Yes.

Q: So it's the consequences of the virus that concerns the Transit Authority, not the virus itself; is that correct?

A: Yes.[29]

Another MaBSTOA physician, Dr. Denis, also testified that physical manifestations are the critical criteria for determining a bus operator's fitness under section 19A, the governing New York state regulation:

> Q: If an HIV employee is not symptomatic, meaning they have no opportunistic infections, there is no visual or hearing loss, there is no fainting, there is no tuberculosis, blah, blah, blah, if that's the case, wouldn't you, even with the lab data, have to wait for some physical manifestation to arise that would support not passing a person for 19A?
>
> A: Well, yeah.[30]

In Gajda's Reply Brief, he presented evidence to refute MaBSTOA's argument that it needed the laboratory data to "stage" his illness, i.e., to determine how frequently to schedule Gajda's physical examinations.[31] Another MaBSTOA physician, Dr. Isenberg, testified that the agency's medical staff knows how often to examine an HIV-positive bus operator and that six months would be an appropriate time interval for such periodic examinations:

> A: We know that HIV is a progressive disease. We see such an employee as you describe at a given point in time, and particularly if they are in what they call a public safety title, I would ask for monitoring probably every six months to determine the medical status of an employee.
>
> * * *
>
> A: Because, let's take the example of a public safety employee, which I can define to you, if you want.
>
> Q: You don't need to.
>
> A: Okay. If it is a bus operator, train operator or tower operator, we see them only every two years. A conductor we see every five years. The employee is supposed to report any intervening illness or medication which they may have to their supervisors, which in practice they may or may not do.
> So we ask the employee to come on a, usually a six-monthly basis to provide a report of their health condition.[32]

Gajda asserted that such evidence created an issue of fact as to the genuine necessity of MaBSTOA's inquiries, and that a reasonable jury could find that MaBSTOA failed to meet its burden on the business necessity defense.

The Second Circuit disagreed and affirmed the district court's grant of summary judgment.[33] Again, the decision rested, in part, on Gajda's admission of disability in his FMLA application. The Second Circuit held that Gajda's representations in his FMLA application opened the door to MaBSTOA's inquiries by providing the employer with "legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his . . . duties."[34] The court avoided the question of whether the inquiries were broader or more intrusive than necessary by finding that the requests for laboratory data were "surely 'a reasonably effective method of achieving the employer's goal of determining whether plaintiff could safely perform those duties.'"[35] Accordingly, the inquiries did not violate the ADA, and the court affirmed summary judgment for MaBSTOA.[36]

The *Gajda* decision establishes the disturbing precedent that an employee's admission of disability made to exercise his rights under a federal disability statute such as the FMLA may be used against him if he attempts to combat discrimination under the ADA. However, Gajda's statements in his FMLA application that he was HIV-positive and would suffer adverse health consequences because of this condition were merely consistent with his status as a disabled individual entitled to the protections of the ADA. Indeed, the regulations promulgated by the Equal Employment Opportunity Commission that interpret the ADA specifically recognize HIV as a limiting disability subject to the ADA.[37]

Furthermore, the *Gajda* decision casts doubt on the viability of the Second Circuit's business necessity test. Specifically, it is unclear how much, if any, of the intrusiveness prong of the *Conroy* test remains intact after this decision. MaBSTOA bore the burden of proving the affirmative defense of business necessity, and therefore had to show that the challenged requests for laboratory data were not broader or more intrusive than necessary. However, MaBSTOA never explained how the specific information it sought from the laboratory data would inform its physicians as to Gajda's fitness to operate an Authority bus. To the contrary, Gajda offered ample evidence that the information requested would *not* provide the

necessary information. Testimony of various MaBSTOA doctors revealed that physical symptoms and conditions, not the viral load in the laboratory data, are the ultimate determinants of an individual's fitness to drive a bus. The doctors presumably glean this information from periodic physical examinations, which are required of a bus operator irrespective of the viral load information in laboratory data.[38]

But the court found the requests for laboratory data to be permissible. The Second Circuit reached this conclusion because, although an employer's request may not be "broader or more intrusive than necessary," it only need be a "reasonably effective method" of accomplishing the business necessity.[39] After this ruling that the evidence presented here was not sufficient to send the case to a jury; a plaintiff would be hard-pressed to survive summary judgment on any ADA claim where an employer asserts the business necessity defense. Specifically, if there is no factual issue as to intrusiveness on these facts, it seems there never could be on any facts, and the "reasonably effective method" exception may have swallowed the intrusive prong of the *Conroy* business necessity test.

It is important that advocates for the disabled be aware of this decision. While it is beyond the scope of this article to provide a detailed discussion of strategies to protect disabled employees from the ramifications of the *Gajda* decision, this author would recommend first that practitioners at least advise disabled employees who apply for medical leave under the FMLA to provide only the minimum information required on the application and avoid damaging admissions if possible. In addition, it is recommended that a plaintiff challenging medical examinations or inquiries under the business necessity provision of the ADA aggressively build as strong a record as possible to show that the inquiries are unduly burdensome and ineffective methods of assessing the plaintiff employee's fitness for his job. Plaintiff's counsel should build this record as if plaintiff bears the burden of proving efficacy and intrusiveness, because this is effectively the case after *Gajda*. In this way, perhaps advocates can ameliorate the detrimental effects of the *Gajda* decision and continue to effectively protect the rights of the disabled.

Endnotes

1. *Gajda v. Manhattan and Bronx Surface Transit Operating Authority*, 396 F.3d 187 (2d Cir. 2005).
2. *See id.* at 189.
3. *See id.* ("Here, the representations by plaintiff, signed by his doctor, on an application for intermittent leave under the Family and Medical Leave Act that 'my own serious health condition renders me unable to perform the functions of my position,' **[**4]** that his condition left him 'unable to perform work of any kind,' and that '[patient] will need intermittent leave at undetermined times for lifetime,' demonstrates that the employer had 'legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his . . . duties.'").
4. *Conroy v. New York State Dep't of Correctional Serv.*, 333 F.3d 88 (2d Cir. 2003).
5. *See id.* at 98 ("The employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary.").
6. *See supra*, note 1 at 189.
7. *Gajda v. Manhattan and Bronx Surface Transit Operating Authority*, 2003 U.S. Dist. LEXIS 22338, *2 (S.D.N.Y. Dec. 12, 2003).
8. *Id.*
9. *See supra*, note 1 at 189.
10. *See supra*, note 7 at *3.
11. *Id.* at *4.
12. *Id.* at *4-5.
13. *Id.* at *5.
14. 42 U.S.C. § 12112(d)(4)(A) (2005).
15. 42 U.S.C. § 12113(a) (2005).
16. *See supra*, note 7 at *5-6.
17. *See supra*, note 4 at 98.
18. *Id.* at 97.
19. *Id.* at 97-98.
20. *Id.* at 98.
21. *Id.* at 98.
22. *Id.*
23. *See supra*, note 7 at *7-8.
24. *Id.* at *8.
25. *See* Br. & Special App. For Pl.-Appellant at 17.
26. *See id.* at 9-10, 18-22.
27. *See id.* at 9-10, 14, 25-26.
28. *Id.* at 23-24.
29. *Id.* at 24.
30. *Id.* at 25.
31. *See* Corrected Reply Br. For Pl.-Appellant at 8-11.
32. *Id.* at 10-11.
33. *See supra*, note 4 at 189.
34. *Id.*
35. *Id.*
36. *Id.*
37. *See* 29 C.F.R. Pt. 1630, App. § 1630.2(j) ("Other impairments, however, such as HIV infection, are inherently substantially limiting.").
38. *See supra*, note 25 at 13. ("Under Article 19A [of the N.Y. Vehicle & Traffic Law], bus drivers are required to undergo medical examination every two years.").
39. *See supra*, note 36 at 188-89.

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Post Award Motions Under the Federal Arbitration Act

By Eugene S. Ginsberg

Some elementary rules are necessary for understanding any arbitration. First is that an arbitration proceeding will result in what is called an Award. Its form, time and delivery are referred to in CPLR 7507. There may also be an Award by confession under CPLR 7508. But what if a party is not pleased with the outcome? Or, to the contrary, what if one is quite content and wants the Award to have full effect?

There are several options. For starters, a party may apply for modification within 20 days of delivery of the Award. This is referred to in CPLR 7509, which provides:

> **§ 7509. Modification of award by arbitrator**
>
> On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration within ten days of receipt of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them, within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration.

Alternatively, an Award may be confirmed under CPLR 7510, which provides:

> **§ 7510. Confirmation of award**
>
> The court shall confirm an award upon applications of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

It may also be vacated or modified under CPLR 7511, which provides:

> **§ 7511. Vacating or modifying award**
>
> **(a) When application made.** An application to vacate or modify an award may be made by a party within ninety days after is [*sic*] delivery to him.
>
> **(b) Grounds for vacating.**
>
> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds the rights of that party were prejudiced by:
>
> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.
>
> 2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:
>
> (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or
>
> (ii) a valid agreement to arbitrate had not been complied with; or
>
> (iii) the agreement to arbitrate had not been complied with; or
>
> (iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.
>
> **(c) Grounds for modifying.** The court shall modify the award if:
>
> 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
>
> 2. the arbitrators have awarded upon a matter not submitted to them and the

award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

The grounds for vacating the award under CPLR 7511 (b)1 are narrow (misconduct, bias, excess of power and procedural defect), and there has to be a showing of prejudice.

The grounds under CPLR 7511 (b)2 apply to a non-participant. In addition to the above, such grounds include non-arbitrability, noncompliance with conditions precedent and statutes of limitation. (Vincent C. Alexander's Practice Commentaries in McKinney's, Book 7B).

Failure to adhere to the time restraint for filing an application to vacate under CPLR 7511 (a) can mean the difference between the court declining to vacate and instead questioning whether or not to confirm the award. *Finding It Violates Education Law, Public Policy*, N.Y. L. J., May 2, 2006, at 20, col. 3 (discussing *Lawrence Teachers Ass'n v. Lawrence Public Sch.*) (*Lawrence Teachers Ass'n*).

Claims of arbitral misconduct have been successful when there has been an unreasonable refusal to adjourn a hearing (*Woodco Mfg. Corp. v. G.R. & R. Mfg., Inc.*, 51 A.D.2d 631 (3d Dep't 1976)) or refusal to hear admissible, pertinent evidence. *Prof'l Staff Congress/CUNY v. Bd. of Higher Ed.*, 39 N.Y.2d 319 (1976).

An award granting relief greater than sought exceeds the power of the arbitrator. *Banc of Am. Sec. v. Knight*, 4 Misc. 3d 756 (2004), *overruled on other grounds by Morgan Stanley DW Inc. v. Afridi*, 13 A.D.3d 248, 250 n.1 (1st Dep't 2004).

After the Award is confirmed, a Judgment may be entered under CPLR 7514, which provides:

§ 7514. Judgment on an award.

(a) Entry. A judgment shall be entered upon the confirmation of an award.

(b) Judgment-roll. The judgment-roll consists of the original or a copy of the agreement and each written extension of time within which to make an award; the statement required by section 7508 where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application under sections 7510 and 7511; and a copy of the judgment.

Judicial Remand to the Arbitration Panel

A court may remand a case back to the arbitration panel. This collides with the common law doctrine that the arbitrator(s) no longer have jurisdiction of the dispute and have no authority to change the final award. This is the doctrine of *functus officio.*

For a discussion of the doctrine, see chapter 11 (Post-Award Matters) of the recently published (2006) *The College of Commercial Arbitrators Guide to Best Practices in Arbitration* (JurisNet, LLC).

Federal Law—the Federal Arbitration Act

There are occasions when a state court will apply the Federal Arbitration Act ("FAA"), which is embodied in 9 U.S.C.A. Before engaging in any discussion on choice of law, it is first necessary to understand what the Act actually provides.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon that court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction

of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing; upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[(5) Redesignated (b)]

(b) If an award is vacated and the time within which the agreement required the award to be has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceeding of the adverse party to enforce the award.

The FAA "governs arbitrability questions to the exclusion of state arbitration law whenever the matter involved qualifies as a 'maritime' transaction or one involving interstate or foreign commerce." David D. Siegel, New York Practice § 607 (4th ed. 2005); 9 U.S.C.A. § 1. The Act

provides much about procedures to compel arbitration and jurisdiction. *Id*.

As for whether a particular suit falls subject to the FAA, "involving commerce" has been interpreted to mean the "broadest jurisdictional scope permitted under the commerce clause." *In re James B. Fellus*, 7 Misc. 3d 1016A (Sup. Ct., N.Y. Co. 2005) (discussing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) and holding that the FAA is applicable to an employment contract).

A *New York Law Journal* article restated this well: "As virtually every commercial transaction arguably affects interstate commerce, the FAA is deemed to apply to most commercial contract arbitrations." Raymond A. Bragar and Paul D. Wexler, *When Does an Arbitrator's Award Disregard the Law?* N.Y. L. J., Mar. 22, 2005, at 4 ("Brager"). Indeed, the FAA often preempts state law when the applicable state statute is inconsistent with the FAA. Grant Hanessian, *Gross Error of Law and Manifest Disregard of Law as Grounds to Overturn Arbitration Awards in the United States*, 2005: 2 STOCKHOLM INT'L ARBITRATION REV. 1 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 2 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Assocs. v. Cassarotto*, 517 U.S. 681 (1986)). However, in contract disputes, state law governs when the contract clearly demands arbitration via state laws, and that state law will enforce such a provision. *Id*. (citing *Volt Info. Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)).

