NYSBA SPRING 2007 | VOL. 32 | NO. 1

L&E Newsletter

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

A Message from the Chair

The Section's Annual Meeting took place on January 26 in New York City. Two hundred ninety-four attorneys attended a three-hour program which included two plenary sessions: "Retaliation Cases After *White v. Burlington Northern*" followed by "Diversity Issues in a Global Economy: What Labor and Employment Law Lawyers Need to Know." Attendees then had a choice of four diverse and relevant workshops that ran concurrently: (1) "The New Ethics Rules on Attorney Advertising," (2) "The New Pension Reform Act," (3) "Changes in Albany: What Election Results Will Mean For Public Sector Employment," and (4) "In-House ADR Programs: Do They Work? Are They Fair? What Would Improve Them?" Attendees received three MCLE credit hours, including one hour in Ethics. Thanks to Program Chair Alan Koral and all of the participants responsible for this timely and meaningful program.

At the Annual Meeting of Section Members immediately preceding the MCLE program, the membership elected Alan Koral to be the new Chair-Elect effective June 1, 2007, and the following District Representatives for three-year terms beginning June 1, 2007: Ninth District—Al Feliu; Tenth District—Terence O'Neil; Eleventh District—Dan Driscoll and Twelfth District—Mark Leeds. The prior evening at the Section's Executive Committee

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Meeting, Dick Chapman was elected as the new Alternate Delegate to the NYSBA House of Delegates. Dick will assume that role on June 1 when current Alternate Delegate Linda Bartlett becomes one of the Section's three Delegates to the House of Delegates.

The Annual Meeting was followed by the Section luncheon. Former Chair Pearl Zuchlewski recognized and made a presentation (including a gender-based sports quiz) to Immediate Past Chair Rich Zuckerman for his indefatigable service to the Section. Luncheon attendees heard guest speaker Cynthia Thomas Calvert, Esq., Deputy Director of Worklife Law, who discussed what every lawyer needs to know about family responsibilities discrimination.

At the L&E Section's Executive Committee Meeting we implemented a new procedure utilizing District Representatives to provide monitoring of attendance and document completion for attendees at the concurrent workshops. This procedure will insure the necessary documentation for obtaining CLE credits and at the same time allow our Section to continue presenting concurrent workshops covering separate and diverse subject areas of interest to our members. Many thanks to Don Sapir and the District Representatives who provided monitoring at the workshops on January 26.

Our Section is fortunate to have many active members who contribute their time and talent to the Section. We have undertaken initiatives to attract more members to active committee participation. We are also focusing recruiting efforts on bringing more newly admitted attorneys into the Section. Please mark your calendars for the Section's Fall Program, September 28-30 on the Cornell Campus in Ithaca. Hope to see you there.

Donald D. Oliver

From the Editor

Articles about cross-border labor and employment law generate a lot of interest. That's why I asked Donald Dowling, Jr., of White & Case, to begin a regular column called **"XB."** Don's inaugural column is about choice-of-law and expat employees. There are so many articles in this issue that I can't thank each author individually in this space. The variety of subject matter offers something of interest for everyone. Our thanks to all who contributed.

There are several cases worth noting that have recently been, or are about to be, decided. They are, briefly:

NYCTA v. PERB: Public Sector "*Weingarten* Rights"

In the spring of 2001, two New York City Transit Authority employees got into a dispute. Igor Komarnitskiy allegedly refused to show his identification card to a guard and used a racial slur. Both employees were members of Local 100 of the Transport Workers Union.

The guard complained and Mr. Komarnitskiy was asked to file a report on the incident, which he prepared with the assistance of his union shop chair. Management told him he had to fill out a second report form in the superintendent's office and would not allow his union representative to attend.

The Union filed an improper practice charge with PERB. It claimed that the TA violated the Taylor Act by requiring its member to fill out the form a second time without union representation. Citing *NLRB v. Weingarten*,[1] the PERB ALJ found that New York public sector employees have an analogous right under section 202 of the Civil Service Law[2] because "there is no clearer expression of participation in an employee organization than the request for union representation at an investigatory interview which may result in discipline."[3]

The Transit Authority began an Article 78 proceeding, which has wended its way through the courts. The Supreme Court denied the employer's petition and the Appellate Division, Second Department, affirmed, holding that "Civil Service Law § 202 (Taylor Law) implicitly extends a *Weingarten*-type right of union representation to public sector employees, and that PERB's interpretation of such provision is permissible and should not be disturbed."[4]

Throughout the legal process, the Transit Authority has relied on the *Rosen* case to argue that PERB exceeded its jurisdiction and misinterpreted the statute.[5] Issues of pure statutory construction, the TA argued, are matters for the courts, rights of general applicability are matters for the legislature, and issues directly bearing on the contractual relationship between public employers/public employees are matters for collective bargaining.

The Court of Appeals agreed with the Transit Authority and found that the Taylor Act does not give New York State public employees "*Weingarten* rights." Citing *Rosen*, the Court held that "the question is one of pure statutory construction 'dependent only on an accurate apprehension of legislative intent [with] little basis to rely on any special competence'" of PERB.[6] It found that the language of the Taylor Act is different from section 7 of the NLRA;[7] because the legislature did not give New York public employees the right to "mutual aid and protection," the Taylor Act cannot support the concept of rights granted to private sector employees under *Weingarten.*

"The variety of subject matter offers something of interest for everyone. Our thanks to all who contributed."

The Court noted, too, that the legislature previously amended section 75 of the Civil Service Act to provide representation for public sector employees, as well as a specific remedy for a violation of those rights. This, it said, was further proof that the legislature did not intend to accord the same rights as were granted to private sector employees by the Supreme Court in *Weingarten.*

Washington Education Association[8]

The U.S. Supreme Court will hear oral argument in a pair of consolidated cases concerning non-member union fees. The State of Washington passed a statute which requires a union to obtain the "affirmative authorization" of non-members before spending their fees for political purposes.[9] Thus, their fees could not be spent for political purposes unless they "opted in." Supporters of the statute said it was intended to protect the free speech and association rights of employees who choose not to join unions.

