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L&E Newsletter

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

Message from the Chair

Donald L. Sapir

Thanks to the groundwork laid by former Chair Kayo Hull, and built upon by my predecessor, Alan Koral, we will soon be unveiling our Section's newest service to its members, a blog. With the advent of the blog, it is our hope that the Section's Web site will become one of the most important Web sites for our members. By visiting our Web site, you will be able to obtain up-to-date information of special interest to New York's labor and employment lawyers concerning the latest court and agency decisions; new federal, New York State and local legislation; recently published news articles; and other items of interest. Our Section's Communications Committee Co-Chairs, Jim McCauley, Mark Risk, and Mike Curley, with assistance from Seth Greenberg, Chair of our Section's Public Sector Labor Relations Committee, have been working together with New York State Bar Association staff to beef up our Web site and to get our blog up and running.

When you go to the Section's Web site, you now have the following at your fingertips:

- A directory with the names and contact information for each of our nearly 2,500 members.
- Dates, locations, and subject matter of our upcoming CLE programs with registration.
- Articles published in the Section's *Newsletter* since 2000.
- Papers submitted by our CLE speakers at the Section's 2008 CLE Meeting.
- Other information about the Section and its Committees.
- Links to legal research and legal ethics materials and Web sites
- And coming soon, the blog.

We want our Web site to be the go-to Web site you visit each day to keep abreast of important labor and employment law related news. Our content will include brief descriptions of newsworthy items free of manage-

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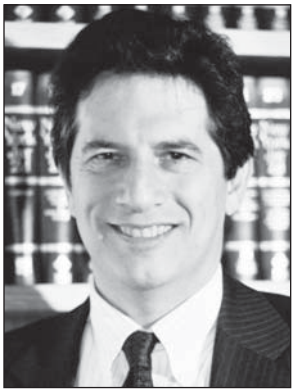
Inside

From the Editor



Philip L. Maier

My assumption is that, though I am writing this in October, the calendar will proceed as normal and that if this is the Annual Meeting it must be January. So, Happy New Year, and I hope you are enjoying, or enjoyed, the meeting. Since I am a neutral at the Public Employment Relations Board, I have decided that it is better to not opine on the labor-related issues of the day. So without further ado I would simply like to thank the authors for their submissions in this edition. The articles relate to issues that we frequently confront in our work lives and which have also been the subject of mainstream media attention. I am sure that they will be of interest to you and will assist you in your professional careers. Once again, if anyone is interested in submitting an article, or wishes to have an event publicized (labor or employment related, that is), please feel free to contact me.

Philip L. Maier

Philip L. Maier is the Regional Director for the New York City office of the New York State Public Employment Relations Board. He serves as an Administrative Law Judge and Chief Regional Mediator for the agency.

Message from the Chair

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ment, employee, or union bias. A link will be provided to the primary source, i.e., the decision, statute, news article or other item described in the blurb. Opinion pieces or commentary written from the viewpoint of one of our labor and employment law constituencies will be noted as such. To perform this service successfully, we need to post new content on a daily basis. We must develop a core group of Section members willing to supply brief unbiased squibs and links to newsworthy items that they come across in their practices. Attribution given to volunteers will provide a great opportunity for any contributor to gain exposure to our members visiting the Web site.

If you are interested in helping to launch the Section's blog and/or participating in its maintenance, please contact any of our Communications Committee Co-Chairs: Jim McCauley at jmccauley@clarityconnect.com; Mark Risk at mdr@mrisklaw.com; Mike Curley at mcurley@curleymullen.com.

After our Fall CLE Meeting at the Sagamore Hotel in Bolton Landing, New York, October 2-4, the Section co-sponsored a one-day CLE program entitled, "Finding the Bottom Line: Rights of People with Disabilities in New York State." The program highlighted the greater protections afforded to employees with disabilities under New York State and local laws when compared to rights granted by federal statutes. It will include discussion of the areas of public accommodations and housing, as well as employment. The program was scheduled to be held in Rochester on December 1, New York City on December 4, and Albany on December 9, 2009.

Finally, be sure to set aside January 28 and 29, 2010, to attend the Section's Annual CLE Program and Luncheon. For the first time in many years, the Section will be meeting in the same hotel as other NYSBA sections, at the New York City Hilton. Our CLE Committee Co-Chairs, Stephanie Roebuck and Ron Dunn, are putting together a CLE program that will provide insight into and the latest developments concerning issues important to New York's labor and employment bar. Presenters will include state and federal government labor and employment-related agency officials and many of the leading labor and employment lawyers and neutrals in the state. Check our Web site for further details.

As this year's Chair of the Section, please contact me regarding any service you would like the Section to provide, or anything you think we can do better than the way we are doing it. Thanks for your support of the Section and its activities.

Don Sapir

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PERB Update

The following is a digest of recent decisions issued by the Public Employment Relations Board from January through September 2009.

Good Faith Bargaining

County of Westchester, 42 PERB ¶3027 (2009). The Board affirmed an ALJ decision conditionally dismissing a charge pursuant to the Board's merit deferral policy based upon a maintenance of standards clause in the CBA. The charge was subject to being reopened should the County interpose any objections to arbitrability, or the award did not satisfy the criteria under *New York City Transit Authority (Bordansky)*, 4 PERB 3031 (1971).

County of Westchester, 42 PERB ¶3025 (2009). The Board affirmed an ALJ decision finding that the County violated the Act by transferring the work of air transportation of extradited prisoners. The County admitted that the work was performed exclusively, but raised as a defense that the work was not substantially similar. The Board rejected this argument, finding that the work was substantially similar, if not identical. The Board also rejected the argument that there was a significant change in job qualifications, so as to balance the parties' interests to determine a violation.

Niagara Frontier Transit Metro System, Inc., 42 PERB ¶3023 (2009). The Board affirmed an ALJ decision which dismissed a charge alleging that the employer violated the Act by changing the use and purpose of information obtained during medical examinations, and using it for workers' compensation purposes. The Board held that the subject of the medical reports was "inherently and inextricably intertwined" with the negotiated procedures and that the employer satisfied its duty to bargain. In light of this determination, the Board did not address the exception relating to the mandatory nature of the change.

City of Middletown, 42 PERB ¶3022 (2009). The Board affirmed in part and reversed in part an ALJ decision. The Board stated that both parties recognize in the CBA that Civil Service Law § 75 is applicable to at least some members of the unit consisting of police officers. The Board therefore reversed a portion of the ALJ decision, and concluded that proposals for a disciplinary procedure and a bill of rights are not prohibited to the extent that they seek to replace Civil Service Law § 75 for unit members eligible (those who are honorably discharged veterans and volunteer firefighters) for those disciplinary procedures. These same proposals, however, are prohibited to the extent that they would apply to other members of the unit. Based upon the City Charter, the disciplinary procedure is a prohibited subject of bargaining. It also found that the bill of rights proposal was prohibited. The Board concluded that the PBA proposal regarding a General Municipal Law § 207-c proposal is mandatory. A proposed time limit for a determination, a procedure regarding a request for reconsideration, and arbitration procedures are mandatorily negotiable.

Incorporated Village of Hempstead, 42 PERB ¶3024 (2009). The Board affirmed an ALJ decision on different grounds, finding that the Village violated §§ 209-a.1(a) and (d) of the Act. The Village mayor had entered into an agreement pursuant to which 8 employees were accreted to the unit, in settlement of a unit placement petition filed by the union. The next mayor rescinded the agreement. The ALJ found a repudiation of the agreement. The Board, however, held that recognition is a legislative function, and the Village had a colorable right to renounce the settlement. The Village violated the Act by unilaterally altering the bargaining unit, though the agreement was binding upon the parties and did not require legislative action. As to remedy, the Board ordered that the *status quo ante* be restored, in that the at-issue titles be restored to the bargaining unit.

Board of Education of the City School District of the City of New York, 42 PERB ¶3026 (2009). The Board affirmed an ALJ decision which had dismissed a charge as untimely. The case was remanded, however, to address an inconsistency in a prior Board decision in the same case to examine again whether the District violated the Act by failing to respond to an information request.

Board of Education of the City School District of the City of New York, 42 PERB ¶3019 (2009). The Board affirmed an ALJ decision which held that the District violated the Act when it unilaterally imposed a three-hour limitation on the amount of leave time that employees may take when they donate blood as part of a blood drive during the work day. Employees for over a decade took between one and eight hours of leave time when donating blood. The Board rejected the District's contract reversion defense, stating that in order to demonstrate such a defense a party must show "a specific provision in their agreement which is reasonably clear on the subject presented and that the at-issue change by the District constitutes a reversion to that negotiated provision from an inconsistent practice." The Board also rejected the District's defense based upon a District policy. Since the policy was not the result of a negotiated agreement, it does not provide a reversion defense. If the District had reserved unfettered discretion to change the practice, it could exercise that discretion without violating the Act. The Board found that a past practice had existed and by unilaterally changing it the District violated the Act.

Village of Highland Falls, 42 PERB ¶3020 (2009). The Board held that a proposal relating to a General Municipal Law (GML) § 207-c procedure which included the creation of a claims manager position was a nonmandatory unitary demand. The Board stated that the demand was intended to be comprehensive and non-severable with respect to the GML § 207-c procedure. There were numerous sections specifying the duties of the positions and accordingly the Board found it to be a nonmandatory, unitary demand.

Town of Walkill, 42 PERB ¶3017 (2009). The Board held that the Town violated the Act by adopting and implementing a local law establishing a new police disciplinary procedure different than that which was in the parties' expired CBA. The Board held that police disciplinary procedures are not a prohibited subject of bargaining. The Board found that Town Law § 154 and § 155 did not preempt negotiations over police disciplinary procedures. The Board dismissed that portion of the charge, however, which alleged that the Town repudiated the parties' contract provision since the Town had a colorable claim of right to implement the local law.

New York City Transit Authority, 42 PERB ¶3012 (2009). The Board reversed an ALJ decision and found that the NYCTA violated the Act by adopting stricter dual-employment standards. The policy in place stated that requests for dual employment will be reviewed on a case-by-case basis, and that more stringent standards may be disseminated as warranted. The evidence also showed that the NYCTA did not rely upon any safety studies, that it did not apply the policy to certain safety-sensitive positions, and that it was adopted and applied to conductors, tower operators and train operators because they are safety-sensitive positions, and wanted to ensure that these employees were not fatigued. The Board held that the policy did not reserve unfettered discretion to allow the NYCTA to act unilaterally, and interpreted the phrase "as warranted" to require the existence of facts necessitating more stringent standards. Since the NYCTA failed to present such evidence, it violated the Act by acting unilaterally. The Board also rejected the defense that the new standards were required to provide safe transit services, or that it faced an acute problem in this regard (appeal pending).

Town of Wallkill, 42 PERB ¶3006 (2009). The Board affirmed the dismissal of a charge which alleged that the Town violated the Act by failing to respond to the PBA's request that it advise it as to whether it would comply with negotiated disciplinary procedures in the parties' expired collective bargaining agreement. The Board concluded that the Town's non-response to a letter which stated, in effect, that the failure to respond would be an admission that the Town would not comply with the negotiated disciplinary procedures in the parties' expired collective bargaining agreement satisfied its duty to respond. The Board also stated that the PBA did not meet its burden of demonstrating that its information requests were relevant and necessary under the Act.

City of Albany, 42 PERB ¶3005 (2009). The Board affirmed, as modified, an ALJ decision which held that the City violated the Act when it unilaterally revised a disciplinary rule of conduct prohibiting employees from consuming any alcoholic beverages eight hours before the start of a scheduled tour of duty. The Board invited the submission of amicus briefs on the issue of whether the Second Class Cities Law and the Albany City Code render the subject of police discipline a prohibited subject of bargaining. The Board dismissed the exceptions relating to alleged factual errors by the ALJ. The Board stated that it employs a balancing test to determine whether a particular work rule is a mandatory subject of bargaining and found that while the rule is mission-related, there was no support in the record to conclude that the rule was necessary or that there was a problem that required the adoption of the rule. There was nothing in the record to demonstrate that the rule was necessary to ensure that officers do not report to work inebriated or under the influence. The Board also found that the rule is not a prohibited subject because of relevant precedent establishing that police discipline in the City of Albany, New York public policy, the provisions of the Second Class Cities Law have been superseded by the Act, and the Albany City Code does not preempt the Act. In a concurring opinion, Member Hite stated that he found it unnecessary to reach the issue of whether police discipline is prohibited in this matter, since the rule was only tangentially related to discipline and as such, under *City of New York v. PBA*, 41 PERB ¶7514 (1st Dep't) it is a mandatory subject of bargaining.

Representation

County of Washington, 42 PERB ¶3021 (2009). The Board affirmed a Director's decision which sustained the Board election agent's challenge to unsigned envelopes and voided the challenged ballots. Initially, the Board stated that the exceptions were properly filed pursuant to § 213 of the Rules, as opposed to § 201.9(h)(2) which requires that objections to the conduct of an election be filed within 5 working days of the tally of ballots. The Board stated that the election agent was authorized to challenge the unsigned ballot. It stated that the appropriate practice to follow is that the unsigned ballots are challenged by the election agent before any envelopes are opened. The parties are asked their position without be being shown the envelope or advised of the identity of the voter. If the parties waive the signature requirement, PERB withdraws its challenge and the unsigned ballots are then opened. The waiver must be in writing and the Director satisfied that the integrity of the election is not compromised by the waiver. Though the Board did

not know whether this practice was applied in this case, there was no waiver and the Director properly voided the ballots.

City of Troy, 42 PERB ¶3028 (2009). The Board upheld a Director's decision finding ballots void. *See County of Washington*, 42 PERB ¶3021 (2009).

Fashion Institute of Technology, 42 PERB ¶3018 (2009). The Board affirmed in part and reversed in part an ALJ decision which dismissed a unit clarification petition but granted, in part, a unit placement petition. The Board found that the ALJ correctly determined that an employee was not managerial because, in part, he does not exercise "substantial and unfettered discretion" in making daily decisions with respect to programs and operations, and did not play a major role in employee relations. With regard to another employee, the Board found that he did not formulate policy and that a managerial designation was thus not warranted. The Board also concluded, however, that another employee had broad authority to formulate campus-wide policies and procedures and was managerial. The Board also overruled *Dormitory Authority of the State of New York*, 38 PERB ¶3029 (2005) (subsequent history omitted) to the extent that it considered an employer's hierarchical structure to be determinative of whether an employee is managerial under the Act.

St. Paul Boulevard Fire District, 42 PERB ¶3009 (2009). The Board affirmed an ALJ decision which granted a unit placement application putting a fire lieutenant in a unit of firefighters. The Board stated that it will determine whether a supervisor should be accreted to a unit based upon the community of interest and administrative convenience standards set forth in § 207.1 of the Act, giving predominate consideration to the community of interest standard. The Board found that the supervisor did not have sufficient supervisory duties so as to demonstrate a conflict of interest to require exclusion from the unit. The authority to hire, impose discipline, initiate disciplinary procedures, conduct formal evaluations and determine grievances was not present.

Duty of Fair Representation

1199 SEIU United Healthcare Workers East (Rowe), 42 PERB ¶3010 (2009). The Board affirmed an ALJ decision dismissing a charge which alleged that the union violated its duty of fair representation. The Board stated that following a clarification of the charge, an ALJ may decline to further process a charge which is deficient. The ALJ correctly determined that Rowe did not present a *prima facie* case, and that the union responded to his numerous inquiries consistent with its obligation under the Act.

District Council 37 (Blowe and Watson), 42 PERB ¶3008 (2009). The Board affirmed an ALJ decision dismissing a charge which alleged that the union violated its duty of fair representation by not moving a grievance to arbitration. The Board held that the record did not support a finding that the union acted in an arbitrary, discriminatory or bad faith manner, or that the charging parties' asserted interpretation of the parties' collective bargaining agreement was the only possible interpretation.

Nassau County Community College Federation of Teachers (Staskowski), 42 PERB ¶3007 (2009). The Board affirmed an ALJ decision dismissing a charge at the conclusion of the charging party's direct case which alleged a breach of the duty of fair representation because the union failed to bypass step 2 of the grievance procedure and its representation of her at a pre-hearing meeting with the College. The Board found that the evidence did not establish that the union acted in an arbitrary, discriminatory or bad faith manner, and that there was no causal link shown upon which an inference could be drawn that any dissident activities engaged in by Staskowski affected the union's actions.

Practice and Procedure

United Federation of Teachers, Local 2, AFT, AFL-CIO (Gray), 42 PERB ¶3011 (2009). The Board affirmed an ALJ decision dismissing a charge for failure to prosecute. The ALJ dismissed the charge after Gray refused to produce any evidence after giving an opening statement. The Board also rejected Gray's argument that § 212.4(b) of the Rules of Procedure violates due process and that PERB did not have the authority to promulgate the rule.

State of New York (Department of Correctional Services) (Biegel), 42 PERB ¶3013; 42 PERB ¶3014 (2009); 42 PERB ¶3015 (2009). The Board affirmed the Director's decisions to dismiss charges since they were procedurally defective.

Remedy

Manhasset Union Free School District, 42 PERB ¶3016 (2009). Upon remand by the Appellate Division, and in light of that decision (see below) the Board modified its order to take into consideration certain contingencies recognized by the Court. It stated, however, that nothing in the decision should be interpreted as a modification of the policies concerning remedies under the Act.

Court Decisions

County of Erie and Erie County Sheriff v. PERB, 42 PERB ¶7002 (2009). The Court of Appeals reversed an Appellate Division decision which had confirmed a PERB decision which held that the employer violated the Act by assigning sentenced inmates to deputy sheriffs and unsentenced inmates to corrections officers. The Court

stated that given the statutory requirement of Correction Law § 500-b, which requires that the sheriff maintain and implement a formal objective classification system, the Court concluded that PERB's determination was not entitled to deference, and reversed the Appellate Division.

PFAU v. PERB and District Council 37 AFSCME, AFL-CIO, 42 PERB ¶7003 (2009). The Supreme Court vacated and annulled a Board order which held that the Unified Court System violated the Act by failing to provide information requested to represent a grievant in a disciplinary hearing. The Court held that the right does not extend to disciplinary hearings, only grievance proceedings (appeal pending).

Manhasset Union Free School District v. PERB, 42 PERB ¶7004 (2009). The Appellate Division affirmed a Board decision holding that the Manhasset Union Free School District violated the Act by transferring the unit work of transporting students. The Court held, however, that enforcement of the order was unreasonable because it may require taxpayer approval, and remanded the matter to the Board to fashion an order that would allow for contingencies that could prevent compliance.

Hampton Bays Union Free School District v. PERB, 42 PERB ¶7004 (2009) (motion for *lv. to reargue or appeal den*, 42 PERB ¶7006 (2009). The Court enforced a Board order which found that the Hampton Bays Union Free School District violated the Act by refusing to provide the union with documents requested to represent a probationary teacher in a disciplinary matter. The Court found that the agreement between the parties provided a basis for this request, in that it prevented a probationary teacher from being terminated on a arbitrary, capricious or discriminatory basis and allowed for a grievance to be filed.