One way to vacate an award under the FAA (9 U.S.C.A. § 10 (a)(2)) is to show "evident partiality," the meaning of which can be quite elusive for several reasons. For starters, courts are in flux over whether a challenger has to show an appearance of bias or more. The answer is often dependent on the jurisdiction and whether its appellate court interprets *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 146 (1968) as a plurality opinion or not. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 499-502 (5th Cir. 2006) (discussing the various readings of the case). In *Commonwealth,* Justice Hugo L. Black's "opinion of the court" was joined by three other justices. That opinion suggested that commercial arbitrators had to live up to the same standards for impartiality as federal judges. 393 U.S. at 148-49. Complications, however, result when interpreting a concurring opinion written by Justice Byron R. White, who was joined by Justice Thurgood Marshall. Justice White wrote that he "was glad to join" Justice Black's opinion, but then stated that the Court did not decide that arbitrators were to be held accountable to the judicial decorum standards used for Article III judges or other judges. *Id*. at 150 (White, J., concurring).

In addition to divergent interpretations of *Commonwealth*, courts sometimes place weight on whether the arbitrator disclosed his involvement at all with a particular party or its counsel. *Positive Software*, 436 F.3d at 501. Such a factor should likely be construed with the demands of the actual arbitration clause in the litigated agreement. *See* Philip J. Loree, Jr. and Keith R. Wesolowski, *Settling the standards for neutrals' impartiality: Two circuits suggest a standard for judging violations of neutrality*, THE NATIONAL LAW JOURNAL, May 15, 2005, at S3-S5 ("Loree"). Two highly noted cases on the issue, *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 499-502 (5th Cir. 2006) and *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 644-45 (6th Cir. 2005), suggest that courts are heavily influenced by the agreements. *Id*. As authors Loree and Wesolowski stated in their article on these cases: "[A] closer examination reveals that the choice of standards was influenced by what the courts believed to be the parties' legitimate expectations arising from the different methods of dispute resolution each freely chose." *Id*.

But before discussing the impact of the contractual terms, it is first necessary to comprehend what various circuits have held. That educational journey should begin with the *Positive Software* court, which established that the appearance of bias is sufficient in the Fifth Circuit to show evident partiality. 436 F.3d at 502. The court quoted *Commonwealth* as stating that arbitrators must disclose "'any dealings that might create an impression of possible bias.'" *Id*. at 502. Specifically for non-disclosure cases, *Positive Software* adopted the test of whether undisclosed facts show a reasonable impression of partiality. *Id*. The goal is to protect the integrity of the selection process for arbitrators and the parties' ability to make informed choices. *Id*. at 501 (citing *Commonwealth*, 393 U.S. at 1047). Reasonableness does not depend on whether the arbitrator's decision is, in itself, incorrectly reasoned, which is a key element in challenges where the arbitrator actually had disclosed his past or present relations with a party or a party's counsel. *Id*. Reasonableness can turn on, for instance, the arbitrator's failure to disclose that he had previously served as co-counsel with an attorney for a party in the arbitration, which was the case in *Positive Software*. *Id*. at 503. Even though the undisclosed litigation in *Positive Software* arguably involved seven law firms and thirty-four different lawyers, the court found an appearance of bias by noting the existence of ten pleadings containing the arbitrator's and the attorney's names. 436 F.3d at 503.

Ties to a former litigation are not always enough to substantiate vacatur. *Metalmark Nw., LLC v. Stewart*, No. 04-682-KI, 2006 WL 488715, at *4 (D. Or. Feb. 28, 2006). In *Metalmark*, an impression of partiality was alleged between the arbitrator and plaintiff's counsel, because the arbitrator did not disclose that he had worked on the same case as the plaintiff's counsel during his tenure as a lawyer. *Id*. at *3-4. In the end, the plaintiff's lawyers disclosed to the court that to the best of their recollection they and the arbitrator had represented separate parties in the matter and did not engage in any kind of joint defense. *Id.* at *4.

Ultimately, that led the court to find that the arbitrator did not have the ability to curry favor or appear biased. *Id*.

Unlike the Fifth Circuit, the Second and Sixth Circuits require more than an appearance of bias. *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 644-45 (6th Cir. 2005). The test for evident partiality in both circuits is "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Nationwide*, 429 F.3d at 645. Although the Second Circuit is "mindful of the trade-off between expertise and impartiality, and cognizant of the voluntary nature of submitting to arbitration," it stops short of requiring "proof of actual bias." *Morelite*, 748 F.2d at 83-84. It does, however, look at such factors as the peculiarities of a commercial practice, and the size and population of an industry. Such factors are important because "the small size and population of an industry might require a relaxation of judicial scrutiny, while a totally unnecessary relationship between arbitrator and party may heighten it." *Id*. at 84. In *Morelite*, the court was confronted with a father-son relationship, in which the son was the arbitrator and the father then-vice president of an international union whose local district was a named party in a lawsuit. The court refused to create any bright line rule involving familial relationships, but found evident partiality existed here because there was no evidence before the court on the father and son's dependency or personal views. *Id*. "And without knowing more, we are bound by our strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers." *Id*. (noting that under an elaborate set of circumstances, the defendant was unaware of the arbitrator's relationship with the union).

Like the Second Circuit, the Sixth Circuit is cognizant of the parties making a deliberate trade-off—arbitrator with industry knowledge who is likely to have contacts with other industry players, as opposed to someone who is impartial but unknowledgeable of the industry norms. *Nationwide*, 429 F.3d at 645-47. This trade-off is quite proper, especially when the alleged partiality concerns a party-appointed arbitrator for a tripartite panel, as opposed to someone deemed to be a neutral arbitrator, and the arbitration clause in the agreement required selecting someone with industry experience. *Id*. at 645. Because such arbitrators are "chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results." *Id*. at 646 (citing *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir. 1981)). Thus, the Sixth Circuit requires a showing of partiality be "direct, definite and capable of demonstration, and 'the party asserting [it] . . . must establish specific facts that indicate improper motives on the part of the arbitrator.'" *Id*. at 645 (citing *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998)). In *Nationwide*, the court had to decide the propriety of three events: (1) a birthday celebration dinner that included the arbitrator, the attorney for defendant Home and their wives; (2) the arbitrator's contact with a company (named ACE) that administered the litigated contract on behalf of Home; (3) the arbitrator's brief conversation with ACE's CEO about weather and politics at an annual dinner at a school. *Id*. at 644. In the end, the court found no impropriety. Ultimately, the court held that the arbitrator had made sufficient disclosures and that the plaintiff has failed to show "with specificity how the substance of these disclosures . . . manifest evident partiality and are powerfully suggestive of bias in the present matter." *Id*. at 649 (internal quotations omitted). Moreover, the social relations were not improper, since there was no communication regarding the arbitration. *Id*.

By relying on the arbitration terms in the litigated agreement, the parties in *Positive Software* had a basis for expecting a different level of impartiality than the parties in *Nationwide*. Loree, *supra*, at S5. "*Positive Software* agreed to have a single, neutral arbitrator decide disputes. *Nationwide*, however, agreed disputes should be resolved by a neutral umpire and two party-appointed arbitrators, each of whom was expected to advocate, at least to some degree, the positions of the party that appointed him." *Id*. The process for choosing the arbitrator was also distinguishable. "In *Positive Software*, the court believed that the nondisclosure had deprived the challenging party of an opportunity to make an informed choice of arbitrator." *Id*. In *Nationwide*, however, the party-appointed arbitrators selected the neutral arbitrator, not the parties. Thus, "each party had no right to choose the other party's arbitrator, let alone a right to make an 'informed choice.'" *Id*.

Manifest Disregard of the Law

The grounds for vacatur are explicitly stated in both federal and state law. Yet, an unstated one also exists; it is called Manifest Disregard of the Law. In a commentary, author David Siegel has noted that the standard came about on the federal side. David Siegel, *Court Applies and Examines "Manifest Disregard of Law" Standard, but Only Because Federal Arbitration Act—Not New York's—Governs Case*, NEW YORK STATE LAW DIGEST, no. 557 (May 2006) *available at* www.nysba.org/lawdigest ("Siegel").

Simply stated, awards under the FAA are subject to review when the arbitrator acts in "manifest disregard" of the law. *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (using the standard in dictum); *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (noting that appellate courts review the district court's decision on the issue de novo). When a matter is litigated under state law, the courts are left to examine either common law or statutory law promulgated by the U.S. National Conference of Commissioners on Uniform State Laws ("UAA"). Under the common law, many states apply a "gross error" standard. *Bd. of Ed. v. Prince George's County*

Educators' Ass'n., 309 Md. 85, 105 (Md. Ct. App. 1987) (noting the standards for reviewing arbitration awards for vacatur are "a palpable mistake of law or fact . . . apparent on the face of the award" or for a "mistake so gross as to work manifest injustice"); *Policeman's Benevolent Ass'n v. Borough of North Haledon*, 158 N.J. 392, 395 (N.J. 1999) (the state recognizes the existence of common-law arbitration, despite the enactment of the state Arbitration Act).

In New York, the Court of Appeals has not adopted the standard under New York state law, but has held it applicable in *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471 (2006), which applied the federal act. Siegel, *supra* (noting that "a thoughtful lower court case addressing the matter at length" rejected the existence of a manifest disregard standard as applicable to New York law). The FAA was applicable in that case because "real property arrangements" were at issue, and they were deemed to "affect" interstate commerce. Siegel, *supra*.

In regards to the FAA, manifest disregard of the law in the Second Circuit requires showing that:

> (a) the arbitrator "knew of a governing legal principle but refused to apply it or ignored it"; and
>
> (b) the ignored rule of law was well-defined, explicit and clear. *In re James B. Fellus*, 7 Misc. 3d 1016A (Sup. Ct. N.Y. Co. 2005) (citing *Wallace v. Buttar*, 378 F.3d 182, 189 (2d. Cir. 2004); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *see also Hoeft v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003); *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200 (2d Cir. 2002); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000) *cert. denied.*, 531 U.S. 1075, 148 L. Ed. 2d 669, 121 S. Ct. 770 (2001)).

Use of the doctrine, however, is one of "last resort." "Indeed, we have recently described 'it as a doctrine of last resort—its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply.'" *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (citing *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)).

In commercial disputes, courts are more likely to confirm arbitrators' rulings that involve one or more mixed questions of law and fact. Bragar, *supra*. When the award rests solely on an issue of law, courts are more likely to overturn the result if the court believes "outcome-determinative legal issues have been ignored and incorrectly decided." *Id*.

Deciding whether a case meets the standard can be tricky, since the difference between "manifest disregard" and "mere error of law" is not always clear. It is a contextual issue, and an important one, since mere errors of law do not qualify as grounds for vacating the arbitrator's decision. *Id*. Courts are more likely to find mere errors in, for instance, contract disputes, which involve questions of law and fact. Often, the arbitrator's decision as to which contract doctrines apply is predicated on his interpretation of the facts in the contract. *See Wien & Malkin LLP v. Helmsley-Spear*, No. 10, 2006 N.Y. Lexis 197, at *14-16 (N.Y. Feb. 21, 2006) (noting that the arbitration panel held a valid successor in interest to an assigned contract, while the Appellate Division reversed the panel by finding the contract to be a personal one and thus unassignable.). A court is not permitted to overturn an arbitrator's factual findings merely because they "disagree with his honest judgment." *Id*. at *17. "'[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.'" *Id*. at *18 (citations omitted).

However, manifest disregard is often found to exist when there is an application of pure legal precedent, without factual concerns. Vicarious liability and corporate form are appropriate examples. *Id*. Such situations have been known to arise in securities cases, where the claimant, by virtue of the doctrine of respondeat superior, seeks to hold the employers culpable. *Id*. (citing *Hardy v. Walsh Manning Securities L.L.C.*, 341 F.3d 126 (2d Cir. 2003)). "If the arbitrators impose liability on the brokerage house on the basis of respondeat superior, but not on the broker individually, some courts have held that the award is in manifest disregard of the law. Thus, an award that penalizes the firm but not the broker is in manifest disregard of the law." *Id.* (noting that if the award does not state the arbitrator's reasoning, but the outcome is the same, the award can be sustained if the legal record shows any supporting reason).

As for corporate disputes, in *Spear, Leeds & Kellogg v. Bullseye Securities, Inc.*, 291 A.D.2d 255, 256 (1st Dep't 2002), *rev'd sub nom. Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308, 308-09 (1st Dep't 2004) the appellate court reversed an award to the individual shareholders of a trading company, who owned all of the company's stock, but not to the company itself. Bragar, *supra*. In discussing Spear, the court has stated: "We held that the award which, *without explanation*, provided monetary relief to individual claimants for damage suffered by a corporation, was made in manifest disregard of the law." *Roffler*, 13 A.D.3d at 308-09. However, upon remand and further appeal, the award was confirmed, because the arbitrator articulated his reason by pointing to an agreement between the parties. *Id*. at 309.