The Union challenged the statute in state court on the grounds that it violated the First Amendment, and the court agreed. It held that the rights of unions and union members are violated because of the costly administrative burden imposed on the union. The statute also violates union members' rights, the court said, because

a presumption of dissent burdens their right to associate themselves with the union on political issues.

Under the original statute, unions were to send out notices and non-members were required to object within thirty days to receive a refund of part of their agency fees. Those who did not object on time received no refund.

In the companion case, *Davenport v. Washington Education Association*, a non-union teacher brought a class action suit to recover the fees used for political purposes and the trial court denied WEA's motion to dismiss. The state Court of Appeals reversed the trial court's decision in favor of the teachers and remanded their claims for dismissal because of its decision in *Washington Education Association*.

The state's Supreme Court consolidated the cases and affirmed the decisions by the Court of Appeals, on the grounds that the statute imposed an unconstitutional restriction on the political speech of unions, union members and non-union members. It found that a union has the right, under the First Amendment, to use fees paid by non-dissenting non-members for political purposes.

Long Island Care at Home v. Coke

A home health care attendant brought an action against her employer under the Fair Labor Standards Act, claiming that she never received overtime payments and her hourly wage was less than the legal minimum wage. The Eastern District found for the employer on summary judgment, holding that it was not arbitrary or unreasonable to interpret the relevant FLSA provisions to preclude coverage for companionship services provided by casual employees in domestic service employment. The court also found that the statutory provisions excluding coverage for companionship services were not arbitrary, capricious, or manifestly contrary to the FLSA. Thus, the employee was not entitled to the minimum wage or overtime pay under the FLSA.[10]

On appeal, the plaintiff maintained that the two disputed regulations were inconsistent with the intent of Congress to extend FLSA coverage to domestic service employees. Specifically, she argued that the definition of "companionship services" in section 552.6 is overbroad and that section 552.109(a) improperly extended the exemption to employees who are employed by an agency. The Second Circuit affirmed the enforceability of section 552.6, according it the highest level of deference available to agencies pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[11] But it found that section 552.109(a) was neither entitled to *Chevron* deference nor enforceable.[12] The U.S. Supreme Court granted *certiorari* and found that the case should be remanded for further consideration in light of a new Department of Labor Advisory Memorandum issued in December 2005.

Back at the Second Circuit, the court affirmed its original decision. It found nothing persuasive in the new DOL memo. It noted the several purposes of the FLSA, some of which are in tension with the others: a desire to expand the coverage of the FLSA to domestics,[13] to exempt companionship services from that coverage,[14] to ensure that companionship and babysitting services remain affordable for working families,[15] and to ensure minimum wage and overtime compensation for domestic workers who were regular bread-winners, responsible for supporting their families.[16] Despite the Department's repudiation in its memo of all previous statements questioning its validity, the court found, the fact remained that the Department had held a different position in the past.

The court noted it was originally concerned with DOL's failure to explain the inconsistency between section 552.109(a) and section 552.3 and the Department's decision in 1975 to promulgate a rule that was contrary to the one originally proposed. The DOL Memo shows that the agency has spent some time considering its position with respect to section 552.109(a) and the agency has considered and decided against amending the regulation on several occasions. But these facts do not address our concerns regarding the thoroughness of the original consideration and reasoning that went into the promulgation of section 552.109(a).

The U.S. Supreme Court granted *certiorari* in this case for the second time on January 5, 2007.

BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC

Certiorari to the U.S. Supreme Court was also granted a case from the Tenth Circuit that concerns subordinate liability theory.[17] There is some dispute about who said what to whom. Generally, it appears that Cesar Grado, the supervisor, asked an African-American employee, Stephen Peters, to work his day off because of a shortage of workers. Peters said he had made plans for that day and, on the advice of the Human Resources Department, Grado ordered him in to work anyway.

Peters was sick, went to the doctor, called in sick and was given permission by a different supervisor to stay home. The second supervisor tried to page Grado, but Grado did not return the calls.

Grado reported Peters to the Human Resources Department for insubordination, although he did not recommend that he be discharged. The Human Resources Department investigated and fired Peters. The Human Resources manager who took the adverse action worked in a different city, had never met Peters and did not know his race.

In December 2002, the Equal Employment Opportunity Commission sued on behalf of Mr. Peters. The case was dismissed on summary judgment despite evidence that Mr. Grado was biased against African-Americans and treated them differently than other employees, including a similarly situated Latina women who called in sick to celebrate her birthday under similar circumstances. There was testimony that Mr. Grado had remarked on that occasion, "You can't make someone work one of their days off." The district court found that the EEOC had not shown the supervisor's bias to be a significant influence on the decision to discharge Mr. Peters.

The Tenth Circuit Court of Appeals reversed and remanded for trial. It found that the question of whether the supervisor actually recommended the termination was immaterial; the supervisor's actions led to the termination and the Human Resources Department had not conducted a thorough investigation. The U.S. Supreme Court granted *certiorari* in January 2007.

The circuits are split on the question of subordinate liability, dividing on how involved the subordinate must be to incur liability for the employer.[18] In some circuits, an employer is liable if an employee with a racial bias had any influence on the adverse action. In others, the employer is liable only if the biased employee was principally responsible for the decision. In *BCI*, the Tenth Circuit set forth a "causation" standard finding that the biased employee need not be the effective decision-maker but that his or her "discriminatory reports, recommendation, or other actions caused the adverse employment action." According to the Tenth Circuit, remanding this case for trial would encourage employers "to verify information and review recommendations before taking adverse employment actions against members of protected groups."

