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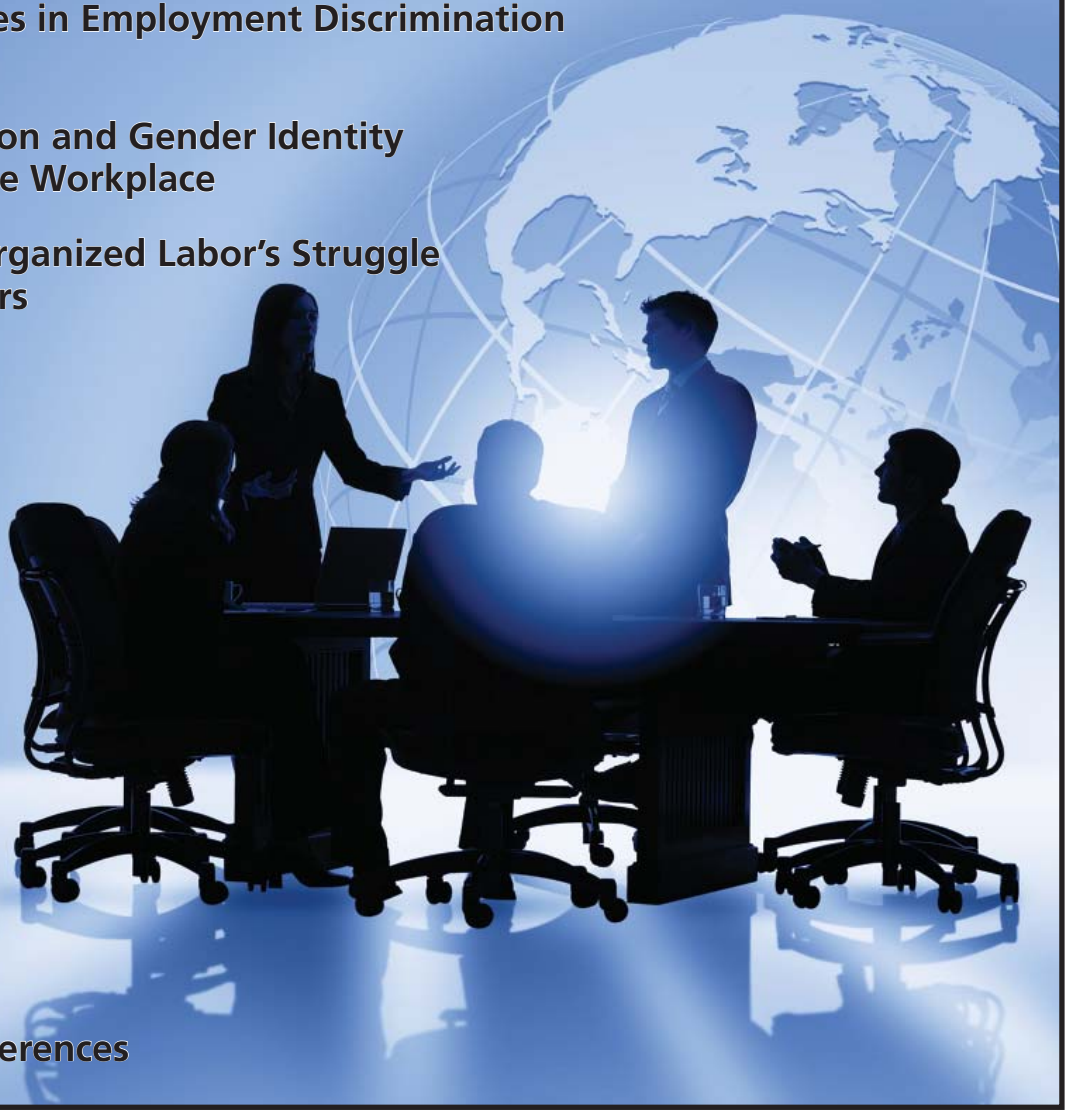
Inside



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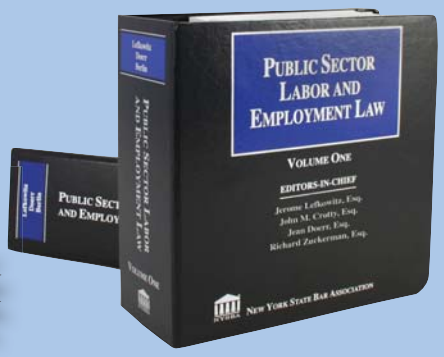

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Message from the Section Chair

This continues to be a very busy time for our Section.

We recently held our Fall Meeting at Hunter Mountain. We had more than 20 presenters speak on eight different topics, providing seven-and-one-half hours (including one and one-half hours of Ethics) CLE credit. By all accounts, the programs were very informative and well received. This marked our Section's first meeting at Hunter Mountain, which provided a very affordable venue for our members and resulted in two dozen first-time attendees joining us for the weekend. In addition to keeping up on the latest developments in the practice of labor and employment law, the weekend afforded us a great opportunity to simply enjoy one another's company. A special thanks to our many sponsors for the meeting (who are highlighted on p. 54 in this *Journal*). Also, thanks to our Program co-chairs, Ron Dunn, Sharon Stiller, and Seth Greenberg, for all of their work in putting this program together, with a special thanks to Ron Dunn, who after several years as co-chair of our CLE Committee is taking a well-deserved respite from the hectic world of CLE programming. Thanks for all your work, Ron. For those of you who could not join us at Hunter Mountain, the CLE papers presented will be available to members on the Section's website, which can be accessed at www.nysba.org/labor.

Last year the Section was a "top winner" in the NYSBA's initial Diversity Challenge. Phase II of the challenge has just started and we again are devoting a great deal of effort to successfully completing this phase as well. The leaders of our Section are firm believers in the importance of diversity within our ranks and are committed to improving upon the work we started a few years ago. Appropriately, at our Fall Meeting we were able to introduce our latest Diversity Fellows—Mariam Manichaikul and Asad Rizvi—who promise to be enthusiastic, energetic and talented additions to our Section.

Our mentoring program, under the leadership of Genevieve Peeples and Rachel Santoro, is in full swing. Our first class of 27 mentees has been matched with experienced mentors from our Section ranks and we continue to host programs of interest for our mentees. Earlier this Fall, the Honorable Denny Chin was kind enough to host a group of our mentees at a session of the U.S. Court of Appeals for the Second Circuit, where they were able to attend an argument and meet privately with Judge Chin afterwards. In September, mentoring program participants attended a reception at the offices of Outten & Golden at which they were able to meet with and hear from Elizabeth Grossman, Regional Attorney in the EEOC's New York Region office. It was an enjoyable evening for all who were able to attend, and a special thanks to Ann Golden of Outten & Golden for hosting us and Elizabeth Grossman for taking time out of her schedule to meet with our mentees. We will be holding another "meet and greet" for our mentees with Karen Fernbach, Regional Director of Region 2 of the National Labor Relations Board. (Originally scheduled for November, this event was postponed due to Superstorm Sandy and is in the process of being rescheduled.) Our thanks to Ted Rogers and Sullivan & Cromwell who have been working with us to host this event.

Our committees also continue to be very active. Our CLE Committee presented a very successful combined live/webcast program in November on the Affordable Care Act. Our Workplace Technology Committee, chaired by Bill Herbert and Mike Curley, also presented a November program on social media and the public sector in conjunction with Hofstra Law School. Our Equal Employment Opportunity Law Committee, chaired by Chris D'Angelo and David Fish, is jointly sponsoring with the U.S. District Court for the Southern District of New York a training program for lawyers assisting pro se employment litigants in mediation on a pro bono basis.

Also right around the corner is the Annual Meeting. This year's meeting and CLE program will be held on Friday, January 25, 2013, at the Hilton New York in New York City, as part of the annual Bar Week. Programming for this year's session is still under way but we can confirm that our luncheon speaker will be National Labor Relations Board Chairman Mark Pearce, who is a long-time Section member. These are certainly interesting times at the NLRB and we are most interested in hearing what Chairman Pearce has to say. Keeping with tradition, on the preceding Thursday evening preceding our Friday program, the Section's Committees on Equal Employment Opportunity Law, Alternative Dispute Resolution, and Labor Relations Law and Procedure will be hosting events.

Our Committees have also been charged with updating and enhancing the information available to our members on the Section's website as it pertains to their individual committees and their activities. Continuing on the technology front, we recently welcomed a new group of Section "bloggers" who will provide even more coverage of new developments for members.

Finally, I am pleased to report that the Section's Executive Committee recently approved a report from the Section's Committee on Legislation and Regulatory Developments recommending changes to New York State's WARN Act legislation. The report is the result of a lot of hard work, and takes the concept of bipartisanship two steps further as it reflects agreement among employer, union, individual, and neutral representatives of our Section membership. This effort was spearheaded by Jerry Hathaway, with assistance from Jon Weinberger, Vivian Berger, Jack Raisner, and Rene Roupinian. Providing the report with even more weight in its presentation to NYSBA's Executive Committee for NYSBA endorsement is the support of the Commercial and Federal Litigation Section, which has joined in this submission.

Our Section provides many opportunities for members to actively participate in a wide range of activities, which in turn provide many career development and professional networking opportunities. I urge all of you who are not already members of a committee to sign up online today. If you have any questions about committee service, feel free to contact one of the chairs of the committee you are interested in or contact me directly. We look forward to your participation.

If you have any suggestions, proposals, new ideas, or complaints, I am anxious to hear from you. My email is jgaal@bsk.com and my office number is (315) 218-8288. I look forward to seeing you at Annual Meeting on January 25, 2013.

John Gaal

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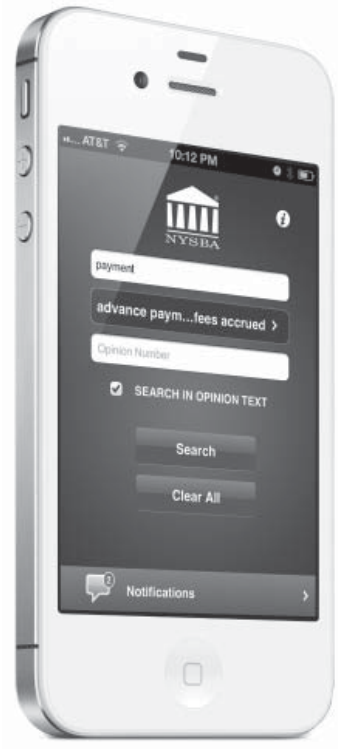

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Punitive Damages in Employment Discrimination Cases: Myth or Reality?

By Vivian Berger

I. Introduction

As a mediator specializing in employment disputes, most of which involve discrimination charges, I fairly often receive assurances from plaintiffs' lawyers that their clients are very likely to receive substantial punitive damages if the matter goes to trial. A number routinely include in their pre-mediation submissions a laundry list of employee-dream, employer-nightmare punitive awards. Rarely is any attempt made to compare the facts of the case at hand with those of the cases yielding a jackpot. I do not usually attempt to argue; I simply admonish that one cannot bargain with respect to punitive damages—their incidence and size are just too random. At most, I advise, the potential for a verdict including punitives should operate as a thumb on the scale, a consideration that might influence parties to settle at the higher end of an otherwise determined reasonable range.

But even attorneys disinclined to heed my counsel, in mediations or in unfacilitated talks, would probably agree that the more they know (not guess or intuit) about the subject, the better they can serve their clients in negotiation. This article constitutes a modest effort to substitute facts for emotions and "hype" in discussions generally evincing much more heat than light. The results should dampen the expectations of plaintiffs' counsel who imagines that a sizable punitive verdict will surely reward her efforts at trial while cautioning her dismissive opponent that sometimes the vision is not a mirage.

II. A Primer on the Legal Landscape[1]

The last two decades have seen the emergence of a Supreme Court jurisprudence setting due process limitations on the size of punitive damages awards. Its overarching principle is that the Fourteenth Amendment forbids the states to impose on a tortfeasor "grossly excessive or arbitrary punishments."[2]

The seminal decision of *BMW of North America, Inc. v. Gore*[3] announced three factors (the "*Gore* guideposts") to use in determining whether a particular punitive award had crossed the constitutional line: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the award and the civil penalties authorized or handed down in comparable cases.[4] The Court has emphasized the second guidepost, opining in 2003 that a single-digit ratio between punitive and compensatory damages is "more likely to comport with due process"[5] In 2008, in *Exxon Shipping Co. v. Baker*,[6] the justices established a 1:1 ratio as "a fair upper limit" in maritime matters. Although federal common law and the Clean Water Act governed this case, they bolstered their conclusion by reference to the one-digit maximum presumptively appropriate under their prior due process precedents.[7]

Notably, neither *Gore* nor any of the subsequent decisions in this vein arose in an employment discrimination context. The Civil Rights Act of 1991[8] for the first time provided for punitive damages under Title VII if the complainant demonstrates that the "respondent (other than a government, government agency or political subdivision)… engaged in a discriminatory practice…with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[9] In *Kolstad v. American Dental Association*,[10] which involved alleged sex discrimination, the Court fleshed out the requirements of the amended law in certain respects.

Justice O'Connor's majority opinion held that to satisfy the statute's "mens rea" element so as to support liability for punitives, the perpetrator "must at least discriminate in the face of a perceived risk that its actions will violate federal law"; the Court rejected the view of the en banc D.C. Circuit that the actor's conduct must have been"egregious."[11] The opinion also stated that "[t]he inquiry does not end with a showing of the requisite 'malice or reckless indifference' on the part of certain individuals.… The plaintiff must impute liability for punitive damages to respondent"—that is, the employer. Agency law permits such vicarious liability when the principal either authorizes or ratifies the tortious act or "the agent was employed in a managerial capacity and was acting in the scope of employment." The Justice, however, departed from strict agency precepts by framing a defense for the employer whose agent's "discriminatory employment decisions are contrary to [its] 'good-faith efforts to comply with Title VII.'"[12]

None of the key terms in the opinion is self-defining. Thus, the lower courts have struggled over how to apply such concepts as "malice or reckless indifference," "managerial capacity," and "good-faith efforts."[13]

Significantly, unlike the cases discussed earlier, *Kolstad* did not deal with the issue of excessiveness. More on point in this regard in the setting of punitive damage awards in employment lawsuits is the statute itself: it calls for caps ranging from $50,000 to $300,000, depending on the number of workers employed by the defendant.[14] These maximums' existence reduces, although it does not eliminate, the likelihood that a punitive award under Title VII or the ADA will run afoul of the *Gore* guideposts, especially the second. Presumably, in the wake of *Exxon*, these criteria

would inform rather than control the inquiry in the federal context.[15] Due-process analysis does, however, apply to punitive damages assessed pursuant to the New York City Administrative Code. (Notably, it contains no caps.[16]) But within the Second Circuit, courts may invoke a "shock the judicial conscience" test (which also refers to the *Gore* factors) to find a punitive award excessive even if it is not so large as to offend the Constitution.[17]

What lessons can practitioners usefully draw from this brief review? In a nutshell: pertinent law considerably constrains the jury's power to redress employment discrimination through an assessment of punitive damages. Furthermore, judges have not been reluctant to police such awards quite vigorously.[18] Even the plaintiff who gains the proverbial pot of gold in the first instance will often see it substantially—if not wholly—drained by the end of post-trial motions and appeals.

III. A Sampling of Punitive Awards in the New York City Metropolitan Area

One can analogize the universe of civil cases to an iceberg. Matters that culminate in a trial comprise the portion above the water; pre-trial dispositions and settlements lurk, invisibly, below the surface. Of the visible part—the top one-third, let us estimate[19]—consists of those lawsuits that plaintiffs have won. In terms of our metaphor, only the very tip of the top represents cases in which the verdict has included punitive damages. These observations hold as true for employment litigation as for other disputes.[20]

In my earlier article on employment discrimination trials in the Southern and Eastern Districts of New York, I remarked that the necessarily small number of verdicts that could be surveyed precluded the type of rigorous analysis that, one hopes, may lead to statistically significant results.[21] The same is true in spades of a study of punitive damages limited to a particular geographic and subject area. Nonetheless, having dealt with the topic in my previous piece in only a paragraph, I thought it worthwhile to expand the inquiry. Even an impressionistic picture might serve as a reality check for attorneys and clients who fixate, either in hope or in fear, on a few humongous punitive awards—"litigation legends" bearing no more relationship to litigation reality than a pro basketball player's height bears to the average adult male's.

The database used in the trial study (relevant filings in 2004 and 2005)[22] yielded 33 winning plaintiffs eligible for punitive damages; of these, six (18.2%) actually received them. The median figure (after taking into account post-trial reductions, which one-half suffered) lay between $50,000 and $190,000 (average $120,000).[23] Respecting the key parameter of amount, this handful of cases tells us little, though it does provide anecdotal support for the conclusion suggested by pertinent legal doctrine as well as experience: a plaintiff with a punitive verdict should celebrate only, or to the extent, that it survives post-trial defense attacks upon it.[24]

A. The Present Study: How Much Punitive Damages Do Plaintiffs Get, in What Kinds of Cases?

In an attempt to expand the data, I searched for punitive damages verdicts using a variety of sources covering trials[25] occurring between 2000 and 2011. From PACER, the online system for tracking federal litigation, I took closed employment cases whose last docket entries were in 2010-2011; the trials resulting in a punitive award occurred between 2003 and 2011. The rest of the data came from Westlaw databases: (1) CTA2-ALL—2008 (published federal and state cases in the Second Circuit[26]); (2) NY-CS-2000-11 (published state cases[27]); and (3) JV-2nd—2000-11 (synopses of federal and state cases).[28] I excluded class actions and suits against governments and related entities, as to which punitive damages are barred.[29]

My review of these sources yielded a total of 34 cases (26 federal and eight state) with punitive awards; the number of plaintiffs was 41. Interestingly, nearly a quarter of these—representing almost one-third of the cases—were made in actions culminating in default judgments; hence, no jury was involved.

Although this study was not designed to permit testing for statistical significance, it did produce a seemingly robust correlation between the type of claim and punitive damages. Twenty plaintiffs whose verdict included punitive damages (48.8% of the 41) in nineteen cases (55.9% of the 34) had prevailed on a charge of retaliation. Furthermore, fourteen plaintiffs (34.1%) in eleven cases (32.4%) won on the ground of sexual harassment. (Some of the latter also bore features of other kinds of sex discrimination.) Several received punitive awards on both these claims.[30] Notably, of the six impositions of punitive damages identified in my previous article, five represented victories on retaliation; the remaining one arose from a charge of sexual harassment.[31]

With regard to amount, averages tend to be misleading on account of their sensitivity to outliers—especially large ones; more informative for one who wishes to calculate the probability of an award's falling within a certain range is the median, the middle value or values in a distribution.[32] The median amount of punitives found by the trial fact-finder (calculated by number of cases) came to $500,000.[33] The calculation by plaintiff was harder because of an undifferentiated verdict for three people; on the reasonable assumption that they split the amount roughly evenly, the median would be around $326,667.

But apart from its potential utility as leverage in post-verdict bargaining, which may be substantial at times,[34] a trial award of punitive damages presents a picture that is often deceptively favorable to the plaintiff. To re-invoke my earlier metaphor, cases (or plaintiffs) with punitive verdicts that survived, let alone survived intact, through the close of litigation embrace only the tip of the tip of the top of the iceberg.

Simply put, of the 41 plaintiffs who initially received punitive damages, two suffered a later court ruling that they were not entitled to punitives; eight were subjected to reversal of their victory for lack of liability or trial error;[35] and thirteen saw their damages reduced when defendants prevailed on a motion for remittitur. Three of the latter reductions were due to statutory caps. Thus, a mere 31 out of 41 plaintiffs (about three-quarters) ended up with punitive damages in some amount; and only 18 (43.9%) retained the full original award. When one calculates by case, not plaintiff, the result is that only in 27 of the 34 actions yielding punitives (79.4%) did the prevailing party or parties hold onto at least part of the award; the figure was 14 out of 34 (41.2%) for awards that survived unchanged. Given these setbacks, predictably the plaintiffs' median award fell considerably: to $200,000 (by case) and $75,000 (by plaintiff).[36]

B. The Present Study: How Often Do Plaintiffs Get Punitive Damages?

Logically, this question precedes the questions of who receives them and how much. But because my inquiry was mainly geared toward finding cases where plaintiffs had received punitive damages, I gave the topic secondary, and summary, treatment. The only information I had that could yield the ratio of number of punitive awards to number of prevailing employment plaintiffs came from my PACER database, cases with final docket entries in 2010-2011; therefore, they are all federal.

Of 20 plaintiffs who won, twelve, or 60%, received a punitive verdict from the trier of fact; eleven, or 55%, retained their awards in whole or in part. In my estimation, this number is high given the relative paucity of cases; it may well be an artifact of sampling error. Significantly, an exhaustive study by Professor Marc Galanter of punitive damages awards in 1992 in the nation's largest 75 counties found that only 26.8% of victorious employment plaintiffs obtained such an award from the factfinder.[37] In a review of all published federal decisions in 2004 and 2005, focusing on awards of punitives in cases arising under Title VII, Professor Joseph A. Seiner found that about 29% of juries who returned a plaintiff's verdict also gave out punitive damages.[38] Recall that the 33 relevant suits in my prior article, which dealt with cases from the Southern and Eastern Districts of New York, produced the lowest rate of all, 18.2%.

IV. Conclusion

At the end of the day, there is mixed news for plaintiffs and defendants on the subject of punitive damages in employment discrimination cases. Their incidence is likely rarer than suggested by the small numbers in this study; their amount, after post-trial depredations, is quite moderate. Still, employers can hardly discount this civil form of "capital punishment" as a prospect comparably "freakish" to being hit by a bolt of lightning.[39] Other than egregious facts,[40] an obvious predictor, a strong claim of retaliation or sexual harassment should alert counsel to the realistic possibility of such an award—especially in cases that involve a notorious defendant.

Seasoned practitioners will scarcely find these conclusions surprising, though a fair number of plaintiffs' attorneys seem to ignore the lessons of experience (or posture in a way suggesting they do so). Perhaps this article will at least help both sides' counsel to educate clients misled by media exaggeration of supposedly rampant large recoveries to base their litigation decisions on a cool-headed view of the actual facts. If so, it will have served its purpose.

Endnotes

1. *See generally* Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 Iowa L. Rev. 473 (2012); Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 Okla. L. Rev. 701 (2010) ("*The New Calculus*"); Sandra Sperino, *Judicial Preemption of Punitive Damages* ("*Judicial Preemption*"), 70 U. Cin. L. Rev. 227 (2009).
2. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).
3. 517 U.S. 559 (1996).
4. *Id.* at 574-74.
5. *State Farm*, 538 U.S. at 425. Justice Kennedy's opinion for the Court stated that in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1(1991), "in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.... We cited that 4 to1 ratio again in Gore." *State Farm*, 538 U.S. at 425.
6. 554 U.S. 471 (2008).
7. *Id.* at 514-15.
8. Pub. L. No. 102-166, 105 Stat. 1071.
9. 42 U.S.C. § 1981a(b)(1). The Act also authorized punitive damages under the ADA. *See* 42 U.S.C. § 1981a(b)(2).
10. 527 U.S. 526 (1999).
11. *Id.* at 533.
12. *Id.* at 543-46.
13. *See* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 Wm. & Mary L. Rev. 735, 754 (2008). The *Kolstad* Court itself noted the lack of any good definition of what constitutes "managerial capacity." *See* 527 U.S. at 543. It wrote that examples in the Restatement of Torts suggested that to come under this definition "an employee must be 'important,' but perhaps need not be the employer's 'top management, officers or directors.'" *Id.* (citations omitted). The opinion also implied that a written policy can go far toward negating malice or recklessness. *Id.* at 545 (citation omitted). Relevant trainings can likely perform a similar function. The employer (on whom the burden of proof of good faith probably rests) must also be able to demonstrate that the policy is effectively enforced. *See* Seiner, *supra* note 1, at 475, 511-12.
14. 42 U.S.C. § 1981a(b)(3). The maximums apply to the total of punitive and compensatory damages. The latter encompass "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *Cf.* Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of Kolstad v. American Dental Association*, 14 Legis. & Pub. Pol'y 477 (2011) (*Kolstad*'s good-faith defense should obviate the need for caps).
15. *See* Seiner, supra note 1, at 491-93. The same would be true for cases arising under Section 1981, which permits punitive awards in appropriate cases, *see Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975), and has no caps.
16. *See* N.Y.C. Admin. Code § 8-502(a). *But cf. Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007) (noting that, despite absence of caps on punitive damages in NYC law, "the federal cap nonetheless provides guidance on what is considered an

appropriate civil penalty for comparable misconduct"), *aff'd*, 629 F.3d 276 (2d Cir. 2010), quoted in *Tse v. UBS Fin. Servs., Inc.*, 568 F. Supp. 2d 274, 317-18 (S.D.N.Y. 2008). It also does not incorporate *Kolstad's* good-faith defense. Instead, various good-faith measures may serve only to mitigate punitives. *See* N.Y.C. ADMIN. CODE § 8-107(13)(e). The New York State Executive Law does not provide for punitives at all in the context of employment discrimination. *See* N.Y. Exec. L. § 297(9).

17. *See, e.g., Norris v. NYC College of Technology*, No. 07-CV-853, 2009 WL 82556, at *6 (E.D.N.Y. Jan. 14, 2009) (citations omitted); *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp. 2d 555, 563-64 (S.D.N.Y. 2008), *aff'd*, 344 F.App'x 628 (2d Cir. 2009).

18. Professor Sandra Sperino has exhaustively analyzed the ways in which judges in her view err to plaintiffs' disadvantage, mathematically and conceptually, in applying excessiveness review in employment discrimination cases. *See generally* Sperino, *The New Calculus*, *supra* note 1; Sperino, *Judicial Preemption*, *supra* note 1.

19. *See* Vivian Berger, *Winners and Losers: Employment Discrimination Trials in the Southern and Eastern Districts of New York*, 37 NYSBA LABOR & EMP. L.J. 42, 42 (2012).

20. *E.g.*, in 2006 only 3.2% of employment discrimination cases concluded by trial. *See id.* at 43 (citing statistics from the Administrative Office of the U.S. Courts).

21. *See id.* at 42.

22. *Id.*

23. *Id.* at 44.

24. While any verdict is potentially subject to the vagaries of post-trial motions and appeals, punitive awards, especially large ones, predictably attract such defense maneuvers disproportionately often. Even an"unstable" award, however, may advantage the plaintiff in that it provides leverage for settlement. *See, e.g., Velez v. Novartis Pharmaceuticals Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (after sex discrimination class action trial resulted in a verdict for, inter alia, $250 million in punitive damages, parties settled for relief valued at up to $175 million). In one of the cases in my database, *Chisholm v. Memorial Sloan-Kettering Cancer Center*, 824 F. Supp. 2d 573 (S.D.N.Y. 2011), a plaintiff who obtained $1 million in punitive damages refused to accept a remittitur to $50,000. Both sides appealed. Later they withdrew their appeals, settled the matter—which also involved $233,290 in back pay, $102,546 in front pay, $13,665 in pre-judgment interest, and an unknown amount of attorneys' fees—for $690,000.

