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L&E Newsletter

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A Message from the Chair

It is with a great deal of excitement that I begin my tenure as Chair of our Section. I look back over the last several years and see the accomplishments of the Chairs, **Rosemary A. Townley, James R. Sandner, Bruce R. Millman, Michael T. Harren, Margery F. Gootnick** and **Louis P. DiLorenzo**, and it is intimidating. Our Chair Emeritus, **Frank A. Nemia**, still invests us with his wisdom and can eloquently describe the changes he has seen. Our membership has skyrocketed, our committees are very active, the CLE programs are without equal, the Employment Law Litigation Institute has become a bi-annual event, we have diversified our leadership and collegial relationships between colleagues have flourished. The credit certainly goes to these people, many of whom have remained active during a period of hardship, keeping the Section on track.

The exceptional quality of our Executive Committee and Section members is not only reflected by their support of each other professionally. On a personal level, they are cognizant of the difficulties each of us experience and are always there, offering their friendship and assistance. In the last few years, members of our Section, including myself when my mother recently passed away, have gone through some of the saddest of life's experiences. Not only do the flowers, fruit, cards and letters come, joined by the e-mails and phone calls, but, too, the offers of assistance with the legal work, court appearances, and depositions abound. All of us who have received this bounty thank our colleagues for their gracious efforts.

The benefits of serving as a member of the Labor & Employment Law Section certainly include the educational benefits, the influence we exercise in our profession, and the camaraderie we enjoy. Few in the past have spoken of the kinship that develops from our consistent association at meetings, programs and committee work. For this, too, I am most grateful.

For many years, our Section has been in the forefront of legal developments by responding to and addressing changes in the practice of labor and employment law, whether by case law, statute, regulation or local court rule. As a result, Section members advise their clients to institute changes in processes and procedures and to analyze again the strengths and weaknesses in their clients' cases in this new light. The neutrals, too, must reassess their interpretations of the evidence before them. This tradition, at least for me, has always been a great aid in my practice as an advocate, mediator and arbitrator.

While the foregoing description of some of our activities is important, we should consider expanding

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our role. Taking a more proactive approach, we can identify areas in our practice that could be improved and seek these improvements through our activities.

Our members are some of the most enlightened and brilliant practitioners in our field. Together, on our Executive Committee alone, we have approximately 1,000 years of experience. Is the New York State Legislature or the United States Congress more knowledgeable than we are about what works in the workplace? I think not. We must use our collective minds, experience, knowledge and our sense of fairness and duty, to influence decisionmakers of the need for improvement. I will, therefore, propose to our Executive Committee that we form an *ad hoc* committee to consider actions that we can take for the advancement and benefit of the practice of Labor & Employment Law. In this regard, please join me in thinking about what we can do so that we can discuss it in the near future.

This is a new millennium, with a new executive, administration and Congress in Washington, from which we can expect changes in the composition and operation of various federal agencies, not to mention the United States Supreme Court. In New York, an election is upon us and it should prove interesting to see its impact on our practices. Our Section can be ahead of the curve by playing a positive role in influencing the directions our society will take.

I look forward to working with you and hope for the involvement of a broad and diverse cross-section of our membership. Each of us can make a contribution.

Linda Bartlett

From the Editor

This edition marks the end of Judith LaManna's outstanding stewardship of this publication and the beginning of my term as Editor. Marguerite Yourcenar wrote, "A young musician plays scales in his room and only bores his family. A beginning writer, on the other hand . . . sometimes gets into print." A beginning editor's debut is equally public.

Since I didn't know anything about editing any publication until a few weeks ago, I hope you will bear with me as I learn. In this edition, there are substantive articles about labor and employment law in the public and private sectors, a message from the Chair, the "PERB Update," "Changes in Brief," an announcement about the Fall 2001 Section Meeting and photos of last January's Annual Meeting. In future editions, more of your old favorites—such as the "Legislative Update" and ethics guidelines—will return.

The Section has a commitment to balancing the content of this *Newsletter* between upstate and downstate, public and private, and labor and employment. I intend to keep that commitment. I am curious to know what the members of the Section want from this *Newsletter*, whether you read it, what you want to read in it, what kinds of new features might appeal to you. I would also like to encourage you to contribute articles. Please take some time to call me at (718) 428-8369 or e-mail me at mceneaneyj@aol.com or say hello at the Fall Meeting.

Beginning this year, the Section will also publish an online journal that will appear on the Association's Web site. Edited by Prof. David Gregory, of St. John's University School of Law, it will run longer, more scholarly articles, some written by students from law schools throughout the state. The Association is now establishing a policy and negotiating terms for online publications. As soon we know, we will tell you when the online journal will begin, how you can submit articles and how it can be accessed.

I cannot end without expressing my gratitude to Judith for her invaluable, generous and good-humored guidance, including the 12-page publishing manual she wrote. Great thanks, also, to Dan McMahon, Lyn Curtis and Wendy Pike of the Bar Association Publications Department for helping me through my first edition. Finally, thank you to Linda Bartlett and the Executive Committee for trusting me to do this job.

I hope that "the God of Fair Beginnings hath prospered here my hand"—and keep those cards and letters coming, folks.

Janet McEneaney

Handle Temps With Care: Unionization of Temporary Workers with an Employer's Regular Workforce Is Now Possible

By Elizabeth A. Alcorn

I. Introduction

The National Labor Relations Board (the "Board" or the "NLRB") issued a surprising decision on August 25, 2000, redefining the legal framework concerning the unionization of temporary and other contingent workers. In two consolidated cases, *M.B. Sturgis, Inc.* (NLRB Case No. 14-RC-11572) and *Jeffboat Division* (NLRB Case No. 9-UC-406) (collectively, "*Sturgis*"),[1] the Board made it possible for unions to include temporary workers—supplied by an agency—in bargaining units consisting of an employer's regular employees.

"The National Labor Relations Board . . . issued a surprising decision on August 25, 2000, redefining the legal framework concerning the unionization of temporary and other contingent workers."

In *Sturgis*, the Board reversed its policy concerning the organization of temporary agency workers. The Board held that employees who are "jointly employed" by the "supplier" employer (i.e., the agency) and the "user" employer (i.e., the contractor) may be made part of a single bargaining unit. In today's workplaces, temporary and regular employees frequently work alongside one another, often under common working conditions and terms provided by the user employer. However, the supplier employer generally hires the temporary employees, and sets their wages and benefits. In *Sturgis*, the Board held that both employers could be compelled to "negotiate with the union over their jointly employed employees to the extent that they each control their conditions of employment."[2]

Taken separately, the *M.B. Sturgis, Inc.* decision presents serious election strategy concerns where a union-free employer faces an initial union organizing drive seeking to combine its regular workforce with the temporary staff. The *Jeffboat Division* case enables unions to petition the Board to include jointly employed temporary workers in existing bargaining units without the consent of the employers, or even of the temporary workers the union seeks to organize.

II. Prior Board Case Law

Before *Sturgis*, the Board required that both the user and supplier employers consent to bargain with a union that sought to represent a unit comprised of jointly employed regular and temporary employees. Joint employer status arises where the user and supplier employers "share or co-determine matters governing essential terms and conditions of employment."[3] The Board requires that each employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction over the employees employed by the other employer."[4]

With regard to the composition of bargaining units, the Board consistently held that employer consent was necessary. In *Greenhoot, Inc.*,[5] the Board refused to recognize as appropriate a bargaining unit comprised of one common employer (a building maintenance company) and 14 separate building owners who individually contracted with the maintenance company and shared with the maintenance contractor the employer responsibilities at their individual buildings. Although each building owner and the maintenance company were joint employers at each building individually (making the maintenance workers at each building an appropriate unit limited to that building), the building owners had not agreed among themselves to form a single, multiple-site bargaining unit or delegate to the building maintenance company the authority to bind all employers collectively. Thus, without consent, the Board disallowed this proposed "multi-employer" bargaining unit.

In 1990, the Board extended *Greenhoot* by refusing to certify as appropriate a single-site bargaining unit comprised of both temporary and regular employees. The Board deemed this proposed unit, comprised of both leased and directly employed professionals, to be a multi-employer bargaining unit that could not be formed without the consent of both the user and supplier employers.[6] As a practical matter, *Lee Hospital* became an insurmountable barrier to the inclusion of temporary employees in an established unit of regular workers, because either the user or supplier employer alone could veto the temporary workers' inclusion in the bargaining unit.

Sturgis specifically overruled *Lee Hospital* and limited *Greenhoot*. Now, the objection of neither the user employer nor the supplier employer may bar the combination of regular and temporary workers in one unit. Furthermore, in a unionized setting, temporary employees sought to be included in a bargaining unit by the established union may not be able to choose whether they wish to become unionized.