The arbitrator's knowledge is in itself a factual issue. Since an arbitrator does not have to be an attorney, "a court reviewing an arbitral award cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney." *Wallace*, 378 F.3d at 190. An arbitrator is there-

fore presumed to be a "blank slate unless educated in the law by the parties." *Id*. Moreover, arbitrators do not have to provide a reasoned written opinion when issuing their decisions. *Id*. Although vacatur is uncommon, it can occur if the court can conclude that the arbitrator knew and made a "conscious decision" to ignore relevant law. *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006); *Wien & Malkin LLP*, 2006 N.Y. LEXIS, at *12 ("It is a doctrine of last resort limited to the rare occurrences."). The burden of proving that falls on the petitioner. *See B.L. Harbert Int'l*, 441 F.3d at 911-12. An objection to the results will not suffice, *O.R. Securities, Inc. v. Prof. Planning Assocs., Inc.*, 857 F.2d 742 (11th Cir. 1988), nor will demonstration of clear error. *B.L. Harbert Int'l*, 441 F.3d at 911.

> Harbert's argument that the arbitration award clearly contradicts an express term of the contract is simply another way of saying that the arbitrator clearly erred, and even a showing of a clear error on the part of the arbitrator is not enough. *Id*. at 911-12.

Manifest Disregard of the Facts/Evidence

It has been argued, albeit quite unsuccessfully, that an arbitrator's award can be vacated when the evidence "overwhelming[ly]" favors the party seeking vacatur. *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1133 (9th Cir. 2003). However, manifest disregard of the evidence is not a proper basis for vacatur in the Second Circuit, *Wallace*, 378 F.3d at 193, or seemingly elsewhere, *Coutee*, 336 F.3d at 1133, n.5.

In addressing the use of the doctrine, the *Coutee* court stated:

> [I]t does not appear that any other circuit has adopted a manifest disregard of the facts standard. Barington cites *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), for the proposition that, in the Second Circuit, an arbitration decision can be vacated based on "overwhelming" evidence in favor of the party seeking vacatur. However, the Second Circuit has recently clarified that *Halligan* is based on the traditional manifest disregard of the law standard. See *GMS Group v. Benderson*, 326 F.3d 75, 79 (2d Cir. 2003) (observing that in *Halligan*, "we could only conclude that [the arbitrators] had disregarded [the law], as any other explanation would strain credulity given the quantity and quality of evidence. . . . We reached this conclusion applying the traditional manifest disregard standard").

The *Coutee* court further explained: "In some circumstances, however, legally dispositive facts are so firmly established that an arbitrator cannot fail to recognize them without manifestly disregarding the law." 336 F.3d at 1133.

Freedom to Contract

"A recent decision by the Tenth Circuit Court of Appeals confirms the need for careful and informed drafting in commercial arbitration clauses of the standard for court review of arbitral awards and underscores the limitations on the parties' freedom to contract in this area." Dana H. Freyer and Rona G. Shamoon, *Limiting and Expanding by Contract U.S. Court Review of Arbitral Awards*, MEALEY'S INTERNATIONAL ARBITRATION REPORT, March 2006., vol. 21, #3, at 1 ("Freyer").

That Tenth Circuit case, *Mactec v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005), held that a contract that requires the parties arbitrate any claim and characterizes an arbitration award as *confirmed by the district court* as "final" and "nonappealable" is binding so long as the parties clearly and unequivocally intend this effect (emphasis added). The clause in the disputed contract read: "[j]udgment upon the award . . . shall be final and nonappealable." *Id*. Indeed, the contract must employ both terms, "final" and "nonappealable," in order for an appellate court to lack jurisdiction. *Id*. Contrarily, a contract cannot expand judicial review. *Id*. at 828-29.

Why the different rules for reviewability? The distinction lies in that the former upholds the policy behind the FAA, which is to reduce litigation costs. *Id*. at 829. Meanwhile, the latter would reduce the FAA to a mere collection of default rules. *Id*.

Yet, the freedom to contract may only go so far. The *Mactec* court suggests that a provision barring district court review or "any type of review or appeal whatsoever" would fail. *Id*.

In their article, authors Freyer and Shamoon said, "As a matter of drafting strategy, it is seldom, if ever, advisable for parties even to attempt to contract away court review of arbitral awards on the four FAA grounds, or, in international arbitrations, on the somewhat similar limited grounds on which courts may refuse to recognize and enforce a foreign arbitral award set forth in Article V of the United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards, 1958." Freyer, *supra*, at 1-2.

Their warning may still be timely in the second circuit, even though *Mactec* relies on *Hoeft v. MVL Group, Inc.*, a second circuit case. Indeed, the Second Circuit has not expressly addressed the issue in *Mactec*. 427 F.3d at 829 (citing *Hoeft v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003)). *Hoeft* came close to examining the problem when addressing whether private parties could by contract prevent all judicial review of an arbitrator's award. The court held no. *Id*. at 64. "We hold today that private parties may not dictate to a federal court when to enter a judgment enforc-

ing an arbitration award. Judicial standards of review, like judicial precedents, are not the property of private litigants." *Id*. at 64.

This leads to another question: What is the impact if the contract is arguably void or voidable? Must the matter still go before an arbitrator, as stated in the challenged contract? In *Buckeye Check Cashing v. John Cardegna*, 163 L. Ed. 2d 1038, 1044 (2006), the Supreme Court held potential voidability or void contracts, because use of allegedly illegal terms does not remove the cause of action from arbitration to the courts. Such is the rule as long as the contract is wholly challenged, not the arbitration clause alone. *Id*. "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id*. "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Id*. Such rules apply in federal and state courts. *Id*. at 1044-45 (noting Congress' power to legislate rules under the Commerce Clause and interpreting 9 U.S.C.A. § 2 of the FAA as applicable to "contracts" that are later deemed voidable).

When a contractual matter ends up before an arbitrator, the arbitrator may be afforded quite a bit of discretion in interpreting its terms, as was the case with *WRW Chocolates LLC v. Moonstruck Chocolatier Inc.* Judge Denis Hurley, *Court Upholds Arbitrator's Award of Legal Fees to Individual Not Signing License Agreement*, N.Y. L. J., June 6, 2006, at 31, col. 1, which reported the decision. The *WRW Chocolates* dispute involved an exclusive license agreement. Based on a provision in the license agreement, the licensor went to arbitration to rescind the license and named the licensee as well as William Simmons, the licensee's founder who was also an officer of the licensee, as defendants. Ultimately, the defendants prevailed, and the arbitrator awarded the licensee and Simmons more than $500,000 in attorneys' fees. When the defendants moved for confirmation, the plaintiff opposed, arguing that the arbitrator had exceeded his power under 9 U.S.C.A. § 10 (4). However, the court confirmed the award, based on the arbitrator's interpretation of the underlying agreement. That agreement said:

> If any arbitration, suit, or action is instituted to interpret or enforce the provisions of this Agreement, to rescind this Agreement, or otherwise with respect to the subject matter of this Agreement, *the party prevailing on an issue* shall be entitled to recover with respect to such issue, in addition to costs, reasonable attorney's fees incurred in preparation or in prosecution or defense of such arbitration, suit, or action as determined by the arbitrator. . . . *Id*. (emphasis added)

The question at hand was whether Simmons, who prevailed as a defendant but was not a signatory to the license agreement, was entitled to the contractual benefits. The arbitrator had said yes, and the court confirmed, holding a manifest injustice did not exist. "As noted above, a court has no authority to vacate an award solely because of an alleged error in contract interpretation." *Id*. In an important parenthetical cite, the court quoted *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 1015 (2001): "It is only when the arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable." "Given that Simmons was named as a defendant . . . [the arbitrator's] construction of the provision is a plausible interpretation. . . ." *Id*.

Disregard of Public Policy

Although the courts openly recognize the freedom to contract, they will not confirm an award contravening public policy via contractual interpretation. *Lawrence Teachers Ass'n,* at 20, col. 3. A two-part test is applied to set aside an award on such grounds. That test is: 1) "a court must be able to conclude, without fact finding or legal analysis, that a law absolutely prohibits the particular matters to be decided"; and 2) "the award itself must violate a well defined constitutional, statutory or common law of the state." *Id*.

Both prongs invite litigation. In *Matter of Lawrence,* the court found fault with the arbitrator's decision to enforce a contractual provision that expanded the teacher association's collective bargaining unit, as contravening the statutory scheme in Education Law § 3602-c.2. *Id*. The ramifications of the rather complicated scenario were that the association's contract required anyone who provides service to the school district to become part of the association's collective bargaining unit. *Id*. Meanwhile Education Law requires that when a resident of one school district chooses to go to school in another district, the resident's home school district must enter into a contract with other district to provide those educational services to the resident. *Id*. The arbitrator decided that the non-residential school district should be included in the association's collective bargaining unit. However, in vacating the award, the court said that would create an anomaly, since the association would end up representing persons employed in other districts. *Id*.

The second-prong's emphasis on well-defined law is not as neat as it seems. For instance, the underlying issue in *Indep. Chemical Corp. v. Local Union 807* was whether it was appropriate for a chemical company to bar an employee indicted for attempted murder from working. *Accused Worker Keeps Job at Chemical Plant; Arbitration Confirmed Despite Security Concerns*, N.Y. L.J., May 1, 2006, at 26. The arbitrator held in the negative, despite the chemical company's argument that under the amended Homeland Security Act, it was prohibited from "distributing explosive materials to one under indictment." *Id.* The court also rejected the chemical company's argument and stated that the term "distribute" means "exchange of title rather than

mere handling" and "nothing indicated the petitioner intended to transfer ownership of its chemicals to the employee, who loaded and unloaded trucks and moved materials between containers." *Id.* The court found that there was nothing specific in the Act to render it applicable to "employment relationships at facilities handling explosive materials." *Id*.

Jurisdiction

It is well settled that subject-matter jurisdiction under 42 U.S.C. § 1331 does not exist merely because a claim is brought under section 10 or section 4 of the FAA. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25 (2d Cir. 2000).

Moreover, the Second Circuit requires an "independent basis of jurisdiction" over motions to vacate or stay enforcement of an arbitration award. *Greenberg*, 220 F.3d at 25; *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 268 (2d Cir. 1996).

The *Greenberg* court reasoned:

> In both contexts, there is no necessary link between the requested relief and the character of the underlying dispute. For example, a petition to compel arbitration because the dispute falls within the scope of an arbitration clause, or to vacate an award because the arbitrators exceeded their powers under that clause, will turn on the interpretation of the clause, regardless of whether the actual dispute implicates any federal laws. Accordingly, the fact that the arbitration concerns issues of federal law does not, standing alone, confer subject matter jurisdiction on a federal district court to review the arbitral award. *Greenberg*, 220 F.3d at 26.

However, federal jurisdiction will be conferred if the claim "necessarily depends on resolution of a substantial question of federal law." *Id*. (citing *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49, 54 (2d Cir. 1996)). To answer this, the court will look at the pleadings and the federal interest at stake. *Id*. For instance, when the claim asserts that the arbitrator acted in manifest disregard of a *federal law*, federal court jurisdiction will lie. *Id*. at 27 (emphasis added). "[T]he reviewing court [must] . . . do two things: first, determine what the federal law is, and second, determine whether the arbitrator's decision manifestly disregarded that law. This process so immerses the federal court in questions of federal law and their proper application that federal question subject matter jurisdiction is present." *Id*. It is worth noting that a disputed, non-unique federal claim may not be sufficient. Other circuits have denied federal jurisdiction when the arbitration involved federal claims other than manifest disregard of federal law. *Id.* (citing *Kasap*, 166 F.3d at 1245; *Baltin v. Alaron Trading Corp*., 128 F.3d 1466, 1472 (11th Cir. 1997) (acknowledging the "alleged misdeeds of the arbitrators"); *Minor v. Prudential Sec., Inc.*, 94 F.3d 1103, 1105-06 (7th Cir. 1996) (examining an argument rooted in "fraud, corruption, undue means, evident partiality, and failure to consider pertinent and material evidence"); *see Ford*, 29 F.3d at 258 (examining manifest disregard of state law); *Lipton*, 934 F. Supp. at 639.

Conclusion

As lawyers, we can all agree that an arbitrator Award in favor of your client is the preferred outcome. Certainly, the day the Award is handed down, the lawyers on the losing side won't be in a celebratory mood. That said, the Award is really just one piece of a much bigger process. Any skilled practitioner must understand much more for that Award to have any effect.

At the onset is Article 75 in the CPLR and the FAA (9 U.S.C.A), and how the two confer jurisdiction. By knowing whether federal or state law applies, the lawyer will then know what standards and rules apply for seeking relief and enforcement. For the content winner, the ultimate prize is confirmation. For the less than happy, a modification may be desired. Or for the utterly dismayed loser, the desired path may be a vacatur. Regardless of which role a particular party occupies, all three share several important features. The first important rule is that the lawyer act timely. Second, the lawyer must carefully examine any contract involved in the dispute. And third, the lawyer must understand "manifest disregard" and "evident partiality." Absent such knowledge, an Award may never amount to justice for a well-deserving client.