25. Under "trials" I include inquests leading to default judgments.

26. I found only federal cases. The trials in this sample had taken place in 2007-2008. Given that the median time to get to trial was about a year-and-a-half in the prior study, the cases reviewed there would probably have clustered in 2006-2008. *See* text accompanying note 22; Berger, *supra* note 19, at 44. When compiling the results of all my searches for this study, I eliminated duplicate cases.

27. This search yielded punitive verdicts from 2000-2007. In the 2000 case, the amount was not given.

28. Trials in the state cases occurred from 2003-2008. In one tried in 2005 the jury said that the plaintiff was entitled to punitive damages but did not indicate any amount. (The court in dictum stated that punitives were not warranted.) In the federal cases trials took place between 2004 and 2010.

29. Title VII's authorization of punitive awards in terms excludes a "government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1). *See Terry v. Ashcroft*, 336 F.3d 128, 153 (2d Cir. 2003). Nor are such damages available against New York City; *see Krohn v. N.Y.C. Police Dep't*, 2 N.Y.3d 329, 778 N.Y.S.2d 746 (2004), or a public corporation like CUNY. *See Norris v. N.Y.C. Institute of Technology*, No. 07-CV-853, 2009 WL 82556, at *8 (E.D.N.Y. Jan. 14, 2009). Because City law does permit aiding and abetting liability, *see id.* at *8-*9; N.Y.C. ADMIN. CODE § 8-107(6), it is conceivable that I may have missed one or more cases involving this type of situation.

30. In one instance, each of two plaintiffs was given punitives for sexual harassment "or" retaliation.

31. *See* Berger, *supra* note 19, at 44. Several of the defendants held liable for punitive damages were well-known figures: *e.g.*, real estate mogul Sheldon Solow, *see Lamberson v. Six West Retail Acquisition, Inc.*, No. 98 CIV 8053, 2002 WL 59424 (S.D.N.Y. Jan. 16, 2002); basketball player Isiah Thomas, *see Verdict and Settlement Summary, Browne Sanders v. Madison Square Garden L.P.*, 2007 WL 3144545 (S.D.N.Y. Oct. 4, 2007); Governor Eliot Spitzer's father, *see Boyce v. Spitzer*, 29 Misc.3d 1207(A), 2010 WL 3959616 (Sup. Ct., Bx. Co. 2010), *aff'd in part, rev'd in part*, 82 A.D.3d 491, 918 N.Y.S.2d 111 (1st Dep't 2011); and "The Queen of Mean," Leona Helmsley. *See Bell v. Helmsley*, 2003 WL 1453108 (Sup. Ct., N.Y. Co. Mar. 4, 2003). Notably, even Ms. Helmsley attracted a modicum of sympathy from the judge if not the jury. In reducing the punitive award in *Bell* from $10 million to $500,000, he wrote: "…Mrs. Helmsley is not a 4 Billion Dollar pinata for every John, Patrick or Charlie to poke a stick at in the hopes of hitting the jackpot." *Id.* at *3.

32. Berger, *supra* note 19, at 34.

33. Where the damages figure was not given, the case and/or plaintiff was excluded.

34. *See supra* note 24.

35. In two cases an appellate court disapproved in dicta the trial court's actions with respect to punitive damages. In one instance, the New York Appellate Division, First Department, stated that it would have annulled in any event the "grossly excessive compensatory and punitive damages." (The latter exceeded $10 million.) *See Minichiello v. Supper Club*, 296 A.D.2d 350, 350, 353, 745 N.Y.S.2d 24, 26 (1st Dep't 2002). In another, the Appellate Term, First Department, opined that if it were not reversing, it would have found that the evidence failed to warrant a punitive damages award. *See Taylor v. N.Y.U. Med. Ctr.*, 21 Misc. 3d 23, 28, 871 N.Y.S.2d 568, 573 (N.Y. Sup. Ct. App. Term 2008).

36. The latter calculation included one verdict of $0, where the court set aside a $5,000 punitive award as a matter of law. Because it would have been misleading to record in this manner verdicts lost pursuant to reversal for trial error, unrelated to punitive damages, I omitted such cases entirely.

37. *See* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. Rev. 1093, 1134-35 (Table 4) (1996).

38. *See* Seiner, *supra* note 13, at 741-742, 758-59. As the author admits, a database limited to published decisions cannot capture those cases that yielded no opinion. *See also* Berger, *supra* note 19, at 45 (discussing publication bias). I suspect that a survey limited in this way may well exaggerate the ratio of punitive damages awards to plaintiffs' verdicts. An imposition of punitive damages, especially when it is large or contested by the defense, should be one of the factors making a case important enough for a judge to submit for publication.

39. *Cf. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

40. *See, e.g., Gallegos v. Elite Model Mgt. Corp.*, 28 A.D.3d, 52, 807 N.Y.S.2d 44, 46 (1st Dep't 2005) (defendant and its agents failed to accommodate asthmatic plaintiff in a heavy smoking environment, proposing that she bring a gas mask to work). Plaintiff received a punitive verdict of $2.6 million, but because of error a new trial on damages was ordered. *See* 28 A.D.3d at 51, 53, 807 N.Y.S.2d at 45, 47.

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Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law

By Edward J. Reeves and Lainie D. Decker

I. Introduction

Current federal law generally does not prohibit workplace discrimination based on sexual orientation. Until the recent ruling by the Equal Employment Opportunity Commission (EEOC), it was generally held that current federal law does not prohibit workplace discrimination based on gender identity.[1] For over a decade now, advocates of the gay, lesbian, bisexual and transgender (GLBT) community have sought to change this with proposed federal legislation—the Employment Non-Discrimination Act (ENDA)[2]—that would prohibit such discrimination nationwide. Upon President Obama's election, ENDA was widely predicted to finally pass, but today its fate remains far from clear.

In light of current law and the uncertainty of ENDA's passage in the near future, employees and employers need to know that a narrow range of employment discrimination claims involving GLBT individuals have the potential to succeed under federal law. This paper provides a timely overview of the viability of claims related to sexual orientation and gender identity under current federal statutory law before—or without—the passage of ENDA. As this paper demonstrates, some employee advocates have found successful paths to establish claims of sexual harassment or gender stereotyping despite the lack of explicit protection for GLBT individuals. However, such claims succeed only when they fit within a very narrow set of factual circumstances.

II. Employment Discrimination Based on Sexual Orientation

Neither sexual orientation nor gender identity is currently covered by federal anti-discrimination laws. Nonetheless, GLBT plaintiffs can succeed on claims related to sexual orientation or gender identity either by utilizing their state or local law, if applicable, or by shaping their claim to fit within the very particular requirements of cognizable same-sex sexual harassment or gender stereotyping claims under federal law.

A. Title VII Does Not Prohibit Discrimination Based on Sexual Orientation

Title VII of the Civil Rights Act of 1964 prohibits discrimination by covered employers on the basis of "race, color, religion, sex, or national origin."[3] Title VII's prohibition against discrimination based on "sex" does not include discrimination based on sexual orientation.[4]

For example, in *DeSantis v. Pacific Telephone & Telegraph Co.*, the Ninth Circuit found that Title VII "applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."[5] The court also found that the employers had discriminated against *all* homosexuals, both male and female, and, therefore, there had been no gender discrimination under Title VII.[6]

The Equal Employment Opportunity Commission (EEOC) also has concluded that Title VII's protections do not extend to discrimination based on sexual orientation. EEOC Dec. No. 7675.[7] Although EEOC guidelines are not binding authority, the U.S. Supreme Court has shown a great deal of deference to them because the guidelines constitute "a body of experience and informed judgment to which courts…may properly resort for guidance."[8]

B. Many States, Local Governments, and Private Employers Prohibit Workplace Discrimination Based on Sexual Orientation

Aside from federal law, many state and local laws prohibit employment discrimination based on sexual orientation. At least 181 cities and counties,[9] 21 states and the District of Columbia[10] prohibit sexual orientation discrimination by statute. Other laws contain language that has been held to prohibit sexual orientation discrimination by its express prohibition of discrimination on the basis of marital status, sex or gender. As noted in Section III below, 16 states and the District of Columbia also prohibit gender identity discrimination in the workplace.

In addition, many private employers have adopted policies prohibiting workplace sexual orientation discrimination. These protections have expanded rapidly in the past decade. In 2000, 51% of the Fortune 500 companies had such policies, and in 2008 that number had jumped to 85%, including 97% of the Fortune 100.[11]

Accordingly, employee advocates who are considering GLBT-related claims that may be subject to such state, local or company-provided protections should seriously consider whether to bring a federal claim of sexual harassment or gender stereotyping. As described below, there are only a handful of viable paths to a successful claim under Title VII, and the required evidentiary showing is often very difficult to achieve.

C. Same-Sex Sexual Harassment Claims Are Cognizable Under Title VII

Until 1998, it was unclear whether and under what circumstances Title VII applied in cases of sexual harassment where the harasser and victim were of the same sex.[12] After years of divisiveness and bitterly split cir-

cuits, the U.S. Supreme Court finally decided in *Oncale v. Sundowner Offshore Services, Inc.*[13] that same-sex sexual harassment "because of sex" is actionable under Title VII.

In *Oncale*, the plaintiff, Joseph Oncale, worked as part of an eight-man crew on an offshore oil platform in the Gulf of Mexico. On several occasions, other crew members restrained the plaintiff, "subjected [him] to sex-related, humiliating actions" and threatened to rape him.[14] The plaintiff complained to supervisors, but no remedial actions were taken. He eventually resigned and soon after filed suit against Sundowner claiming quid pro quo and hostile environment sexual harassment under Title VII. The Eastern District of Louisiana held that Title VII did not encompass sexual harassment where the alleged harasser and the harassed employee were of the same sex,[15] and the Fifth Circuit affirmed.[16]

The U.S. Supreme Court reversed the Fifth Circuit on the narrow legal question of whether a same-sex sexual harassment claim could be cognizable under Title VII. It held: "If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of…sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[17] The Court remanded the case back to the trial court for a determination of whether the alleged discrimination in that case was "because of sex."

In *Oncale*, the Court described a handful of successful routes to a valid same-sex discrimination claim under Title VII. It stated, for example, that lower courts and juries generally had no trouble finding an inference of sex discrimination when the alleged conduct involved explicit or implicit proposals of sexual activity between a man and a woman because "it is reasonable to assume those proposals would not have been made to someone of the same sex."[18] The Court also noted that a similar inference of sex discrimination could be drawn where the alleged harasser was homosexual and the alleged victim was of the same sex; for example, where a male employee claims that he was harassed by his gay male supervisor.

The *Oncale* decision also made clear, however, that sexual desire is not essential to find an inference of discrimination based on sex, including in same-sex harassment cases.[19] The Court reiterated that the critical inquiry in Title VII sex discrimination claims, including those involving same-sex sexual harassment, remains "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[20] The Court offered an example of such a situation not involving sexual desire: where a female victim is harassed in sex-specific and derogatory terms by another female in such a way as to make it clear that the harasser had a general hostility to the presence of women in the workplace. The Court also stated that a plaintiff could offer "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[21]

Significantly, the Court in *Oncale* did not describe which evidentiary route could have been successful for Oncale, and none of the options it described appeared to apply, as there were no women in the workplace and there was no evidence that the alleged harassers were motivated by sexual desire or by a general hostility toward men in the workplace. Oncale settled with his employer upon remand.

D. Valid Claims for Same-Sex Sexual Harassment Related to Sexual Orientation Require a Specific and Narrow Evidentiary Showing That Is Rarely Met

Since *Oncale*, plaintiffs' claims of same-sex sexual harassment have had mixed success. While several courts have recognized claims for same-sex sexual harassment under Title VII, *see, e.g.*, *Dick v. Phone Directories Co.*;[22] *La Day v. Catalyst Tech., Inc.*;[23] *Schmedding v. Tnemec Co.*,[24] many courts have dismissed such claims based on a lack of sufficient evidence that the alleged harassment was based on sex, rather than on sexual orientation. These courts have invoked the Supreme Court's analysis in *Oncale* that same-sex sexual harassment can be inferred only where there is evidence of sexual desire, general hostility toward one sex, or noncompliance with gender stereotypes; plaintiffs have been required to provide evidence that fits squarely into one of those specific situations in order to have a viable claim. Despite recognition that there may be other ways to establish that discrimination was "because of sex," in practice, courts have rarely gone beyond the limited examples of *Oncale*.[25]

For example, in *Bibby*, a gay male employee alleged hostile work environment sexual harassment based on the actions of a co-worker who assaulted him in a locker room, used a forklift to slam a load of pallets on the platform where he was standing, and yelled at the plaintiff that "everybody knows you're gay as a three dollar bill," "everybody knows you're a faggot" and "everybody knows you take it up the ass."[26] While acknowledging that same-sex sexual harassment claims are cognizable under Title VII, the Third Circuit nonetheless held that this plaintiff had not alleged a viable claim because the evidence indicated that he was harassed because of his sexual orientation and not because of sex.[27] The court acknowledged that there may be additional ways to prove that same-sex sexual harassment occurred because of sex, but it analyzed the evidence only in light of the illustrative examples from *Oncale* and upheld the dismissal of all claims.

Despite this narrow approach in many cases, *Oncale* did open some doors to federal claims of workplace discrimination involving GLBT individuals. The Ninth Circuit's en banc decision in *Rene v. MGM Grand Hotel, Inc.*[28]

demonstrates the broadest interpretations of these theories to date. *Rene* involved an openly gay male worker who was subjected to workplace harassment amounting to sexual assault, as well as mockery by male coworkers and a male supervisor. The plaintiff alleged that the harassing treatment he received had been motivated by his sexual orientation; however, he also provided evidence that much of the harassment involved issues of gender stereotyping. The defendant argued that the claims were not cognizable under Title VII because they were based on the plaintiff's sexual orientation.

Judge Fletcher, joined by four other judges, wrote the plurality opinion in favor of the plaintiff, holding that harassment "of a sexual nature" regardless of its motivation constitutes discrimination "because of sex" and is therefore actionable under Title VII.[29] Judge Fletcher held that "an employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action [under Title VII]."[30] Under this analysis, sexual orientation harassment that relates to sex, including gender-related mockery or assault, contravenes Title VII.

Judge Pregerson, joined by two other judges, agreed that the treatment the plaintiff received was sex discrimination under Title VII, but disagreed with Judge Fletcher's reasoning as to why and how. Judge Pregerson's opinion argued that the plaintiff's treatment amounted to gender stereotyping, and that, as such, he had stated a claim for Title VII discrimination under *Nichols v. Azteca Restaurant Enterprises, Inc.*[31] and *Price Waterhouse v. Hopkins*.[32] (Title VII sexual discrimination claims under gender stereotyping are discussed in the next section.)

The four-judge dissent, written by Judge Hug, argued that Title VII strictly requires that the harasser have a motivation based on gender as opposed to sexual orientation. The dissent did not disagree with the Pregerson concurrence's statement of the law, but would nevertheless have rejected the claim on the grounds that the plaintiff had not raised gender stereotyping before the district court below.

In subsequent cases, courts grappling with a harasser's motivation have been reluctant to permit claims involving conduct of a sexual nature related to sexual orientation to the extent provided in Judge Fletcher's plurality opinion.[33]

E. Title VII Claims of Discrimination Based on Gender Stereotyping Related to Sexual Orientation Can Succeed

The U.S. Supreme Court has made it clear that Title VII prohibits discrimination based on gender stereotyping. In *Price Waterhouse*, a case where sexual orientation was not expressly at issue, the Supreme Court upheld the sex discrimination claim of a woman who had been denied partnership in an accounting firm at least in part on the basis that she was "macho," "masculine," "overcompensated for being a woman" and needed "a course at charm school."[34] Moreover, a partner had advised the plaintiff that to improve her chances of joining the partnership, she should "walk more femininely,…wear make-up, have her hair styled, and wear jewelry."[35] The Court held that Title VII prohibits employers from allowing gender to play a motivating part in an employment decision and found that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[36] The Court explicitly addressed the legal relevance of a sex stereotyping claim: "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[37]

Building on *Oncale* and *Price Waterhouse*, the Ninth Circuit in *Nichols*[38] extended Title VII protections to a gay employee based on gender stereotyping. The plaintiff in *Nichols* sued his former employer for sexual harassment and retaliation after he was subjected on a daily basis to insults and name-calling, including being referred to by male co-workers and a supervisor (in Spanish and English) as "she," "her" and "faggot."[39] His co-workers also mocked the plaintiff for walking and carrying his serving tray "like a woman" and derided him for not having sexual intercourse with a female waitress who was his friend.[40]

The district court granted summary judgment to the employer, in part because it found that the alleged harassment was not "because of sex."[41] The Ninth Circuit reversed, however, finding that the verbal abuse was closely linked to gender and therefore occurred because of sex.[42] The *Nichols* court expressly relied on *Price Waterhouse* in rejecting the employer's argument that the harassment was not actionable because it was based on sexual orientation, reasoning as follows: "At its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act."[43] The court held that an employer violates Title VII when it discriminates against an employee because that employee did not conform to gender stereotypes.[44]

It has proven difficult for many gay and lesbian plaintiffs to establish a claim under Title VII for discrimination based on gender stereotyping because"[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality."[45] Recognizing that a gender stereotyping claim should not be used to "bootstrap protection for sexual orientation into Title VII," circuit

courts have struggled to distinguish between discrimination based on sexual orientation and discrimination based on gender stereotyping.[46] In determining whether discrimination is based on a plaintiff's nonconforming gender behavior, these courts look to *Price Waterhouse*, where the Supreme Court focused principally on characteristics that were readily demonstrable in the workplace, such as a manner of walking and talking, work attire and hairstyle.[47] Thus, courts that have applied *Price Waterhouse* have reasoned that, for a gender stereotyping claim to succeed, plaintiffs should be able to identify the observable nonconforming gender behavior upon which the discrimination could be based.[48]

The facts necessary for a cognizable gender stereotyping claim were demonstrated recently in the Third Circuit. In *Prowel v. Wise Business Forms, Inc.*,[49] the plaintiff presented evidence of discrimination both because he was gay and because he failed to conform to gender stereotypes:

> In stark contrast to the other men at Wise, Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit"; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the nale encoder with "pizzazz."[50]

Based on this evidence, the district court found that his claim was simply a repackaged sexual orientation discrimination claim (and therefore not viable under Title VII) and granted summary judgment to the employer. The Third Circuit reversed, however, holding that the plaintiff had put forth sufficient evidence of harassment based on gender stereotypes to withstand summary judgment. The court rejected the employer's argument that because the plaintiff was gay he was precluded from bringing a gender stereotype claim under Title VII: "There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not."[51]

The Eighth Circuit also recently upheld a claim for gender stereotyping. In *Lewis v. Heartland Inns of America*,[52] the plaintiff was terminated for appearing "slightly more masculine" and having "an Ellen DeGeneres kind of look" instead of the preferred "Midwestern girl look."[53] The plaintiff's theory of her case was that Heartland had enforced a de facto requirement that a female employee had to conform to gender stereotypes in order to work the day shift at the hotel's front desk.[54] The district court granted summary judgment in favor of Heartland on all claims, reasoning in part that the plaintiff was required to produce evidence that she was treated differently than similarly situated males.[55] Relying on *Price Waterhouse*, *Oncale* and other cases, the Eighth Circuit reversed and remanded, holding that the plaintiff had offered sufficient evidence from which a reasonable fact finder could find that she was discriminated against because of her sex.[56]

In other cases, courts have avoided the issue completely by dismissing gender stereotyping claims on discrete factual distinctions or procedural grounds. For example, in *Jespersen v. Harrah's Operating Co.*, the Ninth Circuit dismissed a claim by a female bartender at Harrah's Casino who was fired from her job for refusing to wear makeup in violation of her employer's requirements.[57] In pursuit of a program aimed at enhancing its image throughout its casinos, Harrah's had imposed gender-specific standards of appearance on employees.[58] The standard at issue required women to wear makeup at all times, while men were prohibited from wearing cosmetics.[59] While upholding its earlier gender-stereotype decisions in *Nichols* and *Rene*, the *Jespersen* court distinguished this case as one of employer appearance standards and not sexual harassment.[60] Because the Ninth Circuit has applied *Price Waterhouse* to sexual harassment and not to appearance and grooming cases, it declined to do so here.[61]

Despite this general reluctance to recognize gender stereotyping claims by gay or lesbian plaintiffs, the circuit courts have consistently acknowledged that such claims could be viable under different facts or circumstances.[62] Interestingly, Sixth Circuit Judge Lawson commented in his dissent in *Vickers* that in gender stereotyping cases where factual distinctions are complicated, the circuit courts' tendency to grant summary judgment draws a "line [that] should not occur at the pleading stage of the lawsuit."[63]

III. Employment Discrimination Based on Gender Identity

Openly transgender individuals have become part of the American workplace.[64] Some estimates place the number of transgender Americans at nearly a quarter million. Indeed, "[t]ransgendered people are now represented in virtually every profession—musicians, entertainers, writers, engineers, teachers, doctors, and lawyers—and are 'coming out' as such to their employers and coworkers in ever-increasing numbers."[65] This is evident in both the public and private sectors. Sixteen states and over 100 cities and counties prohibit gender identity discrimination by statute.[66] According to a 2008 study by the Human Rights Campaign, 176 of the Fortune 500

businesses have gender identity protections at this time, including 61 of the Fortune 100.[67]

A. Gender Identity Defined

Gender identity, also referred to as transsexuality or gender dysphoria in medical communities, is distinct from homosexuality (attraction to members of one's own biological sex) and transvestitism or cross-dressing (dressing in clothes usually worn by those of the opposite biological sex).[68] Although definitions vary, an article from the Human Rights Campaign defines gender identity as "a person's innate, deeply felt psychological identification as male or female, which may or may not correspond to the person's body or designated sex at birth (meaning what sex was originally listed on a person's birth certificate)."[69]

Transgender individuals identify emotionally and psychologically with the opposite biological sex and usually live in the gender role opposite the one they were biologically born into or assigned. Transgender individuals do not always use surgery or medication to alter their bodies, but many do seek surgical alteration of their anatomy to conform to their desired biological sex.[70] Before undergoing gender reassignment surgery, transgender individuals are required to undergo a period of counseling and cross-gendered living—a period that, by necessity, includes employment.[71]

B. Title VII Does Not Prohibit Discrimination Based on Gender Identity

Federal courts generally have held that transgender individuals are not afforded protection under Title VII when the discrimination is based on transsexuality itself.[72]

Generally, the physical state of the transgender individual at the time of the alleged discrimination has little influence on a court's decision to deny Title VII discrimination claims. Courts have refused to allow Title VII actions when the transgender individual has yet to undergo gender reassignment surgery, *see Sommers*;[73] *Holloway*,[74] and after the transgender individual has undergone such surgery, *see Ulane*.[75]

C. Courts Generally Have Held That Title VII Claims of Discrimination Based on Gender Stereotyping Related to Gender Identity Can Succeed

Recently, the rationales in gender identity decisions have been shaped by application of the Supreme Court's broad interpretations of Title VII and gender stereotyping in *Price Waterhouse*. For example, in *Smith v. City of Salem, Ohio*,[76] the Sixth Circuit recognized the Title VII claim of a transgender firefighter who alleged that he was fired because of his feminine mannerisms. Relying on the reasoning in *Price Waterhouse*, the court held that an employer violates Title VII when it discriminates against an employee because that employee does not conform to gender stereotypes, regardless of the employee's status as a transgender individual.[77] Similarly, in *Etsitty v. Utah Transit Authority*, the Tenth Circuit assumed without deciding that Title VII protected transgender individuals who are discriminated against because they do not conform to gender stereotypes.[78]

In *Schroer v. Billington*, the plaintiff, who applied and interviewed while presenting as a man, was given an offer of employment as a terrorism research analyst with the Library of Congress.[79] After the plaintiff informed the organization that she was in the process of transitioning from male to female and would be working as a woman, the Library rescinded the plaintiff's employment offer. The district court upheld Schroer's Title VII sexual stereotype claim under *Price Waterhouse*, but also concluded that she was entitled to judgment based on the language of the statute itself, finding that "the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of… sex.'"[80]

Similarly, the Eleventh Circuit recently held that firing a transgender or transsexual employee because of gender nonconformity violated the Equal Protection Clause's prohibition of sex-based discrimination.[81] In *Glenn*, the plaintiff was hired by the Georgia General Assembly's Office of Legal Counsel (OLC) as an editor. Soon after, the plaintiff notified her direct supervisor that she was initiating a gender transition and would be coming to work as a woman. The OLC subsequently fired her, claiming that her gender transition was inappropriate, disruptive and immoral.[82] In holding that transsexuality was a protected class under the Equal Protection Clause, the court substantially relied on *Price Waterhouse* and its progeny. The court also concluded that the transgender plaintiff would have been protected under Title VII's prohibition of gender stereotyping. In its discussion of the Title VII analysis, the court stated that "the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."[83] The court noted that discrimination against transgender or transsexual individuals is inherently similar to discrimination based on gender stereotypes.[84]

Federal district courts are increasingly recognizing Title VII claims brought by transsexual plaintiffs under a gender stereotyping theory.[85] As these decisions are appealed, more circuit courts will have the opportunity to address the issue of sex discrimination against transgender employees.

D. Recent Developments: EEOC Holds That Title VII Prohibits Discrimination Based on Gender Identity

In a landmark decision, the EEOC unanimously held in *Macy v. Holder* that gender identity discrimination is sex discrimination under Title VII.[86] Under *Macy*, trans-

gender and transsexual individuals are not limited to a showing of discrimination through gender stereotyping. The EEOC held that discrimination based on gender identity alone is actionable under Title VII.[87]

In *Macy*, a former police detective applied for a position at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).[88] During the application process, the complainant informed the background check company that she had changed her name and gender, and asked that the ATF be informed of her decision. Not long afterward, the ATF notified her that the position was no longer available due to budget restrictions. However, the complainant learned later that the position actually had been offered to another candidate after the disclosure of her gender change.