Sines v. Service Corporation International[19]

This is another case with a lengthy history of litigation. The plaintiffs were employed in the funeral industry in New York in non-exempt positions under the Fair Labor Standards Act.[20] They brought a class action suit against their employers and, after almost three years of litigation, entered into a mediated settlement that was approved by the court.[21]

A jury then found the employers liable for a retaliatory suspension of one of the plaintiffs, James Sines, in violation of section 215(a)(3) of the FLSA. The parties had agreed in advance about jury instructions as to penalty if the defendants were found guilty. As part of the mediated consent decree, the jury was told the judge would make the award of back pay or liquidated damages if they found the defendants liable. The parties stipulated that the combined back pay and liquidated damages awarded to Sines would be $65,020.51.

Also pursuant to the parties' agreement, the jury was given separate instructions on the issue of punitive damages and had the opportunity to determine whether Sines should be awarded punitive damages. The jury returned a verdict in favor of awarding punitive damages in the amount of $130,000.

The parties briefed the question of whether punitive damages are available under the FLSA and the court found in the affirmative. Noting that the Second Circuit has not yet ruled on whether punitive damages are available to a plaintiff suing for retaliation under section 216(b) of the FLSA,[22] the court cited cases in the Seventh and Ninth Circuits for its conclusions[23] and then declined to consider whether punitive damages are available under New York State labor law under these circumstances.

Janet McEneaney

Endnotes

1. 420 U.S. 251 (1975).
2. "Public employees shall have the right to form, join or participate in . . . any employee organization of their own choosing." Civil Service Law § 202.
3. *New York City Transit Authority*, 35 PERB 7012 (2002), *aff'd sub nom*, *New York City Transit Auth. v. N.Y.S. Pub. Empl. Relations Bd.*, 196 Misc. 2d 532, 36 PERB 7009 (Sup. Ct., Kings County 2003), *aff'd* 27 A.D.3d 11, 38 PERB 7019 (2d Dep't 2005), *leave to appeal granted*, 7 N.Y.3d 702, 818 N.Y.S.2d 192 (2006).
4. 27 A.D.3d 11, 38 PERB 7019.
5. *Rosen v. Public Empl. Relations Bd.*, 72 N.Y.2d 42 (1988).
6. *Id.*, quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980).
7. 29 U.S.C. § 157.
8. *Davenport v. Washington Education Association* and *Washington v. Washington Education Association*, 130 P.3d 352 (Wash. 2006), No(s) 05-1589, 05-1657 (consolidated) (Argued Jan. 10, 2007).
9. RCW 42.17.760 (Washington Fair Campaign Practices Act).
10. *Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp. 2d 332 (E.D.N.Y. 2003), a*ff'd in part, vacated in part, remanded by Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2d Cir. 2004), *certiorari granted, judgment vacated by Long Island Care at Home, Ltd. v. Coke*, 126 S. Ct. 1189, 163 L.Ed.2d 1125 (2006), *on remand to Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48 (2d Cir. 2006), *cert. granted* by *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 853 (Jan. 5, 2007) (No. 06-593).
11. 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).
12. It was entitled only to the more limited level of deference announced in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L.Ed. 124 (1944), and reaffirmed in *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 150 L.Ed.2d 292 (2001).
13. S. Rep. No. 93-690, 93d Cong., 2d Sess., at 16, 18-20 (1974).
14. *Id.* at 20.
15. 18 Cong. Rec. 24,715 (1972).
16. S. Rep. No. 93-690, at 20.
17. 450 F.3d 476 (10th Cir. 2006).
18. *See, e.g.*, *Hill v. Lockheed Martin Logistics Management*, 354 F.3d 277 (4th Cir. 2004) (subordinate acting pursuant to discriminatory animus need not be "formal decisionmaker" to impose liability upon employer); *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005)

(employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir.1999) ("cat's paw" causation may be established if the plaintiff shows that the decision-maker followed the biased recommendation without independently investigating the complaint against the employee); *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998) (evidence of a subordinate's bias is relevant where the ultimate decision-maker is not insulated from the subordinate's influence).

19. WL 3247663, LEXIS 82164 (S.D.N.Y. Nov. 8, 2006).

20. 29 U.S.C. § 201 *et seq*. The action also proceeded as a collective action under the FLSA, 29 U.S.C. § 216(b), for certain persons employed in non-exempt positions on or after July 1, 2001.

21. In *Sines v. Service Corp. International*, WL 1148725 (S.D.N.Y. May 1, 2006), the court addressed counsels' request for an adjustment of the negotiated fees.

22. *See Lai v. Eastpoint Int'l, Inc.,* WL 265148 (S.D.N.Y. 2002). Under this provision of the FLSA, any employer who violates the anti-retaliation provision of the statute is "liable for such legal or equitable relief . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."

23. *Travis v. Gary Community Mental Health Center, Inc.,* 921 F.2d 108, 111-12 (7th Cir. 1990), *cert. denied,* 502 U.S. 812 (1991); *Lambert v. Ackerley,* 180 F.3d 997, 1011 (9th Cir. 1999).

Uniformed Services Employment and Reemployment Rights Act Regulations—Part 1

By Michael J. Sciotti and Tyler G. Brass

This article addresses the new Uniformed Services Employment and Reemployment Rights Act (USERRA) Regulations which were recently promulgated by the United States Department of Labor (USDOL).

1. Introduction

With the increased number of deployments of active duty soldiers and the activation of thousands of military reservists following September 11, 2001, it is imperative that employers and attorneys be familiar with the USERRA.[1] USERRA attempts to mitigate the financial losses an employee may endure as a consequence of service in the uniformed services and his or her return to work.

USERRA is enforced and administered by the USDOL Veterans Employment Training Service. Pursuant to 38 U.S.C. § 4331, on December 19, 2005, the USDOL issued regulations implementing USERRA in an effort to provide guidance to employers and employees regarding their respective rights and obligations under USERRA (the "Regulations"). These regulations became effective January 18, 2006. The Regulations are broken down into six subparts, dealing with the following topics: (A) An introduction to the Regulations; (B) USERRA's anti-discrimination and anti-retaliation provisions; (C) The steps uniformed service members must take to return to a previous position; (D) The rights, benefits and obligations of individuals in the uniformed services, including those related to health plan coverage; (E) Rights, benefits and obligations of returning veterans and service members; and (F) The role of the USDOL in connection with USERRA. This article reviews the first two subparts of the Regulations.