III. The *M.B. Sturgis* Decision—The Union-Free Setting

M.B. Sturgis, Inc. had approximately 35 full-time employees and contracted out for 10 to 15 temporary employees, supplied through a temporary agency. Both groups of employees performed the same work. In 1995, the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 108 filed a petition to represent Sturgis' full-time employees. The company, perhaps trying to dilute the union's strength, argued that the voting unit should include the temporary employees. The Regional Director, citing *Lee Hospital*, instead ruled the temporary employees could not be included in the unit without the consent of the temporary agency. The Regional Director directed an election among the full-time employees only, and the company appealed.

"[I]f the temporary employees are performing the same work, share the same facilities, work the same hours, and are paid the same wages as the regular employees, then more likely than not the Board will find a community of interests and will grant representational rights."

IV. The *Jeffboat Division* Case—The Unionized Setting

This case, consolidated with the *M.B. Sturgis, Inc.* case, involved a unionized employer, Jeffboat Division. The International Brotherhood of Teamsters, Local 89 represented the company's 600 production and maintenance employees. At the time, the company also used 30 welders and steamfitters who were recruited, paid, and supplied by a temporary agency. Jeffboat managers and supervisors directed the work of the temporary employees, and had the authority to discipline them. The temporary employees were not unionized.

In 1995, Local 89 filed a unit clarification petition with the Board, asserting the temporary employees constituted an "accretion" to the existing production and maintenance unit at the shipyard. Under "accretion," a smaller group of nonunion employees is merged into a larger group of unionized employees without holding an election for the employees. Relying on *Lee Hospital*, the Regional Director dismissed Local 89's petition because the temporary agency had not consented to multi-employer bargaining. The union appealed the decision to the Board, contending that consent was not required because the unit is not a "true" multi-employer unit.

V. The Board's Analysis in *Sturgis*

The Board in *Sturgis* applied a new two-part analysis that did not depend upon the consent of the user and the supplier companies. First, the Board determined that the user and supplier employers in each case were joint employers under the established principles described above.[7]

The Board went on in *Sturgis* to distinguish what it called the "true" multi-employer context from a joint employer situation in which two employers maintain employees at the same job site. The Board simplistically found that temporary employees who supplement an existing workforce and are jointly directed and supervised share a common employer, i.e., the employer who employs regular employees and who uses temporary employees. Consequently, the Board found that no multi-employer bargaining was present and that the employer consent requirements applicable in the multi-employer bargaining context do not apply in the joint employer context.

The second factor the Board then examined is whether the temporary workers shared a "community of interests" with the user employer's regular workers. "Community of interest" means that the two groups of employees share common wages, hours, and other terms and conditions of employment. Thus, if the temporary employees are performing the same work, share the same facilities, work the same hours, and are paid the same wages as the regular employees, then more likely than not the Board will find a community of interests and will grant representational rights.

However, the Board did not apply the "community of interest" analysis to the cases before it. Although each case was more than five years old, the Board remanded them to the respective Regional Directors to decide, based on the Board's new analysis, whether both groups of employees in *M.B. Sturgis, Inc.* and *Jeffboat Division* shared a sufficient community of interest, and whether an accretion should be found in *Jeffboat Division*. After these determinations are rendered in each Region, these decisions will then be subject to appeal to the Board and, ultimately, to the federal Courts of Appeals.

VI. Board Precedent After *Sturgis*

Although there have not, as yet, been many Board decisions interpreting *Sturgis*, those decisions rendered so far illustrate the complexities in applying *Sturgis*; and the many unanswered questions concerning the effect *Sturgis* will have. In addition, the different contexts in which issues related to *Sturgis* may arise, counsels caution in predicting precisely how *Sturgis* may be applied in these various settings.

Perhaps the latest word on the subject is the Board's decision in *Interstate Warehousing of Ohio, LLC*.[8] In this case, a divided Board (Chairman Truesdale and Member Walsh, for the majority) denied the employer's request for review of the Regional Director's Decision And Direction Of Election in a case where the union sought to represent a unit of warehouse employees, including employees supplied by several different temporary agencies. However, in its petition, the union named only the "user" employer and sought to bargain only with that employer (not the temporary agencies).

"Although there have not, as yet, been many Board decisions interpreting Sturgis, *those decisions rendered so far illustrate the complexities in applying* Sturgis*; and the many unanswered questions concerning the effect* Sturgis *will have."*

The Board majority agreed with the Regional Director that the petitioned-for unit was appropriate; and that the temporary employees had a sufficient community of interest with the "user" employer's "regular" employees to be included in the same unit.[9] In addition, the employer did not dispute that since January 1, 2000, it had obtained all of its permanent employees by hiring from its temporary workers. Thus, according to the Board majority, the temporary workers "are akin to probationary employees whom the Board includes in units with employees with more permanent tenure."[10]

The majority further rejected dissenting Member Hurtgen's concerns about "bargaining difficulties" that might result from this situation.[11] In this regard, the majority stated that the issue of the employer's bargaining obligations was not currently before the Board; and cited prior NLRB cases to the effect that the Board would not be drawn into bargaining issues in a representation case.[12]

Finally, the NLRB majority rejected the argument that the union's failure to name the temporary agency employers in its petition was a fatal flaw. The majority opined that this would not affect the existence of a community of interest; or the appropriateness of an otherwise appropriate unit.[13] The majority also stated that this factor related only to the extent of the employer's bargaining obligations if the union were certified; and the absence of one of the joint employers at the bargaining table would not destroy the ability of the named employer to bargain effectively with its employees to the extent that it controlled their terms and conditions of employment.[14]

In *J.E. Higgins Lumber Co.*,[15] the majority (Chairman Truesdale and Member Liebman) granted a union's request for review of the Regional Director's Decision And Order clarifying the unit to exclude jointly-employed temporary workers. Member Hurtgen, although concurring in the majority's decision to remand the case to the Regional Director for further consideration in light of *Sturgis*, expressed concern about the Section 7 rights of temporary workers if they were accreted to an extant unit of the "user" employer's workers without a vote. Member Hurtgen expressed doubts that, in most cases, an overwhelming community of interest would exist between a user employer's employees and jointly-employed contingent workers; and, because of this and Section 7 considerations, he stated that he generally would not "force" contingent workers into a bargaining unit comprised of the user employer's employees.[16]

Of course, some of the "joint employer" issues discussed in *Sturgis* may be presented in other contexts as well.[17]

VII. Employer Preparation for Union Organizing of Temporary Workers

In light of the *Sturgis* decision, a principal means by which a user employer can avoid having temporary employees added to an existing or petitioned-for bargaining unit is to avoid being found to be a joint employer. That may be difficult to do; but some steps can be taken to increase the likelihood that joint employer status will not be found. The user employer can:

- Decline to take on the authority to assume responsibility for the setting of wages or benefits; or the hiring, firing, discipline, supervision, or direction of the temporary employees. The supplier employer should exercise such responsibilities over its temporary employees;
- Refrain from exercising direct control over the temporary workers—at a minimum, the user employer should consider having the supplier employer provide on-site supervision to the temporary workers;
- Audit its use of temporary workers: place time limits on the duration that temporary employees

work on-site to minimize any expectation of continued employment with the user employer;

- Ensure that the contract with the supplier employer, concerning the services provided by temporary workers and the business relationship itself, protects against joint employer status; and
- Prepare for increased union activity and organizational efforts.

Obviously, each situation is unique and will require a case-by-case assessment to try to decrease the possibility that the "user employer" will be found to be a joint employer with the "supplier employer."

Consequences For Union-Free Employers

In the event of a union organizing campaign, a union-free employer who contracts for temporary employees may now have no choice in whether those workers may be included in a voting unit. Given the way many employers use temporary workers, the temporary workers may be entitled to vote. It is likely that to tap this new source of potential members, unions will begin campaigning around the issues involving temporary workers; and will try to enmesh a larger part of the regular workforce in a costly organizing campaign. In this event, the user employer may be tied to the supplier employer for the duration of the organizing campaign, and perhaps beyond it. Moreover, terminating the contract with the temporary agency during active organizing would likely be considered an unfair labor practice, which could subject both companies to liability.

Under the *M.B. Sturgis, Inc.* decision, a company that desires to remain union-free will now face more challenges. The company will require a more detailed employee relations strategy, including working with legal counsel experienced with multi-employer bargaining issues. Some of the issues to consider include:

- How the company treats temporary workers. Will an internal audit reveal that the temporary agency and the company may be considered joint employers? Does it appear that a community of interest exists between the company's regular employees and the temporary workers?
- Temporary worker expectations. Has the company disabused the temporary workers of any reasonable expectation of continued employment? Has the company given the temporary workers a specific date for their services to end?
- How the company uses temporary agency services. Several types of temporary service arrangements are available. For example, a "temp to hire" arrangement—in which companies utilize temporary employment as a screening device and then offer regular employment to the temporary workers who meet required criteria—might be thought to decrease the company's exposure to a successful union drive.[18]
- The company's history and relationship with the temporary agency. If union organizing begins at the company, the two employers may have divergent views on addressing the situation. What happens if the temporary agency wants to approach the situation differently than the company does? How will the mechanics of joint bargaining with the temporary agency work?
- How will the cost of any Board litigation be divided between the company and the temporary agency?