Politics in the Public Sector Workplace

By David M. Cohen

While government employees are not discouraged from participating in the political process, there must be a clear separation between their political activities and their duties as government employees. It is the policy of the State that no employee shall conduct political activities on paid government time or use government equipment, vehicles, or office space for any purpose other than official government business. In addition, government employees shall not use their official authority to influence the political action of any person. Neither shall appointment to or removal from a government position, in any manner, be affected by one's political affiliation. This article will review relevant statutes and case law in this area.

Civil Service Law Section 107—A Summary

Section 1

Appointments, selections and removal from employment shall not be affected by political opinions or affiliations. No person shall be required to contribute to a political fund or render any political service. No person shall be discharged, demoted or promoted, or have his/her compensation affected for either giving or withholding political contributions or political service. No person shall use his/her official authority or influence to coerce political action or interfere with an election.

Section 2

Inquiry Concerning Political Affiliations. One cannot ask, directly or indirectly, or transmit to anyone else, what an employee's political affiliation is, as a test of fitness for holding a position. Exception: inquiring about an employee's activity or affiliation with any group or organization that advocates overturning the government of the United States or any state by force, violence or any unlawful means.

Section 3

Political Assessments. One cannot use official authority or influence to compel or induce an employee to pay or promise to pay a political contribution. One cannot knowingly permit anyone access to a government building, room or office for the purpose of giving or accepting a political contribution. One cannot use the government building, room or office to send a letter or other writing to solicit a political contribution.

The above prohibition in Section 3 concerns activity in government building, but the last part of Section 3 states:

> No person shall prepare or take any part in preparing any political assessment, subscription or contribution with the intent that the same shall be sent or presented to or collected of any officer or employee subject to the provisions of this chapter, and no person shall knowingly send or present any political assessment, subscription or contribution to or request its payment of any said officer or employee.

Query: This latter part of Section 3 seemingly suggests that the proscribed conduct is not limited to conduct on governmental property. Yet a court may be hard-pressed not to find constitutional issues with a blanket prohibition on governmental employees voluntarily making contributions, off-duty and off governmental property, to another employee.

Section 4

Prohibition Against Promise or Influence. No person holding public office or running for office can use or promise to use influence to secure another person public employment or a promotion or increase in salary in consideration for supporting a candidate or a political party. No person having or claiming to have authority or influence affecting someone else's public employment shall use or threaten to use that authority or influence to coerce or persuade the vote or political action of another.

Section 5

Violations of § 107 by a statewide elected official or state officer or employee may be directed to the Commission on Public Integrity. In 2007, the State adopted the Public Employee Ethics Reform Act (PEERA), which combined the State Ethics Commission and the Temporary State Commission on Lobbying into a new Commission on Public Integrity, effective in September 2007. Executive Law § 94.

In furtherance of its duties, the Commission may conduct any investigation necessary to carry out its duties, and will advise and assist any state agency in establishing regulations regarding conflicts between private interest groups and elected officials, officers and employees. The Commission must also prepare an annual report to the governor and the legislature summarizing its activities and recommending changes in the laws regarding the conduct of elected officials, officers, employees, and political party chairpersons. It is authorized to make rules concerning restrictions on outside activities and limitations on the receipt of honoraria by persons subject to its jurisdiction. See 19 N.Y.C.R.R. §§ 930, 932. In addition, the Commission must render advisory opinions as to conflicts of interest and ethics provisions.

Other Restrictions

Public Officers Law § 74. This provision contains the code of ethics for state employees. Generally, the code of ethics is directed at addressing the conflict between public service and private financial interests. Under § 74(2), no officer or employee of a state agency should have any interest in substantial conflict with his or her public duties. § 74(3)(d-h) provides standards of conduct which address both actual and apparent conflicts of interest. Under § 74(3)(d) no employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for oneself or others. Under § 74(3)(f) an employee should not by his or her actions give the impression that any person can improperly influence the employee or gain the employee's favor in the performance of the employee's official duties, or that the employee is affected by the kinship, rank, position or influence of any party or person. Under § 74(3)(f) an employee should act not to raise public suspicion that he or she is engaged in acts violating the employees public trust. This provision certainly encompasses conduct involving politics in the workplace, but goes beyond it as well.

N.Y.S. Ethics Commission Advisory Opinion 98-12. A state employee requested an opinion on whether he can work on a political campaign and if so, whether there were any restrictions. The Commission expressly stated that § 74 applies to employees working on behalf of a candidate or in any other political endeavor. Thus the employee

- should refrain from soliciting a person or entity which has dealings with him or his department, or had such dealings in the last 12 months, but this does prohibit the employee from using his name on untargeted mass mailings, even if the mailed document reaches an individual or entity which has dealings with his department, provided, however, that he does not use his official title or governmental position in the mass mailing;
- cannot use state resources (telephone, office supplies, computer, photocopy machine, support staff) or conduct political activity in a government building or during working hours;
- cannot solicit contributions from his subordinate, citing to Civil Service Law § 107;
- should at all times avoid conduct which promotes perception that his actions as a state employee may be influenced by his political activities.

Election Law. § 17-158 prohibits those holding or seeking public office from corruptly using or promising to use, directly or indirectly, their official authority to aid anyone in securing public employment in return for one's political vote or influence. In addition, employees may not accept or request payment or contributions in return for a promise of a public appointment. However, nothing stated within the statute prevents an employee from making a voluntary contribution to a candidate or political committee.

General Municipal Law § 800 *et seq*. Contained in Article 18. These provisions deal with conflicts of interest of municipal officers and employees and generally deal with conflicts of a financial nature. § 806 requires all municipalities, including school districts, to adopt a code of ethics and it specifically provides that it may prescribe conduct which is not specifically prohibited by Article 18. *Belle v. Town Bd. of Town of Onondaga, 61 AD2d 352,* 402 NYS2d 677 (4th Dep't 1978). The town board adopted a code of ethics prohibiting employees and various board members from being a political committee person, chairman, or vice chairman of a political party. Two zoning board members were removed from their positions because they held prohibited political positions, and they sued. The court dismissed their lawsuits because General Municipal Law § 806 gives broad authority to local governments when it comes to conflicts of interest. *(See also Golden v. Clark,* 76 NY2d 618, 563 NYS2d 1 (1990)).

How far can you go in restricting political activity in order to foster a claimed legitimate governmental interest? In *Weingarten v. Board of Educ. of City School District of the City of New York,* 591 F. Supp. 511 (S.D.N.Y. 2008), the New York City School Chancellor's regulation prohibited the distribution, posting, or displaying of material supporting any candidate or political organization in a school building. It also prohibited use of staff mailboxes to advocate the election of political candidates or for the purpose of campaigning.

As a result of a teachers' union e-mail providing guidance on the wearing of political buttons on school time and the hanging of posters on union bulletin boards, the City informed the union that wearing political buttons and the distribution of political material was prohibited by the regulation. The union and several teachers sued and sought injunctive relief barring enforcement of the regulation. The teachers argued that their First Amendment rights were being violated. The City argued that permitting this activity would compromise its responsibility to maintain neutrality in political campaigns; that permitting the wearing of buttons might send the wrong message that a candidate was being endorsed by the school. Although there was no evidence that students or parents viewing the buttons worn by teachers would in fact reach this conclusion, the issue was whether the court should defer to the City because the ban carried a legitimate pedagogical concern with the maintenance of neutrality.

The court denied the injunction concerning the wearing of the buttons. Thus, the prohibition contained in the Chancellor's regulation stood. However, the court did enjoin the prohibition on using the staff mailboxes and union bulletin boards, in areas closed to students, for the distribution and posting of political literature.

Interpretation by the N.Y.S. Commission on Public Integrity

"Be a candidate for public office in a partisan election"

In seeking elected political office, employees should consider whether the office sought might conflict with their government position. It is recommended that government employees seek an opinion from their employing agency and the Commission on Public Integrity. If an incompatibility is found, the employee may be prohibited from seeking office.

Employees must campaign on their own time and avoid using their position to gain any advantage over a political opponent. They must form a separate entity to receive campaign contributions and be wary of soliciting and accepting contributions from individuals or entities that do business with their agency, because they might be illegal gifts or give rise to actual or apparent conflicts of interest. Employees must also refrain from using government resources to aid the campaign. The rule applies to telephones, office supplies, postage, photocopying machines or support staff assistance.

Furthermore, employees cannot in any way indicate in their campaign literature or speeches that the State or their agency endorses their candidacy. However, the name of one's employing agency and description of their position can be cited in a campaign biography. New York State Commission on Public Integrity, www.nyintegrity.org/pubs/political_activities.html.

Cases Involving Using Government Property for Political Purposes

***People v. Haff*, 53 N.Y.2d 997 (1981)**

Public officers gave notice to subordinates, within a building occupied for governmental purposes, to collect and receive political assessments. The court held that said conduct violated subd. 3 of Civil Service Law § 107.

Despite defendant's arguments, the Court held that Civil Service Law § 107, subd. 3, is a reasonable regulation of speech, since it is limited to a place. Furthermore, it is not void for vagueness given the commonly understood meaning of the words in which it is phrased. Thus Civil Service Law § 107, subd. 3 is a valid regulation of a partisan political conduct.

***Hempstead Democratic Club v. Incorporated Village of Hempstead*, 112 A.D. 2d 428 (2d Dep't 1985)**

The Court held that Civil Service Law § 107, subd. 3, prohibiting solicitations and collections of funds, by or from government employees in government offices, did not prohibit a political party from seeking use of an auditorium in a municipal park for monthly meetings, even though the political meetings were to be conducted on premises owned by and rented from a government entity.

A provision regulating the park's use stated that "political groups or Secret Societies may not use the facilities of the Park to conduct meetings or to gather informally to hold discussions pertaining to their respective organizations." However, many organizations, including political ones, such as the NAACP, the Black and Hispanic Voters' League and a tenants' organization, were allowed to use the auditorium and other park facilities.

Regardless, permission for the Hempstead Democratic Club to use the auditorium for monthly meetings was denied. The Village of Hempstead argued that the regulation applied only to partisan political groups having a nexus with a political party and only as to their conducting of business meetings. The Village argued that the use by such clubs would politicize the function of the park and create an improper aura of partisan political business activity and would allow the solicitation and collection of political contributions in violation of Civil Service Law § 107(3).

The Court dismissed these arguments given that the park was used by numerous other groups with significant political involvement. Plus, the Village failed to explain why political business activities by political parties is any different from business activity by nonpartisan political groups such as the NAACP, or non-business political activity by any political group.

The Court held that the limitations provided in the Civil Service Law bear no relation to the activities prohibited by the Village. The purpose of § 107(3) is to shield public employees from job-related pressures to make political contributions; thus, the statute is narrowly tailored to meet this purpose while not imposing on other legitimate political activities. Thus, it is intended to apply only to fund-raising activities in government offices and other rooms occupied for similar governmental purposes. However, this does not extend to political meetings conducted on premises which happen to be owned by and rented from a government entity.

When Political Affiliation Can Be a Factor in Employment

***Catterson v. Caso*, 472 F. Supp. 833 (E.D.N.Y., 1979)**

Plaintiff was appointed County Attorney of Nassau County by Ralph G. Caso, who at that time was the County Executive of Nassau County. In the latter part of 1976, Caso announced he was seeking the Republican nomination to succeed himself as Nassau County Executive when his term of office expired on December 31, 1977. Caso sought support from Republican Party members and municipal officials, including the plaintiff. He requested the plaintiff to speak in support of his candidacy to the Nassau County Republican Chairman. Catterson told Caso that he would not support his candidacy nor speak to the Republican chairman on

Caso's behalf. Caso then ordered Catterson to appoint Robert J. Sweeney to the office of chief deputy county attorney which was to become vacant on December 31, 1976. Catterson complied on December 30, 1976. He was then informed that he was terminated as of midnight December 31, 1976. Sweeney then succeeded Catterson as county attorney.

The Court found that no clear line can be drawn between policymaking and non-policymaking positions, but there are general guidelines. Employees with broad responsibilities are more likely to be policymakers. Consideration should also be given to whether the employee is an adviser or formulates plans to implement broad goals. The Nassau County Attorney had considerable discretion in operating his office. He had the authority to appoint deputies, officers and employees Therefore he had the final say in the makeup of his staff and was a policymaker.

However, even without finding Catterson to be a policymaker, his dismissal was still constitutional. As county attorney, Catterson was in a confidential relationship with the officers of the political body whose legal interests he represented. The confidential relationship between an attorney and his client is based on trust. In view of confidential relationship between county attorney and officers of political body, and in view of public interest of allowing a county executive to effectively implement his policies, the First Amendment rights of the county attorney are outweighed.

***Regan v. Boogertman*, 984 F.2d 577 (2d Cir. 1993)**

This was an appeal from a final judgment entered in the United States District Court for the Eastern District of New York, granting the Town of Islip's motion for summary judgment dismissing Regan's suit alleging a violation of her constitutional rights because she was fired given her political affiliation. The Court of Appeals concluded that Regan held a policymaking position, and therefore political affiliation was an appropriate consideration in terminating her employment. Merely placing the label of "policymaker" on a position does not insulate it from First Amendment scrutiny because there are policymaking positions in which political affiliation is not an appropriate employment consideration, such as coach of a university football team. However, there are other positions in which political affiliation is essential, yet involve no policymaking. Therefore, the inquiry is not whether the label policymaker fits a particular position, but rather, whether the hiring authority can show that party affiliation is an appropriate requirement for effective job performance, that there is a rational connection between shared political ideology and job performance.

By law, Regan's position of Deputy Tax Receiver is exempt from civil service status and the protections afforded therein. However, the Court refused to hold that if a position is exempt from civil service protection it is presumed that political dismissal is permissible. There are positions that serve at the will of elected officials, but have no connection with the essential functioning of the office. Therefore, there must be a multiple-factor analysis to determine whether the position falls within the political dismissal exception. Whether a position comes under civil service protection is only one such factor.

Other factors include whether the position is given policymaking functions by law, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders. Regan argued that her role as the Deputy Tax Receiver was merely ministerial because every function was tightly controlled by law, leaving her virtually no discretion. However, her actual actions taken while in office are not conclusive. The Court also looked at the power with which Regan was vested by law, and which is inherent to her office, and held that there likely is no circumstance where a shared ideology is more important than when an elected official appoints a deputy who may act in his or her stead. The Court also noted that she hired seasonal employees and determined who would be laid off. She coordinated office activities with other Town and County officials; she attended Board meetings; she was an authorized signatory to Town checks. Thus, the Court concluded that political party loyalty can be deemed essential in this case.

***Vezzetti v. Pellegrini*, 22 F.3d 483 (2d Cir. 1994)**

Former town employees, including a highway superintendent, brought suit against the town supervisor, members of the town board, and town, alleging that they were fired due to their political affiliation. The United States District Court for the Southern District of New York granted summary judgment for defendants, and the employees appealed. The Court of Appeals held that the highway superintendent position was a policy-making position, thus political affiliation was a valid employment consideration.

The factors analyzed in deciding whether one is a policymaker include whether the employee (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders. It is not an exhaustive list of indicators, nor is any one factor or group of them dispositive. The proper approach is to consider all the factors and determine whether there is a rational connection between shared ideology and job performance.

The Court found Vezzetti to be a policymaker because he lacked civil service status and was responsible

for one-sixth of the entire Town budget. He managed sixty employees and maintained broad hiring authority. As a department head, Vezzetti consulted directly with elected officials of the Town Board on budgets and programs. Under his guidance, the highway department developed a public relations campaign to promote certain highway department programs, and Vezzetti himself made frequent public speeches.

***Affrunti v. Zwirn*, 892 F. Supp. 451 (E.D.N.Y. 1995)**

The Court held that because members of the town board of zoning appeals (BZA) were policymakers, the First Amendment did not prevent the town board and town from reducing their salaries, even to the point of constructive termination. Although the employees had been appointed to five-year terms and could only be removed for cause pursuant to Town Law § 267, they were considered policymakers because they were appointed by the town board, a policymaking body. Moreover, they were hired based on their political affiliations and beliefs. In addition, they were exempt from civil service protection, perceived as policymakers by the public, and had sufficient influence on government programs regarding town zoning. Furthermore, they maintained contact with elected officials, such as town board members, and carried out the objectives of political leaders on the town board. The court noted that while their First Amendment rights were not violated on the reductions of their salaries because they were policymakers, it expressly did not pass upon where they would have a stated cause of action under Town Law 267.

***Butler v. New York State Dept. of Law*, 211 F.3d 739 (C.A.2 N.Y. 2000)**

A former Deputy Bureau Chief for New York State Department of Law ("NYSDL") brought suit against New York's Attorney General, his First Deputy, and NYSDL, alleging a political patronage discharge in violation of the First Amendment. The Court of Appeals, 2d Circuit held that the Deputy was a policymaker and was exempted from First Amendment protection. The Court found that political patronage dismissals are proper given a connection between shared ideology and job performance. The criteria for such status include the confidential nature of the position, duties that require the exercise of authority or discretion at a high level, or the need for expertise that cannot be measured in a civil service exam. In this case Butler was in the exempt class of the Civil Service. She was required to have legal expertise. She supervised 80 other attorneys. She routinely acted and spoke on behalf of the Attorney General. Although Butler argued she was not a policymaker because she had to consult with her supervisors or clients on policy issues, the court looked not only at what she did on the job, but the power with which she was vested by law. The court also cited to other cases holding that attorneys working in public capacities were not protected against patronage dismissals.

***Wallikas v. Harder*, 118 F. Supp. 2d 303 (N.D.N.Y. 2003)**

A deputy sheriff captain brought § 1983 action against the county, sheriff, and undersheriff for violating his First and Fourteenth Amendment rights. The deputy sheriff alleged that they retaliated against him for participating in county sheriff's election. On motion for summary judgment, the District Court for Northern District of New York held that issues of fact remained as to whether deputy sheriff captain was political position. The Court held that the classification of a job as a civil service position is not dispositive in determining whether a public employee is policymaker for whom political affiliation is an appropriate job requirement.

The Court cited the Second Circuit, which has held that political affiliation is a valid criterion for jobs held by policymakers or confidential employees. *Butler v. New York State Dep't of Law,* 211 F.3d 739, 743 (2d Cir. 2000). To determine whether an employee is a policymaker, the hiring authority must demonstrate that party affiliation is necessary for effective job performance. Thus political affiliation is a proper job requirement given a rational connection between shared ideology and job performance. Therefore, courts must look at the inherent duties or job description, rather than an employee's performance, to determine whether an employee is a policymaker.

In examining all of the *Vezzetti* factors, the Court noted that the employee did have civil service protection, which weighed in his favor. He did have technical competence and expertise in computers and in law enforcement; he did exercise control over subordinate employees (but did not control hiring or firing), which weighed in the County's favor. Although he did engage in activities which seemed to indicate he acted as or in place of a policymaker, his actual job description did not reflect many of the duties he performed. Therefore, the Court could not conclude, as a matter of law, that policymaking activities he engaged in "were inherent in the job of Duty Sheriff Captain." Summary judgment in favor of the County was therefore denied.