Due to the comprehensive nature and broad coverage of USERRA and the Regulations, employers would be well advised to review and update leave and related policies and procedures to ensure compliance. Although the Regulations cover a vast array of issues, they are written in an easy-to-read question-and-answer format.

2. Subpart A—Introduction to the Regulations and Their Coverage

Subpart A of the Regulations provides a general background of USERRA, including the definitions applicable, the types of service involved and its relation to other laws. USERRA establishes certain rights and benefits for employees and sets out the duties of employers where an employee leaves his or her job for service in the United States' uniformed services. It is the most recent in a string of laws enacted to address the employment and reemployment rights of veterans. The predecessors to USERRA were the Vietnam Era Veterans' Readjustment Assistance Act of 1974,[2] the Soldiers' and Sailors' Relief Act of 1940[3] and the Selective Training and Service Act of 1940.[4] USERRA was enacted in an attempt to clarify and strengthen these laws as they relate to reemployment rights and its provisions are intended to be liberally construed.

The Regulations implement USERRA as it applies to states, local governments and private employers. The Federal Office of Personnel Management has issued separate regulations for federal executive agency employers and employees. In addition, USERRA established a separate program to protect the employees of certain federal intelligence agencies.

USERRA was signed into law on October 13, 1994 and its reemployment provisions apply to uniformed service members seeking civilian reemployment on or after December 12, 1994. The anti-discrimination and anti-retaliation provisions became effective on October 13, 1994.

Returning service members are entitled to assistance in their efforts to protect their rights under USERRA. According to 20 C.F.R. § 1002.4 of the Regulations, USERRA requires the Secretary of Labor to provide assistance to "any person with respect to the employment and reemployment rights and benefits to which such person is entitled under [USERRA]." As set forth above, the role of the Secretary of Labor is set out in its own subpart, which will be discussed in greater detail in a future article.

The Regulations broadly define an "employee" as any person employed by an employer.[5] However, the definition of an employee also includes "any person who is a citizen, national or permanent resident alien of the United States who is employed in a workplace in a foreign country by an employer . . . incorporated or organized in the United States, or that is controlled by an entity organized in the United States."[6] Unlike the Family and Medical Leave Act of 1993,[7] USERRA does not contain an exception for "key employees."[8] Professional, executive and managerial positions are protected. Even former employees fall within the protection afforded by USERRA.

The Regulations also contain an extremely broad definition of "employer." An employer is defined as "any person, institution, organization, or other entity that pays salary or wages for work performed, or that has control over employment opportunities."[9] This definition also includes the Federal Government, states, successors in interest to employers and any entity or individual which has denied initial employment in violation of USERRA.

The Regulations adopt the view taken by some federal courts which have held that individual supervisors may be liable under USERRA.[10] Although several civil rights statutes, such as the Americans with Disabilities Act[11] and Title VII of the Civil Rights Act of 1964,[12] do not provide for individual liability, the USDOL has not included a similar restriction on liability in the Regulations. Therefore, a supervisor or manager may be held personally liable under USERRA where he or she has sufficient control over an employee and has been "delegated the performance of employment-related responsibilities," such as the power to hire and fire.[13]

The definition of an employer is also broad enough to include an insurance company, even if it does not actually employ the individual. An employer includes any employee pension benefit plan, as that term is described in the Employee Retirement Income Security Act of 1974 (ERISA).[14] Congress included these benefit plans as employers so that these entities would not be able to refuse to modify their policies and effectively prevent direct employers from complying with USERRA.[15] However, entities to whom employers or plan sponsors have delegated purely ministerial functions regarding the administration of benefit plans, such as the mere preparation and maintenance of plan benefit forms, will not be considered as employers under USERRA.

An individual will be deemed to be performing service in the uniformed services when he or she is engaged in any of the following: active duty, active and inactive duty for training, National Guard duty or examinations to determine fitness for the performance of such a duty.[16] Funeral honors duty, certain service upon activation of the National Disaster Medical System (NDMS) and participation in an authorized training program also qualify as service in the uniformed services. Although National Guard duty is included in the definition of service, only National Guard duty under federal control is included. Service under state law is not protected, but many states have their own sets of laws protecting National Guard members. The uniformed service protected by USERRA includes *all* training and service, regardless of whether it is performed on a voluntary or involuntary basis or whether in time of peace or war.[17]

The Regulations define the "uniformed services" to include the Armed Forces as well as the Army National Guard and the Air National Guard, when engaged in active or inactive duty training or full-time National Guard duty; the commissioned corps of the Public Health Service; and any category designated by the President in time of war or national emergency. Active components of the Armed Forces are covered by USERRA along with traditional National Guard and reserve personnel. Although service with the NDMS qualifies as "service in the uniformed services," an individual service with NDMS is not considered a member of the uniformed services for the purposes of USERRA.[18]

The protections afforded by USERRA are considered to be a floor for the employment and reemployment rights and benefits of those covered individuals. This means that an employer may provide greater rights than those under USERRA, but the employer may not refuse or reduce any benefit provided by USERRA. If an employer provides a benefit which is greater than that required under USERRA, the employer is still required to fully comply with USERRA and is not permitted to reduce or limit any other benefit under USERRA solely due to offering any other benefit which is greater than that required. USERRA supersedes any state law, contract, agreement, policy, plan or practice which reduces or limits any right or benefit provided by USERRA. However, where any federal or state law, contract, agreement, policy, plan or practice which establishes a benefit more beneficial than those provided by USERRA, those protections will be upheld.