Consequences for Unionized Employers

The most immediate impact of the *Jeffboat Division* decision will be on employers whose employees are currently represented by unions. If the union claims the temporary workers should be part of an existing bargaining unit, the union can file a unit clarification petition and request that the Board "accrete," or merge, the temporary workers into the unit, without the benefit of an election. The Board would simply apply a two-step analysis: 1) are the user and supplier companies joint employers, and 2) do the employees share a community of interest. If the Board finds both factors are present, then the user company would be forced to apply all the terms of the collective bargaining agreement to all of the temporary workers accreted to the bargaining unit. This could be a very expensive situation for both the user and supplier companies.

As with the considerations for non-union employers, the issues in this area for unionized employers are complex; and actions should not be taken without competent legal advice. In the unionized situation, the user employer should:

- Examine its company's use of temporary workers. Again, the joint employer issue is paramount: what is the probability that the company and the temporary agency will be considered joint employers? Does it appear likely that the company's regular workers and the temporary employees share a community of interest?
- Examine the company's collective bargaining agreement to analyze how the company can withstand a union effort to accrete temporary employees into the existing bargaining unit. Does the collective bargaining agreement address the use of temporary workers explicitly? Does the recogni-

tion clause provide any guidance? What has been the company's history of using temporary workers?

- Examine the company's relationship with the temporary agency. What happens if the temporary agency takes a different or even antagonistic position on the issue of accretion? What would be the mechanics of joint bargaining with the temporary agency?
- Consider who will pay for, or in what percentage the company and the temporary agency will divide, the cost of Board proceedings that may arise.

Conclusion

It is difficult to appreciate and predict the impact of the *Sturgis* decision on both user employers and supplier employers. For instance, the Board did not address such practical matters as the mechanics of bargaining as joint employers; and voter eligibility issues. Moreover, as a result of the Board's remand of the decisions to the respective Regions, the final application of this decision is still pending. However, all companies that use or supply temporary workers (and their labor counsel) should closely review this decision and its potential impact; and monitor future developments.

Endnotes

1. 331 N.L.R.B. No. 173, 2000 WL 1274024 (N.L.R.B.) (August 25, 2000).
2. *Sturgis*, 331 N.L.R.B. No. 173, 2000 WL 1274024 (N.L.R.B.) at *15.
3. *N.L.R.B. v. Browning Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982).
4. *International Transfer of Florida, Inc.*, 305 N.L.R.B. 150 (1991).
5. 205 N.L.R.B. 250 (1973).
6. *Lee Hospital*, 300 N.L.R.B. 947 (1990).
7. *See, e.g., International Transfer of Florida, Inc., supra.* (As a practical matter, the joint employer test is rather easily met in many cases, so that many user/supplier relationships would give rise to a joint employer relationship.).
8. 333 N.L.R.B. No. 83, 2001 WL 311008 (N.L.R.B.) (March 27, 2001).
9. In this regard, the Board majority noted that the temporary workers shared the same job classifications as the "permanent" employees; performed common work functions; and shared common work hours and supervision. In addition, the duration of the temporary workers' employment was indefinite.
10. *Id.* at *1 (citation omitted).
11. Member Hurtgen, dissenting in part, stated, *inter alia*, that he would have granted review; that he had "substantial doubts" as to whether the two groups of employees at issue shared a community of interest; and that a bargaining unit of temporary and regular employees "poses substantial bargaining difficulties." *Interstate Warehousing*, 2001 WL 311008, at *4. He further opined that in this situation, bargaining for the group of temporary employees would necessarily be limited, because the supplier employer was not named in the petition. This, in his view, was a factor that substantially mitigated against a finding that the two groups would share a common interest in bargaining. *Id.*
12. *Id.* at *2 (citations omitted).
13. *Id.*
14. *Id. See also Lodgian, Inc.*, 332 N.L.R.B. No. 128, 2000 WL 1740949 (N.L.R.B.) (Nov. 14, 2000) (the Board, by Chairman Truesdale and Members Fox and Hurtgen, denied an employer's request for review of the Regional Director's Decision And Direction of Election finding that inclusion in the unit of jointly employed temporary workers was not required, where the union sought to represent only those workers solely employed by the user employer); *Professional Facilities Management, Inc.*, 332 N.L.R.B. No. 40, 2000 WL 1449837 (N.L.R.B.) (Sept. 26, 2000) (remanding case to Regional Director but finding that Regional Director need not consider the "joint employer" issue on remand where the union sought to represent only the user employer's solely employed workers).
15. 332 N.L.R.B. 109, 2000 WL 1663426 (N.L.R.B.) (Oct. 31, 2000).
16. *J.E. Higgins*, 2000 WL 1663426, at *3.
17. *See Bultman Enterprises, Inc.*, 332 N.L.R.B. No. 31, 2000 WL 1449839 (N.L.R.B.) (Sept. 25, 2000) (affirming the Administrative Law Judge's finding that a hotel and temporary agency were joint employers, and thus the hotel is jointly liable for the agency's unfair labor practices; *Sturgis* did not change existing Board precedent concerning the "joint employer" standard).
18. *But cf. Interstate Warehousing*, *supra* (Board majority found this type of arrangement favored including temporary workers in the unit with the "user" employer's permanent workers).

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PERB Update: Recent Decisions of the Public Employment Relations Board

By Philip L. Maier

The Public Employment Relations Board has issued a number of recent, significant decisions regarding a variety of Taylor Law issues. This article reviews those cases which have been decided since January 1, 2000.

Representation

Unit Placement: *Monroe Woodbury CSD* 33 PERB ¶3007 (2000). In a unit clarification petition, where the at-issue title is clearly included in the recognition clause of the parties' collective bargaining agreement, the terms of the agreement define the scope of the unit. Since the title was listed in the recognition clause, it was included in the unit, notwithstanding the practice of the parties to exclude it from negotiations.

Unit Clarification and Placement: *Rye City School District*, 33 PERB ¶3053 (2000). A unit clarification petition seeks a factual determination as to whether a position is in a unit. When contract language is general and not title-specific, the inquiry goes beyond the language of the recognition clause and examines other contractual language. If there is no relevant language, the Board will look at past practice. The uniting criteria in § 207 of the Act can be relevant to resolve a fact question if it shows the actual scope of the bargaining unit. In this matter, the title was not listed in the recognition clause. The Board dismissed the unit clarification petition since the uniting factors did not demonstrate a community of interest. Turning to the unit placement portion of the petition, the Board concluded that there was not a community of interest. Based on community of interest and administrative convenience, the position was appropriately placed in another unit.

Unit Placement: *Hamondsport CSD,* 33 PERB ¶3036 (2000). Citing *Ogdensburg City School District*, 31 PERB ¶3060 (1998), the Board restated that in a unit placement petition, a majority status question is presented if the number of employees to be added to a unit is 30% or more of the number of employees in the existing unit. The unit placement petition was granted, however, because the number of employees sought to be accreted was less than 30% of the existing unit.

Unit Placement: *Marcus Whitman CSD*, 33 PERB ¶3016 (2000). The mere fact of supervisory responsibility does not preclude placement in the same unit as employees who are supervised. The titles in issue shared a community of interest with the employees whom they supervised and there was no conflict of interest. The two supervisory employees were therefore appropriately placed in a mixed unit of supervisory and rank and file employees.

Fragmentation of an Existing Unit: *Ichabod Crane CSD*, 33 PERB ¶3042 (2000). The Board reversed prior case law and concluded that nurses were not properly placed in a unit of nonprofessional or non-instructional employees. There was a conflict of interest with other non-instructional employees due to their job duties and requirements. The Board stated nurses have a unique community of interest which requires a separate unit. The Board therefore permitted fragmentation of the existing unit although there was no evidence of inadequate representation.

Unit Placement: *County of Montgomery*, 33 PERB ¶3006 (2000). The Board affirmed the placement of part-time employees into a unit of full-time employees. The controlling factor establishing coverage under the Act is the regularity and continuity of the employment relationship. The test set forth in *State of New York*, 5 PERB ¶3022 (1972), modified by *Town of Brookhaven*, 30 PERB ¶3040 (1997), applies only to seasonal employees. The number of hours and days worked is a factor used in determining the regularity of employment for year-round employees.

Certification: *County of Putnam*, 33 PERB ¶3001 (2000). The uniting criteria of § 207.1(b) require that an elected sheriff be included in collective bargaining as a joint employer with the county that controls the employees' economic terms and conditions of employment.