***Alberti v. County of Nassau*, 393 F. Supp. 2d 151 (E.D.N.Y. 2005)**

Upon Thomas Suozzi's election to the position of Nassau County Executive, several employees were terminated, including an attorney in the Office of Housing and Intergovernmental Affairs, Manager of Budget Analysis, Assistant to the Coordinator of Housing, Budget Examiner and Legislative Liaison. On the issue of whether they were policymakers and therefore exempt from the restriction on firing for political affiliation, they argued that the County was estopped from making the policymaker defense because of an unemployment ruling. Under Labor Law § 565(2)(e), a person in a major non-tenured policymaking or advisory position is not eligible for unemployment benefits. In one case, an administrative law judge found, over the County's objection, that the

Assistant to the Housing Coordinator did not fit within the exemption and was therefore eligible for benefits. In the other cases the County did not contest the employees' claim for benefits. The court held that the County was not estopped from arguing the policymaker defense because (1) there is no legal basis that establishes that a policymaker as used in unemployment is equivalent to a policymaker for purposes of the political patronage analysis; and (2) the County should not be penalized for determining not to spend its resources by contesting the claims of the other employees.

***Hogan v. City of Syracuse*, 2007 WL 969177 (W.D.N.Y. 2007)**

Deputy Commissioner of Parks Department claimed his termination was politically motivated when he supported a Democratic candidate in the primary for mayor, but not the incumbent mayor, also a Democrat. Although analysis of terminations based upon political affiliation traditionally invoke competing political parties, the same analysis must be applied even when all involved are members of the same party. Thus the court applied the traditional 8 factor test.

The Deputy Commissioner, whose job duties seemed to be confined to special events, had no civil service protection; he did have expertise in holding special events for the city; he supervised 4 of the department's 40-60 employees. He did not have authority to hire or fire, but his recommendations were generally accepted by the Parks Commissioner; he was authorized to speak as a representative of the Parks Department, although his work at these special events required the Commissioner's approval. He had contact with the mayor at special events. He was responsive, but not always, to partisan politics.

However, the court determined he was not a policymaker because every special event he organized required approval of its scope, content and presentation arrangements by the Commissioner.

***Cicchetti v. Davis*, 607 F. Supp. 2d 575 (S.D.N.Y. 2009)**

Fire Commissioner of the City of Mount Vernon was terminated by the Mayor. After a trial, the jury concluded that his political activity in supporting a candidate who defeated the Mayor in the general election was a substantial or motivating factor in his termination. The trial judge set aside the jury verdict, finding that the Fire Commissioner was a policymaker based upon special interrogatories which had been presented to the jury, and which were based on the *Vezzetti* factors. The court had previously denied the defendant's motion for summary judgment (2088 W.L. 619013) because there were questions of fact. Yet it was the jury's determination of those facts, in their answers to the interrogatories, which provided the basis for the court's decision to set aside the verdict.

Political Activities Permitted Under New York State Statutes?

POLITICAL ACTIVITY	YES / NO
Be a candidate for public office in nonpartisan elections.	YES
Register and vote as they choose.	YES
Assist in voter registration drives.	YES
Express opinions about candidates and issues.	YES
Contribute money to political organizations.	YES
Attend political fundraising functions.	YES
Attend and be active at political rallies and meetings.	YES
Join and be an active member of a political party or club.	YES
Sign nominating petitions.	YES
Circulate nominating petitions.	YES
Campaign for or against political issues.	YES
Campaign for or against candidates in partisan elections.	YES
Make campaign speeches for candidates in partisan elections.	YES
Distribute campaign literature in partisan elections.	YES
Hold office in political clubs or parties.	YES
Engage in political activity on government property.	NO
Use government property in connection with political activity.	NO
Engage in political activity while in uniform.	NO
Wear partisan political buttons on duty.*	YES
Use official authority to affect election results.	NO
Solicit agency funds at a political fundraiser.	NO
Personally solicit, accept, or receive contributions.	YES
Host a political fundraiser at their home.	YES
Be candidates for public office in partisan elections.	YES
Sell tickets to political fundraising functions.	YES
Organize or manage political rallies or meetings.	YES
Work to register voters for one party only.	YES

*Subject to lawful restrictions imposed by a governmental employer, as in *Weingarten*.

Restrictions on Political Activity of Federal Employees

The Hatch Act restricts certain political activities by federal employees. 5 U.S.C.A. §§ 1501 to 2100, 7323 to 7326. Under the Act, Federal employees cannot engage in political activity (1) while on duty; (2) in any room or building where the employee discharges official duties or holds office; (3) while wearing a uniform or official insignia identifying the office or position of their employment; or (4) while using any government vehicle or instrumentality. 5 U.S.C.A. § 7324(a)(1) to (4). The Act is meant to promote efficient, merit-based advancement for federal employees, avoid the appearance of politically-driven justice, prevent coercion of federal employees who support certain political positions, and ultimately to prevent the civil service from building political machines. *Burrus v. Vegliante*, 336 F.3d 82 (2d Cir. 2003). State employees may also be subject to the Hatch Act if their principal employment is connected to an activity partially or fully financed by the Federal Government. 5 U.S.C.A. § 1501(4). However, employees who work for educational or research institutions which are supported in whole or in part by a State or political subdivision of the State are not covered by the provisions of the Hatch Act. Federal Employees of the following agencies are subject to more extensive restrictions on their political activities than employees in other Departments and agencies:

Administrative Law Judges; Central Imagery Office; Central Intelligence Agency; Contract Appeals Boards; Criminal Division (Department of Justice); Defense Intelligence Agency; Federal Bureau of Investigation; Federal Elections Commission; Merit Systems Protection Board; National Security Agency; National Security Council; Office of Criminal Investigation (Internal Revenue Service); Office of Investigative Programs (Customs Service); Office of Law Enforcement (Bureau of Alcohol, Tobacco and Firearms); Office of Special Counsel; Secret Service; Senior Executive Service.

The Hatch Act is somewhat more restrictive than the Civil Service Law. Thus, under this federal statute, wearing political buttons on duty is prohibited, as is soliciting political contributions, even off governmental property, holding a political fundraiser at home, and being a candidate for public office in a partisan election.

Interpretations from the U.S. Office of Special Counsel Which Investigates Hatch Act Complaints (www.osc.gov)

"Be a candidate for public office in nonpartisan election"

- An employee may be a candidate for a school board position, or a candidate for a non profit leadership position, such as the Rotary Club.

"Use official authority to affect election results"

- An employee cannot sign a letter seeking volunteer services that identifies the employee via his or her job title.

"Express opinions about candidates and issues"

- Affirmative expressions of opinions and candidates, such as displaying campaign posters and wearing political buttons while on duty, is prohibited. However, informal conversation among coworkers regarding political issues and candidates is permissible provided it does not interfere with one's duties. In addition, an employee may write a letter to the editor at the *New York Times* to express a personal opinion on a candidate or political issue.

"Join and be an active member of a political party or club"

- An employee may serve as a delegate, alternate or proxy to a state or national party convention.

"Campaign for or against candidates in partisan elections"

- An employee may walk around his neighborhood and introduce a candidate for a partisan election to his neighbors. In addition, an employee may serve as treasurer to a campaign to the extent of preparing and filing campaign finance reports and paying campaign expenses. However, the employee would be prohibited from personally soliciting, accepting, or receiving political contributions.

"Distribute campaign literature in partisan elections"

- An employee may stand outside polling centers on election day and hand out leaflets in support of a partisan political candidate or political party.

"Engaging in political activity on government property"

- Employees working in partially leased federal buildings may engage in partisan political activity in the nonleased common areas of the building, such as the courtyard, roof deck, or main lobby.

"Be candidates for public office in partisan elections"

- Although employees are prohibited from being candidates in partisan elections, an employee who holds elective office prior to his commencement as a federal employee, may continue to hold office until his or her term expires. Once the term of office has expired, the employee may not seek reelection.

"Personally soliciting, accepting, or receiving contributions"

- An employee may be listed as a "guest speaker" or "special guest" on fundraising invitations, provided the listing does not imply that the employee is soliciting contributions.

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***Burrus v. Vegliante*, 336 F.3d 82 (2d Cir. 2003)**

The Postal Workers' union brought an action against United States Postal Service (USPS), seeking declaratory and injunctive relief arising from orders of USPS officials requiring removal, from union bulletin boards in nonpublic areas of post offices, of posters displayed by postal workers on active duty that compared candidate positions in the 2000 presidential election. The 2d Circuit Court of Appeals held that the display of political posters is not protected under 5 U.S.C.A. §§ 7323(c), 7324. The enforcement of the prohibitions did not turn on a showing of interference with duty or misappropriation of workplace rooms or buildings. The Court found that the Act requires only that an employee be on duty or be in any room or building occupied in the discharge of official duties by a government employee. Furthermore, the Court held that the Hatch Act was not impermissibly vague; given that the meaning of "political activity" was amply elaborated by definition and examples, plus advisory opinions were available from the Office of Special Counsel.

Navigating the do's and don'ts of what is and is not permitted political activity requires careful factual analysis as applied to myriad state and federal statutes as well as to the First Amendment. Tread carefully!

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2008–09 U.S. Supreme Court Decisions Affecting Labor and Employment

By Seth H. Greenberg

The 2008-09 U.S. Supreme Court term featured some hotly contested labor and employment cases, particularly with regard to issues of discrimination and the enforceability of arbitration clauses. It also featured some notable decisions on retaliation and union service fees. The purpose of this article is to briefly summarize those decisions and, where appropriate, offer a preview of what is to come. As is always the case, readers should refer to the full text of the decision.

Discrimination

Ricci v. DeStefano (Vote: 5-4)[1] (Decided June 29, 2009)

On the last day of the term, the Court issued its decision in *Ricci v. DeStefano*. Here, the Court narrowly concluded that the City of New Haven violated Title VII when it tossed out and failed to certify the results of a civil service examination after white candidates outscored minority candidates.

In the winter of 2003, the New Haven Fire Department administered civil service examinations for promotion to Lieutenant and Captain. The tests had been designed and administered by a private company after performing in-depth job analyses. Assessors, who were superior in rank to the positions being tested, were hired at the approval of City officials. They were trained and taught how to score a candidate's responses consistently using checklists of desired criteria. Notably, two-thirds of the assessors were minorities.

Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 passed the examination—25 whites, six blacks, and three Hispanics. Eight lieutenant positions were vacant. Using the "rule of three," which operates almost identically to New York's "one in three rule," the top ten candidates were eligible for immediate promotion.[2] All ten were white.

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those who passed, 16 were white, three were black, and three were Hispanic. There were seven captain positions vacant. Of the nine candidates eligible for immediate promotion, seven were white and two were Hispanic; there were no black candidates eligible for immediate promotion.[3]

The City ultimately rejected the test results and failed to certify them because "too many whites and not enough minorities would be promoted were the lists to be certified."[4] In response, several white and one Hispanic firefighter sued, alleging the City's rejection of the results was discriminatory against white and non-black applicants who scored well on the examination.

The District Court granted summary judgment in favor of the City, finding it was proper to reject the results because of disparate impact discrimination. The Second Circuit affirmed.

On June 29, 2009, the Supreme Court reversed in a 5-4 opinion, decided along familiar ideological lines with Justice Anthony Kennedy siding with the Court's more conservative bloc. Writing for the majority, Justice Kennedy explained that the City's action was an express, race-based decision that violated Title VII as disparate treatment discrimination.

The City had been especially concerned with the likelihood that it would be sued under a disparate impact claim if the test results had been certified. But the Court concluded, "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."[5] In order to resolve any conflict between the disparate treatment and disparate impact provisions of Title VII, the Court adopted a "strong-basis-in-evidence" standard.[6] To justify its action, a municipality would have to have a strong basis in evidence that "the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision."[7] Although it may be proper to consider the racial make-up of the workforce and to seek input in the designing of a race neutral system of promotions, "once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."[8]

Justice Ruth Bader Ginsburg, writing for the dissent, would have upheld the decision of the City on the basis that it had a good faith belief its testing process was faulty and unfairly discriminatory toward minority candidates. Justice Ginsburg showed concern about the use of the "strong-basis-in-evidence" standard articulated by the majority, which appears to be a somewhat artificial criterion ripe for further litigation.

Recently confirmed Supreme Court Justice Sonia Sotomayor sat on the Second Circuit panel that had dismissed the firefighters' claims. However, it seems unlikely that her membership on the Court would have altered the result had the case been decided in the upcoming term since she replaces Justice David Souter, who had voted along with the more liberal bloc of justices and as part of the dissenting opinion.

An interesting follow-up to *Ricci* is *Lewis v. City of Chicago*,[9] which was just added to the Court's docket on September 30, 2009. In *Lewis*, eight black applicants passed a 1995 entry-level test to become firefighters but they were never selected. They argue that the test was flawed but additionally argue that the act of discrimination arises when actual hiring decisions are made, not when the results were announced. The Court must address which event starts the 300-day filing period for an EEOC charge.

Gross v. FBL Financial Services, Inc. **(Vote: 5-4)[10] (Decided June 18, 2009)**

An employee claiming disparate treatment under the Age Discrimination in Employment Act (ADEA) must establish, by a preponderance of evidence, that age was the "but for" cause of the challenged adverse employment action, says the Court in *Gross v. FBL Financial Services, Inc.*, another decision narrowly divided along the same ideological lines as *Ricci*.[11]

In 2003, at age of 54, Jack Gross was reassigned from claims administration director to the position of claims project coordinator. Although paid the same, many of his former duties and responsibilities were transferred to a newly created position—claims administration manager. Considering this a demotion, Gross sued, alleging that his reassignment violated the ADEA. At the close of trial, the district court instructed the jury to enter a verdict for Gross if he proved, by preponderance of the evidence, that his employer, FBL, demoted him and that his "age was a motivating factor" in demoting him. It further instructed the jury that Gross's age would qualify as a "'motivating factor,' if [it] played a part or a role in [FBL]'s decision to demote [Gross]." The jury was also instructed to return a verdict for FBL if it proved that it would have demoted Gross regardless of age.[12]

After the jury returned a verdict for Gross, FBL appealed, challenging the jury instructions. The Eighth Circuit reversed, holding that the jury had been incorrectly instructed under the standard established for "mixed-motives" cases. In *Price Waterhouse v. Hopkins*,[13] six members of the Court agreed that if a Title VII plaintiff shows that discrimination was a "motivating" or a "substantial" factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. In her concurring opinion in *Price Waterhouse*, Justice O'Connor found that to shift the burden of persuasion to the employer, the employee must present "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision."[14] The Eighth Circuit had essentially adopted O'Connor's opinion as controlling, finding that Gross was required to present "[d]irect evidence…sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." Since Gross admitted that he had not presented "direct evidence of discrimination," the Court of Appeals found the mixed-motives instruction was inappropriate. Rather, says the Eighth Circuit, Gross should have been held to the burden of persuasion applicable to typical, non-mixed-motives claims; that is, whether Gross had carried his burden of "proving that age was the determining factor in FBL's employment action."

The Supreme Court vacated the Eighth Circuit's decision. Writing for the majority, Justice Clarence Thomas opined that the burden of persuasion never shifts to the party defending an alleged mixed-motives discrimination claim brought under ADEA, even when there is some evidence that age was a motivating factor. It is this conclusion that is most interesting since the parties had never specifically put that inquiry before the Court. In footnote one, the Court explained, in relevant part: "Although the parties did not specifically frame the question to include this threshold inquiry, '[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.'"[15] In other words, practitioners beware!

Declining to apply the burden-shifting framework in Title VII claims to ADEA actions because they are materially different statutes, the Court explicitly rejects the Court's prior Title VII decisions on burden of proof. Focusing squarely on the test of the ADEA, the Court concludes that a "plaintiff bringing an ADEA disparate-treatment claim must prove, by preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."[16]

In his dissenting opinion, Justice John Paul Stevens finds the majority's "resurrection of the but-for causation standard is unwarranted."[17] He concludes that a mixed-motives jury instruction is proper in an ADEA case and that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction. Justice Stevens took the majority to task in its interpretation of judicial and legislative history. He explained that the "but-for" causation standard endorsed by the Court had originally been enunciated in Justice Kennedy's dissenting opinion in *Price Waterhouse,* a case construing identical language in Title VII. Both the Court and, later, Congress rejected the "but-for" standard. Stevens then unloads at the majority's decision: "Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking."[18]

The decision is a clear win for parties who must defend against age discrimination claims (not just employers but labor organizations too). Some believe that the issue of an ADEA mixed-motives case will be resurrected by legislation. This is so in light of the passage of the Ledbetter Act[19] and in light of increasing numbers of older workers. In fact, on or about the date this article was being submit-

ted, U.S. Senator Patrick Leahy, (D-VT), chair of the Senate Judiciary Committee, was set to join Senator Tom Harkin (D-IA), chair of the Health, Education, Labor & Pensions Committee, and Congressman George Miller (D-CA), chair of the House Education and Labor Committee, in introducing legislation that sought to overturn the *Gross* decision. Leahy's committee had recently held a hearing to examine the Court's pro-employer decisions, including the one in *Gross*.

AT&T Corp. v. Hulteen (Vote: 7-2)[20] (Decided May 18, 2009)

Employees who took pregnancy leave at AT&T prior to 1979 are not entitled to the same pension credits as employees who took disability leaves during the same period, says the Court. In *AT&T Corp. v. Hulteen*, the Court concluded that the provisions of the Pregnancy Discrimination Act (PDA) do not apply retroactively provided that an employer's pre-PDA plan was not adopted with discriminatory intent.[21]

In 1978, Congress passed the PDA. Prior to that, employers were free to deny service credits to employees who took pregnancy leave at rates different from other short-term disabilities. Under AT&T's old pension plan, employees on pregnancy leave did not receive the same service credit as employees on leave for other disabilities. The difference in treatment of pregnancy-related and other disability leave was lawful. After the PDA was passed, Congress amended Title VII, establishing that discrimination on basis of pregnancy was sex discrimination within the meaning of Title VII. AT&T modified its service credit calculations prospectively; however, it continued to calculate pre-PDA service under its pre-PDA rules.

AT&T employees sued AT&T, claiming that its calculation of pre-PDA service under pre-PDA rules violated the PDA. Both the district court and the Ninth Circuit agreed with the employees.

The Supreme Court reversed. Writing for the Court, Justice David Souter explained that the benefit calculation rule is a bona fide seniority system under § 703(h) of Title VII,[22] which insulates it from challenge. Accordingly, AT&T's method of calculation was proper. This decision is consistent with many prior Court rulings that apply new statutory rights prospectively.

Arbitration

14 Penn Plaza, LLC v. Pyett (Vote: 5-4)[23] (Decided April 1, 2009)

Where collective bargaining agreements contain a provision that "clearly and unmistakably" require union members to arbitrate individual statutory discrimination claims under the ADEA, such arbitration clauses are enforceable.[24] So says the Supreme Court in *14 Penn Plaza, LLC v. Pyett*. And in so deciding, the Court either took one giant step in overturning its 35-year-old decision in *Alexander v. Gardner-Denver Co*.[25] or, alternatively, it carved out a very narrow ruling that each case is to be decided on a fact-specific basis. In any event, this case is certainly one to follow and it should be interesting to see how the circuit courts implement the ruling.

In *14 Penn Plaza*, a multi-employer bargaining association and a union entered into a collective bargaining agreement which requires union members to submit all claims of employment discrimination to binding arbitration under the agreement's grievance and dispute resolution procedures. The provision specifically stated that all claims were subject to the contract's grievance and arbitration procedures "as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination."[26]

After some union workers were reassigned to new, undesirable jobs at different, undesirable locations, allegedly also resulting in a loss of income, grievances were filed on their behalf by the Union claiming age discrimination and other contractual violations. After the Union withdrew the age discrimination claims, the employees filed an ADEA complaint with the EEOC.