Nassau County Bar Association Federal Litigation Series

This article was presented as a lecture in the Nassau County Bar Association Federal Litigation Series.

Eugene S. Ginsberg is a full time arbitrator, mediator and fact finder. In the Labor and Employment Law Section of the Nassau County Bar Association he was: Co-chair of the Alternate Dispute Resolution Committee; Tenth District Representative; a member of the Section's Executive Committee from 1995 through 2004; and a member of the Section's Long-Range Planning and Future Directions Committee. He is an elected Fellow of The New York Bar Foundation; The College of Labor and Employment Lawyers and the College of Commercial Arbitrators. He was a contributor to The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (2006 – JurisNet, LLC) (Labor Arb., etc.) and BNA's 1990 publication *Labor Arbitration, A Practical Guide for Advocates*.

The Very Model of a Modern Major General Release

By James M. Rose

This form was produced by the Multinational Corporation Protective Council, to protect heartless and bloodless corporations (which are creatures of statute without pride of ancestry or hope of posterity). It was written in cahoots with the Trilateral Commission, and crossed our desk recently with a paltry settlement check.

UNCONDITIONAL SURRENDER TO AND GENERAL RELEASE OF LARGE MULTINATIONAL CORPORATION

TO WHOM IT MAY CONCERN AND OTHERS WHO ARE JUST NOSY:

General Release[1] executed this __ day of _____, by Releasor _____ (hereinafter "Really Sore") whose address is 000 Northchester Drive, Nouveau Riche on Hudson, New York, and Humongous Multi National Corporation, Inc. (hereinafter "Really Seize") of everywhere and anywhere (Internet address biglie@voracious.org). In consideration of the sum of What Seems Like A Lot to You but Is Petty Cash to a Corporation Like Us ($00,000,000.00) less applicable withholding, and other deductions which greatly diminish it (hereinafter "Government's Cut") in (hot little) hand which nowadays is considered **FAIR AND ADEQUATE VALUABLE CONSIDERATION**, and other good and sufficient consideration too illegal to mention received from Really Seize, receipt of the legal portion of which is hereby acknowledged and the illegal portion of which is hereby denied, the Really Sore for himself, his alter egos, super ego, id, inner child, his clones, image, reputation, good name, his ghost, shadow, aliases, his A/K/As, D/B/As and IOUs, his C.B. handle, all his domain names, his various on-line identities, all of his multiple personalities, his DNA or any mutation thereof, his immortal soul, his aura, and his heirs, his executors, administrators, children as yet unborn to the extent that guardians *ad litem* have not been named for them, his wife to the extent he is permitted to speak for her, his conservators, trustees, committee (including any subcommittees), his proxies, his predecessors, closely held corporations, very limited partnerships, his assigns and Zodiac sign,

FOREVER RELEASES, DISCHARGES AND UNCONDITIONALLY SURRENDERS to the Really Seize, its parent corporation and sibling corporations (legitimate and illegitimate), and all of their present, former, and future subsidiaries and affiliates, partnerships, allied foreign entities in strange forms, hidden trusts and tax dodging mechanisms in tax havens, and foreign governments and/or politicians who are in their pockets; and each of them;

ALL OF THEIR PRESENT, former and future officers, directors, employees, agents, representatives, partners, successors, failures, flunkies, sycophants, yes men, henchmen, lackeys, toadies, go-fers, toe kissers, brown-nosers, apple polishers, boot lickers, lap dogs, myrmidons, spinmeisters, flacks, hacks, buttboys, briefcase carriers, scrubs, benchwarmers, retainers, spear carriers, supernumeraries, subordinates, beasts of burden, office temps, per diems, menials, wannabes, hangers on, freeloaders, time servers, water cooler jockeys, clock watchers, photocopy machine Romeos, wage slaves, pencil pushers, nit pickers, officious middle managers, bean counters, number crunchers, data processors, computer networkers, amanuenses, navel contemplators, interns, outterns, bureaucrats, wool gatherers, alibi Ikes, no shows, factotums, underlings, serfs, vassals, peons, pawns, indentured servants, pissants, varlets, valets, hirelings, puppets, quislings, parasites, fall guys, duffers, novices, greenhorns, schlemiels, sacrificial lambs, Judas goats, scapegoats, stooges, cannon fodder, straw men, drones, clones, schmoozers, snoozers, boozers, losers, receptionists, deceptionists, eye candy, mercenaries, goons, finks, scabs, operatives, informers, stool pigeons, jackals, hit men, condottieri, front men, tortfeasors, accomplices, co-conspirators, chums, cronies, retinues, poker buddies, entourages, posse, apologists, caddies, astrologers, money launderers, shills, Swiss bankers, mouthpieces, pettifoggers, consigliere, scriveners, sophists, rogues, flotsam and jetsam, significant others, insignificant others, dependents, co-dependents, independent contractors including their undocumented aliens working off the books, and assigns, RICO, ERISA, OSHA, and each of them jointly and severally,

FROM AND AGAINST any and all claims, demands, causes of action, alleged dues and/or don'ts, obligations, onuses, requirements, mandates, accounts, extents, exposures, jeopardies, or liabilities of any kind whatsoever (whether legal or equitable, illegal or inequitable, moral or immoral); be they contractual, tortious or tortuous;

WHETHER (OR NOT) SUCH CLAIM IS PURSUANT TO common law, canon law, maritime law, case law, or federal, state, local, international, and interplanetary law (or anarchy) created by statute, Constitution, administrative agency or Authority, regulation, rule, covenant, by law or by-law, charter, house rule, treaty, compact, concord, tontine, deal, pledge, perk, privilege, habit, custom, fashion, protocol, dogma, public opinion, prevailing style, usage, birthright, heritage, religion, societal norm or established pecking order, or because mom says so and she's your mom; no matter how they are alleged to have arisen which Really Sore now has or has ever had, or ever imagined to have against Really Seize by reason of any act, occurrence, omission, transaction, transgression, infraction, booboo, shakedown, rumor, insinuation, innuendo, thought, perceived slight (real or imagined, conscious, subconscious or unconscious presently known or unknown, even if the memory of the same is presently psychologically repressed or known only to God), of Really Seize whether compensable or preposterous, from the time when the Universe was just a twinkling in the Creator's eyes up to and including the date of this release and until the cows come home and thereafter,

ARISING OUT OF OR RELATED TO the claim against Really Seize in a summons and complaint dated the __ day of _____ 20__ or any claim which arises from, was made or could have been made, or could not have been made upon the facts related therein, or is in any way related to that claim by any stretch of the imagination; now and forever, to have and to hold (and to release), for better or for worse, in sickness and in health, for richer and for poorer,

AND FURTHER RELEASES AND WAIVES any claim concerning this agreement and the contents hereof, including but not limited to claims that this release was procured by fraud and deceit, overreaching, coercion, creative accounting, a media campaign, or because of the mental condition of the Really Sore (or lack thereof) that could be made in any forum including but not limited to in therapy or on a talk show. Really Sore is advised pursuant to the Older Workers Benefits Protection Act, the Age Discrimination in Employment Act (29 U.S.C. § 621), and the Lawyer and Accountant Full Employment Act you have a right to consult with an attorney before signing this agreement. You have twenty one (21) days from the date of receipt of this agreement to consider your fate. If you sign this agreement you have seven (7) days in which to revoke this agreement, and if you do this agreement will be of no force and effect, and your attorney and Really Seize will descend upon you with both feet. No payments will be made to you until this seven (35) day period has expired. Really Sore affirmatively represents that before signing this agreement he has consulted an attorney, at least three legal advice websites, a physician, a psychiatrist, a substance abuse counselor, a spiritual leader, the Psychic Hotline, a guru, a palm reader, his know-it-all brother-in-law, the Oracle at Delphi, N.Y. and a registered Astrologer. Really Sore affirmatively asserts that he is not suffering from any condition that would prevent him from understanding what he is doing any more than any of the rest of us, and that he is not currently under the influence of any drug (legal or illegal), any alcoholic beverage, a sugar high, or any charlatan, guru, cult leader or radio waves generated by alien beings in a manner that prohibit him from comprehending in excruciating detail all the multi-layered nuances of this agreement.

Really Sore AGREES THAT this release is in Plain Language **AND BIG ENOUGH TYPE TO READ**. Really Sore represents he has read this agreement thoroughly and diligently, looking up all of the big words he did not understand in a dictionary approved by the American Librarian's Association, agrees with all the provisions of it, and is tickled pink to sign it just as it is. Really Sore affirmatively states that he has been told by an astrologer/chiropractor that Really Sore is signing on an auspicious day when the stars and his spinal column are properly aligned. Really Sore promises to think only kind thoughts. The parties agree that nothing contained herein is an admission of anything whatsoever, including but not limited to admissions that Really Seize exists at all, and anyone who says so is itching for a fight.

REALLY SORE agrees to cooperate fooly with REALLY SEIZE in its defense of any claim in any forum by perjury if necessary, and to hold REALLY SEIZE harmless for any and all claims. REALLY SORE AGREES that the terms of this settlement are CONFIDENTIAL and are on a need-to-know basis. Since there are some provisions of this general release that REALLY SEIZE believes REALLY SORE does not need to know, REALLY SORE has not been shown them. Should the terms of this agreement leak to the public even if it is not the fault of REALLY SORE, then REALLY SORE will forfeit the VALUABLE CONSIDERATION mentioned herein to REALLY SEIZE together with inflated costs and the exorbitant legal fees and unjustifiably padded expenses paid by REALLY SEIZE to several unctuous firms of attorneys.

THIS RELEASE may not be modified orally, in writing, electronically, telepathically or any other way. It shall be effective immediately upon its execution *nunc pro tunc*. WORDS USED in their singular sense shall also encompass the pluralistic and vice versa. Words of the male gender shall also include malefactors where appropriate, as well as refer to the female gender without gender neutering. Words used in the present tense shall also include the past and future tense, but not the conditional or subjunctive tense unless so interpreted by Really Seize. Rules of Grammar shall apply only where they are applicable. Rules of Punctuation and Capitalization shall apply RANDOMLY. There are no section headings in this release. If there were section headings, they would be illustrative only, and would not form a part of the agreement. The provisions of this agreement are severable (as is Really Sore). If any portion of this agreement is held to be unenforceable or invalid (or Really Sore is held to be an invalid), it will not affect the unconscionability of the remaining portions thereof.

REALLY SEIZE may then pick and choose which portions of this agreement it will honor. Should Really Seize believe that Really Sore has violated, will violate, or is thinking of violating the terms of this release, Really Seize may commence an action. Venue for such action shall be the Court of the Star Chamber. The Laws of the Pack shall be the only law applicable to this agreement. Really Sore waives service of process in any such action, waives trial by jury and consents to trial by wombat.[2] Probably a typographical error, and should probably read the entry of an immediate default judgment in favor of Really Seize, and immediate execution of any judgment obtained therefrom by seizure of all of Really Sore's assets in the middle of the night by human waves of repo men.

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IN WITNESS WHEREOF after profusely swearing an oath the REALLY SORE has hereto and thereto et cetera, et cetera, yatta yatta yatta, set REALLY SORE'S hand and seal, made his mark and affixed his logo with the blood out of his veins this _____day of _____ in a manner notoriously public.

I REALLY MEAN THIS:

_____

REALLY SORE, his mark

Before me this ___ day of _____ 20__ appeared_____, the REALLY SORE herein who showed me three (6) forms of photographic identification and left me a DNA sample and 25 cents (two bits) and who acknowledged that he is the REALLY SORE herein, and that he is absolutely thrilled with this settlement which I witnessed him sign.[3]

_____

Notary Public

INSTRUCTIONS TO REALLY SORE: Please execute yourself in front of a notary, and return to us in triplicate in this envelope.

Endnotes

1. Release 4.1 3/4.
2. Possibly a typographical error which should read "combat."
3. The author gratefully acknowledges the assistance of *Roget's Thesaurus* in the preparation of this release.

Interpreting Title VII to Include Sexual Orientation as Applied to Public School Teachers

By Sheila Hatami and David Zwerin

Introduction

Title VII established freedom from discrimination because of sex, inter alia, in the workplace.[1] The language of Title VII omits the words "sexual orientation" yet states that an employer may not lawfully discriminate against any individual because of sex. In 1964, the protection of the "because of . . . sex"[2] provision protection was ambiguous, and in the forty years since then, the Supreme Court has attempted some rules and guidelines to interpret the provision. Although some protections from same-sex harassment have been recognized, "because of sex" discrimination is a limited concept.[3] Outside the sexual harassment sphere, private employers need fear no legal repercussions for discrimination against homosexuals.[4] Although the Supreme Court has recognized that Title VII protects workers from sex or gender stereotypes,[5] it has not expanded Title VII to become a general prohibition against all sex-related discrimination.