The EEOC held that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on…sex.'"[89] From *Price Waterhouse* to *Glenn*, the EEOC's decision relied on a catalog of supporting Title VII cases. Most notably, the EEOC applied reasoning from *Schroer* analogizing a discriminatory action based on gender identity to discrimination based on an individual's change of religion. The EEOC reasoned that discrimination "because of religion" included discrimination toward "converts" from one religion to another.[90] Under an analogous theory, the EEOC explained that a complainant would be covered under Title VII for discrimination based on *change* of gender identity without the need for proof of gender stereotyping. However, the EEOC explained that the central question remained "whether the employer actually relied on the employee's gender in making its decision."[91] Consequently, under *Macy*, an employer violates Title VII by discriminating based on (a) nonstereotypical gender expressions, (b) change or transition from one gender to another, or (c) plain dislike of transgender persons. According to the EEOC, all three are clear examples of discrimination "based on…sex" under Title VII.[92]

While not binding on courts, the EEOC's position is persuasive authority to which the Supreme Court has expressed a great deal of deference.[93] It is possible, if not likely, that district and circuit courts will rely on *Macy*'s analysis of gender identity discrimination in future Title VII cases.

Under *Macy*, most transgender employees may remedy discrimination based on gender identity by filing a complaint at any of the EEOC's 53 field offices. Alternatively, a transgender federal employee may file a complaint with the equal employment opportunity counselor within the federal agency. Lastly, a transgender employee working for an employer controlled by the Office of Federal Contract Compliance Programs (OFCCP) may file a complaint with OFCCP and EEOC.[94]

IV. Proposed Employment Non-Discrimination Act (ENDA)

ENDA, H.R. 1397, was introduced in the U.S. House of Representatives on April 4, 2011 by Barney Frank of Massachusetts, along with 165 cosponsors. The bill was subsequently referred to the Committees on Education and the Workforce, House Administration, Oversight and Government Reform, and the Judiciary. Jeff Merkley of Oregon, along with 42 co-sponsors, introduced a companion ENDA bill, S. 811, in the U.S. Senate on April 14, 2011. The bill was subsequently referred to the Committee on Health, Education, Labor, and Pensions.

If enacted, the current version of ENDA, which closely tracks Title VII, would prohibit employment discrimination on the basis of sexual orientation and gender identity nationwide. Under ENDA, an employer that employs 15 or more employees may not "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity," including such actions taken "against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated."[95]

Thus, even if an employee is not gay, lesbian, bisexual or transgender, if his or her employer makes an adverse employment decision based on erroneous perceptions about the employee's sexual orientation or gender identity, the employer would be in violation of ENDA. Additionally, ENDA would protect employees from adverse employment decisions based on their association with a child, parent or friend who is of, or is perceived as having, a particular sexual orientation or gender identity. There are several major exceptions in the current version of ENDA. The proposed legislation exempts religious organizations (including educational institutions substantially controlled or supported by religious organizations), the Armed Forces and small businesses.[96] It does not apply to domestic partnership benefits[97] and prohibits quotas or preferential treatment based on sexual orientation.[98] The legislation also specifically excludes disparate impact claims and bars the EEOC from requiring the collection of statistical information on sexual orientation or gender identity.[99] The EEOC and the Department of Justice would enforce the law, and the relief available would be the same as under Title VII.[100]

As proposed, ENDA would define "sexual orientation" as meaning "homosexuality, heterosexuality, or bisexuality,"[101] and "gender identity" as "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[102] Thus,

if enacted, ENDA will prohibit discrimination based on actual or perceived heterosexuality. ENDA also will prohibit employment discrimination against transgender individuals to the same extent it will prohibit discrimination based on sexual orientation.

V. Conclusion

The inconsistent results in federal case law and the narrow protections afforded currently under Title VII establish the need for ENDA if there is to be any meaningful federal prohibition of workplace discrimination and harassment based on sexual orientation and gender identity. Nonetheless, existing federal law does, in limited circumstances, provide some potential remedies to employees who suffer gender stereotyping or sexual harassment related to their sexual orientation or gender identity. Additionally, while federal law offers only limited assistance, the EEOC's *Macy* decision provides alternative recourse for many victims of gender identity discrimination and will likely influence federal courts in future Title VII cases.

Endnotes

1. *See infra* note 106 and accompanying text (discussing recent EEOC ruling establishing discrimination based on gender identity under Title VII).
2. ENDA is described more fully in Section IV below.
3. 42 U.S.C. § 2000e2(a)(1).
4. *See, e.g.*, *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections…do not extend to harassment due to a person's sexuality."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) ("[Plaintiff] has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII."); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation."); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 2000) (refusing to extend Title VII to encompass sexual orientation); *U.S. Dep't of Housing & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1 (D.C. Cir. 1992) (acknowledging Title VII does not prohibit discrimination on basis of sexual orientation); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (termination based on homosexuality not actionable under Title VII), *cert. denied*, 493 U.S. 1089 (1990); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 32627 (5th Cir. 1978) (Title VII does not extend to rejection of job applicant on basis of presumed sexual orientation).
5. *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 32930 (9th Cir. 1979) (footnote omitted).
6. *Id.* at 330-31.
7. 19 Fair Empl. Prac. Cas. (BNA) 1823 (E.E.O.C. 1975).
8. *Meritor Sav. Bank, FSB v. Vinson*., 477 U.S. 57, 65 (1986) (internal quotation marks and citations omitted).
9. Samir Luther, Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 20072008* at 4 (revised Feb. 20, 2009), *available at* http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf.
10. California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin. Human Rights Campaign, *Statewide Employment Laws & Policies* (updated June 12, 2012), *available at* http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf.
11. Luther, *supra*, note 9 at 56.
12. The Fifth Circuit held that Title VII precluded a claim where the harasser and the victim were the same sex (*Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 45152 (5th Cir. 1994)); the Fourth Circuit held that such a claim was cognizable but only if the harasser was homosexual (*McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Wrightson* v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996)); and the Seventh Circuit permitted same-sex harassment claims as long as the harassment was sexual in nature (*Doe v. City of Belleville*, 119 F.3d 563, 576 (7th Cir. 1997)).
13. 523 U.S. 75 (1998).
14. *Id.* at 77.
15. *See* Civ. A. No. 941483 (E.D. La. Mar. 24, 1995).
16. *See* 83 F.3d 118 (5th Cir. 1996).
17. 523 U.S. at 79 (ellipsis in original).
18. *Id.* at 80.
19. *Id.* ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.").
20. *Id.* (internal quotation marks and citation omitted); *see also id.* ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").
21. *Id.* at 8081.
22. 397 F.3d 1256, 126466 (10th Cir. 2005).
23. 302 F.3d 474, 47080 (5th Cir. 2002).
24. 187 F.3d 862, 864 (8th Cir. 1999).
25. *McCown v. St. John's Health Sys., Inc.*, 349 F.3d 540, 543 (8th Cir. 2003) (no evidence showing employer was homosexual or sexually attracted to plaintiff); *Bibby*, 260 F.3d at 264 (no evidence that harassers were motivated by sexual desire or hostility toward men in workplace); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 261 (4th Cir. 2001) (sex-specific conduct is not enough to establish claim for same-sex harassment if members of opposite sex are treated equally).
26. 260 F.3d at 25960 (internal quotation marks omitted).
27. *Id.* at 264.
28. 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003).
29. *Id.* at 1068.
30. *Id.* at 106364.
31. 256 F.3d 864 (9th Cir. 2001).
32. 490 U.S. 228 (1989) (harassment of woman deemed insufficiently "lady-like" by her office partners was actionable under Title VII).
33. *See, e.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006), *cert. denied*, 551 U.S. 1104 (2007).
34. 490 U.S. at 235 (internal quotation marks omitted).
35. *Id.* (internal quotation marks and citation omitted).
36. *Id.* at 250.
37. *Id.* at 251 (internal quotation marks and citations omitted).
38. 256 F.3d at 864.

39. *Id.* at 870.

40. *Id.* at 870, 874.

41. *Id.* at 871.

42. *Id*. at 87475.

43. *Id*. at 874.

44. *Id.* at 87475 (recognizing male worker's Title VII claim of harassment by male co-workers and male supervisor that stemmed from harassers' perception that male worker did not behave according to stereotype of male behavior and finding such harassment amounted to discrimination "because of sex").

45. *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004).

46. *Simonton*, 232 F.3d at 38.

47. 490 U.S. at 235.

48. *See Vickers*, 453 F.3d at 763 (holding that comments that plaintiff was "gay" or "homosexual" were based on perceived sexual orientation rather than nonconforming gender behavior); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2d Cir. 2005) (refusing to consider gender stereotyping claim when there was no substantial evidence that any adverse employment consequences resulted from plaintiff's appearance); *Hamm v. Weyauwega Milk Prods., Inc*., 332 F.3d 1058, 106566 (7th Cir. 2003) (finding that sexually explicit threats were based on plaintiff's perceived sexual orientation because of his relationship with male co-worker, not way he dressed or behaved); *Dawson v. Entek Int'l.*, 630 F.3d 928 (9th Cir. 2011) (affirming summary judgment for employer on hostile work environment claim because plaintiff, who allegedly was harassed for being gay but did not "exhibit effeminate traits," presented no evidence that he failed to conform to gender stereotypes).

49. 579 F.3d 285 (3d Cir. 2009).

50. *Id*. at 287.

51. *Id.* at 292. The court, however, dismissed Prowel's claim of religious discrimination despite a strong evidentiary showing of religious-based bias, including co-workers leaving anonymous prayer notes on his work machine, leaving messages for him that he was "a sinner" for the way he lived his life and leaving a note that he would "burn in hell." *Id.* at 288. The court rejected this religious discrimination claim as not "because of" religion but "because of" his sexual orientation and, therefore, his claim was not actionable. *Id*. at 293.

52. 591 F.3d 1033 (8th Cir. 2010).

53. *Id*. at 1036.

54. *Id*. at 1037.

55. *Id*. at 1040.

56. *Id*. at 1042.

57. 444 F.3d 1104, 1107-08 (9th Cir. 2006).

58. *Id*.

59. *Id.*

60. *Id.* at 1109.

61. *Id*. at 111213.

62. *See Dawson*, 398 F.3d at 21821 (lesbian employee was fired because of her poor performance on job); *Hamm,* 332 F.3d at 1065 (sexual comments made due to work-related conflicts are not sexual harassment); *Bibby*, 260 F.3d at 264 (gay male plaintiff had no Title VII gender stereotyping claim because he failed to plead that theory in his original complaint); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 25859 (1st Cir. 1999) (refusing to consider gender stereotyping claim because it was not argued in district court).

63. 453 F.3d at 767 (Lawson, J., dissenting).

64. *See* Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 Temple L. Rev. 283 (1997).

65. *Id.* at 285.

66. Sixteen states (and the District of Columbia) have laws prohibiting gender identity discrimination in public and private employment: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachussetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. Human Rights Campaign, *Statewide Employment Laws & Policies*, *available at* http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf.

67. *Id*. at 5-6.

68. *See id*.at 283 n.3 (*citing* Gender Vocabulary fact sheet distributed by Action AIDS, 1216 Arch Street, Philadelphia, PA 19107).

69. Human Rights Campaign, Sexual Orientation and Gender Identity: Terminology and Definitions, http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited July 17, 2012).

70. *Id.*

71. *See* Eric Matusewitch, *Transsexual Rights in the Workplace*, 12 No. 5 Andrews Empl. Litig. Rep. 3 (1998).

72. *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("[A] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act."); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning."); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 394 (Sup. Ct. 1995) ("The federal courts that have considered the issue at hand have unanimously held that the Title VII prohibitions do not apply to transsexuals.").

73. 667 F.2d at 749 (no actionable Title VII claim existed when transgender individual was fired after discovery that she was male who represented herself as female but had not yet undergone sex change surgery).

74. 566 F.2d at 661 (Title VII inapplicable when transgender individual was fired in midst of hormonal and other treatment in preparation for sex change surgery).

75. 742 F.2d at 1083 (refusing to extend Title VII protections to transgender individual who was fired after undergoing sex change surgery).

76. 378 F.3d 566 (6th Cir. 2004).

77. *Id.* at 574; *see also Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (recognizing claim for sex discrimination under Title VII when transgender police officer alleged denial of promotion to sergeant because of nonconformance to male stereotype).

78. 502 F.3d 1215, 122124 (10th Cir. 2007) (denying Title VII claim because defendant had a legitimate, nondiscriminatory reason for its employment decision and the plaintiff proffered no evidence that such reason was pretextual).

79. 577 F. Supp. 2d 293 (D.D.C. 2008).

80. *Id.* at 308 (ellipsis in original).

81. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

82. *Id.* at 1313-14.

83. *Id.* at 1316 (*citing* Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007)).

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84. *Id.; see Michaels v. Akal Sec., Inc.*, No. 09-cv-01300-ZLW-CBS, 2010 U.S. Dist. LEXIS 62954 (D. Colo. June 24, 2010) (drawing on the *Glenn* court's discussion of gender stereotypes as an inherent part of discrimination against transgendered individuals to conclude that Title VII prohibits discrimination based on transsexuality itself).
85. *See, e.g., Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 667 (S.D. Tex. 2008) (permitting Title VII claim to proceed to trial to determine whether employer relied on "impermissible sex stereotyping" in rescinding job offer to transgender applicant); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05243, (W.D. Pa. Feb. 17, 2006) (permitting Title VII sex discrimination claim by male-to-female transgender individual to proceed under *Price Waterhouse*); *Michaels v. Akal Sec., Inc.*, No. 09-cv-01300-ZLW-CBS, (D. Colo. June 24, 2010) (denying motion to dismiss claim by male-to-female transgender individual claiming gender stereotyping).
86. No. 0120120821 (E.E.O.C. Apr. 20, 2012).
87. *Id.* at *14
88. *Id.* at *1-3.
89. *Id.* at *11.
90. *Id.* (*quoting Schroer*, 577 F. Supp. 2d at 306 ("No court would take serious the notion that 'converts' are not covered by [Title VII's prohibition of religious discrimination].")).
91. *Id.* at *10 (internal quotation marks and brackets omitted) (quoting *Price Waterhouse*, 490 U.S. at 251).
92. *Id.* at *7.
93. *Meritor Sav. Bank, FSB*, 477 U.S. at 65.
94. Equal Employment Opportunity Commission, Coordination of Functions; Memorandum of Understanding, 76 Fed. Reg. 71,029 (Nov. 16, 2011).
95. H.R. 1397, 112th Cong. § 4(a)(1), (e) (2011).
96. *Id.* §§ 6, 7.
97. *Id.* § 8(b).
98. *Id.* § 4(f).
99. *Id.* § 9.
100. *Id.* § 10.
101. *Id.* § 3(a)(9).
102. *Id.* § 3(a)(6).

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Specialty Healthcare: The NLRB's Answer to Organized Labor's Struggle for New Members

By Peter D. Conrad

I. Introduction

On December 22, 2010, the National Labor Relations Board (NLRB) (the "Board") issued a "Notice and Invitation to File Briefs" in *Specialty Healthcare and Rehabilitation Center of Mobile*,[1] a case involving appropriate units in nursing homes and other non-acute health care facilities. The Notice clearly signaled that with the demise of the Employee Free Choice Act, the Board was looking at other ways to facilitate and extend collective bargaining under the National Labor Relations Act (NLRA).

Among the questions that interested parties were invited to address in *Specialty Healthcare* was the following: "Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute healthcare facilities."[2] Another question posed was: "Should the Board find a proposed unit appropriate if…the employees in the proposed unit are 'readily identifiable as a group whose similarity of function and skills create a community of interest.'"[3]

On August 26, 2011, the Board responded to those questions in the affirmative, issuing what today stands out as one of the most controversial rulings of the NLRB since it achieved a three-member quorum after functioning for over two years without one.[4]

Although *Specialty Healthcare* involved members of the nursing staff at a long-term care facility, the NLRB's holding in that case extends far beyond the health care industry. As the decisions discussed below plainly demonstrate, the Board's ruling in *Specialty Healthcare* has made it significantly easier for unions to organize by allowing them to seek certification in what have come to be known as "micro-units," which may consist of employees in just a single classification within a department, regardless of whether those employees share a clear community of interest with other employees working by their side.

In doing so, the Board largely ignored § 9(c)(5)'s admonition that "[i]n determining whether a unit is appropriate…the extent to which the employees have organized shall not be controlling."[5] At the same time, the *Specialty Healthcare* rule has effectively negated the employer's ability to demonstrate the inappropriateness of the union's proposed unit.

What Congress was unable to achieve in the Employee Free Choice Act, the Board was able to at least partially accomplish in the results-oriented test of bargaining unit appropriateness articulated in *Specialty Healthcare*. It is axiomatic that the smaller the unit, the higher the union win rate in NLRB elections. And that is what *Specialty Healthcare* is all about.

II. The *Specialty Healthcare* Rule

Specialty Healthcare involved an organizing campaign at a nursing home and rehabilitation center in Mobile, Alabama. The union sought to represent a unit limited to 53 certified nursing assistants (CNAs). The employer opposed that unit configuration, arguing that the appropriate unit included a total of 86 nonsupervisory, nonprofessional employees, including the CNAs, i.e., a unit comprised of all service and maintenance employees at the home. There was no history of collective bargaining among any of the home's employees.

The Regional Director found that a unit of CNAs was appropriate under a traditional community-of-interest analysis. That finding was based on the CNAs' distinct training, certification, supervision, uniforms, pay rates, work assignments, shifts and work areas, in addition to the fact that all occupied the same job classification.

On review, the NLRB (Chairman Liebman and Members Becker and Pearce) agreed with the Regional Director, pointing to many of the same factors, and in addition emphasizing that (1) "[t]he primary duty of the CNAs, unlike all other employees, is the direct, hands-on care of facility residents"; (2) the CNAs "experience unique risks and are subject to unique requirements" including "expos[ure] to blood and other bodily fluids"; (3) the CNAs "routinely perform the physically demanding tasks of assisting residents with repositioning and ambulation"; and (4) "CNAs, unlike the other employees, must also undergo periodic training in order to maintain their certification," a requirement for continued employment.[6] The Board made no effort to disguise its strained efforts to find the CNA unit to be appropriate.

On the basis of that evidence, the Board found that the CNAs were clearly identifiable as a group and shared a community of interest. It then turned attention to the showing "required to demonstrate that a proposed unit consisting of employees readily identifiable as a group who share a community of interest is nevertheless *not* an appropriate unit because the smallest appropriate unit contains additional employees."[7]

Focusing first on what would not suffice, the Board noted that the Act requires only *an* appropriate unit, adding that the fact that employees in the proposed unit also share a community of interest with other employees out-

side that unit does not render the smaller unit inappropriate. In other words, that there may be other appropriate units, and even other more appropriate units, is not enough if the employees in the petitioned-for unit share a community of interest.[8]

Quoting from the D.C. Circuit's decision in *Blue Man Vegas, LLC* v. *NLRB*,[9] the Board emphasized "[t]hat the excluded employees share a community of interest with the included employees does not, however, mean that there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate unit."[10] Nor is a unit inappropriate simply because it is small. "The fact that a proposed unit is small," the Board said, "is not alone a relevant consideration, much less a sufficient ground for finding a unit in which employees share a community of interest nevertheless inappropriate."[11]

While acknowledging that different terminology has been used over the years to describe the applicable standard, and recognizing that its rulings have not always articulated a clear standard, the NLRB stated that "[w]hen the proposed unit describes employees readily identifiable as a group and when consideration of the traditional factors demonstrates that the employees share a community of interest,…a heightened showing [is necessarily required] to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees."[12] Typically, "a showing that the included and excluded employees share an overwhelming community of interest has been required."[13]

With that as the backdrop, the Board went on to announce a rule that in the last year has been the basis for numerous "micro" unit findings in various industries:

> Absolute precision and predictability, of course, are not possible in this highly fact-specific endeavor engaged in with regard to diverse workplaces. However, the use of slightly varying verbal formulations to describe the standard applicable in this recurring situation does not serve the statutory purpose "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act." Nor does it permit employers to order their operations with a view toward productive collective bargaining should employees choose to be represented. We therefore take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.[14]

There are limits, however, to the Board's holding in *Specialty Healthcare*. The question is whether they have been properly observed. The ruling makes clear that "[a] petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit."[15] The Board defines a "fractured" unit as one where the "combinations of employees are too narrow in scope or that have no rational basis."[16] For example, the Board acknowledged that if the proposed unit in *Specialty Healthcare* consisted only of selected CNAs—e.g., CNAs working only on the night shift or only on the first floor of a facility—it might amount to a fractured unit and not be eligible for certification.[17]

Dissenting, Member Hayes wrote that the majority's ruling in *Specialty Healthcare* "fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction."[18] He criticized the majority's adoption of the "overwhelming community of interests test," accurately predicting that it "will make the relationship between petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances."[19] Member Hayes then opined that "by looking only at whether a group of employees share a community of interest among themselves…[will] make it virtually impossible for a party opposing this unit to prove that any excluded employees should be included."[20]

Subsequent decisions have confirmed the dissent's prediction that the *Specialty Healthcare* rule "will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in § 9(c)(5) against extent of organization as the controlling factor in determining appropriate units."[21]

III. The Board's Application of the *Specialty Healthcare* Rule

As of the date of this paper, the NLRB has applied the *Specialty Healthcare* rule in three officially reported representation cases. In two of those cases, the Board approved the petitioned-for unit. In the third, it found a fractured unit and included additional employees.

A. *Odwalla, Inc.*[22]

In *Odwalla,* the union petitioned to represent a bargaining unit of route salesmen, relief drivers, warehouse assistants and cooler technicians. The employer, a producer of fruit drinks and energy bars, took the position that the unit also should include merchandisers. The union disagreed, but entered into a Stipulated Election Agreement providing that the merchandisers could vote subject to challenge.

Following a post-election hearing on challenged ballots, the hearing officer sustained the union's challenge to the merchandisers, finding that as a group they lacked a sufficient community of interest with the unit employees. The Board disagreed and found that without the merchandisers the unit would be a "fractured" unit, i.e., there was no rational basis for their exclusion.[23] The employees in the petitioned-for unit did not share a community of interest with each other that was not also shared by the merchandisers.[24]

The Board emphasized that the unit did not track any lines of demarcation drawn by the employer, such as classification, department or function, nor was it structured along lines of supervision or methods of compensation.[25] In directing the Regional Director to open and count the ballots of the merchandisers who voted in the election, the Board "conclude[d] that the Employer ha[d] carried its burden of proving that the merchandisers share an overwhelming community of interest with the employees in the recommended unit because none of the traditional bases for drawing unit boundaries used by the Board supports excluding the merchandisers while including all the remaining employees."[26]

Odwalla appears to be the only reported NLRB decision, since *Specialty Healthcare* was decided, holding that the employer met its burden of establishing an overwhelming community of interest between the employees in the petitioned-for unit and the excluded employees. It should be noted, however, that in *Odwalla* only a handful of merchandisers were excluded from the petitioned-for unit consisting of about 35 employees.

B. *DTG Operations, Inc.*[27]

In *DTG*, the employer operated a car rental facility at a major airport. The union petitioned to represent a unit of the employer's 31 Rental Service Agents (RSAs) and Lead Rental Service Agents (LRSAs), excluding all other employees. The employer opposed the unit, taking the position that the smallest appropriate unit was wall-to-wall, including all 109 hourly employees at the facility.

In a Decision and Order issued before the Board's ruling in *Specialty Healthcare*, the Regional Director agreed that the RSAs and LRSAs shared an "overwhelming community of interest with the 78 other employees that the employer seeks to include in the bargaining unit," including lot agents, exit booth agents, return agents, service agents, lead service agents, fleet agent and shuttlers.[28] Because the union had not agreed to proceed to an election in any other unit, the petition was dismissed. On review, the Board applied *Specialty Healthcare*, reversed the Regional Director and reinstated the petition.

The NLRB found that the RSAs and LRSAs shared a community of interest on virtually all factors, and that the employer had not demonstrated an overwhelming community of interest with the other employees at the facility, noting especially that: (1) RSAs and LRSAs worked separately from other employees and performed distinct sales tasks not performed by any other employees; (2) the RSAs and LRSAs alone were required to have at least nine months of car rental or sale experience; (3) RSAs and LRSAs participated in their own incentive compensation program; (4) there was little or no interchange or cross-utilization of RSAs and LRSAs and the other hourly classifications; and (5) RSAs and LRSAs were subject to separate supervision for purposes of scheduling, time off and other administrative tasks.[29] In conclusion, the Board held:

> [W]e find that the petitioned-for RSAs' and LRSAs' primary job functions and duties, skills and qualifications, uniforms, work areas, schedules, incentives, risks, and supervision are different from all other employees. RSAs/LRSAs, therefore, have employment interests that are materially different from the other employees that the Employer seeks to include in the bargaining unit. Accordingly, we reverse the Regional Director's finding that RSAs/ LRSAs share an overwhelming community of interest with those other hourly employees and her resulting determination that a wall-to-wall unit is the only appropriate unit.[30]

Member Walsh dissented from the majority's outcome-driven application of the *Specialty Healthcare* rule to reverse the Regional Director. His frustration was palpable:

> As long as a union does not make the mistake of petitioning for a unit that consists of only part of a group of employees in a particular classification, department, or function, i.e., a so-called fractured unit, it will be impossible for a party to prove that an overwhelming community of interests exists with excluded employees. Board review of the scope of the unit has now been rendered largely irrelevant. It is the union's choice, and the likelihood is that most unions will choose to organize incrementally,

> petitioning for units of the smallest scale possible. The days of traditional all-inclusive production and maintenance units, technical units, or service and maintenance units—much less wall-to-wall plant units—are numbered. I adhere to the previously expressed view that giving the Board's imprimatur to this balkanization represents an abdication of our responsibility under Section 9 and may well disrupt labor relations stability by requiring a constant process of bargaining for each micro-unit as well as pitting the narrow interest of employees in one such unit against those in other units.[31]

C. *Northrop Grumman Shipbuilding, Inc.*[32]

In *Northrop Grumman,* the union sought to represent a unit of approximately 225 radiological control technicians and other technical employees in the "E85 radiological control department (E85 RADCON)" at the Employer's shipyard, where approximately 18,500 employees constructed nuclear-powered submarines and aircraft carriers for the U.S. Navy.

The employer took the position that the only appropriate unit would include all 2,400 technical employees at the shipyard. The RCTs (and RCT Trainees), who comprised approximately 90% of the unit, performed independent radiological oversight for nuclear work areas.

The Regional Director concluded that the departmental unit was appropriate for purposes of collective bargaining, as it was "a functionally distinct grouping with a sufficiently distinct community of interest as to warrant a separate unit appropriate for the purposes of collective bargaining."[33] On review, the Board agreed. Applying *Specialty Healthcare*, it found that the employees in the petitioned-for unit were "readily identifiable as a group" being that they were all members of the same department and shared a unique function, i.e., to provide independent oversight of radiation exposure.[34] In addition, they shared a community of interest based on the fact that they work together in the same department and under the same supervisor, and their work as a group is integrated.