3. Subpart B—Anti-Discrimination and Anti-Retaliation Provisions

USERRA provides protection for members of the uniformed services against discrimination and retaliation in employment and reemployment. According to the Regulations, USERRA protects not only an employee returning to an employment position, but also applicants for employment. Specifically, the Regulations provide that an employer may not deny initial employment, reemployment, retention in employment, promotion or any other benefit to an individual based upon his or her "membership, application for membership, performance of service, or obligation for service in the uniformed services."[19] It is also impermissible for an employer to withdraw an employment offer due to the applicant being called into service.[20]

Employers are also prohibited from retaliating against an individual by taking any adverse employment action due to that individual having participated in an action to protect past, present or future members of the uniformed services in an effort to exercise their rights under USERRA. This includes testifying or making a statement in connection with a proceeding under USERRA, taking any part in a USERRA investigation or exercising any right under USERRA.[21] These anti-retaliation protections apply whether or not the individual seeking to protect rights under USERRA has actually performed service in the uniformed services. Civilian employees will be protected when seeking to protect the rights of fellow employees who are serving or have served in the uniformed services.

USERRA's prohibitions against discrimination and retaliation apply to all covered employers and all employment positions, regardless of duration. This includes employment positions which are for "a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period."[22] Although USERRA's

discrimination and retaliation prohibitions apply to these brief, nonrecurrent positions, there is no right of reemployment associated with these types of positions.

The initial burden of proving discrimination or retaliation in violation of USERRA rests with the individual seeking protection under USERRA. That individual must prove that "a status or activity protected by USERRA was one of the reasons the employer took action against him or her."[23] A status or activity is protected if it falls into one of the following categories: (A) Membership or application for membership in a uniformed service; (B) Performance of service, application for service, or obligation for service in a uniformed service; (C) Action taken to enforce a protection afforded under USERRA; (D) Testimony or a statement made in or in connection with a USERRA proceeding; (E) Any participation in a USERRA investigation; or (F) Exercise of a right provided by USERRA.[24] To meet its burden, the individual must prove a causal connection between the protected activity or status and the adverse employment action. The individual does not need to prove that the protected status was the sole cause of the employment action, just that it was a motivating factor and was "one of the factors that a 'truthful employer would list if asked for the reasons for its decision.'"[25]

4. Subpart C—Eligibility for Reemployment

To be eligible for reemployment, the employee need not actually prove that the employer discriminated against him or her based upon service in the uniformed services. The employee merely needs to meet the five (5) general criteria set out in § 1002.32: (1) with certain exceptions, the employer must be provided advance notice of the employee's uniformed service; (2) the employee must have less than five (5) years of cumulative service with that specific employer; (3) the employee must timely return to work; (4) upon returning from service, the employee must timely report to work or apply for reemployment; and (5) the employee must not have received a disqualifying discharge from the uniformed services.

Even if the employee meets these reemployment criteria, he or she may not be entitled to reemployment if the employer establishes one of several affirmative defenses set out in § 1002.139. Employers should be aware that they are responsible for proving any applicable defenses. The first affirmative defense permits an employer to refuse reemployment where the employer establishes its circumstances have changed to make such reemployment impossible or unreasonable. However, this exception should be narrowly construed and it is the employer's responsibility to prove the changed circumstances relate to the employer's pre-service conditions and not to the individual circumstances of the employees. It is not a defense if no opening exists at the time the employee returns from service or that another person was hired to fill the returning employee's position. However, an employer is not required to create a "useless job" for the employee to fill. Any other undue hardship created by reemployment also relieves an employer from having to reemploy that individual. The Regulations define an undue hardship as "an action requiring significant difficulty or expense," when considered in light of various factors, including the nature and cost of the action needed and the financial resources of the employer.[26] This undue hardship defense generally applies when the returning service member is not qualified for a position after the employer has made reasonable efforts to help the employee become qualified. Finally, the employer is not required to reemploy a returning service member if the employment position was "for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely."[27]

USERRA's coverage is extremely broad and it applies to virtually every employer. Pursuant to § 1002.34, USERRA applies to "all public and private employers in the United States, regardless of size." There are no size limitations for covered employers and it only takes one employee to create a potential liability under USERRA. The coverage also applies to foreign employers either doing business in the United States or maintaining a physical location or branch office in the United States as well as American companies operating "either directly or through an entity under its control in a foreign country."[28] USERRA's definition of employer is broad enough to include states, their political subdivisions, the District of Columbia, Puerto Rico, Guam, the Virgin Islands and all United States territories.

Even successors in interest to employers are covered by USERRA. The test for determining whether an employer is a successor in interest involves a multi-factor test considering the following factors: (1) whether there has been a substantial continuity; (2) whether the current employer uses the same or similar facilities, machinery, equipment and methods; (3) whether there has been a substantial continuity of employees; (4) whether there is a similarity of jobs and working conditions; (5) whether there is a similarity of supervisors and managers; and (6) whether there is a similarity of products and services.[29] Employers should be aware of the fact that as a successor in interest they may be liable for a USERRA reemployment claim even without having had notice of the claim at the time of merger, acquisition, or other form of succession.

A single employment position may encompass more than one employer under USERRA. The definition of employer is broad enough to cover any entity that has control over the employee's employment opportunities, including "a person or entity to whom an employer has delegated the performance of employment-related responsibilities."[30] The Regulations provide the example of a security guard hired by a security company and assigned to a third party's work site. The security

guard may report to both companies and, therefore, both employers would be responsible for complying with USERRA. Hiring halls also will be considered employers if the job assignment functions have been delegated by an employer to the hiring hall.

An employer need not actually employ an individual to be considered his or her "employer" under USERRA. Employers are prohibited from denying initial employment to an individual based upon his or her "membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services."[31] In addition, employers are prohibited from denying initial employment to an individual due to that individual taking any action to enforce USERRA's protections for any person.