The time has come for Title VII to be reexamined and expanded to become a complete Federal prohibition on sexual orientation discrimination in the educational arena. As this article will show, the cases that have interpreted Title VII's requirement that an employer may not discriminate "because of . . . sex" have enabled lower courts to afford protections to workers that, while sensible, were certainly not explicit in the language of the statute.[6] Nonetheless, the Supreme Court has failed to accord the same implicit protection to workers suffering discrimination based on sexual orientation. Subsequently, the myriad of Supreme Court decisions has greatly expanded the scope of Title VII, yet the refusal of the courts to also expand the doctrine to ban sexual orientation discrimination has led to confusing results in the Circuit Courts, most notably the Ninth Circuit Court of Appeals. Many states have been far more responsive to the changes in the political and social climate of this country in the past forty years and have granted homosexual workers much needed protection from sexual orientation discrimination.[7]

The Supreme Court's refusal to modernize its interpretation of Title VII is perplexing because in other opinions, the Court has reflected the desire that the workforce reflect the surrounding population.[8] This requirement has greatly changed the field of education, once an essentially male-dominated field.[9] However, there is another concern in the field of education: that educators should serve the student clients and reflect their population in certain characteristics.[10] Education is the one area in which there has been an especially strong fight for gay, lesbian, bisexual, or transgender individuals to stay out of the classroom.[11] However, a teacher's sexuality should not give co-workers, administrators, or students an opportunity to discriminate without repercussion. Teachers should be unafraid to publicly acknowledge their sexuality, and in fact, should be encouraged to do so by the state as role models in a progressive and democratic society. Currently, the faculty of public schools does not accurately reflect the makeup of the student population or the population at large; it may not even reflect the population of qualified teachers. The emphasis on teachers as role models should not be ignored, but rather, the educator workforce needs to provide role models for every kind of student that walks through the schoolhouse door—including lesbian, gay, bisexual, transgender, and questioning students.[12]

"The time has come for Title VII to be reexamined and expanded to become a complete Federal prohibition on sexual orientation discrimination in the educational arena."

Section I will give a brief history of Title VII, and the landmark Supreme Court cases in the past forty years that have refined the court's interpretation of "sex" discrimination. In Section II, we will examine the subsequent treatment of Title VII in the Circuit Courts, specifically the inconsistency in the Ninth Circuit between *Rene v. MGM Grand Hotel, Inc.*[13] and *Nichols v. Azteca Rest. Enterprises*.[14] Section III will examine the inconsistency between the founding and purpose of public schools, the development of educational theories to denigrate sexism and applaud the characteristics of the individual, and take a look at the specific problem of educators suffering from sexual orientation discrimination, unable to bring a proper claim under Title VII. Finally, in Section IV, we will more closely examine the key language of Title VII, specifically the purpose of Title VII to codify constitutional protections in the "because of . . . sex" provision. After consideration of important Circuit Court decisions and the foundation and purposes of both Title VII and modern education, the authors argue that the statute, designed in part to protect Constitutional rights in public education, has been improperly interpreted by the Federal Courts and needs to be reexamined and expanded to include sexual orientation discrimination under the "because of sex" language, in order to protect the fundamental rights of all citizens.

I. History of Title VII

Since Title VII was first enacted in 1964, the Supreme Court's conception of "sex" discrimination, under the "because of sex" provision, has continuously expanded. "Sex" was originally understood as discrimination requiring actual physical sexual advances upon the affected party.[15] Later, the Court modified "because of sex" to prohibit discrimination against one because of his or her gender, or more specifically, whether she or he does or does not fit certain gender stereotypes.[16] Recently, the Court clarified the "because of sex" requirement to show that Title VII encompasses violations between members of the opposite sex.[17]

The first major interpretation of the "because of sex" requirement by the Supreme Court came in *Meritor Sav. Bank, FSB v. Vinson*.[18] In *Meritor*, the respondent claimed that the petitioner bank had subjected her to constant sexual discrimination in her employment, violating Title VII.[19] The petitioner conceded that were its harassment because of the subordinate's sex or gender, such behavior would constitute a Title VII violation,[20] but it contended that based upon the existing Title VII cases and existing legislative history of Title VII, Congress only intended to apply the "because of sex" requirement to "tangible loss of an economic character," rather than "purely psychological aspects of the workplace environment."[21] The Supreme Court rejected the employer's interpretation of Title VII, holding that Congress did not intend to limit sexual harassment claims to those of a tangible economic nature, but to those where the harassment was so pervasive as to create a "hostile work environment."[22] Consistent with the decisions to follow, *Meritor* was decided not upon any concrete language that established a hostile work environment claim in Title VII, but upon past constructions and a sparse record of legislative intent.

The next decision by the Supreme Court to greatly expand the "because of sex" interpretation was *Price Waterhouse v. Hopkins*.[23] The respondent, Anne Hopkins, charged the petitioner accounting firm, her employer, with failure to reconsider her for a partnership on the basis of her sex as a woman.[24] In Hopkins' case, she was praised for being an aggressive, intelligent, and capable professional.[25] However, Hopkins was derided for not "walk[ing] more femininely, talk[ing] more femininely, dress[ing] more femininely, wear[ing] make-up, hav[ing] her hair styled, and wear[ing] jewelry."[26] She was also criticized for being a "a lady [who] us[ed] foul language."[27] The Supreme Court expanded its interpretation of discrimination "because of sex" to prohibit discrimination against a woman not only because she was a woman generally, but because of her failure to conform to gender stereotypes requiring an individual to possess or lack certain stereotypical traits, whether they be male or female.[28]

In his majority opinion, Justice Brennan wrote for the court, "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[29] Consistent with the decision in *Meritor* to expand Title VII to protect against a "hostile work environment," the decision in *Price Waterhouse* that Title VII's "because of sex" discrimination was intended to bar gender or sex stereotyping has no explicit demarcation in the language of Title VII.

More recently, the Supreme Court made the next logical extension of Title VII's "because of sex" clause when a male claimant alleged sexual harassment under the statute. In *Oncale v. Sundowner Offshore Services, Inc.*, the petitioner, Joseph Oncale, claimed that he voluntarily left his job feeling that if he didn't he would be "raped or forced to have sex" with two male coworkers.[30] Although the Supreme Court had never before ruled for a male claimant asserting a Title VII violation, it readily extended the doctrine to apply to both genders.[31] In a unanimous opinion by Justice Scalia, the court stated that there was "no justification in the statutory language or our precedents for a categorical rule" against same-sex harassment suits under Title VII.[32] The court specified that the prohibition of "discrimination . . . because of sex" raises the issue as the question of "'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not[.]'"[33] The Supreme Court cleared up prior confusion in the circuit courts by holding that the important issue in a Title VII claim is not whether the parties are the same sex, or opposite sexes, or if the party discriminated against was a woman, but whether "*members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed*."[34]

Consistent with *Meritor* and *Price Waterhouse* before it, *Oncale* is another logical extension of Title VII, providing a remedy that was clearly not established by the plain language of the statute. However, despite the Supreme Court's willingness to broaden the coverage in Title VII over the past 40 years, the Supreme Court has failed to accord the same protection and expansionary treatment to claims of sexual orientation discrimination under Title VII.

II. The Circuit Courts Agree There Is No Sexual Orientation Discrimination Claim Under Title VII, but Remain Confused Where to Draw the Line

A. Examination of the Circuits' Analysis

The Supreme Court has never decided the specific question of whether a claim of harassment against an individual based upon that person's sexual orientation is automatically cognizable under Title VII's "because of sex" requirement. In *Oncale,* the Supreme Court, faced

with an opportunity to address the possibility of a cause of action under Title VII for sexual orientation-based harassment,[35] sidestepped the issue, perhaps because the petitioner, not wishing to publicly be classified as a homosexual, instead asserted only that he had suffered discrimination under Title VII because the statute protects victims of same-sex harassment.[36] The Supreme Court has maintained silence on the actionability of a claim based upon an individual's sexual orientation under Title VII. Most courts, recognizing that the Supreme Court has not reversed a Circuit decision rejecting sexual orientation as a protected class, continue to reject claims of harassment based on sexual orientation.[37]

Bibby v. Philadelphia Coca Cola Bottling Co.[38] provides a good illustration of the treatment of the several courts of appeals to Title VII claims based solely on sexual orientation. In *Bibby*, the petitioner's energy level was significantly decreased following a period of hospitalization for a severe illness, however, defendant accused him of sleeping on the job. Seeking to remove petitioner from his employ one way or the other, defendant offered him a deal by which he would receive $5,000 and benefits if he were to resign; otherwise he would be terminated and receive nothing.[39] Bibby also claimed that he was verbally insulted by his co-workers, and that he was mistreated and yelled at by supervisors because of his sexual orientation.[40] Bibby brought suit, claiming that he had been sexually harassed in violation of Title VII.[41]

The Third Circuit Court of Appeals dismissed the claims against the employer, citing the opinion of several circuits that Title VII did not apply to claims of sexual orientation discrimination.[42] The court implicitly assumed that sexual orientation is not "because of sex" although the Supreme Court has never so specifically held.[43] *Bibby* bases this assumption on the fact that in recent years Congress has been unsuccessful in several efforts to amend Title VII to include sexual orientation discrimination.[44] The court concluded that in order to state a Title VII claim upon which relief could be granted, Bibby would have to show either that he endured same-sex harassment based upon his harasser's sexual desires or that he was improperly sexually stereotyped based upon his male gender.[45]

In the Sixth Circuit, a male with gender identity disorder can establish a prima facie case for sex discrimination under Title VII.[46] In *Smith v. City of Salem*,[47] the court held that the employee in question, a man with gender identity disorder who worked for a fire department for seven years without incident until his diagnosis, made valid claims under Title VII for sex stereotyping and adverse employment action.[48] The court criticized the district court's reliance on pre-Price Waterhouse cases to decide against Smith.[49] It then established its grounds for equaling Title VII's "sex" language with gender, and delineated the precise meaning of treating someone differently on the basis of sex as:

> [A]n employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[50]

This logical construction of Title VII leaves open the door to recognizing causes of action against employers who discriminate against men who like men as discrimination on the basis of sex because such men are treated differently from female employees who have relationships with men. If the purpose of Title VII is to eradicate sex discrimination, in all of its forms, and sex discrimination includes sex stereotypes, then Title VII should also prohibit discrimination based on sexual preference, since such discrimination is rooted in the failure of an individual to meet the sex stereotypes of the heterosexual majority.

Basing the "because of . . . sex" requirement upon gender becomes increasingly unworkable when claims are filed by transsexuals. Courts have been unable to uniformly define the gender of transsexuals and have broken their gender into three categories:

> (1) cases that consider sex to be immutably fixed at birth as either male or female; (2) cases that consider sex to be either male or female but not necessarily fixed at birth; and (3) cases that place transsexuals outside of the categories male and female and thus outside of sex entirely.[51]

This variation among judicial decisions is equally as illustrative of the difficulty that the courts have had in drawing distinct, bright line boundaries with sex discrimination in general. Just as the legal definitions of transsexuals are changing, the legal definitions of sex are changing and should, therefore, include sexual orientation, especially since, in many cases, transsexuality may be a part of sexual identification and orientation.

The Second Circuit has rejected sexual orientation as a gender norm because under Title VII not all homosexual men are feminine, and not all heterosexual men are masculine.[52] In *Simonton v. Runyon*, the court considered the question of sexual harassment focused on the target individual's homosexuality.[53] The court called the behavior of Simonton's co-workers "morally reprehensible," but relied on the traditional rule that the role of the judiciary is to interpret statutes according to Supreme Court precedent, not according to how it believes the

law should be.[54] The court stated that "[t]he law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."[55]

However, the court still found it important to look at the legislative history of Title VII as a guide.[56] The court noted that there was little in the way of legislative history, and that congressional silence does not always provide a guide to statutory interpretation.[57] Nonetheless, the court interpreted Congress' failure to amend Title VII as instructive, especially in light of many court decisions construing the "because of sex" language in Title VII to exclude it.[58] The court also relied on its prior decision in *DeCinto v. Westchester County Medical Center*, where it held that "sex" "'logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender.'"[59] This failed to recognize that this interpretation of sex and gender, or sexual activity as a result of gender expression, creates a double standard and reinforces normative stereotypes of heterosexual gender expression.

The court threw out all three of Simonton's arguments that sexual orientation discrimination should fall under "sex" in Title VII.[60] First, the court refused to evaluate Simonton's claim that his harassers singled him out because he was male, as he did not offer comparative evidence regarding the treatment of other male co-workers.[61] Therefore, the court concluded that the conduct could just as well have been directed at a female.[62] Second, it declined to find that "sexual orientation is discrimination based on sex because it disproportionately affects men," as Simonton suggested, determining that this would be an unwarranted judicial foray into the legislative arena.[63]

Lastly, the court struck down Simonton's third argument, not on the merits of the argument, but for insufficient pleading. [64] Simonton argued, based on *Price Waterhouse*, that he suffered actionable sex discrimination because sexual orientation discrimination is based on sex stereotypes. The court noted that other courts have mentioned that "failure to conform to gender norms" might be capable of recognition under Title VII,[65] but even so, the sexual stereotype theory creates a protection that would not only cover sexual orientation, but rather a protection that bleeds over to cover those who, regardless of sexual orientation, do not fit traditional gender stereotypes.[66] The court reserved its opinion on the impact of *Price Waterhouse* on sexual orientation discrimination to "a future case in which is squarely presented and sufficiently pled."[67] Unfortunately for Simonton, insufficient pleading may have derailed the expansion of this protection.