The employer did not dispute that employees in the E85 RADCON Department shared a community of interest. Rather, it argued that employees outside that department shared an "overwhelming community of interest" with the technical employees in the petitioned-for unit.[35] However, the Board disagreed, concluding that the common salary structure, personnel policies and benefit plans were outweighed by the facts distinguishing the E85 RADCON technicians from the other technical employees, most notably that the RCT's job function, i.e., to ensure workplace safety and control radioactive contamination at the shipyard, was a task distinct from the production-oriented jobs of the technical employees outside the department.[36] Again, Member Hayes dissented.

IV. Application of the *Specialty Healthcare* Rule at the Regional Office Level

A. *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, Inc.*[37]

Regional Director found that a unit limited to the employees working in the store's shoe departments satisfied *Specialty Healthcare's* test of appropriateness and that the employer had not demonstrated that other store employees shared an overwhelming community of interest with the petitioned-for shoe sales employees. The case is currently pending before the Board on the employer's request for review.

B. *T-Mobile USA, Inc.*[38]

Regional Director found that a unit limited to 15 field technicians and switch technicians working in Nassau and Suffolk Counties—a fragment of the employer's New York Market, which also included Brooklyn, Queens, Manhattan and the Bronx—constituted a "readily identifiable group" with a community of interest of their own, despite evidence that all 60 field and switch technicians throughout the Market performed identical work, were subject to common supervision, had frequent work contacts and otherwise shared a clear community of interest. Employer did not seek review of the Regional Director's unit determination; union was unable to carry a majority even in the micro-unit.

V. *Specialty Healthcare* on Review

Following an election among the home's CNAs in which the union received a majority of the votes cast, the employer refused to bargain to obtain judicial review of the Board's unit determination. On December 30, 2011, on an unfair labor practice charge filed by the union, the NLRB found that the employer was simply seeking to relitigate the unit issue that had been fully litigated and decided in the underlying representation case. Accordingly, the Board granted the Acting General Counsel's motion for summary judgment and issued a bargaining order directing the employer to recognize and deal with the union as the CNAs' exclusive representative.[39]

The employer has petitioned for review of the NLRB's order in the Court of Appeals for the Sixth Circuit.[40] In the Sixth Circuit, the employer has urged the court to grant review and deny enforcement of the Board's order on the ground that the agency abused its discretion by, *inter alia*, requiring employers to demonstrate that employees excluded by the union share an "overwhelming community of interest" with the petitioned-for employees, a test historically applied only in accretion cases, as opposed to simply a "close" community of interest. The two standards are dramatically dif-

ferent and produce opposite results. The employer also argues to the court that the NLRB's ruling ignores the dictates of Section 9(c)(5) of the NLRA, which prohibits the Board from giving controlling effect to the union's "extent of organization" when making bargaining unit determinations, and that the Board has abdicated its responsibility for deciding in each case what the appropriate unit should be. Oral argument has not yet been scheduled.

VI. Conclusion

In the wake of the NLRB's failed effort to revamp its rules and regulations to limit litigable issues prior to an election and to otherwise expedite the resolution of questions concerning representation, the Board has at least partially achieved its goal of facilitating the formation of new bargaining units with its holding in *Specialty Healthcare.*

It always has been difficult for employers to challenge the scope and composition of the petitioned-for unit, but *Specialty Healthcare* now makes it all but impossible to demonstrate that the union seeks certification in a unit that is inappropriate for purposes of collective bargaining.

Absent reversal in the Court of Appeals, units limited to single classifications and small departments are bound to proliferate, putting an unreasonable burden on businesses, whose administrative structure is likely to count for little, if anything, in the Board's analysis of unit appropriateness.

Endnotes

1. 356 NLRB No. 56 (2010).
2. *Id.* at 2.
3. *Id*.
4. *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).
5. 29 U.S.C. § 159(c)(5).
6. 357 NLRB No. 83 at 9-10.
7. 357 NLRB No. 83 at 10.
8. *Id.*
9. 529 F.3d 417, 421 (D.C. Cir. 2008).
10. *Specialty Healthcare*, 357 NLRB No. 83 at 10.
11. *Id*.
12. *Id.* at 11.
13. *Id.*
14. *Id.* at 12-13 (footnotes omitted).
15. *Id.* at 13.
16. *Id.*
17. *Id.* The Board also noted that it "has developed various presumptions and special industry and occupation rules in the course of adjudication" and that its holding was "not intended to disturb any rules applicable only in specific industries other than the rule announced in *Park Manor*." *Id.* at 13, n.29 (The *Park Manor* rule referred to by the Board governed bargaining unit determinations in nonacute healthcare facilities prior to *Specialty Healthcare*. *See Park Manor Care Center*, 305 NLRB 872 (1991)).
18. 357 NLRB No. 83 at 15.
19. *Id.*
20. *Id.* at 19.
21. *Id.*
22. 357 NLRB No. 132 (2011).
23. *Id.* at 5.
24. *Id.*
25. *Id.*
26. *Id.* at 6.
27. 357 NLRB No. 175 (2011).
28. *Id.* at 5.
29. *Id.* at 5-7.
30. *Id.* at 7-8.
31. *Id.* 8-9 (footnotes omitted).
32. 357 NLRB No. 163 (2011).
33. *Id.* at 5.
34. *Id.* at 3.
35. *Id.* at 3-4.
36. *Id.* at 4.
37. Case No. 02-RC-076954 (May 4, 2012).
38. Case No. 29-RC-012063 (December 5, 2011).
39. *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 174 (2011).
40. *Kindred Nursing Centers East, LLC, d/b/a Kindred Transitional Care and Rehabilitation—Mobile, f/k/a Specialty Healthcare and Rehabilitation Center of Mobile v. National Labor Relations Board*, Nos. 12-1027 and 12-1174.

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A Disability Rights Law Primer

By Mark H. Leeds

Labor and employment attorneys need to be aware of disability rights laws at the national, state, and local levels, not only to advise clients properly, but also to comply with their own obligations as employers and places of public accommodation. Those of us who have disabilities also need to be aware of our own rights and of how to assert them appropriately. This article is intended to help you meet these needs. For a broader discussion of disability rights, see my chapters and others in the Fourth Edition of the New York State Bar Association's *Representing People with Disabilities*, scheduled for publication during the fall of 2012.

People with disabilities are America's largest, most diverse, and fastest-growing minority group—one anyone can join at any moment. Most discussions of human rights of this group focus on the Americans with Disabilities Act (ADA)[1], yet other laws at the federal,[2] state, and local levels sometimes recognize greater rights, and provide broader coverage and/or better remedies. The ADA explicitly does not preempt such state or local laws.[3] The United States Supreme Court has recognized that "state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress."[4] In particular, as detailed below, the New York State Human Rights Law (SHRL)[5] "provides protections broader than the ADA; and the… New York City Human Rights Law (CHRL)[6] is broader still."[7] The "bottom line" varies with the laws of overlapping jurisdictions. Some of these laws, from the ADA itself to local laws, have seen significant changes in recent years. This article highlights how attention to local laws throughout New York State is important both to those representing people with disabilities and to those seeking to avoid violating those laws.

While, with the exception of housing discrimination,[8] the acts prohibited by the respective federal, state, and city laws each cover a wide range of issues, from discriminatory hiring practices to denial of access to public accommodations,[9] the relative strengths of the city, state, and federal laws are evidenced not only in their respective definitions of the term "disability" but also in substantive and procedural requirements, as well as in the availability of remedies.

The New York State Court of Appeals recognizes:

> [W]e must be guided by the Local Civil Rights Restoration Act of 2005 (LCRRA), enacted by the City Council "to clarify the scope of New York City's Human Rights Law," which, the Council found "has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law" (Local Law No. 85 [2005] of City of NY § 1). The LCRRA, among other things, amended Administrative Code § 8-130 to read: "The provisions of this title [*i.e.,* the New York City Human Rights Law] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."
>
> The application of the LCRRA provision…is clear: we must construe…provisions of the City's Human Rights Law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.[10]

"People with disabilities are America's largest, most diverse, and fastest-growing minority group—one anyone can join at any moment."

Both leading up to and in the wake of this recognition, the Appellate Division, First Department, has issued a series of significant rulings, followed as well by the Second Department; in the first of these, the First Department held that:

> it is clear that interpretations of state or federal provisions worded similarly to City HRL provisions may be used as aids in interpretation only to the extent that the counterpart provisions are viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise" (§ 1), and only to the extent that those state or federal law decisions may provide guidance as to the "uniquely broad and remedial" provisions of the local law.
>
> * * *

The Council directs courts to the key principles that should guide the analysis of claims brought under the city HRL:

> "[D]iscrimination should not play a role in decisions made by employers, landlords and providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation" (Committee Report, 2005 NY City Legis Ann, at 537).[11]

Federal courts have recognized the need to analyze New York City Human Rights Law (CHRL) claims in this light as well.[12]

This article will address the following issues: Who has a disability? What entities have what obligations with respect to people with disabilities? What procedures and remedies apply?

Although the focus of this article is on the significance of some local and state laws, any comparative analysis must include at least a brief review of the law—the ADA—to which state and local laws are being compared. More detailed coverage of the ADA is provided in NYSBA's *Representing People with Disabilities*.

Who Has a Disability?

ADA

To be covered under the ADA, a person must have "a physical or mental impairment that substantially limits one or more major life activities of such individual"; have a "record of such an impairment"; or be "regarded as having such an impairment."[13] Although these "prongs" of the definition have not changed,[14] the ADA Amendments Act expressly repudiated Supreme Court interpretations of some of the terms, now setting forth definitions and rules of construction in some detail in the amended ADA.[15]

> [M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The term

> 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.

Further,

> [a]n individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

However, with respect to the "regarded as" prong—but not as to actual disability or a record of such disability—a person regarded as having only a "transitory or minor" impairment is not covered by the ADA. "A transitory impairment is an impairment with an actual or expected duration of 6 months or less."

To make even clearer how far the Supreme Court had strayed from Congress' original intent, the ADA Amendments Act added the following rules of construction:

> The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
>
> (A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.
>
> (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.[16]
>
> (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
>
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
>
> (E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as
>
> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable

hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

With respect to employment, a person who currently is engaging in the use of illegal drugs is not covered and an employer may prohibit use, or being under the influence, of illegal drugs or alcohol at the place of employment.[17]

Definitions of "auxiliary aids and services" and "state" were retained, but relocated.[18]

New York State Human Rights Law

The New York State Human Rights Law (SHRL) contains a different definition of "disability":

> 21. The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.[19]

The SHRL's exclusive list of types of impairments "resulting from" certain conditions, use of the words "prevents" and "normal" in the phrase "prevents the exercise of a normal bodily function" and alternate requirements for clinical diagnosis may make that law less inclusive in its definition of "disability" than is the reinvigorated ADA, except, perhaps, as to "transitory and minor" impairments. With respect to employment, the SHRL's very definition of the word "disability" is even more "limited"—requiring the person seeking relief to prove that, were reasonable accommodations[20] provided, the condition "would not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." The employer or prospective employer has "undue hardship" as an affirmative defense.[21] Among factors to be considered in denying an accommodation are "the 'hardships', costs, or problems it will cause for the employer, including those that may be caused for other employees."[22] The ADA Amendments Act disengaged the term "qualified individual" from the definition of "disability" and requires that only "essential functions" (as opposed to "activities" under the SHRL) be considered.[23] Contrast complainant's burdens, beyond defeating a summary dismissal motion,[24] under the SHRL with burdens under the CHRL, discussed further below.

Like the ADA, the SHRL (as interpreted by the New York State Division of Human Rights (SDHR)) does not require reasonable accommodation in the employment context for current users of illegal drugs and such individuals may be terminated;[25] the SHRL does protect a person with alcoholism if that person can perform "in a reasonable manner the activities involved in the job or occupation sought or held."[26]

Some SHRL amendments highlighting specific types of disabilities or potentially disability related conditions,[27] by focusing on particular issues, may call into question the coverage of the basic definition quoted above.

Local Human Rights Laws—New York City

Several localities around the state prohibit disability discrimination. Most use definitions similar to those in federal or state law,[28] although, as noted below, some provide superior rights and remedies. New York City, the home, workplace, school, commercial center, and/or visitor destination for far more people than any other locality, has been aggressive in defining "disability" more broadly—and simply—than do federal or state laws.[29] The CHRL states:

> 16. (a) The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment.
>
> (b) The term "physical, medical, mental, or psychological impairment" means:

> (1) an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or
>
> (2) a mental or psychological impairment.
>
> (c) In the case of alcoholism, drug addiction or other substance abuse, the term "disability" shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse and shall not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.[30]

Section 8-102(16)(c), relating to illegal drug and alcohol abuse, is the only provision in which the CHRL is less inclusive than its federal and state counterparts.[31] The latter limit such coverage only in an employment context and, again, the SHRL does not exclude a person with alcoholism even with respect to employment, so long as the person can perform "in a reasonable manner the activities involved in the job or occupation sought or held."

Discrimination based on "perceived" membership in a suspect class (including disability) is prohibited throughout the CHRL litany of unlawful discriminatory practices.[32]

The section-by-section analysis accompanying the City Council report on the extensive 1991 CHRL amendments that included the definition above, in discussing the change from "handicap" to a new term—"disability"—and its definition, stated:

> The definition is amended to clarify that any person with a physical, medical, mental or psychological impairment or a history or record of such an impairment is protected by the law. Those impairments are defined broadly so as to carry out the intent that persons with disabilities of any type be protected from discrimination.[33]

This was a direct response to more restrictive language in the ADA and in federal regulations then being developed under the ADA.[34] Under the CHRL, anyone with an impairment—substantial or not, corrected or not, transitory or not—is covered, as are those perceived to have a disability. As with the ADA, people also are protected by the CHRL from discrimination on the basis of their relationship with someone who has or had an actual or perceived disability.[35]

As discussed in "Reasonable Accommodation" below, the burden of proof under the CHRL rests with the entity refusing an accommodation or asserting "undue hardship."

What Is a Covered Entity and What Are Its Obligations?

The ADA, CHRL, and SHRL each prohibit discrimination in a wide array of employment contexts (from application to discipline, from evaluations to working conditions, from training opportunities to employer-sponsored social events, from physical access to reasonable accommodation), as well as in the provision of and access to goods, services and programs by both governmental and non-governmental entities.[36] While the city and state laws prohibit housing discrimination,[37] the ADA (except for public housing programs and land use planning) does not address most housing-related issues, since those matters were covered well in the Fair Housing Amendments Act of 1988 (FHAA),[38] though, even there, some CHRL requirements are stronger and remedies better.[39] The SHRL also explicitly makes unlawful employment- and union-related discrimination based on genetic information;[40] it similarly prohibits credit discrimination.[41]

Employment

In the employment context,[42] a "covered entity" prohibited from discriminating on the basis of disability under the ADA is "an employer, employment agency, labor organization, or joint labor-management committee,"[43] with an employer defined as one employing 15 or more people.[44] The SHRL prohibits employment discrimination in varying contexts by employers, labor organizations, employment agencies, and, in some circumstances, licensing agencies or joint labor-management committees,[45] with the term "employer" covering those employing 4 or more.[46] The CHRL prohibits employment discrimination in a wide array of contexts by an employer, labor organization, employment agency, or joint labor-management committee—or by an employee or agent of those entities.[47] Although employers of 4 or more are covered, independent contractors may be counted.[48] Law offices are covered as employers.[49]

Places of Public Accommodation

Law offices and other law-related venues are public accommodations under federal, state, and city law.[50] This requires both an avoidance of discrimination and action to modify policies, programs, activities, and venues, as discussed below in making distinctions from "reasonable accommodations." When facilities are being built or renovated, the ADA Accessibility Guidelines,[51] as well as applicable state and local building codes must be consulted.

Local Human Rights Laws Around New York State

New York City is not the only locality recognizing rights and providing remedies independent from those in federal and state law. Each local law, like those discussed only in part here, must be reviewed in detail when it may be pertinent to a given situation. For example, the Albany City Code's Omnibus Human Rights Law,[52] while incorporating by reference the SHRL definition of "place of public accommodation," does not include either the examples or the exclusions added by Chapter 394 of the 2007 Laws of New York. It also has no reference to "reasonable accommodation," subsuming that under its general nondiscrimination requirements. Westchester County's Human Rights Law[53] recognizes rights of people with disabilities similar—but not identical—to those recognized in the SHRL. For example, "reasonable accommodation" is defined only with respect to employment. The human rights provisions of Nassau County's Administrative Code[54] track the SHRL, with some differences, including a broad, but brief, treatment of public accommodations.[55] Again, each of these laws, as well as their counterparts in other localities, must be scrutinized as applicable to determine where they provide a "bottom line" different from that in federal and state law.

"Reasonable Accommodation"

The right to "reasonable accommodation" often is misconstrued as coextensive with one of multiple aspects of the right to be free from discrimination— the aspect that requires covered entities to modify their policies, practices and premises; it sometimes even is misconstrued as the only right under laws prohibiting disability discrimination. Under the ADA, "reasonable accommodation" is defined and required (as only one of several items on a non-exclusive list) only with respect to employment.[56] Private sector places of public accommodation are prohibited from discriminating against people with disabilities under Title III of the ADA.[57] That Title does not use the term "reasonable accommodation," but, after a sweeping general prohibition of disability discrimination, includes, in a non-exclusive list of specific prohibitions:

- "a failure to make reasonable modifications in policies, practices, or procedures,…unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations;"[58]
- "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently…unless the entity can demonstrate" that doing so would cause a fundamental alteration "or would result in an undue burden;"[59] and
- "a failure to remove architectural…,[structural] communication…,and transportation barriers… where such removal is readily achievable" and,
- "where an entity can demonstrate that the removal of a barrier…is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable."[60]

Note the applicability of "undue burden" and "readily achievable" standards; the former is not defined,[61] but the latter is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[62] Contrast this with the CHRL approach to reasonable accommodation, discussed below.

The SHRL has similar provisions.[63] The SHRL defines and requires "reasonable accommodation" in an employment context[64] and, in relation to places of public accommodation, requires modifications such as those set forth above for ADA Title III.[65] The SHRL has been amended to adopt some ADA requirements for some places of public accommodation. In so doing, the state also adopted the ADA's "readily achievable" and "undue burden" standards.[66]

Under the CHRL, "reasonable accommodation" is not limited to employment or housing[67] and is in addition to the CHRL's extensive nondiscrimination provisions recognizing rights of people with disabilities,[68] so "any person prohibited by the provisions of…section [8-107] from discriminating on the basis of disability shall make reasonable accommodation" to the needs of people with disabilities and, where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense [i.e., it must be pleaded and proven] that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.[69] "Unlike the state HRL, the issue of the ability to perform essential requisites of the job is not bound up in the definitions of disability or reasonable accommodation [under the CHRL]."[70] The CHRL defines "reasonable accommodation" as meaning "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business" and continues "[t]he covered entity shall have the burden of proving undue hardship."[71] The more limited "readily achievable" standard of the ADA and SHRL is not used. Considerations for determining "undue hardship," while similar to those used in the ADA and SHRL, apply only (for disability purposes) to the prohibited activities relating to employment and apprentice training programs.[72]

Again, it is important to bear in mind that, although "reasonable accommodation" is an important aspect of avoiding disability discrimination, none of the laws prohibiting such discrimination limits its approach to a requirement for "reasonable accommodation."

> The need for individualized inquiry when making a determination of reasonable accommodation is deeply embedded in the fabric of disability rights law.… Rather than operating on generalizations about people with disabilities, employers (and others) must make a clear, fact-specific inquiry about each individual's circumstance.…This good faith process is the "key mechanism for facilitating the integration of…[people with disabilities into society]."[73]

The interactive process promotes identification of appropriate and effective reasonable accommodations. The prospect of liability for a failure to engage in such a good faith process is an incentive for cooperative dialog to diminish resolution by litigation.[74]

What Remedies Are Available?

ADA

Relief under the ADA is limited not only by Supreme Court neo-Federalism (not all of which was addressed in the ADA Amendments Act), but also by the terms of the statute itself. With respect to employment discrimination (Title I), an individual may file a complaint with the Equal Employment Opportunity Commission within prescribed time limits not exceeding 300 days after the alleged discrimination, or file suit in federal or state court within three years of the allegedly discriminatory act, seeking reinstatement of employment, back pay, attorney's fees and other relief, including compensatory and punitive damages in cases of intentional (not disparate impact) discrimination.[75] The addition of compensatory and punitive damages (though not for governmental entities), in the Civil Rights Act of 1991, was on a capped sliding scale depending on the size of the employer.[76] That Act also added provisions for attorneys' fees,[77] although the Supreme Court since has limited significantly opportunities for recovering attorneys' fees.[78]

With respect to public accommodations (Title III), an aggrieved individual can seek injunctive relief, court costs and attorneys' fees—but no monetary damages.[79] Discrimination in the provision of public services by governmental entities (Title II) is subject to the remedies available for violation of § 504 of the Rehabilitation Act of 1973,[80] discussed above.[81] Also noted above, the Eleventh Amendment does not bar monetary suits under Title II of the ADA against state governments with respect to the "constitutional right of access to the courts," protection against actual Constitutional violations, and, potentially, some other violations of Title II.[82]

New York State and City Laws

The CHRL and, in part, the SHRL, provide some remedies more expansive than those available under the ADA. Administrative complaints may be filed within one year after the alleged discriminatory act with the New York City Commission on Human Rights (CCHR)[83] or with the State Division of Human Rights (SDHR).[84] The CHRL also contains a substantial private right of action under an evidentiary standard consistent with the unique remedial purpose of the CHRL, with a three year statute of limitations, in which a full range of remedies, including compensatory and punitive damages, injunctive relief, costs, and attorneys' fees, may be awarded.[85] The SHRL has a similar statute of limitations, although punitive damages and attorneys' fees are not available, except in cases of housing discrimination, and the evidentiary standard is not as favorable to plaintiffs as is the CHRL's.[86] Unlike the ADA, the CHRL and the SHRL have no limitation on the amount of damages that may be sought. Government agencies are not exempt from suit under the CHRL, although designated representatives of the CCHR and the City's Corporation Counsel must be served with a copy of the complaint within ten days after commencement of a suit and prompt notice of claim requirements for suits against municipalities must be kept in mind.[87] The City itself may bring a "pattern or practice" suit, seeking a wide range of relief, including civil penalties.[88]

Other Local Laws Around New York State

Other localities have varying remedies—for violations of prohibitions that often are not identical to federal and state laws[89]—that may supplement and/or be superior to those in the ADA and/or SHRL. For example, a civil suit is possible for violation of Albany's Omnibus Human Rights Law, with damages and other relief in law and equity.[90] The Westchester Human Rights Commission is empowered to award compensatory damages ("including, but not limited to, actual damages, back pay, front pay, mental anguish and emotional distress"), as well as punitive damages (not to exceed $10,000), and to assess a civil penalty of up to $50,000 ($100,000 for a willful violation).[91] The Nassau County Commission on Human Rights may assess penalties ranging from $5,000 to $20,000 in employment and public accommodation cases.[92]

Conclusion

Considering the many millions of people who live, work, study, use public accommodations (both governmental and non-governmental) in, or otherwise pass through, New York City and state each day—and the fact that more than one in five Americans have disabilities—it is essential for practitioners to look not only to the ADA, but also to the New York City Human Rights Law, similar county and municipal ordinances, the State Human Rights Law, the State Civil Rights Law, and common law, for recognition of rights of people with disabilities and for "independent avenues of redress."[93]

Endnotes

1. 42 U.S.C. §§ 12101-12213. To view the current text, with highlights showing the changes made by the ADA Amendments Act of 2008, P.L. 110-325, 122 Stat. 3553, Sept. 25, 2008; *see* http://www.ada.gov/pubs/adastatute08markscrdr.htm (see especially, § 2 (Findings and Purposes)). Revised Equal Employment Opportunity Commission (EEOC) regulations regarding Title I of the ADA, 29 C.F.R. Part 1630, became effective in March of 2011. Revised Department of Justice regulations concerning Titles II (28 C.F.R. Part 35) and III (28 C.F.R. Part 36) of the ADA became effective March 15, 2011; *see* http://www.ada.gov/regs2010/ADAregs2010.htm. Although the ADA Amendments Act was not effective until January 1, 2009, the amendments "narrow application" of Supreme Court precedents repudiated by the amendments, even in cases arising before the effective date and "raise serious questions as to the continued viability of the type of approach taken in" non-precedential cases inconsistent with the amendments but cited in cases arising before the effective date. *Geoghan v. Long Island Rail Road*, 06 CV 1435, 2009 WL 982451(E.D.N.Y., April 9, 2009).

2. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794, and related statutory and regulatory provisions prohibiting disability discrimination by recipients of federal funds, should not be forgotten, although they will not be discussed further in detail here.

   Similarly, the federal Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq., and comparable New York State legislation, N.Y. Exec. Law §§ 292(21), (21-a), (21-b); § 296 (especially § 296(19)), are of note, though they will not be considered further here.

   Also, in 2008, the United States Department of Labor made substantial revisions to its regulations under the Family and Medical Leave Act (FMLA) significantly affecting people with disabilities. 29 C.F.R. Part 825. The FMLA will not be addressed further here, but provisions modifying eligibility and other requirements have a significant effect on the right of people with disabilities—and of those related to them—to leave from employment—under that law—to address those disabilities. Among the modifications are requirements for (1) follow-up medical visits otherwise unnecessary for people with chronic disabilities; and (2) following now unregulated employer rules for time and manner of notice, limitations on use of simultaneous paid (or even unpaid) leave (making FMLA leave impossible for many). Confidentiality of medical information also is significantly compromised under the new regulations.

   The United States in 2009 joined 141 other nations in signing the United Nations Convention on the Rights of Persons with Disabilities, *available at* http://www.un.org/disabilities/default.asp?id=150. Although the Convention itself does not create any rights, it obligates signatory states to promote rights of people with disabilities. *See also* http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf. The Senate ratification process is under way as this is written.

3. 42 U.S.C. § 12201(b).

4. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374, n. 9 (2001). In that case the Court found Eleventh Amendment immunity for states under the ADA. The Court subsequently found Congress validly had abrogated states' Eleventh Amendment immunity under Title II of the ADA with respect to provision of governmental programs and services, *Tennessee v. Lane*, 541 U.S. 509 (2004), although the case involved a criminal defendant who had to crawl up steps in a courthouse in which the state had failed to accommodate his disability; the Supreme Court's 5-4 decision has a narrow holding:

   > Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.
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   > ***
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   > Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment.