Employees on layoff, strike and leave of absence are provided certain reemployment rights under USERRA. As long as he or she meets the other eligibility criteria, an employee on layoff when the period of service begins will be entitled to reemployment, if the employer would have recalled the employee during the period of service. This also applies to employees on strike or on leave of absence. The employee is entitled to reemployment even if he or she does not respond to any recall notices sent during the period of uniformed service. However, the employee is not entitled to be recalled if he or she would not have been recalled during the period of service because USERRA "cannot put the employee in a better position than if he or she had remained in the civilian employment position."[32]

Although USERRA protects a wide range of employees, including executive, managerial and professional employees, it does not apply to independent contractors. When determining whether an individual is an independent contractor, several factors will be considered, including the extent of the employer's control over the manner in which the work is performed, the individual's managerial skill and the effect on profit or loss, the individual's investment in equipment, and whether the position requires a special skill.

USERRA's protections also apply to a wide range of uniformed services. This includes all military fitness examinations, funeral honors duty authorized by Federal Statute, service with the National Disaster Medical System, service in the commissioned corps of the Public Health Service and National Guard duty with the Air National Guard and Army Reserve, but not National Guard service under authority of State Law. In addition, the President has the authority, in time of war or national emergency, to designate any category of persons as a uniformed service for purposes of USERRA. Membership in the Reserve Officers Training Corps (ROTC) and attendance at any of the military service academies is also protected under USERRA.

An employee will be protected under USERRA even if the service is not the sole reason for leaving the employment position. He or she may use the absence for other purposes, including working at another job or visiting relatives. These actions will not negate any reemployment rights to which the employee is entitled.

Employers must provide employees with enough time after leaving the employment position to travel safely to the place of service and to arrive fit for duty. Often, this will mean time off from shifts prior to the employee leaving. In addition, in the case of an extended period of service, the employer should provide the employee with "a reasonable period of time off from the civilian job to put his or her personal affairs in order."[33]

Unless prevented by military necessity or otherwise made impossible or unreasonable, the employee must provide the employer with advance notice of the service. The determination of a military necessity may only be made by a designated authority and this designation is not subject to judicial review. Although USERRA does not provide a specific time frame for notice of service, the notice should be given "as far in advance as is reasonable under the circumstances."[34] The Department of Defense has its own set of USERRA regulations which strongly recommend that such notice be provided at least thirty (30) days before the employee departs for the uniformed service. As USERRA provides no specific form of the notice, it may be either oral or in writing and employers may not require that the notice be in any specific form. Therefore, the employer may not take action against an employee simply because no advance notice was provided, or that the notice was not provided in the form the employer required.

Although the employee is to provide advance notice of the service, he or she does not need to seek the employer's permission for the service. In addition, the employee is not required to inform the employer of his or her intention to return to the employment position upon completion of the service. Employers should note that they may not even rely on an employee's statement that he or she does not intend to return upon the completion of service as the employee "is not required to decide in advance . . . whether he or she will seek reemployment after completing uniformed service."[35] Therefore, even if the employee states that he or she does not intend to return after completing the uniformed service, the employee would still be entitled to reemployment, provided the other eligibility criteria are met.

USERRA's protections apply for a cumulative period of up to five (5) years of uniformed service. This means that the employee is entitled to a length of absence of up to five (5) years with each individual employer. The five (5) year period only applies to the time the employee spends in uniformed service. Any time between notice of service and actual service does not count and neither

does the time between the completion of service and the employee's return to work. Various types of uniformed service do not count towards this five (5) year limitation. These include military specialties which require an initial period of obligated service greater than five (5) years and situations where the employee is ordered to or retained on active duty in certain national emergencies or during wartime.[36]

Employers have no control over the timing, frequency or duration of uniformed service and may not refuse to reemploy the employee due to concerns that the timing, frequency or duration of the leave was unreasonable. However, employers may bring such concerns to the attention of the appropriate military authority, and pursuant to the Department of Defense USERRA regulations, military authorities are required to provide assistance to employers with these types of concerns.

If the employee intends to return to the pre-service employer, he or she must timely notify the employer, or an agent with apparent responsibility for employment applications, of this intention. USERRA contains specific rules for returning to work and they are dependent upon the duration of the uniformed service. The table below illustrates the applicable rules:

Period of Service	Reporting Deadline
Uniformed service for less than 31 days or where absence is due to physical examination to determine fitness for uniformed service:	Must report to employer no later than first full regularly scheduled work period on first full calendar day following completion of uniformed service. Work period cannot begin until 8 hours after employee has arrived at his or her residence after traveling from place of uniformed service.
Uniformed service for more than 30 days but less than 181 days:	Must **submit an application** for employment or reemployment no later than 14 days after completing service.
Uniformed service for more than 180 days:	Must **submit an application** for reemployment no later than 90 days after completing service.

The above time limitations will be extended if the employee is hospitalized for or recovering from an illness or injury related to the uniformed service. Under those circumstances, the employee must generally report to the employer or submit an application for reemployment at the end of the necessary recovery period, but such period may not to exceed two (2) years, except where there are extenuating circumstances.

In addition to an application for employment, if the period of service exceeded thirty (30) days, the employee must provide the employer with specific documentation. This documentation must establish that the reemployment application is timely, the employee has not exceeded the five (5) year time limit and that the employee did not receive a disqualifying discharge. The employer may not deny reemployment by demanding documentation which does not exist or is not readily available from the uniformed services and the Regulations are clear that the employee "is not liable for administrative delays in the issuance of military documentation."[37] However, if the employee has been absent from employment for more than ninety (90) days, the employer may require the documentation prior to treating the employee as having had continuous employment for pension purposes. Obviously, an employee may be terminated if the documentation is received subsequent to reemployment and shows ineligibility for reemployment. A wide range of documents will satisfy this requirement, including a Department of Defense Certificate of Release or Discharge from Active Duty, a copy of duty orders and a letter from the commanding officer.

An employee will not be eligible for reemployment if he or she receives a disqualifying discharge from service. A disqualifying discharge includes a dishonorable or bad conduct discharge, a separation from the uniformed service under other than honorable conditions, certain commissioned officer dismissals and commissioned officers dropped from the rolls due to a court-martial or related confinement. However, reemployment rights will be restored if a military review board upgrades the disqualifying discharge or release, but the employee is not entitled to any back pay.