After being issued a right to sue letter, an ADEA suit was filed in federal court. The employer, 14 Penn Plaza, moved to compel arbitration. The Second Circuit denied the employer's motion, concluding that a union could not waive a litigant's right to a judicial forum under the ADEA even though an individual employee may do so for his own claims.

In yet another close decision, the Supreme Court reversed. "We hold," writes Justice Thomas, "that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[27] The majority noted that the parties had freely negotiated a term of the collective bargaining agreement to include the submission of employment discrimination claims to binding arbitration. Despite recognizing that the individual's right to be free of employment discrimination is a non-waivable substantive right, in the Court's view the choice of a forum to litigate the statutory discrimination claim is not one of the substantive statutory rights that cannot be waived.

In a strong dissent, Justice John Paul Stevens noted the decades-long Supreme Court law on arbitration and protested, "Today, the majority's preference for arbitration again leads it to disregard our precedent," adding that the majority was making policy choices not made by Congress.[28]

The Court's decision leaves much still unresolved. Although the Union in *14 Penn Plaza* declined to arbitrate the claims, it authorized individual employees to proceed to arbitration without the Union. Can a union block an

individual from pursuing its claim to arbitration? I guess only time will tell. Until then, unions should be careful when negotiating contract language that requires arbitration of statutory claims.

Retaliation

Crawford v. Metropolitan Government of Nashville (Vote: 9-0)[29] (Decided January 26, 2009)

Title VII forbids retaliation against employees who report gender or race discrimination in the workplace. This anti-retaliation provision contains two clauses, making it "an unlawful employment practice for an employer to discriminate against any of his employees…[1] because he has opposed any practice made an unlawful practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[30] The first clause is known as the "opposition clause" while the other is known as the "participation clause."

Vicky Crawford, a 30-year employee of the Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), was interviewed by Metro's human resources officer as part of an investigation in connection with allegations of sexual harassment by Metro School District's employee relations director. Crawford described several instances of sexually harassing behavior she experienced. Two other employees also reported being sexually harassed. When all three were fired, Crawford filed a charge with the EEOC, claiming retaliation.

The District Court granted Metro its motion for summary judgment, holding that Crawford "could not satisfy the opposition clause because she had not 'instigated or initiated any complaint,' but had 'merely answered questions by investigators in an already-pending internal investigation, initiated by someone else.'"[31] The District Court also found that Crawford's claim failed under the participation clause since there was no pending EEOC charge. Affirming the lower court's decision, the Sixth Circuit specifically found that the opposition clause "demands active, consistent 'opposing' activities to warrant… protection against retaliation.'"[32]

Clearly an easy decision for the Supreme Court, which unanimously reversed the Sixth Circuit and found that retaliation protection of the so-called opposition clause "extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation."[33] Justice Souter clearly explained that "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."[34] The Court declined to address whether Crawford's conduct was protected by the participation clause.

Union Fees

Locke v. Karass (Vote: 9-0)[35] (Decided January 21, 2009)

Whether a labor union may charge nonmembers a "service fee" was the question addressed by the Supreme Court in *Locke*. The Court upheld the right of unions to charge non-members a service fee for national litigation as long as the litigation does not concern political activities and as long as each other local of the national unit also contributes.[36]

More than 50 years ago, the Court found that payment of a "service fee" to a local union that acts as the exclusive bargaining agent of government employees, even where those employees disagree with and/or do not belong to the union, is permissible and does not violate the First Amendment.[37] Certain elements of that fee have also been addressed by the Court previously. For example, it upheld charging a fee for "administering a collective bargaining contract" as constitutional while forbidding charges for "political expenditures."[38]

Specific to *Locke*, the fee at issue is an "affiliation fee" that the local union pays to its national organization, a portion of which is used "to pay for litigation expenses incurred in large part on behalf of *other* local units."[39] The Court concluded that this charge is permissible of nonmembers as long as two elements are met. First, the subject matter of the litigation must be of a kind "that would be chargeable if the litigation were local, e.g., litigation appropriately related to collective bargaining rather than political activities." And second, "the litigation charge is reciprocal in nature, i.e., the contributing local reasonably expects other locals to contribute similarly to the national's resources used for costs of similar litigation on behalf of the contributing local if and when it takes place."[40]

Other Cases of Interest

Though not an employment case, *Ashcroft v. Iqbal*[41] makes it clear that the heightened pleading standards set forth in the Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*[42] apply to all civil actions, not simply antitrust cases, and that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[43]

In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*,[44] decided unanimously, the Court held that the administrator of an employee benefit plan, governed by ERISA, properly paid benefits to a decedent employee's former spouse, even though the spouse waived the right to benefits as of their divorce settlement. The Court explained that the beneficiary designation was never changed by the decedent after the divorce and that the ex-wife did not expressly disclaim benefits in accordance with the terms of the benefits plan. The lesson, of course, is that a divorcee must ensure that a "qualified domestic relations order" is filled out and that his benefi-

ciary designation card is amended as soon as a divorce is finalized. This used to be advice; it is now the law.

Looking Ahead to the 2009–10 Term

The Court began its 2009–10 term, the first with new Justice Sonia Sotomayor, on October 5, 2009. During the upcoming term, the Court will continue to hear arguments and address issues that affect labor and employment laws. It will decide *Lewis v. City of Chicago* (see *supra*). It is also being asked to decide, in *Mohawk Industries, Inc. v. Carpenter*,[45] whether an employer's attorney's investigation of an internal complaint is protected by the attorney-client privilege. Stay tuned as the Court now seems to be addressing employer and business interests on a regular basis.

Endnotes

1. No. 07-1428, 557 U.S. __ (2009). Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Scalia filed a concurring opinion, as did Justice Alito, in which Justices Scalia and Thomas joined. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens, Souter, and Breyer joined.
2. *Id.* at 5. The "rule of three" permits that the appointing authority may choose one of the top three candidates on the eligible list to fill a vacancy. If, for example, two vacancies exist, then the top four candidates would be considered for appointment.
3. *Id.* at 6.
4. *Id.* at 19, citing the District Court's decision, 554 F. Supp. 2d 142, 152.
5. *Id.* at 33.
6. *Id.* at 25.
7. *Id.* at 24.
8. *Id.* at 25.
9. 528 F.3d 488 (7th Cir. Ill. 2008), *cert. granted,* 2009 U.S. LEXIS 5149.
10. No. 08-441, 557 U.S. __ (2009). Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined. Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined. Justice Breyer also filed a dissenting opinion, in which Souter and Ginsburg joined.
11. *Id.* at 12.
12. *Id.* at 2.
13. 490 U.S. 228 (1989).
14. *Id.* at 265.
15. No. 08-441, 557 U.S. at 5, fn 1.
16. *Id.* at 12.
17. *Id.* at 8.
18. *Id.* (Stevens, J. dissenting), at 1. It would seem, therefore, that cries of so-called judicial activism are not limited to one side of the political aisle, but exists across the ideological spectrum.
19. The Ledbetter Act amended the Civil Rights Act of 1964 so that the 180-day statute of limitations for pay discrimination claims resets with each new paycheck. This Act was Congress' direct answer to the Court's 2007 ruling in *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), which held that the limitations period begins to run on the date pay is agreed upon, not the date of one's most recent paycheck.
20. No. 07-543, 556 U.S. __ (2009). Justice Souter delivered the opinion of the Court, in which all but Justices Ginsburg and Breyer joined. Justice Stevens filed a concurring opinion and Justice Ginsburg filed a dissenting opinion that was joined by Justice Breyer.
21. *Id.* at 1.
22. 42 U.S.C. § 2000e–2(h).
23. No. 07-581, 556 U.S. __ (2009). Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined. Justice Souter filed a dissenting opinion, which Justices Stevens, Ginsburg, and Breyer joined. Justice Stevens also filed a separate dissenting opinion.
24. *Id.* at 1, 25.
25. 415 U.S. 36 (1974).
26. No. 07-581, 556 U.S. at 2.
27. *Id.* at 25.
28. *Id.* (Stevens, J. dissenting) at 2. The majority asserts it reached its conclusions after an analysis of the statutory language and history of both the National Labor Relations Act and the ADEA. The dissent strongly disagreed with the majority's analysis of legislative history and statutory construction. Two strongly worded, convincing interpretations make for some interesting law going forward. It must be true, then, what Benjamin F. Fairless, the head of U.S. Steel Corp. from 1935 until 1953, said: "What five members of the Supreme Court say the law is may be something vastly different from what Congress intended the law to be."
29. No. 06-1595, 555 U.S. __ (2009). Justice Souter delivered the opinion of the Court, in which all but Justices Alito and Thomas joined. Justice Alito filed and opinion concurring in the judgment of the Court, in which Justice Thomas joined.
30. 42 U.S.C. § 2000e-3(a).
31. No. 06-1595, 555 U.S. at 2, 3.
32. *Id.* at 3.
33. *Id.* at 1.
34. *Id.* at 6.
35. No. 07-610, 555 U.S. __ (2009). Justice Breyer delivered the opinion for a unanimous Court. Justice Alito filed a concurring opinion, in which Chief Justice Roberts and Justice Scalia joined.
36. *Id.* at 2.
37. *Id.* at 1, citing, *e.g.*, *Railway Employees v. Hanson*, 351 U.S. 225 (1956); *Abood v. Detroit Bd of Ed.*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991).
38. *Id.*, citing, *e.g.*, E*llis v. Railway Clerks*, 466 U.S. 435 (1984) and *Machinists v. Street*, 367 U.S. 740 (1961).
39. *Id.* at 2.
40. *Id.*
41. No. 07-1015, 556 U.S. __ (2009), decided May 18, 2009. Justice Kennedy delivered the opinion for the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Souter dissented, in an opinion joined by Justices Stevens, Ginsburg, and Breyer. Justice Breyer also filed his own dissenting opinion.
42. 550 U.S. 544 (2007).
43. No. 07-1015, 556 U.S. at 29.
44. No. 07-636, 555 U.S. __ (2009), decided January 26, 2009. Justice Souter delivered the opinion for a unanimous Court.
45. No. 08-678. *Certiorari* was granted on January 26, 2009 and oral arguments were set for the first day of the new term to begin October 5, 2009. Lower court decision can be found at 541 F.3d 1048.

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The Federal and State Worker Adjustment and Retraining Notification Acts (WARN): Getting Back to Basics

By Stuart S. Waxman and Aron Z. Karabel

In these turbulent economic times, employers considering downsizing or restructuring their operations will face federal and state laws that impact how those objectives may be carried out. The Federal Worker Adjustment and Retraining Notification Act ("FWA") is one such law.

For more than 20 years under the FWA, large employers, have been required to provide advance notice to their employees of mass layoffs and dislocations (*see* 29 U.S.C. § 2101 *et seq*. and 20 C.F.R. Part 639). Not unlike other federal statutes, the FWA sets a "floor," leaving open the possibility for supplemental protection under state law.

Last year, the New York State legislature did just that by enacting the New York State Worker Adjustment and Retraining Notification Act ("SWA"). The SWA extends protection to employees who work for smaller employers, and requires those employers to provide additional notice of layoffs and dislocations beyond that required by the FWA (*see* New York State Labor Law § 860 *et seq*. and 12 N.Y.C.R.R Part 921 *et seq*.).

This article examines the requirements for employers under the FWA and the SWA, and will answer the following questions:

- Which employers are covered by both Acts?
- What is required of those covered employers?
- Which events trigger the notification requirements under both Acts?
- When is compliance with the statutory notification period not required under both Acts?

A chart which compares the requirements of the FWA and SWA appears on p. 22 in this issue.

(1) To Whom Does the FWA Apply?

The FWA applies to any business enterprise (for-profit or not-for-profit) that employs at least 100 employees. Part-time employees, whom the Act defines as individuals who work, on average, fewer than 20 hours per week, and individuals employed fewer than 6 of the 12 months prior to the required notice date, do not count toward the minimum employee threshold. The Act also applies to any business enterprise that employs at least 100 employees who work, in the aggregate, at least 4000 hours per week. Only in this instance are part-time employees considered "employees" for purpose of reaching the minimum hours per week threshold. Only straight time, and not overtime, is counted toward that threshold.

While many local governmental entities such as cities, towns and villages are not covered by the Act, certain public and quasi-public entities are covered. These covered public and quasi-public entities include housing authorities, hospitals, rail passenger services, and businesses that generate and distribute electric power.

"In these turbulent economic times, employers considering downsizing or restructuring their operations will face federal and state laws that impact how those objectives may be carried out."

(2) To Whom Does the SWA Apply?

Not unlike the FWA, the SWA also applies to business enterprises. The important distinction between the statutes is that the SWA covers more employers by reducing the minimum employee and hour thresholds set by the FWA. Businesses that employ at least 50 employees (exclusive of part-time workers) or businesses that employ at least 50 employees (inclusive of part-time workers) who work, in the aggregate, at least 2,000 hours per week are covered by the Act. Unlike the FWA, regularly earned overtime counts toward the minimum hours per week threshold.

The New York State Department of Labor's regulations resolve any question regarding whether public sector entities such as school districts, public authorities, and boards or commissions are exempt from the Act, by specifically referring to these entities as "non-covered" employers.

(3) What Does the FWA Require of Employers?

The FWA requires employers to provide a minimum of 60 days advance notice of a plant closing or mass layoff. Notice must be sent to each affected employee or his or her representative and the following entities:

- The State dislocated worker unit (in New York the employer must notify the Department of Labor, Division of Employment and Workforce Solutions); and
- The chief elected official of the local governmental unit where the closing or layoff is to occur (in New York it is the local Workforce Investment Board[s]).

Employers who fail to provide the required notice to affected employees or their representatives are liable for back pay and benefits for the period in which notice should have been given. Employers are not permitted to make a payment to employees in lieu of the required notice period. However, as a practical matter, the payment of wages or salaries and benefits for the entire notice period will effectively negate any relief sought by an employee.

(4) What Does the SWA Require of Employers?

The SWA increases the notice period provided under the FWA by requiring employers to provide a minimum of 90 days advance notice of a plant closing, mass layoff or relocation. It also requires covered employers to provide notice to both the affected employee and his or her representative.

(5) What Triggers the Notification Requirements Under the FWA?

Under the FWA, plant closings and mass layoffs trigger the notification requirements.

A "plant closing" is the shutdown of an employment site (or one or more facilities or operating units within the site), and the "employment loss" of 50 or more employees (excluding part-time workers) during any 30-day period. An "employment loss" includes (1) a discharge without cause; (2) a layoff of at least 6 months in duration; or (3) a reduction in hours of work of more than 50% in each month of any 6-month period.

A "mass layoff" is a reduction in force (not the result of a plant closing) which results in an "employment loss" at a single site of employment during any 30-day period for either (1) 50 or more employees (excluding part-time workers) if they make up at least 33% of the workforce; or (2) 500 or more employees (excluding part-time workers).

Employers who must decide whether their actions rise to the level of a plant closing or mass layoff must first determine whether an "employment loss" has occurred under the Act. An employment loss is either (1) a discharge without cause; (2) a layoff of at least 6 months in duration; or (3) a reduction in hours of work of more than 50% in each month of any 6-month period. There are, however, several exceptions to the general rule that the cessation of employment constitutes an employment loss.

First, employees who refuse to transfer to another employment site within a reasonable commuting distance from their previous work site and are subsequently affected by a plant closing or mass layoff are not entitled to notice. This same is true of employees who voluntarily accept transfers outside of a reasonable commuting distance within 30 days of a transfer request, plant closing or mass layoff, whichever occurs on a later date. Whether an employer is transferring an employee to a position within a "reasonable commuting distance" depends on the site's geographic accessibility, the quality of the commute (roads and available transportation) and the employee's travel time.

Second, employees who are discharged because of the completion of a defined project or undertaking are also not entitled to notice. An employer cannot, however, simply label an ongoing project temporary to evade the purposes of the Act.

(6) What Triggers the Notification Requirements Under the SWA?

Similar to the FWA, notification requirements under the SWA are triggered by plant closings and mass layoffs. They are also triggered by relocations of all or substantially all of an employer's business more than 50 miles from its original location.

The principal distinction between both Acts is the number of affected employees that trigger the notification requirements.

Under the SWA, a plant closing is the shutdown of an employment site in which at least 25 employees experience an employment loss. A shutdown of an employment site can include either the effective cessation of work performed by a unit or the temporary shutdown of a site which would result in a qualifying employment loss.

A mass layoff is a reduction in force which results in an "employment loss" at a single site of employment during any 30-day period for either (1) 25 or more employees (excluding part-time workers) if they make up at least 33% of the workforce; or (2) 250 or more employees (excluding part-time workers). Workers on temporary layoff or leave who an employer reasonably expects to recall must be counted.

(7) When Is Compliance With the Statutory Notification Period Not Required?

There are only a few exceptions to the notice requirements of both Acts. First, companies that are actively seeking business or capital to avoid or postpone plant closings or mass layoffs and reasonably believe that complying with WARN will jeopardize those opportunities are exempt from the notice requirements. These business opportunities must be realistic and necessary for the company as a whole, and not just necessary to the financial viability of a single site.

Companies that experience mass layoffs or dislocations as a result of unforeseeable events are also exempt from the notice requirements. These types of events could include the unexpected loss of a principal client, the governmental closure of a site, or an unanticipated economic crisis.

Third, companies that experience mass layoffs or dislocations as a result of a natural disaster such as a flood, earthquake or fire are also exempt from WARN requirements.

To qualify for any of these exceptions, the affected company must demonstrate that it attempted to give as much notice as practicable both before and after the layoff or dislocation.

Finally, notice is not required to be provided by employers who replace employees engaged in strikes or lockouts in violation of the National Labor Relations Act.

Conclusion

As more employers consider whether to go out of business, relocate or consolidate, they will need to consider how the FWA and SWA will impact their decisions. Employers should reach out to their counsel to determine whether their actions are, in fact, covered by either Act. Employers should also review their collective bargaining agreements and policy manuals to determine if they provide for greater employee protection than what is provided for under the FWA and the SWA.

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APPENDIX

A Comparison of the Federal WARN Act and State WARN Act

Requirement	FWA	SWA
1. Minimum Employee and Hour Thresholds	Businesses w/ 100+ employees (excluding P-T employees) **and** business w/ 100+ employees working 4,000+ hrs/wk (including P-T employees)	Businesses w/ 50+ employees (excluding P-T employees) **and** business w/ 50+ employees working 2,000+ hrs/wk (including P-T employees)
2. Notice Period	Minimum of 60 days	Minimum of 90 days
3. Service of Notice	employee or representative Department of Labor Local Workforce Investment Boards	employee representative Department of Labor Local Workforce Investment Boards
4. Triggers for Notification Requirements	Plant Closing: shutdown of employment site **and** employment loss of 50+ employees (excluding P-T employees) Mass Layoff: employment loss at a single site in any 30-day period of (1) 50+ employees (33% of workforce) or (2) 500+ employees (excluding P-T employees)	Plant Closing: shutdown of employment site **and** employment loss of 25+ employees (excluding P-T employees) Mass Layoff: employment loss at a single site in any 30 day period of (1) 25+ employees (33% of workforce) or (2) 250+ employees (excluding P-T employees) Relocations: all or substantially all of business moving 50+ miles from original location

Emerging Trends in Class Action and Collective Action Lawsuits

By Evan J. Spelfogel

I. Introduction

Class action employment discrimination lawsuits and collective action wage and hour litigation have been accelerating exponentially over the past several years. Plaintiffs' attorneys see class and collective actions as a way to overcome the economic inefficiency of seeking to recover relatively small amounts on behalf of numerous arguably similarly situated claimants.