   Id. at 530-31, 533-34. Thus, *Lane* might not even extend to disability discrimination in voting rights. *See Press v. State Univ. of N.Y. at Stony Brook*, 388 F. Supp. 2d 127 (E.D.N.Y. 2005) (right to higher education not "fundamental" nor entitled to any more than "rational basis" analysis after *Lane*). In *United States v. Georgia*, 546 U.S. 151 (2006), it was alleged *inter alia* that Georgia had violated the Eighth Amendment, through its violation of the Fourteenth Amendment, by confining an inmate who uses a wheelchair in a 3-foot by 12-foot cell for 23-24 hours a day, where he could not turn his wheelchair or use the toilet or shower. The Supreme Court stated "insofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Georgia*, 546 U.S. at 159 (emphasis in original). The Court noted that, on remand, the lower courts might find "actual constitutional violations (under either the Eighth Amendment or some other constitutional provision)." *Id*. It left open for initial determination on remand the extent to which violations of Title II that do not independently violate the Constitution might support a valid abrogation of sovereign immunity. *Id*. Relying on *Georgia*, Judge Swain of the Southern District of New York has denied summary judgment sought by New York State on Eleventh Amendment grounds in a suit by an inmate whose use of a wheelchair and prosthesis had been cited as bases for denying him participation in "shock incarceration" and work release programs. *Hallett v. N.Y. State Dep't of Corr. Servs*., 99 Civ. 5853, 2006 WL 903200, at *7 (S.D.N.Y. April 7, 2006). At the same time, Judge Swain, citing *Garcia v. State Univ. of N.Y. Health Sciences Center*, 280 F.3d 98, 111-112 (2d Cir. 2001), noted the Second Circuit's approach to private suits against states for damages under the ADA, which requires a showing of "discriminatory animus or ill will" against people with disabilities (a standard used in determining violations under the Fourteenth Amendment) or a "motivating-factor analysis similar to that set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-258(1989)," *Hallett*, 2006 WL 903200, at *7-8 *but see Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), *infra* note 36. While "the Eleventh Amendment does not extend its immunity to units of local government," *Garrett*, 531 U.S. at 369, counties and municipalities are not subject to punitive damages under ADA Title II nor under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, since remedies in Title VI of the Civil Rights Act of 1964, on which § 504 and Title II remedies are based, are derived from contract law. *Barnes v. Gorman*, 536 U.S.101 (2002). New York City is immune by common law from punitive damages under its Human Rights Law (CHRL), N.Y.C. Admin. Code §§ 8-101–8-703, *Katt v. City of New York*, 151 F. Supp. 2d 313, 337-45 (S.D.N.Y. 2001), *aff'd sub nom*, *Krohn v. N.Y.C. Police Dep't*, 372 F.3d 83 (2d Cir. 2004). There is no provision for punitive damages against New York State under its Human Rights Law (SHRL), N.Y. Exec. Law §§ 290–301. The Eleventh Amendment does not bar enforcement of consent decrees. *Frew v. Hawkins*, 540 U.S. 431 (2004). Eleventh Amendment immunity may not apply to allegations of retaliation under the ADA, *Roberts v. Pa. Dep't of Pub. Welfare*, 199 F. Supp. 2d 249 (E.D.Pa. 2002). Municipalities, even where protected from punitive damages, are not covered by the Eleventh Amendment and may be subject to compensatory damages, not only under antidiscrimination laws, but also under state tort law. *See, Sayers v. City of New York*, No. CV-04-3907 (CPS), 2007 WL 914581 (E.D.N.Y. March 23, 2007). Where federal law may provide advantages over state law, Eleventh Amendment issues might be avoided by filing a claim

under the federal law in the New York State Court of Claims, in which the state has waived its sovereign immunity under N.Y. Court of Claims Act §§ 8, 9, although that Act's procedural (§ 10) and fee (§ 27) constraints make such a course problematic.

5. N.Y. Exec. Law § 290 *et seq*.

6. N.Y.C. Admin. Code § 8-101 *et seq.*, N.Y.C. Administrative Code §§ 8-101–8-703; it may be helpful to view the substantial amendments enacted as Local Law 39 of 1991, *available at* http://www.antibiaslaw.com/sites/default/files/files/LL39.pdf, and as Local Law 85 of 2005, *available at* http://www.antibiaslaw.com/sites/default/files/files/RestorationAct_0.pdf, discussed at nn. 10-12 and accompanying text, *infra*. Subsequent amendments may be found through http://legistar.council.nyc.gov/Legislation.aspx and through http://www.antibiaslaw.com/nyc-human-rights-law/legislative-history. Administrative decisions interpreting the CHRL are available at http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library (search under the City Commission on Human Rights (CHR) (elsewhere herein CCHR) and Office of Administrative Trials and Hearings (OATH)).

7. *Phillips v. City of New York*, 66 A.D. 3d 170, 176, 884 N.Y.S. 2d 369 (1st Dep't 2009) (footnote and citation omitted).

8. Except for public housing programs and land use planning, most housing-related issues are beyond the scope of the ADA, but are covered in the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3631 (FHAA).

9. 42 U.S.C. §§ 12112, 12132, 12182; Exec. Law § 296; N.Y.C. Admin. Code § 8-107; but see N.Y.C. Admin. Code S 8-107(17) (making disparate impact actionable), highlighted by the New York State Court of Appeals as going beyond the SHRL, *Levin v. Yeshiva Univ.*, 96 N.Y. 2d 484, 493, 730 N.Y.S.2d 15 (2001). The ADA has significant coverage of public and private transportation. 42 U.S.C. § 12141 *et seq*.; 42 U.S.C. § 12184, as well as of telecommunications, 47 U.S.C. §§ 225, 611, but those areas—also covered under city and state antidiscrimination laws—will not be addressed in detail here.

10. *Albunio v. City of New York*, 16 N.Y.3d 472, 477-78, 922 N.Y.S.2d 244 (2011); *see Zakrzewska v. The New School*, 14 N.Y. 3d 469, 479-82 (2010). The Local Civil Rights Restoration Act was intended as a ringing repudiation of an earlier Court of Appeals decision, *McGrath v. Toys "R" Us*, 3 N.Y.3d 421, 788 N.Y.S.2d 281 (2004), that had rejected a recovery of attorneys' fees under the CHRL under a "catalyst" theory; the Council addressed this with an explicit amendment to § 8-502(f). The LCRRA was enacted as Local Law 85 of 2005. *See supra* note 6. The N.Y.C. Council's Committee on General Welfare's August 17, 2005, report on this bill is *available at* http://www.antibiaslaw.com/sites/default/files/files/CommitteeReport081705.pdf. Congressional rejection of Supreme Court decisions, in Section 2 of the ADA Amendments Act of 2008, was similar to the New York City Council's rejection of *McGrath*. In both cases, legislative bodies were reminding courts of the intent of earlier legislation. *See Geoghan*, *supra* note 1, with respect to the ADA Amendments Act. Going beyond *Geoghan*, with respect to the Local Civil Rights Restoration Act,

> to the extent…provisions [of Local Law 85/05] are intended to "clarify" the legislative intent and construction of the City's Human Rights Law as originally enacted in 1991, they do not create new rights, but are consistent with the meaning and enforcement of pre-existing rights, and as such, are entitled to retroactive application.

Yanai v. Columbia University, No. 118343/03, 2006 N.Y. Misc. LEXIS 9354 (Sup. Ct. N.Y. Co. July 11, 2006) (citations omitted). *See Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 997-99 (2d Dep't 2011) (affirming dismissal under the SHRL, but reversing under the CHRL). Both the CHRL and the SHRL are applicable only where there has been an impact (not merely a decision) within the respective city or state borders. *Hoffman v. Parade Publs*., 15 N.Y.3d 285, 907 N.Y.S.2d 145 (2010).

11. *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 65-81, *lv. Den.*, 13 N.Y.3d 702 (2009); *see Phillips v. City of New York*, 66 A.D.3d 170, 174-90, 884 N.Y.S. 2d 369 (1st Dep't 2009); *Vig v. New York Hairspray Co., L.P.*, 67 A.D.3d 140, 145-47, 885 N.Y.S.2d 74 (1st Dep't 2009) ("We separate the analysis because the disability provisions of the city and state HRLs are not 'equivalent,' and require distinct analyses." 67 A.D. 3d at 147 (footnote omitted). After *Albunio*, *supra* note 10, the Second Department issued *Nelson*, 87 A.D. 3d 995, and the First Department, on December 20, 2011, *Bennett v. Health Mgt. Sys., Inc*., 92 A.D.3d 29 (1st Dep't 2011) (narrowing the applicability of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), under the CHRL, particularly in summary judgment). In *Bennett*, the First Department concluded with a footnote (16) significant in understanding the narrow scope of exceptions under the CHRL:

> We cannot put this holding in absolute terms—there can be limited exceptions to the rule that emerge on a case-by-case basis—but we write here to underline that the exceptions are intended to be true exceptions (*compare Williams*, 61 A.D.3d at 73-80 [the rule is that any difference in treatment reflected by harassment is actionable gender-based discrimination, with narrowly drawn affirmative defense to "narrowly target concerns about truly insubstantial cases" designed with the goal of making certain to avoid "improperly giving license to the broad range of conduct that falls between 'severe or pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other, with emphasis on the need to permit borderline situations to be heard by a jury, and with finding that one could "easily imagine a single comment that objectifies women being made in circumstances where their comment would, for example, signal views about the role of women in the workplace and be actionable"] *and Wilson v N.Y.P. Holdings, Inc.*, 2009 WL 873206, 2009 US Dist LEXIS 28876 [SD NY 2009] [ignoring the *Williams* holding and finding comments like "training females is like training dogs'" and "women need to be horsewhipped" to not be actionable]; *Mihalik v Credit Agricole Cheuvreux North America, Inc.*, 2011 WL 3586060 [SD NY 2011] [wrenching the *Williams* reference to a "general civility code" out of context; inaccurately portraying the case as one whose principal concern was that too many victims of harassment were having the opportunity to be heard by juries, not the opposite; and collecting and relying on some of the many cases that nominally acknowledge *Williams* but ignore its teaching, including *Wilson*]). As with *Williams*, it is our intention that a limited and narrow exception is not intended to be simply the new means by which an old status quo is continued.

In *Fletcher v. Dakota, Inc*., 99 A.D.3d, 948 N.Y.S. 263 (1st Dep't 2012), the First Department, relying on *Williams* and related cases, held individual coop board members could be liable for housing discrimination under the SHRL and CHRL, using a tort law analysis and repudiating its own decision in *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1 (2006).

12. *Loeffler v. Staten Island University Hospital*, 582 F. 3d 268, 278 (2d Cir. 2009). *See* the pre-Local Civil Rights Restoration Act and pre-ADA Amendments Act *Giordano v. City of New York*, 274 F.3d 740, 753-55 (2d Cir. 2001) (citations omitted):

> [T]he definitions of disability under the New York State Executive Law and the New York City Administrative Code are broader than the ADA definition.…Neither of these [CHRL, SHRL] definitions requires Giordano to show that his disability "substantially limits a major life activity."…[T]he New York Court of Appeals,

> whose construction of New York State law binds this Court,…has confirmed that the definition of a disability under New York law is not coterminous with the ADA definition.… [I]n the absence of any remaining federal claims, the appropriate analytic framework to be applied to discrimination claims based on a "disability" as defined by New York state and municipal law is a question best left to the courts of the State of New York.… Should this case come before New York courts on the state and municipal claims, we do not think that those courts should be bound, or think themselves bound, by principles of collateral estoppel or otherwise, to any findings or conclusions reached by the district court in its discussion of whether, as a matter of law, Giordano was qualified to perform the essential functions of his job…. We therefore vacate the district court's judgment dismissing with prejudice the state and municipal claims and instruct the court to dismiss them without prejudice so that the state courts may adjudicate those claims in their entirety if the plaintiff chooses to pursue them in those courts.

13. 42 U.S.C. § 12102. Failure to object to evidence of disability has been held to prove that a person in question is regarded as having a disability. In *People v. Brathwaite*, 11 Misc.3d 918, 816 N.Y.S.2d 331 (Crim. Ct. Kings Co. 2006), Judge Wilson, citing 42 U.S.C. § 12102(2), noted that the criminal defendants each had presented evidence of a condition that case law indicated did not meet the ADA criteria, but observed: "However, this is a question of fact to be determined by either the finder of facts (i.e., a jury) or in this instance, the Court. *See Barnes* [*v. Northwest Iowa Health Center*], 238 F. Supp. 2d [1053] at 1077 [ND Iowa 2002], distinguishing *Moore* [*v. J.B. Hunt Transport, Inc*., 221 F.2d 944 (7th Cir. 2000)]." In the absence of any objection by the People to defendants' evidence of disability, "the Court holds that Defendants…are both considered to be disabled under the definition of 42 USC 12102(2)(C). As such, both are entitled to not be denied participation in 'state services and benefits'." *Brathwaite,* 11 Misc. 3d at 923-25. Accordingly, if the Kings County District Attorney could not make reasonable accommodation to defendants' disabilities in the community service portion of their respective criminal sentences by a date set by the Court, those community service obligations would be deleted from their sentences. *See Hallett*, *supra* note 4, concerning possible discrimination in denial of work release and "shock incarceration" to a state inmate due to his use of a wheelchair and prosthesis.

14. Indeed, the definition had been developed in regulations under Section 504 of the Rehabilitation Act of 1973, prohibiting disability discrimination. Prohibitions of housing discrimination originally planned for the ADA were relocated to the faster moving Fair Housing Amendments Act of 1988, where the term "handicapped" effectively had the same definition. 42 U.S.C. § 3602(h); *see* the federal Air Carrier Access Act of 1986, 49 U.S.C. § 41705(a).

15. 42 U.S.C. § 12102.

16. *See* P.L. 110-325, Sept. 25, 2008, 122 Stat. 3553, § 2, codified at 42 U.S.C. § 12101.

17. 42 U.S.C. § 12114.

18. 42 U.S.C. § 12103.

19. N.Y. Exec. Law § 292(21).

20. *See* Exec. Law § 292(21-e) and N.Y. Comp. R. & Regs. tit. 9 § 466.11 (N.Y.C.R.R.).

21. Exec. Law § 296(3).

22. 9 N.Y.C.R.R. § 466.11(b)(i)(iii). Although within quotations, the term "hardship" is not defined. *See infra* note 56.

23. 42 U.S.C. §§ 12111(8), 12112(a).

24. *See Phillips*, 66 A.D.3d at 177-90; Bennett, supra note 11.

25. 9 N.Y.C.R.R. § 466(11) (h). No statutory language supports this interpretation. See the discussion below concerning the CHRL's limited coverage of substance abusers.

26. Exec. Law § 292(21).

27. Exec. Law §§ 292(21-a), 292(21-b).

28. *See, e.g.*, Laws of Westchester County, Chap. 700, § 700.02(4); Nassau County Administrative Code, Chap. 21, Title C, § 21-9.2(e); Buffalo uses the SHRL definition, without the employment proviso, with respect to damage to property or physical injury motivated by bias, Code of the City of Buffalo, §§ 154.9—154.11, and a FHAA definition in cases of housing discrimination. U.S.C.§ 154.13 et seq. The Albany City Code, while prohibiting disability discrimination and incorporating by reference the SHRL definition of "place of public accommodation" (but giving its own definitions of other terms), does not define "disability." City of Albany, NY Code § 48-23—§ 48-27. For these and other local laws in New York State, *see* http://www.lawsource.com/also/usa.cgi?ny#Z9Q .

29. Phillips, 66 A.D.3d at 176, 180-83.

30. N.Y.C. Admin. Code § 8-102(16).

31. This anomaly was the result of a vain, but adamant, hope of those who prevailed in Mayor Dinkins' Administration in 1991 that state and federal laws applicable in New York City would be changed to reflect this limitation.

32. N.Y.C. Admin. Code § 8-107.

33. *Supra* note 6.

34. Testifying on behalf of the Mayor, in explanation and support of the bill, the author pointed out to the City Council how more progressive interpretations of the then-current CHRL could be lost unless the city's definition of "disability" were made to be substantially different from that under federal law and unless other provisions were added to the city's law. N.Y.C. Admin. Code § 8-107(15). The Council's concurrence is reflected not only in the amended language itself, but also in the analysis quoted in the text accompanying n. 33, *supra*.

35. 42 U.S.C. §§ 12112(b)(4), 12182(b)(1)(E); N.Y.C. Admin. Code § 8-107(20).

36. 42 U.S.C. §§ 12111, 12112, 12132, 12181, 12182; N.Y.C. Admin. Code §§ 8-102, 8-107; Exec. Law §§ 292, 296. Even a community service program operated by a district attorney to enable criminal defendants to avoid or to limit incarceration has been held to fall under the term "state services and benefits," *see Brathwaite*, *supra* note 13. A covered entity's policies also must reasonably accommodate people with disabilities. A decision in Maryland found a department store located in a mall may be required under Title III of the ADA to have an emergency evacuation plan that enables a person with a mobility impairment to evacuate safely not only from the store itself, but also from the mall in which it is located; issues of failure to remove architectural barriers and of negligence also were proceeding to trial, *Savage v. City Place Limited*, No. 240306, 2004 WL 3045404 (Md. Cir. Ct. Dec. 20, 2004), when the case was settled on May 4, 2005, with the settlement requiring provision of an accessible means of emergency egress in all Marshall's stores nationwide.

    The Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), raises a question concerning mixed motive actions under the ADA and, perhaps, the SHRL, N.Y.C. Admin. Code § 8-101 should avoid the question with respect to the CHRL, since discrimination is prohibited "from playing any role." In *Gross*, the Court ruled that, since Congress had not amended the Age Discrimination in Employment Act (ADEA) to require that age merely be a "motivating factor" (a term it had used in amending Title VII of the Civil Rights Act), in adverse action, such action is discriminatory only where, but for the person's age, the action would not have been taken. The

ADA Amendments Act changed "because of" to "on the basis of" disability in the employment context, 42 U.S.C. § 12112(a), it left "by reason of…disability" in defining public sector discrimination, 42 U.S.C. § 12131, and "on the basis of…disability" with respect to private sector discrimination, 42 U.S.C. § 12182(a). This language may run afoul of the Court's reasoning in *Gross*, thus precluding a mixed motive theory under the ADA. *See Bolmer v. Oliveira*, 594 F.3d 134, 148-49 (2d Cir. 2010) ("questionable" whether ADA plaintiff could avoid "but for" requirement in light of *Gross*, but issue not ripe on interlocutory appeal).

37. N.Y.C. Admin. Code § 8-107(5), Exec. Law §§ 296(5), 296(18).

38. 42 U.S.C. §§ 3601-3631.

39. *Riverbay Corp. v. New York City Commission*, 260832/10, N.Y.L.J. 1202518198460 (Sup. Ct. Bronx Co.) decided September 9, 2011), *available at* http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202518198460 (affirming CCHR interpretation that the CHRL "require[es] that housing providers. public accommodations and employers (where applicable), make the main entrance to a building accessible unless doing so creates an undue hardship, or is architecturally infeasible. Only then should an alternative entrance be considered."). *See N.Y.C. Comm'n on Human Rights v. United Veterans Mutual Housing No. 2*, New York City Comm'n on Human Rights Compl., No. EM00877-7/27/88, Recommended Decision and Order (April 4, 1990), *aff'd sub nom*, *In re: United Veterans Mut. Hous. No. 2 Corp. v. New York City Comm. on Human Rights*, N.Y.L.J. March 2, 1992, 35:3 (Sup. Ct. Queens Co.), *aff'd*, 207 A.D.2d 551, 616 N.Y.S.2d 84 (2d Dep't 1994). When a tenant requested installation of a Building Code compliant exterior ramp and lobby lift, as well as relocation, widening and opening force adjustments to entrance doors, the landlord could not avail itself of the "tax fiction" of depreciation to avoid, or to reduce the resources from which to meet, its obligation to make reasonable accommodation to the tenant. *T.K. Management, Inc. v. Gatling*, N.Y.L.J. Nov. 2, 2005, 19:3 (Sup. Ct. Queens Co., Oct. 19, 2005).

40. Exec. Law § 296(19).

41. Exec. Law § 296-a. The CHRL bars lending discrimination in real estate related matters, N.Y.C. Admin. Code § 8-107(5)(d).

42. A full review of how employers might violate these laws is beyond the scope of this article, but coverage of employment agencies and labor organizations deserves some discussion. Employment agencies, as screeners of prospective employees for an employer, might stray into prohibited disability-based action, either at the suggestion of an employer/client or by their own concept of who might be "right" to recommend. Unions, although active proponents of the ADA and similar laws, tend to favor seniority over reasonable accommodation (notwithstanding a duty of fair representation) and cumbersome, time-consuming grievance and arbitration procedures over more streamlined methods of reaching a reasonable accommodation. (See n. 75, *infra*, for further discussion of limits on the applicability of collective bargaining agreements in resolving discrimination claims.) Unions also might insist on provisions in collective bargaining agreements that may result in discrimination charges against the employer, which then must decide whether to jeopardize general labor relations by bringing the union into the case. In some cases, a union that has accepted a discriminatory policy put forward by an employer in a collective bargaining agreement may sue on behalf of employees aggrieved by that policy. *Transp. Workers Union of America v. N.Y.C. Transit Auth.*, 341 F. Supp. 2d 432 (S.D.N.Y. 2004). An employer and the union(s) with which it collectively bargains also must navigate between Scylla and Charibdys (or, more precisely, the EEOC and the NLRB) in sharing confidential information about the disability of an employee, 42 U.S.C. § 12112 (d); New York State also imposes a confidentiality requirement, 9 N.Y.C.R.R. § 466(11)(j)(5), on an employer whose employee has requested a reasonable accommodation that may conflict with collectively bargained seniority rights. The EEOC has advised the NLRB that such sharing with pertinent union representatives may be permissible under the ADA to a limited extent in the context of determining whether an accommodation poses an undue hardship to the union or to its senior member who has been bypassed to accommodate a person with a disability. *See* EEOC-NLRB Memorandum of Understanding (Nov. 16, 1993), *available at* http://www.eeoc.gov/policy/docs/eeoc-nlrb-ada.html. *See also* letter from Ellen J. Vargyas of EEOC to Barry Kearney of NLRB (Nov. 1, 1996). The 1996 opinion was based in part on the right of pertinent inquiry to verify the need for an accommodation requested, where both the employer and the union have obligations to make reasonable accommodations. Not addressed squarely, *inter alia*, is a situation in which the member with a disability has not directly invoked the union's obligation, making the request to the employer alone; the employer may want to suggest the employee involve the union or clearly authorize the employer to do so. For more concerning the balance between reasonable accommodation and seniority systems under the ADA, *see U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). *See infra* note 56. Unions also may be sued for policies and practices resulting in underemployment of protected class members. *See EEOC v. Local 638*, 401 F. Supp. 467 (S.D.N.Y. 1975) (Werker, J.), *judg. modified*, *EEOC v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n*, 532 F.2d 821 (2d Cir. 1976), and its progeny (race and national origin).

43. 42 U.S.C. § 12111 (2).

44. 42 U.S.C. § 12111 (5).

45. Exec. Law § 296.

46. Exec. Law § 292(5); *but see* Exec. Law § 296-b, covering employers of even a single domestic employee. Employees of related entities may be aggregated to meet the jurisdictional minimum of 4 employees. *In re*: *Argyle Realty Assoc. v. New York State Div. of Human Rights*, 65 A.D.3d 273, 882 N.Y.S.2d 458 (2d Dep't 2009). A mother-in-law employed by a physician could not be excluded from the term "employee" as defined in Exec. Law § 292(6) for purposes of bringing the doctor's staff below the jurisdictional requirement. *Goldman v. Stein*, 60 A.D.3d 902, 875 N.Y.S.2d 273 (2d Dep't 2009). However, participants in a Work Experience Program (WEP) have been held not to be employees under SHRL, CHRL, nor under federal law. *McGhee v. City of New York*, No. 113614/01, 2002 WL 1969260 (Sup. Ct., N.Y. Co. Aug. 5, 2002). Employers of even one person are covered under Civil Rights Law Art. 4-B that prohibits discrimination against people with disabilities who use guide, hearing or service dogs, or who are blind and use a cane as a mobility aid; *see particularly* §§ 47-a and 47-b; employers of all sizes also are prohibited from discrimination under Civil Rights Law § 40-c.

47. N.Y.C. Admin. Code §§ 8-102(5), 8-107(1). Also, an employer's agent "who actually participates in the conduct giving rise to a discrimination claim may be held personally liable under the [state]]HRL." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir. 1995); *see Mendez v. City of New York Human Res. Admin.*, N.Y.L.J. May 23, 2005, 24:3, 04 Civ. 0559 (May 10, 2005, S.D.N.Y.) *See Zakrzewska*, 14 N.Y. 3d at 479-82.

48. N.Y.C. Admin. Code § 8-102(5), *but see McGhee*, *supra* note 46.

49. *See* EEOC's *Reasonable Accommodations for Attorneys with Disabilities*, *available at* http://www.eeoc.gov/facts/accommodations-attorneys.html.

50. N.Y.C. Admin. Code §§ 8-102(9), 8-107(4); Exec. Law §§ 292(9) and 296(2)(c)-(e); 42 U.S.C. § 12181 (7); *State Div. of Human Rights v. Cross and Brown*, 83 A.D. 2d 993, 415 N.Y.S. 2d 671 (1st Dep't 1981) (affirming without opinion a SDHR decision). A State Bar continuing legal education program is covered. Department of Justice Title III Technical Assistance Manual, 1994 Supplement, § III-1.1000, *available at* http://www.ada.gov/taman3up.html. A law firm may not exclude a client's service animal from its premises. *See* consent decree in *U.S. v. Larkin, Axelrod, Ingrassia & Tetenbaum, LLP, and John Ingrassia*, June 28, 2012, *available at* http://www.ada.gov/larkin-cd.htm. (The SHRL currently contains definitions of guide, hearing, and service dogs, Exec. Law § 292(31), (32), and (33), that require training that is both

unavailable by their terms and inconsistent with federal law, effectively eliminating coverage under the SHRL for use of such dogs; NYSBA and the New York City Bar are collaborating to try to get the state to correct this problem; in the meanwhile, the ADA and CHRL provide coverage.) *See also* http://www.ada.gov/taman3.html; the Justice Department's *Guide for Small Businesses*, *available at* http://www.ada.gov/publicat.htm#Anchor-ADA-35326, *ADA Best Practices Tool Kit for State and Local Governments*, *available at* http://www.ada.gov/pcatoolkit/toolkitmain.htm, and, with respect to accessibility of web information and services provided by entities covered by the ADA, http://www.ada.gov/anprm2010/anprm2010.htm.

51. *Available at* http://www.ada.gov/2010ADAstandards_index.htm.

52. §§ 48-23–48-27.

53. Chapter 700 of the Laws of Westchester County.

54. Nassau County Administrative Code §§ 21-9.0 –21-9.9.

55. § 21-9.8(3).

