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L&E Newsletter

A publication of the Labor and Employment Law Section
of the New York State Bar Association

A Message from the Chair

On Friday, October 1, Section members convened at the Otesaga Hotel in Cooperstown for our Fall Meeting. Whether they attended in search of CLE credit, to network with professional colleagues or to play ball on Doubleday Field, no one was disappointed. Program Chair Alan Koral and members of the CLE committee had designed a dynamic program for all Section members—management and union lawyers, attorneys who represent individuals and neutrals.

On Friday, plenary sessions began with Secretary-Elect Elena Cacavas presenting the Supreme Court Update. Rachel Minter then moderated a panel on the challenging topic of "Dealing with an Employee Having Mental or Emotional Disorders."

On Saturday, we were privileged to have members of the judiciary join our two plenary sessions. The Hon. David R. Homer, United States Magistrate Judge for the Northern District of New York, gave us much-needed advice on navigating "Electronic Discovery Issues in Employment Law Cases." The Hon. Barbara Howe, a former Erie County Supreme Court Justice, provided helpful direction on "State Court Injunctions in Labor and Employment Law Disputes: From Enforcing Restrictive Covenants to Enjoining Strike Violence."

Our workshops covered a broad range of more specialized topics, including the role of financial control boards, employment counseling for not-for-profits, the new Department of Labor reporting requirements, guidance on how to become COBRA and HIPAA compliant, practical FLSA advice, a discussion of issues in business restructuring and the basics of arbitration. I particularly was pleased that the Section's newest Committee—International Law—sponsored the workshop "Cross-Border Employment—A Practical Workshop."

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NYSBA

I am delighted to report that the programs were both substantive and engaging. Alan and the CLE Committee made every effort to seek out speakers who previously had not made presentations at a Fall or Annual Meeting. Alan, the Committee and I are committed to continuing to seek out members who have not had an opportunity to speak at a Section event. If you are interested in participating in a future program, please contact Alan, a member of the CLE Committee or me.

Our Section's Fall Meeting always includes social events. Thanks to the New York State Bar Association's outstanding, and seldom recognized, meetings staff—Linda Castilla, Kathy Heider, Lori Nicoll and Cathy Teeter—this year was especially memorable.

On Friday evening, we gathered for cocktails at the Fenimore Art Museum where we could wander through the collection or view a stunning sunset from the terrace. We then returned to the Otesaga for dinner.

Our dinner speaker, Gene A. Budig, former President of baseball's American League, shared his views on umpires, players and labor relations and discussed his new book *Inside Pitch*. The Section thanks Labor Relations Law and Procedure Committee Co-Chair Peter Conrad and his colleagues at Proskauer Rose LLP for arranging Dr. Budig's appearance.

Saturday afternoon offered difficult choices—golf at the Otesaga's famed Leatherstocking Golf Course, tennis or softball on Doubleday Field. Later that day, everyone shared their adventures over cocktails at the Member Gallery of the Baseball Hall of Fame where our Association's President, Kenneth G. Standard, joined us.

On Sunday, the Section's Executive Committee met to discuss various business matters. Among the more significant was the Association's request for our Section's comments on proposed revisions to the New York Code of Professional Responsibility. Ethics Committee Co-Chairs John Gaal and Nancy Hoffman prepared a thorough, thoughtful analysis which the Section endorsed.

Next, Kayo Hull, Bruce Millman, Jim Sandner and Don Sapir presented a draft amendment to our Section's bylaws in response to a House of Delegates proposal for expanding our Section's representation. The Section adopted their proposal.

As soon as the Fall Meeting ended, Alan and the CLE Committee immediately turned their attention to three upcoming programs—Employment Law for the General Practitioner, the Annual Meeting and a Litigation Institute.

EEO Committee Co-Chair Deborah Skanadore Reisdorph and Secretary Michael Gold did an outstanding job marshaling the resources of Cornell's Law School and School of Industrial Labor Relations to support the November 13 introductory program for general practitioners. Both Law School Dean Stewart Schwab and ILR Dean Edward Lawlor welcomed the group. The Law School generously provided space, and the ILR School provided refreshments. Speakers included ILR Associate Professor Risa Liebewitz, ILR Senior Extension Associates Lee Adler and Rocco Scanza and EEOC Mediator David Ging.

Our Annual Meeting will be held Friday, January 28 at the New Yorker Hotel in Manhattan; it promises to be another outstanding event. The Hon. Denise Cote, United States District Judge, Southern District of New York, will be our keynote speaker, thanks to New York University Law Professor Sam Estreicher's assistance. Our first plenary session panelists will discuss what the results of the 2004 elections will mean for labor and employment lawyers, and the next plenary session will address FLSA regulation. A variety of workshops will follow.

I hope to see many familiar faces in January. I also hope to see new faces, and I assure everyone who is considering attending our meetings that they will receive a very warm welcome.

Our Fall and Annual Meeting programs often are developed by one of our Section's many Committees which focus on areas of interest to the Section's different constituencies—for example, Equal Employment Opportunity Law, Government Employee Labor Relations, Individual Rights & Responsibilities and Labor Arbitration and Collective Bargaining. Committees will meet in conjunction with the Annual Meeting, and I urge all Section members who are not yet active Committee members to attend a meeting and explore that Committee's activities. Rich Zuckerman, our Chair-Elect, any of our Committee Chairs and Co-Chairs and I would be pleased to answer any questions that you may have about Committee membership.

In addition, please note that our Section will be sponsoring a litigation institute on restrictive covenants in employment cases June 17 and 18 at the Fordham Law School in Manhattan. Program Co-Chairs Mike Curley and Arnie Pedowitz are in the early stages of the planning process, but they assure me that the institute will provide both substantive information on the state of the evolving law as well as practical advice on litigating temporary restraining orders and preliminary injunctions.

Our Section's members have accomplished much this year, including publishing this *Newsletter* and updating a treatise on public sector law. I hope that you will join us in the New Year.

Pearl Zuchlewski

From the Editor

I am truly pleased by our good fortune in having our first Regional Report from the NLRB in this issue. Many thanks to Al Blyer, Helen Marsh and Celeste Mattina for making it possible.

Thanks also to John Gaal and Ellen Mitchell for their fine articles about ethics; Deborah Volberg Pagnotta for her insightful piece on the role and uses of apology in conflict resolution; and Andrew Schatkin for his article on election of remedies under the New York State Human Rights Law.

In this issue we also have the first-place winning article in our annual Emanuel Stein Writing Competition for law students, which is chaired by Robert Simmelkjaer. Thanks to Bob and all the judges for selecting these fine articles. All the winning articles will appear in the *Newsletter* in the next few issues. Finally, we have the annual Supreme Court legislative report given to the Section by Secretary-Elect Elena Cacavas at the Fall Meeting.

Our Section recently added a committee on International Labor and Employment Law, an area that I believe will concern many of us more and more in the coming years. Changes are occurring in EU employment law which will have an impact on any U.S. company that has employees in Europe. Even for those who don't do business in Europe, I think the news on the labor and employment front is of interest, so in this issue I will use the editor's space to write about it.

The legal structure of the Union is likely to seem odd to those unaccustomed to working within it, particularly to those from common-law jurisdictions. It presents an astonishing array of directives and regulations, as well as a different way of enacting legislation.

Union-wide laws are formulated in Brussels as directives, but the EU does not directly enact or enforce national laws and a directive does not take effect directly in Member States. Instead, the European Commission issues deadlines for the Member States to enact legislation to conform with the directives. This means that laws will vary from State to State as to standards and enforcement, although the underlying principles should be the same.[1]

Employment Discrimination

In 1997, in the Treaty of Amsterdam, the Member States introduced an express basis for legislation regarding employment discrimination. Article 13 of the Treaty provided:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[2]

Article 13 itself did not prohibit discrimination; it provided authority for the Community to legislate in the areas in which it had competence. In 2000, the European Council relied on Article 13 to enact the two directives known as the "Article 13 package."[3]

The first was the Employment Directive, which established a general framework for equal treatment throughout the Union in employment, self-employment and occupation.[4] The directive required Member States to pass legislation that would ban discrimination in employment based on race, gender, age, disability, religion and sexual orientation.[5] It covers direct and indirect discrimination, with a requirement for reasonable accommodations for persons with disabilities. The second, known as the Race Directive, prohibited racial and ethnic discrimination in employment, education, social security and health care, access to goods and services and housing.[6]

The implementation date of the directives was December 2003. However, a Member State may extend the deadline until December 2006, for legislation on disability and age discrimination. Where employment discrimination legislation already existed, most Member States were obliged to alter their statutes to comply with the Directive.

Although States may offer more protections than are required by the Directive, and some already do, all must afford at least the minimum that complies with the directives. In Britain, Wales and Scotland, for example, the existing Disability Discrimination Act of 1995 will be amended as of October 2004 to reflect the

requirements of the Directive. The exemption for employers with less than 15 employees has been eliminated, including employees in private households. The legal concepts of reasonable accommodation and harassment will be added and most occupational exemptions will be abolished.

By the end of 2003, few countries had passed national laws to implement the directives. The first three countries to implement the race directive were Belgium, Sweden and the U.K. Others had no previous anti-racism statutes; even Germany, with its large immigrant workforce, had no specific legislation covering the workplace. Some Member States are still having difficulty reconciling the requirements of the new directives with previous national legislation.[7]

The European Confederations of Trade Unions (ETUC) and European employers (CEEP and UNICE) are known in Euro-speak as the "Social Partners," and they have an official role that is not found elsewhere. They have an affirmative duty by treaty to meet and discuss all issues relating to the European workplace, and it is they who have sometimes unofficially found ways to implement the law. For example, in Belgium, the social partners have agreed to achieve a particular employment rate among ethnic minorities by 2010 and the EU Employment Commissioner has asked the social partners to publicize together the new EU employment rights. The ETUC has actively been involved in anti-discrimination training throughout Europe, and the unions have insisted on addressing discrimination issues in collective agreement bargained in multinational corporations.

Another aspect of the EU employment environment that may seem unfamiliar is the interconnection and participation in employment disputes of players we would not expect here. Europeans are less likely to see resolution of disputes either as a strictly legal matter or as a series of defined penalties. Most employment cases do not end with a cash settlement but with reinstatement and other types of penalties and remedies, sometimes requiring cooperation between the employer and the union. It has been known to happen that disgruntled employees have gone to their unions, which have made the problem part of their next round of negotiations, or have gone to a legislator or political party, who targeted the employer in the next election. Thus, a company may find that, as a result of an employment dispute with one individual, an entire workforce may walk out or legislation may be passed to bar a particular company practice.

The Council of the European Union has passed a Burden of Proof Directive that requires a shift in the burden of proof in employment discrimination cases from employee to employer, a state of affairs that will be new not only to U.S. corporations but to employers in some European countries, too.[8] With a nudge from the European Court of Justice, the Council deemed it necessary to adopt Union-wide rules on the burden of proof applied in sex discrimination cases brought under national laws implementing the 1976 Equal Treatment Directive. The Council states in Directive 97/80 EC that "plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory."[9]

Of the Central and Eastern European countries which acceded to the European Union in 2004, the Czech Republic is the only country so far to adopt implementing legislation on reversing the burden of proof in sex discrimination cases, as required for accession. On the whole, "[t]he question of shifting the burden of proof has been rejected—either vigorously or gently—even in those countries [acceding to the European Union] where it is legally possible/permitted."[10] The failure to reverse the burden of proof in sex discrimination cases has been a disincentive to bringing legal action for sex discrimination in most accession countries.

Considering the burden of proof now required, statistical record-keeping by the employer would seem to be of great importance. In Europe, however, there is resistance to record-keeping by race and other demographic factors.[11] Since, in addition, the bar for an arguable claim is quite low, an employer should be able to prove it has systems in place to promote equal treatment and fight discrimination. These would include training programs, monitoring of recruitment, clear standards for equal pay and advancement, and procedures to elicit and process feedback from workers.

Another factor that impacts employment discrimination law is the new treaty, proclaimed in June 2004, which establishes a Constitution for Europe. Part II of the constitutional treaty is the Charter of Fundamental Human Rights, which assures EU citizens the right to be free from discrimination in employment. No one yet knows what effect, if any, the new Constitution will have on employee and employer rights, what relationship it will have to national laws, or how—and whether—it will be enforced by the ECJ.[12] If the Constitution is ratified, Article 13 would give the European Union the right to act legally against an entity that does not enforce the European Values set forth therein, among them being non-discrimination.

The Posting of Workers Directive

The Posting of Workers Directive broadly requires that where a Member State has certain minimum terms and conditions of employment, these must also apply to workers sent by their employer to work temporarily in that State.[13] It also establishes that undertakings from non-EU countries must not be given more favorable treatment than similar undertakings in Member States; in other words, workers from such undertakings must benefit from the same minimum terms and conditions of employment as workers posted from undertakings in Member States.

The Directive applies to companies which post workers to other Member States under a contract, make intra-company postings to other Member States, or post workers and maintain an employment relationship during the posting. The Directive provides maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay, including overtime rates; conditions of hiring out workers, especially temporary workers; workplace health, safety and hygiene; protective terms and conditions of employment of pregnant women, new mothers and children; gender equality and other provisions for non-discrimination.

Where States have in place laws or mandatory collective agreements on terms and conditions of employment covered by the Directive, they must ensure that these apply to workers temporarily posted to their territories. Member States may also apply certain other collective agreements to posted workers and have the option not to apply some terms and conditions to certain groups of workers.

The Social Partners Create an Agreement on Telework to Be Enacted as National Legislation

At the request of the European Commission, the Social Partners recently concluded an agreement on telework. For the first time, the Commission and the Social Partners officially chose to implement the agreement through unions and employers' groups in individual countries rather than by national legislation. In their agreement, they defined telework as a "form of organizing . . . work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis."[14]

As with most EU legislation, the agreement must be implemented within three years. In this case, however, it will be the Social Partners rather than national governments who will be responsible for interpreting the directive according to the labor practices of each country. This is an historic arrangement and will be watched closely in Europe and elsewhere. The Social Partners will report on the results of the agreement after four years have passed.

There are currently about 10 million teleworkers in the EU. They fall into four broad categories: home-based employed teleworkers, most of whom work alternately at home and on the employer's premises; self-employed teleworkers who normally work from home; mobile workers who spend at least ten hours per week away from home or their main place of work during which time they use online computer connections; and casual workers who spend less than ten hours per week teleworking from home. The framework agreement does not cover the self-employed.

The agreement states that teleworkers should be treated no differently from employees who are based at the employer's premises and highlights work issues that are especially relevant to teleworkers. These include data protection, privacy, equipment, health and safety, organization of work, training and collective rights. According to the agreement, all telework should be voluntary.

The parties agreed that the employer is responsible for providing adequate software to protect the data used by the employee while working. The worker must follow the employer's data protection policy, and any restrictions contained in it. The privacy of the worker will be preserved and monitoring systems will conform to the VDU Directive.[15] The employer will usually provide equipment, but the costs of operation and technical will be borne by the employer even if the worker provides the equipment. The teleworker must agree to look after the employer's equipment and not use it for any illegal purpose.

The teleworker must be informed of company health and safety policies and has the right to call for inspections of the working environment and equipment. The agreement says that the teleworker must be equal to employees working at the employer's premises as far as productivity, training and access to worker representatives are concerned.

A Proposed Directive on Job Mobility in the Professions

One of the four freedoms first set forth in the Treaty of Rome in 1959 is freedom of movement, which means, among other things, the right to live and work in other Member States. Although this right was limited at first to "workers," the European Court of Justice has recently issued a number of activist decisions that has broadened this right considerably to include students, pensioners and, in some cases, EU citizens in general.[16] By virtue of recent ECJ decisions, some rights may also now be held by family members under some circum-

stances, even if they are not Member State nationals.[17] U.S. companies who employ EU nationals, guest workers or, more rarely, third-party nationals, should be aware of the ECJ's changing case law in this area. Whether it comes quickly or slowly, increased mobility of the workforce is on the horizon.

A long-standing barrier to job mobility in the European Union has been the lack of mutual recognition of professional qualifications among the States. The inability of qualified professionals to move easily into employment in other Member States undercuts the Union's ambitions to create a competitive and knowledge-based economy.

Some States have been most reluctant to give up their restrictive practices. Now, the European Parliament has voted in favor of a proposal from the Commission for a directive on the recognition of professional qualifications. Under the new directive, workers who are legally established in a profession in one Member State could practice in another State temporarily, as long as they provide relevant information to the authorities and their clients. In the health care industry, where public safety concerns are paramount, registration would also be required.

The European Parliament has also proposed that a faster and more responsive procedure be instituted to recognize standard qualifications throughout the EU, with national professional associations coming together to form a Union-wide governing body in each profession. The Parliament expects this system to work better in dealing with scientific and technological progress, as well as in informing professionals of qualification standards and working conditions throughout the Union.

In the meantime, the Commission has set up an employment web site to break down barriers of language and tradition, as well as differing laws and qualifications.[18] The European Employment Services (EURES) site brings together all public employment services and the EU Social Partners, to put job seekers in touch with employers with the aid of an Internet search engine. It also offers European employment statistics and information on working in the various Member States.

British Union Threatens to Take the U.K. to European Court of Justice

The British firefighters' union (FBU) won proposed changes in health and safety law in the U.K. by pursuing its case before the European Commission. Until now, unions were not allowed to take legal action against employers on health and safety grounds. Instead, they were required to ask the Health and Safety Executive to proceed on their behalf. It was the unions' view that this rendered them unable to enforce employers' compliance with the law before an accident or other incident occurred.

When the FBU threatened referral to the European Court of Justice, the British government changed the regulations so that injunctions may now be sought directly by unions, in this case for risk assessments. Fines or imprisonment could result if employers ignore the injunctions.

The Information and Consultation Directive

The Information and Consultation Directive, to be implemented by the spring of 2005, concerns information-sharing and consultation between workers and employers with more than 50 employees.[19] The Directive gives employees the right to be informed about the company's financial situation and about employment prospects, as well as to be informed and consulted about decisions likely to lead to changes in work organization or contractual relations, including layoffs and transfers.

This will have a substantial effect on industrial relations, particularly in countries in which works councils have never previously been effective. The European Commission passed the directive because it hoped that more openness on the part of employers would lead to higher productivity, as well as bringing all Member States into an equal position in this area. The social partners have been working together to suggest ways for each State to implement the directive.

In Britain, where works councils have never taken off in the past, the new arrangements for information and consultation will only be required if a specific number of employees in a company ask for them. If there are no existing arrangements, employers will have six months to come to an agreement with genuine representatives of the employees. Either they must all agree on the plan or the whole work force must vote on it.

There are numerous contingencies for negotiating and ascertaining whether the employer already has an I&C plan in effect, and many of these contingencies involve ratification by the Central Arbitration Committee. The suggested procedures seem to reflect the Trade Union Council's desire that the new legislation not override trade unions where they are strong, while leaving them scope to recruit in weaker areas.

Whatever arrangement for negotiation is finally approved, failure to reach a deal after six months would trigger statutory provisions based on article 4 of the EU directive, which provides that a committee must be elected with one representative for each 50 workers. The topics for consultation are also specified, and include those set forth in the directive. An employer

who fails to set up such a committee would be liable for substantial fines and would have to take remedial steps.

The results of this new directive implicate the question of the future of trade unions and what role they will play in the new Europe.[20] In this particular case, the new directive encourages cross-European union organizing.

Conclusion

There is a whole new labor and employment world in Europe. It is fascinating to watch the European Union create what some people think of as a United States of Europe, despite its deference to the sovereignty of the individual Member States. The new legislation now in effect, as well as the potentially sweeping changes in the historic roles of the Social Partners, will have a huge effect on U.S. multinational corporations doing business in Europe and those who counsel and represent them.

Janet McEneaney

Endnotes

1. If a Member State fails to implement a directive, or implements it incorrectly, an individual might have a cause of action against the State. *See, e.g.*, Case C-6/90 & 9/90, *Francovich and Bonifaci and Others v. Italian Republic* (1991) ECR I-5357; Joined Cases C-46 & C-48/93, *Brasserie du Pecheur v. Bundesrepublik Deutschland* and *R. v. The Secretary of State for Transport*, *ex parte Factortame* (1996) 1 CMLR 889.
2. http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN & numdoc=32000L0078&model=guichett.
3. The EU Green Paper on "Equality and Non-discrimination in an Enlarged European Union" can be found at: http://www.stop-discrimination.info/fileadmin/bilder/pan-European_Events/ Greenpaper/greenpaper_en.pdf.
4. Council Directive 2000/78/EC, which may be found at: http://europa.eu.int/eur-lex/pri/en/oj/ dat/2000/l_303/l_30320001202en00160022.pdf.

   EU anti-discrimination laws use the term "in occupation." To attain this status, one must have a contract of service or of apprenticeship or a contract personally to do any work or labor. This does not exclude running a business or practicing a profession. Even if the individual is not being paid, as in volunteer work, or if others perform some of the work, an individual may still be "in occupation."
5. The concept of sexual harassment as illegal discrimination, which was omitted from the Framework Directive, was addressed in a subsequent directive.
6. Council Directive 2000/43/EC, which may be found at Celex No. 300L0043.
7. Examples would be countries in which age-based retirement and seniority plans are permitted, or which have passed laws to encourage the use of a particular language at the workplace in certain jobs.
8. Council Directive 97/80/EC of 15 December 1997, *at* http://europa.eu.int/eur-lex/pri/en/oj/ dat/1998/l_014/l_01419980120en00060008.pdf.
9. Under Directive 97/80, Member States must "take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment . . . has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment" set out in Directive 76/207/EEC. The EU Council notes in this 1997 Directive that Member States "need not apply [this reversal of the complainant's burden of proof] to proceedings in which it is for the court or competent body to investigate the facts of the case" as is the case in many proceedings in civil law countries.
10. Open Society Institute, "Monitoring the EU Accession Process: Equal Opportunities for Women and Men 18-19" (2002); and Czech Republic, Civil Procedure Code, Section 133(a).
11. The experience of Europe with racial documentation during the Nazi occupation causes resistance because of the resulting belief that collecting racial statistics is a racist act. Just to cite two examples, it is illegal in the Netherlands to collect racial data and, in France, to identify employees by ethnicity, gender, or national origin.
12. As an example, the Charter of Fundamental Rights states, in Article 23(1), that "equality between men and women must be ensured in all areas, including employment, work and pay."

    For the new treaty to take effect, it must be ratified by the 25 member states. A comprehensive listing of issues arising from the new European Constitution may be found at www.bbc.org.
13. Council Directive 96/71/EC, which may be found at Celex No. 396L0071.
14. The framework agreement on telework can be found at: http://www.etuc.org/en.
15. Council Directive 90/270 on Work with Display Screen Equipment. *See* Case No. C-11/99 *Margrit Dietrich v. Westdeutscher Rundfunk* (2000), in which the Court harmonized upwards the requirements of the directive and dismissed the narrow interpretation urged by the employer and the Dutch government.
16. Anyone who is interested in the relevant ECJ decisions is welcome to a copy of my paper, "The European Court of Justice and Citizenship of the Union," which was current as of May 2004.
17. Some Member States have opened their labor markets to workers from any EU countries, while others have restricted access in accordance with the Accession Treaty of April 2003. Thus, work permits may be required to demonstrate a right to work in certain host countries.
18. At http://europa.eu.int/eures/home.jsp?lang=en.
19. Council Directive 2000/14/EC, *at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/ l_080/l_08020020323en00290033.pdf. For examples of how two countries are approaching implementation of the directive, see http://www.ncpp.ie/inside.asp?catid=79&zoneId=1 (Ireland) and www.dti.gov.uk/er/consultation/proposal.htm (Great Britain).
20. For a comprehensive examination of this issue, see Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 Mich. J. Int'l L. 987 (1995).

NLRB Update

By Alvin P. Blyer, Celeste J. Mattina and Helen E. Marsh

Region 2's Report

A number of charges filed in Region 2 have raised the issue of whether a union's use of an inflated balloon constitutes picketing that can be enjoined under the National Labor Relations Act, herein the Act. In each of these cases, the unions argued that their activities were protected as free speech under the Constitution and under the Supreme Court's decision in *De Bartolo II*. The Supreme Court held in that case that unions have a right to truthfully advise the public of the existence of a labor dispute and that a union's peaceful distribution of area standards handbills urging a consumer boycott does not constitute restraint and coercion under the Act.

The General Counsel first authorized issuance of a complaint in this context in two cases filed in Region 2. In both cases, the union stationed a large inflated rat balloon in front of a construction site and surrounded it by individuals wearing union insignia who were distributing leaflets. A number of drivers refused to perform deliveries and a union agent in each of these cases was alleged to have referred to the union's activities at the site as picketing.

After an appeal from a dismissal of these charges was filed, the General Counsel authorized a complaint, reasoning that because the rat has been historically and symbolically associated with labor disputes, the union had engaged in the functional equivalent of picketing or signal picketing, and had unlawfully induced employees to withhold their services by stationing an inflated rat balloon in front of the construction sites at issue. Because this conduct was intended to evoke the same response as picketing, without inquiring into the information being disseminated, the General Counsel concluded that it could be regulated and was not constitutionally protected pure speech.