While class actions may be brought pursuant to Rule 23 of the Federal Rules of Civil Procedure to remedy violations of Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act, cases brought under the Fair Labor Standards Act ("FLSA"), the Equal Pay Act or the Age Discrimination in Employment Act must be brought as "collective actions" under Section 216(b) of the FLSA.

II. Class Actions Under Rule 23

Rule 23 provides that one or more members of a class may sue as representative parties on behalf of all, provided that there is (1) numerousity, (2) commonality, (3) typicality and (4) adequacy of representation. Fed. R. Civ. P. 23.

The class must be so numerous that joinder of all members is impractical. Courts have certified classes of under 20 members. *See Roger v. Electric Data Systems, Corp.*, 160 F.R.D. 532 (E.D.N.C. 1995), and have refused to certify classes with over 50 members. *See Kelly v. Norfolk and Western Railroad*, 584 F.2d 34 (4th Cir. 1978).

The courts look not only at the number of class members, but also at the location and dispersion of class members, nature of claims and other non-speculative factors. *See*, *e.g.*, *LeGrand v. New York City Transit Authority*, 1999 U.S. Dist. LEXIS 80202 (E.D.N.Y. 1999), dismissed in part and affirmed in part, 2000 U.S. App. LEXIS 894 (2d Cir. 2000).

Rule 23 also requires commonality and typicality of the plaintiffs' claims. In essence the class representative must have the same interests and suffer the same injury as class members. *Amchem Prods. V. Windsor*, 521 U.S. 591, 625-26 (1997); *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977).

Class members may be dismissed for lack of standing, even though they may have suffered the same injuries. In *Gerlich v. U.S. Dep't of Justice*, eight plaintiffs alleged they were denied positions with the U.S. Department of Justice based on their political leanings. The claims of five were dismissed because they had not yet reached the later stage of the hiring process when the alleged violations occurred. *Gerlich v. U.S. Dep't of Justice*, No. 08-1134, 2009 U.S. LEXIS 84796, at *42 (D.C. D.C. Sept. 16, 2009).

The fourth requirement of Rule 23 has two parts. The first is that the representative plaintiffs fairly and adequately represent class members and protect their interests. The second is that class counsel is qualified, experienced and able to represent the class in what typically becomes a very complex litigation.

In 1974, the U.S. Supreme Court held that neither the language nor history of Rule 23 gave a court the authority to inquire preliminarily into the merits of a suit when determining class certification. *Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178 (1974)*. Nevertheless, the Supreme Court held in 1982 that, in reviewing a motion to certify a class of employees and applicants alleging employment discrimination, there must be a "rigorous analysis" by the trial court showing that the prerequisites of Rule 23 have been satisfied. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *cited in Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 595 (2007); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). The *Falcon* court, however, did not define "rigorous analysis." As a result, the Circuits have had to define the term on their own.

Several Circuits have held that the courts may make a preliminary inquiry into the merits of the case for Rule 23 purposes. *See*, *e.g.*, *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009); *In re Hydrogen Peroxide Antitrust Litig.*, 552, F.3d 305, 320 (3d Cir. 2008); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001). Other Circuits, including the Third, Fourth and Fifth Circuits, have followed the *Szabo* decision. *See, e.g., Newton v. Merrill Lynch*, 259 F.3d 154, 166 (3d Cir. 2001); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Unger v. Amedisys, Inc*., 401 F.3d 316, 322–23 (5th Cir. 2005). *See also In re Initial Pub. Offerings Sec. Litig*., 471 F.3d 24, 27 (2d Cir. 2006) (ruling that each Rule 23 requirement must be met, even if the requirement overlaps with a merits issue). The Sixth Circuit has defined "rigorous analysis" to require "precise information about the incidents, people involved, motivations, and consequences regarding each of the named plaintiffs' claims." *Reeb v. Ohio Dep't of Rehabilitation and Correction*, 435 F.3d 639, 644-45 (6th Cir. 2006).

The courts often deny class certification notwithstanding evidence of discriminatory misconduct. This has more recently occurred where plaintiffs are unable to identify neutral practices or policies that form the basis of

their claims or where the putative class members work in many different facilities in different cities, under different management operating relatively autonomously. *See, e.g.*, *Lumpkin v. Coca-Cola Bottling Co., United, Inc.*, 216 F.R.D. 380, 383 (S.D. Miss. Mar. 31, 2003) (denying class certification for past, present, and future African-American employees); *Carson v. Giant Food, Inc.*, 2002 WL 246437 (D.M. 2002), *aff'd by Skipper v. Giant Food, Inc.*, 68 Fed. Appx. 393 (4th Cir. June 11, 2003), *cert. denied*, 540 U.S. 1074 (2003); *Vinson v. Seven Seventeen HB Phila. Corp.*, No.Civ.A. 00-6334, 2001 WL 1774073, at *1 (E.D. Pa. Oct. 31, 2001) (denying class certification to African-American workers at the Adams Mark Hotels); *contra Save-On Drugstores, Inc. v. Superior Court*, 96 P.3d 194, 199 (Cal. 2004) (reversing the judgment of the Court of Appeals to certify a class where a retail chain had common policy of treating all managers and assistant managers as exempt, but the proposed class action involved operations at 300 different stores with 1,400 managers, all of whom worked in a wide variety of types and sizes of stores and under locally autonomous management).

Similarly, courts have rejected class certification on commonality and typicality grounds where putative class members presented individualized promotion and compensation claims involving isolated and specific decisions by different supervisors in different locations. *See*, *e.g.*, *Cooper v. Southern Co.*, 205 F.R.D. 596 (N.D.Ga. 2001); *Reap v. Continental Casualty Co.*, 199 F.R.D. 536 (D.N.J. 2001) (refusing to certify class of older female employees alleging discriminatory treatment by different supervisors).

A New Jersey District Court denied class certification for Home Depot merchandising assistant store managers where plaintiff could not show that common questions of law and fact predominated and that a class action would be the superior method for trying the case. *Novak v. Home Depot U.S.A. Inc.*, No. 06-4841, 2009 U.S. Dist. LEXIS 76996, at *16 (D. N.J. Aug. 27, 2009). The proposed class would have consisted of similarly situated Home Depot employees in the state of New Jersey who were allegedly improperly classified as exempt and would, therefore, have been entitled to overtime pay under New Jersey law. In its opinion the court referred to a California state appellate court decision that denied class certification to Home Depot merchandising assistant store managers based on a multitude of job and policy differences in each store. *See Home Depot Overtime I*, 2006 WL 330169, *3 (Cal. App. Dep't Super. Ct. Feb. 2, 2006). The Novak court noted that actual daily duties of merchandisers and assistant store managers were "not nearly as uniform as their job description." Notable differences included store size and location, the number of merchandising assistant store managers in each store, and how many departments each merchandising assistant store manager supervised.

In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the court reiterated that where damages were not purely incidental, but needed to be determined on an individual basis, class certification was inappropriate. "Incidental damages," the court said, were damages that class members might automatically be entitled to, calculable by objective standards, not necessitating individual mini-trials. *See also Robertson v. Sikorsky Aircraft Corp.*, No. 379CV1216, 2000 WL 33381019 (D.Conn. 2001), where the district court denied plaintiffs' class certification because, in its view, there would be a need for over 100 separate trials of the claims of each class member to determine if each were individually discriminated against, and to determine what damages each should recover. Plaintiffs' request for punitive damages would also, the court said, necessitate individualized proof of harm against each class member.

III. Collective Actions Under the FLSA, ADEA and Equal Pay Act

Section 216(b) of the FLSA requires only that collective actions be brought on behalf of "similarly situated" employees. While some federal courts interpret this requirement to encompass the class action requirements of Rule 23, the majority hold that collective actions are not subject to Rule 23's strict requirements, particularly at the notice stage. *Compare*, *Bayles v. American Medical Response of Colorado*, 950 F. Supp. 1053 (D.Colo. 1996) (similarly situated encompasses the requirements of Rule 23); *with Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249 (S.D.N.Y. 1997), a case decided by then Judge, now Justice Sotomayor (collective actions are not subject to Rule 23's strict requirements).

IV. Other Major Differences Between Class and Collective Actions

Under Rule 23 the statute of limitations is tolled as to all putative class members upon the filing of the court complaint. In collective actions brought under the FLSA, however, the statute of limitations as to an individual claimant continues to run until that claimant has filed a consent to "opt-in." The "opt-in" requirement also is significant with respect to notices to putative class members. Under Rule 23(e) courts are generally required to give notice to all absent class members in order to dismiss or settle the litigation. Some courts have held that such notice must be provided even before class certification. *See*, *e.g.*, *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976); *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir. 1970), *cert. denied*, 398 U.S. 950 (1970). In collective actions, however, the court may dismiss or settle the case without notice to opt-in putative plaintiffs.

Moreover, in collective actions, the statute of limitations may have already run as to numerous putative class members before they receive notice that a litigation has been filed. In *U.S. Dept. of Labor v. SSC Corp.*, for example, by the time the Department of Labor had amended its complaint to add hundreds of additional putative class members, the two-year statute of limitations (and even the three-year extended period for willful violations) had run. (E.D.N.Y. 1998, not reported). Similarly, in *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303 (D. Colo. 1998)

defendants successfully resisted all efforts by plaintiffs' counsel to persuade the court to send preliminary notices to putative class members, and successfully resisted efforts to certify class and collective actions, until the statute of limitations had run as to all putative class members except for the initial three named plaintiffs. The *Tracy* court also noted that the company's facially lawful nationwide policy mandating overtime for all non-exempt employees after 40 hours of work was independently administered and enforced locally at hundreds of branch offices throughout the country for thousands of employees, by numerous branch, area and district managers in a wide variety of ways. Thus, the Court noted, the case was not amenable to class adjudication.

V. Practical Considerations

In deciding whether to bring class or collective actions, plaintiffs' attorneys must carefully weigh the advantages and disadvantages. On one hand, obtaining class or collective certification usually ensures a much larger potential recovery with significant legal fees. It can also leverage early and wide-ranging settlements. Plaintiffs' attorneys contemplating seeking class certification, however, must weigh the expense of prosecution, including having to make six-figure advances for experts, discovery and other related costs.

See Parris et al. v. Lowes Home Improvement Warehouse Inc., No. BC260702, (D. Cal. 2009, not reported) (approving $29.5 million settlement for alleged FLSA violation); *In re State Street Bank & Trust Co. ERISA Litigation*, No. 07-cv-08488-RJH-DFE (S.D. N.Y. 2009, not reported) (proposing preliminary settlement of $89.75 million for bank's allegedly breaching its ERISA fiduciary duty to plaintiff); *see also EEOC v. Allstate Ins. Co.*, No. 04-cv-01359 (E.D. Mo. 2009, not reported) (agreeing to settlement of $4.5 million with 90 former employees who alleged the company discriminated against them based on age. The settlement ended five years of litigation.).

Defense counsel should examine very closely those persons designated as class or collective representatives. Often the individuals named carry peculiar baggage. It is not unusual for those who have sought out legal representation to have been fired for significant cause, including theft, or drug- or alcohol-related misconduct, or to have past criminal records. Collateral litigation concerning these individuals can often distract from the focus of the litigation or lead to dismissal.

Plaintiffs' class attorneys usually seek to name plaintiffs based upon the strengths of those individuals' claims; typicality and commonality with the claims of other putative class members; whether the named plaintiffs are similarly situated with other class members (in an FLSA collective action); whether they have any conflicts with other potential class representatives or class members (e.g., managers and assistant managers who, as in *Save-On*, were the very persons delegated the responsibility of enforcing the company's facially neutral compensation policies); and the individual class representative's demeanor and credibility.

The nature and scope of the putative class may also determine the outcome of the litigation. Courts have refused to certify a nationwide class even where practices appeared to be identical company-wide. *See*, *e.g.*, *Abram v. United Parcel Service of America, Inc.*, 200 F.R.D. 424 (E.D.Wisconsin 2001) (nationwide class not manageable); *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982); *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1976). And, in *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526 (N.D. Ala. 2001), the court refused to certify a smaller geographically compact class that included across-the-board claims, because of lack of typicality.

In most class and collective actions, plaintiffs' counsel has done a thorough pre-litigation investigation, fact-finding, statistical analysis, and evaluation of the case. Thus, if the court allows significant pre-certification discovery, and certifies a significant class or classes, management may be well advised to seek an early settlement, directly or through alternate dispute resolution.

Courts often bifurcate class action discrimination cases, pursuant to Federal Rules of Civil Procedure 42(b). *See, e.g., E.E.O.C. v. CRST Van Expedited, Inc.*, 257 F.R.D. 513 (N.D. Iowa 2008); *Butler v. Home Depot, Inc.*, No. C-94-4335, 1996 WL 421436, at *1 (N.D. Cal. Jan. 25, 1996); *Barefield v. Chevron, U.S.A., Inc.*, No. C 86-2427, 1988 WL 188433 (N.D. Cal. Dec. 6, 1988); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986).

In bifurcation, the issue of class liability is split from individual liability and damage claims of individual class members. Plaintiffs' counsel typically seek bifurcation also with respect to injunctive relief and punitive damages.

The 1991 amendments to the Civil Rights Act provide for jury trial on intentional discrimination claims (42 U.S.C. § 1981(a)(c)), and for compensatory and punitive damages with caps up to $300,000 for employers with over 500 employees (42 U.S.C. § 1981(a)(b)(3)). It has been held that the Seventh Amendment to the U.S. Constitution prohibits separate juries from re-examining factual issues when a court bifurcates a case. *See*, *e.g.*, *In re Paoli R.R. Yard PCB Litigation*, 113 F.3d 444, 452n.5 (3d Cir. 1997). Before jury trials became available for Title VII claims, courts routinely bifurcated pattern and practice class actions into a liability and remedial phase, with each phase being heard by a different judge. Without this, the action would not have been manageable. Arguably, to preserve class members' Seventh Amendment rights, a single jury would have to hear the liability and damage claims of all members of a proposed class in a Title VII or FLSA case. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

In collective actions under the FLSA, courts have taken a two-tier approach to authorizing notice to putative class members. Most courts apply a relatively light initial showing requirement to justify sending the notice. Plaintiff must make merely a sufficient showing indicating the existence of other similarly situated putative plaintiffs. Most courts permit some limited discovery in order for the plaintiff to make the required showing. *See*, *e.g.*, *Wyatt v. Pride Off Shore, Inc.*, Civ. A. No. 96-1998, 1996 WL 509654, at *1 (E.D. La. Sept. 6,1996); *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264 (D. Minn. 1991); *In re Food Lion, Inc.*, 151 F.3d 1029 (4th Cir. 1998); *Hoffman-LaRouche, Inc. v. Sperling*, 493 U.S. 165 (1989).

Generally, however, after a class has been notified and discovery has been at least partially completed, the courts require the plaintiffs establish, under a much more rigorous standard, that putative class members are similarly situated to be plaintiff representatives. Many courts vacate or deny class certification at this second stage. *See*, *e.g.*, *Thiessen v. General Elect. Capital Corp.*, 966 F. Supp. 1071 (D. Kan. 1998) *cert. granted,* 536 U.S. 934 (2002). The Tenth Circuit discussed the "single-filing" rule, which permits a plaintiff to "piggyback" on an EEOC charge filed by another, similarly situated person. *Thiessen v. General Elec. Capital Corp*., 267 F.3d 1095, 1110 (10th Cir. 2001), *aff'd*, No. 96 2410-JWL, 2002 WL 31571614, at *1 (D. Kan. Nov. *8, 2002). See, e.g., Jackson v. New York Tel. Co.*, 163 F.R.D. 429 (S.D.N.Y. 1995) ("the inquiry at the inception of the lawsuit is less stringent than the ultimate determination that the class is properly constituted); *Garner v. G.D. Searle Pharmaceuticals & Co.*, 802 F. Supp. 418 (M.D. Ala. 1991).

Sanctions for improper discovery tactics are available under Fed. R. Civ. P. Rule 11 in class action cases, even after denial or withdrawal of class certification motions. *See, e.g., Kraft Foods Global Inc.*, where class plaintiff alleged that the company had violated the FLSA by failing to pay overtime wages, and ERISA by not keeping accurate benefits records. Although plaintiff's counsel admitted that the class allegations lacked merit and entered into a dismissal agreement, counsel continued broad-based discovery. Kraft asked the court to impose costs and attorneys' fees as sanctions. (The matter is currently pending.) *Foucher et al. v. Kraft Foods Global Inc.*, No. 08-cv-14896 (E.D. Mich. 2009, not reported).

Further, courts have sanctioned plaintiff's counsel for contacting current and former employees of a company who are ineligible to join a class action suit. *Johnston v. Crossmark, Inc.*, No. 08-cv-01525 (D. N.J. 2009, not reported). In *Crossmark*, named plaintiff class representatives were enjoined from contacting present and past Crossmark employees through e-mail or other forms of communication, and required to produce a list of employees already contacted; plaintiff's attorney was also enjoined from representing any Crossmark employees who had been contacted, and was required to pay legal fees of Crossmark's attorneys for their work on opposition papers. *Johnston v. Crossmark, Inc.*, *supra*.

In 1998, Congress amended Rule 23 to provide for interlocutory appeals from a decision granting or denying class certification. Fed. R. Civ. P. 23(f). Such an appeal is discretionary with the appellate courts. Review is rarely granted for cases that do not fall within one of three categories: (i) there is a "death knell" situation for either plaintiff or defendant; (ii) there is an unsettled and fundamental issue of law; (iii) the decision below is manifestly erroneous. *See*, *e.g.*, *In re Lorazepam & Clorzepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) (a decision on class certification will be reversed only for abuse of discretion); *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991). *See also Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (denial of class action certification is a "death knell" because the small size of individual claims makes a non-class proceeding impractical, the grant of certification puts immense pressure on the defendant to settle, and review may facilitate development of the law). *See also Prado-Steiman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) (additional considerations: whether the case is suitable procedurally and whether future developments will increase or decrease the need for further appellate review).

Note, even after class certification has been denied, plaintiffs' counsel may make additional applications for certification at different stages of the litigation.

VI. Conclusion

Class action in employment discrimination cases and collective action in wage-and-hour cases will continue to play a significant role in employment litigation. Such litigation can be extremely time-consuming, invasive and expensive. Company-wide policies and practices should routinely be examined periodically, for compliance with legal requirements. This is particularly significant with respect to policies and practices that may have a disparate impact on a protected class, such as those concerning hiring and promotion, performance and evaluation systems, discipline and discharge procedures and the classification of employees as exempt or non-exempt under the wage-and-hour laws. While in our current litigious society it may be impossible to design, implement and maintain employment policies and practices immune from lawsuit, careful attention to many of these considerations and managerial training may reduce the risks and potential liabilities significantly.