Confidential Employee: *North Rose-Wolcott Central School District,* 33 PERB ¶3002 (2000). An employee is confidential only when, in the course of assisting an employee who exercises labor relations responsibilities, she regularly has access to personnel/labor relations information which is inappropriate for rank and file personnel or their representative. A two-part test is applied when determining whether a particular employee should be designated confidential: the first part is duty-oriented while the second part is relationship-oriented. Mere access to personnel information does not establish that the information presented a clash of loyalties or a conflict of interest with employee's representation for purposes for collective bargaining. Finding that the facts met this standard, Board dismissed the petition seeking to designate an employee as confidential.

Improper Practices

Interference/Discrimination

Greenburgh #11 Union Free School District, 33 PERB ¶3018 (2000). The Board reversed *State of New York* 10 PERB ¶3108 (1977) (when an employer's conduct is so inherently destructive of a § 202 right, such as the filing of a grievance, it must be irrebuttably presumed to have been engaged in conduct for the purpose of depriving an employee of that right). Finding that the earlier case in effect rewrote the statute, the Board adopted a permissive presumption standard, in which the burden shifts to the respondent to destroy the presumption if sufficient proof to the contrary is produced.

In this case, the union alleged an improper practice when the District unilaterally moved the location of grievance hearings and stationed armed security personnel and a metal detector at both the hearing site and room. The Board held that, while cognizant of school violence, the District's proffered reasons were insufficient to overcome the presumption that the security measures were undertaken to deprive employees of statutory rights. In affirming that filing a grievance is one of the basic rights protected under the statute, the Board stated that security guards and searches have the effect of interfering with this basic right, and these actions had the necessary effect of chilling employee rights. Therefore, a unilateral change in a grievance procedure violates § 209-a.1(d) unless the employer's managerial concerns predominate. Balancing the employees' interest in filing grievances against the employer's, the Board found the employees' interests predominated.

Holbrook Fire District, 33 PERB ¶3050 (2000). Pursuant to a remand, the Board examined whether an employee was discharged because of the exercise of protected activity. In its initial determination, the Board found that the ALJ should have deferred to the decision in an Article 75 proceeding, where the parties stipulated the employee had been discharged for legitimate business reasons. The Appellate Division held that inquiry under an Article 75 proceeding deals with whether the employee was dismissed for cause, while in an improper practice proceeding the inquiry is whether the dismissal was for improper motivation. On remand,[1] the Board examined the record and found that the evidence did not demonstrate an improper motive, because the coincidence of events did not give rise to inference of improper motivation. Further, the Board did not agree that there was disparate treatment, or that matters which were the subject of discipline were trivial.

City of Utica, 33 PERB ¶3039 (2000). The City did not violate the Act by disciplining the President of a firefighters' union. The President's attempt to deliver a letter directly to the Mayor was not protected activity since he refused a direct order and engaged in "loud and opprobrious" conduct. The City was not motivated by anti-union animus when it sought to impose discipline.

State of New York, 33 PERB ¶3046 (2000) There was no improper motive when an employee, who was also a union representative, was disciplined for using the State e-mail system to criticize elected officials. The union representative was engaged in protected activity, and the State had knowledge of this activity, but the decision to block the employee's e-mail account was not improperly motivated. It was the employee's refusal to comply with a directive rather than the contents of the e-mail that prompted the discipline.

County of Monroe, 33 PERB ¶3044 (2000). Timing alone is not sufficient to find a violation of §§ 209-a.1(a) and (c). Finding insufficient evidence to support the finding of a violation, the charge was dismissed.

Duty of Fair Representation

Buffalo Police Benevolent Assoc. (Sanford) et seq., 33 PERB ¶3060 (2000) (appeal pending). The union violated its duty of fair representation to detectives challenging removal by opposing their interests in an Article 78 proceeding. The union violated § 209-a.2(c) by giving members false and inaccurate information about the status of pending grievances and improper practice charges. In filing the Article 78 proceeding, the union went beyond asserting a contrary position to that of certain members of the unit. Without prior notice, the union intervened in a proceeding on behalf of certain members to argue a position which undermined that of other members. The Board ordered the union to reimburse the charging parties for legal fees and related expenses incurred in the Article 78 proceeding, move class action and individual grievances to arbitration, and pay the cost of outside counsel in arbitration proceedings.

United Federation of Teachers (Grassel), 33 PERB ¶3038. The duty of fair representation was not breached when a union attorney withdrew as counsel after repeated attempts to contact charging party to prepare for hearing met with no response. Under those circumstances, withdrawing as representative was not arbitrary, discriminatory, or in bad faith.

Oneida County Deputy Sheriff's Benevolent Assoc., (Kulesa), 33 PERB ¶3037 (2000). The union was alleged to have breached its duty of fair representation by withdrawing a demand for arbitration in violation of the union's by-laws. The Board affirmed the dismissal because internal union disputes are outside its jurisdiction.

Good Faith Bargaining

Town of Southampton, 34 PERB ¶3007 (2001). The Board, in a case of first impression, held that the terms of an expired interest arbitration award establish a *status quo* which cannot be unilaterally altered under § 209-a.1(d) of the Act. The Board found that it had jurisdiction, and accepted the rationale of the ALJ in *Town of Blooming* Grove, 33 PERB ¶4581 (2000), in which this situation was analogized to those in which a legislative imposition is found to establish the new *status quo* to which the parties are obligated to adhere.

In *City of Watertown*,[2] the Board held that the demand to appeal to arbitration disputes about eligibility for General Municipal Law § 207(c) benefits were mandatorily negotiable, as a reasonable substitute for Article 78 review. In the wake of that decision, the Board decided two cases involving GML §§ 207(a) and (c).

(1) *City of Poughkeepsie*, 33 PERB ¶3029 (2000). A demand for a *de novo* review of an initial determination for GML § 207-a benefits was found to be a nonmandatory subject of bargaining. Such demands cannot be upheld, since the *Watertown* case did not find a union would be entitled to a *de novo* second hearing. Additionally, a demand that the fire chief be the sole employer agent responsible for making initial and continuing eligibility determination was nonmandatory as it would interfere with the employer's right to designate its own representative.

(2) *County of Westchester,* 33 PERB ¶3025 (2000). The County violated its bargaining obligation by unilaterally implementing a procedure to withhold taxes on a biweekly basis from employees who were receiving Workers Compensation or whose GML 207-c benefits were being controverted. In past practice, these monies had not been deducted, and the Internal Revenue Service ruled the County had discretion to withhold or not withhold monies and could negotiate on the subject.

City of White Plains, 33 PERB ¶3051 (2000). Citing *City of Cohoes*,[3] the City argued that seeking to have the PBA waive a statutory right to permanent appointment under Civil Service Law § 58(4)(c) is a mandatory subject of bargaining. The Board disagreed, since the language of the statute evidenced an intent to foreclose negotiations. The Board also found a proposal adding language to the grievance procedure to be nonmandatory because of ambiguity; it involved procedures to be followed in the event of an internal or criminal administrative investigation. A PBA demand concerning overtime was nonmandatory since it would affect the right to set staffing levels. Finally, a demand related solely to maternity leave was discriminatory, and thus a prohibited subject of bargaining.

In *Greenburgh No. 11 Union Free School District*, 33 PERB ¶3059 (2000), the union requested information from the District in preparation for grievances filed concerning class size provisions of the CBA. The Board held that an employer's obligation to provide information extends through grievance processing and continues after a demand for arbitration is filed. Consistent with NLRB decisions, the Board held that the duty to disclose the information does not cease with the demand for arbitration, even though the information may also be available by way of subpoena from the arbitrator.

Town of Mamaroneck, 33 PERB ¶3010 (2000). Relying upon *Fairview Fire District*, 29 PERB ¶3042 (1996), the Board reaffirmed that the change in qualifications due to the substitution of a civilian for a uniformed officer is sufficient to trigger the balancing of employee and employer interests under *Niagara Frontier Transportation Authority*, 18 PERB ¶3083 (1983).

Port Jefferson Union Free School District, 33 PERB ¶3047 (2000). A sign-in, sign-out procedure is a mandatory subject of bargaining since the law is silent as to how a school district may impose restrictions on a suspended employee, and the unilateral imposition of the procedure was violative of the Act. The fact that an employee is subject to an Education Law § 3020-a proceeding does not change the analysis as to the negotiability of a subject.

City of Niagara Falls, 33 PERB ¶3058 (2000). A union proposal containing mandatory and nonmandatory subjects of bargaining was a unitary, nonmandatory demand. While seniority used as a factor to fill a position is a mandatory subject of bargaining, the qualifications and time to fill a position are not. Additionally, a demand requiring that restrictions on Tier II employees' retirement benefits be eliminated by the City if anticipated State legislation authorizes it, is nonmandatory. The language in § 443-(f-1) of the New York State Retirement and Social Security Law was clear: demands for additional pension benefits are not subject to interest arbitration.