56. 42 U.S.C. §§ 12111(9), 12112(b)(5)(A); *see also* § 12111(10), defining "undue hardship," which is a defense to the requirement to make a reasonable accommodation. The individual seeking reasonable accommodation must be "qualified," meaning that, with or without reasonable accommodation, the person must be able to perform the essential functions of the job in question, 42 U.S.C. § 12111(8). *See also* 29 C.F.R. § 1630.9; EEOC *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, *available at* http://www.eeoc.gov/policy/docs/accommodation.html. However, interpreting the language and history of the ADA (before the 2008 amendments, that did not address this issue), the Supreme Court has held that seniority systems (whether or not part of a collective bargaining agreement) "ordinarily" will "trump" a request for job reassignment as a reasonable accommodation, unless the employee requesting the accommodation can show special circumstances (e.g., that exceptions otherwise made to the seniority system reduce expectations of its application) making the assignment contrary to the seniority system "reasonable" in a particular case. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). SDHR's consideration of "problems…that may be caused for other employees" (9 N.Y.C.R.R. § 466.11(b)(i)(iii)) would make reasonable accommodation even less likely in a case brought solely under that law. *See supra* note 22. *Barnett* would not apply under CHRL § 8-102(18). Governmental entities are covered under Sec. 504 of the federal Rehabilitation Act, 29 U.S.C. § 794 and by Title II of the ADA, 42 U.S.C. § 12134(b).

57. 42 U.S.C. § 12182(a). Title II of the ADA, prohibiting governmental discrimination against people with disabilities in the full gamut of public programs, services and activities, as well as in employment, involves nondiscrimination and, as one aspect of such nondiscrimination, reasonable accommodation. In large measure, this is done by adoption of longstanding regulations developed under Sec. 504 of the Rehabilitation Act of 1973. *See* 42 U.S.C. § 12131 *et seq*.

58. 42 U.S.C. § 12182(b)(2)(A)(ii).

59. 42 U.S.C. § 12182(b)(2)(A)(iii). *See Camarillo v. Carrols Corp.*, 518 F.3d 153 (2d Cir. 2008), vacating and remanding a dismissal of a complaint by a woman who is blind against a restaurant chain for failing to provide effective communication (a large print menu) as required by this section and by 28 C.F.R. § 36.303(c)—not for failing to make reasonable modifications. Plaintiff's claim under Exec. Law § 296(2)(a) also was reinstated "because the scope of the disability discrimination provisions…[under that section] are similar to those of the" ADA (internal quotations and citations omitted). (Note that this is a pre-*Albunio* case; *see supra* note 10 and accompanying text).

60. 42 U.S.C. §§ 12182(b)(1), 12182(b)(2)(A)(iv), (v); the term "readily achievable" is defined in 42 U.S.C. § 12181(9).

61. The term "undue hardship" is defined in the employment context as "requiring significant difficulty or expense." 42 U.S.C. § 12111(10).

62. 42 U.S.C. § 12181(9).

63. Exec. Law §§ 296 (2-a) (b)(2) and 296 (18)(2).

64. Exec. Law §§ 292(21-e), 292(21), 296(3); 9 N.Y.C.R.R. § 466(11) and its appendix; *see supra* note 29.

65. Exec. Law § 296(2)(d).

66. Exec. Law §§ 296(2)(c), (d). Exec. Law § 296(14) prohibits discrimination against some people using guide, hearing, or service dogs, whether accommodation would be "reasonable" or not; however, under Exec. Law § 292 (31), (32) and (33), such dogs effectively are defined out of existence under the SHRL. *See supra* note 50.

67. N.Y.C. Admin. Code § 8-102(18).

68. N.Y.C. Admin. Code § 8-107.

69. N.Y.C. Admin. Code § 8-107(15).

70. *Phillips*, 66 A.D.3d at 181; *see generally* 180-83.

71. N.Y.C. Admin. Code § 8-102(18). *See Comm'n on Human Rights v. 325 Cooperative Inc.*, OATH Index No.: 1423/98 (July 15, 1998), available through http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library.

72. N.Y.C. Admin. Code § 8-102(18). See 42 U.S.C. § 12111(10); Exec. Law § 292(21-e). *But see supra* note 22 and accompanying text..

73. *Phillips*, 66 A.D.3d at 175 (citations omitted). SDHR's failure to analyze whether a provider of housing accommodations had engaged in an interactive process concerning a reasonable accommodation rendered a "no probable cause" finding arbitrary and capricious. *Valderrama v. New York State Division of Human Rights and York Ville Towers Associates, LLC*, 401640/11, N.Y.L.J. 1202519960377 (S. Ct., N.Y. Co. October 6, 2011), *available at* http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202519960377&slreturn=1.

74. *Phillips*, 66 A.D.3d at 175. However, when an employee, acting through counsel, confront[ed]…[the employer] with an inflexible, categorical demand, with no room for negotiation and no suggestion of a time frame in which plaintiff would be open to revisiting the issue…plaintiff discharged…[the employer], as a matter of law, of the obligation to continue its efforts to initiate…[a bilateral, interactive process to find a way to reconcile both parties' needs]. *Romanello v. Intesa SanpauloS.p.A.*, 97 A.D.2d 449, 949 N.Y.S.2d 345 (1st Dep't 2012).

75. 42 U.S.C. § 12117, adopting remedies available under 29 U.S.C. § 794a for those claiming discrimination under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; as to those remedies, *see Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Doe v. N.Y. Univ.*, 666 F.2d 761, 774 (2d Cir. 1981); *Martin v. N.Y.S. Dep't of Labor*, 512 F. Supp. 353 (S.D.N.Y. 1981) (applying CPLR § 214(2) to establish a three-year statute of limitations). Counties and municipalities are not subject to punitive damages under ADA Title II, under § 504, nor under New York State common law. *See supra* note 4. The EEOC may pursue victim-specific remedies even when the individual would be bound by agreement with the employer to proceed in arbitration. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). While the Supreme Court has found the individual's right to proceed individually in court under the ADA is subject to the preference for arbitration in the Federal Arbitration Act, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), that preference itself is subject to legal and equitable principles that would invalidate a contract (such as an arbitration agreement), for example, due to unconscionability, and courts have been ready to find unconscionability in appropriate cases. *Circuit City v. Adams*, 279 F.3d 889 (9th Cir. 2002) (on remand); *Brennan v. Bally Total Fitness*, 198 F. Supp.

2d 377 (S.D.N.Y. 2002). Similarly, when a collective bargaining agreement precludes an individual covered by that agreement from seeking arbitration without union approval, the individual may pursue a discrimination claim in court or in another appropriate forum. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Kravar v. Triangle Services Inc.*, N.Y.L.J. May 28, 2009, (S.D.N.Y. 1:06-cv-07858, May 12, 2009, Holwell, J.), *available at* http://law.justia.com/cases/federal/district-courts/new-york/nysdce/2:2006cv07858/353157/53.

76. 42 U.S.C. § 1981a. Front pay is not limited by the cap. *Pollard v. E.I. duPont de Nemours & Co.*, 532 U.S. 843 (2001).

77. 42 U.S.C. § 1988.

78. *Farrar v. Hobby*, 506 U.S. 103 (1992); *Buckhannon Board & Care Home, Inc. v. W, Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001); *see also McGrath* (following *Farrar* as to attorneys' fees under the CHRL), repudiated in the Local Civil Rights Restoration Act; *see supra* note 10.

79. 42 U.S.C. §§ 12188, 2000e-5.

80. 42 U.S.C. § 12133.

81. *Supra* note 2.

82. *See Lane* and *Georgia*, *supra* note 4.

83. N.Y.C. Admin. Code § 8-109.

84. Exec. Law § 297(5).

85. N.Y.C. Admin. Code § 8-502.

See Bennett, *supra* note 11. For example, in the *McDonnell Douglas* test must be tailored to CHRL mandates so "considerations of severity or pervasiveness applicable in state and federal harassment cases are impermissible in determining liability in discriminatory harassment cases under the City HRL," *Bennett*, 92 A.D.3d at 34, citing *Williams* and *Nelson v. HSBC*.

See Jordan v. Bates Advertising Holdings, Inc., 11 Misc. 3d 764, 770-71 (Sup. Ct., N.Y. Co. 2006) (upholding a jury award of $2,000,000 in compensatory and $500,000 in punitive damages, and setting a hearing on the amount of attorneys' fees). *But see Norris v. New York City College of Technology*, N.Y.L.J. Jan. 29, 2009, 33:1 (S.D.N.Y. Jan. 14, 2009, Block, J.), *available at* http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202503560416 (remitting punitive damages of $425,000 to $25,000 against an individual defendant (the only one subject to punitive damages), relying primarily on U.S. Supreme Court criteria), and *Riverbay*, *supra* note 39. (reducing damages and fines levied by CCHR). An award of compensatory damages to a person aggrieved by illegal discriminatory practice may include compensation for mental anguish, and that award may be based solely on the complainant's testimony. *119-121 E. 97th St. Corp. v. New York City Comm'n on Human Rights*, 220 A.D.2d 79, 83, 642 N.Y.S.2d 638 (1st Dep't. 1996). A trial court's unexplained denial of attorneys' fees to a plaintiff prevailing in a settlement under the CHRL was remanded by the Appellate Division for a hearing to determine the amount of attorneys fees to be awarded. *Fornuto v. Nisi,* 84 A.D.3d 617, 923 N.Y.S.2d 493 (1st Dep't 2011).

Where damages or fees are sought with respect to pendent local or state discrimination law liability in a federal action, enforcement of such an award may be sought in a motion in the federal action and does not require state court proceedings. *Mitchell v. Lyons Professional Services, Inc.*, 727 F. Supp. 2d 120 (E.D.N.Y. 2010).

Common law sovereign immunity has been held to bar punitive damages against the city itself under the CHRL. *See Katt*, 151 F. Supp. 2d at 337-45, *supra* note 4.

New York City has repudiated an interpretation of the CHRL that attorneys fees rarely would be awarded under the CHRL "where plaintiff obtained only nominal damages unless the case served a significant public purpose:" *McGrath*, 3 N.Y.3d at 427-28, *supra* notes 10, 78 (in the same legislation, civil penalties under the CHRL were increased significantly, N.Y.C. Admin. Code § 8-126, although the absence of a waiver of sovereign immunity was not addressed, *see Krohn*, discussed at n. 4, *supra*).

Attorneys' fees and court costs recovered by individuals in civil rights litigation (e.g., under ADA and CHRL), including those secured in settlement, are free from federal taxation to the prevailing individual. 26 U.S.C. §§ 62 (a)(20), 62(e)(18).

86. Exec. Law §§ 297(9), (10). Attorney's fees may be available to a prevailing party in a discrimination action against the State. *Kimmel v. State of N.Y.*, 76 A.D.3d 188, 906 N.Y.S.2d 403 (4th Dep't 2010).

87. N.Y.C. Admin. Code § 8-502(c); before enactment of Local Law 85 of 2005, *see supra* note 12, such notice had to be given before suit was filed. Failure to comply with notice of claim time limitations (N.Y.S. General Municipal Law §§ 50-i, 50-e; N.Y.S. Civil Practice Law and Rules § 9801 (villages)) can result in dismissal. *See Erlich v. Gatta*, N.Y.L.J. Oct. 16, 2009, 30:1 (S.D.N.Y. Oct. 2, 2009). The SHRL does not authorize suit against the state or other governmental entities. *See* A10676/S7482 of 2010 and Veto Message 6720, *available at* http://public.leginfo.state.ny.us.

88. N.Y.C. Admin. Code §§ 8-402, 8-404. While a civil action in the name of the city (as opposed to a private right of action, *see supra* note 85 and accompanying text) would have to be brought by or at the direction of the Corporation Counsel, the CCHR is empowered to initiate administrative complaints based on its own investigations, "in addition" to a referral to Corporation Counsel for court action. N.Y.C. Admin. Code § 8-105(4)(a), (b).

89. *See supra* notes 52-55 and accompanying text.

90. § 48-27(H).

91. Laws of Westchester County §§ 700.11(h)(3)-(5).

92. Nassau County Admin. Code § 21-9.9.1.

93. *Garrett*, 531 U.S. at 374, n. 9.

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Is Your Executive Compensation Agreement Covered by ERISA?

By Sharon M. Goodman and Catha Worthman

I. Introduction

ERISA may not be the first thing that comes to mind when we think about executive compensation. Executive compensation itself is a hot topic in the news—put there by everything from the Occupy Movement to recent legislation like Dodd Frank. It has been an issue in the Presidential elections. The New York Times website has a page devoted to executive compensation issues, where it says that large pay packages have become "the focus of public fury." In April 2012, a Citigroup advisory shareholder vote rejected the bank's $15 million pay package for Citigroup's CEO, a move the New York Times described as a "warning shot." Severance pay packages for top executives of many years of payments in stock and cash dwarf those for ordinary workers, which are more like two weeks of ordinary pay.

Many executive compensation arrangements are exempt, probably including those for the top executives that have been the subject of public ire. As the Department of Labor has explained in the context of "top hat" arrangements, the exemption is founded on the assumption that executives have greater power to negotiate arrangements for themselves and don't require the protections that ordinary workers do. The issue is thus probably most important for more "ordinary" executives. It's also important for those of you who are involved in designing or administering executive compensation packages, or who may have clients who have to defend or enforce them.

This article covers some of the basics of ERISA's application to executive compensation arrangements, including the consequences of ERISA coverage, both for the sponsoring employer and for the covered executives. Among the consequences discussed are what it means to be subject to ERISA's fiduciary duties, reporting and disclosure requirements, and claims and appeals procedures.

II. ERISA: Some Basics

The Employee Retirement Income Security Act (ERISA)[1] was passed into law in 1974, with the stated purpose "to protect interests of participants and beneficiaries by establishing standards of conduct, responsibility, and obligation for fiduciaries, providing for appropriate remedies, and ready access to Federal courts."[2]

This article focuses on implications of ERISA Title I coverage, which contains the rules for reporting and disclosure, vesting, participation, funding, fiduciary conduct, and civil enforcement, and is administered by the U.S. Department of Labor. It does not cover the oft-discussed complicated ins-and-outs of Internal Revenue Code 409A, or other titles of ERISA.[3]

A. Is the Plan or Arrangement Covered by ERISA?

An employee benefit plan exists under ERISA if it is: (1) a plan, fund or program; (2) maintained or established by an employer or an employee organization or both; (3) for the purpose of providing pension or welfare benefits; (4) to participants or beneficiaries.[4]

Welfare plans provide benefits for medical, surgical, or hospital care or benefits; sickness, accident, disability, death, or unemployment, vacation benefits, severance benefits, etc. ERISA Reg. § 2510.3-1 lists payroll and workplace practices that are NOT plans under ERISA, such as overtime and similar pay, certain types of sickness or absence pay, Christmas turkeys, recreation or dining facilities, etc.

Pension plans provide (as determined by express terms or as a result of surrounding circumstances) for retirement income or for deferral of income to termination of employment or beyond. Pension plans may be defined benefit or defined contribution, and may include, for example, Section 401(k), profit sharing, ESOP plans, or employer-sponsored IRAs. ERISA Reg. § 2510.3-2 excludes from the definition of a pension plan: severance pay and supplemental pay plans treated as welfare plans; bonus programs; and IRAs and tax-sheltered annuities not sponsored by an employer.

The case law provides further guidance as to when an ERISA plan exists. In *Fort Halifax v. Coyne*,[5] the Supreme Court held that a Maine state law requiring payment of severance benefits was not preempted by ERISA. In a key holding that is often cited, the Supreme Court held that it did not establish an ERISA plan because there was no ongoing administrative scheme to administer promised benefits.

Whether or not "a plan" exists is often further evaluated by a test developed in *Donovan v. Dillingham*,[6] which held that an employer group life insurance policy was an ERISA plan. Even though there was no written plan document, the court held that it was subject to ERISA because, from the surrounding circumstances, a reasonable person could ascertain: (1) the intended benefits; (2)

the beneficiaries; (3) the source of financing: and (4) the procedures for obtaining benefits.

B. Executive Compensation Specifics

Examples of common executive compensation arrangements include deferred compensation for highly compensated employees, excess benefit plans, or severance plans, among many others. Each of these are subject to specific rules as to their coverage (or not) by ERISA.

Unfunded excess benefit plans are exempt. An excess benefit plan is a funded or unfunded Plan designed solely to provide benefits to employees in excess of IRC Section 415 limits (not Section 401(a)(17)limits).[7] These are sometimes known as "SERPs," Supplemental Executive Retirement Plans. If an excess benefit plan is "funded," it is subject to all ERISA requirements other than participation, vesting, and funding. Few technical excess benefit plans exist, because they are restricted to IRC Section 415 by definition—most are now "top hat" plans, as described further below.

Top hat plans are partly covered by ERISA. A top hat plan is defined as an unfunded plan designed to provide deferred comp. primarily for a select group of management or highly compensated employees. Welfare benefits plans may also be top hat plans.[8] Top hats plans are subject to ERISA reporting and disclosure and enforcement and preemption requirements, but not participation, vesting, funding, fiduciary or trust requirements.[9] Although exempt from ERISA fiduciary requirements, top hat plans are nonetheless enforceable through the common law of contracts. And if a top hat plan is determined in fact not to meet the exemption requirements, such as by being in fact *funded* or not in fact limited to a *select group of management or highly compensated employees*, it is subject in full to ERISA's requirements.

Deferred "non-retirement" income compensation is exempt, *e.g.*, equity or performance-based deferred compensation "bonus" programs. Most stock option, stock purchase or "phantom stock" plans operate as incentive programs, not as welfare plans or retirement plans within the meaning of ERISA, and are therefore exempt under 29 C.F.R. § 2510.3-2.[10] Employee Stock Ownership Plans ("ESOPs") designed primarily to invest in employer stock, however, are regulated by ERISA.[11]

Severance benefits, often provided for in employment agreements, vary widely in their structures and terms, and thus require careful analysis as to whether or not they are subject to ERISA. Courts have found severance benefits to be ERISA-governed plans where they are provided pursuant to an "ongoing administrative scheme," as described above, and when the administration of the benefits is discretionary rather than purely mechanical and automatic.[12]

III. Why Does It Matter if an Executive Compensation Arrangement Is Subject to ERISA?

A. In General

I. Non-ERISA Arrangements

Advantages and disadvantages of ERISA coverage will vary, not only depending on one's point of view (employee or sponsor). Employees and sponsors may or may not want to characterize the arrangement at issue as an ERISA plan, depending on the circumstances of the arrangement and the particular interests litigants are seeking to enforce or defend.

Non-ERISA arrangements are governed by contract and/or state wage law. Perhaps surprisingly given the tough ERISA compliance requirements, state law may have some additional enforcement teeth. Most importantly, consequential and punitive damages may be recoverable, some state laws provide for treble damages and other penalties, and a jury trial is available.

On the other hand, non-ERISA arrangements are *exempt* from ERISA's fiduciary, funding, vesting, and reporting and disclosure requirements. As a substitute for ERISA's fiduciary requirements, employees should be able to enforce their rights through the duty of good faith and fair dealing (depending on state contract law). And, although ERISA's personal fiduciary liability may not apply, personal liability may exist under state law for corporate owners and officers who fail to pay "wages" due.

2. ERISA Covered Plans

The primary enforcement advantage (for the would-be enforcer) of an ERISA covered plan is that ERISA imposes strict fiduciary duties, including personal liability in cases of a breach of those duties. ERISA's reporting, disclosure, vesting, and funding rules all provide important protections for plan participants. ERISA's separate trust requirement, providing that funds must be set aside in a trust, may be very important for employees both to protect the assets of the plan in general, and in particular if the company declares bankruptcy.

On the other hand, ERISA offers certain protections for employers, as well. Preemption of state law is the major such protection. No consequential or punitive damages are available in litigation under ERISA. Nor is a jury trial available. Damages are limited to those benefits that are due under the plan, perhaps with interest (although after *CIGNA v. Amara*,[13] it remains to be seen what remedies may be available in equity now that it is confirmed that money may sometimes be recovered from a breaching fiduciary). For some plans—like top hat plans—ERISA coverage offers even further advantage, as

they may be subject to some of ERISA, but not to fiduciary duties, and may nonetheless benefit from ERISA's preemption of state law claims.

B. Fiduciary Duties Under ERISA

1. What Are They?

ERISA's strict fiduciary duties are said to be the "highest known to the law."[14] The requirements are primarily set forth in Section 404. Under the exclusive benefit rule, the fiduciary must act solely in the interest of participants and fiduciaries for the exclusive purpose of providing benefits.[15] A fiduciary must act with an "eye single" to the interests of the plan's participants and beneficiaries.[16] Under the prudent person rule, a fiduciary must act with same care, skill, prudence and diligence as a prudent person in like capacity and familiar with such matters would use in same circumstances.[17] Under the diversification rule, the fiduciary with investment responsibilities for Plan assets must diversify plan investments unless clearly prudent not to do so.[18] Under the plan documents rule, the fiduciary must follow the plan documents unless in conflict with ERISA and other laws.[19]

Fiduciaries also must avoid self-dealing and conflicts of interest. Strict prohibited transactions rules contained in Section 406 prohibit a sale, exchange, or lease between the plan and party in interest; extending credit between the plan and party in interest; and furnishing goods, services, or facilities between the plan and party in interest, unless a specific exemption applies. Prohibited "parties in interest" include the employer, union, plan fiduciaries, and service providers, as well as owners, officers, and relatives of parties in interest.

2. Who Is Subject to Fiduciary Duties?

Broadly speaking, people can become fiduciaries under ERISA in two ways. First, they may be explicitly named as such. This is true, for instance, of the plan Administrator and/or plan Trustee.[20]

A person can also be a "functional fiduciary" under ERISA § 3(21)(A) to the extent that the person (a) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets; (b) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (c) has any discretionary authority or discretionary responsibility in the administration of the plan.

3. How Are ERISA Duties and Protections Enforced?

Enforcement actions under ERISA are governed primarily by Section 502. Section 502(a)(1)(B) provides for an action for failure to provide benefits under the plan.[21] Section 502(a)(3) provides for an action for failure to comply with ERISA, such as providing equitable relief to ensure compliance with accrual and vesting requirements where a plan is held not to be a top hat plan.[22] Section 502 also provides the vehicle for a cause of action on breach of fiduciary duty, such as misrepresentation or breach of the duty of loyalty.[23]

Liability for breach of fiduciary includes personal liability for losses resulting from the breach, as discussed above, under Section 409(a). Additionally, a breaching fiduciary must restore to the plan profits made through use of plan assets. Other equitable and remedial relief may be sought, and co-fiduciary liability may attach under Section 405, including liability for acts of other plan fiduciaries.

Section 510 also provides a cause of action for interference with rights protected by ERISA, such as a claim that someone was fired to avoid paying benefits.[24] Note that the Plan may not exculpate fiduciaries from liability for breach of fiduciary duties.[25] Even where someone is a *non-fiduciary*, there may be liability for *knowing participation* in a breach, under *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*[26] Also significant is the broad civil and criminal enforcement power of the U.S. Department of Labor ("DOL"). DOL may seek civil penalties, equitable remedies, and injunctive relief.[27]

In short, liability under ERISA is subject to a highly defined scheme under which participants can enforce their rights.

C. ERISA Reporting and Disclosure

If a deferred compensation plan is subject to ERISA, the level of reporting and disclosure obligations under ERISA depends on the type of plan.

1. Top Hat Plans

For a top hat plan (which by definition must be unfunded), there is an alternative compliance rule for all of Part 1 of ERISA.[28] To satisfy the alternative method of compliance, the plan administrator must file a short statement within 120 days after the plan is subject to Part 1 of ERISA, which is usually the adoption date. The statement must include the employer's name, address and Employer Identification Number (EIN), a declaration that the plan is primarily for deferred compensation for a select group of management or highly compensated employees, and the number of such plans and the number of employees in each plan. Only one statement needs to be filed for each employer if there are one or more top hat plans. The plan administrator also is required to provide the plan documents to the Department of Labor upon request.[29]

Without the alternative compliance rule, the ERISA reporting and disclosure rules are extensive, and include a Summary Plan Description ("SPD") (ERISA Section

102), a Summary of Material Modifications ("SMM") for changes to the SPD (ERISA Section 104), an Annual Report Form 5500, and certain additional documents upon request. Department of Labor Regulation 2520.102 provides that an SPD must include, among many other things, the name of the plan and employer whose employees are covered by the plan; rules on eligibility for participation, benefits and conditions to be eligible; rules on disqualification, denial, suspension, reduction of any benefits that participant might otherwise reasonably expect plan to provide; rules on termination of a plan or amendment or elimination of benefits; and a summary of the rules on fees or charges on participants to receive benefits.

An SPD must be distributed to a new participant within 90 days of initial participation or within 120 days after the plan is subject to Part 1. The SPD must be distributed every 5 years after issuance if the plan is amended and every 10 years after issuance if the plan is not amended. Additionally, the SPD must be distributed to the participant or to the Department of Labor upon request. The SMM must be distributed to a new participant with the first SPD, to participants by the 210th day of the plan year after the change is adopted, and to a participant or the Department of Labor upon request.

The Annual Report Form 5500 usually involves an auditor to prepare, which in turn creates an added expense for the plan. Finally, the plan has an obligation to provide participants with certain documents upon request. These documents include SPDs, SMMs, collective bargaining agreements, other documents under which the plan is maintained, and the current Form 5500.

2. Excess Benefit Plan

Whether an excess benefit plan is subject to ERISA's reporting and disclosure requirements depends on whether the plan is unfunded or funded.[30] If the excess benefit plan is unfunded, it is exempt from all of Part 1 of ERISA. However, if the excess benefit plan is funded, all of Part 1 of ERISA applies, just as with funded top hat plans.[31]

3. Delinquent Filer Voluntary Compliance Program

For top hat plans that fail to comply with the alternative compliance method to satisfy Part 1, the Department of Labor maintains a Delinquent Filer Voluntary Compliance Program ("DFVCP"). Under the DFVCP, top hat plans may file the applicable notice and statement described in regulation §§ 2520.104-22 and 2520.104-23 under DFVCP in lieu of filing past due annual reports. By filing statements and meeting other applicable DFVCP requirements, the plan is considered to be electing compliance with the alternative method of compliance for all subsequent plan years. To be eligible for the DFVCP the plan must make the required filings before the Department of Labor discovers the failure to file, such as through an audit.

The plan may voluntarily file an overdue Form 5500 and pay reduced civil penalties. The applicable penalty amount for Small Plan Filers, namely those plans with 100 persons or fewer, is $10 per day late, up to $750. For more than one late filing for the same plan, the maximum penalty amount is $1,500 per plan. The applicable penalty amount for large plan filers is $10 per day for each day late, not to exceed $2,000. For more than one late filing for same plan, the maximum penalty amount is $4,000 per plan. There are detailed rules and exceptions on how to determine whether a plan is a small or large plan.[32]

By filing under the DFVCP, the plan waives the right to receive a Notice of Assessment and to contest the penalty amount. The DFVCP also covers Code penalties for non-filing and late filing.[33]

D. ERISA Claims And Appeals Procedures—Part 5

Top hat plans also are subject to the enforcement and administration provisions of ERISA Title 1, Part 5. The central administrative obligation under Part 5 is the claims and appeals procedures. Funded excess benefit plans also are subject to the claims and appeals procedures of Part 5 of ERISA.[34]

An adverse benefits determination must describe the specific reason, or reasons, for denial, cite to the specific plan provisions relied upon, and provide any voluntary appeals procedure available and all required information to be given in connection with that procedure.[35] If the plan fails to follow the ERISA claims and appeals procedures, the claimant may be deemed to have exhausted all internal review and is allowed to sue.