The General Counsel authorized issuance of a complaint in two subsequent cases. In addition to relying on the historical and symbolic association of the rat with labor disputes, the General Counsel evaluated the overall conduct of the union to determine whether the confrontation that is typically an essential component of picketing was present. The conduct at issue consisted of mass rallies, noisy campaigns and some patrolling in one case and aggressive handbilling, walking in an elliptical pattern and shouting in the other case. This conduct, in conjunction with the placement of a large inflated rat balloon on the sidewalks and entrance to the building, created a gauntlet effect that forced pedestrians to confront the handbillers and the inflated rat balloon, and was deemed sufficiently confrontational to constitute picketing. While there was no interruption of work or deliveries, this is not a prerequisite for a finding of unlawful inducement or encouragement under existing case law.

In one of these two cases, the union used an inflated skunk, rather than an inflated rat, while distributing leaflets on certain days. The General Counsel did not rely upon the display of the skunk in determining that the union had engaged in picketing, because the skunk, unlike the rat, "has no historical significance in the labor movement" and therefore could not, by its mere display, operate as a signal.

A complaint issued in another case alleging that the union had engaged in substantial confrontational conduct, in addition to the use of an inflated rat, under the theory developed by the General Counsel in the abovementioned cases.

Three other cases have since been either been dismissed or withdrawn and the Advice Memoranda authorizing dismissal in these cases have been released to the public under the Freedom of Information Act. The facts in two of these cases were very similar: the union's communications were consistent with an area standards objective; there was no interference with deliveries, in fact, a union agent expressly assured drivers and one delivery contractor that the union did not intend to interfere with deliveries; there was no confrontational conduct, and the union handbilled, at times without any inflated balloons and at other times alternatively used two different balloons, a rat balloon and an Uncle Sam balloon.

While recognizing that the use of an inflated rat balloon could be arguably unlawful, neither of these cases was deemed to be a good vehicle to test the General Counsel's theory in this area. The union's communications and conduct were consistent with a purely informational objective. Since Uncle Sam was deemed to have no historical association with labor disputes and the inflated rat balloon was used inconsistently and only sporadically, the General Counsel was of the view that it was likely that the union used these balloons to generate public attention for its handbilling activities, rather than for the purpose of creating "an invisible picket line."

The issue of whether a threat to use an inflated rat balloon constituted a threat to picket was raised in the last case. Citing the previously discussed two cases, the

Advice Memorandum noted that there were circumstances in which the use of an inflated rat balloon will not be deemed to constitute unlawful picketing. In the absence of further specifics or a contextual basis for the statement, it was concluded that the threat to "set up" a rat was neither a threat to engage in picketing or other confrontational conduct, nor a signal to employees to induce them to withhold their services.

The Board has not had occasion to consider the issue of signal picketing in the context of inflated rat balloons that was raised in the cases that were found to be meritorious because they were all informally resolved prior to a hearing.

—Celeste J. Mattina, Regional Director

Region 3's Report

Region 3 received UC unit clarification petitions filed by a successor employer that sought to divide an existing bargaining unit encompassing two of its manufacturing plants located in different towns, into two separate bargaining units. The separate contracts for the single unit had been established under the predecessor employer's agreement with the union for tax purposes and other reasons, rather than because of any acknowledged separate and distinct communities of interest present among the employees at each plant. After the expiration of the predecessor's collective bargaining agreements, the successor employer proposed, during its own contract negotiations with the union, that the unit be divided. However, the parties entered into two new collective-bargaining agreements that reaffirmed the existence of one overall unit. In its UC petition, the successor maintained that the existing bargaining unit was no longer appropriate and should be divided, because of operational changes at the two facilities. The union maintained that there were no recent significant changes that rendered the existing bargaining unit inappropriate, despite the fact that the union had agreed to individual collective bargaining agreements at each plant, containing separate, but similar, recognition clauses.

In the instant cases, as in *Batesville Casket Co.*, 283 NLRB 795 (1987), there was no evidence of recent, significant changes in the organizational structure and operations of the facilities that rendered the single unit inappropriate. The significant operational changes that occurred, i.e., one plant becoming an operationally separate department, acquiring its own plant manager, its own human resources department, relocating to a different facility, and a change in ownership, were not recent, but rather, occurred years ago. Moreover, subsequent to these changes, the existence of a single bargaining unit was reaffirmed by subsequent collective bargaining agreements. Accordingly, the unit clarification petitions were dismissed and the Board denied the employer's Request for Review of the Decision.

In two companion 8(a)(5) and 8(b)(3) cases the employer and the union each charged the other with refusing to execute the negotiated successor agreement. The union drafted the final version of the contract, forwarded two copies of the agreement to the employer, and requested that the employer sign and return the two copies of the contract with the original signature of the employer's owner. The owner signed and retained the original and sent a photocopy of the original to the union. The union refused to execute the photocopy of the agreement because the employer had not provided the originals with the owner's signature as requested. It was the union's position that, in absence of its receipt of the originals, the contract had not been signed. The union filed an unfair labor practice charge in Region 3 alleging that the employer violated Section 8(a)(1) and (5) of the Act by refusing to execute the collective bargaining agreement. Thereafter, the employer filed an 8(b)(3) charge alleging that the union unlawfully refused to execute the agreement. The union's charge was determined to be without merit, as the National Labor Relations Act does not require that a collective bargaining agreement be executed by original signature. While Board case law did not address this specific issue, federal contract law relies on applicable state law in determining the validity of a signature on a legal document. New York General Construction Law § 46 states: "The term signature includes any memorandum, mark or sign, written, printed, stamped photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate such instrument or writing." In a number of cases, New York State courts have found that typewritten, stamped or printed signatures did not invalidate the documents at issue.

In the instant matter, the owner's photocopied signature constituted a valid execution of the collective bargaining agreement and there was no evidence that the employer's owner did not intend the copy of his signature to be a valid execution of the contract. However, Region 3 determined that the union had violated Section 8(b)(3) by refusing to execute the contract. *See Chauffeurs, Teamsters & Helpers Union, Local 186*, 172 NLRB 788 (1968) (A union that refuses to execute a written agreement that embodies the terms and conditions agreed upon during collective bargaining negotiations violates Section 8(b)(3) of the Act.). An unfair labor practice complaint issued, which was ultimately settled after the union agreed to execute the collective bargaining agreement.

In the past year, Region 3 was presented with cases involving neutrality agreements. A charge was filed by

a construction industry employer that alleged that a union violated Section 8(b)(7)(C) of the Act by picketing for more than 30 days with an object of obtaining from the employer a signed neutrality/card check agreement. Under the terms of the proposed agreement, the employer would have to agree not to state any opposition to the union's efforts to organize its employees; would have to grant the union access to its premises to meet with employees; would have to provide the union with a list of its employees' names and addresses; and would have to agree to recognize the union as the employees' representative in the event that a card check by a third party revealed that the union represented a majority of the employees. The agreement also provided that the employer agreed not to file its own RM petition seeking to have the Board conduct an election. In support of its demand that the employer sign the neutrality agreement, the union picketed the employer on and off over a period of 30 days. At no time did the union file any petition for representation with the NLRB.

Because of the uniqueness of the issue being presented, the Region submitted the case for advice. The case was submitted to the Division of Advice which authorized complaint. Advice noted that although the agreement did not require immediate recognition, it required the employer to submit to a card check, and to forgo having an election conducted by the NLRB to determine the union's majority status, and thus would ultimately compel the employer to voluntarily recognize the union once it was provided with cards establishing the union as the majority representative. Advice noted that the Board, in *New Otani Hotel*, 331 NLRB 1078 (2000), left open the question whether picketing for a neutrality card check agreement with an ultimate recognitional objective, would violate Section 8(b)(7), and authorized complaint in order to present the Board with a case to resolve the question. Complaint issued in that case, but the case ultimately settled, without the matter being litigated. The union entered into an informal settlement agreement in which it agreed not to picket for recognition for a period exceeding 30 days without filing a petition.

In another case involving a neutrality agreement issue, a manufacturing employer filed a charge alleging an 8(b)(3) violation. In that case, a union, which already represented a unit of its employees, proposed during contract negotiations that the employer remain neutral in the face of the union's attempt to organize a different group of its employees. The evidence revealed that the union's proposal was a permissive subject of bargaining and that the union had not insisted to the point of impasse on the inclusion of that proposal in a new collective bargaining agreement. As long as the proposal did not serve to create a deadlock in negotiations, the union's conduct was not deemed to be unlawful and the charge was withdrawn.

An interesting 8(a)(5) unilateral change case was filed with Region 3 involving the installation of surveillance cameras. The union alleged that the employer had unilaterally installed surveillance cameras in its parking lot and garage area. The employer defended its position on the grounds that the cameras were not hidden, were there to monitor property, and opined that there would be only incidental exposure to the coming and goings of employees. In making its determination that the employer was obligated to notify and bargain with the union over this matter, the Region considered the lead surveillance camera case, *Colgate Palmolive Company*, 323 NLRB 515 (1997). In that case the Board held that an employer must bargain with a union over the installation and use of surveillance cameras, and the general areas where they would be placed. *Colgate-Palmolive*, however, involved a fact situation where the cameras were hidden inside the building and had the express purpose of detecting employee activity like theft or sleeping on the job. The Region concluded that the broad sweep of *Colgate-Palmolive's* language applied to the facts of our case and issued complaint. The matter subsequently settled after the employer gave the union assurances safeguarding employee interests.

Another Region 3 case presented the novel issue of whether an employer was required to provide the union with access to the residents of its nursing home in order to investigate the circumstances involving the discharge of a unit nursing assistant who had worked in the nursing home. The union represented certified nursing assistants in a nursing home. Two unit employees were charged with patient abuse and terminated. The union grieved the discharges and requested certain information relative to the discharges. In connection with processing the grievances, the union requested that the employer provide access to the residents involved in the alleged abuse. The union volunteered to permit the facility's ombudsman to sit in during the resident interviews. The employer's refusal led to the filing of the charge. Under normal circumstances, unions are entitled to know the names, addresses and phone numbers of employer witnesses to enable them to contact the witnesses and conduct their own independent investigations. *See Transport of New Jersey*, 233 NLRB 694 (employer was required to give the union the names and addresses of passengers on a bus that was involved in an accident so the union could determine whether to process a grievance on the driver's behalf.).

The Region 3 case was novel because this employer controlled the access to the witnesses and the union had no other means of contacting and interviewing the witnesses without the employer's permission to visit with

them at the nursing home. The employer's property rights and its interest in safeguarding infirm residents from controversy had to be balanced against the right of nursing home employees to be represented in the same fashion as employees in other industries. While this case was pending in Advice, the union obtained reinstatement and back pay for the two employees, and withdrew the charge.

—Helen E. Marsh, Regional Director

Region 29's Report

In a representation matter, the Region conducted an election notwithstanding the objections of the employer that it could not conduct a campaign against the union. The employer noted that it received most of its funding from New York State, and that pursuant to recently passed legislation, it was prohibited from spending any funds it received from New York State to either encourage or discourage union membership. The employer argued that the state law was preempted by the National Labor Relations Act, because the state law interfered with the policy established by Congress in the Act that the electorate in NLRB elections are best served when both sides are able to engage in a vigorous campaign about the benefits and disadvantages of unionization. The representation case was consolidated for hearing with an unfair labor practice matter. After the hearing was completed, the ALJ severed the matter for the purpose of issuing a prompt decision in the representation case. The ALJ's decision issued on June 7, 2004. In it, the ALJ overruled the employer's objections and found that the employer failed to establish that the state law precluded it from conducting a campaign and that the employees' free choice in the election was not impacted by that state legislation.

In a second representation case, the Region revoked the certification it issued to a labor union months after it had certified that union after a Board-conducted election. The evidence disclosed that at the time the election was held neither the employer nor the union involved informed the Region that the facility would not be opening for a couple of months, that only a very small percentage of the intended work force was employed at the time of the election and that another labor union was likely to have interest in participating in the election. A request for review of the Regional Director's decision to revoke the certification was denied by the Board.

In a case involving 8(g) of the Act, the issue of when an 8(d)(B) notice must be given is critical to resolving the case. 8(g) of the Act requires a union that wishes to strike or picket or engage in any other concerted refusal to work, to give 10 days' notice to the employer and the FMCS before engaging in any such conduct. 8(d)(B) of the Act requires a labor union, where it has been certified or recognized and is negotiating an initial agreement, before giving a 10-day notice under 8(g), to give a 30-day notice of the existence of a dispute to the FMCS and any state agency established to mediate and conciliate disputes. In the case before the Region, the union involved is arguing that an 8(d)(B) notice is required only where the union strikes and not where the union pickets the health care institution.

In another unfair labor practice case, the Region concluded that the union involved had accepted minority recognition in violation of Section 8(a)(2) of the Act. This was not the first time in the recent past that the union had engaged in the same conduct. The Region insisted on a formal settlement (which provides for the issuance of a Board Order and the entry of a court decree). However, because of the recent proclivity of the union to engage in this type of unlawful conduct, the Region insisted that as part of the formal settlement the union agree that for a certain period of time, within a certain geographic area, the union not accept voluntary recognition from any employer (not just the one involved in the most recent case). The union agreed, and the formal settlement was approved by the Board.

—Alvin P. Blyer, Regional Director

The views expressed in this article do not necessarily represent the views of the National Labor Relations Board or the United States Government.

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This report was presented to the Section at the Fall Meeting in Cooperstown.

A Review of Recent United States Supreme Court Cases Affecting Labor and Employment

By Elena Cacavas

Consistent with the past several years, the United States Supreme Court, in its 2003–04 term, has issued several decisions which deal with various issues relating to labor and employment law. The cases are presented below by topic, but otherwise in no special order.

Discrimination

The breadth, scope and application of a number of the most prominent statutes dealing with discrimination were addressed by the Supreme Court this past winter and spring.

In *Raytheon Company v. Hernandez*,[1] the Court considered a policy against rehiring employees charged with misconduct and its implications under the Americans With Disabilities Act of 1990 ("ADA") when the misconduct constitutes a "disability" under the Act.

Joel Hernandez had worked for Raytheon for twenty-five years when he was forced to resign after testing positive for cocaine use. Two years later, claiming that he was rehabilitated, he sought re-employment and was refused. The company claimed that it had an unwritten policy against rehiring employees who had been terminated for workplace misconduct and that the person who rejected his application had no knowledge of his prior drug use and/or addiction. Hernandez filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming that he was discriminated against based on the employer's having viewed him as a drug addict and/or his record of drug addiction. The EEOC issued a right-to-sue letter and the ADA lawsuit was filed. In response to a motion for summary judgment, Hernandez also argued, as an alternative theory, that even if the employer had applied a neutral no-rehire policy, it still violated the ADA because of the policy's disparate impact.

The trial judge dismissed the suit, but on appeal to the Ninth Circuit Court of Appeals, the case was reinstated.[2] The Ninth Circuit found that the disparate impact claim had not been timely pleaded or raised. With respect to the disparate treatment claim, the Circuit Court held that under the burden-shifting approach of *McDonnell Douglas Corp. v. Green*[3], Hernandez had established a *prima facie* case of discrimination and the employer had not met its burden to provide a legitimate, non-discriminatory reason for its action. The Circuit Court further reasoned that the no re-hire policy, though lawful on its face, was unlawful as applied to employees who were lawfully forced to resign for illegal drug use, but have since been rehabilitated.

The employer then appealed to the United States Supreme Court, which, in a decision dated December 2, 2003, concluded that the Circuit Court had improperly applied a disparate impact analysis to Hernandez's disparate treatment claim. Distinguishing between disparate treatment and disparate impact, the Court noted that claims under the former theory arise when an employer treats some people less favorably than others because of a protected characteristic.[4] The latter cases involve facially neutral employment practices that fall more harshly on one group than another and cannot be justified by business necessity.[5]

Concluding that the Ninth Circuit had applied an improper analysis to the case, which was limited to the disparate treatment theory, the Supreme Court sent the case back down for further consideration.[6] The job for the court below was to determine whether or not this no-rehire policy was merely a "pretext" for illegal discrimination.

Unfortunately, the Supreme Court sidestepped the crucial issue of whether an employer can properly maintain a policy such as Raytheon's without violating the ADA. It offered only that the no-rehire policy was "a quintessential legitimate, non-discriminatory reason for refusing to rehire an employee who was fired for violating workplace conduct rules" and was sufficient to defeat a prima-facie case. The Court also did not address whether a refusal-to-rehire policy may be challenged under a "disparate impact" theory where a showing is made by the employee that the policy, though lawful on its face, unfairly screens out former drug addicts.[7]

On February 24, 2004, the Court, in *General Dynamics Land Systems, Inc. v. Cline*,[8] addressed the issue of reverse age discrimination, ruling that an employer does not violate the Age Discrimination in Employment Act of 1967 ("ADEA") by providing preferential treatment to older workers over younger ones, even where the younger workers are over the age of 40.[9]

In *General Dynamics*, the company and the union negotiated a new collective bargaining agreement

("CBA") that offered retiree health benefits only to those employees who were at least 50 years of age at the time of the new agreement.[10] A group of employees who were in their 40s brought a claim before the EEOC on the basis that the agreement violated the ADEA because it discriminated against them because of their age. The EEOC agreed and the employees brought this action under the ADEA and state law.

The District Court dismissed, calling the federal claim one of "reverse age discrimination" upon which no court had ever granted relief under the ADEA, and relying upon a Seventh Circuit decision holding that the ADEA does not protect younger workers against older ones.[11] The Sixth Circuit reversed, reasoning that the ADEA's prohibition of discrimination is so clear on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so.[12]

The Supreme Court disagreed and held that the ADEA only prohibits discrimination in favor of younger employees and does not address discrimination that favors older workers.[13] Acknowledging that the statute on its face could be read to prohibit discrimination in favor of older workers, the Court reviewed the legislative history of the ADEA and determined that the purpose of the law was only to prohibit discrimination in favor of younger employees. Congress' interpretive clues, it concluded, speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better.

The Court also acknowledged that none of its cases directly addresses the question of reverse age discrimination, but concluded that they all reveal the Court's consistent understanding that the text, structure and history of the legislation point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern.[14]

The ruling under *General Dynamics* is limited only to the question of reverse age discrimination or preferential treatment under federal law. By contrast, New York State and New York City law may still prohibit employers from favoring older employees over younger ones. The New York State and City human rights laws regarding age discrimination apply to all employees who are 18 years of age or over. In fact, in *McLean Trucking Co. v. State Human Rights Appeal Board*,[15] the New York appellate court held that an employer violated the New York State and the New York City human rights law when it applied a minimum age requirement of 24 to reject a 23-year-old applicant.

The applicable statute of limitations for section 1981 claims was the subject of the Court's consideration in *Jones v. R.R. Donnelley & Sons Co.*[16] In this May 3, 2004 ruling, the Court decided that causes of action under the Civil Rights Act of 1991 are governed by a four-year statute of limitations.

In this case, African-American former employees of R.R. Donnelley & Sons filed a class action alleging violations of 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991.[17] The 1991 amendment effectively provided for allegations of discrimination during the employment relationship and upon its termination. The suit specifically alleged that the former employees had been subjected to a racially hostile work environment, given inferior employee status, and wrongfully terminated or denied a transfer when the plant at which they worked was closed down.

The former employer sought summary judgment on the ground that the claims were barred by the applicable Illinois statute of limitations because they arose more than two years before the complaint was filed. The plaintiffs responded that their claims were governed by 28 U.S.C. § 1658, which provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues."[18] Section 1658 was enacted on December 1, 1990. The Supreme Court ruled that a cause of action "arises under an Act of Congress enacted" after December 1, 1990, and therefore is governed by the four-year statute of limitations, if the claim was made possible by a post-1990 enactment. Here, since the actions arose under the Civil Rights Act of 1991, the claims were not time-barred.

The District Court, too, had held that the former employees' claims arose under the 1991 Act, and were, therefore, governed by section 1658. The Seventh Circuit reversed, however, concluding that section 1658 does not apply to a cause of action based on a post-1990 amendment to a pre-existing statute.

The Supreme Court noted the ambiguity of the term "arising under" in section 1658 and relied upon the context in which it was enacted to discern its scope. Prior to the enactment of section 1658, the lack of a uniform statute of limitations for federal causes of action created a void for a vast amount of litigation and the settled practice of borrowing state limitations statutes itself generated a host of issues. The Court stated that a central purpose of section 1658 was to minimize the need for borrowing, which purpose would not be served if section 1658 were interpreted to reach only entirely new sections of the United States Code. An amendment to an existing statute, the Court ruled, is no less an "Act of Congress" than a new, stand-alone statute.

Looking specifically to the claims raised by the action before it, the Court stated that they all "arose under" the 1991 Act in the sense that they were made possible by the Act. That Act overturned the Supreme Court's ruling in *Paterson v. McLean Credit Union*,[19] which held that racial harassment relating to employment conditions was not actionable under section 1981 and, in so doing, redefined that section's key language to expand the scope of coverage. As such, the Court held, the causes of action clearly arose under the 1991 Act and enjoy a four-year limitations period.[20]

Sexual Harassment

In a June 14, 2004 decision, *Pennsylvania State Police v. Suders*,[21] the Supreme Court addressed the issue of "constructive discharge" actionable under Title VII of the Civil Rights Act of 1964. In this case, the Pennsylvania State Police Department had hired Suders in March 1998 to work as a police communications operator. In June 1998, Suders claimed that her male supervisors subjected her to a continuous barrage of sexual harassment, including reference to bestiality and sodomy and making vulgar gestures and comments. She was also told that the "village idiot could do her job."

Prior to making her formal complaint, Suders had on one occasion casually told one of her male supervisors that she did not think he should be engaging in such conduct. Suders' June complaint to the employer's Equal Employment Opportunity Officer ("EEOO") was precipitated by a supervisor's claim that Suders took a missing accident file home and was limited to Suders' stating only that she "might need some help." The EEOO gave Suders her telephone number, but neither woman followed up on the conversation.

On August 18, 1988, Suders again contacted the EEOO and said that she was being harassed and was afraid. The EEOO told Suders to file a complaint, but gave no information on how to do that. Suders characterized the EEOO's response as insensitive and unhelpful. Two days later Suders' supervisors arrested her for theft and Suders resigned. Her employer did not bring any criminal charges against her.[22]

In September 2000, Suders sued her former employer in federal District Court, alleging, *inter alia*, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII.[23] At the close of discovery, the District Court granted the employer's motion for summary judgment. Recognizing that Suders' testimony would allow a trier of fact to conclude that the supervisors had created a hostile environment, the District Court nevertheless held that the employer was not vicariously liable for the supervisors' conduct. In so ruling, the District Court cited two Supreme Court decisions, *Faragher v. Boca Raton*[24] and *Burlington Industries, Inc. v. Ellerth*.[25] Those cases hold that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment." When no such tangible action is taken, however, the employer may raise an affirmative defense to liability by showing that it exercised reasonable care to prevent and promptly correct sexually harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

The District Court found Suders' hostile work environment claim untenable as a matter of law because she unreasonably failed to avail herself of the employer's internal anti-harassment procedures. The District Court did not address Suders' constructive discharge claim.

The Third Circuit reversed and remanded the case for trial. The appeals court focused on two key elements: first, even if the employer could assert the *Ellerth/Faragher* affirmative defense, genuine issues of material fact existed about the effectiveness of the employer's program to address sexual harassment claims; second, the claim of constructive discharge due to hostile work environment had not been addressed. The appeals court ruled that a constructive discharge, if proved, constitutes a tangible employment action that renders an employer strictly liable and precludes the *Ellerth/Faragher* affirmative defense.

The Supreme Court held that Title VII encompasses employer liability for constructive discharge and instructed that to establish "constructive discharge," a plaintiff alleging sexual harassment must show that the abusive working environment became so intolerable that her resignation was a fitting response. The reasonable response to intolerable conditions transforms the resignation to a formal discharge. The inquiry, the Court directs, is objective: Did working conditions become so intolerable that a reasonable person in the same position would have felt compelled to resign? Here, the constructive discharge stemmed from an aggravated case of sexual harassment or hostile work environment.

An employer may assert the *Ellerth/Faragher* affirmative defense unless the plaintiff quit in reasonable response to an adverse action which officially changed her employment status or situation, such as a humiliating demotion, extreme pay cut or a transfer to unbearable working conditions.