State of New York (State University of New York at Stony Brook), 33 PERB ¶3045 (2000). The Board affirmed dismissal of a charge alleging a unilateral recission in academic freedom policy when teaching assistants were reassigned. Regardless of the constitutional nature of the provision, the Board engages in a balancing approach to determine negotiability. Charges related to changes in curricula, methods and programs go to the nature and extent of the service provided, not academic freedom, and the subject of the charge was nonmandatory.

Practice and Procedure

Reopening a Charge

United Federation of Teachers (Fearon), 33 PERB ¶3003 (2000), To reopen a settled charge, there must be a finding of a denial of a valid agreement or a violation of a contractual obligation without any colorable right to do so. While the Board has jurisdiction to entertain an allegation that the contract or settlement agreement has been repudiated, there was only a difference of opinion as to the extent of compliance with the settlement. *See also United Federation of Teachers (Freedman)*, 33 PERB ¶3004 (2000).

Evidence Considered in Deciding a Motion to Dismiss

State of New York, 33 PERB ¶3024 (2000). When deciding a motion to dismiss at the close of the charging party's case, only the evidence elicited during the course of a charging party's case is to be relied upon, not cross-examination of adverse witnesses.

Timeliness of Improper Practice Charges

New York City Transit Authority, 33 PERB ¶3026 (2000) Complained of change in disciplinary procedure occurred simultaneously with implementation. A charge filed four months after the change was untimely.

New York City Transit Authority (Jenkins), 33 PERB ¶3013 (2000). The Rules do not provide for an extension of time to file an improper practice charge because of extraordinary circumstances.

United Federation of Teachers (Roemer), 33 PERB ¶3041 (2000) The limitations period to file a charge is not extended while other proceedings are pursued on behalf of a charging party.

Greenburgh No. 11 Union Free School District, 33 PERB ¶3059 (2000). The Board applied timeliness principles where a union made a demand for information to assist in processing a grievance. The first demand for information was made more than four months prior to the filing of the charge. The second demand was made within four months and was identical to the first demand. The Board rejected a timeliness defense and held that when there is no response to a request for information necessary for the processing of a grievance, the party making the request may wait a reasonable time for a response before filing the charge. It was reasonable to wait for the arbitration hearing to see whether the information would be provided by the employer. Each request for information or failure to respond gives rise to a separate violation of Act, the Notice of Claim requirements were satisfied since the charge was served within 90 days of a timely request for information, and they do not apply to § 209-a.1(a) specifications.

Failure to Appear at a Pre-Hearing Conference

International Brotherhood of Teamsters, L. 237, AFL-CIO (Jouldach), 34 PERB ¶3010 (2001). An unexcused failure to appear at a scheduled PERB proceeding constitutes a failure to prosecute a charge and is grounds for dismissal.

Waiver of Right to Prosecute Charge

New York City Transit Authority (Fredericson), 34 PERB ¶3006 (2001). A grievance settlement effectuated a waiver of the right to prosecute timely allegations of improper practices. The waiver analysis is three-pronged: whether the language of waiver covers the improper practice charge, whether it is unenforceable as against public policy; and whether the waiver was clear and knowing. Broad language may constitute the waiver of the right to file a charge.

Strike Charges

Buffalo Federation of Teachers, 34 PERB ¶ 3012 (2001) The Board approved a stipulation settling a strike charge that included suspension of dues and agency shop fee deduction for one year. The penalty itself was suspended, subject to reinstatement if the union violated the no-strike provision within a year and the parties agreed to select a neutral to maintain labor harmony. Under the circumstances of this case, and because litigation resulted in a substantial back pay award due to be paid to teachers this year, the Board found that the penalty imposed effectuated the policies of the Act.

Endnotes

1. *CSEA v. PERB*, 267 A.D.2d 935, 32 PERB ¶7027 (3d Dep't 1999).
2. 30 PERB ¶3072, (1997), *confirmed*, 31 PERB ¶7013 (Sup. Ct., Albany Co. 1998), *rev'd* 263 A.D.2d 797, 32 PERB ¶7016 (3d Dep't 1999), *motion for leave to appeal granted*, 94 N.Y.2d 751 (1999), 33 PERB ¶7003, *rev'd* N.Y.2d, 2000 N.Y. LEXIS 902 (2000).
3. 31 PERB ¶3020 (1998), *confirmed*, 32 PERB ¶7026 (Sup. Ct., Albany Co. 1999); 33 PERB ¶7019, 276 A.D.2d 189 (3d Dep't 2000) (appeal pending).

Philip L. Maier is Chief Regional Director of the New York City Office of the New York State Public Employment Relations Board.

Panel #1: (l-r) Nicholas D'Ambrosio, Bond Schoeneck & King LLP and Janice Goodman, Goodman and Zuchlewski LLP

Guest Speaker Jonathan Hiatt, General Counsel of the AFL-CIO

Panel #1:
"Bright Lines & Grey Lines: More Ethical Issues in Employment Litigation"

Panel #1: Alan Koral, Vedder Price Kaufman & Kammholz

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Rosemary Townley, Arbitrator and Mediator and Former Section Chair

Linda Bartlett, Acting Section Chair, Bartlett & Bartlett LLP

Panel #2: (l-r) William Frumkin, Sapi Sullivan & Cromwell; Allegra Fishel, Be

Presenting an award, (l-r) Linda Bartlett and Judith LaManna, Arbitrator and Mediator

Panel #3: Richard K. Zuckerman, Rains & Pogrebin, PC

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Panel #3: Steven A. Crain, CSEA

Panel #3:
"Non-Traditional Delivery of Classic Public Services: Civilianization, Privatization and Reorganization of Bargaining Unit Work"

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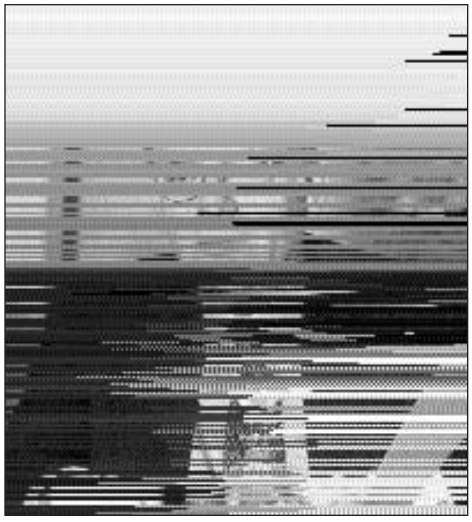
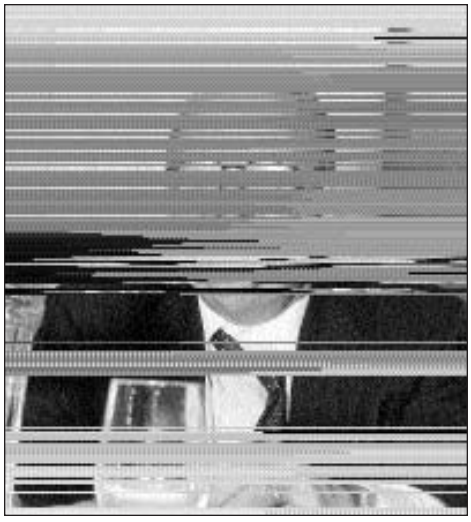


Panel #3: Howard C. Edelman, Arbitrator and Mediator



Panel #3: Melvin H. Osterman, Whiteman Osterman & Hanna

U.S. Supreme Court Holds that Application of Title I of ADA to States Is Barred by the Eleventh Amendment of the United States Constitution

By Lawrence M. Monat

On February 21, 2001, in a five to four decision, the United States Supreme Court, in *Board of Trustees of the University of Alabama, et al., v. Garrett et al*,[1] held that the sovereign immunity the states enjoy under the Eleventh Amendment[2] makes Title I of the ADA unconstitutional to the extent that it permits suits by employees of the state, against the state, for money damages and reasonable accommodation. The court held that Congress could not apply Title I to the states based upon its power under the Commerce Clause because that would abrogate the states' sovereign immunity under the Eleventh Amendment.[3]

"The court expressly held the ADA unconstitutional only to the extent that it permitted suits by employees directly *employed by the state. It rejected arguments that 'state actors,' such as cities and counties, should also be immune from suits by their employees."*

The court rejected the argument that the Fourteenth Amendment was a source of authority for Congressional regulation of state conduct under the ADA. Section 1 of that Amendment reads:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of that Amendment grants Congress the power to enact "appropriate legislation" to enforce the Amendment. The key question before the court was what standard should be applied in determining whether Title I of the ADA, as applied to the states, was "appropriate legislation." The court held that, as a predicate for the legislation creating monetary liability of the states to its citizens, there had to be a showing of "a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."[4] The court found that these requirements were not met on the record before it. In particular, it found that Congress had not made sufficient findings of a pattern of discrimination and that no necessity had been shown for creating monetary liability for disability discrimination or a duty of reasonable accommodation.