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Ethics Matters

By John Gaal

Q I am representing a client in an employment law matter. Counsel for the other side has been difficult, at best, and I believe is not communicating important information to her client, including information which would expedite a reasonable settlement for all involved. My client is furious with me that we seem to be getting nowhere with opposing counsel and has insisted that I reach out directly to the opposing party. I have explained that I do not think I am permitted to do that. However, it occurs to me that if I lay out the information I want the opposing party to know in a letter addressed to my adversary and simply copy the opposing party on the letter, I should be okay. Can I do that?

A Few ethics questions are subject to easy answers. This one is the exception, and the answer is "no."

New York Rule of Professional Conduct 4.2[1] provides that

> [i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

This provision has been narrowly construed to mean exactly what it says: a lawyer may not communicate with another lawyer's client without that other lawyer's consent. The New York Court of Appeals has explained the purpose behind this rule as follows:

> The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact.

Niesig v. Team I, 76 N.Y. 2d 363, 370 (1990) (citations omitted). This "no contact" Rule also furthers the role of counsel as a "spokesperson, intermediary and buffer" on behalf of his client. In fact, this Rule is so literally applied that even when an opposing party initiates contact with counsel, that counsel may not continue the communication without that initiating party's lawyer's consent. See ABA Formal Opinion 95-396.

Simultaneous communication with opposing counsel and her client does not satisfy the requirement of securing opposing counsel's prior consent to the communication. The Committee on Professional and Judicial Ethics of The Association of the Bar of the City of New York ("Committee") recently addressed a nearly identical situation in Formal Opinion 2009-1. There, counsel sought to send a letter directly to an opposing party with a simultaneous copy to that party's lawyer. Not surprisingly, the Committee found that doing so ran afoul of the "no contact" Rule. As explained by the Committee, the "prior consent" language of the Rule means just that: "consent obtained in advance of the communication." Simultaneous communication with the opposing party satisfies neither the "prior" nor the "consent" requirements of the Rule. A similar conclusion was reached by the Court in *AIU Ins. Co. v. The Robert Plan Corp.*, 17 Misc. 3d 1104 (Sup. Ct., N.Y. Co. 2007), where plaintiff's counsel sent a letter to the directors of the defendant corporation with a copy to the company's counsel. *See also* ABA Formal Opinion 92-362 and Informal Opinion 1348.

Because of the strict application of this Rule, a lawyer should not communicate with a represented party without explicit consent from that party's attorney. Nonetheless, there are circumstances in which consent can be inferred from the circumstances. For example, in today's age of e-mail communications, it might be permissible to infer from opposing counsel's inclusion of her client on a "group e-mail" that a "reply to all"—including to the represented opposing party—has opposing counsel's consent, although that may not always be the case. NYC Formal Opinion 2009-1 addresses this issue as well, noting that whether consent can be inferred may depend on two important considerations: (1) how the group communication was initiated and (2) whether the communication arose in an adversarial context.

With respect to this first factor, if a lawyer invites a response to a group e-mail on which her client has been copied, it is reasonable to conclude that he has consented to a "reply to all" response that would simultaneously be sent to her client. Similarly, if a meeting of both counsel and their clients conclude with an understanding that a communication will subsequently be circulated to all in attendance at the meeting, unless an objection is raised, it is reasonable to conclude that counsel may send that later communication to all in attendance, including the represented opposing party.

With respect to the second factor, NYC Formal Opinion 2009-01 points out that clearer consent to direct communication may be required in an adversarial context, where the risk of prejudice and overreaching created by direct communication is greater. Thus, for example, where a lawyer threatens litigation in a letter (or e-mail)

to another party's counsel and "cc's" their own client on the letter, no one should reasonably conclude that that "cc" represents a consent for opposing counsel to directly communicate with that represented client, either alone or simultaneously with communication to opposing counsel.

In the end, the key question is whether, objectively, opposing counsel has reflected an intent to permit direct communication with his or her client.

Of course, even if consent can be inferred, it is not without some limits. Thus, when we are talking about an inferred consent to a "reply to all" response to an e-mail, that consent is necessarily limited to the subject matter of the initial message (unless clearly indicated to the contrary) and is not an open-ended invitation for direct communication. Similarly, such a consent would last for only a reasonable period of time. And consent, whether it is explicit or implicit, can always be revoked at any time.

So does all of this mean that where opposing counsel is insulating her client from needed information, you have no recourse, in order to protect the interests of your own client? Not exactly.

New York's Rule 4.2 also provides:

> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

This provision recognizes that not only is direct client-to-client communication permissible, but as a lawyer, you can counsel your client on that direct communication provided reasonable advance notice has been given to opposing counsel. So while, as a lawyer, you may not directly communicate with a represented party, you may advise your client to do so, and assist your client in doing so, provided advance notice is provided.

While this is not a perfect answer to the situation you posed, it does provide a means to proceed which can effectuate your client's interests and keep you in compliance with the Rules of Professional Conduct.

Endnote

1. Until this past April, New York lawyers were subject to New York's Code of Professional Responsibility. In April of 2009, the Code was replaced by the Rules of Professional Conduct. With respect to this issue—communication with represented persons—the provisions of the new Rules (Rule 4.2) and the provisions of the former Code (DR 7-104(A)) are virtually identical.

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 John Gaal at (315) 218-8288.

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Code of Conduct Toolkit: Drafting and Launching a Multinational Employer's Global Code of Conduct

By Donald C. Dowling, Jr.

According to the International Labour Organization, "corporate codes of conduct do not have any authorized definition.…[T]here is a great variance in the way these statements are drafted." Indeed, "code of conduct" is not a term of art, but is merely a label affixed to a range of corporate and non-governmental-organization policies.

Most major multinationals, particularly those based in the U.S., seem to have issued a global conduct code that spells out certain rules applicable to their worldwide operations. These global codes of conduct vary substantially in both purpose and content. Moreover, the focus and content of these codes differs widely. But global codes of conduct do not always do what their issuers intend.

Many corporate policies called "codes of conduct" have little to do with employment relationships: There are professional-association antitrust compliance codes of conduct, environmental-protection codes of conduct, and advisory codes of conduct on topics like intellectual property and computer programming. These codes—while vital—are only loosely connected to global efforts at legal and ethical human resources compliance. Anchoring our code of conduct discussion in the international employment context, there are two very different types of codes to distinguish: *External supplier codes* chiefly protect employees working for a multinational's suppliers from so-called "sweatshop" conditions, whereas *internal ethics codes* chiefly impose compliance rules on a multinational's own employees across its worldwide workforces. In one sense, these two global codes of conduct are opposites: External supplier codes seek to *protect* employees who are not on the code issuer's payroll, while internal ethics codes seek to *restrict* (impose rules on) a code issuer's own employees. Some multinational codes of conduct try to combine these two types of document, but effectively combining them is difficult because both the goals and the intended audiences differ. As such, any multinational launching a global "code of conduct" should (1) first clarify which type of code it needs, then (2) determine what the code of conduct should say, and finally (3) implement the code properly across global operations. As such, part 1 of this article distinguishes the two types of codes of conduct, part 2 is a checklist of topics to address in an internal ("ethics") code of conduct, and part 3 addresses the steps in properly launching a multinational's internal code of conduct.

Part 1: Distinguishing the Two Types of Code of Conduct

The two types of employment-related global code of conduct are external supplier ("sweatshop") code of conduct and internal ("ethics") code of conduct. We address each in turn.

External Supplier ("Sweatshop") Codes of Conduct

In the U.S., global employers' supplier ("sweatshop") codes of conduct first got traction in the 1990s when American human rights activists championed them to promote worker rights in the developing world, teaming up with U.S. labor-union activists promoting job security for American workers. These activists continue to urge that multinationals selling Third World–sourced products to rich First World consumers police the labor conditions of the overseas workers making the products.

Supplier codes of conduct are external in that they seek to protect employees of multinationals' unaffiliated suppliers. An external code's text may also reach a multinational's own employees, but internal compliance is rarely a primary concern. External codes' terms almost always reach supplier employees worldwide—in developed and developing countries alike—but these codes implicitly focus on supplier employees in the developing world. Labor law violations, of course, occur everywhere, but domestic "sweatshops" are not seen as a pressing social issue in, say, Canada, Denmark or Japan.

External supplier codes tend to require a multinational's suppliers to meet the minimum basic labor protections set out in the code. Some codes offer specific lists of core labor protections, while others (increasingly) incorporate by reference International Labour Organization conventions, model industry code templates, or local employee-protection laws.

Multinationals usually impose these supplier codes as appendices to supply contracts or sourcing agreements with factories around the world. Some (largely unsuccessful) lawsuits filed in U.S. courts have sought to enforce global supplier codes for overseas workers on a third-party-beneficiary theory. Indeed, the lurking legal issue here is *privity-of-employment-contract*: Multinationals that order products from unaffiliated factories are mere customers. In the normal course of business, a customer has little information or say about a seller's work conditions. Legally (as opposed to economically), customers tend to be powerless to direct and monitor sellers' day-to-day human resources. How can a customer get access to a supplier's premises to monitor, let alone dictate, work conditions? Who monitors work conditions upstream, at materials suppliers that supply the factory?

The issuers of robust supplier codes of conduct tend to be multinationals that source low-cost manufactured tangible products from the developing world: Think of athletic shoe companies like Nike and Adidas, retailers like Wal-Mart and Target, clothes-makers like Liz Claiborne and Kathie Lee Gifford, and sports equipment and toy makers like Reebok and Mattel. In addition, some oil companies and some global manufacturing conglomerates (General Electric, for example) also impose tough supplier codes. However, supplier codes remain rare among luxury goods companies that source products from developed countries, and also rare among *services firms*.

Until now, the supplier code of conduct movement has targeted institutional buyers of tangible products, even though most of the social, compliance, public relations, and business-case arguments for a supplier code of conduct apply equally to suppliers of *services*. The next frontier, perhaps, will be imposing supplier codes on outsourced call centers and other low-wage back-office services operations in the developing world.

Internal ("Ethics") Codes of Conduct

Completely distinct from external supplier codes of conduct, but still within the context of international human resources, are internal ("ethics") codes of conduct. These are internal human resources policies by which multinationals use human-resources enforcement tools to impose sets of ethics rules and compliance standards on their subsidiaries' and affiliates' workforces worldwide—reining in employee misbehavior by sanctioning illegal, unethical, and inappropriate acts. The rest of this article focuses on these internal ("ethics") codes.

Successfully launching an internal code of conduct requires attention to two disparate issues: code *content* versus code *roll-out*:

- **Code Content:** Distinguish an internal code of conduct from an *employee handbook.* Employee handbooks tend to address quotidian aspects of human resources that mostly differ from country to country, and local topics that tend to be best relegated to local employee communications. A well-drafted global code of conduct, on the other hand, focuses on minimum base-line compliance rules that apply across borders. A good internal code also propagates corporate culture and fosters compliance with ethical standards tailored to specific needs of the issuing organization. Multinationals based in the U.S. tend to be particularly concerned that their internal codes address global rules on anti-discrimination/harassment, Sarbanes-Oxley, bribery, and adherence to data privacy, antitrust, and intellectual property standards, and that they meet U.S. federal sentencing guideline standards. Part 2 of this article is a checklist of topics that make up typical internal codes of conduct.
- **Code Roll-Out**: Completely separate from code content is the distinct issue of the *process* for launching an internal code. Because an international internal code of conduct is essentially a set of human resources policies that subject violators to discipline, every code needs to get implemented consistent with local-law restrictions against unilaterally imposing new, restrictive terms/conditions of employment. In rolling out any internal global code, be sure to address five key issues: (1) multiple versions, (2) dual employer, (3) consultation, (4) translation, (5) distribution/acknowledgement. Part 3 of this article addresses these five issues.

Part 2: Checklist of Topics to Address in an Internal ("Ethics") Code of Conduct

Drafting an internal global code of conduct that imposes ethics rules and compliance standards on employees across a multinational's worldwide subsidiaries raises the question of which topics to cover—and which to omit. A Google search for "code of conduct" yields dozens of sample codes, and the easy temptation is simply to copy some other multinational's code. The problem with the model-form approach, of course, is that each multinational's unique business operations give rise to special needs. A code of conduct should include only those topics which the issuing organization has an actual business case to regulate. The needs of government contractors differ from needs of publicly traded businesses, which differ from needs of non-profits, which differ from needs of organizations operating in the world's trouble spots. In addition, many provisions in a well-drafted code of conduct will inevitably reflect the issuer's specific

business sector—an oil company's code looks quite different from a bank's.

In short, someone else's code of conduct might make an interesting example, but a best practice for drafting an internal ethics code is to use a topic-by-topic checklist and craft a bespoke code that meets the issuing organization's particular business needs, without including anything extraneous. Consider whether to include these topics:

- **Introduction stating core values:** Internal codes of conduct usually open with a statement, often from the chief executive officer, explaining the organization's core values and the reasons it imposes a global code.
- **Statement of purpose and compliance philosophy:** Any multinational that imposes a global code of conduct will do so largely in an effort to comply with applicable laws. The vast majority of "applicable" laws are local laws imposed by the local host countries in which a multinational operates. On top of that, a multinational's headquarters country may impose a handful of legal mandates that extend internationally. Indeed, overseas compliance with the *U.S.* set of "extraterritorial" laws (FCPA, SOX, securities laws, international trade laws, discrimination laws, etc.) is what drives many U.S.-based multinationals to implement codes of conduct. The code-drafting issue here is that multinationals too often neglect to explain to overseas employees that certain headquarters-country laws really do reach abroad. Without this explanation, a U.S. multinational's overseas workers may doubt that they really have a legal obligation to follow *American* laws. But be careful to word any such compliance mandate carefully, to account for doctrines in some Eastern European and other countries that prohibit imposing foreign laws locally.
- **Discrimination/equal employment opportunity:** Some U.S. multinationals may transplant robust American anti-discrimination provisions (often labeled "equal employment opportunity") from U.S. handbooks straight into a global code of conduct. Prohibiting illegal discrimination across worldwide operations is, of course, a vital and legally mandated goal. But U.S.-based multinationals need to deconstruct their U.S.-drafted discrimination rules and rebuild them in a way that accounts for the global context. A key issue here is the code's listing of protected groups: While U.S. discrimination laws focus on protected groups, some other countries, like Belgium, impose an obligation of total equality, meaning no group can be singled out for affirmative action. Further, certain groups protected in the U.S. are not protected abroad, while many countries outside the U.S. impose their own unique protected categories. A catch-all clause (*"…or any other group protected by applicable law"*) may be ineffective, given the doctrine of interpretation by which included factors take precedence over omitted ones. One viable but less-than-ideal strategy is not to list protected groups at all, but rather to invoke "applicable law." A separate issue is accounting for the narrowness of the "extraterritorial effect" issue: U.S. discrimination laws reach abroad, but only to protect a tiny sub-set of most U.S. multinationals' overseas workforces—foreign-employed U.S. citizens. Too many global discrimination provisions seem to extend U.S. discrimination laws to everyone abroad.
- **Harassment:** Code of conduct harassment provisions lifted from U.S. handbooks fall short in jurisdictions (such as some in Europe) that impose a broad concept of so-called "moral harassment," "bullying," "mobbing," or "psycho-social harassment"—what used to be known stateside as *non-actionable* "equal-opportunity harassment" and what U.S. states are only now considering regulating as "abusive work environment." Too many U.S.-drafted international harassment provisions persist in defining "harassment" as unwelcome behavior *based on a victim's membership in a protected class*. But that definition is far too narrow for those jurisdictions that legislatively prohibit abusive workplace behavior unlinked to protected-group status: To be effective, of course, a harassment prohibition in a given jurisdiction must be broad enough to include all locally actionable harassment. A separate problem is that U.S.-drafted harassment provisions tend to impose too-heavy *co-worker dating restrictions*. In many countries these provisions, even if they merely require reporting a relationship, are offensive and virtually impossible to enforce.
- **Diversity:** U.S.-based multinationals sometimes include a diversity provision in their global codes of conduct, often lifted directly from the organization's domestic U.S. handbook or diversity communications. But any robust U.S.-style diversity program will need radical reinvention outside the U.S. Avoid a diversity provision in any globally applicable code of conduct unless the outside-U.S. diversity program, goals, and metrics have been painstakingly tailored for the international environment.
- **Conflicts of interest:** Many global codes contain provisions on employee conflicts of interest, such as prohibitions against contracting with relatives and against employing former government officials. Often these provisions also address moon-

lighting (employee holding a side job or position on board of directors at competitor or supplier). Be careful that any globally applicable conflicts provision is flexible enough for regions where family relationships play a vital part in everyday business, such as the Arab world and Latin America.

- **Bribery:** Local laws in probably every country prohibit bribing local government officials. In addition, extraterritorial laws in Organization for Economic Cooperation and Development (OECD) countries prohibit multinationals from bribing or making improper payments to *foreign* government officials. The U.S. law on this point, the Foreign Corrupt Practices Act, is a particularly robust and aggressively enforced statute that reaches accounting notations of certain payments. Multinationals—particularly those that sell to or need licenses from foreign governments—need tough code of conduct anti-bribery provisions. Indeed, the bribery/improper payments code provision will in many cases be among the most vital.
- **Business gifts to *non-government* contacts:** While U.S. FCPA law prohibits overseas bribery of, and improper payments to, *government officials*, a growing trend is for employers (and even some countries' laws) to prohibit "bribes" to *non-government* actors, such as payments to get business from customers, or gifts from suppliers. Global codes of conduct increasingly address this. Any such provision should be carefully thought through: A payment to procure business from a private company is in certain respects different from a bribe or improper payment to a government official.
- **Money laundering/financing terrorism:** Employers in the financial-services sector often impose code provisions that address money laundering and so-called "know your customer/client" rules. Codes also address compliance with U.S. executive orders and regulations meant to control financing of terrorism, such as so-called "list-scrubbing" obligations meant to prohibit payments to and from specific suspected terrorists—an issue particularly acute for non-profits.
- **Embargo/anti-boycott and foreign trade:** U.S. trade laws with extraterritorial effect prohibit doing business in certain black-listed countries, and prohibit complying with the Arab boycott of Israel. U.S.-based multinationals often impose code provisions on compliance with these laws, although some countries (particularly in Eastern Europe) prohibit requiring locals to follow foreign laws. As such, compliance with U.S. trade restrictions raises special issues in certain jurisdictions, which a code of conduct trade provision should address.
- **Antitrust/competition and non-collusion with competitors/trade practices:** Antitrust laws differ from country to country. Global codes of conduct often instruct employees not to engage in basic violations such as collusion and price-fixing, and codes often tell employees whom to ask for guidance on these matters.
- **Insider trading:** Publicly traded multinationals need global code of conduct provisions that ban insider trading in the company's own stock. Organizations such as professional services firms whose employees' jobs afford them access to insider information about publicly traded clients need client insider trading restrictions.
- **Audit/accounting fraud/substantive SOX compliance:** Sarbanes-Oxley-regulated multinationals are subject to audit/accounting rules that reach operations worldwide. Codes of conduct often impose SOX accounting and compliance standards worldwide, with an explanation of why compliance is vital. Indeed, as a best practice, even certain *non-SOX-regulated* multinationals include audit/accounting provisions in their codes.
- **U.S. federal sentencing guidelines**: Violations of some U.S. laws with extraterritorial effect can lead to a U.S. criminal conviction. Multinationals draft global code of conduct provisions cognizant of provisions in U.S. federal sentencing guidelines that offer affirmative credit for certain human resources policies meant to curtail illegal conduct. Of course, codes tend not to discuss sentencing guidelines explicitly; the drafting issue is imposing human resources rules and non-compliance sanctions robust enough to earn sentencing credit.
- **Data privacy/processing**: Data "protection" laws in the European Union, Argentina, Australia, Canada, Hong Kong, Japan, and elsewhere impose tough mandates on multinationals that run global human resources information systems. Multinationals' compliance initiatives should impose tight rules on employees who "process" personal data. Codes of conduct often set out these rules.
- **Monitoring communications and reserving right to search:** A best practice for a handbook issued domestically *within the United States* is to clarify that employees should not have expectations of privacy in employer-provided communications systems, by expressly reserving the employer's right to monitor employee e-mails, telephone calls, and the like—and sometimes also reserving a right to search offices, desks, lockers, even lunch boxes. American employers drafting global codes of conduct often try to extend an American-style right-

to-monitor/search provision globally. The problem is that data privacy laws outside the U.S. differ radically; the American approach of using an employee communication to defeat an "expectation of privacy" simply is not enough in many countries. But there is no "magic bullet" here. Global employee monitoring provisions need careful structuring to account for the employer's specific needs and the specific jurisdictions in play. And regardless of what monitoring rights a global code of conduct purports to reserve, in many jurisdictions employers will need legal advice before *invoking* any such purportedly reserved right.