The Court noted that the case before it concerned one subset of constructive discharge claims: those resulting from sexual harassment or a hostile work environment attributable to a supervisor. As such, it agreed with the lower court's application of the *Ellerth/Faragher* framework, but said that the key

inquiry was into which category hostile-environment constructive discharge claims fall and the applicable burden of proof. Citing the reliance, in those earlier cases, upon the principle of agency law which makes an employer liable for the acts of its agent when the agent is "aided in accomplishing the tort by the existence of the agency relation,"[26] the Court noted that a tangible employment action takes the issue of "aiding" beyond question. The Court stated that a tangible employment action is an "official act of the enterprise" and "fall[s] within the special province of the supervisor."[27] In contrast, when there is no tangible employment action, it is less obvious that the agency relationship is the driving force. That uncertainty justifies affording the employer the chance to establish, through the affirmative defense, that it should not be held vicariously liable. The Court viewed the Third Circuit to have erred in drawing the line differently and in declaring that the affirmative defense is never available in constructive discharge cases. The Circuit Court's decision was vacated and remanded.[28]

ERISA

Suspension of early retirement benefits already accrued was the focus of the Court's consideration in *Central Laborers' Pension Fund v. Heinz, et al.*[29] There, respondents were retired participants in a multiemployer pension plan administered by the Central Laborers' Pension Fund ("Fund"). Heinz had retired from his job in construction after accruing enough pension credits to qualify for early retirement benefits under a "service only" pension scheme which entitled him to the same monthly benefit which he would have received had he retired at the usual age. Prohibited under the plan, however, was engagement in certain "disqualifying employment" after retirement. The penalty for such prohibited activity was suspension of benefits until the employment ceased.

At the time of Heinz's retirement, forbidden work was employment as a construction worker, but not as a supervisor. Heinz took a supervisory position, after which, in 1998, the plan expanded its definition to include any construction industry job. Heinz's benefits stopped pursuant to that change.

A lawsuit brought by Heinz claimed that the suspension violated the "anti-cutback" rule of the Employee Retirement Income Security Act of 1974 ("ERISA"), which prohibits pension plan amendments that would reduce a participant's "accrued benefit."[30] The District Court granted the plan judgment on the pleadings, but the Seventh Circuit reversed, holding that imposing new conditions on rights to benefits already accrued violates the anti-cutback rule.

On June 7, 2004, the Supreme Court held that ERISA § 204(g) prohibits a plan amendment which expands the categories of postretirement employment that trigger suspension of the payment of early retirement benefits already accrued. Citing *Lockheed Corp. v. Spink*,[31] the Court noted that the anti-cutback provision is crucial to ERISA's central objective of protecting employees' justified expectations of receiving benefits that they have been promised.

The provision relied upon prohibits plan amendments that have "the effect of . . . eliminating or reducing an early retirement benefit."[32] Focusing on whether the plan amendment had such an effect, the Court reasoned that although the statutory text is not as helpful as it might be, it is clear as a matter of common sense that a benefit had suffered. It cited Heinz's "reasonable reliance" on the plan's terms in planning his retirement and the amendment's effect of undercutting that reliance. In so ruling, the Court rejected the plan's urging of a technical reading which would apply the restriction only to amendments directly altering the monthly payment's nominal dollar amount and not to a suspension when the amount that would be paid is altered. The question framed by the Court was whether a new condition can be imposed after a benefit has accrued; its holding makes clear that the right to receive certain money on a certain date may not be limited by a new condition narrowing that right.[33]

Pre-emption under ERISA was the Court's focus in the June 21, 2004 decision, *AETNA Health, Inc., fka AETNA U.S. Healthcare Inc. et al. v. Davila,*[34] where respondents brought separate Texas state-court suits alleging that their health maintenance organizations (HMOs) had refused to cover certain medical services and proximately caused them injury.

In this consolidated case, two individuals had sued the HMOs for alleged failure to exercise ordinary care in the handling of coverage decisions, in violation of a duty imposed by the Texas Health Care Liability Act (THCLA).[35] Certiorari was granted to decide whether the individuals' causes of action were completely pre-empted by the "interlocking, interrelated, and interdependent remedial scheme" of ERISA.[36] The Supreme Court reversed the Court of Appeals in holding that such causes of action are completely pre-empted and, hence, removable from state to federal court.[37]

Noting that ERISA is a federal statute which completely pre-empts a state law cause-of-action, the Supreme Court opined that the purpose of that law is to provide a uniform regulatory regime "intended to ensure that employee benefit plan regulation is exclusively a federal concern."

The matter at hand, as reasoned by the Court, was an action to rectify wrongful benefit denials and did not arise independently of ERISA or the terms of the employee benefit plan. A benefit determination under ERISA is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan; that the determination is infused with medical judgments does not alter the result. The Court was careful to state that its decision does not implicate its holding in *Pegram v. Herdrich*,[38] to the effect that an HMO is not intended to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians. In the instant matter, the coverage decisions were pure eligibility decisions, a principle recognized by *Pegram*.[39] Those decisions were not made by treating physicians or their employees.

The Fifth Circuit had erred in its reliance upon the employees' assertion that involved here were tort, rather than contract, claims. Analyzing pre-emption based upon the label affixed to the action, the Supreme Court noted, would allow parties to evade ERISA's pre-emptive scope simply by labeling contract claims as claims for tortious breach of contract. And the fact that a state cause of action attempts to authorize remedies beyond those that ERISA § 502(a) authorizes does not put it outside the scope of ERISA's civil enforcement mechanism.[40] In addition, earlier decisions on pre-emption do not suggest that ERISA § 502(a)'s pre-emptive force is limited to state causes of action that precisely duplicate an ERISA section 502(a) claim.[41] Lastly, the Court rejected the theory that THCLA is a law regulating insurance that is saved from pre-emption by ERISA § 514(b)(2)(A). The Court cited its understanding that the ERISA provision is informed by the overpowering federal policy embodied in ERISA § 502(a), which is intended to create an exclusive federal remedy.[42]

The definition of a qualifying "participant" in a pension plan was addressed by the Court in its March 2, 2004 decision, *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*.[43] Yates was the sole shareholder and president of a professional corporation that maintained a profit sharing plan. From the plan's inception, at least one person other than Yates or his wife was a participant. The plan qualified for favorable tax treatment under Internal Revenue Code ("IRC") § 401. As required by the IRC,[44] and ERISA,[45] the plan contained an anti-alienation provision, entitled "Spendthrift Clause," which stated, in relevant part, that but for loans to participants, no benefit or interest available under the plan would be subject to assignment or alienation.

In December 1989, Yates borrowed $20,000 from another of his corporation's pension plans, which later merged into the plan, and failed to make any of the required monthly payments. In November 1996, however, he paid off the loan in full with the proceeds of the sale of his house. Three weeks later, Yates' creditors filed an involuntary petition against him under Chapter 7 of the Bankruptcy Code. Hendon, the Bankruptcy Trustee, filed a complaint against the plan and Yates, as plan trustee, asking the Bankruptcy Code to void the loan repayment.

The Bankruptcy Court granted Hendon summary judgment, determining that the repayment qualified as a preferential transfer under 11 U.S.C. § 547(b), which finding was not challenged on appeal. The Bankruptcy Court then held that the plan and Yates, as plan trustee, could not rely on the plan's anti-alienation provision to prevent Hendon from recovering the loan repayment for the bankruptcy estate. That holding was dictated by Sixth Circuit precedent, under which a self-employed owner of a pension plan's corporate sponsor could not "participate" as an "employee" under ERISA and therefore could not use ERISA's provisions to enforce the restriction on transfer of his beneficial interest in the plan.[46] The District Court and the Sixth Circuit affirmed on the same ground. The Sixth Circuit's determination that Yates was not a "participant" in the plan for ERISA purposes obviated the question whether, had Yates qualified as such a participant, his loan repayment would have been sheltered from the Bankruptcy Trustee's reach.

The Supreme Court, in reversing and remanding the case, held that the working owner of a business may qualify as a "participant" in a pension plan covered by ERISA. If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants. The working owner qualifies for the protections ERISA affords plan participants and is governed by ERISA's rights and remedies.

Because ERISA's definitions of "employee" and "participant" are uninformative, the Court looked to other ERISA provisions for instruction. The Court cited ERISA's "multiple textual indications" of Congress' intent that working owners qualify as plan participants. Further, ERISA's enactment in 1974 did not change the existing backdrop of IRC provisions permitting corporate shareholders, partners and sole proprietors to participate in tax-qualified pension plans. Rather, Congress' objective was to harmonize ERISA with those long-standing tax provisions. The Court ruled that Title I and Title IV of ERISA and related IRC provisions expressly contemplate the participation of working owners in covered benefit plans. In fact, under ERISA a working owner may wear two hats, i.e., he can be an employee entitled to participate in a plan and, at the same time, the employer who established the plan.[47]

The Court rejected the lower courts' position that a working owner may rank only as an "employer" and not also as an "employee" for purposes of ERISA-sheltered plan participation. It said that the Sixth Circuit's leading decision in point relied on an incorrect reading of a portion of a DOL regulation which states: "[T]he term 'employee benefit plan' [as used in Title I] shall not include any plan . . . under which no employees are participants"; "*[f]or purposes of this section*," "an individual and his or her spouse shall not be deemed to be employees with respect to a . . . business" they own. (Emphasis added.)[48] In common with other appellate courts that have held working owners do not qualify as participants in ERISA-governed plans, the Sixth Circuit apparently understood the regulation to provide a generally applicable definition of "employee," controlling for all Title I purposes. A Labor Department Advisory Opinion, however, interprets the regulation to mean that the statutory term "employee benefit plan" does not include a plan whose only participants are the owner and his or her spouse, but does include a plan that covers as participants one or more common-law employees, in addition to the self-employed individuals.[49]

The Sixth Circuit leading decision also mistakenly relied on ERISA's "anti-inurement" provision which states that plan assets shall not inure to the benefit of employers.[50] The Supreme Court said that correctly read, the provision does not preclude Title I coverage of working owners as plan participants, but demands only that plan assets be held to supply benefits to plan participants. Its purpose is to apply the law of trusts and discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets by employers and others. Those concerns are not implicated by paying benefits to working owners who participate on an equal basis with non-owner employees. In remanding the case, the Court ordered consideration of whether the November repayment became a portion of Yates' interest in the plan, excluded from his bankruptcy estate, and, if so, whether those monies are beyond the reach of the Bankruptcy Trustee's power to avoid and recover preferential transfers. The Court did not express an opinion as to whether Yates, in his handling of the loan repayments, engaged in conduct inconsistent with the anti-inurement provision, which issue was not addressed by the courts below.[51]

Endnotes

1. No. 02-749, 539 U.S. ___ (2003).
2. 298 F.3d 1030 (2002).
3. 411 U.S. 792 (1973). Under *McDonnell Douglas Corp. v. Green*, once a prima facie case is established, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for its employment action. Thereafter, the only remaining question is whether there can be produced sufficient evidence from which a jury could conclude that the stated reason for the action was, in fact, pretextual.
4. Liability in such a case depends on whether the protected trait actually motivated the employer's action.
5. Such policies can be deemed illegally discriminatory without evidence of the employer's subjective discrimination.
6. Such theory was premised upon the employer's refusal to rehire because it regarded the ex-employee as disabled and/or because of his record of disability. The Supreme Court found that the employer's proffer of its neutral no-rehire policy plainly satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire Hernandez. Therefore, the only remaining question before the Ninth Circuit was whether there was sufficient evidence from which a jury could conclude that the employment decision was based on disability despite the proffered explanation.
7. Justice Thomas delivered the opinion of the Court, in which all other Members joined, except Justice Souter, who took no part in the decision of the case, and Justice Breyer, who took no part in the consideration or decision.
8. No. 02-1080, 540 U.S. ___ (2004).
9. Under the ADEA, an employer shall not discriminate against a worker who is over 40, in favor of a younger worker.
10. The provision actually eliminated the company's obligation to provide benefits to subsequently retired employees, except as to then-current workers at least 50 years of age.
11. *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226 (1992).
12. 296 F.3d 466 (2002). Referencing 29 U.S.C. § 623(a)(1). The Circuit Court acknowledged that its ruling conflicted with earlier cases, but criticized those decisions for paying too much attention to the general language of Congress' ADEA findings. The Circuit Court also drew support from the EEOC's position in an interpretive regulation.
13. Justice Souter delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, Ginsburg and Breyer joined. Justice Scalia filed a dissenting opinion. Justice Thomas filed a dissenting opinion, in which Justice Kennedy joined.
14. Citing *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993).
15. 437 N.Y.S. 2d 309 (1st Dep't 1981), *aff'd*, 55 N.Y.2d 910 (1982).
16. No. 02-1205, 540 U.S. ___ (2004).
17. The original version of the statute now codified at Rev. Stat. § 1977, 42 U.S.C. § 1981, was enacted as section 1 of the Civil Rights Act of 1866, 14 Stat. 27. It was amended in minor respects in 1870 and recodified in 1874, *see Runyon v. McCrary*, 427 U.S. 160, 168–169, n.8 (1976), but its basic coverage did not change prior to 1991. As first enacted, section 1981 provided, in relevant part, that "all persons [within the jurisdiction of the United States] shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 14 Stat. 27. The Supreme Court subsequently held that that statutory right did not protect against harassing conduct after the formulation of the contract. In 1991, Congress responded to that limitation by adding a new subsection to section 1981 that defines the term "make and enforce contracts" to include the "termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981(b).
18. 28 U.S.C. § 1658(a).
19. 491 U.S. 164, 171 (1989).
20. Justice Stevens delivered the opinion for a unanimous Court.
21. No. 03-95, 540 U.S. ___ (2004).

22. The circumstances of Suders' arrest were noted by the Court. Suders had several times taken a computer skills exam which was a job requirement. Each time, her supervisors told her that she had failed. Suders ultimately came upon her exam papers in some drawers in the women's locker room and concluded that her supervisors had never forwarded the tests for grading. Viewing the tests as her property, Suders removed them. When the supervisors noticed that the tests were gone, they dusted the drawer with a powder that turns hands blue when touched and waited to see if the tests would be returned. When Suders returned the tests, her hands turned blue and her supervisors arrested her. Even after Suders tendered a written resignation, she was detained in an interrogation room and read her *Miranda* rights. Once she reiterated her intent to resign, she was released.
23. 78 Stat. 253, 42 U.S.C. §§ 2000e *et seq.*, App. 1, 12–13. Suders also alleged several other claims against the employer and her supervisors, individually, which were not at issue before the Court.
24. 524 U.S. 775 (1998).
25. 524 U.S. 742 (1998).
26. *Ellerth,* 524 U.S. at 758.
27. *Id.* at 762.
28. Ginsburg delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Souter and Breyer joined. Justice Thomas filed a dissenting opinion.
29. No. 02-891, 540 U.S. ___ (2004).
30. ERISA § 204(g), 29 U.S.C. § 1054(g).
31. 517 U.S. 882, 887 (1996).
32. 29 U.S.C. § 1054(g)(2).
33. Justice Souter delivered the opinion for a unanimous Court. Justice Breyer filed a concurring opinion, in which Chief Justice Rehnquist and Justices O'Connor and Ginsburg joined.
34. No. 02-1845, 540 U.S. ___ (2004).
35. Tex. Civ. Prac. & Rem. Code Ann. §§ 88.001–88.003 (2004 Supp. Pamphlet).
36. Citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).
37. Justice Thomas delivered the opinion for a unanimous Court. Justice Ginsburg filed a concurring opinion, in which Justice Breyer joined.
38. 530 U.S. 211 (2000).
39. *Id.* at 231–232.
40. *See, e.g., Pilot Life Ins. Co. v. Dedeuax*, 481 U.S. 41, 43 (1987).
41. *Citing Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).
42. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987).
43. No. 02-458, 540 U.S. ___ (2004).
44. 26 U.S.C. § 401(a)(13).
45. 29 U.S.C. § 1056(d).
46. *See SEC v. Johnston*, 143 F.3d 260 (1998); *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (1992).
47. *See* section 1301(b)(1) and 26 U.S.C. § 401(c)(4).
48. 29 C.F.R. § 2510.3-3.
49. Labor Department Advisory Opinion 99-04A.
50. 29 U.S.C. § 1103(c)(1).
51. Justice Ginsburg delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Souter and Breyer joined. Justices Scalia and Thomas each filed an opinion concurring in the judgment.

Elena Cacavas, an Administrative Law Judge at the New York State Public Employment Relations Board, is Secretary-Elect of the Section.

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Sometimes Sorry Just Ain't Good Enough[1]

By Deborah Volberg Pagnotta

"I'm sorry."

"I'm SORRY!"

"I'M sorry."

"I'm SO sorry."

In conflict resolution, apologizing can carry great weight or be as meaningless as a sneeze. As adversaries in any dispute move through conflict resolution, an apology may assume different forms and meanings, and obtain different results. This is particularly true in employment discrimination disputes, where the conflict frequently results from unintentionally offensive behavior which has led to charges of a hostile work environment. Potential plaintiffs will often voice to their (potential) lawyers: "I just want him to apologize!"

Unfortunately, this sincerely held desire typically evaporates as the resolution process progresses, particularly as it moves into litigation. First, very few lawyers will take on a matter where an apology is truly the sole remedy sought. Second, litigation is costly, and plaintiffs ultimately seek to recover those costs, necessarily in financial terms. Third, our civil legal system provides limited remedies, either injunctive or financial: no court can order a defendant to apologize to a plaintiff. Fourth, as litigation proceeds, the adversarial nature of our system generally ensures that parties become increasingly incensed at their opponent(s), rendering an apology at this point in the game financially valueless and emotionally meaningless.

So, an apology, to be effective in resolving a dispute, should take place as early as possible in the process, preferably well prior to commencement of litigation. (Once litigation starts, parties' agendas change and, in truth, lawyers rarely encourage a "mere" apology as the sole resolution of a lawsuit.) Even more important than the timing of an apology is its structure. Many factors undermine ability to apologize effectively: fear of legal consequences, loss of face, resentment, failure to understand why the other party is even upset, gender and other cultural differences. Frequently, the offenders "apologize" in a manner that further annoys the offendee and exacerbates the problem.

Doing It Wrong

I'm sorry you responded the way you did: In February 2003, North Carolina congressman Howard Coble remarked on radio that during World War II, Japanese-Americans were interned for their own safety: "We were at war. They [Japanese-Americans] were an endangered species . . . For many of these Japanese-Americans, it wasn't safe for them to be on the street." After Asian-American groups voiced their acute distress over these remarks, which appeared to be an *apologia* for the U.S.'s subsequently discredited actions, Coble released a written statement that "I regret that many Japanese . . . found my choice of words offensive because that was certainly not my intent." *Underlying message: I regret that these groups responded the way they did; I do not, however, regret my actual choice of words or what I said.*

"You say To-MAH-to, I say To-MAY-to" or **"Read my heart, not my lips":**

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."[2]

On January 7, 2003, Defense Secretary Donald Rumsfeld, responding to a reporter's question about the possibility of reinstating the draft, said he saw no need because the all-volunteer system works better: "Big categories were exempted—people that were in college, people that were teaching, people that were married. It varied from time to time, but there were all kinds of exemptions. *And what was left was sucked into the intake, trained for a period of months, and then went out, adding no value, no advantage, really to the United States* armed services over any sustained period of time because of the churning that took place, it took enormous amount of effort in terms of training, and then they were gone." (Emphasis added.)

Veterans' groups and some Congressmen expressed outrage. ("We are shocked, frankly, that you were apparently willing to dismiss the value of the service of millions of Americans, tens of thousands of whom gave their lives for their country in World War I, World War II, Korea and Vietnam."[3]) Rumsfeld, in a written apology, acknowledged his remarks on draftees were "not eloquently stated." But then he noted that "a few columnists and others . . . have suggested that those words were intended to mean that draftees added no value to the military. That is not true. *I did not say they added no value while they were serving*. They added great value. I was commenting on the loss of that value when

they left the service." He further said he had no intention of disparaging the service of draftees: "I always have had the highest respect for their service, and *I offer my full apology to any veteran who misinterpreted my remarks. . . .*"

I didn't actually say what you thought I said: Rumsfeld further used the flat-out denial: "It is painful for anyone, and certainly a public servant whose words are carried far and wide, to have a comment so unfortunately misinterpreted . . . [and] particularly troubling . . . that there are truly outstanding men and women in uniform . . . *who may believe that the Secretary of Defense would say or mean what some have written. I did not.* I would not." This type of apology can be very effective if, in fact, it is true. But it is not useful, and in fact harmful to credibility, where there is actual documentation of the hurtful words themselves, in black and white. This type of response is also known as "The Big Lie."[4] (Surely he wouldn't say that if it were not true!") It is akin to then-President Clinton's incorrect "I did NOT have sexual relations with that woman."

I'm sorry, but it really wasn't my fault: After then-President Clinton finally acknowledged that he had indeed had, and had falsely denied, a sexual relationship with Monica Lewinsky, he "apologized" in a manner that only exacerbated the situation:

> This afternoon . . . I testified before the Office of Independent Counsel and the grand jury. I answered their questions truthfully, including questions about my private life, *questions no American citizen would ever want to answer*. *Still*, I must take complete responsibility for all my actions, both public and private. . . . Indeed, I did have a relationship with Ms. Lewinsky that was not appropriate. In fact, it was wrong. It constituted a critical lapse in judgment and a personal failure on my part for which I am solely and completely responsible. *But* I told the grand jury today and I say to you now that *at no time did I ask anyone to lie, to hide or destroy evidence or to take any other unlawful action*. . . . I misled people, including even my wife. I deeply regret that. I can only tell you I was motivated by many factors. . . . *It is time to stop the pursuit of personal destruction and the prying into private lives* and get on with our national life. Our country has been distracted by this matter for too long, and *I take my responsibility for my part in all of this. That is all I can do. . . .* (Emphasis added.)

This apology is strewn with "weasel words."[5]

I'm sorry my actions might have been inappropriate, but they were consistent with our then-effective policies which we are now revising: Cardinal Bernard Law presided over the Archdiocese of Boston over many years during which extraordinary and horrific allegations of sexual abuse by priests have now been made. Criminal prosecutions soon underscored the seriousness and truthfulness of the allegations. At the outset of the burgeoning scandal, on January 9, 2002, Cardinal Law provided only an exculpatory apology, which did nothing to stem the outcry:

- "While [the open and public discussion of sexual abuse] . . . is often painful, it has allowed us to address the issue more directly. Only in this way can all of us be more alert to its dangers, protect potential victims. . . . *Fault lies in many places, not just with the priests. All of us, including* ***family members****, should have been more alert*." (This, of course, infuriated family members.)

"I promulgated [in January 1993] a [relevant] policy . . . all priest personnel records were reviewed in light of this policy. In those instances in which a charge of abuse had not been processed earlier with the rigor of our present policy, the case was re-opened, and the policy followed. I am aided in such cases by a priest-delegate and by an interdisciplinary review board that examines each case and makes a recommendation to me. This review board includes the mother of a victim, another parent, a clinical social worker, a clinical psychologist, a psychotherapist, a retired justice of the Supreme Judicial Court, a priest, a civil attorney and, usually, a canon lawyer." ("So, it wasn't just my fault.")

- While our policy has been effective, we continue to refine our procedures. . . . In August [2001] I directed that our policy be reviewed. In September [2001] a panel of persons with special expertise began the review process. There just wasn't a problem, but if there was, I took action by assigning "experts." If anything is wrong now, it is their fault.
- However much I regret having assigned him, it is important to recall that John Geoghan was never assigned by me to a parish without psychiatric or medical assessments indicating that such assignments were appropriate. That is, it really was not my fault, but the fault of the doctors. It is also important to state that it was I who removed him from parish ministry, that I then placed him on retirement, and that I finally asked the Holy See to dismiss him from priesthood. . . . I was the one who actually solved the problem!

- That some should criticize my earlier decisions I can easily understand. Before God, however, it was not then, nor is it my intent now, to protect a priest accused of misconduct against minors at the expense of those whom he is ordained to serve. Judgments were made regarding the assignment of John Geoghan which, in retrospect, were tragically incorrect. These judgments were, however, made in good faith and in reliance upon psychiatric assessments and medical opinions that such assignments were safe and reasonable." This, of course, is the classic Nixonian post-Watergate syntax of "mistakes were made": somebody made a mistake but that wouldn't necessarily be me.

- "Before God, we are trying to do the best we can. In your kindness, pray also for me." This was the last paragraph of the statement. *Unfortunately, this—his final plea—can be interpreted as "I am doing my best, so leave me alone. I am having a hard time, too, so please pray for me, I need it. Me, me, me, me."*

I'm sorry, I'm sorry, I'm really, really sorry!: On Thursday December 5, 2002, U.S. Senator Trent Lott, then-Senate GOP leader, at a 100th birthday party for Sen. Strom Thurmond, said that Mississippians were proud to have voted for Thurmond in 1948 when he headed the pro-segregationist Dixiecrat ticket "and if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years either." A bipartisan firestorm followed his remarks.

- On Monday December 9, he issued a short written apology: "A poor choice of words conveyed to some the impression that I embrace the discarded politics of the past.[6] Nothing could be further from the truth, and I apologize to anyone who was offended by my statement."

- On Wednesday, December 11, as criticism continued to grow, he gave several interviews in which he said his "terrible" and insensitive" remarks were meant only as a gesture of affection for Thurmond.

- On Friday, December 13, he said "I have learned from the mistakes of the past. I ask and am asking for forbearance and forgiveness. . . . I'm not about to resign for an accusation for something I'm not."