5. Subpart D—Rights, Benefits and Obligations of Persons Absent from Employment

It is important for employers to understand the specific rules relating to the rights and benefits of employees in the uniformed services. While on leave for uniformed service, an employee is to be considered on furlough or leave of absence and is entitled to the same non-seniority rights and benefits, such as the accrual of vacation time, as are provided to similarly situated employees on furlough or leave of absence.[38] If these non-seniority benefits vary depending on the type of leave, the employee on leave for the uniformed services is entitled to the most favorable treatment accorded to any comparable form of leave. Employers must provide all of these non-seniority benefits, regardless of whether the employer provides additional benefits, such as full or partial pay for performing service. Providing rights and benefits above and beyond those required does not permit the employer to

take away any other rights provided under USERRA. Employers should note that if the employee provides written notice of his or her intent not to return to the position following the uniformed service, the employer is not required to provide these benefits, but the employee retains his or her entitlement to reemployment.

USERRA also governs the types of accrued leave and/or time employees are allowed to use during their uniformed service. Although employees must be allowed to use any accrued or similar leave with pay during the period of uniformed service, he or she is not entitled to use sick leave which accrued during the period of service unless the employer allows the use of sick leave for any reason or "allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave."[39] Despite the employee's ability to use such sick leave, employers may not actually require employees to use accrued leave during their uniformed service.

A broad range of health plans are protected by USERRA. The definition of a health plan includes "an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee's health services are provided or the expenses of those services are paid."[40] Group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA),[41] as well as group health plans which are not subject to ERISA, are covered by USERRA. Multiemployer plans maintained pursuant to any collective bargaining agreements are also protected by USERRA.

Employees entering the uniformed services are entitled to continuing coverage for themselves and their dependents, if applicable. The plan must permit the employee to continue the coverage for the lesser of the following: (1) twenty-four (24) months from the date he or she leaves the employment position; or (2) for the period beginning on the date the employee leaves the employment position until he or she either returns to employment or fails to return to employment. USERRA does not specify how this election must be made and health plan administrators are free to develop "reasonable requirements" addressing how continuing coverage may be elected, provided such requirements are consistent with the plan and USERRA's other notice requirements.[42] Although USERRA's requirements with respect to health plans appear to be similar to those provided under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA),[43] there are important distinctions. Initially, USERRA applies to all employers whereas COBRA requires at least twenty (20) employees. In addition, COBRA's coverage period can vary, but USERRA has an outside time limit of twenty-four (24) months.

USERRA also contains specific rules regarding the amount employees may be required to pay for such coverage. The following chart sets forth these limits:

Length of Service	Payment for Coverage
Less than 31 days	No more than the regular employee share, if any
31 or more days	No more than 102% of the full premium (the employee's share plus 2% for administration expenses).

Employers and plan administrators may take a variety of actions with respect to employees who fail to either elect coverage or fail to pay for coverage. The options vary depending upon whether the employee provided notice of the uniformed service. If the employee failed to provide the employer with notice of the uniformed service and has failed to elect continuing coverage, the health plan coverage may be canceled upon the employee's departure. However, if the notice was excused for any reason set forth in the Regulations, the health coverage must be reinstated upon the employee's election to continue coverage and the payment of all outstanding amounts. If the employee provided notice of service, but failed to elect continuing coverage, employers and plan administrators may "develop reasonable requirements addressing how continuing coverage may be elected."[44] Where a health plan is also covered by COBRA, the plan administrator may adopt COBRA-compliant rules, provided those rules do not conflict with USERRA's other requirements.

6. Subpart E—Reemployment Rights and Benefits

Employees returning from the uniformed service are entitled to prompt reemployment. Prompt means "as soon as practicable under the circumstances of each case."[45] Generally, this means within two (2) weeks of the employee's application for reemployment. However, the time period may be extended where the employer is required to make reassignments, etc., to accommodate an employee who has been absent for an extended period of time.

There are very specific requirements with respect to the position to which the returning employee is entitled. Employers would be well advised to become very familiar with these requirements as the onus is on the employer to find a suitable position for the returning employee. The employee is generally entitled to reemployment in the "escalator position" which is defined as the position "that he or she would have attained with reasonable certainty if not for the absence due to uniformed service."[46] This position is intended to reflect the pay, benefits, seniority and other benefits the employee would have received if he or she had never left for uniformed service. Even

missed opportunities for promotion must be considered. For example, if the employee missed the opportunity for a promotion based upon a skills test, he or she must be provided an opportunity to take the skills test after a reasonable period of time to adjust to the employment position. If the employee is successful on the skills test and there is a reasonable certainty the employee would have been promoted or even made eligible for promotion, the promotion or eligibility for promotion must be made effective as of the date it would have occurred. However, the escalator position may result in adverse employment consequences in certain situations, such as where the employee would have been laid off or even terminated.

The specific escalator position is dependent upon the length of the employee's uniformed service and it places a heavy burden upon employers to accommodate the returning service member. In each instance, the employer must find a suitable employment position for the employee based upon a detailed set of priorities. If the employee is not qualified for a certain position, it is the employer's responsibility to make reasonable efforts to help the employee become qualified. An employee will be qualified for a position if he or she has the ability to perform the essential tasks of the position. The Regulations contain various criteria for determining whether a task is essential, such as the amount of time spent on the task, work experience and the consequences of not requiring those tasks. If, after the employer has made reasonable efforts, the employee is unable to qualify for any of the enumerated employment positions, the employer is not required to reemploy the individual. The escalator provisions are outlined below:

Length of Service	Reemployment Position
Less than 91 days	First, to the escalator position.
	If not qualified for the escalator position, the employee should be reemployed in his or her pre-service position.
	If not qualified for the pre-service position, the employee should be reemployed in the nearest approximation first to the escalator position and then to the pre-service position.
More than 90 days	First, to the escalator position.
	If not qualified for the escalator position, the employee should be reemployed in the pre-service position or a position with similar seniority, status and pay.
	If not qualified for the pre-service position, the employee should be reemployed in a position which is the nearest approximation first to the escalator position and then to the pre-service position.