- **Environmental protection:** Some global codes of conduct contain provisions requiring employees to comply with local environmental laws, and some codes require complying with the more protective of local law, U.S. law, or global standards.

- **Intellectual property**: Some global codes contain intellectual property provisions instructing employees to respect others' copyrights, such as in photocopying or e-mailing copyrighted materials or copying software.

- **Restrictive covenants and trade secrets:** Global codes of conduct often purport to impose on worldwide workforces restrictive-covenant-like prohibitions—confidentiality, post-termination non-compete and non-solicitation of employees/customers restrictions. But a code of conduct is an impotent medium to impose these. Restrictive-covenant-type rules often need to appear in an employee's signed contract, and enforceability rules differ widely by country, with some countries requiring extra consideration, making a global approach totally infeasible. As such, restrictive covenant topics are best left out of a code of conduct (other than perhaps a short statement of the employer's commitment to enforce any employee-signed covenants). This said, though, a *confidentiality* provision can be appropriate, as can a general statement on the importance of complying with applicable trade secrets laws.

- **Safety in the workplace and pandemic response:** Most every country has workplace safety laws broadly analogous to U.S. OSHA. While no code of conduct can replicate all applicable safety rules, many codes contain provisions requiring compliance with applicable safety rules and imposing accident reporting procedures. Some multinationals impose more complex global safety frameworks that include, for example, pandemic response protocols. These require special attention to additional issues.

- **Drug-free workplace/substance abuse:** U.S. employers seem inclined to take a "zero-tolerance" approach to illegal drugs and alcohol in the workplace, even refusing to hire employees whose positive drug-test results offer no evidence of work-time impairment, or firing good performers whose test results demonstrate use of illegal drugs. Outside the U.S., however, workplace drug testing can as a practical matter be virtually impossible. Further, some drugs illegal in the U.S. are legal elsewhere, and as such are inappropriate to prohibit using off-hours. Even zero-tolerance workplace *alcohol* policies can seem impractical and puritanical in countries where company cafeterias and vending machines serve beer and wine and where alcohol is ubiquitous at business lunches. Rethink any U.S.-drafted drug/alcohol policy for the global context. Run a draft of any proposed global drug/alcohol provision by local human resources overseas, to check whether the mandate is realistic.

- **Media contact:** Multinationals are constantly the subject of business press media stories. Some global codes of conduct contain provisions instructing affiliates' employees worldwide on press relations and fielding media inquires.

- **Compliance with company rules and cooperation in investigation:** A code of conduct might have a provision requiring employees to follow company rules set out elsewhere, such as in local human resources polices and handbooks, or such as reimbursement procedures, clocking-in rules, safety protocols, and the like. Some codes also affirmatively require employees to cooperate in employer internal investigations. While these cooperation clauses may seem unobjectionable as written, in many countries they may be unenforceable (in that local laws may not support discipline imposed for non-cooperation), even where the code of conduct expressly required cooperation.

- **Sanctions clauses:** U.S.-drafted codes often contain clauses exposing employees who violate any provision in a code to discipline, up to discharge. Outside the U.S., however, saying conduct is subject to a sanction does not necessarily make it so: Local laws on good-cause discipline may prohibit employer sanctions even for some violations of rules set out in a code. Also, outside the U.S., mandated disciplinary procedures often apply. Draft any sanctions clause cognizant of the limits on disciplinary restrictions outside of the U.S. employment-at-will environment.

- **Complaints system/whistleblowing hotlines:** Sarbanes-Oxley requires imposing "anonymous" whistleblower hotline "procedures." These days, even many non-SOX-regulated multinationals impose global reporting procedures, often outsourcing hotlines to outside providers. But employee

hotlines are heavily regulated in the European Union. Any code of conduct provision outlining global reporting procedures needs careful strategy. See the article on the point (by this author) at 42 *The Int'l Lawyer* 1 (2008).

- **Acknowledgment:** Many global codes of conduct end with an acknowledgement page for employees to sign, acknowledging their agreement to follow the code. But global employee acknowledgements raise a number of logistical problems—and they can actually backfire, giving ammunition to non-signers who violate the code. Consider any acknowledgement procedure carefully. See the discussion of this topic in Part 3.

A well-drafted internal ("ethics") code of conduct contains a tailored provision on those of the above topics for which there is a business case, and omits topics that the code issuer need not address. Good global codes *steer clear of* provisions on those everyday human resources topics that are more appropriately relegated to the local level, which in many cases include provisions on such topics as: testing/monitoring, breaks, vacation, holidays, overtime, payroll, work hours, smoke-free workplace, performance evaluations, employee benefits, and severance pay/procedure.

Part 3: Steps in Properly Launching a Multinational's Internal Code of Conduct

When a multinational's headquarters launches a global code of conduct, often the only question seems to be: "*What's our code going to say?*" But that question (addressed above in part 2) merely gets the code-implementation process started. Once an internal ("ethics") code of conduct has been drafted, the question immediately becomes: "*How are we going to impose this global code of conduct on our employees overseas?*"

Too many global codes of conduct in place today were implemented without accounting for the vital logistical issues related to launching new human resources policies outside the United States. As such, many codes are subject to attack, and could give rise to liabilities. A best practice is to go back, check and correct any oversights. There are five key logistical steps to take before launching a global code of conduct:

1. **Multiple versions:** U.S.-based multinationals rolling out global codes of conduct should decide whether: to use one global code worldwide; to create a "rest-of-the-world" version separate from the "U.S." version; *or* to spin off distinct local codes for each affected country. There are pros and cons to each approach:
   - **One global version:** A single global code of conduct creates a uniform policy and is of course simplest. However, code provisions appropriate for U.S. employees may need to be modified or reworded for use elsewhere.
   - **Two versions:** Many U.S.-based multinationals roll out a U.S. code of conduct plus a separate "rest-of-the-world" version; this strategy accounts for issues from a non-U.S. perspective, but neglects specific local-country issues.
   - **Local versions:** Every country's laws are unique. Tailoring an aligned local code of conduct for each country that accounts for local law and human resources policy, as well as for headquarters issues, should be the most effective strategy. But many versions of one code of conduct can get unwieldy—and expensive.
2. **Dual employer:** Most U.S.-based multinationals' overseas employees work for locally incorporated subsidiaries or affiliates. To extend a headquarters code of conduct directly to employees of foreign affiliates raises the "dual employer" problem. By imposing rules directly on local foreign workers, the U.S. headquarters may become a co-employer with the local subsidiary, jointly liable for employment claims. In Latin America, U.S. multinationals regularly face these claims. A related problem is that a parent entity that imposes a global code directly on subsidiaries abroad arguably starts transacting business locally, possibly making it a "permanent establishment" subject to corporate registration and tax-filing obligations. A best practice to avoid these problems is for headquarters to impose the conduct code on foreign affiliate entities only; each affiliate, in turn, imposes the code on its own employees. This approach also cuts off the technical argument where an overseas employee disciplined for violating a headquarters conduct code claims the code is inapplicable because the local employer entity failed to implement it in the first place (or else failed to take account of rules as to how validly to introduce a local human resources policy).
3. **Consultation:** Outside the U.S., employee representative groups such as "works councils," trade union committees, and health-and-safety committees are common. Laws impose a requirement analogous to the U.S. labor-law concept of "mandatory subject of bargaining": an employer cannot change workplace rules until after it sits down and discusses the proposal with affected employee representatives. This doctrine implicates codes of conduct, because by definition codes impose mandates on employee "conduct." Unfortunately, outside the U.S. employee representatives can be skeptical of U.S. codes of conduct. Therefore, a multinational headquarters launching a code of conduct needs to involve overseas management

and local foreign management-side labor liaisons. Give foreign local labor liaisons a "heads-up" that a code of conduct will be coming, and discuss consultation strategy and timing.

4. **Translation:** In Belgium, Chile, France, Poland, Portugal, Quebec, Turkey, much of Central America and elsewhere, local laws require that work rules (including rules in a code of conduct) be communicated in the local language. In these places, an English-language code will not only be unenforceable, it can cost money: recently a major U.S. multinational that distributed English-language papers to French workers was forced to pay a $689,920 fine. Further, even in those countries that do not impose these local-language laws, local courts are reluctant to enforce English-language policies. Translations buttress enforceability.

5. **Distribution/acknowledgement:** Multinationals need strategies for: how to distribute a code of conduct to overseas employees; how to train on the code overseas; and how to adapt the code to local offerings (in Japan and Korea, for example, it will be necessary to amend the local work rules to reflect new code prohibitions). Also, multinationals need to develop some way to prove each employee actually received the code, so as to allow enforcement against those claiming never to have seen it, and so as to establish a defense against U.S. Foreign Corrupt Practices Act and Sarbanes-Oxley enforcement actions. The common U.S. approach here is to have employees sign *acknowledgements*. But an acknowledgement mandate raises logistical problems abroad:

    - In Continental Europe and elsewhere, employee acknowledgments often are not binding; signed consents are often presumed coerced, due to inequality of bargaining power.
    - A 100 percent return rate on acknowledgements may be impossible outside the U.S., where codes of conduct often meet with skepticism. Abroad, expect some employees either to refuse to sign, or passively to neglect to sign even after repeated reminders. But away from the U.S. employment-at-will environment there is no "good cause" to discipline an employee who openly refuses or quietly neglects to sign. How, then, to handle non-signers?
    - Non-signers raise an "Achilles' heel" problem: If they later violate the code, they will argue they were exempt because they never signed. That is, they can point to their coworkers' signed acknowledgements to argue that the code of conduct reaches only employees who acknowledged it.
    - Human resources teams often have document-management problems: Years after the signing, it can sometimes prove maddeningly difficult to locate the signed code of conduct acknowledgement of a given employee in a remote overseas office who now, all of a sudden, needs to be disciplined for violating the code.

As an alternative to acknowledgements, local HR representatives might distribute the conduct code personally (or in training sessions). Then HR representatives themselves could sign forms stating the date and circumstances of transmission to each employee.

Conclusion

Codes of conduct have become virtually ubiquitous among multinational employers. Any multinational launching, or revamping, a global employment-context code of conduct should first distinguish whether it needs an external supplier ("sweatshop") code of conduct, or a very different internal ("ethics") code of conduct. As to drafting an internal code, a multinational should avoid copying a form from some other employer. Instead, tailor a code to the issuer's own cross-border business needs, using a checklist of possible topics and omitting inherently local matters better relegated to local employee communications. Once the code is drafted, the focus needs to turn to a legally compliant global *launch*. Follow the necessary steps to ensure the code becomes enforceable in all applicable countries.

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Weight Discrimination: Adding Weight as a Protected Class Under Title VII

By Pooja Kothari

I. Introduction

Fattism: The last frontier of employment discrimination.[1] With an increasingly overweight population in a country that places extraordinary value on being thin, it is no surprise that overweight Americans are facing discrimination in their employment. Subtle (and not so subtle) discrimination exists against overweight applicants along with an animus against overweight employees.[2] For the last 45 years, we have been trying to dispel stereotypes in employment through Title VII. We started with the neediest, most fundamental groups that were being blatantly discriminated against. It is now time to add another group that is widely discriminated against and deserves Title VII protection.

As yet, there is no federal law that protects overweight Americans from employment discrimination. Overweight, female plaintiffs have sued under Title VII using sex to link their claim to Title VII. [3] However, using sex as a proxy for overweight women does not get to the crux of weight-based discrimination. Moreover, neither the Rehabilitation Act nor the ADA adequately addresses or remedies weight-based discrimination. The ADA can be successfully used only if plaintiffs show their fatness impedes a major life activity or that the employer perceives them as having such an impairment. The ADA may be more effective for obese individuals; however, overweight individuals would be hard-pressed to show that being fifteen to thirty pounds overweight impedes a major life activity or that the employer believes that their fatness impairs them. In reality, the employers are likely discriminating based on stereotypes of overweight individuals, not because they believe the applicant cannot perform the job successfully. Overweight employees or applicants may not be obese and even if they are obese they should not have to tailor their case to the ADA definition of disability in order to get federal protection against discrimination. Accordingly, this article limits its scope to overweight or obese plaintiffs who do not fit the disability definition.

This paper proposes adding weight to Title VII as a protected class. Part two of this paper links the sociological and scientific research behind the weight-gain epidemic to employment discrimination. Part three discusses why the ADA is an inadequate remedy to weight discrimination. Part four discusses the state laws that have added weight to their anti-discrimination laws. Part five explains why weight should be added to Title VII. Part six explores what a hypothetical plaintiff's claim looks like under the proposed legislation. Part seven discusses counterarguments to adding weight to Title VII, and part eight concludes.

II. Sociological Research

Two-thirds of the adult population and half of the children in the United States are overweight or obese.[4] As the media glorifies thin models, actors, and newscasters, the evident bias against overweight people has grown stronger in American culture. Some say that weight can be controlled, and those who are overweight should take the initiative to lose weight through a disciplined diet and exercise regime. Others say that numerous factors are at play in managing weight, that weight is not that easy to control, and that overweight individuals should not be faulted for not having a trim, thin frame as their genetically lucky counterparts. Our culture places a premium on thinness and a disdain on overweight people, thus creating incongruous and false stereotypes of fat people that are out of sync with reality with our super-sized lifestyle.[5] Overweight employees may be viewed as "lazy," "less competent," "lacking in self-discipline," "less conscientious" and "slower" than their non-overweight counterparts.[6] These negative stereotypes can factor into an employer's decision to hire or promote an overweight applicant or employee.

Numerous studies and law review articles have addressed the growing issue of weight discrimination.[7] Econometric analyses on the wages earned between overweight employees versus their thinner counterpart reveal wage discrimination against overweight or obese employees.[8] The economics literature on wage disparity shows "significant wage penalties" against overweight women.[9] Obese or overweight employees may earn less than their non-overweight counterparts because employers may be deducting the cost of health coverage from the salary of an overweight employee.[10] One study found that insured obese employees earn $1.70 an hour less than insured, non-obese employees, while uninsured obese employees earn 40 cents an hour less than uninsured non-obese employees.[11] Another study found that overweight employees earn up to six percent less than "normal" weight employees in comparable positions.[12] None of these articles, however, address remedies for weight-based discrimination in employment through Title VII.

How else do we know these biases exist? Aside from sociological surveys, another way to measure one's preference for thin people and bias against fat people is through the Implicit Association Test (IAT).[13] The IAT

examines what words our mind naturally pairs with certain images. The test begins by asking the participant to sort words with a positive connotation and a negative connotation into one pile labeled "good' and another pile labeled "bad," as quickly as possible. For example, one would place words such as "glorious" and "happy" into the "good" pile, while words like "evil" and "horrible" would be placed into the "bad" pile. Next, participants are asked to sort images of obese or thin individuals in accordance with their description: "fat" or "thin." Next, the test pairs the word "good" with "thin" and the word "bad" with "fat." Again, participants are shown a series of images and directed to sort them into the "thin + good" pile or the "fat + bad" pile. The words are then switched so that the categories read "fat + good" and "thin + bad." Another series of obese and thin images is shown. The results of the IAT depend on the speed at which the participant can sort the images into the correct pile. The test results reveal the degree to which the participant has an automatic preference for thin people. The degrees range from "little to no preference" to "strong."[14] If the participant responded faster to placing the skinny image into the "thin + good" pile than placing the obese image into the "fat + good" pile, the test interprets that the participant has an automatic preference for thin people.[15] The creator of the IAT, Harvard psychologist Mahzarin Banaji, says that the IAT "measures the thumbprint of the culture on our minds."[16]

III. The Rehabilitation Act and the ADA Are Insufficient Remedies

The Rehabilitation Act of 1973 mandated all federal departments, agencies and instrumentalities to provide to applicants or employees with disabilities adequate "hiring, placement, and advancement opportunities."[17] The Americans with Disabilities Act of 1990 (ADA) applied the same mandate to all employers subject to Title VII.[18] The ADA states:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an individual in regard to job application procedures, the hiring, advancement, or discharge of employees, compensation, training or other terms, conditions and privileges of employment.[19]

"A qualified individual with a disability" is defined as "an individual with a disability who…can perform the essential functions of the employment position that such individual holds or desires."[20] A disability, under the ADA, is defined as "a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment."[21] Plaintiffs who sue under the ADA must show that their obesity substantially limits a major life activity or that the employer perceives that it does. The code of federal regulations defines "major life activity" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[22] Substantially limits means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[23]

The regulations also state the factors that should be considered in determining whether a disability affects a major life activity:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.[24]

In *Cook v. State of Rhode Island*, Bonnie Cook sued her employer for failing to hire her based on her obesity.[25] In 1988, Ms. Cook applied for a position she had occupied several years prior at the Department of Mental Health, Retardation and Hospitals (MHRH). A routine physical examination revealed that Ms. Cook stood 5'2" tall and weighed over 320 pounds.[26] Based on her morbid obesity MHRH refused to hire her, stating that her morbid obesity prevented her from being able to aid patients in the case of emergency.[27] Ms. Cook sued MHRH using the Rehabilitation Act because MHRH was a department under the State of Rhode Island. To state a claim under 29 U.S.C. § 794(a), a claimant must show by a preponderance of the evidence that (1) she applied for a position in a federally funded program; (2) she suffered from a disability as defined by the Rehabilitation Act; (3) she was qualified for the position; and (4) she was not hired because of her disability.[28] Ms. Cook argued that she was not disabled but in fact fully capable of performing the job.[29] She argued that MHRH *perceived* her as disabled and wrongfully based their refusal to hire on that perception.[30] The Court held in favor of Ms. Cook. The regulations to the Rehabilitation Act, similar to the ADA, cover applicants or employees who are "regarded as having an impairment."[31]

The limitation in overweight individuals using the Rehabilitation Act or the ADA as an avenue for a remedy

is that the plaintiff must mold his or her actual physical condition to meet the impairment definitions under the respective Acts. These Acts provide no relief for fat but not obese applicants or employees since it is unlikely that an employer will *perceive* an overweight applicant or employee as not able to perform a major life activity of "walking, seeing, hearing, speaking, breathing, learning, and working."[32] Such major life activities are not typically impeded by an extra 15 to 30 pounds. The Americans with Disabilities Act is an insufficient remedy to protect overweight employees or applicants from weight discrimination.