- On December 16, he appeared on Black Entertainment Television, and denied he was a racist: "To be a racist, you have to feel superior . . . I don't feel superior to you at all. [The] important thing is to recognize the hurt that I caused and ask for forgiveness and find a way to turn this into positive thing, and try to make amends for what I've said and for what others have said and done over the years." "I'm trying to find a way to deal with the understandable hurt that I have caused. You can . . . say it was innocent, but it was insensitive at the very least and repugnant, frankly."

- On December 20, Lott announced his resignation as Senate majority leader.

I'm sorry to everybody and anybody who may have been offended, although I don't understand WHY they were offended, and obviously they have no sense of humor: In January 2003, MTV nearly sparked an international incident by parodying the Mahatma Gandhi, a revered Indian spiritual leader, on an animated series (Clone High, USA). The then-new program presented a cartoon version of Gandhi as a teenager with an affinity for long earrings, rap music, junk food and wild partying. After a crowd in India demonstrated against the depiction, MTV issued an apology: "MTV U.S. apologizes if we have offended the people of India and the memory of Mahatma Gandhi. We have the utmost respect for Gandhi and all that he represents as a revered Indian leader and one of the most important figures in world history. . . . We recognize and respect that various cultures may view this programming differently, and we regret any offence taken by the content in the show." (Interestingly, the media in India characterized this apology as "unconditional.")

In 2002, basketball player and L.A. Laker Shaquille O'Neal outraged the Asian-American community when he trash-talked Houston Rockets' Yao Ming: "Tell Yao Ming, ching-chong-yang-wah-ah-so." (He made the comment on June 28, 2002, and it was replayed several times on radio in December 2002.) After an advocacy group for Chinese-Americans protested, O'Neal said, "I said it jokingly, so this guy was just trying to stir something up that's not there. He's just somebody who doesn't have a sense of humor, like I do. . . . I mean, if I was the first one to do it, and the only one to do it, I could see what they're talking about. But if I offended anybody, I apologize." When the furor continued, O'Neal attempted another apology: "Yao Ming is my brother. The Asian people are my brothers. I grew up an Army kid. I grew up around Asians, around whites, around browns. [This also falls into the category of "my best friend is [name the category] and therefore I couldn't be racist/agist/etc.] It was a bad joke. Don't try to make a racial war out of it." The NBA issued a statement stating O'Neal's comments were "insensitive, although not intentionally mean-spirited," and therefore no further action was necessary.

Doing It Right

Myriad factors may impede or impair an offender's ability to apologize, including cultural differences such as language, gender and status. However, it is often possible to craft an apology which transcends these differences. Legal concerns may also affect the decision to apologize, but this article addresses those situations in which apologies are legally viable.

Here's how to do it. To be effective, an apology should: be made swiftly, with no foot-dragging; focus on the actual speech or action which was offensive; refer to the offensive act itself, not a *de minimis*, peripheral act; recognize the responsibility of the offender; acknowledge the hurt of the recipient of the behavior (but do not discount the pain); agree the act was wrong; explain why the offender did what she or he did; be in the first person (do not issue a written statement, or have your office issue a statement on your behalf—it diminishes the sincerity and immediacy of the apology); and actually apologize.

In 1995, then-N.Y. Senator Alfonse D'Amato on a radio show used an exaggeratedly heavy accent associated with Japanese movie stereotypes to mock Japanese-American Judge Lance Ito, then presiding over the O.J. Simpson trial. The next day, after an initial outcry, D'Amato issued a short written, unsuccessful "apology" which only created more controversy: "If I offended anyone, I'm sorry. I was making fun of the pomposity of the judge and the manner in which he's dragging the trial out."

The following day, the Senator did it right. On the Senate floor, he personally read into the public record[7]: "I'm here . . . to give a statement as it relates to that episode. It was a sorry episode. As an Italian-American, I have a special responsibility to be sensitive to ethnic stereotypes. I fully recognize the insensitivity of my remarks about Judge Ito. My remarks were totally wrong and inappropriate. I know better. What I did was a poor attempt at humor. I am deeply sorry for the pain that I have caused Judge Ito and others. I offer my sincere apologies."[8]

Epilogue: Apologies, sincere as they may be, do not always offer prophylaxis against future accountability. Senator D'Amato (who became teary-eyed when senatorial race opponent Bob Abrams[9] called him a "fascist" in 1992) in 1998 called his opponent, Chuck Schumer, a "putzhead."[10] Schumer won the election.

Endnotes

1. Thanks to Joe Mathews, The Thelma Records Label.
2. *Through the Looking Glass*, Lewis B. Carroll.
3. Letter signed by Senators Tom Daschle (South Dakota) and John Kerry (Massachusetts) and Rep. Lane Evans (Illinois).
4. The big lie is defined as "the intentional distortion of the truth, especially for political or official purposes." Adolf Hitler wrote that "[t]he great mass of people will more easily fall victim to a big lie than to a small one." *Mein Kampf*, vol. 1, ch. 10 (1925).
5. Weasel words: If your information is less than conclusive, acknowledge that either in summary or by choosing another argument. But don't undercut your argument with weasel words—empty palliatives such as "to a certain degree," "it may seem likely that," or "in some cases." If your points are weak, they need no additional burdens. Note how much stronger the following become as the bracketed words drop out:

   > [It may even be, as] some experts have hinted that Thomas More was [somewhat] suicidal [anyway].
   >
   > Josiah Royce was [to some extent] the Hegel of American philosophy.

   Weasel words dilute your thought, and hence your argument. *See* Ronald Walters and T.H. Kern, "How To Eschew Weasel Words. . . . and other offenses against language and logic: a manual for students," *at* http://www.collegecampus.com/writing/eschew5.html#weasel.
6. This, of course, is a version of the "I say what I mean, I mean what I say" from Alice in Wonderland: "Then you should say what you mean," the March Hare went on. "I do," Alice hastily replied; "at least—at least I mean what I say—that's the same thing, you know." "Not the same thing a bit!" said the Hatter. "You might just as well say that 'I see what I eat' is the same thing as 'I eat what I see!" "You might just as well say," added the March Hare, "that 'I like what I get' is the same thing as 'I get what I like!'" You might just as well say," added the Dormouse, who seemed to be talking in his sleep, "that 'I breathe when I sleep' is the same thing as 'I sleep when I breathe!'"
7. N.Y. Times, April 7, 1995, p. A1.
8. More recently, Arnold Schwartzenegger during the recall election in California was dogged by rumors and reporting of sexually offensive behavior occurring over many years. Now-Governor Schwartzenegger effectively dodged the bullet with an apology that met the criteria above-noted. Within only a few days of the allegations being reported, he addressed a rally where he acknowledged "where there is smoke there is fire. . . . Yes, I have behaved badly some times, yes it is true that I was on rowdy movie sets. . . . I have done things I thought were playful that now I recognize that I have offended people. I want to say to them that I am deeply sorry about that, and I apologize because that is not what I was trying to do." He added, "When I am governor I will prove to women that I will be a champion for women. I hope you will give me the chance to prove this."
9. "Bob Abrams would probably be a United States Senator today if he hadn't muttered the word *fascist* when he had run out of other adjectives to describe Al D'Amato in the final stretch of the 1992 New York Senate campaign." Lawrence O'Donnell Jr., "Open Mike Nightmare," New York Metro.com, http://www.newyorkmetro. com/nymetro/news/politics/ columns/nationalinterest /3791/. "If the recent history of New York Senate races is any guide, elections have a tendency to boil down to one oversimplification." In 1998, Senator Chuck Schumer won after it was revealed that incumbent Al D'Amato had called him a "putzhead" in a closed-door meeting. In 1992, Mr. D'Amato won re-election when Bob Abrams called him a "fascist." Snyder, Gabriel, *The Murky Steve Emerson Surfaces in the Senate Race*, N.Y. Observer, November 5, 2000.
10. Putz means penis in Yiddish, but the term "putzhead" is frequently used rather affectionately to mean fool or idiot.

NYSBA Ethics Summary—2003 Opinions

By Ellen M. Mitchell

The following is a brief summary of the ethics opinions issued by the New York State Bar Association Committee on Professional Ethics during 2003.

Opinion 758 (12/10/02)

Code: DR 9-102(d)(8)

Question: May the items listed in D 9-102(D)(8)—"checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips"—be retained by the attorney in electronic form (rather than in the form of paper copies) for the designated seven-year period?

Opinion: The items listed in DR 9-102(D)(8)—"checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips"—should be retained by the attorney in their original form. Where these items are returned to the lawyer in paper form by the lawyer's bank in the ordinary course of business, the lawyer should retain them in that form. However, the lawyer is not required to undertake extraordinary effort or incur extra expense to obtain these items in paper form.

Related Cases: N.Y. State 680 (1996).

Opinion 759 (12/10/02)

Code: DR 9-102

Question: May an attorney use an automated teller machine ("ATM") for the purpose of making deposits into a special account required by DR 9-102(B)?

Opinion: An attorney may use an ATM for the purpose of making deposits into a special account if the attorney carefully reviews the transaction and otherwise complies with the detailed requirements of DR 9-102. We note that the lawyer may not use an ATM for withdrawals from a special account.

Related Cases: 22 N.Y.C.R.R. § 603.15 (1st Dep't); 22 N.Y.C.R.R. § 691.12 (2d Dep't); N.Y. State 680 (1996); N.Y. State 758 (2002); *Matter of Heiner*, 1 Cal. State Bar Ct. Rptr. 301, 316–317 (Cal. Bar Ct. 1990); Vapneck, Tuft, Peck and Weiner, *California Practice Guide, Professional Responsibility*, p. 9:246–247 (2001); Vecchione, "Working with Client's Trust Accounts," www.state.ma.us/obcbbo/ctatips.htm

Opinion 760 (1/27/03)

Code: DR 1-102(A)(1), (4), (5), (6); DR 9-102(B)(4), (C), (C)(1), (D); EC 7-7

Question: May a lawyer's retainer agreement contain a power of attorney authorizing the lawyer to sign a general release and stipulation of discontinuance for the client upon settling the case, or to endorse a settlement check on behalf of the client? May an attorney use a power of attorney executed separately by the client in favor of the lawyer to sign a settlement agreement or to endorse a settlement check made out jointly to the lawyer and the client or solely to the client?

Opinion: The Code of Professional Responsibility does not expressly prohibit a lawyer from obtaining or using a power of attorney from the client authorizing the lawyer to perform a variety of acts on behalf of the client. However, any power of attorney granted to the lawyer for settlement purposes, whether general or specific, must be revocable. We are not aware of any cases in New York holding that a revocable power of attorney authorizing a lawyer to sign a settlement check would be per se unethical.

A lawyer may obtain and use a revocable power of attorney, either in a stand-alone document or as part of the lawyer's retainer agreement, that authorizes the lawyer to settle a case and to endorse the client's name to the settlement check, provided that the lawyer makes full disclosure as to the effect of such power of attorney and provided that (i) the lawyer may only settle a case on terms indicated in advance by the client or if the settlement is submitted to the client for approval, and (ii) a lawyer who endorses a settlement check on behalf of the client must promptly comply with the notice, record keeping and disbursement requirement of DR 9-102.

Related Cases: N.Y. State 746 (2001); American Law Institute, *Restatement (Third) of the Law Governing Lawyers* § 22, comment "c," "d"; 22 N.Y.C.R.R. Part 1215; 22 N.Y.C.R.R. § 202.19 (b)(3); N.Y.C.R.R. § 202.16(f)(2)(iii) and (3); 22 N.Y.C.R.R. § 600.17 (e) (1st Dep't); 22 N.Y.C.R.R. § 670.4(a) (2d Dep't); 22 N.Y.C.R.R. § 800.24-b (3d Dep't); Federal Rules of Civil Procedure 16(a); *Hayes v. Eagle-Picher Indus. Inc.*, 513 F.2d 892 (10th Cir. 1975); Model Rule 1.2, com. 5; *Rohrbacher v. Bancohio Nat'l Bank*, 171 A.D.2d 533, 567 N.Y.S.2d 431 (1st Dep't 1991); *In re Stanley S. Hansen*, 108 A.D.2d 206, 488 N.Y.S.2d 742 (2d Dep't 1985); *Hafter*

v. Farkas, 498 F.2d 587 (2d Cir. 1974); 11 N.Y.C.R.R. § 216.9(a); N.Y. Dep't of Insurance, N.Y. General Counsel Op. 4-1-2002; Wolfram, *Modern Legal Ethics*, Sec. 4.8, fn. 21; *In re Theodore L. Malatesta*, 124 A.D.2d 62, 511 N.Y.S.2d 246 (1st Dep't 1987).

Opinion 761 (2/12/03)

Code: DR 4-101(A), (B); DR 5-105(A), (C), (D); DR 5-107(A), (B); DR 5-108 (A); DR 7-101(A)

Question: (1) Where a lawyer represents or previously represented an individual in applying for legal permanent resident status for his wife, which has not been granted, is it ethically permissible to represent the wife in obtaining such status based on the current or former client's alleged spousal abuse? (2) Can a lawyer ethically represent the husband and wife jointly or the wife alone in obtaining legal permanent resident status for the wife where her spouse must file the petition?

Opinion: Regarding question (1), the lawyer's ability to represent the wife of a current or former client does not turn on whether it was a joint representation. With respect to current clients, DR 5-105(A) provides that "a lawyer shall decline proffered employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent provided in DR 5-105(C)." "Differing interests" is defined in the definitions section of the Code.

Because the interests of the husband and wife are now clearly differing, we do not believe that the inquirer can continue with the representation of either spouse or take on the wife as a new client. The allegations that the wife will be required to make in the self-petition regarding the other spouse's conduct would be prejudicial to the husband's interest. The result is the same if only the husband is the current client of the lawyer. The interest of the two clients would clearly be differing within the meaning of the Code.

DR 5-105(C) permits a lawyer to represent multiple clients with differing interest "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." This is not a practical solution in this situation.

For reasons similar to those applicable to current clients, the lawyer could not represent the wife in filing a self-petition even where the husband is a former client. *See* DR 5-108. The attorney could not ethically undertake representation of the wife with respect to a self-petition because her interests in that petition are naturally adverse to those of her husband, the former client. And because the lawyer could not represent the wife where the husband is a current or former client, all other lawyers at the firm are similarly disqualified.

With regard to question (2), it is the Committee's opinion that the law firm could structure the relationship so that the wife is considered the sole client from the outset with respect to the INS petition for legal permanent residence status. Where the lawyer is approached initially by the husband/petitioning spouse, the lawyer must make clear that the wife, and not the husband, is the client.

In sum, a lawyer who has undertaken to represent a husband in obtaining legal permanent residency status for his wife may not thereafter represent the wife in seeking residency status based on alleged spousal abuse. This conflict could be avoided by structuring the engagement as a representation of the wife only, notwithstanding that the husband is the petitioner and may pay for the legal services. Alternatively, the lawyer could represent the wife in seeking permanent residency based on the alleged abuse of her husband if the original engagement was structured as a joint representation with the parties' agreement that not all information acquired during the course of the representation would be shared with both co-clients, and if the parties provided a prospective conflict waiver that contemplated the situation presented and permitted the lawyer to withdraw from the representation of the husband and to continue to represent the wife.

Related Cases: *Restatement (Third) of the Law Governing Lawyers* §§ 14, 75, 122, 128, 130 (2002); *In re H. Children*, 160 Misc. 2d 298, 608 N.Y.S.2d 784 (1994); Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 2.5 (3d ed. 2001); N.Y. State 721 (1999); ABA Formal Op. 372 (1993).

Opinion 762 (3/5/03)

Code: DR 1-102; DR 1-104; DR 1-105; DR 1-106; DR 1-107; DR 2-101(E), (G), (L); DR 2-102(A), (D); DR 2-105(A); DR 2-106(A), (C) (2); DR 2-111; DR 3-102(A); DR 4-101(B), (D); DR 5-102(B); DR 5-105(E); DR 5-108(C); DR 6-101; DR 7-102(B)(1); DR 9-102(B), (D); EC 1-8; EC 2-19; EC 4-5

Question: To what extent must a New York attorney or the attorney's law firm supervise associates, partners and non-lawyers who are admitted to practice in foreign jurisdictions but not in New York?

Opinion: The New York Code specifically addresses which lawyers are subject to the disciplinary authority of New York. *See* DR 1-105. It does not, however, provide a similar rule for "law firms." Although the First

Department has adopted such a rule, none of the other Departments in the state have done so. In the absence of a clear rule, the reach of the New York Code as it applies to law firms is uncertain. At a minimum, however, the Disciplinary Rules that are specifically applicable to law firms under the New York Code apply to firms with a New York office and at least one New York lawyer affiliated with the firm in that office. For purposes of this opinion we refer to such a firm as a "New York firm"; it follows that DR 1-104 applies to a New York firm.

Both DR 1-104(A) and (B) provide that the law firm and lawyers with management or supervisory responsibility in the law firm must make "reasonable efforts" to ensure that other lawyers in the firm conform to the disciplinary rules. While what constitutes "reasonable efforts" will vary from firm to firm, some general standards are applicable. First, the firm should adopt procedures to deal with ethical questions and problems. EC 1-8 suggests that these measures may include "informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior lawyer or special committee, and continuing legal education in professional ethics." What constitutes reasonable efforts will depend, in part, on the size of the firm and its structure. Informal supervision may be sufficient in a small, one-office firm, but detailed written policies and procedures may be necessary in a multi-office firm. *See* ABA Model Rule 5.1 cmt. [2]. The locus for confidential referral of ethical questions confronting a New York lawyer should be another New York lawyer. Other ways in which a firm may carry out its responsibilities include adopting internal standards of conduct or an ethics manual, seeking opinions of bar ethics committees, or consulting outside experts. *See generally* New York Code of Professional Responsibility: Opinions, Commentary & Caselaw bk. xi at 20-22 (Mary C. Daly ed. 2002); Roy D. Simon, Jr., Simon's New York Code of Professional Responsibility Annotated 50-52 (2003).

In addition to having procedures in place to respond to ethical inquiries or lapses, the firm has an obligation to respond to any ethical issue that comes to its attention. While the firm does not need to monitor every aspect of every representation undertaken by one of its lawyers, it does have a duty to make inquiries where it has reason to believe there is a likelihood that there may be ethical problems.

DR 1-104 (C) requires a law firm to adequately supervise, as appropriate, the work of partners, associates, and non-lawyers who work at the firm. This provision imposes obligations on the New York firm with respect to affiliated lawyers licensed only in foreign countries who are, for this purpose, "non-lawyers."

DR 4-101(B) imposes on lawyers that obligation to preserve the confidences and secrets of a client, requiring that a lawyer "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client . . ." *See also* EC 4-5.

Non-lawyers and lawyers licensed in foreign countries whose confidentiality rules may differ need to be sensitized to the obligation not to disclose or use a client confidence or secret.

The supervision mandated by DR 1-104(C) requires reasonable efforts to ensure that adherence to the disciplinary rules of a foreign country by a lawyer licensed in a foreign country does not expose the New York firm or its New York lawyers to the possibility of violating the New York Code.

In sum, New York lawyers with management or supervisory authority in law firms with New York offices, as well as the firms themselves, are required to make reasonable efforts to ensure that lawyers subject to the New York Code who are affiliated with the firm in such offices comply with the New York Code. A New York firm has broad supervisory responsibility under DR 1-104(C) with respect to non-lawyers, especially in ensuring that compliance with the ethical rules of a foreign jurisdiction does not compromise the firm's adherence to the New York Code.

Related Cases: N.Y. State 658 (1994); 22 N.Y.C.R.R. § 137.1(b)(7), 603.1, 603.2(b), 691.1, 806.1, 1022, 1215.2(4); N.Y. State 542 (1982); N.Y. State 646; ABA 423 (2001); Detler F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 Georgetown J. Legal Ethics 677 (2000); ABA Model Rule 5.1(a); New York Code of Professional Responsibility: Opinions, commentary and caselaw bk. xi at 20-22 (Mary C. Daly ed. 2002); Roy D. Simon, Jr., *Simon's New York Code of Professional Responsibility Annotated* 50-52 (2003); *Restatement (Third) of the Law Governing Lawyers* § 11(1), 60; James Altman, *An Associate's Duty to Supervise Non-Lawyers*, N.Y.C.J. Oct. 11, 2002 at 28; D.C. Op. 278 (1998).

Opinion 763 (5/15/05) (22-01)

Code: DR 2-106(A); 2-106(B); 2-106(C)(2)(b); 2-106(D); 2-106(E); 4-101; 9-102(A); 9-102(B)(4); EC 2-17; 2-19; 2-20; 2-21; 2-23; 9-5

Question: May an attorney whose practice includes debt collection matters (1) accept payment by credit card on behalf of a client from the client's debtors; (2) transfer the payment collected into an IOLA or other trust account to be held until a netted payment is remitted to the client; (3) deduct from the trust account an agreed upon sum as the attorney's legal fee, together

with all related disbursements except for the credit card service fee; (4) remit the netted payment to the client; and (5) pay all applicable credit card service fees from the attorney's own operating account.

Opinion: In N.Y. State 362 (1974) and N.Y. State 117 (1969), as well as N.Y. State 399 (1975), this Committee answered in the affirmative the question of whether a lawyer could participate in a bank charge card system where the agreement with the bank permits the lawyer's clients to pay for legal services by credit card. Certain minimal safeguards, however, were to be incorporated into any such plan.

In the present inquiry, and unlike the situation posed in our prior opinions, the monies to be received by the lawyer from credit card payments are from third persons, not clients directly, and are primarily the property of the creditor-client. The payments only partially comprise the lawyer's legal fee. For this reason, the funds must be placed in the lawyer's trust account (or an IOLA account, if the amount of funds received from each transaction is small and/or is to be held for a short period of time).

A law firm whose practice includes debt collection matters (1) may accept payment by credit card on behalf of a client from a client's debtors; (2) should transfer any payments collected by the law firm into an IOLA or other trust account where the payment is to be held until the netted amount can be remitted to the client; (3) may deduct from the trust account an agreed upon sum as the law firm's legal fee, together with all disbursements, so long as the fee is not excessive or in dispute; (4) may not withdraw any amount on account of fees that are disputed, and must promptly forward to the client the balance owing to the client; (5) may deduct the costs and expenses associated with the credit card service from the payment to be forwarded if agreed to by the client; otherwise, the lawyer must pay such expenses out of the firm's fees or its operating account; and (6) should promptly remit the netted payment to the client.

Depending on the nature of the fee arrangement with the client, the law firm should also comply with all requirements of DR 2-106(E) if the fee is contingent, or, alternatively, comply, if applicable, with 22 N.Y.C.R.R. § 1215.1. In the event of any dispute regarding the fee, the law firm should attempt to resolve all disputes amicably and promptly and, if applicable, should comply with the fee dispute resolution program set forth in 22 N.Y.C.R.R. Part 137.

Related Cases: Utah State Bar Op. 97-06; So. Carolina Bar Ethics Advisory Opinion 98-08; Colo. Bar Ass'n Opinion 97/98-01; N.Y. Jud. Law § 497.

Opinion 764 (7/22/03)

Code: DR 2-106 (A); DR 5-101(A); DR 5-107 (A)(2); DR 7-101(A)(3); DR 9-102(A); EC 2-21

Question: May an attorney accept an earnings credit against bank charges based upon balances held in the attorney's IOLA account?

Opinion: A bank is developing a package of banking products designed specifically for attorneys that will include an "earnings credit" based on balances held in an attorney's operating accounts. Subject to this committee's approval, the earnings credit will also be given with respect to balances maintained in an attorney's IOLA account, but not with respect to non-IOLA attorney trust accounts. The earnings credit would only be applied to reduce or eliminate monthly bank fees otherwise chargeable to the attorney, and would not result in a cash payment or bank credit over and above the monthly bank fees. Because the bank would, in addition, waive the monthly maintenance fees associated with the IOLA account, the IOLA Fund would receive more money from IOLA accounts maintained by attorneys who have accepted the earnings credits than from other IOLA accounts.

IOLA accounts are unsegregated interest-bearing transactions accounts with check-writing privileges. The interest on IOLA accounts is used to help finance legal services for the poor. Pursuant to New York Judiciary Law § 497(4)(c)(i) and (ii), "qualified funds" that are not deposited in an unsegregated IOLA account must be deposited in a segregated interest-bearing attorney trust account for the client's benefit, or in an unsegregated interest-bearing attorney trust account provided the bank or depositing lawyer can separately compute and pay to each client the interest earned by such client's funds.

"Qualified funds" are defined by Judiciary Law § 497(2). The qualified funds determination "guideline" authorized by § 497(2) is found at 21 N.Y.C.R.R. § 7000.10, and provides that where the deposit is not expected to "generate at least $150 in interest or such larger sum as the attorney or law firm in the exercise of his professional judgment deems may be equivalent to the cost of administering a separate account," the attorney "may choose to place these funds in a pooled IOLA account."