The reasonable claims procedures required by § 2560.503-1 include the claimant's right to have an authorized representative pursue a claim or appeal and the prohibition against requiring more than two levels of internal appeals before claimant has the option to sue. Any decision sent by plan must include specific reasons for denial, reference to the specific plan provision being relied upon, and a description of the plan's review procedures and time limits.

The plan must provide full and fair review of a denied claim.[36] Specifically, the plan must provide claimants with an opportunity to submit written information as well as access to and free copies of all documents related to the claim. No deference is given to the original decision and the review is not conducted by the same person who made the initial decision or by that person's subordinate.

E. Why Small Employers Should Care About the Deferred Compensation Rules Under ERISA

As shown above, all employers (as do all participants) have reason to care whether their executive compensation plans are covered by ERISA. Counsel for a small employer may think that the rules on deferred compensation matter only to corporate counsel. However, under ERISA, some common benefits provided to any owner, officer or long-service employees can create a "plan" that is subject to ERISA. When that happens, a number of other obligations and duties are imposed on the people who run the employer. There may be reasons for an employer to establish a plan that is subject to ERISA. However, in most instances, the employer is not aware that these informal practices may impose the same duties that apply to the defined benefit plans or Section 401(k) plans that the employer may provide to all employees.

Many small employers have used different types of "informal" benefits to reward officers and employees with long service in addition to qualified retirement plans. For example, an employer might pay a monthly severance benefit to a retiring president or retiring director for a number of years. In other cases, the employer might offer such benefits to every employee with twenty or more years of service, which sometimes includes a majority of the staff. Often, these benefits were paid from a bank account set aside in the person's name. The counsel for the employer might have focused on avoiding being classified as an ERISA pension plan under ERISA Section 3(2) by paying the severance benefits within two years of the employee's termination date and in a limited benefit amount (specifically, up to twice the employee's salary).[37]

For these benefits to officers to be exempt from ERISA, or at least from the most onerous parts like fiduciary duty, the benefits must not be "funded." While a "funded" top hat plan (really, a "failed" top hat plan) is subject to all of ERISA Title I's requirements for reporting, participation, vesting, funding, and fiduciary requirements, unfunded top hat plans are, with a few minor exceptions, exempt from all ERISA requirements. To be unfunded, payments must be from the employer's general assets that are subject to the employer's creditors or using a "rabbi trust" (often using the IRS draft trust in IRS Revenue Procedure 92-64, 1992-2 CB 22). However, payments made from a separate, identifiable bank account, such as an account in a person's name, could create a funded plan.

Creating a non-complying top hat plan subject to ERISA could result in significant monetary penalties for the employer. There may be penalties from both Department of Labor and the Internal Revenue Service for not filing Form 5500 annual report (ERISA § 502(c)(2)) outside of the Delinquent Flier Voluntary Compliance Program (DFVCP). The Department of Labor can assess up to $1,100 a day for failure or refusal to file. The Internal Revenue Service can assess up to $25 a day, up to a $15,000 maximum, for failure or refusal to file.

The need to meet alternative compliance for the annual report (Form 5500) is real. In *Barrowclough v. Kidder, Peabody & Co.*,[38] a plan that failed to comply with the alternative notice was deemed fully subject to ERISA's reporting and disclosure requirements and therefore could be subject to a daily penalty for failing to provide a participant with requested documents. Likewise, in *Senior Exec. Benefit Plan Participants v. New Valley Corp. (In re New Valley Corp.)*[39] and *Welsh v. GTE Serv. Corp*,[40] the court found the administrative exemption under 29 C.F.R. § 2520.104-23 was "applicable only if the regulation had been complied with." As a penalty for not providing the Summary Plan Description and other required documents if requested under ERISA §502(c)(2) within 30 days, a court can assess a penalty of up to $100 a day.

Endnotes

1. All section references hereinafter are to ERISA and not to its U.S. Code sections. ERISA is codified at 29 U.S.C. § 1001 *et seq*. A correspondence table may be found at http://benefitslink.com/erisa/crossreference.html.
2. ERISA § 2(b); *see also Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996).
3. Title II of ERISA amends the Internal Revenue Code to parallel many of the Title I rules, Title III addresses jurisdictional matters and coordinates enforcement and regulatory activities by the U.S. Department of Labor and the IRS, Title IV covers the insurance of defined benefit pension plans and is administered by the PBGC.
4. *See* ERISA §§ 2, 3; 29 C.F.R. § 2510.3-1.
5. 131 S. Ct. 1866 (2011).
6. 688 F.2d 1367 (11th Cir. 1982) (en banc).
7. § 2(36); § 4(b)(5); *Gamble v. Group Hosp. & Medical Servs., Inc*., 38 F.3d 126, 128 (4th Cir.1994); *Olander v. Bucyrus-Erie Co*., 187 F.3d 599, 604 (7th Cir. 1999).
8. *See* 29 CFR § 2520.104-24.
9. §§ 3; 201(2), 301(a)(3), 401(a)(1).
10. *Compare*, *e.g*., *Kaelin v. Tenneco, Inc*., 28 F.Supp.2d 478, 486–87 (N.D. Ill.1998) (holding that restricted stock option plan was not an ERISA pension plan) *with Kolkowski v. Goodrich Corp*., 448 F.3d 843, 852 (6th Cir. 2006) (holding that stock option plan was required to be provided under ERISA-governed severance plan).
11. § 407(d)(6).
12. *See*, *e.g*., *Cassidy v. Akzo Nobel Salt, Inc*., 308 F.3d 613, 616 (6th Cir. 2002) (holding a severance plan to be subject to ERISA because it "reveal[ed] a degree of discretion, periodic demands on assets, and an administrative burden that ERISA's definition contemplates").
13. 131 S. Ct. 1866 (2011).
14. *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982).
15. § 404(a).
16. *Donovan*, 680 F.2d at 271.
17. § 404(a)(1)(B).
18. § 404(a)(1)(C).

19. § 404(a)(1)(D).
20. ERISA § 402(a).
21. *See, e.g*, *Starr v. MGM Mirage*, No. 2:06-cv-00616-RLH-RJJ (D. Nev. Nov. 7, 2006).
22. *See*, *e.g.*, *Carrabba v. Randalls Food Mkts, Inc.*, 145 F. Supp. 2d 763 (N.D. Tex. 2000).
23. A very recent case—and a great primer on all ERISA coverage issues because of the complexity of the facts—is *Solis v. Koresko*, No. 09-988 (E.D. Pa. Aug. 3, 2012).
24. *See Gabelman v. Sher*, No. 11-CV-2718 (E.D.N.Y Mar. 23, 2012).
25. § 1110(a).
26. 530 U.S. 238 (2000).
27. §§ 409, 502.
28. DOL Regulation Section 2520.104-23.
29. ERISA § 104(a)(6).
30. ERISA § 4(b)(5).
31. *See* ERISA § 201(7), § 301(a)(9).
32. 29 C.F.R. § 2520.103-1(d).
33. I.R.C. § 6652(e).
34. ERISA § 4(b)(5).
35. § 2560.503-1(j).
36. § 2560.503-1(h).
37. DOL Reg. Section 2510.3-2(b).
38. 752 F.2d 923, 941 (3d Cir. 1985).
39. 89 F.3d 143, 149 (3d Cir. 1996).
40. 866 F. Supp. 1420, 1429 (N.D. Ga. 1994).

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Protection for Participation in Internal Investigations: Examining Title VII's Anti-Retaliation Provision

By Sandra E. Pullman

The Second Circuit recently clarified the reach of the participation clause of Title VII's anti-retaliation provision. Joining every other appellate court to have considered the issue,[1] the court in *Townsend v. Benjamin Enterprises, Inc.* held that the participation clause does not cover participation in an employer's internal investigation of discrimination, unconnected with a formal EEOC charge.[2] While this ruling would seem to limit the definition of protected activity under the statute, putting employees who participate in internal investigations at risk of reprisal, recent Supreme Court jurisprudence indicates that such activity is, in fact, covered under the opposition clause. Other Supreme Court rulings have also created greater zones of protection from retaliation. Further, in minimizing the role of employer investigations in bringing Title VII claims, the court in *Townsend* actually expanded liability for employers.

I. *Townsend*'s Ruling

The unique circumstances in *Townsend* led to the court's conclusion that the plaintiff did not engage in protected activity. The plaintiff, a human resources representative, conducted an internal investigation pursuant to an informal complaint but did not form any opinion about the truth of the allegations.[3] When she was subsequently fired, the human resources representative alleged that her termination was unlawful retaliation, based on the fact that she "participated in any manner in an investigation, proceeding, or hearing under this subchapter."[4]

The Second Circuit held that internal investigations were not properly considered proceedings "under this subchapter" of the statute, reserving that status for EEOC charges and judicial proceedings. While conceding that, as an affirmative defense, an employer could defeat a discrimination claim by showing the plaintiff failed to exhaust internal complaint processes,[5] the court nonetheless noted that participation in these internal investigations was not a necessary prerequisite to filing suit under Title VII.[6] Therefore, the court held that the language of the statute did not convert an employer's affirmative defense into a proceeding protected by the participation clause. The court also rejected the plaintiff's policy argument "that, because internal investigations are integral to the deterrent aims and effective operation of Title VII, participation in such investigations should qualify as protected activity."[7]

II. Identifying Protected Activity

Despite this restrictive interpretation of the participation clause, Title VII's anti-retaliation protection is not so limited as the Second Circuit's holding would suggest. In addition to protection for employees who have "participated" in proceedings under the statute, Title VII's anti-retaliation provision makes it unlawful for an employer to retaliate against an individual "because he has *opposed* any practice made an unlawful employment practice by this subchapter."[8]

The Supreme Court has adopted an expansive definition of protected activity under the opposition clause. In *Crawford v. Metropolitan Government of Nashville & Davidson County,* the Supreme Court rejected the Sixth Circuit's narrow interpretation of opposition as "active, consistent" affirmative steps and its ruling that an employee must "instigat[e] or initiat[e]" a complaint to be covered.[9] Instead, it held that the term "oppose" goes beyond "active, consistent" behavior, to encompass "someone who has taken no action at all to advance a position beyond disclosing it."[10]

In *Crawford*, the Court held that an employee who disclosed evidence of discrimination in responding to questions in an employer's investigation was covered under the opposition clause, though she did not raise any complaints on her own. The Court observed 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."[11] Because the plaintiff's conduct was covered by the opposition clause, the Supreme Court did not discuss the reach of the participation clause.[12]

Post-*Crawford*, participation in employers' internal handling of discrimination claims may well be covered under the opposition clause. The First Circuit has applied this rule to hold that an employee's efforts to assist a coworker in filing and pursuing an internal complaint of discrimination were protected conduct under the opposition clause.[13]

Indeed, even the activity at issue in *Townsend* would likely fall under the protection of the statute, based on this expansive definition. At oral argument in that case, the plaintiff contended that she would have been covered

by the opposition clause had she pled that claim; she had not done so because *Crawford* had not yet been decided.[14]

Nonetheless, human resources managers, such as the aggrieved employee in *Townsend,* still may lack protection under the opposition clause. Some courts outside the Second Circuit have limited *Crawford's* ruling, holding that "a management employee that, in the course of her normal job performance, disagrees with or opposes the actions of an employer does not engage in 'protected activity.'"[15] Still, other courts have refused to apply such a rule to employment discrimination claims under Title VII.[16]

III. Defining the Reach of the Participation Clause

Employees who do participate in EEOC investigations are entitled to broad protection from retaliation. Although the opposition clause covers activity unrelated to the filing of a formal charge, whereas the participation clause may not, "the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause."[17] Specifically, under the participation clause, "(a)n employee need not establish the validity of his original claim to establish a charge of employer retaliation[.]"[18]

In contrast, the language of the opposition clause requires that the opposed conduct be an "unlawful employment practice" under the statute, 42 U.S.C. § 2000e–3(a). That is, the allegations must describe prohibited activity. The plaintiff need not demonstrate that the claim is meritorious,[19] however; rather, "the employee need only have a reasonable belief that the employer was engaged in the unlawful employment practice opposed."[20]

Although the Second Circuit declined to address the issue in *Townsend,* several courts have held that the participation clause does cover participation in internal investigations begun *after* an EEOC charge has been filed.[21] As stated by one court, the issue is whether the conduct was "an intimately related and integral step in the process of making a formal charge."[22]

IV. Title VII Protection Generally

While the court's decision in *Townsend* limits the definition of the participation clause to exclude employees who participate in internal employer investigations of discrimination, the Second Circuit also expanded employer liability based on the same reasoning. In another issue of first impression, the Second Circuit held that the *Faragher/Ellerth* affirmative defense is unavailable when the acting supervisor is the employer's proxy or alter ego, joining every Court of Appeals to have considered this issue.[23]

Other recent Supreme Court rulings also have expanded the statute's anti-retaliation protection, by providing coverage for third parties who are affiliated with employees who have engaged in protected activity[24] and promoting a context-specific analysis of whether an employer's actions would deter a reasonable employee from reporting discrimination.[25]

V. Conclusion

Ultimately, the rule adopted by the Second Circuit in *Townsend*, limiting coverage for participation in an employer's internal investigation under the participation clause, does not unreasonably restrict the scope of Title VII's anti-retaliation provision. Rather, as described herein, the opposition clause likely covers any such activity. Overall, in light of recent Supreme Court jurisprudence, the anti-retaliation provision of the statute remains strong.

Endnotes

1. *See Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 747 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1603 (2011); *Van Portfliet v. H & R Block Mortg. Corp.*, 290 F. App'x 301, 303-04 (11th Cir. 2008); *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *see also Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000).
2. 679 F.3d 41, 47-51 (2d Cir. 2012).
3. *Id.* at 48, n.7.
4. *Id.* at 48 (quoting 42 U.S.C. § 2000e-3(a)).
5. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).
6. *Townsend*, 679 F.3d at 50.
7. *Id.*
8. 42 U.S.C. § 2000e-3(a) (emphasis added).
9. 555 U.S. 271, 277 (2009).
10. *Id.* at 277.
11. *Id.*
12. *Id.* at 272.
13. *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 42 (1st Cir. 2010).
14. *Townsend*, 679 F.3d at 48, n.7.
15. *Brush v. Sears Holdings Corp.*, 466 F. App'x 781, 787-88 (11th Cir. 2012) (citing *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996) (applying the "manager rule" in the context of the FLSA); *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617 (5th Cir. 2008) (same)). Under this rule, to qualify as "protected activity" an employee's acts must cross the line from "performing her job… to…lodging a personal complaint." *McKenzie*, 94 F.3d at 1486; *c.f. E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998) (observing that "a requirement of 'stepping outside' a normal role is satisfied by a showing that the employee took some action against a discriminatory policy").
16. *See, e.g., Rangel v. Omni Hotel Mgmt. Corp.*, No. 09 Civ. 811 (W.D. Tex. Oct. 4, 2010) (noting that "the rule would strip Title VII protection from whole groups of employees—management

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employees, human resources employees, and legal employees, to name a few, employees who are in the best positions to advise employers about compliance") (internal citations omitted).

17. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 n.4 (4th Cir. 1998) (citations and internal quotation marks omitted); *see also Vaughn v. Epworth Villa*, 537 F.3d 1147 (10th Cir. 2008) ("interpret[ing] the scope of the participation clause vis-à-vis the opposition clause" and concluding that the participation clause is broader).

18. *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66 (S.D.N.Y. 1975), *supplemented sub nom. EEOC v. Kallir, Philips, Ross Inc.*, 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd sub nom. EEOC v. Kallir, Philips, Ross, Inc.*, 559 F.2d 1203 (2d Cir. 1977).

19. *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) ("It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge.").

20. *Sias*, 588 F.2d at 695; *see also Evans v. Kan. City, Mo. Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995); *Trent v. Valley Elec. Ass'n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1046 (7th Cir. 1980).

21. *See Abbott*, 348 F.3d, 543 ("we hold that Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge"); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) ("we recognize that, at least where an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee's participation is participation 'in any manner' in the EEOC investigation"); *Gilooly v. Mo. Dept. of Health & Senior Servs.*, 421 F.3d 734, 744 n.4 (8th Cir. 2005) (holding, in dicta, that such activity was "likely" protected); *Gomez v. Rest. One Ltd. P'ship*, No. 10 Civ. 1850 (N.D. Ill. June 19, 2012) (noting that the Seventh Circuit was silent on the issue and concluding that "participating in an internal investigation commenced in response to an EEOC charge or Title VII lawsuit is a statutorily protected activity").

22. *Croushorn v. Bd. of Tr. of Univ. of Tenn.*, 518 F. Supp. 9, 23 (M.D. Tenn. 1980). In *Croushorn*, the court held that it was not the fact of a pending charge that was dispositive; rather, the question was whether the employer was motivated by a desire to retaliate against the individual for participating in a formal charge filing, whether or not the employee had taken that step. The court further noted that either the opposition clause or the participation clause would cover the plaintiff, who had "formed a definite intention to file an EEOC charge, whose employer learn[ed] of this intention and retaliate[d] because of it, and who actually did file the intended charge the next day." *Id.* at 21-22. The Court noted that "the lack of a pending EEOC charge is thus not only not a controlling consideration, it is generally inconsequential as long as the reprisal is animated by the requisite improper motivation." *Id.* at 22.

23. *Townsend*, 679 F.3d at 56; *c.f. Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 383–84 (5th Cir. 2003); *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 517 (9th Cir. 2000).

24. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868-69 (2011).

25. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69 (2006).

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EEOC Attorneys Speak to Mentoring Program Participants

By Rachel Santoro

On September 6, 2012, the Labor and Employment Law Section's New Lawyers Committee hosted Regional Attorney Elizabeth Grossman and Supervisory Trial Attorney Nora Curtin of the U.S. Equal Employment Opportunity Commission (EEOC) for a discussion with the Section's new Mentoring Program participants regarding public sector legal careers. At the event, held at Outten & Golden's New York City office, Ms. Grossman and Ms. Curtin discussed how their career paths led them to EEOC and some of the benefits of working at the Commission, including trial experience and the ability to engage in substantive legal work early in their legal careers. Ms. Grossman explained how cases move through EEOC and recommended some best practices for parties working with EEOC investigators and attorneys. Mentees also learned about how new lawyers can apply for positions with EEOC. Ms. Grossman recommended that candidates be prepared to demonstrate their past and present commitment to civil rights work.

The event with Ms. Grossman and Ms. Curtin is one in a series of Mentoring Program events the New Lawyers Committee will host in the coming year. The Committee, in conjunction with the Section Chair and in consultation with the Membership and Diversity and Leadership Development Committees, launched the Mentoring Program in Spring 2012 to help bridge the gap between newly admitted lawyers and more seasoned lawyers who practice in the labor and employment field, as well as to introduce new Section members to the State Bar. Over the summer, Mentoring Program participants visited the Court of Appeals for the Second Circuit to observe oral arguments and speak with Circuit Judge Denny Chin about appellate advocacy. The New Lawyers Committee is currently accepting mentor and mentee applications for its 2013 Mentoring Program. For more details about the Mentoring Program or to request an application, please contact Committee Co-chairs Genevieve Peeples at gpeeples@gbglawoffice.com or Rachel Santoro at rachelsantoro@paulhastings.com.

Whose Laws Reach Border-Crossing Employees?

By Donald C. Dowling, Jr.

Probably the most common question in international employment law practice is: *Which countries' employment laws protect border-crossing employees* like expatriates and mobile workers? This question is relevant when arranging any mobile job, expatriate posting or "secondment," and it becomes vital when a multinational needs to fire border-crossing staff. A terminated international employee who can "forum shop," it has been said, has "powerful ammunition in negotiations over compensation." P. Frost and A. Harrison, "Company Uniform," *The Lawyer* (London), December 11, 2006 at 21.[1]

General Rule

To determine which country's law applies in any cross-border employment scenario, always start with the assumption that *the local employee protection laws of the host country* (the current place of employment where an international assignee now works) apply as "mandatory rules" applicable by force of public policy. Employee protection laws tend to reach everyone working in a given host country, even foreign-citizen "inpats" who affirmatively opted out of local law by signing some choice-of-home-country law provision. And these mandatory host-country employee protection laws tend to comprise all the local laws at the heart of an employment relationship, such as local laws regulating: pay rate, overtime, payroll, mandatory benefits, hours, rest periods, vacation/holidays, health/safety, labor unions/collective representation, discrimination/harassment/"moral" abuse, employee-versus-contractor classification, restrictive covenant/non-compete/trade secret rules and, of course, dismissals—firing procedure, notice, severance pay, releases. In fact, the "mandatory rules" of employment law add up to most all laws that regulate the workplace except for a fairly confined subset of regulations on executive compensation, equity, and non-mandatory benefits.

General Rule Applies Stateside

This general rule on the mandatory application of host-jurisdiction employee protection laws strikes Americans as heavy-handed, an odd quirk of over-protective foreign regimes hostile to employment-at-will. But actually we Americans impose this very same rule ourselves. In the words of the U.S. Ninth Circuit Court of Appeals 2012 opinion *Ruiz v. Affinity Logistics*,[2] the employee protection law of the U.S. state of employment applies even over some foreign jurisdiction's law expressly selected by the parties because those American laws that "see[k] to protect…workers" are "protective legislation" constituting public policy so deeply "fundamental" that parties are powerless to opt out of or contract around them.

- **Hypothetical:** Imagine hypothetically an India tech company transfers a Bangalore programmer (Indian citizen with U.S. work visa) to its new branch in Silicon Valley. Imagine the programmer signs a contract calling for the law of her and her employer's home country—India. India obviously has a strong nexus to this particular employment relationship, so under *commercial* principles this choice-of-law clause would be enforceable. But imagine that after our programmer's place of employment shifts to California she earns an Indian wage below U.S. minimum wage, she gets sexually harassed, she suffers an injury from a workplace safety violation and she discovers that her employee handbook prohibits her from using Facebook to criticize her boss. The programmer might file claims with the U.S. Department of Labor, the EEOC, OSHA and the NLRB or California state agencies, plus a workers' compensation claim. To these charges, the employer could assert its threshold "choice-of-Indian-law clause" defense. But few lawyers would bet on that defense going anywhere. America's federal and California's state public policy void most prior waivers of employee protection laws, including waivers in the guise of a foreign choice-of-law clause. *See Ruiz, supra.* Just as an agreement to work for below minimum wage is void under the U.S. Fair Labor Standards Act, so is a contractual selection of Indian wage law, if India's minimum wage is below the FLSA's. Any American court holding otherwise would give employers a back door from which to escape mandatory responsibilities under American employee protection laws.

Outside the U.S. it works this same way. Local employee protection laws of a host country place of employment where an expat currently works tend to apply notwithstanding any contractual selection of home-country law. *See, e.g.*, French Supreme Court decision 10-28.563 (Feb. 2012)[3] (New York law covers French employee working in New York for French-owned employer). Indeed, employment-at-will makes this choice-of-law principle particularly significant as to an *American* expat: After his place of employment shifts abroad, an American steps out of U.S.-style employment-at-will and into a cocoon of local law protection—the "indefinite employment" regime of host country vested rights, severance pay and termination protections. Try as they might, American employers cannot export employment-at-will by inserting U.S.-law clauses into expatriate assignment arrangements. Expect a host country court to void a U.S.-law clause if the employer invokes it to defend a claim under local employee protection laws.

Four Refinements to the General Rule

Having stated this general rule on the mandatory application of the law of the place of employment, we need to address four important refinements: (1) long business trips and mobile employees; (2) the Communist and Arab exception; (3) extraterritorial reach; and (4) of employment-context choice-of-law clauses.

1. Long business trips and mobile employees: While the employee protection laws of a host country current place of employment almost always govern an expat's employment relationship, *which country* is a given employee's "current place of employment" can sometimes be unclear—a fact question. Using terminology in Europe's Rome I Regulation on conflict of laws, disputes sometimes arise as to what jurisdiction is "habitually" the place of "work." *Cf.* Europe Rome I Regulation, EU Reg. 593/2008/EC (6/17/08) at arts. 8, 21.[4] The place of employment of the vast majority of employees is obvious. But the place of employment of a small minority, the mobile workforce, is debatable. Where do we draw the line between an employee working temporarily abroad on a very long business trip versus a very short-term expatriate assignment? What is the place of employment of a re-assigned expat only recently arrived in a host country? What is the place of employment of a mobile employee like a flight steward, pilot, sailor, or salesman with an international territory—what the British call a "peripatetic employee"? What about so-called "international commuters" who live in one country but work in another?

- **Wage/hour laws:** Regardless of how we resolve fact questions as to mobile employees' current places of employment, in many—maybe most—jurisdictions, *wage/hour laws* tend to be mandatory rules that reach everyone rendering services locally, even incoming business travelers and guest workers with foreign principal places of employment. That is, local laws on minimum wages and caps on hours tend to protect even inbound business travelers and guest workers. Otherwise, guest workers could come in and undercut locals.[5]

2. The Communist and Arab exception: A handful of countries—mostly Communist regimes like China, Cuba, North Korea and Vietnam but also including Indonesia—actually impose separate sets of employment laws on local citizens versus immigrant foreigners, or at least allow inbound expats to opt out of local employment regulations. Public policy in these countries sees local employment protection laws as protecting local citizens and so is less concerned with protecting non-citizen residents (who are likely to be highly compensated and well-protected, anyway). Local law in these jurisdictions can be more hospitable to employment-context choice-of-law arrangements with non-citizen employees. In addition, some Arab country employment laws reach only local citizens or at least accommodate choice-of-law provisions. For example: minimum wage laws in UAE; social security rules in UAE and Saudi Arabia; Saudi employment protections for Saudi citizens; and end-of-service gratuities in a handful of Arab jurisdictions. These exceptions, though, are rare, even in the Arab world.

3. Extraterritorial reach: Our general rule—employment laws are territorial—means not only that host country employment protections cover "inpats," but also that home country employment laws tend *not* to follow local residents who emigrate to work abroad. But there are some key exceptions to this outbound prong of our rule. A handful of home countries presume to attach some or all of their employment laws to their local citizens, local residents or local hires who go off to work abroad. In those cases, home country employment protection laws actually follow locals after they set off to work abroad, *even though foreign local* (host country) *law will also apply*. Both sets of rules end up applying simultaneously, bedeviling multinational employers.