The cases cited in this section demonstrate that lower courts are interpreting the "because of sex" clause inconsistently from each other. While the Third Circuit adopts a narrow interpretation that no claim with relation to sexual orientation may be recognized under Title VII, other courts such as the Sixth Circuit have seemingly more liberal interpretations, at least allowing claims by transgendered individuals. However, a larger fundamental problem has arisen in the Ninth Circuit, where two recent cases have established holdings that are inconsistent with each other and improperly derived from Supreme Court precedent.

B. Inconsistency between Rene and Nichols in the Ninth Circuit

Two recent cases in the Ninth Circuit are the only two cases yet decided that attempt to identify a boundary between sexual stereotyping as identified in *Price Waterhouse* and sexual orientation discrimination denied as an actionable Title VII claim.[68] As a result of the inability of the courts to distinguish these two lines of cases effectively, Title VII must be expanded to incorporate sexual orientation discrimination to avoid inconsistent and illogical results.

Medina Rene, an openly homosexual man, was employed by the MGM Grand Hotel as a butler on the twenty-ninth floor of the hotel, catering to very high-profile and wealthy guests.[69] Rene was subject to pervasive abuse by his all-male coworkers, significant enough to constitute a hostile work environment violation of Title VII.[70] His superiors failed to respond to his complaints against his coworkers.[71] Rene brought suit against MGM Grand for a violation of Title VII, alleging unlawful sexual harassment. The district court dismissed Rene's claim, reasoning that Rene's sole claim was that he was a victim of sexual orientation discrimination, not prohibited by Title VII.[72] The Ninth Circuit Court of Appeals heard the case twice, including an *en banc* rehearing. The first panel dismissed Rene's claim because it overlooked the *Oncale* requirement for physical sexual abuse and narrowly focused on Title VII's denial of discrimination based on sexual orientation.[73] The *en banc* rehearing reversed the first panel's prior decision and found that Rene had a valid Title VII claim,[74] however, reaching a decision not supported by precedent. The court concluded that *Oncale* "forbids severe or pervasive same-sex sexual touching," and that Title VII prohibits offensive touching,[75] a requirement that is found nowhere in the text of *Oncale*. The Ninth Circuit ruled that Rene's sexual orientation was irrelevant because sexual orientation is also irrelevant for a woman. In other words, the court concluded that because Rene's homosexuality did not defeat his Title VII claim, he properly provided sufficient evidence of a hostile work environment.[76]

Rene's requirement of "physical conduct of a sexual nature" is directly inconsistent with *Nichols v. Azteca Rest. Enterprises, Inc.*, in which a man who was the target of slurs regarding his sexuality, yet suffering no physical or sexual abuse, was found to show an actionable claim of

"because of sex" discrimination.[77] During the four years in which Antonio Sanchez worked for Azteca Restaurant Enterprises, his coworkers constantly victimized him with verbal abuse because of his effeminate traits.[78] The remarks were not isolated incidents over his tenure at the restaurant; rather they were indicative of his general experience week in and week out.[79] After making repeated complaints to the human resources director, Arnie Serna, that he continued to suffer higher degrees of abuse as time progressed, Azteca told Sanchez that if he had any further complaints he should report the incidents to the general manager and that routine spot checks would be conducted by Serna.[80] This proposal had no visible effect upon Sanchez' working situation, and following a heated argument with his assistant manager, Sanchez walked off the job site.[81] Relying on *Price Waterhouse*, the Ninth Circuit held that Sanchez was a victim of gender stereotyping in violation of Title VII.[82] The Court ruled that Sanchez had proven an actionable "because of sex" claim under Title VII.[83]

The court's holding in *Nichols* seems wholly at odds with *Rene*. Despite *Rene's* requirement that there must be "physical conduct of a sexual nature,"[84] *Nichols* seemingly imposes no such requirement. Sanchez endured ongoing verbal abuse,[85] but did not suffer any physical abuse as apparently required by *Rene*. Yet the court found Sanchez' claim to be actionable "because of sex," knowing that his harassers called him "a faggot," a term clearly showing that they perceived him to be a homosexual, regardless of whether the harassers were accurate.[86] To further complicate matters, *Rene* made the bold assertion that the sexual orientation of a victim is plainly irrelevant to Title VII litigation.[87] It would appear based on an examination of both that this statement is completely false.

The most notable difference in the facts between *Rene* and *Nichols* is that Medina Rene was an openly gay man while Antonio Sanchez was not.[88] The Ninth Circuit seems lost in finding the distinction between gender stereotyping and sexual orientation discrimination. It is clear that Rene and Sanchez were both victims of gender stereotyping under *Price Waterhouse*; both victims were forced to endure ongoing humiliation and abuse because their coworkers did not believe that their conduct comported with traditionally accepted notions of masculinity. Yet the final result after both cases, it would appear, is that a gay man cannot recover under Title VII for nearly identical suffering based on gender stereotypes as his heterosexual counterpart, unless he happens to be physically assaulted in a sexual manner.[89]

The sexual orientation and gender stereotyping problem in these two cases could very easily be clarified if the Supreme Court would merely incorporate sexual orientation into the "because of sex" provision. Had the Supreme Court established a bright-line rule that "because of sex" applies to sexual orientation discrimination, then neither *Rene* or *Nichols* would have had to struggle to find a way for the respective plaintiffs to recover for clearly egregious behavior on alternate grounds. Instead, the Court could simply look to the conduct, note that it clearly constituted a hostile working environment to both the plaintiffs, and in both cases, clearly the conduct was based on either the plaintiff's actual sexual orientation, or perceived sexual orientation. As such, there is clear sexual orientation discrimination in both cases; a revision of Title VII would have resulted in simpler and more equitable results in both *Nichols* and *Rene*.

III. Special Problem of Protecting Teachers in Public Education

The public education arena presents a pressing need for extending protections against sex discrimination to include sexual orientation. The origins of the school system and its continued development over the last two hundred years are illustrative of a pattern of development, progress, and interdependency with the law. The development of the school system occurred during the colonial period, 1760, and extended through 1830,[90] and was heavily influenced by the political challenges of forming a democracy. Founded on the principle that every citizen, for the benefit of the republic, has the right to a free and public education,[91] public education and public schools provide the opportunity for every student to grow into a full participant in the political process. The pioneers of the public school system sought an environment that would produce a well-rounded, well-educated citizen;[92] many believed that education was the key to stability and development of the nation.[93]

Social change is evident when looking at the social and political climate of the writers of the Constitution until present day; however, the founders of the public school system, like the founders of America, had timeless theories that are still often at issue in addressing public school curriculum today. Some public, or common, school proponents argued that schools should be the breeding ground of the next generation and should reflect the morals and values of society.[94] The main tenet of this argument advocated for the indoctrination of republican values in the American public, to first, "perpetuat[e] . . . the values and institutions which constituted the basis of republican society and government," and second, to provide "the training required to make sound decisions within the framework of these institutions."[95] The standard curriculum consisted of the indoctrination of democratic theories and democratic government institutions; where topics of political conflict were discussed, the teaching standard was the utmost neutrality.[96] This view persisted through the nineteenth century,[97] and still exists today.

A second contingency thought that schools should not merely be a breeding ground for republican life but that schools should provide practical vocational training.[98] In this view, the purpose of schools "was to train,

not scholars, statesmen, and philosophers, but 'practical business men [sic], or intelligent, independent citizens.'"[99] This view of vocational utility persisted through the early 1900s, as many children preferred to gain technical skills as opposed to book learning, and still persists today by leading educational authorities, although the number of children enrolled in vocational programs has declined.[100] The need for an engaged and enlightened citizenry has not declined, despite the push for academic standards that supposedly leave no child behind.[101] In order to prepare young students for the workforce, the schools need to reflect the diversity of the workplace that young adults will encounter.

Technological preparation has expanded in education; the social environment, while progressing from inception by the integration of women and minorities in the educator workforce, needs to further match the facilities' improvement by incorporating openly gay teachers as part of today's modern society. Educational instruction has expanded from the sparse and mean existence of the one-room schoolhouse to the full-featured educational facilities in existence today.[102] In contrast, American schools now have evolved to have fully expounded curriculum, master lesson plans, mentors, staff development, full administrations, school boards, state committees, state-propounded curriculum objectives, and fully developed facilities that can span acres.[103] Education has since shifted from the "one size fits all" attitude of the past and changed in recognition of the fact that students have different learning modalities and academic abilities, and that the curriculum should reflect and build on those individualistic characteristics.[104] Since individualism is now the student model, the teaching model should also reflect that individualism at the head of the class. The key to this is to represent diversity in all its forms, including sexual orientation.

IV. Analysis of Title VII's Purpose and Application Regarding "Because of Sex" Discrimination

Title VII states in the preamble that the purpose of the act is to "authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education . . . to prevent discrimination in federally assisted programs . . . and for other purposes."[105] Title VII is codification of implied Constitutional rights that Congress has sought to duly enforce and propound by statute. It is intended to protect rights in education and federally funded programs, of which public schools are a part.[106] Since the stated purpose of Title VII is to apply its protections to education and federally funded institutions, including all the public schools in the nation, discrimination against teachers has been particularly singled out by Congress for protection.

The Circuits' proffered rules for determination of "because of sex in Title VII" have not been uniform between each circuit.[107] For instance, the Third Circuit requires that for a homosexual plaintiff to recover for a "because of sex" violation, that the harassment is based on same-sex attraction to the victim, or that the harassment is a result of the type of gender stereotypes announced in *Price Waterhouse*.[108] While the Sixth Circuit has established a similar requirement that gender stereotyping is clearly a violation because such conduct would not occur but for the sex of the worker, however, it lacks the same requirement as the Third Circuit that a same-sex harasser be motivated by sexual desire to the victim.[109] As the conflict in the Ninth Circuit shows, even within Circuits the outcomes of the court are not standardized between what does and does not fall under "because of sex" in Title VII.[110]

The Second Circuit's rejection of a homosexual man's right to protection from outrageous verbal abuse is both shocking and inconsistent with the Ninth Circuit's opinion in *Nichols*. In *Simonton* the plaintiff was subject to pervasive and consistent verbal comments of a sexual nature from his co-workers because of his sexual orientation.[111] There can be little doubt that the abuse suffered by Simonton would be sufficient to show a hostile work environment under Title VII.[112] However, the court threw out all three of his theories for which he had a claim for relief under Title VII. Most shocking is the court's assertion that because he failed to present comparative evidence to show how other male co-workers were treated, the harasser's conduct may have been the same for both males and females at the job site. The plaintiff was clearly being singled out because of his homosexuality; women at any job would never expect to be the recipient of the type of conduct of which Simonton was a victim, and while they might be sexually harassed, they would not likely be referred to as a "f***ing faggot" or one suffering from "bung hole disorder."[113] In the Second Circuit, therefore, the possibility of a successful suit for sexual orientation discrimination remains open if the case is properly pleaded, although the court may again recite the lack of Supreme Court case law to come through with a successful decision for the plaintiff.

The failure of the Supreme Court to enforce a meaningful guideline for "because of sex" discrimination has forced the lower courts to act based upon their own subjective values and biases. Clearly plaintiffs may recover when they are discriminated against because of gender stereotypes,[114] but there is little difference between a stereotype based on gender and one based on sexual orientation. A gay man who likes to wear a dress to work is not acting as one would expect a male to behave, but he may also not be behaving as one would expect a homosexual male to behave. When people discriminate against a homosexual because they think he or she is not acting in a way that is expected of that person's gender, they are also making a stereotypical judgment that that person either is behaving normally or abnormally for a homosexual

person. Every instance of gender stereotyping involving a homosexual person is necessarily implicating sexual orientation discrimination. The courts are left to make the determination as to the true cause of the discrimination without any bright-line rule.

Teachers are singularly important to children as role models, but a role model is not a narrow stereotype.[115] As America has become more liberalized in the forty years since Title VII, America's perception of homosexuals and the attitude toward homosexual rights have changed greatly. In 2000, 83% of Americans believe that homosexuals should be protected from employment discrimination based upon their sexuality.[116] The most obvious way to protect homosexuals is to update Title VII's interpretation of "because of sex" discrimination to include discrimination based upon sexual orientation.

A homosexual teacher is not necessarily an unskilled teacher, and his or her sexuality should have no bearing upon that person's ability to teach. The knowledge that a person is homosexual confuses their morality or lifestyle with their skill level.[117] Fears about homosexuality may prevent the hiring or retention of many qualified teachers.[118] During shortages, and to a lesser extent during times of regular market supply and demand, the imperative of getting certified, qualified, and talented teachers in the classroom is difficult. The No Child Left Behind Act is an example of the government's emphasis on the employment of exemplary teachers; if gay, lesbian, and bisexual teachers are excluded from this workforce, then the disservice is to the students who are the true victims of such discrimination, having to suffer through subjects taught by lesser qualified individuals who may have their jobs solely because they fit the heterosexual "norm."