There are a number of ethical concerns which touch upon the question presented, some of which have been brought to our attention by the inquirer. Each concern arises from the same basic dynamic—namely, the statute and regulations governing IOLA accounts give an attorney considerable discretion in determining whether to deposit client funds into an account that

pays interest to the client or into an account that pays interest to the IOLA funds, and where the anticipated interest would be less than $150, such discretion is arguably beyond all review. Whether or not the IOLA fund benefits from the bank's proposed special program for attorneys, both the bank and the attorney would benefit whenever an attorney exercised his or her discretion in favor of a deposit into an IOLA account. The bank would benefit from paying a lower interest rate and, more importantly, the lawyer would benefit from paying lower monthly bank charges.

Notwithstanding, this arrangement would not, in our opinion, run afoul of the prohibition against charging or collecting "an illegal or excessive fee" set forth in DR 2-106(A) as the earnings credit is not a client generated "fee." Similarly, the bar of DR 9-102(A) against misappropriation of client "funds" or client "property" does not apply, as the proposed earnings credit is neither. Nor do we believe it is necessary to decide whether the determination to deposit client funds in an unsegregated IOLA account or in a segregated attorney trust account (i) is or is not "the exercise of professional judgment" within the meaning of DR 5-101(A), or might "prejudice or damage the client" within the meaning of DR 7-101(A)(3). Rather, the disposition of this inquiry is clearly governed by DR 50-107(A)(2) and EC 2-21. Therefore, as contemplated by DR 5-107(A), provided the client has consented to the arrangement after full disclosure, an attorney may accept an earnings credit against bank charges based upon balances held in the attorney's IOLA account.

Related Cases: Judiciary Law § 497(2), (4); N.Y. State 532 (1981); N.Y. State 582 (1987); N.Y. State 570 (1985); N.Y. State 320 (1973); N.Y. State 461 (1977); N.Y. State 576 (1986); N.Y. State 351 (1974); N.Y. State 667 (1994); N.Y. State 461; N.Y. State 667.

Opinion 765 (7/22/03)

Code: DR 1-106; DR 1-107; DR 1-107(A), (B), (C), (D); DR 2-103(B)(1); DR 5-101(A); EC 1-14; EC 1-16

Question:

1. Under the amendments of the New York Code of Professional Responsibility (the "Code") effective November 1, 2001, may a lawyer enter into and maintain a contractual relationship with an insurance or securities agent/broker which involves the law firm and the insurance/securities agent/broker referring clients to each other?

2. If this were merely a reciprocal referral rather than a contractual relationship would the answer be any different?

Opinion 1:

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001. The amendment added two new rules to the Code, DR 1-106 and DR 1-107, and made conforming changes to a number of other rules. We first addressed DR 1-106 in our Opinions 752, 753, and 755. This opinion is our first to deal at length with DR 1-107.

Contracts under DR 1-107(A) can include reciprocal referral arrangements (EC 1-16), as well as sharing of costs, (DR 1-107[D]), joint advertising (DR 2-101[C][3]), and joint premises (EC 1-14). The relationship may not, however, include the sharing of fees. DR 1-107(A)(2).

A lawyer who wishes to enter into a DR 1-107(A) contract with a non-legal professional may do so only in accordance with the rule. By the terms of DR 1-107(C), if an agreement with a non-legal professional is limited to reciprocal referrals—and does not include, for example, joint advertising, sharing of premises and expenses, and the like—DR 1-107(A) "shall not apply." The implication of DR 1-107(C) is that "relationships consisting solely of non-exclusive reciprocal referral agreements or understandings" between lawyers and non-legal professionals are carved out of the regulation of DR 1-107 entirely and are left to other rules. The other relevant rule is DR 2-103(B).

The language of DR 1-107(C)—that DR 1-107(A) shall not apply to relationships consisting "solely" of non-exclusive referral agreements—suggests that the assumption was that such relationships would be permitted but for the restrictions in DR 1-107(A). In addition, the careful distinction between the language of DR 1-107(A) permitting "contractual relationships" and the language of DR 1-107(C) exempting "agreements or understandings" suggested that the drafters contemplated that the "agreements or understandings" were at best of limited value.

In short, prohibiting non-exclusive reciprocal referral arrangements—relationships, in the words of the Special Committee, "wherein two businesses mutually agree that they can serve their clients, and benefit themselves, by focusing their referrals on each other to the extent consistent with their professional obligations to their respective clients"—would clearly not be consistent with the provisions of DR 1-107, at least with respect to the professions dealt with in that rule (to date, architects, accountants, engineers, land surveyors and certified social workers).

Securities brokers and insurance agents are not on that list. There is, however, no textual basis for restricting non-exclusive reciprocal referral arrangements to the listed professions. We likewise see little policy basis

for limiting a lawyer's mutual referral of business to architects, engineers, accountants, land surveyors and certified social workers.

Based on these considerations, we conclude that a non-exclusive mutual referral arrangement between a lawyer and an insurance agent or securities broker is permitted by DR 1-107(C) and DR 2-103(B)(1). We note that securities brokers and insurance agents both are educated service providers; are commonly involved in legal matters and lawyers have long experience working with them; and are referred to in the special committee report that led to the adoption of the rule. This relationship cannot, however, go beyond a relatively loose reciprocal referral arrangement to include joint advertising or sharing of expenses, for these closer relationships are reserved to professions on the Appellate Division list.

In sum, a lawyer or law firm may enter into a non-exclusive reciprocal referral agreement or understanding with a securities broker or insurance agent and, with appropriate disclosure and client consent under DR 5-101(A), can refer clients to the securities broker or insurance agent.

Related Cases: N.Y. State 741 (2001); N.Y. State 566 (1984), Nassau County 97-8; MacCrate Report at 3347-48; ABA Model Rules 7.2(b)(4); N.Y. State 753; Section 1205.3 of the Joint Appellate Division Rules; Section 1205.4 of the Joint Appellate Division Rules.

Opinion 766 (9/10/03)

Code: DR 2-106; DR 9-102(C)

Question: What is a lawyer's obligation to a former client who requests the files that were generated in the course of the prior representation?

Opinion: As a matter of ethics, upon request by a former client, a lawyer must promptly turn over or provide access to the files which the former client is entitled to possess. As a matter of New York law, a former client is entitled to any document related to the representation unless substantial grounds exist to refuse access. The lawyer may charge such former client reasonable fees for assembling and delivering such files, as reflected by customary fee schedules or any governing retainer agreement.

Related Cases: N.Y. State 623 (1991); Nassau Bar Op. 94-19; Nassau Bar Op. 9613; DR 2-110(A)(2); *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30 (1997); N.Y. State (1975) *Gamiel v. Sullivan & Liapakis, P.C.* 289 A.D.2d 88 (2001); *Getman v. Petro & Ingalsbe*, 266 A.D.2d 688 (1999); *Dearie v. Skadden, Arps, Slate, Meagher & From*, N.Y.L.J., Aug. 17, 1998 (Sup. Ct., N.Y. Co.)

Opinion 767 (10/8/03)

Code: DR 1-102(A)(5); DR 2-101(A); DR 5-101(A); DR 8-101(A)(2); DR 9-101(B)(1), (3)(a), (C); EC 8-8; EC 9-1; EC 9-2; EC 9-4; EC 9-6; Canon 9

Question: A lawyer is certified by the New York State Commissioner of Education as an impartial hearing officer ("IHO") to hear disputes between school districts and parents of students with disabilities regarding the identification, evaluation and educational placement of such students.

1. May the lawyer, in addition to acting as an IHO, also in private practice represent parents in such hearings?
2. May a lawyer so certified refer to the certification in advertising?

Opinion:

Question 1: Although we see no need for a per se prohibition against a lawyer who acts as an IHO from also representing parents of disabled students before individual school districts, there are instances in which the inquirer would be precluded from representing parents of a disabled child in a particular matter or acting as an IHO.

For the same lawyer to one day be an adjudicator and the next day be an advocate in the same school district presents an appearance of impropriety and is prejudicial to the administration of justice. The lawyer acting as both an adjudicator and an advocate in the same school district certainly would diminish the faith of the public that justice could be obtained in that school district and would not promote public confidence in either our system of justice or the legal profession. Consequently, if a lawyer who is on the list of IHOs for a particular county desires to represent clients in a school district within that county, he should arrange to have his or her name removed from the list for that school district.

DR 9-101(B)(1) provides that a lawyer may not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. Similarly, DR 9-101(B)(3)(a) states that a lawyer serving as a public officer or employee shall not participate in a matter in which the lawyer participated personally and substantially while in private practice. Consequently, a lawyer could not represent the parents of a child if the lawyer previously was an IHO in a matter in another school district concerning the same child and disability. Similarly, a lawyer could not act as an IHO in the matter if in another school district the lawyer previously represented the parents of the child regarding his or her disability.

It would be impermissible for one lawyer to be hearing a matter as the IHO when another lawyer in the matter is acting as an IHO in a matter in which the first lawyer is appearing on behalf of a party. It similarly would be impermissible for a lawyer to be representing parents in a hearing if the IHO is appearing before the lawyer in another matter in which the lawyer is the IHO. Even though both lawyers may be of the highest integrity the appearance of each acting as a judge while the other is acting as a lawyer in concurrent matters is too unseemly. In such cases, it would be best for the IHO in the matter arising second to decline the matter so the private client need not find new counsel for hearing.

Question 2: It would not be improper for a lawyer to advertise certification as an IHO provided that the advertising is not false, deceptive or misleading. It would be improper for the lawyer to imply to any private client, whether through advertising or otherwise, that the lawyer's designation as an IHO would enable the lawyer in any way to influence a school district or another IHO.

Related Cases: 22 N.Y.C.R.R. § 100.6(B)(2), (C); 8 N.Y.C.R.R. § 200.1; N.Y. State 543 (1982); 22 N.Y.C.R.R. § 122.10.

Opinion 768 (10/8/03)

Code: EC 7-18; DR 1-105(A), (B); DR 7-104(A), (B)

Question:

1. May a lawyer representing a government agency attend meetings with non-lawyer representatives of a counter-party to a government contract he or she "knows" to be represented by counsel?

2. May the government lawyer who attends such a meeting advise the client representative during the meeting without consent of opposing counsel?

3. Without consent of opposing counsel, must the lawyer who attends the meeting remain silent during the course of the meeting or may the lawyer at least communicate the government's agency's legal position concerning the matter?

4. When a government lawyer attends such a meeting or received inquiries from counter-parties regarding agency filing requirements, how does the lawyer determine whether he or she "knows" the counter-party is represented for purposes of DR 7-104?

5. If the government lawyer has determined that he or she does not "know" that the counter-party is represented in connection with the subject of a civil matter, does the lawyer's (a) statement to counter-parties of the government's legal position and/or (b) response to inquiries from counter-parties regarding agency filing requirements constitute impermissible legal advice to an unrepresented party?

Opinion: This Committee's jurisdiction is limited solely to interpretation of the New York Code of Professional Responsibility and does not extend to resolving questions of law. In addition, in the context of a federal government agency in which a lawyer may be rendering services beyond or outside the boundaries of this state, then the choice-of-law provisions of DR 1-105 may apply. For purposes of this opinion, we assume that the New York Code of Professional Responsibility governs the conduct in question.

Question 1:

The Code does not define the word "communicate," but the plain and ordinary meanings of the word—to "impart," "convey," "inform," "transmit," or "make known," *Webster's Third New International Dictionary* (Unabridged) 460 (1993); *see Black's Law Dictionary* 253 (5th ed. 1979)—all presuppose some form of transmission of information.

Here, the avowed intent of the lawyer's silent attendance at meetings with contractors is to facilitate the lawyer's advice to the government agency about the matter. Such a circumstance falls within the parameters of DR 7-104(B), which regulates a lawyer's conduct in connection with communications that counsel a client to engage in such discussions with a represented party, provided the lawyer gives opposing counsel reasonable advance notice. Thus, in our view, a lawyer may silently attend a meeting between principals provided the lawyer gives reasonable advance notice to opposing counsel of the lawyer's intention to attend the meeting.

Question 2:

Having given reasonable advance notice of the lawyer's intention to attend the meeting, the government lawyer may provide advice to the government contracting officers before and during the meeting. We caution, however, that the government lawyer may not directly address or otherwise communicate with the opposing party during the meeting, and thus, in giving advice to the lawyer's own client during the meeting, the lawyer must do so at times and places and in a manner that does not amount to a communication by the lawyer to the opposing party.

Question 3:

We have no doubt that a statement of a client's legal position, without more, is within the common and ordinary meaning of the word "communicate" used in DR

7-104(A)(1). Current authorities agree "that the rule is designed to prevent opposing counsel from impeding an attorney's performance and that the scope of the rule therefore extends even to well-intentioned approaches." A statement of legal position inescapably entails assumptions of fact. Hence, a lawyer's statement of a client's legal position in a matter, no matter how qualified, is a "communication" that DR 7-104(A)(1) proscribes if the other elements of the Rule are present.

Question 4:

We have previously opined that when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by counsel in connection with a particular matter. The necessary extent of such an inquiry will depend on the circumstances of a particular matter.

Owing to the diversity of facts in which the issue may arise, it is sufficient to say that DR 7-104(A)(1) requires, at a minimum, that when a contractor may be represented by counsel in connection with the subject of the meeting, the government lawyer must make inquiry of the government contractor about whether a lawyer represents the contractor in the matter. Likewise, in the case of counter-party inquiries regarding agency filing requirements, prudence suggests that if the government lawyer has a reasonable basis to believe that counsel represents the government contractor in connection with the matter, then the lawyer must make inquiry about whether the contractor is indeed represented in such matter.

Question 5:

Although the interests of the contractor are or have a reasonable possibility of being in conflict with the interests of the government agency within the meaning of DR 7-104(A)(2), we do not think the government lawyer's statements constitute impermissible legal advice to an unrepresented third party. Rather, the government attorney is stating the client agency's legal position to a third party.

This reasoning also applies to communications with government contractors concerning filing requirements in connection with applications for an agency's approval to take action under the contracts.

Related Cases: N.Y. State 739 (2001); N.Y. State 750 (2001); N.Y. State 735 (2001); *Niesig v. Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990); N.Y. State 652 (1993); N.Y. State 404 (1975); N.Y. State 728 (2000); N.Y. State 607 (1990); American Bar Foundation, Annotated Code of Professional Responsibility, Comment, 332 (1979); N.Y. State 607 (1990); Wisconsin Opinion 91-6; N.Y. State 728 (2000); N.Y. State 652 (1993); *Schmidt v. State*, 722 N.Y.S.2d, 623, 625 (N.Y. App. Div. 2000); N.Y. State 735 (2001); N.Y. State 728 (2000); N.Y. State 663 (1994); N.Y. State 728 (2000); N.Y. State 650 (1993); N.Y. State 358 (1974); *W.T. Grant Co. v. Haines*, 531 F.2d 671, 676 (2d Cir. 1976); *Croce v. Kurnit*, 565 F. Supp. 884, 889–91 (S.D.N.Y. 1982).

Opinion 769 (11/4/03)

Code: EC 1-5; EC 5-1; EC 7-8; DR 1-102l; DR 1-106; DR 2-106; DR 4-101; DR 5-101; DR 5-103; DR 5-104; DR 5-107; DR 7-102; DR 9-1-2

Question: May an attorney who represents a client in a personal injury matter on a contingency basis also represent the client in a transaction with a litigation financing company that advances the client cash in return for a portion of any eventual settlement or judgment received by the client? If so, may the attorney charge the client a fee for this separate representation in addition to the contingent fee already agreed for the underlying representation?

Opinion: In N.Y. State 666 (1994) we considered the question whether a lawyer could properly refer a client to such a company. We concluded that since the lawyer would not be paying or advancing funds, the mere referral would not violate that section of the Code. In response to the continued increase in such lawsuit financings and the de novo nature of the question at hand, this Committee hereby revisits the subject of litigation financing transactions. We start by pointing out that whether such a transaction is legal requires an analysis of various court rules, statutes and cases. We do not opine on the legality of the proposed financing transaction. If what is proposed is illegal, then it would be unethical for an attorney to recommend the action or assist the client in carrying it out.

The lawyer cannot own any interest in the financing institution; any such interest would be prohibited by the Code. The lawyer cannot receive any compensation from the financial institution because DR 5-107(A)(2) states that without informed client consent, a lawyer cannot be paid "anything of value related to his or her representation of . . . the client" from "one other than the client." Furthermore, the lawyer may not permit the financing institution to in any way affect the exercise of the lawyer's independent professional judgment on behalf of the client.

Depending on the circumstances, the lawyer could have a personal interest in respect of the financing transaction that reasonably could affect the exercise of the lawyer's independent professional judgment on behalf of the client and give rise to a conflict of interest under DR 5-101. On the flip side, the lawyer may view such a transaction as potentially disadvantageous to the lawyer's own interests, resulting in the opposite influence on the exercise of the lawyer's professional judg-

ment on behalf of the client. Or the transaction might be viewed by the lawyer as likely to reduce the client's incentive to cooperate or settle the case. If any of these or similar circumstances exist, the lawyer should not undertake the representation in the financing transaction without satisfying the requirements of disclosure and consent set out in DR 5-101(A).

Because the financing institution will likely insist on receiving considerable information about the underlying claim in order to evaluate whether and on what terms to enter into the transaction, the lawyer must be careful not to compromise confidentiality in disclosing information to the financing institution without the informed consent of the client. The lawyer should advise the client that disclosures of confidential information to the financing institution might compromise the attorney-client privilege, and might therefore cause the information to be available to an adverse party in discovery.

The lawyer should consider that an unsophisticated client may reasonably assume that by facilitating the transaction, the lawyer is also endorsing the entering into of the proposed transaction and/or the terms thereof. To address this possibility, the lawyer must either disclaim such responsibility or advise the client of the costs and benefits of the proposed transaction, as well as possible alternative courses of action.

In addressing this question, we assume that the original contingent fee agreement with the client only contemplated representation in the underlying personal injury matter and did not anticipate or include the proposed transaction with the financing company. In that circumstance, the attorney's work in connection with this transaction would be a new and different matter for which the attorney may appropriately charge a separate fee. Furthermore, in calculating the legal fees for this representation, the attorney must avoid any violation of the Appellate Division Rules regarding maximum fees in personal injury cases. Whether the money received from the financing institution would constitute a "sum recovered" under those rules is a question of law on which we do not opine. In any event, the attorney must ensure that the total fee does not violate any of the Rules of the Appellate Division by exceeding the maximum amounts specified therein.

Related Cases: Eileen Libby, *Whose Lawsuit Is It?: Ethics Opinions Express Mixed Attitudes About Litigation Funding Arrangements*, 89 A.B.A. J. 36 (May 2003); N.Y. State 666 (1994); 22 N.Y.C.R.R. §§ 603.7(e); 603.18, 1215.1-2 (2003); N.Y. Judiciary Law §§ 488, 489 (Consol. 2003); N.Y. Gen. Oblig. Law § 13-101(1), 13-103 (Consol. 2003); *Grossman v. Schlosser*, 19 A.D.2d 893 (1963); *Neilson Realty Corp. v. Motor Vehicle Accident Indemnification Corp.*, 47 Misc. 2d 260 (N.Y. Sup. Ct. Spec. Term 1965); *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003); N.Y. State 752 (2002); Florida Opinion 00-3 (2002); N.Y. State 717 (1999); *Leon v. Martinez*, 84 N.Y.2d 83 (1994); Paul R. Rice, *Attorney-Client Privilege in the United States*, § 9 (2d Ed. 1999); N.Y. City 2001–03; *Elliott Assoc. v. Banco de la Nacion*, 194 F.3d 363, 372 (2d Cir. 1999).

Opinion 770 (11/12/03)

Code: DR 1-102(A)(3), (4); DR 5-101(A); DR 5-105 (A)-(E); DR 7-102(A)(3),(7),(8); DR 7-103(A); EC 1-5; EC 5-1; EC 7-13

Questions: This opinion discusses plea bargains in which a criminal defendant agrees, as part of the sentence, to make a financial donation that is not expressly authorized by statute. The five specific questions considered are as follows:

1. As part of a plea bargain in which a defendant charged with driving while intoxicated or driving while ability impaired (either charge hereinafter "DWI") will plead guilty to a lesser charge, may a prosecutor agree that the negotiated sentence will include a donation by the defendant to the county's STOP-DWI program? Would the answer be different if the district attorney were the coordinator of the county's STOP-DWI program?

2. More generally, as part of a plea bargain, may a prosecutor agree that the negotiated sentence will include a donation by the defendant to a not-for-profit organization? If so, must the organization be without "ties" to the district attorney's office?

3. May a prosecutor agree not to bring charges, or to dismiss charges, against a person on condition that the person make a donation to a not-for-profit organization?

4. As part of a plea bargain that includes a donation by the defendant to a not-for-profit organization, may a prosecutor require that the donation be made before the plea is entered to ensure that the defendant will live up to that part of the bargain?

5. As part of a plea bargain that includes a donation by the defendant to a not-for-profit organization, may a prosecutor agree that the terms of the agreement concerning the donation will not be disclosed to the sentencing judge?

Opinion: First, all plea bargaining is subject to ethical constraints. However, we note that the Committee does not opine on questions of law and, therefore, expresses no opinion on whether the possible plea bargains discussed herein are legally permissible. It is the prosecu-

tor's responsibility to determine whether the proposed dispositions are legal in each case. If a disposition would be illegal, it would also be unethical.

Question 1:

We see no ethical objection to a plea bargain in which, as part of a sentence to a lesser charge, the defendant agrees to make a payment that would have been authorized by law as a penalty for the original charge, as long as the payment is a legally permissible term of the sentence to the lesser charge and the original charge was supported by probable cause. We believe the answer to the question would be different, however, if the district attorney were also the coordinator of the county's STOP-DWI program. In that situation, the district attorney's dual role would create both a conflict of interest and the appearance that he or she may not be exercising prosecutorial authority in a disinterested manner.

Question 2:

If the proposed donation would be a legally permissible component of the sentence, it would be ethically permissible as long as the prosecutors handling or supervising the case do not have a "personal interest" in the organization that reasonably may affect their judgment; they do not know that any lawyer in the district attorney's office has such an interest; and the use of the organization does not create an appearance of impropriety. A "personal interest" or "private interest" in this context is not limited to an interest that produces financial benefits. The not-for-profit organization in the question under consideration might be one to which the prosecutor devotes significant time or contributes significant sums of money. The prosecutor's spouse or other close relative might be an officer or director of the organization. Such a situation might bring the organization within the prosecutor's "personal interests," even if a contribution to it pursuant to a plea bargain would not be of financial benefit to her.

Whether a prosecutor's involvement with an organization is likely to affect his or her judgment will depend on the nature, size and scope of the prosecutor's involvement as well as the nature, size and scope of the organization. Certainly if there is another lawyer in the office, such as a supervisor, whose professional judgment is brought to bear on the proposed plea bargain, and who has a personal interest in the organization sufficient to affect that judgment, then the organization should be left out of the plea bargain. The Code does not require the lawyer to investigate whether there is another lawyer in her office who has a "personal interest" in the not-for-profit organization if the prosecutor does not know of another such lawyer in her office. However, as a general matter, inquiry should be made of those lawyers personally and substantially involved in the case.

Question 3:

Such an agreement is clearly not ethical unless there is probable cause that the person committed an offense. If probable cause is lacking the proper disposition is either a dismissal or a decision not to bring charges in the first place, and no concessions may be extracted in exchange therefore. As always, the question of whether the agreement is legal must be decided by the district attorney.

Question 4:

We do not see such prepayment raising any ethical issues other than those discussed above. (permitting deferral of sentence until after defendant completes drug rehabilitation program).

Question 5:

It is unethical to conceal a material term of a criminal disposition from the court that will ultimately rule on and embody in a judgment the disposition proposed. Certainly the court must have the opportunity to review the terms of the plea bargain, including the proposed donation. Every New York court is charged with the responsibility of determining the appropriateness of every sentence it imposes, even if the sentence is embodied in a plea bargain.

Related Cases: *Cowles v. Brownell*, 73 N.Y.2d 382 (1989); N.Y. State 479 (1978); N.Y. Veh. & Traf. Law § 1197; ABA's Criminal Justice Standards § 3-3.1(a), (f), 3-3.8(a) (1992); National District Attorneys Association's National Prosecution Standards, § 7.1, 7.3(d) (1991); N.Y. CPLR 1349 (Consol. 2003); Roy D. Simon Jr., *Simon's New York Code of Professional Responsibility Annotated* 454-56 (Thomason/West 2003); *People v. English*, 88 N.Y.2d 30, 33–34 (1996); *Morgenthau v. Crane*, 113 A.D.2d 20 (1985); *People v. Avery*, 85 N.Y.2d 503 (1995); *Morrissey v. Virginia State Bar*, 448 S.E.2d 615 (Va. 1994); *People v. Farrar*, 52 N.Y.2d 302 (1981); *People v. Cameron*, 83 N.Y.2d 838 (1994); *Kisloff ex rel. Wilson v. Covington*, 73 N.Y.2d 445 (1989); *People v. Muniz*, 91 N.Y.2d 570 (1998); *People v. Fiumefreddo*, 82 N.Y.2d 536 (1993); *People v. Anonymous*, 758 N.Y.2d 806 (N.Y. App. Div. 2003); *People v. Anonymous*, 757 N.Y.2d 847 (N.Y. App. Div. 2003); *People v. Lopez*, 290 N.Y.2d 323 (2003); N.Y. State 629 (1992); N.Y. State 675 (1995); *Jane Doe v. D'Amelia*, 81 F.3d 1204 (2d Cir. 1996); *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

Opinion 771 (11/14/03)

Code: DR 2-101, 2-101(A), (B), (F), 2-102, 2-102(D); EC 2-10

Question: If a law firm's website includes client testimonials and claims of past results as part of its advertising, must the website include a disclaimer that past results do not guarantee similar outcomes in future cases to satisfy the firm's obligations under DR 2-101(A)?