Justice Breyer, in his dissent, took issue with the majority's view of the congressional record, chastising them for reviewing it as if it were an administrative agency record. He argued that the Court should exercise judicial deference to the Congress, which had compiled an extensive record, including "roughly 300 examples of discrimination by state governments themselves in the legislative records." Justice Breyer appended to his decision some 30 pages of references to the record which he believed supported Congress' power to enact the legislation.

"It is unlikely that Garrett *will be of particular concern to practitioners engaged primarily in private sector ADA litigation. However, for those practicing in the public sector its impact is significant."*

Certain important limitations in the court's decision should be noted. The court expressly held the ADA unconstitutional only to the extent that it permitted suits by employees *directly* employed by the state. It rejected arguments that "state actors," such as cities and counties, should also be immune from suits by their employees. The court's limitation of Eleventh Amendment immunity to the state itself, and not its political subdivisions, is consistent with clear precedent.[5] This holding would also seem to leave school districts subject to suits by their employees under Title I of the ADA.[6] The court also restricted its holding of unconstitutionality to the employment discrimination and reasonable accommodation provisions of Title I of the ADA. The court made it clear that it was not passing upon the constitutionality of whether state programs and activities), that the issue had not been briefed and that certioriari on that issue had been "improvidently granted."[7]

It is unlikely that *Garrett* will be of particular concern to practitioners engaged primarily in private sector ADA litigation. However, for those practicing in the

public sector its impact is significant. It has been estimated that the states directly employ 4,826,897 persons, and that New York alone employs 275,780 people. Major categories of such employment in New York include financial and central administration, judiciary and legal, corrections, police, streets and highways, public welfare, health and hospitals, transportation and higher education.[8]

Endnotes

1. (Docket No. 99-1240) 2001 U.S. LEXIS 1700; 148 L. Ed. 2d 866; 69 U.S.L.W. 4105.
2. The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This Amendment has been clearly construed to prohibit suits under federal law by citizens of any state against a state, including suits against a state by its own citizens. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 73 (2000—ADEA found unconstitutional as applied to the states).
3. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996—"Article I [Commerce Clause] cannot be used to circumvent the constitutional limits placed upon federal jurisdiction").
4. 2001 U.S. LEXIS 1700 [*32].
5. *See Lincoln County v. Luning*, 133 U.S. 529, 530 (1890—County held not immune under Eleventh Amendment. "[A county is] part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State").
6. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) ("[A] local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.").
7. 2001 LEXIS 1700 [*32, footnote 1].
8. United States Census: State Government Employment Data, United States Totals, New York State Government, March 1999.

Lawrence M. Monat is a graduate of Brooklyn Law School (LLB., 1967) and the School of Industrial Labor Relations at Cornell University (B.S., 1964). He is a former adjunct professor at Pace University, Lubin School of Business Administration (1984-1990) and former chair of the Labor Relations Committee of the New York County Lawyers Association (1980-85) and the Labor and Employment Committee of the Suffolk County Bar Association (1994-96). He was a trial attorney at Region 29 of the National Labor Relations Board (1967-71) and labor counsel for the United States Postal Service in New York (1971-73). He is engaged in the private practice of labor and employment law.

Who Is "Disabled" Under New York State Law?

By William A. Herbert

This article is excerpted and adapted from a paper prepared for a May 2000 New York State Bar Association Employment Law Litigation Institute Program.

Both federal and New York law prohibit disability discrimination and require, in certain circumstances, that employers provide a reasonable accommodation to a disabled employee. In addition, New York law prohibits employment discrimination based on an employee's genetic predisposition or carrier status.

However, New York Executive Law §§ 290, *et seq*., and the Americans with Disabilities Act have different standards regarding who is considered "disabled" for purposes of being protected against discrimination and entitled to reasonable accommodation. The New York Executive Law definition of "disability" is far broader than the ADA definition.

Having a physical, mental or medical impairment does not guarantee that the individual will be found to be "disabled" under either state or federal law. The existence of an impairment only begins the factual investigation and legal inquiry.

In light of three 1999 decisions by the United States Supreme Court narrowly interpreting the definition of "disability" under the ADA, the substantive differences in the definition of "disability" under federal and state law will impact litigation tactics in disability employment discrimination cases.[1] Furthermore, the importance of the New York State prohibition against disability discrimination is emphasized by the decision in *University of Alabama v. Garrett*,[2] which held that the ADA is unconstitutional in part when applied to state workers.

New York's Statutory Prohibitions Against Employment Discrimination Based on Disability and Genetic Predisposition

It is unlawful for an employer to discriminate because of the disability or genetic predisposition or carrier status of any individual.[3] The law prohibits employers from using employment applications or any other inquiry in connection with prospective employment, which expresses directly or indirectly, a limitation, specification or discrimination based on disability or genetic predisposition. Failure to provide a reasonable accommodation to a disabled individual may constitute an unlawful discriminatory practice.[4] It is also a discriminatory practice for an employer to directly or indirectly solicit, require, or administer a genetic test as a condition of employment.[5]

The ADA Statutory Definition of Disability

Under the ADA, an individual has a disability if he or she has a physical or mental impairment; and the impairment substantially limits one or more major life activities; and he or she can perform the essential functions of the job with or without a reasonable accommodation; or has a record of such an impairment or is perceived as having such an impairment.

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. Consideration is given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[6]

Whether an individual has a "disability" under the ADA is not based on the name of the impairment but, rather, how the impairment impacts the life of the individual. The legal distinction between having an impairment and being disabled under the ADA has been emphasized in a various decisions by the Second Circuit and other circuits.

In *Reeves v. Johnson Controls World Services*, *supra*, the Second Circuit noted that "the need to identify a major life activity that is affected by the plaintiff's impairment plays an important role in ensuring that only significant impairments will enjoy the protection of the ADA."[7] When the complaint does not specify a major life activity, the court will assume that the major life activity at issue is the ability to work.[8]

In *Adams v. Citizens Advice Bureau*,[9] the Court affirmed the granting of summary judgment against the plaintiff who had a temporary injury for three and one-half months. Although the Court refused to determine whether temporary injuries were *per se* unprotected, it found that the plaintiff had failed to demonstrate that the temporary injury substantially limited any major life activities.[10]

In *Ryan v. Grae & Rybicki, P.C., supra*, the Second Circuit affirmed the granting of summary judgment against an individual with colitis on the grounds that her colitis condition did not substantially impair the major life activities of the ability to control her elimination of waste or her ability to care for herself. In reaching its decision, the Court noted that "although she will always be both-

ered by the possibility of a colitis attack, she will not at all times suffer from the symptoms (and concomitant limitations) of her colitis." The Court emphasized that, based on the fact that the condition is asymptomatic for long periods and attacks vary in intensity, the impairment did not constitute a substantial limitation.

In *Colwell v. Suffolk County Police, supra*, the Second Circuit set aside a jury verdict after strictly scrutinizing the trial record to conclude that although plaintiffs demonstrated having physical impairments which affected major life activities, they failed to demonstrate that their impairments substantially limited their articulated major life activities.

New York's Statutory Definition of Disability

Under state law, a disability is (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, the term is limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the employee from performing the job activities in a reasonable manner.[11]

Therefore, under the Executive Law, an individual has a disability if he or she has a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions, and a record or a condition regarded by others as an impairment. The disability must demonstrably prevent the exercise of a normal bodily function but not prevent the individual from reasonably performing the job activities with a reasonable accommodation.

New York's Statutory Definition of Genetic Disposition

A "genetic anomaly" is a variation in an individual's DNA which demonstrably confers on an individual a genetically influenced disease or a predisposition to such a disease, or makes the individual a carrier. The term means that there is a variation in the individual's genes that is scientifically or medically identifiable and associated with an increased statistical risk of being expressed as a physical or mental disease but has not in any symptoms. A "carrier" does not have the genetically influenced disease but is at risk of having offspring with the disease A "genetic test" uses ADNA, constituent genes, or gene products to diagnose or predict the presence of a genetic anomaly that is linked to a physical or mental disease or disability in the individual or the individual's offspring, or susceptibility to or predisposition for a genetically influenced disease or disability.[12]

Case Law About the Definition of Disability Under the New York Executive Law

In *State Division of Human Rights v. Xerox Corporation*,[13] the Court of Appeals, in holding that obesity constituted a disability under the New York Executive Law, emphasized that the term "disability" under the Executive Law was more broadly defined than under the federal Rehabilitation Act of 1973.[14] The court held that the individual's obesity was a disability under New York law although she "does not appear to suffer from any other disorder causally related to overweight."[15] In response to the employer's argument that the individual's condition was probably "due to bad dietary habits," the Court noted that the "statute protects all persons with disabilities and not just those with hopeless conditions."[16]

In reaching its holding, the Court noted that: [t]he statute covers [conditions] varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future. Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious effects. Thus, the [SDHR] Commissioner could find that the complainant's obese condition itself, which was clinically diagnosed and found to render her medically unsuitable by the [employer's] own physician, constituted an impairment and therefore a disability within the contemplation of the statute. Similarly, in *Hazeldine v. Beverage Media, Ltd.*,[17] Judge Haight held that a plaintiff, who was diagnosed with "morbid obesity" by her physician, was disabled under the Executive Law.