- *U.S.*: Ever since the U.S. Congress swiftly overturned the 1991 Supreme Court decision *EEOC v. Aramco*[6] by passing the Civil Rights Act of 1991,[7] the major U.S. federal discrimination laws have reached American citizens working abroad for U.S. "controlled" multinationals—even though, simultaneously, host-country laws apply as "mandatory rules" that parties cannot contract around.[8]
  - *Example*: For example, imagine a hypothetical 41-year-old American-citizen office manager fired from the Paris office of a Silicon Valley tech company. She could simultaneously bring both a French labor court unfair dismissal claim and a U.S. age discrimination charge, regardless of any choice-of-law provision in her employment contract and *even if the tech company's human resources department categorized her as "local hire,"* not an expat. Damages might (perhaps) get offset, but the French and American claims are independent causes of action alleging completely separate wrongs. This is not just theoretical: multinationals have been defending these double-barreled, two-country claims for years.
- *Laws beyond discrimination*: The extraterritorial reach of U.S. employment law is mostly confined to *discrimination* law claims. No U.S. law reaches abroad unless statutory text clearly says it does. *Morrison v. Aust. Nat'l Bank*,[9] *EEOC v. Aramco*.[10] U.S. employment laws other than discrimination prohibitions generally do not reach abroad, although quirky fact scenarios occasionally (but rarely) arise in the international context in which employees working overseas allege their employers, stateside, made employment decisions with ramifications felt abroad.[11]

- *UK*: A UK citizen working outside the UK for a UK employer is almost always subject to our general rule and cannot invoke UK statutory protections. UK employment statutes tend only to cover employment on UK soil; in fact, even a cross-jurisdictional employment contract that expressly calls for "English law" to apply in some workplace outside England will not necessarily export UK employment statutes, because that clause itself should be governed by the English common law of contracts under which UK employment statutes cover only employment physically within the UK. *Cf. Ravat v. Halliburton* [2012] UKSC 1, at ¶32.[12] English and UK case law, though, have carved out a handful of narrow exceptions under which UK employment statutes reach enclaves of Britons working abroad who directly service UK domestic entities, such as British foreign correspondents writing for London newspapers and Britons stationed in foreign outposts like UK embassies or military bases.[13]

In a somewhat surprising 2012 ruling, *Ravat v. Halliburton*, *supra,* the UK Supreme Court extended this rule to reach a "commuter or rotational" employee of a Scottish entity seconded to a German affiliate and working "for 28 consecutive days in Libya, followed by 28 consecutive days at home in Preston[,] in effect job sharing."

- *Venezuela and Brazil*: Article 78 of the Venezuelan labor code extends Venezuelan employment law outside Venezuela to protect Venezuelan expats hired in Venezuela and now working abroad. Similarly, Brazilian law 7.062/82, article 3(II) extends Brazilian labor protection laws extraterritorially to protect Brazilians working abroad, where Brazilian law is more favorable than host country rules. Brazilian courts aggressively enforce this. In *Elizeu Alves Correa v. Contrutopic Contrutora Ltda. et al.*, case # 02541-69.2010.503.0091 (5/16/11),[14] a Brazilian who had worked as a mason in Angola won overtime pay, severance pay and other benefits due under *Brazilian* law. In *Mauricio da Silva vs. Construtopic Construtora Ltda. et al.,* case # 01006-2011-091-03-00-0 RO (11/17/11),[15] the Brazilian Appellate Labor Court, Third Region, awarded "moral damages" under Brazilian law to a Brazilian who had been assigned excessive work hours on a job in Angola—even though he had properly been paid overtime.

- *Emigration laws*: All countries regulate *immigration*. In addition, a handful of nations that export labor to the world impose *emigration* restrictions on overseas employers that recruit local citizens to go off and work abroad, and some countries impose restrictions on local employers "seconding" locals on overseas assignments. These emigration protections laws tend not to extend all home country employment protection laws extraterritorially (as, for example, Venezuelan and Brazilian law do). Rather, these emigration protections tend to impose tailored rules on those foreign employers that lure, recruit and hire locals by requiring certain basic protections for emigrants, or else they impose specific protections for outbound "secondees." For example, the Philippines heavily regulates foreign employers recruiting locals to go work abroad, requiring registrations and permits from two separate Philippine agencies and requiring the parties execute approved form employment agreements. Liberia requires a license from the Liberian Ministry of Labor to recruit locals. Ghana and Mozambique require paying secondees' moving and repatriation expenses, including for families. Ghana also requires employers of Ghanaian secondees dispatched abroad to contribute to the Ghanaian social security system, at least under some circumstances. Guinea requires both social security and tax withholdings paid on behalf of Guinean secondees now working abroad.

- *"Hibernating" territorial employment contracts*: French statutory employment law does not reach abroad. *See* French Supreme Court case no. 10-28.537 (Feb. 2012).[16] But the French have a very territorial view of written *employment contracts.* When a French expat works outside France for a French-controlled employer under a "French employment contract"—even a "French contract" temporarily superseded by a local host country contract that forces the underlying "French contract" to "hibernate"—then French employment laws likely follow, at least upon termination. The theory is that the underlying "French contract" springs back to life when the expat assignment ends or the employee gets fired, somehow imposing French law on the dissolution of the employment relationship even though the employee's most recent place of employment lay outside France. Conceptually, the "Frenchness" of the underlying employment contract itself imposes French termination law abroad as if via a French choice-of-law clause—indeed, often the "hibernating" contract will expressly contain a choice-of-French-law clause. Of course, the mandatory application of local law means local employment protection laws apply simultaneously, bedeviling the employer.

This analysis is not unique to France; other continental European and perhaps Latin American jurisdictions share this territorial view of employment contracts. A multinational in these countries expatriating an employee and trying to reduce its legal exposure should consider terminating the underlying home country contract, rather than letting it "hibernate" and later "spring back to life."

4. Employment-context choice-of-law clauses: "Hibernating" employment agreements in effect impose a choice-of-law selection in a cross-border employment contract. We have already seen that, outside a handful of exceptional countries, a choice-of-law clause in a cross-border employment agreement rarely has the power to divest the mandatory application of host-country employment laws. But a choice-of-law clause nevertheless has vital *ripple effects* on cross-border employment in many scenarios. This clause often backfires on the very employer that drafts and inserts it into international employment agreements. The problem with an employment-context choice-of-law clause is that it implicates tougher employment laws of the selected jurisdiction without blocking the mandatory application of tougher employment protection laws ("mandatory rules") which apply by force of public policy in the host jurisdiction. Both sets of laws end up protecting the employee, who gets to "cherry pick" whichever rules offer better protections. The multinational employer now has to comply with two sets of employment protection laws, rather than just one. This is why a choice-of-home-country-law clause can backfire and *restrict* employer flexibility: The employee gets the best of both worlds while the employer suffers the worst of both worlds. Indeed, where a choice-of-law clause pulls in an additional set of employee protection laws that otherwise would not have reached the employee, the employer often ends up arguing later that the selected jurisdiction's law does not itself reach abroad *even notwithstanding* the choice-of-law clause, because the selected jurisdiction's law has no extraterritorial reach. *See, e.g., Gravquick A/S v. Trimble Nav. Int'l*;[17] *Wright v. Adventures Rolling Cross Country*.[18] The employer in effect has to impeach its own choice-of-law clause. *See, e.g., Wright, supra* (American employer argues clause in its own cross-border employment agreement saying "you are considered to be a California resident, subject to California's tax laws and regulations" is *not* a California choice-of-employment-law clause).

Another drawback to choice-of-foreign-law clauses in employment agreements is that these provisions needlessly complicate employment litigation and impose significant additional costs. When disputes implicating choice-of-foreign-law clauses land in local employment tribunals, local judges inevitably wrestle with complex proof-of-foreign-law issues (often involving expensive expert testimony and translations) before coming to the usual conclusion that local employee protection laws apply, anyway, by force of public policy.

But even given the drawbacks to choice-of-foreign-law clauses in employment arrangements, these clauses remain stubbornly common. Multinationals like them. Presumably, at least in some exceptional contexts, a choice-of-foreign-law clause in an expat arrangement might be a wise strategy. So let us examine five possibly exceptional situations often claimed to render a choice-of-foreign-law clause advantageous to an employer of border-crossing employees: (a) Europe's Rome I regulation (b) Global Employment Companies and non-mandatory benefits (c) restrictive covenants (d) forum selection clauses and (e) the "trick-the-expat" strategy.

a. Europe's Rome I Regulation: European Union member states are subject to a choice-of-law in contracts regime called the Rome I Regulation, which (per Rome I Regulation article 24) "replaces" the earlier 1980 Rome Convention. For some reason many European employment lawyers persist in talking about the Rome regime (Rome I and its predecessor Rome Convention) as if it somehow lets expat choice-of-law clauses block the mandatory application of host-country employment law. A March 2005 article by German lawyers, for example, says the Rome regime leaves European workers "free to agree upon the law of the country that shall be applicable to the employment contract" and an October 2003 article by French lawyers characterizes the Rome regime as leaving "the parties to an employment contract…free to choose the governing law." Indeed, when the Rome I regulation replaced the predecessor Rome Convention, some European lawyers argued that Rome I more effectively empowers choice-of-law clauses to block the mandatory application of host country employment protection laws.

But this analysis is wrong. The texts of both the original 1980 Rome Convention and now the Rome I Regulation affirm our general rule that, in an employment or other contract, the "overriding mandatory provisions of the law of the forum" apply notwithstanding any choice-of-law clause. Rome I defines "overriding mandatory provisions" as laws "the respect for which is regarded as crucial by a country for safeguarding its public interests." Rome I Reg. at art. 9(2)(1); *cf.* art. 21[19] (choice-of-law clause cannot override any rule "manifestly incompatible" with "public policy" of "forum" court). The Rome I Regulation mandates that a choice-of-law clause in an employment agreement cannot "depriv[e] the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable." Rome I art. 8(1). Rome I also declares that a choice-of-law clause cannot override the law of any "country" "more closely connected with" the "circumstances [of employment] as a whole." Rome I arts. 8(1), (4). These Rome I Regulation provisions merely restate firmly entrenched principles of the predecessor Rome Convention at its articles 3(3), 6, 7.

In short, under the Rome regime, terminated expats in Europe—even Americans and other non-European expats (*see* Rome I Reg. art. 2)—lucky enough to have a choice-of-foreign-law clause in their agreements follow our usual rule: They get to select the law more favorable to them, either their selected (chosen) country *or* the law of the country "in which the employee habitually carries out

his work" (Rome I Reg. art. 8(2))—or both. Labor courts in Europe decide cases consistent with this analysis all the time. For example, French appeals courts in Grenoble and Paris have invalidated choice-of-law clauses calling for Texas and German law by invoking the Rome Convention to impose the French employment code on expats working in France.

b. Global employment companies and non-mandatory benefits: We have seen that host-country employee protection laws—laws relating to pay rate, overtime, payroll, mandatory benefits, hours, rest periods, vacation/holidays, health/safety, labor unions/collective representation, discrimination/harassment/"moral" abuse, employee-versus-contractor classification, restrictive covenant/non-compete/trade secret rules and dismissals (firing procedure, notice, severance pay, releases)—tend to be "mandatory rules" applicable by force of local public policy. Parties cannot contracted around or opt out of them. The other side of this coin is that an expat's contractual choice-of-foreign-law might succeed in blocking host country law if it is confined to those human resources laws that *steer clear* of employee protection statutes and "mandatory rules."

Indeed, parties to a cross-border employment relationship can effectively select home-country laws that govern *discretionary* human resources topics outside the realm of local "mandatory rules." In fact, this principle grounds "global employment companies" so-called GECs, multinational entities set up to employ a corps of a company's career expatriates working worldwide, and this principle explains why choice-of-home-country-law clauses are common in international compensation and equity award agreements.

Yet only a small subset of employment laws are discretionary, steering clear of mandatory employment protections. The employment law topics most likely to be discretionary and susceptible to a choice-of-foreign-law clause tend to be equity plan rules, executive compensation doctrines, and some (but not all) regulation of non-mandatory benefits, like rules on voluntary pensions, certain tax and social security totalization treaties, and some, but not all, rules applicable to bonuses.

While selecting the law of a host or headquarters country can be vital in designing a GEC or a cross-border compensation or equity agreement for highly compensated expats, remember that this exception is limited to the discretionary employment law topics that steer clear of "mandatory rules." Even a choice-of-law clause confined to a high-ranking executive's bonus plan, equity award agreement or compensation arrangement will not divest host country "mandatory rules." When multinationals get this wrong, they lose in court. *Duarte* and *Samengo-Turner*,[20] two landmark UK decisions, involved whether a U.S. state choice-of-law clause (one case involved a New York law clause and the other a Maryland law clause) in executive compensation arrangements requires a UK court to defer to U.S. state law in interpreting a *restrictive covenant* enforced in the UK. The facts in each case involved some twists, but at the end of the day both UK courts predictably ruled that UK, not U.S. state, public policy and "mandatory rules" control restrictive covenants enforced on UK soil—even where the employer packs the restrictive covenant into a complex compensation or equity award.

c. Restrictive covenants: The *Duarte* and *Samengo-Turner* cases highlight the special challenges of restrictive covenants (non-competes, non-solicits, confidentiality and employee inventions commitments) in cross-border employment. Laws that enforce restrictive covenants tend to be "mandatory rules" that apply by force of public policy, and so the restrictive-covenant-interpretation rules of a place of employment or forum court tend to apply by operation of law. For example, a California court is highly unlikely to respect a New York or English choice-of-law clause to enforce an employment-context non-compete against a defendant whose place of employment is California. With post-term restrictive covenants, the practical enforcement issue usually comes down to complying with the mandatory restrictive covenant rules and public policy of the *jurisdiction where the employer seeks enforcement*. This often ends up being the place where the employee went off to breach the covenant, and may be neither the home nor the host country.

d. Forum selection clauses: We have been addressing choice-of-*law* clauses that invoke a *legal* regime other than that of the forum country. A separate but similar issue is choice-of-*forum* clauses that seek to require parties to litigate any disputes before some selected forum—arbitration or a foreign jurisdiction's courts. The challenge with employment-context forum selection clauses is that outside the U.S., special-jurisdiction labor courts tend to enjoy mandatory jurisdiction over employees who work locally (just as, within the U.S., special-jurisdiction workers' compensation agencies, unemployment compensation agencies, equal employment agencies and the NLRB tend to enjoy mandatory jurisdiction that choice-of-forum clauses cannot block). In London today, many American financial services expats may be working under arbitration clauses of dubious enforceability. Outside the U.S., clauses in expat agreements and compensation/equity plans purporting to select some forum other than local host-country labor tribunals rarely block the jurisdiction of host-country labor judges—unless, perhaps, the parties sign a forum selection clause *after* a dispute arises or unless the host country is one of a handful of jurisdictions, like Malaysia, with statutes authorizing employment arbitration.

e. The "trick the expat" strategy: An expat consultant at a major HR consulting firm used to recommend inserting into Americans' expat assignment agreements a U.S. choice-of-law and choice-of-forum clause, *even though*

those clauses are extremely unlikely to block local host-country employee protection laws and labor court jurisdiction. His theory: Some American expats, particularly those posted into poor countries, may be so inherently skeptical of overseas justice that a choice-of-U.S.-law (or forum) clause might dissuade at least less-sophisticated American expats from asserting inalienable legal rights granted by their new host country. This consultant predicted that American expats might believe a U.S. choice-of-law/forum law clause means what it says, that any dispute must be resolved under the employer-friendly regime of U.S. employment-at-will. A choice-of-law clause might blind at least a less-sophisticated expat to the fact that "mandatory rules" of the current place of employment grant unwaivable substantive and procedural rights better (for the expat) than what American law provides.

But these days, expats are increasingly sophisticated and increasingly likely to research their rights on the internet. They are increasingly likely, therefore, to figure out that choice-of-law and choice-of-forum clauses in the cross-border employment context are largely powerless to block host-country "mandatory rights." Expats posted to rich countries are particularly likely to figure out that host country law guarantees them employee-friendly labor rights.

This said, though, in some cases a home-country law or forum selection clause is said somehow to act as an acknowledgment between an expat and an employer that their mutual intent, even if non-binding, is to resolve disputes under home-country rules. Some expatriates might accept that—even if the law does not force them to.

Conclusion

One question comes up time after time in administering international human resources: *Whose laws reach border-crossing employees?* The general rule is that because employee protection laws are "mandatory rules" applicable by force of public policy, host country employment law—the law of the current place of employment—tends to apply by operation of law. In addition—but not instead—home country laws sometimes *also* apply, such as where a home country statute has "extraterritorial reach" or where the parties contractually selected their home country law. While the law of the current place of employment tends to apply regardless of most other factors, the issues here are nuanced, particularly when the parties signed a choice-of-foreign-law clause. Analyze border-crossing choice-of-law questions in the employment context strategically. Never *over*estimate the power of an employment-context choice-of-law clause.

Endnotes

1. P. Frost and A. Harrison, "Company Uniform," *The Lawyer* (London), December 11, 2006 at 21.
2. 667 F. 3d 1318 (9th Cir. 2012).
3. French Supreme Court decision 10-28.563 (Feb. 2012).
4. Europe Rome I Regulation, EU Reg. 593/2008/EC (6/17/08) at arts. 8, 21.
5. *Cf.* EU Posted Workers Directive, 96/71/EC, at art. 1 (focusing on place "where the work is carried out"); U.S. Dep't of Labor Wage & Hr. Div. *Field Operations Handbook* (5/16/02) at §10e01(c) (U.S. Fair Labor Standards Act covers guest workers after 72 hours in U.S.).
6. 499 U.S. 244 (1991).
7. Pub.L. 102-166.
8. Cf. 29 USC §§623(h) (ADEA abroad); 42 USC §§2000e-1(a),(c), 2000e-5(f)(3) (Title VII abroad); 42 USC §§12111(4), 12112(c) (ADA abroad).
9. 130 S.Ct. 2869 (2010).
10. *Supra* note 6.
11. E.g., *Carnero v. Boston Scientific*, 433 F.3d 1 (1st Cir.), *cert. den*, 548 U.S. 906 (2006) (Sarbanes-Oxley [SOX] whistleblower protections do not reach abroad); *O'Mahoney v. Accenture Ltd*., 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (SOX whistleblower in France states a retaliation claim where alleged retaliation occurred stateside); *Cruz v. Chesapeake Shipping*, 932 F. 2d 218 (3rd Cir. 1991) (U.S. Fair Labor Standards Act [FLSA] does not extend abroad); *Wright v. Adventures Rolling Cross Country*, case no. C-12-0983 EMC., U.S. D.C. N.D. Cal., Order of 5/3/12 (FLSA and California wage/hour law do not reach abroad); U.S. Dep't of Labor Wage & Hr. Div. Field Operations Handbook, supra, at §10e02 (FLSA does not reach U.S.-based workers working an entire workweek or more abroad).
12. *Ravat v. Halliburton*, [2012] UKSC 1, at ¶32.
13. Cf. *Duncombe v. Sec'y of State for Children* (No. 2), [2011] UKSC 36/ ICR 1312; *Bleuse v. MBT Transport Ltd*, [2007] UK EAT/0999/07 & EAT /0632/07; *Lawson v. Serco*, [2006] UKHL 3/ICR 250; *Saggar v. Ministry of Defence*, [2005] EWCA Civ. 4133; Louise Merrett, *The Extra-Territorial Reach of [UK] Employment Legislation*, 39 INDUSTRIAL L.J. 353 (2010).
14. *Elizeu Alves Correa v. Contrutopic Contrutora Ltda. et al.*, case # 02541-69.2010.503.0091 (5/16/11).
15. *Mauricio da Silva vs. Construtopic Construtora Ltda. et al.*, case # 01006-2011-091-03-00-0 RO (11/17/11).
16. French Supreme Court case no. 10-28.537 (Feb. 2012).
17. 323 F.3d 1219,1223 (9th Cir. 2003).
18. No.. C-12-0983 EMC., U.S. D.C. N.D. Cal., Order of 5/3/12.
19. Rome I Reg. at art. 9(2)(1); *cf.* art. 21.
20. See, e.g., *Duarte v. Black and Decker* [2007] EWHC 2720 (QB)(UK) (1/07); *Samengo-Turner v. Marsh & McLennan*, [2007] EWCA Civ. 723 (UK)(7/07); cf. *Ruiz v. Affinity Logistics*, 667 F.3d 1318 (9th Cir. 2012).

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Using a Judicial Settlement Conference Process Outside of the Court System to Resolve Your Employment Dispute

By Sandra K. Partridge and Jeffrey T. Zaino

Many court systems in the United States have some type of judicial settlement conference program that can assist with resolving employment disputes. Judicial settlement conferences are intended to be an informal process in which a sitting or retired judge facilitates the parties to reach a mutually acceptable resolution of their dispute. This process can be positive, allowing parties to avoid costly and lengthy trials. Judicial settlement conferences are also available to parties whether or not they are litigating their dispute. Alternative dispute resolution service providers, like the American Arbitration Association, JAMS, and Judicial Arbiter Group, Inc., also offer similar type settlement conferences using retired judges. This article will explore the benefits of using a judicial settlement conference to resolve employment disputes outside of the court system.

It is common for parties to an employment dispute first to attempt some method of facilitated negotiation like mediation to resolve the dispute. This is typically the first step in many employer promulgated dispute resolution plans or individually negotiated employment contracts. Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute, providing the opportunity for parties to reach a mutually satisfactory settlement.

Some parties, however, want a higher degree of feedback from their neutral than what they would receive from a mediator. They want to participate in a dispute resolution process that mirrors the process and shares the goals and objectives of judicial settlement conferences that exist in our court systems. These parties believe that a candid evaluation or "reality check" of the strengths, weaknesses and value of their claims provided by a respected, retired judge will contribute to faster, less expensive resolution of their dispute. There are no risks to the parties. To the contrary, an unsuccessful mediation process where parties walk away without having gained a better understanding of their case can further divide the parties and make them feel that they wasted both time and money.

An alternative dispute resolution form of judicial settlement conference provides employers and employees with an ADR process historically utilized by courts that works well and with which parties and their representatives have confidence and comfort. This service offers faster, more economical resolution of disputes by allowing parties to set their own schedule, select their own neutral and respected retired judge and devise their own remedy. On the other hand, many court-sponsored judicial settlement conference programs are mandatory and lack adequate resources to provide the efficient and effective process seen in the private sector.

ADR providers utilize specially selected panels of retired judges who have heard hundreds of cases while on the bench. They have identified and selected judges who are former federal or state trial, appellate and high court judges who have heard a wide variety of cases and have been selected for their skill at conducting settlement conferences. These retired judges' experience conducting court settlement conferences provides the skill to work with parties toward achieving settlement by conducting a fair and neutral airing of the issues.

While judicial settlement conference judges assist the parties in reaching a settlement, unlike arbitrators they do not have the authority to make a binding decision or award. Parties maintain their self-determination in accepting or rejecting the opinions provided or any settlement or resolution proposal. Parties and their representative(s) understand that the judge will comment on the strength or weakness of a case, the relative value of a case, or the likely outcome of subsequent proceedings where the judge deems appropriate. The parties may select whether this evaluative commentary is communicated orally or in writing and in open session or confined to private meeting with the parties during the judicial settlement conference. The evaluative commentary is different from a fact-finding report that summarizes in detail all facts found during a fact-finding investigation and includes credibility determinations.

If the parties want to adopt a judicial settlement conference as a part of their contractual dispute settlement process, the following judicial settlement conference clause can be inserted into the employment contract in conjunction with standard arbitration provision:

> If a dispute arises out of or relates to this contract, or the breach thereof, and the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by Judicial Settlement Conference administered by the [name of service provider] under its Judicial Settlement

> Conference Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

It is recommended, however, if a judicial settlement conference is triggered by an employer promulgated plan (a plan that all employees sign as a condition of employment), the employer should bear the majority of the administrative costs and judge's per diem.

If the parties choose to use a judicial settlement conference to resolve an existing dispute, they can enter into the following submission:

> The parties hereby submit the following dispute to Judicial Settlement Conference administered by the [name of service provider] under its Judicial Settlement Conference Procedures. (The clause may also provide for the qualifications of the Judicial Settlement Conference Judge, method of payment, locale of meetings, whether the evaluations by the Judicial Settlement Conference Judge are communicated orally or in writing, in private or joint sessions, and any other item of concern to the parties.).

While a judicial settlement conference is not recommended for all employment disputes, it is an option parties should consider when there is a desire to settle but the expectations of what should be a fair resolution are too far apart, an expert retired judge can provide that badly needed "reality check" that could lead to a settlement.

Sandra K. Partridge is the Vice President of the Commercial Division of the American Arbitration Association in New York. She is responsible for business development and relationship marketing of arbitration and mediation services, recruitment and training of arbitrators and mediators, conferences and educational outreach programs for the New York/New England territory.

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The Section would also like to thank the Fall Meeting keynote speakers, Daniel L. Feldman and Gerald Benjamin, who graciously shared with us some insider views of life in New York's capitol. Dan and Gerald are the authors of *Tales from the Sausage Factory* (available online and in book stores), which details New York's unique legislative process.

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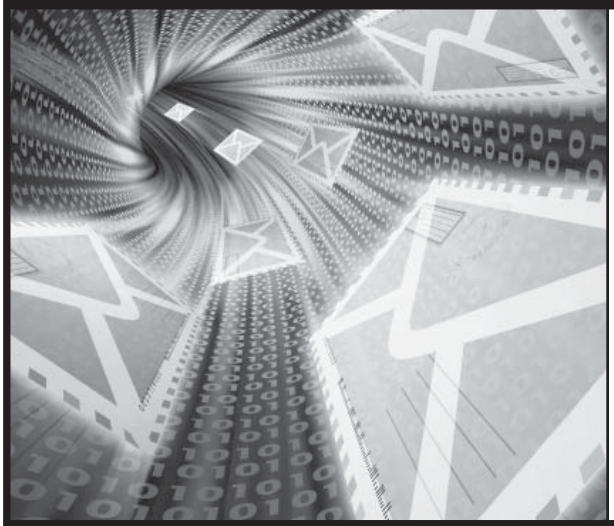

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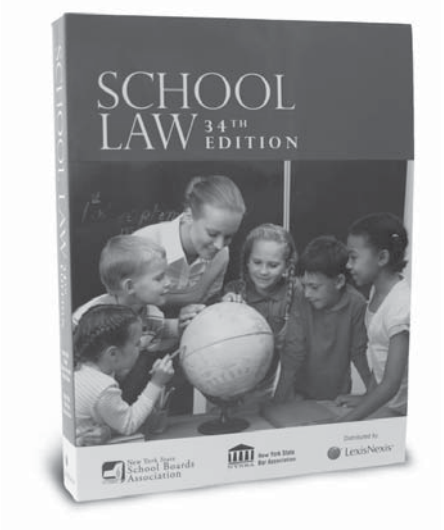

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