Opinion: The Code does not prohibit the use of client testimonials or reports of past results in advertisements. The use of client testimonials or reports of past results in website advertising will not violate DR 2-101(A) unless the testimonials or reports create unjustified expectations or contain insufficient information such that the advertisement is rendered false, deceptive or misleading.

In addition, the Code does not require that client testimonials or reports of past results in advertisements of legal services be accompanied by a disclaimer of any kind, including one that informs the reader that past results do not guarantee similar outcomes in future cases. In N.Y. State 614, however, this Committee opined that to avoid the unjustified expectations that may be created by such advertising, the advertisement should contain a disclaimer that a client endorsement or other report of prior results does not guarantee or predict a similar outcome with respect to any future matter.

Accordingly, to determine whether a disclaimer is necessary in any advertisement that includes client testimonials or reports of past results, the lawyer must determine whether, without a disclaimer, the testimonials or past results render the advertisement false, deceptive or misleading in violation of DR 2-101(A).

It is possible that the mere volume of information presented in website advertising—which may consist of several pages of information and links to other websites—will increase the chance that the reader will form an unjustified expectation regarding the legal services being advertised. If the client testimonials or reports of past results in a website advertisement are misleading in the ways described above (but not false or deceptive), cautionary language warning that prior results do not guarantee or predict a similar outcome in future matters may be sufficient to bring the advertisement into compliance with DR 2-101(A). Moreover, compliance with DR 2-101(A) may require additional cautionary language if the testimonial or report is misleading for reasons beyond the mere report of a positive outcome. The disclaimer must be placed in a reasonably prominent location in the website so that the reader is likely to read the disclaimer in connection with his or her review of the testimonial or report of past results. To assess the sufficiency of the placement of a disclaimer, the lawyer should consider the size of the text and the proximity of the disclaimer to the client testimonial or report of past results. If the disclaimer is in a link, the lawyer should also consider the size and placement of the text signaling the reader to access the link and whether this signal sufficiently informs the reader that reviewing the linked disclaimer is material to any assessment of the information conveyed in the advertisement.

It goes without saying that if an advertisement is false or deceptive—as opposed to misleading because of the unjustified expectations created—no disclaimer, regardless of its content, will cure the ethical violation. Such an advertisement may not be used without violating DR 2-101(A).

Related Cases: *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977); *In re Von Wiegen*, 63 N.Y.2d 163 (1984); *Comm. on Prof'l Standards v. Von Wiegen*, 472 U.S. 1007 (1985). In N.Y. State 709 (1998); N.Y. State 709 (1998); *Model Rules of Prof'l Conduct* R. 7.2 cmt. 3 (2004). N.Y. State 614 (1990)l N.Y. State 539 (1982).

Opinion 772 (11/14/03)

Code: DR 1-102(A)(4), 1-102, 1-102(A) (3), (4), 4-101(A), 4-101(B)(1), 7-101(A)(1),(2),(5), 7-105(A); EC 7-7, 7-15, 7-21

Question: May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

Opinion:

(a) DR 7-105(A) is intended to preserve the integrity of both the system of civil liability and the criminal justice system by making sure that a lawyer's actual or threatened invocation of the criminal justice system is not motivated solely by the effect such invocation is likely to have on a client's interests in a civil matter. When, however, a lawyer's motive to prosecute is genuine—that is, actuated by a sincere interest in and respect for the purposes of the criminal justice system—DR 7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter.

Numerous ethics opinions and court decisions concerning DR 7-105(A) assume that a lawyer's conduct in

reporting allegedly criminal conduct to a prosecutor, with the express or implied request that the prosecutor file criminal charges, is within the scope of DR 7-105(A). To fall within the scope of DR 7-105(A), such a complaint need only report the Broker's conduct to a Prosecutor; it need not expressly request that criminal charges be filed against the Broker, because such a request is implicit in the act of filing such a report with a Prosecutor. DR 7-105(A) does not proscribe the filing of a complaint about the Broker's conduct with a Prosecutor unless the purpose of such a filing is "solely to obtain an advantage in a civil matter." The "solely" requirement makes the propriety of filing such a complaint contingent upon the client's intent.

(b) DR 7-105(A) not only prohibits a lawyer from presenting or participating in the presentation of criminal charges, but also prohibits a lawyer from threatening to do so. Thus, even if a lawyer were to send a letter to the Broker expressing a conditional intent to file a complaint, or even if a lawyer were to send a letter arguing that the Broker's conduct violates the criminal law and asks for an explanation or justification of the Broker's conduct, the lawyer could arguably be in violation of DR 7-105(A) if (i) such communications "threaten to present criminal charges," and (ii) do so "solely to obtain an advantage in a civil matter."

Some letters contain unambiguous threats to present criminal charges. The letter refers to future criminal prosecution, but provides the recipient with the opportunity to avoid such prosecution by taking certain remedial action. The recipient is given a choice: either act to remedy the alleged civil wrong or face a criminal prosecution. The fear of criminal prosecution provides the leverage by which the lawyer hopes to coerce the recipient's decision. We conclude that a lawyer would violate DR 7-105(A) by sending a letter to a Broker stating the client's intention (conditional or otherwise) to file a complaint with a Prosecutor relating to the Broker's conduct, assuming that the sole purpose of the letter were to obtain the return of the Funds.

In our view, there is no universal standard to determine whether a letter "threaten[s] to present criminal charges." Such a determination requires the examination of both the content and context of the letter. In our view, a letter containing an accusation of criminal wrongdoing likely constitutes a threat, especially when coupled with a demand that the accused wrongdoer remedy the civil wrong. Whether the accusation is general (simply stating that the Broker's conduct violates the criminal law) or specific (stating that the Broker's conduct violates particular provisions of the criminal law), such an accusation serves the undeniable purpose of coercing the accused wrongdoer. We point out, moreover, that a lawyer who sends a letter containing such a communication is exposed to professional discipline based upon the disciplinary authorities' interpretation of the lawyer's intent in sending the letter or statement.

DR 7-105(A) does not prohibit all threats to present criminal charges; it prohibits only those that are made "solely to obtain an advantage in a civil matter." For that reason, ethics opinions and court decisions in other jurisdictions have found no violation of DR 7-105(A) or its counterparts when the threat of presenting criminal charges is intended for a purpose other than obtaining an advantage in a civil matter. We point out, however, that when a lawyer threatens criminal charges unless the recipient takes specified action, the threat is likely to have one clear purpose—the doing of that specified act. Thus, when a lawyer threatens to present criminal charges unless an action is taken which remedies a civil wrong, a presumption is likely to arise that DR 7-105(A) has been violated.

Related Cases: Charles Alan Wright, *Federal Practice and Procedure* § 110, at 459 (3d ed. 1999); *Clay v. Wickins*, 101 Misc. 75 (Sup. Ct. Spec. T., Monroe County 1957); *Office of Disciplinary Counsel v. King*, 617 N.E.2d 676 (Ohio 1993); *People v. Farrant*, 852 P.2d 452 (Colo. 1993); *Crane v. State Bar*, 635 P.2d 163 (Cal. 1981); Virginia Opinion 1755 (2001); Nassau County 93-13; Nassau County 82-3; Maine Bar Rule 3.6(c); District of Columbia Rule 8.4(g); Virginia Rule 3.4(h); *Crane v. State Bar*, 635 P.2d 163 (Cal. 1981); Nassau County 98-12; Illinois Opinion 87-7; Maryland Opinion 86-14; District of Columbia Opinion 263 (1996); *In re Hyman*, 226 App. Div. 468 (1929); *In re Beachboard*, 263 N.Y.S. 492 (N.Y. App. Div. 1933); *In re Glavin*, 107 A.D.2d 1006–1007 (1985); *In re Vollintine*, 673 P.2d 755 (Alaska 1983); Virginia Opinion 1755 (2001). *Cf.* District of Columbia Opinion 220 (1991); Charles W. Wolfram, *Modern Legal Ethics* § 13.5.5, at 717 (1986); *In re McCurdy*, 681 P.2d 131, 132 (Or. 1984); *Decato's Case*, 379 A.2d 825 (N.H. 1977); Florida Opinion 85-3; Georgia Opinion 26 (1980); Utah Opinion 71 (1979); New Mexico Opinion 1987-5; Connecticut Informal Opinion 98-19; Florida Opinion 89-3; N.Y. Penal Law §§ 135.60(4), 155.15(2) (Consol. 2003); Nassau County 98-12; *Somers v. Statewide Grievance Committee*, 715 A.2d 712, 718–19 & n.19 (Conn. 1998); *In re Yarborough*, 488 S.E.2d 871, 874 (S.C. 1997); *In re Strutz*, 652 N.E.2d 41, 48 (Ind. 1995); *People v. Farrant*, 852 P.2d 452, 454 (Colo. 1993); Model Rule 3.1, 4.1, 4.4, 8.4; ABA 92-363; Geoffrey C. Hazard, Jr. & W. William Hodes, 2 The Law of Lawyering, § 40.4, at 40-7 (3d ed. 2000).

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The New York State Human Rights Law: Election of Remedies

By Andrew J. Schatkin

A party who believes himself discriminated against in the workplace by his employer may elect to pursue his claim either in the judicial forum or before the State Division of Human Rights.[1] Should the plaintiff, however, choose to file a discrimination complaint with the State Division of Human Rights, or with any local commission on human rights, any court action asserting rights under the Human Rights Law is barred and may not be initiated, except where the Division has dismissed the administrative complaint on the ground of administrative convenience.[2]

The leading case on this rule of law is *Emil v. Dewey*.[3] In *Emil*, the New York State Court of Appeals held that the state discrimination complaint should not be dismissed pursuant to sub. 9 of section 297 of the Executive Law, where the record showed that, prior to commencing the action, the plaintiff had not filed a complaint with the State Division of Human Rights. The court noted that, although the plaintiff withdrew that complaint prior to any determination by the Division, there was no showing this was done for administrative convenience, so that, under these circumstances, the state (Executive Law § 297, sub. 9) precluded the plaintiff from commencing any action in court based on the same incident.[4]

More specifically, it is the law that a court action will be dismissed on this so-called election of remedies ground where the State Division has issued a final determination on the complaint such as a Commissioner's Order or a no-probable-cause finding.[5]

In short, and sum, it is the law that unless there has been an administrative convenience dismissal by the State Division of Human Rights, a subsequent state plenary action, whether there has been a no-probable-cause finding by the State Division of Human Rights, or a Commissioner's Order has been issued, will be dismissed. The prior administrative order, except in the case of an administrative convenience dismissal, will essentially deprive the court of subject matter jurisdiction of the later civil complaint.[6]

The issue which arises, however, and which is the subject of this article, is: Should the contents of the civil complaint differ in subject matter, in the form of an added claim or claims or in added defendants not stated in the previous administrative complaint, and if so, should the civil complaint be allowed to proceed?

The leading case which states the general rule is *Spoon v. American Agriculturalist Inc*.[7] In *Spoon*, the plaintiff was employed as an assistant circulation manager by the defendant. In February of 1983 she commenced a lawsuit for alleged sexual harassment in violation of section 296 of the Executive Law. Thereafter, on March 15, 1983 she filed a complaint with the State Division of Human Rights claiming that the defendant had unlawfully retaliated against her for commencing the initial lawsuit. Alleging several specific acts of retaliation, she again sued the defendant on April 18, 1983. By order dated July 11, 1983 the Defendant successfully moved to dismiss the action for lack of subject matter jurisdiction (CPLR 3211, subd. 5a, para. 2) on the ground that the plaintiff's filing of the complaint with the Division constituted a binding election of remedies.

The plaintiff did not appeal this dismissal. In the meantime, the Division dismissed the complaint before it and the plaintiff pursued an administrative appeal. Following the dismissal of the plaintiff's lawsuit based on retaliation, she commenced a third action against the defendant, the subject of the case before the Appellate Division, Third Department.

A review of this complaint indicated that it duplicated nearly all of the allegations in the previous retaliation complaint, with certain added facts concerning termination of her employment. The defense's motion to dismiss on the grounds of *res judicata*, based on the prior dismissal, and arguing that the court was again deprived of subject matter jurisdiction, was granted. The plaintiff appealed.

The Appellate Division, Third Department affirmed, stating that Special Term properly held that sub. 9 of section 297 of the Executive Law deprived the court of subject matter jurisdiction. The court went on to define the question as whether a sufficient identity of issues existed between the complaint before the Division and the instant claim. It held that the two retaliation claims were largely similar but with some additional facts added in the subject complaint, including the plaintiff's termination. The court, however, held that these facts emanated from a continuous process of alleged retaliation giving rise to one claim, not several. The court concluded that the plaintiff's initiation of the complaint before the Division constituted an election of remedies which effectively deprived the court of subject matter jurisdiction.

What, then, have the cases held to be such an identity of interest as to constitute an election of remedies and to bar a subsequent civil suit or action? *Spoon* says the rule encompasses added facts, emanating from the same factual nexus.

A second gloss is stated in *Brown v. Wright*.[8] In *Brown,* the Appellate Division, Second Department held that the plaintiff, under Executive Law § 297(9), could not commence an action in court against an additional defendant not named in the administrative complaint.

The election of remedies and identity of interests rule has even been held to include the addition of a different theory of action emanating from and encompassing the same facts. Thus, in *Craig-Oriol v. Mount Sinai Hospital,*[9] the Appellate Division, Second Department held that where the plaintiff had previously pursued an administrative action before the State Division of Human Rights alleging age discrimination, the Executive Law precluded a suit alleging the same behavior by the employer over the same period of time.

Similarly, in *Horowitz v. Aetna Life Insurance Co.*[10] the Appellate Division, Second Department held that where, in his state human right complaint, the plaintiff was able to seek damages for mental anguish and humiliation as well as for out-of-pocket damages and in fact sought these damages, his attempts to recover for those injuries under the slightly different theory or claim of intentional infliction of mental distress and prima facie tort were properly dismissed.

It has been held that the election of remedies doctrine is effective even if the plaintiff is uneducated, has only a rudimentary knowledge of English and appeared pro se in the administrative proceeding.[11]

Conclusion

This brief review of the election of remedies doctrine under section 297 of the Executive Law reveals an initial, general rule that there must be a sufficient identity of interests to exist unless the State Division of Human Rights complaint is dismissed on so-called administrative convenience. In the absence of a sufficient identity of interest, any subsequent plenary action will be dismissed.

This basic rule cannot be evaded by adding defendants, adding facts, or adding alternative theories or bases for relief. The same basic factual background is present. It would appear that if the added material is sufficiently factually extended from the original factual background and nexus, whether in the form of an added defendant, theories, claims, or facts, the action may not be subject to dismissal, even though the original complaint may have been brought in the administrative forum.

Endnotes

1. N.Y. Executive Law Art. 15.
2. N.Y. Executive Law § 297(9).
3. 49 N.Y.2d 968, 428 N.Y.S.2d 887 (1980).
4. *See also James v. Loughlin*, 124 A.D.2d 728, 508 N.Y.S.2d 231 (2d Dep't 1986).
5. *See Kirkland v. City of Peekskill*, 651 F. Supp. 1225, (S.D.N.Y. 1987), *aff'd*, 928 F.2d 104 (2d Cir. 1987).
6. *See Spoon v. American Agriculturalist*, 103 A.D.2d 929, 478 N.Y.S.2d 174 (3d Dep't 1984); *Horowitz v. Aetna Life Insurance Co.*, 148 A.D.2d 584, 539 N.Y.S.2d 50 (2d Dep't 1989).
7. *Id.*
8. 226 A.D.2d 570, 641 N.Y.S.2d 125 (2d Dep't 1996); *See also Hirsch v. Morgan Stanley and Co., Inc.,* 239 A.D.2d 466, 657 N.Y.S.2d 448 (2d Dep't 1997) (Held: where the plaintiff commenced the administrative action against the corporate defendant, she could not commence an action in the court arising at the same facts, against an additional defendant who was not named in the administrative complaint or referred to in the administrative complaint.)
9. 201 A.D.2d 449, 607 N.Y.S.2d 391 (2d Dep't 1994).
10. 148 A.D.2d 584, 539 N.Y.S.2d 50 (2d Dept. 1989).
11. *Magini v. Otnorp. Ltd*, 579 N.Y.S.2d 669 (1st Dep't 1992) (For further cases holding on election of remedies doctrine applies to claims based not only on the same facts, but also to claims involving similar facts or adding few facts). *See Tong v. National Broadcasting Co.*, 566 N.Y.S.2d 819, (N.Y. Sup. 1990) *aff'd*, 585 N.Y.S.2d 695 (1st Dep't 1992); *Kuperman v. Association of the Bar of the City of New York*, 499 N.Y.S.2d (1st Dep't 1986). *See also Lyman v. City of New York*, Dkt. No. 96610, 2382 (PKL) 1997 WC 976 (S.D.N.Y. August 20, 1997) (Held: election of remedies bans claims against additional defendants, not named in the administrative determination).

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Ethics Matters

By John Gaal

Q Our firm recently hired a paralegal from another firm in town. I am concerned because she worked on some litigation cases at her former firm for which our firm represents the adverse party. Am I worrying about nothing?

A No, you have good reason to be concerned. You undoubtedly are aware of the ethical problems which can arise when one firm hires an attorney who previously worked at a firm representing an adverse party. In those circumstances, that new firm might be disqualified from continuing its representation if it is determined that its newly hired attorney had come into possession, actual or presumed, of client confidences belonging to that adverse pay.

The Code of Professional Responsibility, of course, does not apply to non-lawyers. However, it does impose obligations on lawyers which relate to non-lawyers. Disciplinary Rule 1-104(C), for example, provides that a "law firm shall adequately supervise, as appropriate, the work of partners, associates and *non-lawyers* who work at the firm." And, DR 1-104(D) provides that a "lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a *non-lawyer* employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer. . . ."

Formal Opinion 774, recently issued by the NYSBA Committee on Professional Ethics, considered the application of these principles to the lateral movement of non-lawyers among firms. The Committee concluded that, while a formal conflicts check might not be required whenever a firm hires a non-lawyer from another firm, certain steps nonetheless should be taken to protect the confidentiality of information which that non-lawyer may have learned in her prior employment. The most basic step which should be taken is to instruct that non-lawyer about her obligation to maintain the confidentiality of information acquired while at her prior firm. Relatedly, the firm should instruct the non-lawyer to not accept work assignments involving matters on which she worked while at her former firm. The Committee concluded that it is also "advisable" that a firm finding itself in these circumstances instruct its lawyers not to solicit or listen to confidential information the non-lawyer might possess, to protect against the possibility that the non-lawyer will fail to comply with her instructions. (The Committee had previously opined, in NYSBA Formal Opinion 700, that it is improper for a lawyer to exploit a non-lawyer's inappropriate willingness to divulge an opposing party's confidential information.)

How much more is required will depend on how involved the non-lawyer was in the matter at hand while at her prior firm. Recognizing that the duty to supervise non-lawyers imposed by DR 1-104(C) varies according to, among other things, the likelihood "that ethical problems might arise in the course of working on the matter," if the non-lawyer was previously employed as a receptionist or typist who only handled correspondence or answered the telephone, a simple warning not to disclose confidential information might suffice. On the other hand, if the non-lawyer had played a more substantive, non-ministerial role at her prior firm and had access to, and recalls, significant confidential information, more elaborate measures, including formal screening devices might be required. (While state courts in New York are reluctant to endorse screening when lawyers change firms under similar circumstances, the Committee saw their use as a viable means of protecting client confidences when non-lawyers are involved.)

Of course, even screening might not be enough. If, for example, the non-lawyer came from a small firm where she had substantial access to client confidences at her former firm, and will now be working for the very lawyers who are handling the opposite side of that same matter, something more radical may be required to satisfy the firm's ethical obligations. In these circumstances, the Committee suggested that obtaining consent from the opposing law firm's client might be required, termination of the non-lawyer by the new firm might be necessary, or even withdrawal from the matter in question could be required.

Despite these conclusions, the Committee did note that the hiring of a non-lawyer does not require supplementing the firm's conflicts system with information on clients or cases on which the non-lawyer previously worked. Disciplinary Rule 5-105(E) requires law firms in New York to keep contemporaneous records of prior engagements for conflict-checking purposes. In NYSBA Formal Opinion 720, the Committee concluded that this provision could be effectuated only "if a firm adds to its system information about the representations of lawyers who join the firm." Nonetheless, here, the Committee concluded:

> We do not believe the same principle applies when nonlawyers join a new law firm. A non-lawyer does not have former clients and does not "represent" clients at the new firm. Thus, DR 5-105(E) does not require law firms to search for conflicts that may be created when nonlawyers join the firm laterally.

We have all grown sensitive to the issues raised when a lawyer leaves a firm to work for opposing counsel. Formal Opinion 774 reminds us that similar issues can arise when a firm hires non-lawyers who, by virtue of their prior employment, may have had access to client confidences and secrets.

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC in Syracuse, New York, and an active Section member. If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact him at (315) 218-8288.

This article won first prize in the Section's annual Dr. Emanuel Stein Writing Competition for law school students.

The Argument for Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil

By Olivia P. Dirig and Mahra Sarofsky

I. Introduction

The state of business today has become increasingly global in nature.[1] The international business landscape is rife with global operations. More and more businesses are expanding their operations beyond the countries in which they are incorporated.[2] A company receives certain legal advantages from the country in which it opts to incorporate.[3] With these legal advantages come legal obligations.

Employers that meet specific requirements are subject to regulation regarding discriminatory employment practices here in the United States.[4] The Civil Rights Act of 1964 ("Title VII") lays out ground rules against discrimination in hiring, firing, promotion and treatment of certain classes of individuals in the workplace.[5] Employers found to be in violation of regulations like Title VII must repair such violations; these companies may also face monetary liability to the aggrieved individuals.[6]

This note examines the contention that the true purpose of Title VII is to regulate the actions of the employer. Compensation for the aggrieved employee is ancillary and only increases the deterrent nature of the statute. Presently the statute extends coverage to American citizens employed by United States firms both here and abroad as well as foreign nationals employed on American soil.[7] However, the statute fails to protect those employees working abroad for American employers who are not citizens of the United States. This note asserts that Congress' refusal to extend Title VII coverage to foreign employees of American companies who work on foreign soil is contrary to public policy. That an employer should be allowed to incorporate in the United States yet escape liability for employment violations by moving their operations to foreign soil stands in opposition to the true intent of the law. This note proposes that the reach of the statute in question be extended to include coverage for both foreign nationals and legal permanent residents of the United States who are employed by American companies on foreign soil.

II. Title VII: Past, Present and Future

1. Overview of Title VII

Congress enacted Title VII in an effort to achieve equal employment opportunities for all persons, regardless of their national origin, sex, religion, race or color, through the elimination of past practices based on those characteristics.[8]

Under Title VII, an employee is defined as "an individual employed by an employer . . . with respect to employment in a foreign country, such a term includes an individual who is a citizen of the United States."[9] The first part of the definition—which the Supreme Court has criticized as being "completely circular" and "explaining nothing"[10] and the First Circuit has said is "a turn of phrase which chases its own tail,"[11]—has been interpreted by the courts to cover only those persons who are not independent contractors.[12] Title VII defines an employer as "a person engaged in an industry affecting commerce."[13] The term "person" is broadly defined as "one or more individuals . . . partnerships, associations, corporations, legal representatives, [or] mutual companies. . . ."[14]

Title VII establishes unlawful employment practices against employees on the basis of race, color, religion, sex, and nationality.[15] These practices go beyond hiring, firing, and compensation. It is unlawful for an employer to discriminate in training based upon any of the aforementioned factors.[16] The employment test scores of any person identified as a member of a protected class may not be altered, adjusted or viewed differently.[17] Additionally, retaliatory actions against those who exercise their rights or participate in the proceedings of another who exercises the provisions of Title VII are outlawed.[18]

Like all civil rights statutes, Title VII is a remedial statute and its broad definitions are reflective of its remedial nature.[19] The Supreme Court has instructed the courts to "broadly construe" remedial statutes.[20] Thus, the terms found in such a statute "like 'employer,'

[as well as] all other definitions, should be given liberal construction, but [the] court's interpretation cannot contradict statutory definitions."[21] One of the statutory definitions at issue in this article is the qualifier on the term employee that provides that Title VII is not applied "to an employer with respect to the employment of aliens outside any State."[22]

It is the contention of this note that federal courts have not gone far enough to broadly construe Title VII to meet its remedial purpose. This new, narrow reading of Title VII, best exemplified by the Supreme Court's requirement of a clear statement of extraterritorial application, is what makes further amendment to Title VII all the more necessary.