However, in *Delta Airlines, Inc. v. New York State Division of Human Rights*,[18] the dismissal of disability discrimination charges brought by "overweight" flight attendants challenging the weight requirements of the employer were affirmed. The Court distinguished its holding in the *Xerox* case by noting that the flight attendants "did not proffer evidence or make a record establishing that they are medically incapable of meeting (the airline's) weight requirements due to some cognizable medical condition. That was crucial in *Xerox* and is utterly absent here."[19]

In *McEniry v. Landi*,[20] the Court of Appeals found that alcoholism could constitute a disability under the Executive Law as a mental impairment and that the employee "had been terminated solely because of his alcohol-related chronic absenteeism."[21] After an individual establishes a "physical, mental or medical impairment," the burden of proof shifts to the employer to demonstrate a crucial element of the Executive Law definition of disability: that rendered the employee incapable

of "performing in a reasonable manner the activities involved in the job."[22] The Court concluded that the employer had failed to satisfy its burden of demonstrating that, at the time of his termination, the employee was unable to perform the duties of his job because he was recovering and performing his job in a satisfactory manner. Nevertheless, the Court noted, in an appropriate case, alcohol-related chronic absenteeism may be found to prevent an employee from reasonably performing his or her job.

In *McAnuff v. City of New York*,[23] the Appellate Division affirmed denial of the employer's motion for summary judgment, finding that missing the left index finger on the nondominant hand constituted a disability under the Executive Law. Further, it held that the issue of whether the employee with the missing finger could perform his job duties in a reasonable manner raised questions of material fact.

Asymptomatic HIV infection has been found to constitute a disability under the Executive Law even though symptoms are not apparent and one who carries it faces future difficulties of the utmost gravity.[24]

In *Reeves v. Johnson Controls World Services*,[25] the Second Circuit held that an individual's mental impairment of Panic Disorder With Agoraphobia constituted a disability under New York law. The Second Circuit reached its holding based on the broad construction of the Executive Law definition of disability by the New York Court of Appeals and the fact that the individual's mental impairment had been diagnosed after an examination by a licensed psychiatrist. Nevertheless, the Second Circuit affirmed the granting of summary judgment regarding plaintiff's ADA claim on the ground that he failed to demonstrate that his impairment substantially limited him in the exercise of a major life activity within the meaning of the ADA.

In *Aquinas v. Federal Express Corporation*,[26] District Judge Stein concluded that an employee who was diagnosed with "post-traumatic fibrositis/fibromyalgia" does not have a disability under the Executive Law because her fibromyalgia does not prevent the exercise of a "normal bodily function."

In *Nowak v. EGW Home Care, Inc.*,[27] District Judge Arcara found that the allegation that plaintiff was "placed on disability leave by her doctor" because of work-related stress was insufficient to state a cause of action under the Executive Law because it failed to allege additional facts that the plaintiff suffers from a "medically diagnosable impairment."

Endnotes

1. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 119 S.Ct. 2133 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S.Ct. 2162 (1999).
2. (Docket No. 99-1240) 2001 LEXIS 1700; 148 L.Ed.2d 866; 69 U.S.L.W. 4105.
3. Executive Law § 296(1)(a) provides:

   1. It shall be an unlawful discriminatory practice:

   (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
4. Executive Law § 296(3)(a). Effective January 1, 1998, the Executive Law was amended to require employers to reasonably accommodate individuals with disabilities. Executive Law § 292(21) was amended to include consideration of whether an individual with a disability is capable of performing in a reasonable manner the activities of the position "upon the provision of reasonable accommodations. . . ."
5. Executive Law § 296(19).
6. 2 U.S.C. § 12111(8).
7. 140 F.3d at 152.
8. *Wernick v. Federal Reserve Bank of N.Y., supra.*
9. 187 F.3d 315 (2d Cir. 1999).
10. 187 F.3d at 316.
11. Executive Law § 292.
12. Executive Law § 292(21).
13. 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985).
14. 29 U.S.C. § 706, 491 N.Y.S.2d at 109.
15. *Id.*
16. 491 N.Y.S.2d at 110.
17. 954 F. Supp. 697 (S.D.N.Y. 1997).
18. 229 A.D.2d 132, 652 N.Y.S. 2d 253 (First Dep't 1996), *aff'd*, 91 N.Y.2d 65, 666 N.Y.S.2d 1004 (1997).
19. 666 N.Y.S.2d at 1008. *See also Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78 (S.D.N.Y. 1989).
20. 84 N.Y.2d 554, 620 N.Y.S.2d 328 (1994).
21. 84 N.Y.2d at 558.
22. 84 N.Y.2d at 560. The Court emphasized that the inquiry regarding whether a particular disability renders a person incapable of reasonably performing his or her job duties is an individualized inquiry. *Id.*
23. 209 A.D.2d 326, 619 N.Y.S.2d 17 (First Dep't 1994).
24. *Petri v. Bank of New York*, 153 Misc. 2d 426, 582 N.Y.S.2d 608 (N.Y. Co. 1992).
25. 140 F.3d 144 (2nd Cir. 1998).
26. 940 F. Supp. 73 (S.D.N.Y. 1996).
27. 82 F. Supp. 2d 101 (W.D.N.Y. 2000).

William A. Herbert is Senior Associate Counsel of the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO. **The author would like to thank Albany Law School student Michele Baptiste and CSEA Legal Assistants Amee Camp and Kathy Collins in assisting in the preparation of these materials.**

Supreme Court Rejects "Pretext Plus" for Discrimination Cases

By Ray Nardo

Twenty-seven years after the Supreme Court established the now familiar burden-shifting analysis for employment discrimination cases in *McDonnell Douglas Corp. v. Green*,[1] the Court has finally—and unanimously—rejected the notion that a plaintiff must establish "pretext-plus" to prevail at trial. In *Reeves v. Sanderson Plumbing Products, Inc.*,[2] the Supreme Court ruled that a jury may find for a plaintiff who establishes 1) a *prima facie* case of discrimination, and 2) that the employer's proffered non-discriminatory reason for his discharge is false. Basically, *Reeves* will prevent employers from obtaining summary judgment where a plaintiff can adequately demonstrate a *prima facie* case of discrimination and pretext.

The *McDonnell Douglas* Model

Proving the ultimate issue of discrimination is often difficult because direct evidence (or a smoking gun) rarely exists in discrimination cases and plaintiffs must resort to establishing their claims with circumstantial evidence. "Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination."[3] Often, the focus is on how an employer treats similarly situated employees (individually or collectively), but the necessary evidence varies with the circumstances of each case.

Recognizing that "the question facing triers of fact in discrimination cases is both sensitive and difficult"[4] the Supreme Court established a unique three-stage, burden-shifting framework to "progressively sharpen the inquiry into the elusive factual question of intentional discrimination."[5] Under this model, a plaintiff must first present a *prima facie* case of employment discrimination, which is a minimal task. Plaintiff must generally establish that he (i) is a member of the protected class (over 40 years of age for an age case); (ii) is qualified for his position; (iii) was terminated (or suffered an adverse employment action); and (iv) was replaced by someone outside of the protected class[6] (or a "substantially younger employee"[7] in an age case).[8] If established, the *prima facie* case creates a "legally mandatory rebuttable presumption"[9] of discrimination because employers are assumed to act for legitimate reasons and, therefore, do not take adverse actions against protected, qualified employees where no such action is taken against similarly situated non-protected employees.

Once an employee establishes a *prima facie* case of discrimination, the inquiry proceeds to the second stage where an employer may rebut this presumption by articulating "some legitimate nondiscriminatory reason"[10] for the adverse action. As set forth in *Reeves*, "[t]his burden is one of production, not persuasion."[11] If the employer produces such evidence, the presumption of discrimination "drops out of the picture"[12] and the plaintiff must prove the ultimate issue: did the employer intentionally discriminate against the plaintiff?