Congress recently amended the ADA to restore Congress's original intent of 1990 Act.[33] One impetus for the amendments was *Sutton v. United Airline*, a case in which the Supreme Court stated that if there are mitigating measures that ameliorate the plaintiff's disability, such as "medicines, or assistive or prosthetic devices," the plaintiff does not qualify as having an impairment under the ADA definition.[34] The Court stated, "[t]o be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limit' a major life activity."[35] A major life activity is redefined as:

> caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working…[it] also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[36]

The new ADA amendments also reject the narrowed scope the Supreme Court presented in *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*. In *Williams*, the Supreme Court found that the plaintiff's disability did not fall under the ADA because her carpel tunnel syndrome did not impede her from performing tasks of "central importance to most people's daily lives."[37] The ADA amendments of 2008 sought also to overrule this holding. The new amendments state that a person's "impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability."[38] Since these amendments take effect January 1, 2009 there is no precedent under which to analyze ADA cases involving obesity as a disability.[39]

IV. States and Counties That Prohibit Discrimination Based on Weight

Michigan, the District of Columbia, San Francisco and Santa Cruz are the only jurisdictions in the United States that have enacted some type of provision prohibiting discrimination based on an applicant's or employee's weight or personal appearance.[40] Michigan enacted the Elliott-Larsen Civil Rights Act in 1977.[41] This Act provides:

> (1) An employer shall not do any of the following: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, **weight**, or marital status.[42] (emphasis added)

Michigan's application of the Elliott Larsen Civil Rights Act tracks the burden-shifting analysis used in federal employment discrimination law, including the *McDonnell-Douglas* framework.[43] To make out a *prima facie* case, the plaintiff must show "(1) that he is a member of a statutorily protected class; (2) that he was qualified for the job; (3) that he was discharged from the job; and (4) that he was replaced by someone outside the protected group."[44] If the plaintiff satisfies these elements, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action. If the defendant satisfies its burden, the burden shifts back to the plaintiff to show that the legitimate, non-discriminatory reason is a pretext for discrimination.[45] The plaintiff need not show that the illegal motive was the sole reason for the adverse employment action, only that the illegal motive "made a difference in determining whether the plaintiff was discharged or not hired."[46] There are several ways to show pretext:

> (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. The soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext.[47]

There have been few cases resulting from the enactment of the Elliott-Larsen Civil Rights Act.

In *Ross v. Beaumont Hospital*, the Court articulated the burden of proof for weight-discrimination cases as whether the plaintiff's weight was a determining factor or but-for cause of her discharge.[48] The Court held that a reasonable jury could find that plaintiff's weight was a determining factor in the discharge of the plaintiff-physician because the plaintiff's letter of suspension cited her obesity as one of the reasons of her suspension.[49] The Court found also that weight was not a BFOQ on part of the hospital because the same doctors who criticized that the plaintiff's effectiveness in the operating room

was hindered by her obesity, continued to work with her.[50] Moreover, other physicians testified that a person's weight does not necessarily interfere with the ability to reach a patient's wounds.[51]

In *Lamoria v. Health Care Retirement Corp.*, Barbara Lamoria sued her employer under the Elliott Larsen Civil Rights Act for weight and age discrimination as well as for handicap discrimination under Michigan's Handicappers' Civil Rights Act.[52] Lamoria worked as a nurse for 20 years at the defendant's retirement home.[53] At the time of her employment Lamoria was 5' 7" tall and weighed 240 pounds.[54] At the time of her discharge, Lamoria was not working due to a knee injury she sustained at work.[55] The trial court granted summary judgment to the defendant stating that Lamoria had failed to make out a *prima facie* case under the *McDonnell-Douglas* framework.[56] The trial court reasoned that since Lamoria could not work at the time of her discharge because of her knee injury, she was not qualified for the position.[57] The Michigan Appellate Court reversed the trial court's holding, stating that Lamoria's showing of direct evidence of a weight-based animus obviated the use of the *McDonnell-Douglas* framework and thus warranted a jury trial.[58] The Court noted that Lamoria's discharge would not have occurred but for her weight.[59] Lamoria presented evidence that the Administrator of the retirement home made disparaging comments about Lamoria's weight including implying that the employer intended to terminate overweight employees.[60] Since Lamoria presented direct evidence that the Administrator of the retirement home fired or forced to resign three employees, all of whom were overweight, "Lamoria's weight was a decisive factor in defendant's decision to discharge Lamoria."[61]

The *Lamoria* Court pointed out that just as racial slurs indicate hostility toward that race, derogatory remarks about a person's weight indicate hostility toward overweight people. The Court did not equate racial discrimination with weight discrimination, only the standard of inferring hostility to the protected class.[62] The Court also cautioned that analysis of comments that are alleged to amount to weight discrimination should be viewed in context, considering the possibility that defendant may have made the weight comment out of concern for the plaintiff, not in derision.[63]

In *Figgins v. Advance America Cash Advance Centers of Michigan, Inc.*, one of Figgins's claims against her employer was for weight discrimination.[64] The Court held that a reasonable jury could find a weight-based animus against Figgins because of the nature of the defendant's comments.[65] For example, defendant commented directly to Figgins or to others about Figgins saying, "Did you make sure that you got diet pop?" "Didn't she have enough to eat?" and telling Figgins at least 12 times, "You should watch what you're eating."[66] The Court thus found direct evidence of hostility against Figgins based on an "illegal motive."[67]

In 1977, the District of Columbia also enacted a statute under its Human Rights Law prohibiting discrimination against a person based on their personal appearance.[68] The law states:

> It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, **personal appearance**, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.[69] (emphasis added)

The law defines personal appearance in part as "bodily condition."[70] Bodily condition may be interpreted to include weight. In one case, a plaintiff sued his health insurance provider because it refused to pre-approve gastric bypass for the morbidly obese plaintiff. Plaintiff sued under the personal appearance protected class of the District of Columbia statute.[71] The Court held that the plaintiff failed to make a *prima facie* case because the plaintiff did not present comparative evidence showing that others received covered gastric bypass surgery who were not morbidly obese.[72] There are few published cases using the D.C. statute suing on the basis of personal appearance. It is unclear as to why this statute is not utilized as often as it could be.

In the city of Santa Cruz, the local government enacted a similar statute to the District of Columbia, in 1992. The Santa Cruz ordinance states:

> It is the intent of the city council, in enacting this chapter, to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, **weight** or physical characteristic.[73] (emphasis added)

The ordinance allows employers to consider personal appearance of an applicant if personal appearance is "relevant to the job performance."[74] Proponents of the ordinance argue that the "best qualified person" should be hired, not the one who is pleasing to the eye.[75] Critics of the ordinance ask why should they, as employers, be forced to hire someone "with fourteen earrings in their

ears and their nose—and who knows where else—and spiky green hair and smells like skunk?"[76] There are no published cases of citizens of Santa Cruz suing his or her employer for weight discrimination under this ordinance. One reason for the dearth of litigation in Santa Cruz may be that part of the ordinance required complaints to be submitted for mediation before legal action was taken.[77]

V. Why Weight Should Be Added to Title VII

Title VII states, in relevant part:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.…[78]

The sociological and scientific research described in part two demonstrates the existence of fattism among employer's and shows the need legal protection. The purpose of Title VII was to break down racial, religious and sex stereotypes. Stereotypes of fat people historically have been socially permitted to perpetuate and subscribe to. But why should any type of discrimination in employment be allowed when the perpetuated stereotype does not relate to the job qualification? It is time to protect overweight individuals who are discriminated against because employers don't think they are pleasing to the eye, believe that they lack discipline or are unmotivated. Up until now, plaintiffs must link weight claims to one of the current protected classes to get the attention of the courts. For example, in *Independent Union of Flight Attendants v. Pan American World Airways, Inc*., the Court held that the PanAm's weight policy was not administered equally between male and female flight attendants, and upheld the Union's sex discrimination claim.[79] The Airline's weight policy used the MetLife weight tables and required that male flight attendants not exceed the weight guidelines under the "large-frame" category, while limiting the female flight attendants to the "medium-frame" weight requirements.[80] Moreover, female flight attendants were required to undergo weight checks if they appeared overweight, which specified:

> "unsatisfactory appearance characteristics" are "[d]isproportionate weight or flabbiness in the areas of the chin, upper arms, waistline, hips, thighs, or legs/ankles." A "snug, ill-fitting uniform" was also graded unsatisfactory. The flight attendant's supervisor rated the following check list items either "satisfactory" or "unsatisfactory": uniform fit, figure/physique proportion, chin, upper arms, waistline, thighs/hips, and legs/ankles.[81]

The Court further stated that:

> The application of the appearance checks was, by definition, subjective. In addition, the Appearance Checks evaluated female flight attendants based on criteria which were not listed as requirements for job performance. Finally, the use of the check list perpetuated a sexual stereotype of slim-bodied women.[82]

The Court held that there was no relationship between the MetLife weight tables and the duties of flight attendants.[83] The Court further held thinness was not reasonably necessary to the duties of a flight attendant and thus was not a bona fide occupational qualification.[84] Here, the Union successfully argued discrimination; however, it was confined by Title VII and only was able to win through the sex discrimination link. Had PanAm required both male and female flight attendants to comply with the medium-frame weight tables, there would be no discrimination suit notwithstanding the Court's own admission that there was no relationship between the weight tables and the duties of the flight attendants. The facts in *Pan American* get to the heart of why weight should be added to Title VII. Similarly in *Air Line Pilots Association, International v. Western Air Lines*, the Court held that the weight requirements did not discriminate on the basis of sex because "how much one weighs is an aspect of one's personal appearance that generally is subject to one's own control."[85] Western Air Lines had suspended or discharged female flight attendants for weighing more than the maximum weight allowed under the Airline's weight policy.[86] It is cases like these that would directly benefit from Title VII protection if weight were added. It is plaintiffs exactly like flight attendants who need and deserve Title VII protection because being overweight is not relevant to the job duties of a flight attendant. Weight, of course, comes in to play when a flight attendant's obesity interferes with his or her ability to effectively and efficiently perform his or her duties in case of emergency. Passenger safety is the utmost importance, and to assure that flight attendants can perform emergency procedures, they can undergo physical fitness tests every year to verify that they are still capable of these duties even if they have gained weight. Physical fitness tests should be the standard of determining whether a flight attendant is qualified for her job, not an arbitrary height/weight chart.

Adding weight to the protected classes of Title VII would grant an effective and appropriate remedy to overweight employees and applicants who are discriminated against because of their overweight appearance. As the social stigma of being fat persists while the numbers of overweight individuals in this country are increasing,

it is imperative to construct a protection for overweight individuals that may have been unforeseen decades ago. External appearance should not dictate whether an individual is qualified for the job. As a California court eloquently stated:

> In our society we too often form opinions of people on the basis of skin color, religion, national origin, style of dress, hair length, and other superficial features. That tendency to stereotype people is at the root of some of the social ills that afflict the country, and in adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth.[87]

Similarly, overweight applicants should be protected from employers who judge applicants on their personal appearance, vis-à-vis weight, instead of their ability to perform the job well. Federal law should follow in the footsteps of Michigan, the District of Columbia, San Francisco and Santa Cruz. Adding weight to Title VII, instead of personal appearance, would sufficiently tailor the statute to the purpose of combating the stigma while offering overweight individuals the equal and fair opportunity to be hired.

Plaintiffs bringing weight-discrimination lawsuits would likely find success using direct evidence, such as the *Lamoria* case in Michigan. Although plaintiffs should be able to use the *McDonnell-Douglas* framework, it is not the ideal legal framework for weight-based discrimination claims because of the difficulty of proving that circumstances gave rise to an inference of discrimination. It is easier to show the employer's hostility toward overweight applicants or employees through their conduct or statements.

The bona fide occupational qualification defense (BFOQ) provided in Title VII is available as a defense against gender, religion and national origin claims.[88] Title VII allows defendants to base their hiring decisions on religion, sex or national origin in cases where there is a BFOQ that is "reasonably necessary to the normal operation of that particular business or enterprise."[89] The BFOQ defense should extend also to weight-discrimination claims. There are jobs whose operations function on employee's body weight, such as modeling and acting, where an individual's image is almost the sole qualification for hiring. In *Dothard v. Rawlinson*, the correctional facility required prison guards to be at least 5'2" tall and weigh at least 120 pounds.[90] The plaintiff-appellant argued that height and weight requirements for prison guards disproportionately discriminated against women.[91] Supreme Court upheld Dothard's bona fide occupational qualification defense, stating, "the likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel."[92] It is reasonable to imagine minimum-weight standards being a bona fide occupational defense, and for maximum weight standards also being a BFOQ for jobs such as firefighter, police officer, and other public safety occupations. However, the height/weight requirement, as depicted in the airline cases, should not determine the BFOQ, but rather physical fitness tests. If an individual cannot perform the job duty, he or she should not be hired. The following example toes the line of weight-based discrimination and a BFOQ.

If weight were added to Title VII, the statute would state:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin **or weight.**

VI. The Hypothetical Plaintiff

Our hypothetical plaintiff stands 5'9," is male and weighs 200 pounds. His body mass index (BMI) is 28.3, which according to the BMI index categorizes him as overweight.[93] According to his doctor, he is overweight and would be healthier at a maximum weight of 165 pounds. Our plaintiff clearly appears to be overweight. His muscles are not defined and his waist is not exactly trim. However, he is passionate about exercise, learning about nutrition and fitness and has become a certified personal fitness trainer. He applies to work at a gym as a personal fitness trainer. According to his certification, he is qualified for this position at the gym, yet the gym refuses to hire our plaintiff. The hiring coordinator mentions to our plaintiff that clients need to be inspired by their personal trainer to lose weight and that our plaintiff simply is not inspirational because he is fat. Our plaintiff finds out that the personal fitness trainers the gym did hire are all trim, lean men and women who look like they are at an average weight or less than average weight.

Under *Lamoria* and *Beaumont*, the gym's behavior probably constitutes direct evidence of weight-based discrimination since the employer told our client that he cannot hire him because his appearance would not inspire confidence in clients. Here, there were no disparaging comments like *Lamoria* or *Figgins* and there is no obvious animus against overweight applicants but certainly there is a bias against fat trainers and a preference for trim and muscular-looking trainers.

Having established a *prima facie* case through direct evidence of the gym's bias against fat trainers, let's say

that the gym puts forth two BFOQ defenses. A personal fitness trainer must have a BMI of 25 or lower in order to be hired because such an individual will (1) be able to safely guide and spot his or her clients; and (2) inspire its clients to lose weight.

It is unlikely that the gym would be successful with the first BFOQ, that a BMI of 25 or under is reasonably necessary to the operation of the gym in order to safely spot and guide clients. If the plaintiff was not fit enough to safely spot a client, he likely would not have received his certification, *unless* the gym can show that the plaintiff was within the weight requirement when he received his certification and gained weight after receiving certification that would make him incapable of performing the job duties. In reality, most sports club Web sites do not mention that personal fitness trainers must maintain a certain weight, only that personal fitness trainers maintain current certification.[94] In fact, the skills required to apply for personal fitness trainer positions focus mainly on congeniality and ability to market the gym to clients.

As for the second BFOQ, that personal trainers need to be an inspiration to their clients, this defense should also fail. The gym's goal is to foster a trust between the clientele and their personal fitness trainer, but if the trainer looks overweight and thus unhealthy, the clients may not trust that the trainer actually has knowledge of and practices healthy nutrition and fitness. The gym's marketability and financial sustainability depend on its personal trainers bringing in new clients and inspiring them to continue exercising at the gym. As the law stands now, courts give considerable latitude to employers with regard to the personal appearance of their employees.[95] However, if weight were added to Title VII as a protected class, a BFOQ of customer preference for a muscular-looking personal trainer should not be valid. If customers preferred thinner personal trainers, they are free to shop around for them. As long as our hypothetical plaintiff is qualified for the job, his weight should not factor into the hiring decision.

VII. Counterarguments

Critics of this proposal to add weight to Title VII have several arguments to oppose this legislation. First, arguably, Title VII was supposed to protect immutable characteristics. The employer in *Cook v. Rhode Island* argued that weight was not immutable and thus the plaintiff's obesity was not an impairment because an obese person is able to lose weight and rid herself of the disability.[96]

This argument carried over to the Title VII arena fails because anti-discrimination law protects groups who do not exhibit immutable characteristics. Marital status and religion are two protected classes that are mutable. People add religion to their life, delete it, or convert to other religions. Just because people *can* change religion, we do not expect them to change it for their employment. The same goes for marital status. Similarly, the idea that overweight individuals *can* reduce their weight should be irrelevant to the discussion of weight-based employment discrimination.

Second, critics may argue that adding weight to Title VII would open the floodgates to litigation, allowing any plaintiff five pounds overweight to 50 pounds overweight to sue their employer for terminating or refusing to hire him or her. How many pounds overweight would a court consider actually overweight? Whose standards do we use to determine someone is overweight? How many pounds overweight does plaintiff become obese? Does an obese plaintiff have the same right to sue under Title VII as a non-obese, overweight plaintiff? Will all the obese plaintiffs who do not fit into the ADA boxes now sue under Title VII? Should any external limitations be placed on Title VII to prevent a mass of new litigation?

This argument fails as well. As shown by our hypothetical plaintiff, a claimant wins by showing the adverse employment action was based on weight, not that the plaintiff actually was overweight. The purpose of the proposed legislation is to break down the stereotypes of overweight individuals that prevent applicants from being hired. Practically speaking, adding Title VII will benefit those individuals who are obviously overweight, where there is direct evidence of a discriminatory, weight-based animus against the applicant.

Third, critics may ask what is this proposed legislation really getting at? Is it the employer's perception of overweight individuals or is it the employer's preference on personal appearance? Is weight simply a proxy for personal appearance, and if so, then adding personal appearance to Title VII would truly open the floodgates to litigation.

The answer is that adding weight to Title VII touches on one facet of appearance discrimination without opening all doors to physical appearance discrimination, like the Santa Cruz ordinance. Although there is merit to enacting legislation to prohibit discrimination based on an individual's unattractiveness, the stereotypes attached to overweight individuals is far more pervasive in a country where 66.3% of adults over 20 years of age are overweight or obese.[97] Limiting this proposed legislation on weight, instead of the all-inclusive personal appearance, creates a cohesive protected class. Overweight individuals are a protected class that encompasses a readily definable group, just like the other protected classes, which makes this legislation more pragmatic and likely to be considered by Congress.[98]

VII. Conclusion

In order to combat the ever-growing stigma against overweight people that overweight persons are "lazy," "lacking self-discipline," "slower," and "less competent," weight should be added to Title VII. Sociological and

scientific research consistently shows that overweight employees earn less than their thinner counterparts. Knowing that discrimination exists against a sizable population, the Congress must act to combat such rampant discrimination. States must also come together and send a message to the federal government that weight discrimination exists and deserves state and federal protections. Considering the few cases brought under the Michigan, Washington D.C., and Santa Cruz laws, it is unlikely that adding weight to Title VII would open the floodgates to litigation.

Endnotes

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Thank you for your cooperation.

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