2. Extraterritorial Application of Title VII

Any discussion on extending the scope of Title VII must first thoroughly investigate the multitude of legal theories surrounding the statute that have brought us to this point. Prior to the installation of the 1991 amendments the courts applied a "traditional approach" that included an expansive reading of Title VII which took into account the underlying purpose.[23]

In 1991, the Supreme Court did an about-face.[24] Suddenly, the court determined that it now required a clear statement in order to impose extraterritorial jurisdiction. In response, Congress drafted and passed the 1991 amendments. These new amendments did not rehabilitate the statute sufficiently enough to provide comprehensive protection against discriminatory employer activities.

A. Application of Title VII 1964–1991

For the 27 years between 1964 and 1991, it seemed clear that Title VII applied to American citizens employed abroad by American employers.[25] Despite saying as much in *Espinoza*, the Supreme Court reversed itself in *Aramco*[26] when it affirmed the Fifth Circuit's decision in *Boureslan v. Arabian American Oil Co.*[27] and held that Title VII did not apply extraterritorially.

In *Boureslan*, a naturalized United States citizen brought suit against his employer, a U.S. corporation with its principal place of business in Saudi Arabia, for employment discrimination on the basis of race and religion that took place at the company's Saudi Arabian offices.[28] In upholding the District Court's decision that Title VII did not afford extraterritorial protections, the Fifth Circuit rejected the plaintiff's assertions that the "legislative history of Title VII, when coupled with the statutory language, evinces a clear congressional intent to apply the Act extraterritorially."[29] In rejecting Boureslan's claims, the Fifth Circuit noted that it could not "ignore strong countervailing policy arguments against the application of Title VII abroad."[30]

Boureslan appealed to the U.S. Supreme Court. In a 6-3 decision, the Court upheld the decision of the Fifth Circuit.[31] Writing for a majority of the court in *Aramco,* Chief Justice Rehnquist's opinion turned on the principle that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[32] That "canon of construction . . . serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[33] Absent express language to the contrary, the Court was unwilling to override the presumption.[34]

The high Court was equally unmoved by the petitioner's argument that the alien exemption clause of Title VII could be construed by negative inference to demonstrate an intent that Title VII was intended to protect U.S. citizens employed outside the United States.[35] Recognizing the myriad of problems that such a holding would have, the Court concluded that in the absence of clear evidence of "congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce."[36]

In deciding *Aramco* as it did, the Supreme Court refused to defer to the Equal Employment Opportunity Commission's ("EEOC") interpretations of Title VII despite the fact that the EEOC has both investigatory and conciliatory authority.[37] The Court determined that the EEOC's interpretation of the statute was neither "contemporaneous with the statute's enactment nor consistent with earlier EEOC pronouncements on the issue."[38] The Court ultimately decided that absent a "clear statement [by Congress] that a statute applies overseas"[39] Title VII could not be construed by the high Court as applying extraterritorially.[40]

B. The 1991 Amendments to Title VII

Congress amended Title VII and the ADA in 1991.[41] Congress passed these amendments in part as a direct response to the Supreme Court's affirmance of the Fifth Circuit decision in *Aramco*.[42] The Southern District of New York stated that "with the 1991 amendments, Congress signaled its dissatisfaction with the Supreme Court's interpretation in *Aramco*. . . ."[43]

The 1991 amendments made several changes to the original 1964 statute with regard to extraterritoriality. First, the amendment expanded Title VII's definition of employee to include United States citizens employed abroad,[44] thus expressly overruling *Aramco*. Section 109(a) of the 1991 Act amended the definition of "employee" by adding at the end: "With respect to

employment in a foreign country, such term includes an individual who is a citizen of the United States."[45] The new definition gave the Court the clear statement of congressional intent to apply the statute to U.S. citizens employed by U.S. corporations abroad that the *Aramco* decision had said was necessary. Much of the clarifying language in the 1991 Amendments was borrowed from the definition of employer found in the 1984 Amendments to the Age Discrimination in Employment Act ("ADEA").[46]

Congress was careful not to let these protections go too far and made an effort to limit the protections now specifically allotted to foreign employment with a U.S. employer.[47] Congress added a provision that precluded the application of Title VII to "the foreign operations of an employer that is a foreign person not controlled by an American employer."[48]

Additionally, Congress created what is known as the "foreign compulsion defense"[49] to Title VII violations. In Section 109(b)(1) of the amendments, Congress provides an exemption for discriminatory practices "with respect to an employee in a workplace in a foreign country if compliance [with Title VII] would cause such employer (or such corporation) . . . to violate the law of the foreign country in which [the] workplace is located."[50] This new provision continues to shelter employers from the "conflict of law dilemma resulting from foreign employment practices."[51]

Finally, the amendments clarified whether a foreign corporation is exempt from Title VII by providing that if a U.S. corporation controlled a foreign corporation, prohibited practices engaged in by the foreign subsidiary were presumed to be the actions of a controlling employer.[52] The amendment further articulated factors which would be taken into consideration when determining if a foreign employer was controlled by a U.S. corporation, including: the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the two entities.[53]

While the legislative history of the Amendments reveals very little about specific congressional intent,[54] an analogy can be drawn between the 1991 Amendments to Title VII and the Americans with Disabilities Act ("ADA") and the 1984 ADEA amendments.[55] It is important to note that the language that gives Title VII its extraterritorial reach is not identical to the language in the ADEA.[56] However, it is clear that both amendments seek to discriminate between U.S. citizens working abroad for U.S. employers (who are afforded protection) and non-U.S. citizens working abroad for the same employers (who are not protected).

C. Application, Pitfalls and Shortcomings of the 1991 Amendments

The clarifying language in the 1991 amendments did not end the fight over extraterritorial application of Title VII and the ADA. Since 1991, the questions of what defines a U.S.-controlled employer and who qualifies for protection under Title VII as a citizen or alien have continued to be litigated. Time and again, courts have determined that a foreign national employed by a U.S. corporation abroad is not entitled to Title VII and ADA protections.

i. What Defines an Employer Who Must Abide by Title VII Today?

Title VII does not apply to an employer who has less than fifteen employees.[57] The Ninth Circuit tackled the question of whether or not the definition of employee in Title VII[58] precluded the counting of foreign employees of U.S.-controlled corporations, in *Kang v. U. Lim America, Inc.*[59] *Kang* involved a national origin discrimination claim brought by a U.S. citizen employee of U. Lim America, Inc., a U.S.-based corporation which had six or fewer employees, all working at its Mexican factory.[60] However, the American corporation owned and operated U. Lim de Mexico, which employed between 50 and 150 workers, all of whom were Mexican citizens.[61] U. Lim America argued that it was exempt from Title VII as a result of its small American workforce.[62]

In rejecting U. Lim America's challenge to Kang's claim, the court relied on the Second Circuit's decision in *Morelli v. Cedel*.[63] The *Kang* court noted that the underlying purpose behind the 1991 Amendments was "to restore civil rights protections that had been limited by the Supreme Court and to strengthen the protections and remedies of Federal civil rights laws."[64] The court further went on to reason that the purpose behind limiting Title VII coverage to employers with fifteen or more workers was to limit the burdens of compliance, limit litigations costs, and protect "intimate and personal relations existing in small businesses, potential effects on competition and the economy, and the Constitutionality [sic] of Title VII under the Commerce Clause."[65] In essence, the Ninth Circuit did not believe that U. Lim was the type of small business that Congress had intended to protect and thus included foreign citizens employed in a foreign nation for purposes of determining Title VII coverage.[66]

Kang and *Morelli* appear to be in direct conflict with other decisions regarding the counting of employees.[67] An example of the contrary argument is *Mousa v. Lauda Air Luftfahrt*.[68] In *Mousa*, a Muslim-American employee of an Austrian airline claimed he was fired before he

was even able to start work, as a result of his religion.[69] In response to the Title VII claim, the airline contended, among other things, that the District Court lacked the jurisdiction to hear the plaintiff's claims because Lauda Air did not meet the Title VII definition of an employer.[70]

The court agreed with Lauda Air[71] and expressly rejected the Second Circuit's reasoning in *Morelli*.[72] The district court pointed to the fact that *Morelli* was an ADEA case and that functionally, the ADEA and Title VII were not similar.[73] Specifically, the court pointed to the fact that Title VII, unlike the ADEA, contains a provision excluding from its coverage "the employment of aliens outside of any state"[74] and "the near unanimity of lower courts that Title VII's coverage and definition of 'employee' are co-extensive."[75] The court also made a negative inference argument (of the type the Supreme Court specifically rejected in *Aramco*) that if Title VI's definition of an employee included all individuals working abroad "there would be no reason for Congress to expressly include United States citizens."[76]

ii. Who Qualifies for Protection Under Title VII Today?

One case decided after the 1991 amendments in which a non-United States citizen was denied protection under Title VII for harassment committed while working overseas for a Unites States corporation is *Shekoyan v. Sibley International Corp*.[77] Vladmir Shekoyan was an Armenian-born, permanent legal resident of the United States who was hired and trained by the defendant at its corporate headquarters in Washington, D.C.[78] He was then sent to work in the Republic of Georgia.[79] While in Georgia he was subject to a course of harassment that he claimed was based on his national origin.[80] Shekoyan was ultimately fired from his position when his employment contract expired, despite the fact that both the government of the Republic of Georgia and his company's corporate headquarters praised his job performance.[81]

The court determined that the plain language of the statute prevented the extension of its protection to non-United States citizens working in foreign countries for U.S. based companies. The court noted: "If Congress had intended to extend Title VII's scope to protect non-United States citizens working abroad for American controlled companies, it could very well have included such individuals in the definition of employee."[82] Shekoyan was ultimately denied relief under Title VII because he did not meet the court's definition of a Unites States citizen[83] and his primary work station was located within the Republic of Georgia.[84]

Shekoyan is a prime example of the shortcomings associated with the 1991 amendments.

Essentially, the dismissal of Shekoyan's Title VII claim came down to whether or not he had filed an application for citizenship.[85] The court determined that despite the fact that Shekoyan had been in the United States for more than 20 years, his failure to meet the "minimal requirement" of filing an application for United States' citizenship meant that his claim must fail.[86]

What makes the *Shekoyan* result particular onerous is the fact that the work the plaintiff was doing for his employer overseas was being funded by a U.S. government agency.[87] Shekoyan did file a claim under Executive Order 11,246 (which established "a program to eliminate employment discrimination from the Federal Government and by those who benefit from Government contracts").[88] The court rejected the claim, citing the fact that the Executive Order did not give rise to a private cause of action.[89]

Additionally, Shekoyan was denied Title VII relief as a result of the statutory distinction between legal permanent resident and citizen. Justice Blackmun described this legal distinction as being functionally irrelevant when he wrote, "for most legislative purposes there simply is no meaningful difference between legal residents and citizens."[90] While it is true that legal residents are denied certain rights,[91] including the right to vote and hold public office,[92] it is part of this paper's proposal that Title VII be amended to avoid unjust outcomes like the one in *Shekoyan*.

III. Proposal for Extension of Title VII Liability to American Employers of Foreign Nationals on Foreign Soil

1. The Proposed Extension

As Title VII is written today, "[t]he general rule is that with respect to foreign employment, Title VII applies only to American citizens employed abroad by American companies or their foreign subsidiaries."[93] Thus, Title VII applies abroad only when 1) the employee is a citizen of the United States and 2) the corporation is controlled by an American employer.[94] This note contends that, in the interests of justice, it is necessary for Congress to amend the current language. In order to conform to the true intent of Title VII, the scope of the law must be expanded.

The thrust of this article's proposed changes to the statute focus on the definition of employer. First, the term "citizen" should be deleted and replaced with "legal resident." This will eliminate the injustices incurred by legal permanent residents of the United States who are transferred overseas for temporary or permanent assignments. Second, the definition must be amended to include foreign citizens employed by American corporations overseas. The new, amended

definition of employee would be: an individual employed by an employer . . . with respect to employment in a foreign country, such a term will include an individual who is either a citizen of the United States; a legal resident of the United States or a citizen of a foreign country employed by an American controlled corporation as determined under 42 U.S.C. 2000e-1(f).

The logic behind these proposed changes is axiomatic. American companies and their subsidiaries can be found in almost every nation in the world. Therefore, one may assume that American employers are employing workers in almost every nation in the world. While companies may choose to employ American citizens in their overseas operations, U.S. citizens cannot account for the entire overseas workforce.

U.S. citizens working abroad have available remedies in the American court system when they are subjected to violations of Title VII.[95] Barring a change in the present language of Title VII, there are no such remedies available to citizens of foreign nations who work side by side with American citizens.[96] In order to control those employers who organize themselves under the laws of the United States, we must make them liable for the discriminatory actions they are responsible for, regardless of whom those actions are taken against.

2. The True Intent of the Statute

The Supreme Court held that "[a]lthough Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination, its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm."[97] The provisions allowing for recovery by those who suffer unlawful employment discrimination serve to make the victim whole in addition to a much larger purpose. The monetary penalties are a strong incentive to avoid such discriminatory actions in the future. Those who have been forced to pay reparations are inclined to take all necessary steps to avoid having similar sanctions imposed again. Those employers who must face the possibility of monetary damages are likely to attempt compliance in order to avoid those penalties. Those employers who have been exposed to liability are under a statutory duty as well as a moral duty to prevent the situation from arising. Yet there is no motivator such as fear. Fear of hefty monetary penalties is a large incentive to comply with enforced regulations.

Civil action by the aggrieved party, attorney general, or the EEOC is only available after the respondent has failed to provide conciliation that is acceptable to the commission.[98] The enforcement provisions call for back pay and future pay as two of numerous possible remedies.[99] The statute also makes injunctive relief, as well as appropriate affirmative action available as redress.[100] These available remedies illustrate that the true purpose of the statute is to control the actions of the employer, not to provide compensation for the employee.

The EEOC has put forth enforcement guidelines dealing with protection for unauthorized workers.[101] "The EEOC concluded that unauthorized workers who are the victims of unlawful employment discrimination are entitled to the same relief as other victims of discrimination, subject to certain narrow exceptions."[102] "[F]ederal discrimination laws protect all employees in the United States, regardless of their citizenship or work eligibility."[103] One may presume from such a contention that the true purpose of the statute is not to protect American citizens, but rather is to control the actions of American employers.

The EEOC has issued guidelines dealing with the extraterritorial application of Title VII to American and American-controlled employers operating abroad.[104] The guidelines recognize that one of the purposes of the 1991 amendments was to provide procedures for determining what defines an American employer.[105] The focus appears to be heavily weighted toward which employers are subject to liability, not which employees are protected.

3. Who Is Liable Under the Statute?

Liability under Title VII will be imposed upon any employer who meets the statutory definition.[106] However, the definition itself is not the final word on who is subject to liability.

"Neither Section 109 nor its legislative history sets forth an explicit test for determining the nationality of employers."[107] "Where a respondent is incorporated in the United States, it will typically be deemed an American employer because an entity that chooses to enjoy the legal and other benefits of being incorporated here must also take on the concomitant obligations."[108] The traditional rule defines any corporation as a national of the state in which it was originally incorporated.[109]

Liability will also be imposed upon those entities which are controlled by American employers. "If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited [by Title VII] engaged in by such corporations shall be presumed to be engaged by such employer."[110] The test for control by an American employer consists of: "(A) the interrelation of operations; (B) the common management; (C) the centralized control of labor relations; and, (D) the common ownership or financial ownership or financial control, of the employer and the corporation."[111] The Seventh Circuit upheld the notion common among the other circuits that "the most significant of [the four] criteria is the existence of any joint control over labor relations."[112] The aforementioned factors

"are the same as those relied upon by the [Equal Employment Opportunity] Commission for determining when two or more entities (whether foreign or domestic) may be treated as an integrated enterprise or a single employer."[113]

4. How May the United States Courts Exercise Jurisdiction?

In *Hartford Fire Insurance Co. v. California*,[114] Justice Scalia wrote, "[T]he extraterritorial reach of [a statute]—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether … [when enacting the law] Congress asserted regulatory power over the asserted conduct."[115] Thus, by amending Title VII as suggested in this note, the presumption of extraterritoriality will be overcome. However, analysis of a statute's extraterritorial reach does not end there. Once the presumption of extraterritoriality has been eliminated, international law must be examined in order to ensure that U.S. statutes are not being interpreted so as to conflict with relevant principles of international law. [116]

Hartford relied on *Restatement (Third) of Foreign Relations Law* § 403(1) which provides, in part, that even if a nation has reason to exercise extraterritorial jurisdiction, it should refrain from doing so when "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[117] This "reasonableness" test is clarified by the *Restatement* in section 403(2), which states that a number of factors can be considered. Such factors include, but are not limited to: "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity[118] . . . the character of the activity to be regulated;[119] the extent to which another state may have an interest in regulating the activity. . . ."[120] Thus, when seeking to apply Title VII for violations committed in foreign countries against foreign workers, courts must take care to ensure that they are not imposing U.S. remedies where there are foreign remedies available.

Title VII and other anti-discrimination laws are designed to control the employer. The American employer, as antagonist, easily falls under the jurisdiction of the Unites States judicial system and should therefore be subject to liability regardless of the nationality of the victim. The operative fact is that the American employer is engaging in discrimination.

IV. Ramifications of Extension and How to Overcome Them

Any legal argument will encounter opposition. Legislation that carries an international effect will necessarily result in trepidation from both the international and domestic communities. While not an exhaustive list, this section seeks to highlight and preempt the various concerns that such a change in Title VII would raise.

1. Foreign Compulsion Defense

It is of reasonable concern to many that the laws of differing nations may at times conflict. One must keep in mind that Title VII obligations presently follow the American employer with respect to his American employees anywhere in the world. Therefore, this is an issue already addressed by Congress in the present version of the statute.

The language of Title VII assures employers that they will not be "required to take actions otherwise prohibited by law in a foreign place of business."[121] The statute holds that an employer may take an "otherwise prohibited action if compliance with [the] statute, with respect to an employee in a workplace in a foreign country, would cause an employer to violate the law of the foreign country in which the workplace is located."[122] In order to prove the "foreign compulsion" defense the employer "must prove three elements: 1) the action is taken with respect to an employee in a workplace in a foreign country, where 2) compliance with Title VII or the ADA would cause the respondent to violate the law of the foreign country, 3) in which the workplace is located."[123]

Through the satisfaction of the prongs of the foreign compulsion test, a corporation may escape liability for acts in violation of Title VII in the event that there is a conflict of law with the host country. Congress has accorded due respect to the laws and values of the nations in which we do business. The extension of Title VII to their citizens will not, in any way, damage the respect and deference we now show these host countries.

2. The Slippery Slope Argument

Some may contend that extension will open the floodgates of litigation. Granted, there is the risk of an increase in Title VII litigation. That risk is run whenever there is new legislation passed or the scope of old litigation is expanded. However, the risk of increased litigation should not be enough to inhibit the application of good law.

Not all applications of Title VII will result in litigation. The EEOC has conciliatory powers.[124] Every attempt should always be made by both sides to reach an agreement that will resolve the issues involved without relying on the already taxed judicial system. Alternative methods of conference, conciliation and conference are built into the language of Title VII presently.[125] These methods are presently encouraged, although not required.[126] A civil action may only be filed after receipt of a right-to-sue letter from the EEOC.[127] If the proposed changes to Title VII include language which

requires alternative methods of dispute resolution as a first step in the remedial process, the need for litigation may be dissuaded even further.

Ultimately there may be an increase in litigation over Title VII principles under this note's proposed statutory provisions. However, any increase in litigation would be tempered by the judicial system's screening procedures. Those cases which will reach the courts will likely involve serious issues of law worthy of the court's time and effort. Additionally, any increase in litigation is likely to ultimately result in an increase in compliance.

3. Forum Shopping

The possibility of forum shopping for the best possible result is a real danger in this case. Even in those countries where ample protection is provided for employees, there may be factors that would make American courts more attractive. In those areas where relief is available through the workings of the host nation, there will be a need to discourage litigants from searching the courts for the most favorable possible result.

There are certain safeguards against forum shopping which already exist. "If . . . an abuse of the judicial process is found to be involved in the selection of a particular forum, the remedies available involve discipline of the parties and their counsel and even, in extraordinary circumstances, dismissal."[128] Statutory limitation as to forum availability will provide further hindrance to those that are intent upon forum shopping.

Additionally, one may hope that this move toward international enforcement will inspire more comprehensive regulation and compliance in the nations with which we do business. As the host nation, those with compliance regulations should be given judicial preference as the appropriate forum for remedy.

4. Application of the Proposed Extension

Unquestionably, enforcement of the proposed amendment will be an issue. The manpower and money it would take to police U.S.-based corporations throughout the world seems staggering.

However, it is important to note that the EEOC was enforcing Title VII, the ADA and the ADEA abroad even prior to the 1991 amendments.[129] American civilian employees of the U.S. government working abroad had been protected by the EEOC since its inception.[130] In a few cases, defendants have raised jurisdictional challenges to attempts by the EEOC to investigate alleged discrimination that occurs overseas.[131] All have been met with denials.[132] While most of these cases did not reach the ultimate question of whether or not Title VII would ultimately apply to the defendants, each court found the EEOC had jurisdiction.[133]

The issue of manpower and resources afforded the EEOC is one that cannot be answered in an article of this length. Short of advocating an increase in taxes, there are a few ways in which the EEOC could raise money for its overseas investigations. One would be to impose monetary fines on overseas employers who are caught violating Title VII, which could then be funneled back into the EEOC. Another would be to impose a small tax on U.S.-based corporations wishing to establish overseas operations that could then be used to fund a foreign branch of the EEOC.

The question then arises of how aggrieved employees in foreign countries will file grievances with the EEOC and what their remedy will be. Much of the time, an EEOC investigation culminates in the issuance of a right-to-sue letter.[134] This right of a private individual to sue was created in 1964 and has remained pretty much intact ever since.[135] Presumably, most foreign workers employed by U.S. corporations abroad will not be able to pursue a private right of action in U.S. courts due to a lack of personal resources. However, rather than issuing right-to-sue letters to aggrieved individuals, it may be somewhat more effective for the EEOC to file on its own behalf in cases that would arise under the proposed extension.

There is danger that enforcement will only be utilized by the wealthy and educated select in these foreign nations. Additionally, class action suits may be filed on behalf of large groups of employees. Many of the plaintiffs in such class action suits may not be educated or informed enough to realize that they are a member of the class. Additionally, members of a class in the most informed circles may not be aware of litigation taking place thousands of miles away, in a foreign country. In order for proper and effective utilization by those employees who are most in need of the protections offered by the proposed revisions, information must reach the masses. This would necessitate proactive involvement from the EEOC in cooperation with international human rights organizations and, wherever possible, foreign governments.

While enforcement of any expansion of Title VII may encounter administrative difficulties, such issues cannot be overriding factors when it comes to determinations about international human rights. The possible solutions suggested above are worthy of further investigation and analysis. However, thorough treatment cannot be offered within the confines of this note.

V. Conclusion

It is conceded that the topic discussed above is controversial. Some may believe that American tax dollars should not be spent protecting the citizens of other nations, while others may believe that the already clogged American courts cannot bear the burden of

increased litigation from any statute. Yet others simply believe that the United States has no business meddling in the affairs of other nations.

But the United States does have the right to meddle in the affairs of its own corporations and business people. American corporations avail themselves of the many benefits the American government can offer them. The payment for those benefits must be compliance with the law.

It is the assertion of this note that compliance is best achieved through closing statutory loopholes. The American government should be able to police and, if necessary, punish the various business entities regardless of where they may try to hide. The government currently has the right to ensure fulfillment of Title VII obligations with regard to domestic employers of American citizens on American soil, domestic employers of aliens on American soil, and domestic employers of American citizens on foreign soil.

Congress must address this shortfall. Following American corporations to foreign nations for the purpose of evincing Title VII observance is not novel, nor is it beyond the scope of the powers of the United States government and the EEOC. The EEOC and Congress have seen fit to apply laws extraterritorially in efforts to protect American citizens from injustices that may be visited upon them by foreign business entities. To then allow American corporations to commit injustices against the citizens of foreign countries is nothing short of hypocrisy.

American corporations should not be permitted to shirk the laws of the United States by transferring non-citizen employees to foreign offices or by simply hiring foreign workers. Title VII must be rewritten in order to conform to its original purpose—the deterrence of discriminatory behavior by employers.

Endnotes

1. "This is the age of the global economy in which resources, supplies, product markets, and business competition are worldwide rather than purely local or national in scope." John R. Schermerhorn Jr., Management 116 (7th ed. 2002). *See also* Kenichi Ohmae, The Evolving Global Economy (1995).
2. Included in those companies which have extensive operations abroad are numerous Fortune 500 companies. The list includes well-known names such as Wal-Mart, General Electric and Exxon. Schermerhorn, *supra* note 1, at 125. Wal-Mart, General Electric and Exxon are ranked numbers 1, 2 and 3, respectively, in the 2003 Fortune 500. *The 2003 Fortune 500*, FORTUNE, April 14, 2003 at F-1.