In the third stage, or pretext stage, plaintiff is given an opportunity to demonstrate by competent evidence that "the employer's proffered explanation [for the adverse action] is unworthy of credence."[13] In *Reeves*, the Supreme Court noted that various Circuit Courts struggled to determine whether or not plaintiff's *prima facie* case and proof of pretext was "adequate to sustain a finding of liability for intentional discrimination."[14]

The Proceedings Below

Reeves, the plaintiff, had been employed for 40 years by Sanderson Plumbing, a manufacturer of toilet seats and covers. Sanderson terminated Reeves when it allegedly uncovered timekeeping errors and misrepresentations on Reeve's part during a departmental audit. Reeves sued in the District Court for the Northern District of Mississippi, contending that he had been fired because of his age in violation of the Age Discrimination in Employment Act.[15] The jury returned a verdict in plaintiff's favor, awarding him $35,000 in compensatory damages. The District Court subsequently awarded liquidated damages and front pay, for a total of nearly $100,000. Sanderson appealed to the Fifth Circuit on the grounds that the trial court had erroneously denied its two oral motions for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure.

In *Reeves*, at the pretext stage, the plaintiff offered evidence that he did not actually make any timekeeping errors or misrepresentations and, to the extent there were actually mistakes, other managers were responsible. In addition, plaintiff testified that the Director of Manufacturing—who had ordered the audit of plaintiff's department and participated in the decision to terminate plaintiff—made age-biased comments towards plaintiff, including (i) plaintiff was so old that he "must have come over on the Mayflower;" and (2) that he was "too damn old to do the job."[16]

Notwithstanding plaintiff's evidence, which the Fifth Circuit recognized was strong, the Circuit Court ruled that even though Reeves could (and did) establish that Sanderson's proffered reasons for his termination were pretextual, he had to offer something more to establish a finding of

discrimination (hence "pretext-plus"). As stated by the Circuit Court, "whether [defendant] was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the "DEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision."[17] In the "essential final step," the Fifth Circuit mistakenly ignored plaintiff's *prima facie* case and his evidence of pretext. Instead, it held that defendant's age-related comments were not made in the direct context of plaintiff's termination, that the Director of Manufacturing was merely one of three managers involved in the decision to terminate plaintiff, and plaintiff had no evidence that the other decision makers were motivated by age-bias. In essence, the Fifth Circuit held that a jury verdict could not stand if a plaintiff *only* establishes his *prima facie* case and that the employer's reasons for taking an adverse action were pretextual.

The Supreme Court reversed, holding that a jury is permitted to rule for a discrimination plaintiff on the basis of the *prima facie* case and proof of pretext. The Supreme Court ruled that the Fifth Circuit erred by mandating that a plaintiff must always introduce evidence of discrimination beyond that required by the *McDonnell Douglas* analysis. Accordingly, "a *prima facie* case and sufficient evidence to reject the employer's explanation may permit a finding of liability" and a plaintiff is not required to "introduce additional, independent evidence of discrimination."[18] Indeed, the Court recounted its previous declaration in *St. Mary's Honor Center v. Hicks* that "[t]he fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."[19] This is because:

> the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that a factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."[20]

The Impact of *Reeves*

Reeves thus clarifies *Hicks*, a previous case in which the Supreme Court reversed the Eighth Circuit's decision that plaintiff's proof of a *prima facie* case and pretext *compels* judgment for the plaintiff. In *Hicks*, the Supreme Court held that the trier of fact *may* find discrimination in such circumstances. *Reeves* and *Hicks*, then, are two sides of the same coin. In both cases, the Supreme Court rejected attempts by Appellate Courts to compel judgment as a matter of law. Plaintiff's proof of a *prima facie* case and pretext does not compel judgment according to *Hicks*, nor does it compel dismissal for want of additional evidence, according to *Reeves*. These factual issues fall within the province of the jury. The Court does not rule out the limited case where a plaintiff's *prima facie* case and proof that an employer's termination for a false reason, or refusal to tell the real reason, may *not* establish a discriminatory motive. In her concurrence, Justice Ginsburg indicated that such circumstances where a plaintiff must prove evidence *beyond* a *prima facie* case and pretext may exist, but are "uncommon" to say the least.[21] Nonetheless, for the overwhelming majority of cases, the Court has decided that plaintiff's *prima facie* case and proof of pretext will prevent a judicially compelled judgment (i.e., summary judgment) for the defendant. The rest is for the jury.

Endnotes

1. 411 U.S. 792 (1973).
2. ___U.S.___, 2000 WL 743663, No. 99-536 (June 12, 2000) (O'Connor, J.).
3. *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224 (2d. Cir. 1994).
4. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716-717 (1983).
5. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981).
6. *McDonnell Douglas*, 411 U.S. at 802.
7. *O'Connor v. Coin Consolidated Caterers, Corp.*, 517 U.S. 308 (1996).
8. In the Second Circuit, the plaintiff may prove, as the last prong of the prima facie case, that he was discharged "under circumstances giving rise to an inference of unlawful discrimination." *Montana v. First Federal Savings & Loan Association of Rochester*, 869 F.2d 100, 103 (2d Cir. 1989).
9. *Burdine*, 450 U.S. at 254 n.8.
10. *McDonnell Douglas*, 411 U.S. at 802.
11. *Reeves*, 2000 WL at *4.
12. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). For a discussion on the impact of *Hicks*, see Nardo, "St. Mary's Honor Center v. Hicks," *Burst Bubble in Employment Discrimination*, N.Y.L.J., Vol. 210, No. 27, August 9, 1993, p.1.
13. *Burdine*, 450 U.S. at 256.
14. *Reeves* at *7.
15. 29 U.S.C. §§ 621, *et seq*.
16. *Reeves* at *11.
17. *Reeves* at *7, quoting the opinion of the Fifth Circuit Court of Appeals.
18. *Reeves* at *9.
19. *Reeves* at *10, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (Scalia, J.).
20. *Id*, citing *Wright v. West*, 505 U.S. 277 (1992).
21. *Reeves* at *13.

Mr. Nardo is a sole practitioner in Mineola, NY. He graduated from NYU School of Law in 1990. His practice concentrates in the representation of plaintiffs in the area of Labor & Employment Law.

For Your Information

Section News

Frank Nemia, Chair of the Nominating Committee, reports that the Committee recommended the following nominations:

Chair-elect	**Richard Chapman** for a term of one year
Secretary-elect	**Richard Adelman** for a term of one year

District Representatives for a term of three years:

1st District	**O. Peter Sherwood**
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The following members were reconfirmed or appointed as Chairs of Standing Committees:

To be confirmed for a second term:

Richard Zuckerman	Government Employee Labor Relations Law Committee
Donald Oliver	Labor Relations Law and Procedure Committee
Jennifer Clark	Employee Benefits Committee
Kayo Hull	Membership and Finance Committee

New Appointments:

Robert Simmelkjaer	Law School Liaison
Eugene Ginsberg	ADR Committee
Jacquelin Drucker	CLE Committee
Arthur Riegel	Labor Arbitration and Collective Bargaining

Changes in Brief

Linda Bartlett and **Randall G. Bartlett**, formerly of Bartlett, Bartlett & Ziegler, PC., have reformed as **Bartlett & Bartlett, LLP,** and remain at 110 E. 42nd Street, Suite 1502, New York, N.Y. 10017 (Phone: 212 889-8585, FAX: 212 889-3933). **Daniel Chiu** and **Shira Y. Rosenfield** are now associated with the firm.

Jay Nadelbach and **Arthur Riegel**, arbitrators based in the New York City area, were accepted into membership in the National Academy of Arbitrators at its Fall 2000 meeting.

The law firm of **Ferrara, Fiorenza, Barrett & Reitz, P.C.** announced that **Joseph G. Shields** has joined the firm as a partner and **Colleen Walsh Heinrich has** joined the firm has an associate. Mr. Shields will represent the firm's public and private sector clients in corporate, employment, municipal, education law and civil litigation related to these areas. Ms. Heinrich will represent the interests of school district clients in disputes involving the education of children with disabilities.

Richard K. Zuckerman, a member of **Rains & Pogrebin, PC**, and Chair of the Section's Standing Committee on Government Employee Labor Relations Law, has been elected to the Municipal Law Section's Executive Committee.

If you have news for "Changes in Brief," or other announcements of general interest to our readers, please phone the Editor at (718) 428-8369, or send an e-mail to mceneaneyj@aol.com.

Save the Dates!

The Section's **Fall Meeting** will be held at **The Sagamore** in Bolton Landing, N.Y., on **September 14–16, 2001**. The CLE Committee, chaired by **Jacquelin Drucker**, is planning a great program—details to follow soon.

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

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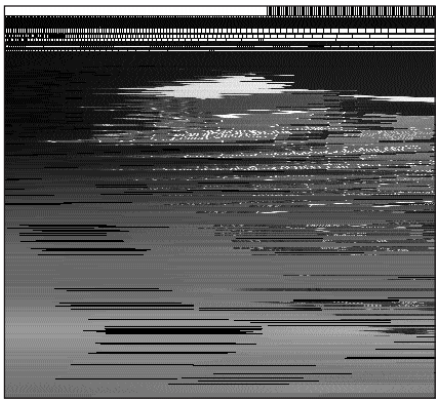

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