Lesbian and gay teachers are as competent as their heterosexual counterparts but cannot be expected to perform as highly without adequate employment protection because of constant fear that they will be mocked, insulted, and emotionally derogated because of their sexuality, without a means to seek recourse.[119] The curriculum of public schools has changed over the decades, evolving to meet the social and political needs of the day, and is now a more fluid, individually tailored endeavor.[120] Additionally, democracy was not as we know it today, but was instead wrought with the inequities of a colonial aristocracy; as American democracy developed, so did the American school, through the New Deal Era, the Civil Rights movement, and the Gay Rights movement.[121] Courts have enforced equal access to schools for gay students;[122] The Fourth Circuit has determined that retaliation against teachers for inclusion of minorities in educational programs is contrary to Title VI.[123] If such protections are extended to a diverse student body, they should equally extend to a diverse faculty, representative of the diversity of society at large. At any point in social history, there exists the view that certain moral standards are slowly eroding and that change needs to be made,[124] but that is not caused by progressive social attitudes of schools or positive reinforcement of civic virtue. Rather, it is in response to social difficulties and the situations of at-risk youths that schools expand social welfare and inclusion programs.[125] Studies have shown that gay youths are the statistical leaders in successful suicides;[126] one of the social difficulties, therefore, that schools need to respond to is the discriminatory environment in the student body toward homosexuals in order to decrease this statistic. If teachers reflected the relevant student population, providing guidance and positive role models, as opposed to remaining in the closet, to at-risk youth, this statistic might decline.[127]

"As America has become more liberalized in the forty years since Title VII, America's perception of homosexuals and the attitude toward homosexual rights have changed greatly. In 2000, 83% of Americans believe that homosexuals should be protected from employment discrimination based upon their sexuality."

Conclusion

The category of "sex" protection in Title VII has always been understood to include gender.[128] It has been expanded to include discrimination on sex stereotypes and against transgender individuals.[129] Because one of the key purposes of Title VII is to protect individuals from discrimination in schools, the expansion of the term "sex" should occur first in the public school setting, where teachers and administrators of public schools help to indoctrinate the next generation with the ideals of democracy, civil rights, equal protection under the law, and freedom from discrimination.

Once the "because of sex" protection is interpreted to include sexual orientation and other gender disparities, the door to the Title VII proof structure opens for plaintiffs. Particularly useful for victims of sexual discrimination in hiring practices would be the disparate impact of a pattern and practice of discrimination in hiring, promotion, and other employment activities by educational institutions against gay, lesbian, bisexual, and even transgender teachers. The sheer number of labels assigned to this group, however, makes the assessment of the relevant percentage of the population that reflects these characteristics difficult, and therefore almost impossible to compare to the workforce. However, discrimination against men because they sleep with men, instead of women, treats men in a different way than women and reflects the dominant heterosexual sex stereotype that only women are allowed to sleep with men. This stereotype is further propounded when discrimination is

allowed to pass unchallenged. Although other Supreme Court decisions have willingly expanded the scope of this language to cover such abstract and indeterminate ideas as gender stereotyping,[130] the Supreme Court has still denied sexual orientation discrimination the protection that it deserves in order to ensure the fundamental rights of America's teachers.

Endnotes

1. 42 U.S.C. § 2000e-2(a)(1*). See also Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986); *Johnson v. Transp. Agen. of Santa Clara County*, 480 U.S. 616 (1987). The key prohibition against discrimination based on sex states:

   > It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, *sex*, or national origin.

   42 U.S.C. § 2000e-2(a)(1) (emphasis added). There are other protections under the Constitution that provide protection from discrimination based on sex and/or gender, and may, in some cases, extend to sexual orientation such as the Equal Protection Clause of the Fourteenth Amendment or the First Amendment. For a discussion of some of the Constitutional issues, see Clifford P. Hooker, *Terminating Teachers and Revoking Their Licensure for Conduct Beyond the Schoolhouse Gate*, 96 EDUC. L. REP. 1 (1995) (addressing the juxtaposition between the right to privacy of a teacher and the school district's desire for their employees to have exemplary conduct); Ralph D. Mawdsley, *The Law in Providing Education: School Board Control Over Education and a Teacher's Right to Privacy*, 23 ST. LOUIS U. PUB. L. REV. 609 (2004) (discussing teachers' Fourteenth Amendment right to privacy in juxtaposition to school boards' authority); Anthony E. Varona, *Setting the Record Straight: The Effects of the Employment Non-Discrimination Act of 1997 on the First and Fourteenth Amendment Rights of Gay and Lesbian Public Schoolteachers*, 6 COMMLAW CONSPECTUS 25 (1998) (discussing the Constitutional implications of broad anti-discrimination legislation encompassing gays and lesbians in schools); Robin Cheryl Miller, Annotation, *Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on the Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct*, 96 A.L.R. 5th 391 (surveying state and federal constitutional challenges against discrimination on the basis of sexual orientation). This is merely a brief survey, and is by no means an exhaustive representation of the plethora of articles and other materials available on the Constitutional questions.
2. 42 U.S.C. § 2000e-2(a)(1) (hereinafter referred to in the text as the "because of sex" provision).
3. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002). These are cases that deal exclusively with sexual harassment, not the broader issue of sex discrimination by employers in the workplace. Before *Oncale*, Circuits were split on the same-sex harassment question. *See Oncale v. Sundowner Offshore Svcs., Inc.*, 83 F.3d 118 (5th Cir. 1996) (same-sex harassment claims not actionable); *Doe v. City of Belleville, IL*, 119 F.3d 563, 569 (7th Cir. 1997) (finding that same-sex harassment is actionable under Title VII*); Quick v. Donaldson Co., Inc.*, 90 F.3d 1372 (8th Cir. 1996) (same-sex harassment actionable where based on "sex"); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (same-sex harassment only actionable where harasser is gay).
4. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).
5. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).
6. *See* 42 U.S.C. § 2000e-2(a)(1).
7. By some counts, twelve states prohibit workplace discrimination based on one's sexual orientation. Lambda Legal Def. & Educ. Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, *available at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=217 (last modified Jan. 6, 2003). Those states are CA, CT, HI, MD, MA, MN, NV, NH, NY, RI, VT, and WI. The District of Columbia also has a more liberal anti-discrimination statute. Definitively, nine states plus the District of Columbia have statutes prohibiting discrimination on the basis of sexual orientation. Stephen D. Sugarman, *"Lifestyle" Discrimination in Employment*, 24 BERKELEY J. EMPL. & LAB. L. 377, 419 (2003) (exploring the legal basis for employer decisions based on lifestyle choices or activities outside the workplace). Cal. Lab. Code 1101-1102 (West 2002); Conn. Gen. Stat. Ann. 46a-81c (West 2002); Human Rights Act, D.C. Law 10-129 (1977); Haw. Rev. Stat. 378-2 (2002); Mass. Gen. Laws. ch. 151B, 3(6) (2002); Minn. Stat. Ann. 363.01 *et seq.* (West 2002); N.J. Stat. Ann. 10:5-12; Tit. 10, c.5, 12, 29.1 (West 2002); R.I. Gen. Laws 28-5-7 (2002); Vt. Stat. Ann. tit. 21, 495 (2002); Wis. Stat. Ann. 101.22, 111.321, 111.36 (West 2001). *Id*. n. 140. 15 states plus D.C. & more than 140 municipalities. Stephen Clark, *Perspectives: Federal Jurisprudence, State Autonomy: Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 720-21 (2003). CA, CT, NJ, NM, NY, OR, RI, VT, WI. Illinois currently has a statute waiting to be signed by the governor, S.B. 3186. Legal Foundation of the Lesbian & Gay Law Association of Greater New York, *Illinois Bans Sexual Orientation and Gender Identity Discrimination,* LESBIAN/GAY LAW NOTES 22 (Feb. 2005) (citing BNA Daily Labor Report No. 8, 1-12-05, p.A-5). This makes Illinois the fifteenth state to join the ranks of others banning workplace discrimination. *Id.*
8. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1989).
9. *See* PAUL MONROE, FOUNDING OF THE AMERICAN PUBLIC SCHOOL SYSTEM: A HISTORY OF EDUCATION IN THE UNITED STATES 295 (1971). Schools were staffed by male "masters," except for the "dame school" and the summer and women's school. *See id.* at 120-21. The dame schools were private or separate schools where women taught children the rudiments of education such as ABCs or basic reading skills before they went to public schools. *Id.* at 128.
10. *Contra Hazelwood,* 433 U.S. 228 (where the lower court relied on statistics of the local student population to show disparate impact, the Supreme Court held that the correct statistical population was the qualified labor pool of teachers in the area).
11. Katherine M. Franke, *Central Mistake of Sex Discrimination Law*, 144 U. PA. L. REV. 1 (1995).
12. *See* Michelle Eisenmenger, *Chalk Talk: Sexual Orientation Discrimination: Teachers as Positive Role Models for Tolerance*, 31 J. L. EDUC. 235, 236 (2002). For examples of suits brought representing student interests, *see Boyd Co. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2 667 (E.D. Ky. 2003) (where the court held for a gay rights group that demanded access to facilities under the Equal Access Act and the First Amendment as were given to other student groups); *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090 (C.D. Cal. 2003) (parents sued a school district for violating a student's civil rights when they suspended her from gym class after finding out the student was a lesbian).
13. 305 F.3d 1061 (9th Cir. 2002).
14. 256 F.3d 864 (9th Cir. 2001).
15. *See Meritor,* 477 U.S. 57 (1986).
16. *See Price Waterhouse*, 490 U.S. 228, 250 (1989).
17. *See Oncale*, 523 U.S. 75, 79 (1998).
18. 477 U.S. 57 (1986).
19. *See id.* at 60.
20. *See id.* at 64.
21. *See id.*

22. *See id.* at 64-65.
23. 490 U.S. 228 (1989).
24. *See id.*
25. *See id*. at 234.
26. *Id*. at 235.
27. *Id.*
28. *See id.* at 250.
29. *Id.* at 251.
30. *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998).
31. *See id.* at 79.
32. *Id.*
33. *See id.* at 80 (*quoting Harris v. Forklift Systems, Inc*., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).
34. *Oncale*, 523 U.S. at 80 (emphasis added).
35. During his brief employment with Sundowner, Oncale was the victim of constant sexually abusive conduct by his supervisors Danny Pippen, John Lyons, and Brandon Johnson including the following incidents: Pippen grabbed and held Oncale's head as Lyons told Oncale he would f*** him in the behind; the next morning Johnson grabbed Oncales while Lyons placed his penis on Oncale's arm and told him they would force him to submit; in the shower later that day, Pippen cornered Oncale while Lyons inserted a bar of soap into Oncale's rear. *Brief for Petitioner* at n.2, 523 U.S. 75 (No. 96-568) (1997).
36. Oncale contended that his argument did not rely upon an automatic extension of Title VII to prohibit discrimination on the basis of sexual orientation, but that the Supreme Court could find a violation of Title VII if he established "the existence of an unlawful hostile work environment, for example, by showing that the harassment of a sexual nature occurred, or that respondent Sundowner would have accorded a greater degree of protection to a woman complaining about such harassment." *Reply Brief for Petitioner* at 13-14, 523 U.S. 75 (No. 96-568) (1997).
37. *See Hamm v. Weyauwega Milk Products, Inc*.**,** 32 F.3d 1058, 1062 (7th Cir. 2003). *See also Rene v. MGM Grand Hotel, Inc*., 305 F.3d 1061, 1075 (9th Cir. 2002); *Higgins v. New Balance Athletic Shoe Inc*., 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am*., 99 F.3d 138, 143 (4th Cir. 1996).
38. 260 F.3d 257 (3d Cir. 2001).
39. *Id*. at 259.
40. *Id*. at 260.
41. *Id*.
42. *Id*. at 261.
43. *See id.*
44. *See id*. *See also* Employment Non-Discrimination Act of 1996, S.2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994).
45. *Bibby*, 260 F.3d at 262-63.
46. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 570 (6th Cir. 2004).
47. 378 F.3d 566 (6th Cir. 2004).
48. *Id*.
49. *Id*. at 573.
50. *Id.* at 572.
51. *See* Rebecca J. Moskow, *Broader Legal Implications of Transsexual Sex Determination Cases*, 71 U. Cin. L. Rev. 1421, 1422 (2003).
52. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).
53. *Id*. at 35. The conduct complained of included comments such as "'go f*** yourself, fag,' 's*** my d***,' and 'so you like it up the a**?,'" notes in the employee bathroom, posting of explicit pornography, "Playgirl" subscriptions, "posters stating that Simonton suffered from mental illness as a result of 'bung hole disorder,' . . . [and] repeated statements that Simonton was a 'f***ing faggot.'" *Id*.
54. *Id.* (citing *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 259 (1st Cir. 1999)).
55. *Id*.
56. *Id*.
57. *Id.*
58. *Id*. at 35-36.
59. *Id*. at 36 (quoting *DeCinto v. Westchecster County Med. Ctr*., 807 F.2d 304, 306-07 (2d Cir. 1986).
60. *Id*.
61. *Id*. at 37.
62. *Id*.
63. *Id*. at 37. This argument, if accepted, could lead in two directions. First, it could open the door to recognition of sexual orientation discrimination against males as having a disproportionate effect on males, specifically gay males. Second, however, it could shut the door to claims of sex discrimination for females or persons of transgender identity if they are unable to show a tangible disproportionate impact.
64. *Id*.
65. *Id*. at 37 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)).
66. *Id*. at 38.
67. *Id*. at 37.
68. *See* Sonya K. Parrish, *The Plight Of Same-Sex Harassment Victims Under Title VII: Why Sexual Orientation Discrimination Should Be Recognized As A Form Of Sex Stereotyping*, 4 Nev. L. J. 471, 472 (2004).
69. *Rene v. MGM Grand*, 243 F.3d 1206, 1207 (9th Cir. 2001).
70. *See id*. "The sexual harassment consisted of, among other things, being grabbed in the crotch and poked in the anus on numerous occasions, being forced to look at pictures of naked men having sex while his co-workers looked on and laughed, being caressed, hugged, whistled and blown kisses at, and being called 'sweetheart' and 'Muneca.'" *Id*. To successfully establish a hostile work environment, a plaintiff must show that he or she was "forced to endure a subjectively and objectively abusive working environment." *Oncale*, 523 U.S. at 81.
71. *Id*.
72. *See id*.
73. *Rene v. MGM Grand*, 305 F.3d 1061 (9th Cir. 2001); 4 Nev. L. J. 471, 486 (2004).
74. *See id*.
75. *Rene*, 305 F.3d at 1067.
76. *See id*. at 1066.
77. *See Nichols v. Azteca. Rest. Enterprises*, 256 F.3d 864 (9th Cir. 2001).
78. *Id*. at 870. Specifically, during his tenure, male coworkers and supervisors referred to Sanchez as a "she" or "her," mocked the way he walked and carried a serving tray "like a woman," and also referred to him as "a f***ing whore." *Id*.
79. *See id*.
80. *See id*.