   Ford Motor Company is ranked number sixth in the Global 500. *The 2003 Fortune Global 500*, FORTUNE, July 21, 2003 at 126. Ford Motor Company includes not only Ford vehicles but also Lincoln, Mercury, Mazda, Volvo, Jaguar, Land Rover, and Aston Martin. Ford does approximately 80 percent of its purchasing on a global basis in order to cover needs for production. David Thursfield, *International Operations*, (January 9, 2004), *available at* http://www.ford.com/NR/rdonlyres/epohetkvfxdibey7vz5qgxk2l7bbh5b7ce43hko5i2rjjzouacaxtmpu6gag7m55qksebwh-wahj545ttvazlz2jzlba/20040109_ford_intl_oper.pdf.

   Citigroup hits the Forbes global list at number 13. *The 2003 Fortune Global 500*, FORTUNE, July 21, 2003 at 126. Citigroup bills itself as "a diversified global financial services holding company whose businesses provide a broad range of financial services to consumer and corporate customers in over 100 countries and territories." Citicorp Form 10-k, *available at* http://www.citibank.com/citigroup/fin/data/k02cci.pdf#xml at 3. It provides banking, lending, investment, insurance, and credit services to customers around the world. *Id.* at 13. The 2002 prospectus called for an international stock offering of 42 million shares. 2002 Prospectus, Travelers Property Casualty Corp., March 21, 2002, *available at* http://www.citibank.com/citigroup/press/2002/data/020321a1.pdf#xml.
3. Business owners may choose a particular area to incorporate in for preferential tax treatment. David Rae, *Small Businesses Face Tax 'Sledgehammer' Threat*, ACCOUNTANCY AGE 1 (2003). Additionally, incorporation offers limited liability to individual business owners. "Personal assets cannot be attached and ownership can be easily transferred through the sale of stock shares. The corporation is a legal entity and will continue to exist until its legal dissolution, even if one of the principals in the business should die." *Choose the Right Legal Structure For Your Firm*, SANTA BARBARA NEWS PRESS, Nov. 2, 2003 *available at* www.newspress.com.

   Besides the legal benefits of incorporation in the United States, there are also multiple advantages which have nothing to do with the law, yet are just as important. The high standard of living in the United States is unparalleled. The education level, economic resources, and breadth of knowledge available in the American population are considerably higher than that for the majority of the world. All of these factors contribute to the spirit of entrepreneurialism and business sense that American and American-controlled companies take advantage of in their operations.
4. It is required that an employer have a minimum of 15 employees working each day for 20 or more calendar weeks for it to come within the scope of Title VII. However, this does not apply to companies that are wholly owned by the government, Indian tribes, or bona fide private membership clubs. 42 U.S.C. § 2000e(b) (2003).
5. Text accompanying notes 8–23, *infra*.
6. Available remedies against employers who violate the statute include injunctions forbidding the employer from continuing the unlawful practice, reinstatement or hiring of employees, the possible award of back and future pay, and attorneys' fees. *Id.* § 2000e-5(g)(1), (k)(2003).
7. Text accompanying notes 86–110, *infra*.
8. *See* Adam M. Mycyk, *United States Fair Employment Law in the Transnational Employment Arena: The Case for the Extraterritorial Application of Title VII of the Civil Rights Act of 1964*, 39 CATH. U.L. REV. 1109, 1121 (1990) *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) *and Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).
9. 42 U.S.C. § 2000e(f) (2003).
10. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).
11. *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997).
12. *See, e.g., Dykes v. Depuy, Inc.*, 140 F.3d 31, 37 n.6 (1st Cir. 1998).
13. 42 U.S.C. § 2000e(b) (2003).
14. *Id*. § 2000e(a) (2003).
15. *Id*. § 2000e-2(a) (2003). "It shall be unlawful employment practice for an employer (1) to fail or refuse to hire any individual,

or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. . . .” *Id.* Additionally an employer may not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . .” *Id.*

16. 42 U.S.C. § 2000e-2(d) (2003).
17. *Id.* § 2000e-2(l) (2003).
18. *Id*. § 2000e-3(a) (2003).
19. *See Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).
20. *Id.*
21. *Chester v. Northwest Iowa Youth Emergency Servs. Ctr*., 867 F. Supp. 700, 716 (N.D. Iowa, 1994).
22. 42 U.S.C. § 2000e-1(a) (2003).
23. *See, e.g., Bryant v. Int'l. Sch. Serv., Inc.*, 502 F. Supp. 472 (D.N.J. 1980); *Love v. Pullman*, No. C-899, 1976 U.S. Dist. LEXIS 13997 (D. Co. July 21, 1976), *aff'd*, 569 F.2d 1074 (10th Cir. 1978).
24. *See EEOC v. Arabian Am. Oil* Co., 499 U.S. 244, 1991.
25. *Id. See, e.g., Seville*, 638 F. Supp. at 590; *Bryant,* 502 F. Supp. at 472, *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982); *Love*, 1976 U.S. Dist LEXIS 13997 at *5; Anne C. Levy, *Putting the “O” Back in EEO: Why Congress Had to Act So Quickly After the Supreme Court Decision in* Boureslan*,* 1991 COLUM. BUS. L. REV. 239, 241 (1991).
26. 449 U.S. 244 (1991).
27. 857 F.2d 1014 (5th Cir. 1988).
28. *Boureslan*, 857 F.2d at 1014.
29. *Id.* at 1018.
30. *Id.* at 1020.
31. *Aramco*, 499 U.S. at 259.
32. *Id.* at 1230 (quoting *Filardo*, 336 U.S. at 285.).
33. *Id.* (*citing McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963)).
34. Keith Highet & George Kahale III, *Decision:* Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 111 S. Ct. 1227*, 85 A.I.J.L. 552, 553 (1991).
35. *Aramco*, 499 U.S. at 253–55 (rejecting the same argument endorsed by the District Court in Colorado that was affirmed by the 10th Circuit in the *Love* case).
36. *Id.*
37. 42 U.S.C. § 2000e-4. *See* Highet & Kahale, *supra* note 34 at 555. The Court had previously held in *Gen. Electric Co. v. Gilbert,* 429 U.S. 125 (1976) that it was not required to abide by the EEOC reading of Title VII, *Aramco,* 244 U.S. at 249. *Gilbert* involved a challenge to General Electric's disability plan for employees that covered absences due to sickness and accidents, but not pregnancy. *Gilbert,* 429 U.S. at 128. In finding that the plan was not discriminatory, the Court included powerful language about the role of the EEOC. The Court said that interpretive rulings, like EEOC guidelines, are limited as to their scope.

    The rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

    Id. at 141–42. In the view of the majority, the EEOC's interpretation did not “meet this test for reasonableness and hence should not be accorded deference,” Highet & Kahale, *supra* note 34 at 556.
38. Mary Claire St. John, Note, *Extraterritorial Application of Title VII: The Foreign Compulsion Defense and the Principles of International Comity,* 27 VAND. J. TRANSNAT'L L. 869, 881 (1994). *See also*, *Aramco,* 499 U.S. at 257 (noting that the EEOC's position that Title VII was applicable abroad was “not reflected in its policy guidelines until some 24 years after the passage of the statute.” *Id.*).
39. *Aramco*, 499 U.S. at 258–59. For a contrary reading of the *Aramco* holding, *see Kollias v. D&G Marine Maintenance*, 29 F.3d 67 (2d Cir. 1994), which held that the Supreme Court did not require a clear statement of extraterritorial intent. The Second Circuit Court of Appeals interpreted the *Aramco* decision as requiring only “sufficiently clear indicia of congressional intent,” because a clear statement rule would eliminate the consideration of legislative history, administrative interpretations and “other extrinsic indicia of congressional intent.” *Id.* at 73.
40. *Aramco*, 499 U.S. at 258. The Court cited numerous times where Congress had indeed made a clear statement about the international reach of a statute including; provisions of the Coast Guard Act, 14 U.S.C. § 89 (a), 18 U.S.C. § 7; the Comprehensive Anti-Apartheid Act, 22 U.S.C. § 5001; the Logan Act, 18 U.S.C. § 953; and the ADEA, 29 U.S.C. §§ 623 (h)(1) and 630 (f).
41. Melody M. Kubo, *Extraterritorial Application of the Americans with Disabilities Act*, 2 ASIAN-PAC. L. & POL'Y J. 259, 274 (2001).
42. *See* Civil Rights Act of 1991, Pub L. 102-166, 105 Stat. 1071 (1991) (stating that one of the purposes of the Act was to “respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination”); *see also* Levy, *supra* note 25 at 240 (arguing that Congress was “forced to take action to correct the Supreme Court's faulty interpretation of Congressional intent in the area of employment discrimination law”).
43. *Torrico v. IBM Corp*., 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002).
44. 42 U.S.C. § 2000e(f) (2003).
45. § 109(a), 105 Stat. at 1077. The complete definition of employee in Title VII now reads:

    > The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

    42 U.S.C. § 2000 (e) (f).
46. Joy Cherian, *Enforcement of Workers Rights Abroad*, 43 LAB. L.J. 563, 564 (1992).
47. Mary McKlveen Madden, *Strengthening Protection of Employees at Home and Abroad: The Extraterritorial Application of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act,* 20 HAMLINE L. REV 739, 746 (1997).
48. Section 109(c)(2), 105 Stat. at 1077 (amendment codified at 42 U.S.C. § 2000e(f)).

49. *See, e.g.*, Linda Maher, *Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation After* Aramco *and the Civil Rights Act of 1991*, 9 CONN. J. INT'L L. 1, 29 (Fall, 1993).

50. 105 Stat. at 1077 (amendment codified at 42 U.S.C. § 2000e-1).

51. Maher, *supra* note 49.

52. Section 109 (c)(1), 105 Stat. at 1077 (amendment codified at 42 U.S.C. § 2000e-1(c)(1) ("If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by [this statute] engaged in by such corporation, shall be presumed to be engaged in by such employer.")).

53. Section 109(c)(2), 105 Stat. at 1077 (amendment codified at 42 U.S.C. § 2000e-1(c)(3)).

54. *See Torrico v. IBM Corp.*, 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002) (observing that "the limited legislative history" of the 1991 Amendments revealed little information about Congress' intent).

55. *See generally* H.R. Rep. No. 102-40, pt. 2, at 99 (1991) ("A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621, et seq., are modeled after, and have been interpreted in a manner consistent with, Title VII"); *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 816 (9th Cir. 2002) (analogizing the Second Circuit's interpretation of ADEA language to similar language at issue in Title VII), *Torrico*, 213 F. Supp. 2d at 399 (remarking that Congress had "modified the ADA and Title VII in much the same way that it had amended the ADEA in 1984").

56. *Compare* 42 U.S.C. § 2000e(f) (Title VII) (applying the statute extraterritorially to U.S. citizens "with respect to employment in a foreign country") *and* 29 U.S.C. § 630(f) (applying the statute extraterritorially to U.S. citizens "employed by an employer in a workplace in a foreign country").

57. *See* 42 U.S.C. § 2000e(b) (defining an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

58. *See e.g., id.* § 2000e(f).

59. 296 F.3d 810, 816 (9th Cir. 2002).

60. *Id.* at 814.

61. *Id.*

62. *Id.* at 816.

63. 141 F.3d 39 (2d Cir. 1998). It is not just the statutes that are similar. *Morelli* involved a fact pattern that is remarkable similar to *Kang*. In *Morelli*, a U.S. citizen employee of a Luxembourg-based bank whose U.S. employees did not meet the minimum ADEA requirement of 20, but whose worldwide employee totals easily exceeded the threshold. *Id.* at 44–45.

64. *Kang*, 296 F.3d at 816.

65. *Id.* (quoting *Morelli*, 141 F.3d at 45).

66. *Kang*, 296 F.3d at 816.

67. *See, e.g., Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999) (holding that "non-citizens working outside the United States . . . are not considered employees"); *Greenbaum v. Svenska Handelsbanken*, 979 F. Supp. 973, 983 (S.D.N.Y. 1997) (finding that "non-U.S. citizens employed outside of the United States are not deemed 'employees' as that term is defined in Title VII"); *Kim v. Dial Serv. Int'l, Inc.*, No. 96 CIV. 3327, 1997 U.S. Dist. LEXIS 66, at *8 (S.D.N.Y. Jan. 8, 1997) (determining that "the foreign employees of a foreign corporation do not count towards the statutory minimum" and that "the relevant group is the number of employees in the United States."); *but see Wildridge v. IER, Inc.*, 65 F. Supp. 2d 429, 431 (N.D. Tex. 1999) ("The exemption for overseas operations of foreign companies speaks only to the substantive provisions of Title VII [and] does not preclude counting employees of these foreign entities for purposes of determining whether the minimum employee threshold is met.").

68. 258 F. Supp. 2d 1329 (S.D. Fla. 2003).

69. *Id.* at 1333.

70. *Id.*

71. *See id.* at 1339 (finding that the plaintiff had failed to meet his burden of demonstrating that Lauda Air was an employer which was subject to Title VII).

72. *Id.* at 1337.

73. *Id.*

74. *Id.* (quoting 42 U.S.C. § 2000e-1(a)).

75. *Mousa*, 258 F. Supp. 2d at 1337.

76. *Id.*

77. 217 F. Supp. 2d 59 (D.D.C. 2002).

78. *Id.* at 62.

79. *Id.*

80. *Id.*

81. *Id.* at 62–63.

82. *Id.* at 65–66.

83. *See id.* at 67 (determining that despite the fact that Shekoyan was a permanent legal resident of the United States, his failure to apply for U.S. citizenship denied him the legal rights and privileges due American citizens employed abroad).

84. *Id.* at 68.

85. *Id.* at 67.

86. *Id.*

87. *Id.* at 62.

88. *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1965).

89. *Shekoyan*, 217 F. Supp. 2d at 70.

90. *Toll v. Moreno*, 458 U.S. 1, 20 (1982). *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952) (Douglas, J., dissenting) ("An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned.").

91. *See generally* Nora V. Demleitner, *The Fallacy of Social "Citizenship" or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35 (1997) (discussing recent efforts to marginalize legal permanent residents).

92. Symposium, *Strangers to the Constitution: Immigrants in American Law: Due Process and the Treatment of Aliens*, 44 U. PITT. L. REV. 165, 210 (1983).

93. *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999) (quoting *Russell v. Midwest-Werner & Pfleiderer, Inc.*, 955 F. Supp. 114, 115 (D. Kan. 1997).

94. 42 U.S.C. § 2000e-1(a) and *id.* § 2000e-1(c). *See also Iwata*, 59 F. Supp. 2d at 604 (concluding that those two sections of Title VII taken together constitute the law regarding extraterritorial application of Title VII); *Denty v. Smithkline Beecham Corp.*, 907 F. Supp. 879 (E.D. Pa. 1995) (drawing the same conclusions about extraterritoriality based on similar language in the ADEA).

95. *See* 42 U.S.C. § 2000-e(f) (2003) (granting Title VII remedies to employees who are employed in a foreign country, so long as they are citizens of the United States).

96. *See id.*

97. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

98. 42 U.S.C. § 2000e-5(f) (2003).

99. *Id.* § 2000e-5(g)(1) (2003) ("which may include, but is not limited to, reinstatement or hiring of employees, with or without back

pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.”).

100. *Id*.

101. EEOC, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Discrimination Laws (1999) (rescinded 2002).

102. Empl. Discrimination Coordinator ¶ 24,133.5 (West 2003).

103. *Id.*

104. EEOC, Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States (1993).

105. *Id.*

106. Employers who will be liable under Title VII include labor organizations, employment agencies and any “person engaged in an industry affecting commerce who has fifteen or more employees” as well as the agents of such entities. 42 U.S.C. § 2000e (2003).

107. *Id.*

108. *Id.*

109. Restatement (Third) of Foreign Relations Law of the United States § 213 cmt. C (2003).

110. Gerald L. Maatman, Jr., *A Legal Guide For Multinational Corporations on Dealing With the Extraterritorial Application of U.S. Employment Discrimination Laws*, 3 DIG. INT’L L. 1 (1996).

111. 42 U.S.C. § 2000e-1(c)(3) (2003).

112. *Gen. Drivers v. Pub. Serv. Co.*, 705 F.2d 238, 242 (7th Cir. 1983). *Accord Russom v. Sears, Roebuck & Co.*, 558 F.2d 439 (8th Cir. 1977); *Fike v. Gold Kist. Inc.*, 514 F. Supp. 722 (N.D. Ala. 1981).

113. EEOC, Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States (1993).

114. 509 U.S. 764 (1993).

115. *Hartford Fire Ins. Co*, 509 U.S. at 813 (citing *Aramco*, 499 U.S. 244, 248 (1991)).

116. *See id.* at 815.

117. Restatement (Third) of Foreign Relations Law of the United States § 403(1) (2003).

118. *Id.* § 403(2)(b).

119. *Id.* § 403(2)(c).

120. *Id.* § 403(2)(g).

121. EEOC, Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States (1993) (quoting the statement of Senator Bob Dole, 137 Cong. Rec. S15477 (daily ed. Oct. 30, 1991).

122. *Id.*

123. *Id.*

124. *See Sanders v. Bd. of Educ.-Sch. Dist. No. 205*, No. 86-C2840, 1986 WL 11978 (N.D. Ill. Oct. 20, 1986) (holding that plaintiff may not exceed the scope of the original complaint placed with the EEOC; because to do so would circumvent their conciliatory power and purpose.).

125. 42 U.S.C. § 2000e-5(b) (2003).

126. *Id*.

127. *Id.*

128. *McLaughlin v. United Va. Bank*, 955 F.2d 930, 935 (4th Cir. 1992).

129. *See* Cherian, *supra* note 46, at n.2.

130. *Id.*

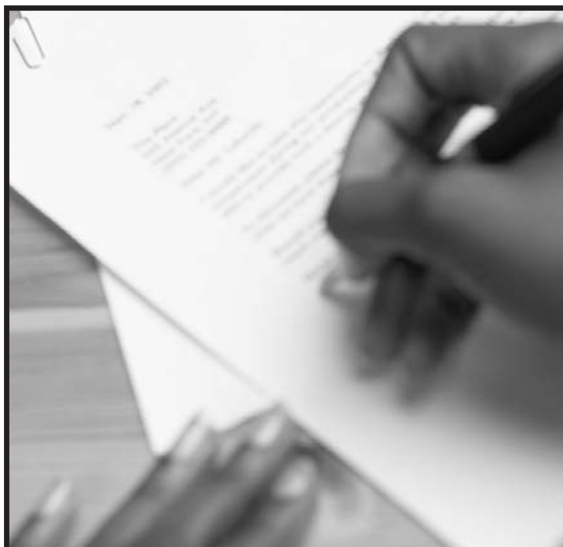
131. *See, e.g., EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920 (11th Cir. 1991) (overturning the District Court’s denial of the enforcement of the EEOC’s request for documents from cruise ships flying under a foreign flag); *EEOC. v. Inst. of Gas Tech.*, No. 79-C786, 1980 U.S Dist. LEXIS 13742, (N.D. Ill. July 23, 1980) (enforcing an EEOC subpoena that had been served on an employer in Algeria).

132. *Kloster Cruise Ltd.*, 939 F.2d at 924; *Inst. of Gas Tech.*, 1980 U.S. Dist. LEXIS, at *8.

133. *See id.*

134. Sandra Gayle Filler, *Recent Case:* Perdue v. Roy Stone Transfer Corp., 52 U. CIN. L. REV. 558, 560 (1983) (explaining that the EEOC must notify an employee of his right to sue in federal court if the EEOC either does not find reasonable cause, takes no action, or fails to reach an agreement with the employer).

135. *See id.* at 561.



REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *L&E Newsletter* Editor

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Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Committee Report

The Continuing Legal Education Committee

The Committee on Continuing Legal Education (the "CLE Committee") is charged with the responsibility for planning and executing—with the help and guidance of the Bar Association's support staff in Albany—the Section's educational programs. These consist of a half-day of presentations in connection with the Association's mid-winter Annual Meeting in New York City, and presentations over two days at the Section's annual Fall Meeting, held in different locations each year. In 2005, in celebration of the Section's 30th anniversary, the Fall Meeting will be held in Longboat Key, Florida.

In addition to these regularly scheduled programs, the Committee works on special presentations of interest to labor and employment law practitioners. For example, this year the Section is planning a series of jointly sponsored breakfast sessions on ADR with New York Law School and the Litigation Institute, to be held at Fordham Law School in June. In addition, the CLE Committee has worked with the Section's EEO Committee to present a program in November at Cornell geared to introducing general practitioners to the basics of employment discrimination law practice.

The CLE Committee consists of at least one member from each of the Section's substantive committees, to ensure that well-rounded programs that will interest the broad spectrum of our membership are presented. Other members are also appointed by the Section Chair based upon an expression of interest and a willingness to contribute ideas and time to the Committee's work. Meetings are generally held by telephone conference call, except at the Fall and Winter Meetings, when the Committee meets in person and telephone participation is not available.

In addition to representation from the many practice area interests of the Section, the Committee seeks a membership reflecting both geographic and other kinds of diversity (e.g., ethnic, gender, disability status, as well as plaintiff, union, management, whether in-house or outside counsel, neutral and public sector lawyers). Members of small firms and solo practitioners are among the members, as well as lawyers from large and mid-size firms. Those interested in discussing membership are encouraged to contact Alan Koral, the current Chair, at akoral@vedderprice.com, to learn more about the opportunities available on the CLE Committee.

SAVE THE DATE

The National Labor Relations Act at 70: Where It Is and Where It Should Go

The Association of the Bar of the City of New York and the NYSBA's Labor and Employment Law Section will sponsor a conference on May 25, 2005 in New York City on the occasion of the 70th Anniversary of the NLRA. The conference will focus on the changes in interpretations of critical labor principles by the current NLRB. Former General Counsels and Members of the Labor Board will provide historical insight into current issues and discuss their views of where the Board is and where it should go.

Topics will include:

- Redefinition of the bargaining obligation in successorship, joint employer and subcontracting situations;
- Changes in the Act's coverage: employee or supervisor, employee or student, employee or independent contractor;
- New rules on the scope of collective bargaining units;
- Changing standards for injunctions.

The following, as of press time for this issue, is the preliminary program for the Section's Annual Meeting on January 28, 2005. Thanks to the CLE Committee and its Chair, Alan Koral, for the advance notice. Look for further details in the mail.

Labor Law Section

Annual Meeting Program

Friday, January, 28, 2005

New Yorker Hotel • New York City

Plenary Sessions

"What the Election Results Mean for Employers, Employees and Counsel"

Moderator:
Rosemary Townley, Ph.D., Arbitrator-Mediator

Panelists:
Judge Fredric Block, U.S. District Court, E.D.N.Y.
Jonathan Hiatt, Esq., General Counsel, AFL-CIO
Tanya Menton, Esq., Vice President, Litigation and Employment Practice, American Broadcasting Company (ABC)
Prof. **Samuel Estreicher**, New York University

"What You Need to Know to Handle Difficult Wage and Overtime Issues"

Moderator:
Sharon Stiller, Esq., Underberg & Kessler LLP

Panelists:
Louis Greer, Assistant District Director, United States Department of Labor, New York City District Office
Stephanie L. Richter, Esq., Global Intellectual Property and Legal Operation, GE Global Research
Jerome Tracy, Esq., Counsel to the New York State Department of Labor

Workshops
The committee is planning four workshops for the meeting. Ideas now in motion include:

1. "What Happens After Public Sector Disciplinary Proceedings"
2. "Ethical Issues in Depositions"
3. "New Developments in Labor Relations"
4. "Managing Attorney Relationships"

Section Committees and Chairs

You are encouraged to participate in the programs and on the Committees of the Section.
Feel free to contact any of the Committee Chairs for additional information.

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Publication—Editorial Policy—Non-Member Subscriptions

Persons interested in writing for the *L&E Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *L&E Newsletter* are appreciated.

Publication Policy: I would appreciate it if you would call or e-mail me to let me know your idea for an article. You can reach me at (718) 428-8369 or mceneaneyj@aol.com.

After we've discussed it, the article should be submitted by e-mail along with a letter granting permission for publication and a one-paragraph bio. The Association will assume your submission is for the exclusive use of this *Newsletter* unless you tell me otherwise in your letter.

Editorial Policy: The articles in the *L&E Newsletter* represent the author's viewpoint and research and not that of the *L&E Newsletter* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscriptions: The *L&E Newsletter* is available by subscription to non-attorneys, libraries and organizations. The subscription rate for 2005 is $75.00. For further information, contact the Newsletter Department at the Bar Center, (518) 463-3200.

Deadlines for submission are the 1st of January, April, July and October each year. If I receive your article after that date, it will be considered for the next edition.

Thank you for your cooperation.

Janet McEneaney
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