81. *See id*.

82. *Id.* at 874. Writing for the majority, Judge Gould states:

> At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray "like a woman"—i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as "she" and "her." And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender.

Id.

83. *See id*. at 875.

84. *Rene*, 305 F.3d at 1064 (*en banc* decision).

85. *See infra*, note 106 at 870.

86. *See* Parrish, *supra* note 68, at 487.

87. *See Rene*, 305 F.3d at 1066.

88. *See* Parrish, *supra* note 68, at 487.

89. *See id*.

90. MONROE, *supra* note 9, at 186.

91. *See* LAWRENCE A. CREMIN, THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION 55 (1951). *Cf*. MONROE, *supra* note 9, at 295 (suggesting that proponents struggled to encourage the public to pay for schools). Public schools were opposed by those that viewed such institutions as a suspicious expansion of government. *Id*. at 334.

92. MONROE, *supra* note 9, at 186.

93. *Id.*

94. *See* CREMIN, *supra* note 91, at 69.

95. *Id*. at 71.

96. *Id*.

97. DAVID TYACK, SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY 101 (2003).

98. CREMIN, *supra* note 91, at 64.

99. *See id*. (quoting Robert Rantoul, Jr., "Introductory Discourse," in *The Introductory Discourse, and the Lectures Delivered Before the American Institute of Instruction, at Springfield (Mass.), August 1839*, p. 21).

100. *See* TYACK, *supra* note 97, at 99 (describing a study by Helen Todd in 1909 of children between fourteen and sixteen, who said they preferred to work rather than attend school); OLIVER S. IKENBERRY, AMERICAN EDUCATION FOUNDATIONS: AN INTRODUCTION 38 (1974) (discussing a report by the U.S. Department of Education indicating the lack of career preparation by the nation's secondary students entering the workforce).

101. *See* No Child Left Behind Act, 20 U.S.C.S. § 6301 (2001) *et seq*.

102. MONROE, *supra* note 9, at 340. In the early days after the American Revolution, children memorized material from primers and the Bible, and classroom management systems consisted of the rod. *Id.* at 341, 348. Innovators on the textbook front include Noah Webster, Lindley Murray, and Jedediah Morse. *Id.*

103. For example, today's expanded facilities include the Harvey Milk School, *First Public Gay High School to Open in New York City*, CNN.COM, *available at* http://www.cnn.com/2003/EDUCATION/07/28/gay.school.ap; and schools built for energy-efficiency, Susan E. White, *Energy-Efficient School to Open Next Year in Virginia Beach*, VA, THE VIRGINIA PILOT (2003). *See generally* U.S. Dep't. of Ed. Website, *available at* http://www.ed.gov. "As of 2002, 99 percent [sic] of public schools have access to the Internet. The ratio of students to computers with Internet access in public schools is approximately 4.8 to one." KRISTA KAFER, FREQUENTLY ASKED QUESTIONS ABOUT EDUCATION IN AMERICA, THE HERITAGE FOUNDATION FOR POLICY AND ANALYSIS, WebMemo #478 (citations omitted), *available at* http://www.heritage.org/Research/Education/wm478.cfm#_ftn22. A recent compilation of school statistics by the Center for Educational Reform reports that there are 94,112 total public schools in the United States. 47,917,774 children are enrolled in public schools; 2,997,748 teachers are employed in public schools. Expenditures for public schooling now range in the $350-450 billion range, with over $200 billion spent on instructional services. Additionally, roughly $119 billion is spent on student services and almost $14 billion on food services. THE CENTER FOR EDUCATIONAL REFORM, K-12 FACTS, *available at* http://www.edreform.com/index.cfm?fuseAction=section&pSectionID=15&cSectionID=97#SCHOOLS.

104. TYACK, *supra* note 97, at 114.

105. 42 U.S.C. § 2000e (emphasis added).

106. *See* JOHN H. JOHANSEN, ET AL., AMERICAN EDUCATION: THE TASK AND THE TEACHER 445 (2d ed. 1975) (citing a number of acts that have provided federal money for education, including the Northwest Ordinance of 1787 and the Elementary and Secondary Education Act of 1965).

107. *See supra*, Section II. B.

108. *See Bibby*, 260 F.3d at 261.

109. *See supra* note 73.

110. *See* Section II.B., *supra*.

111. *See Nichols, supra* note 77, at 874.

112. In order to show a hostile work environment, the conduct suffered by the victim must be "pervasive enough 'to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 24 (1993) (Scalia J., concurring). The Supreme Court requires that the victim actually subjectively perceive the environment to be abusive. *Id*. at 21. Certainly, it is not an issue in any of the cases cited in this article whether or not the victim perceived the conduct as subjectively abusive. All are very extreme incidents of derogation by employers and co-workers.

113. *Simonton*, 232 F.3d at 35.

114. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

115. Clifford P. Hooker, *Terminating Teachers and Revoking Their Licensure for Conduct Beyond the Schoolhouse Gate*, 96 ED. L. REP. 1, 2 (1995).

116. *See* John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46, 48. Compare this finding with that of a 1977 study which found only 55% of Americans would support protection for sexual orientation discrimination in the workplace. *Id*. *See also* Eisenmenger, *supra* note 12, at 236.

117. Transcript from Stand to Reason, *available at* http://www.str.org/free/commentaries/ethics/con_skil.htm.

118. *Id*. The ACLU argues that the curriculum cannot change by the hiring of gay teachers because the decision of what material is taught is controlled by the school districts. *Id.* Research has also shown that sexual orientation of children is determined either at birth or very early in a child's development, long before he reaches school. *See* Homophobia: Fighting the Myths, *available at* http://www.southernct.edu/departments/womenscenter/tolerance/homophobia.htm. Furthermore, studies have also shown the theory that homosexuals are more likely than heterosexuals to be pedophiles and child molesters to be a myth. *See* GROTHAN, MEN WHO RAPE (1979) (citing that heterosexual adults are more likely to be a threat to children than homosexual adults). *See also* RUSSELL D., THE SECRET TRAUMA (1986) (arguing

that 95% of women participating in a study in San Francisco who had experienced sexual abuse had experienced that abuse from a male family member rather than from a stranger).

119. *See* Sugarman, *supra* note 7, at 419.

120. *See, e.g.*, The Individuals With Disabilities Education Act (requiring Individualized Education Plans and vocational transition plans for learning disabled students). The curriculum of early schools was heavily indoctrinated with Christian values. However, there were a number of reformers who sought to change this indoctrination, arguing that the rights of the individual were being subordinated by common education. *See* CREMIN, *supra* note 91, at 69. *See also* KIRKENDALL, *infra* note 124 at 8 ("This concept of democracy closely parallels the teachings of Christianity in its emphasis upon moral stamina and personal integrity. These traits of character are essential to effective democratic social organization. Since democracy implies a society concerned with the worth of each individual as a personality, those things which do violence to the personality of individuals are undemocratic.").

121. Women took their place in the public schools from the early 1900s forward. TYACK, *supra* note 97, at 90. The issue of race in schools and the place of African Americans has been fought out in schools since the Civil War era, with slow, incremental change as the purpose and methods of teaching have changed. *See id*. at 90. However, as a society, we no longer consider interracial marriage taboo or isolate African American students from Caucasian students. In fact, schools now strive for diversity in the student body and in faculty. *Id*. Schools have reflected the conflict over society and the role of gender in society. *See id*. at 91.

122. *See Boyd Co. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*., 258 F. Supp. 2d 667 (E.D. Ky. 2003); *Massey v. Banning Unified Sch. Dist*., 256 F. Supp. 2d 1090 (C.D. Cal. 2003).

123. *See Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003).

124. LESTER A. KIRKENDALL, IRVIN R. KUENZLI, & FLOYD W. REEVES, GOALS FOR AMERICAN EDUCATION, WRITTEN FOR THE COMMISSION ON EDUCATIONAL RECONSTRUCTION OF THE AMERICAN FEDERATION OF TEACHERS 6 (1948). At the time, the AFT recognized seven goals for American Education. "1. The schools must help close the gap between scientific advance and social retardation." *Id*. at 9. "2. The schools must prepare individuals to create and live effectively in a cooperative, independent society." *Id*. at 10. "3. The school must extend the interest and concern of people in international cooperation and the maintenance of a just and durable peace." *Id*. at 13. "4. The schools must help in securing acceptance of the ideals of a democracy in social, economic, and political arrangements." *Id*. at 14. "5. The schools must develop values that will serve to guide the individual toward high standards of moral conduct and ethical living." *Id*. at 15. "6. The schools must provide for the development of creative abilities and afford avenues for expression in constructive activities." *Id*. at 16. 7. "The schools must insure the mastery of the common integrating knowledge and skills necessary to effective daily living." *Id*. at 18. Of course, these goals were promulgated during a time when most of the nation was segregated and schools had little to no diversity, and hatred against Japanese-Americans was high. *Id*. at 4.

125. TYACK, *supra* note 97, at 109.

126. See Micki Archuleta, Suicide Statistics for Lesbian and Gay Youth: A Bibliography, *available at*: http://www.-lib.usc.edu/~retter/suicstats.html. *Contra* Peter LaBarbera, the Gay Youth Suicide Myth, *available at* http://www.leaderu.com/jhs/labarbera.html (discounting scientific studies that show gay and lesbian youths are at a higher risk for suicide as a tool of the gay rights movement to manipulate a gay agenda into public schools).

127. It is not unusual to see lesbian and gay celebrities or individuals on television (e.g., Ellen Degeneres, MTV's *The Real World*). However, such celebrities continue to be out of touch for today's youth, who need a recognition of their worth and value by people they respect and know, namely, teachers.

128. *See* Section I, *supra*.

129. *See* Sections I and II, *supra*.

130. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

For Your Information

Naness, Chaiet & Naness, LLC, announces that **W. Matthew Groh** has become associated with the firm. He will be concentrating on the practice areas of labor relations, employment law and related litigation.

* * *

Our own **Judith La Manna Rivette** has done it again. Her latest book is ***Chasing Hillary,*** a novel that mixes true events with the fictional adventures of four women through the experiences that shaped the boomer generation, from the JFK assassination to 9/11. Judith is the author of the best selling anecdotal histories "Solvay Stories," "Solvay Stories II," and "State Fair Stories." You can read more about her new book at www.chasinghillary.com.

* * *

Congratulations to **Holly Rich** and **Julia E. Zuckerman**, 2004-2005 winners of the **Samuel M. Kaynard Memorial Student Service Award**, sponsored by the Section. Holly and Julia each received $500 and complimentary one-year student membership in the Section.

The Award is intended to encourage scholarship and exemplary service in the field of Labor and Employment Law and was made to these students in recognition of an extraordinary accomplishment in the field.

Samuel ("Sam") M. Kaynard was a nationally recognized expert in the field of labor law and labor management relations. He enjoyed a long and very distinguished career as a labor lawyer that began at the National Labor Relations Board in 1946. Mr. Kaynard was most well known as the Director of the Brooklyn Regional Office of the NLRB, which he founded in 1964 and ran until 1986. Following his retirement from the NLRB, Mr. Kaynard continued his practice at Proskauer Rose LLP.

After practicing law, Mr. Kaynard's greatest love was teaching it. Over the course of his career, he was a member of the faculty at New York University School of Law, from which he graduated first in his class in 1942. He also taught at Fordham Law School, Brooklyn Law School, and from 1986 until his death, the Hofstra University School of Law He served on the Executive Committee of the Labor and Employment Law Section of the New York State Bar Association.

Sam Kaynard passed away in 1997 at his home in Roslyn Estates, New York.

* * *

Announcement

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Thank you for your cooperation.

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