The returning employee is entitled to the same seniority rights and benefits he or she would have received if there had not been a break in employment. In the absence of a formal seniority system, USERRA will look to custom and practice in the place of employment to determine the employee's entitlement to any benefits which are based upon the length of employment.

Not only must employers ensure compliance with the Americans with Disabilities Act,[47] but they also need to comply with USERRA's specific rules regarding the treatment of disabled employees returning from the uniformed services. In addition to being entitled to employment in the escalator position, if the employee has a disability incurred in or aggravated during the uniformed service, the employer is required to make reasonable efforts to accommodate the disability and help the employee become qualified for the applicable reemployment position. If, after the employer's reasonable efforts, the disabled employee is unable to become qualified for the escalator position due to the disability, he or she is entitled to reemployment in a position that is equivalent to the escalator position as far as seniority, status and pay. If the employee is unable to qualify for that position, he or she will be entitled to the nearest approximation to the equivalent position, consistent with his or her circumstances.

With respect to compensation for returning employees, the employer should use the same escalator provisions which determine the reemployment position. If the employee is reemployed in the escalator position, he or she is entitled to be compensated at the rate associated with that position. However, the employer needs to take into account any pay, merit or periodic increases the employee would have attained as well as his or her work history and history of merit increases. If a skills test or examination was involved in any pay or merit increase, the employer should follow the same criteria as set forth above with respect to skills tests for promotions. Where the employee is reemployed in the pre-service position or any other position, the employee must be compensated as any other employee in that position, taking into account the same factors as would be considered for the escalator position.

In addition to reemployment rights, USERRA protects employees from discharge, with such protection period being dependent upon the length of uniformed

service. For service between thirty (30) and 180 days, the employee is protected from discharge for a period of 180 days. This protection is extended to one (1) year following reemployment, if the uniformed service was longer than 180 days. During these periods, the employee may only be discharged for cause.

As with most other areas governed by USERRA, the employee is treated as though there were no break in employment for purposes of pension plans. In addition to the period of uniformed service, the time between the date the employee left the uniformed service and the date the employee returned to work is counted as employment. It is important to note that an employee may take up to ninety (90) days to report to work, depending upon the length of uniformed service. Even a period of hospitalization, up to two (2) years may be included in the calculation of employment time.

"This article merely provides an outline and description of the recent USERRA regulations. Employers should read and review these regulations in detail and take any steps necessary to ensure that all policies, procedures, handbooks, etc., are in full compliance with USERRA."

With limited exceptions, the employer is liable to the pension plan to fund any obligation the plan may have for providing benefits attributable to the period of service. However, the employer is not required to make any plan contributions until the employee is reemployed. Employees enrolled in contributory plans are allowed, but not required, to make up missed contributions or elective deferrals. The period for making these contributions is up to three (3) times the length of uniformed service, but not to exceed five (5) years. The employee is not required or permitted to pay interest on any missed contributions or elective deferrals, but is allowed to repay a previous distribution or elective deferral. For purposes of the calculation of contributions, the employee's compensation is the rate he or she would have received if continuously employed. If that amount is uncertain, the compensation should be based upon the average of the twelve (12) month period preceding the service. For employees not employed for a period of twelve (12) months prior to service, the average compensation should be calculated based upon whatever shorter period the employee was employed.

7. Subpart F—Compliance Assistance, Enforcement and Remedies

USERRA provides two (2) options for an aggrieved employee. He or she may file a complaint with the DOL's Veterans' Employment and Training Services (VETS) or the employee may file a private lawsuit in the appropriate court as set forth in the Regulations. VETS will investigate any complaints and has the power to subpoena witnesses as well as documents. If VETS is unable to successfully resolve the complaint, the individual may request that VETS refer the complaint to the Attorney General or the individual may file a private lawsuit. It is important to note that employers are not entitled to bring claims under USERRA.

In any legal action, whether it is brought by the Attorney General or by the employee, courts are authorized to award compliance with USERRA and to award damages for lost back pay and benefits, liquidated damages for willful violations and attorneys' fees and costs. In addition, courts may award other equitable relief the Court may deem appropriate.

Employers should also be aware that there is no statute of limitations for a claim under USERRA. However, one court has held that the general four (4) year federal statute of limitations applies.[48]

8. Conclusion

USERRA is extremely broad and can have a dramatic impact on employers. This article merely provides an outline and description of the recent USERRA regulations. Employers should read and review these regulations in detail and take any steps necessary to ensure that all policies, procedures, handbooks, etc., are in full compliance with USERRA.

Endnotes

1. 38 U.S.C. §§ 4301-4334.
2. 38 U.S.C. §§ 4301-4304.
3. 50 U.S.C. §§ 501, *et seq*.
4. 20 C.F.R. § 1002.2.
5. 20 C.F.R. § 1002.5(c).
6. *Id*.
7. 29 U.S.C. §§ 2601, *et seq.*
8. 29 C.F.R. § 825.217(a).
9. 20 C.F.R. § 1002.5(d)(1).
10. *See Brandasse v. City of Suffolk*, 72 F. Supp. 2d 608, 617-18 (E.D. Va. 1999) (holding that the city and its personnel director were subject to liability as employers where the city was the direct employer and the personnel director had authority over hiring and firing); *Jones v. Wolf Camera, Inc.*, 1997 WL 22678 (N.D. Tex., 1997) (holding that individual defendants could be held liable under USERRA).
11. 42 U.S.C. § 12101(5).
12. 42 U.S.C. § 2000e(b).
13. 20 C.F.R. § 1002.5(d)(1)(i).
14. 29 U.S.C. § 1002(3) (defining an employee benefit pension plan as an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan).

15. S. Rep. No. 158, 103d Cong., 2d Sess. 42 (1993).
16. 20 C.F.R. § 1002.5(l).
17. *Id.* at § 1002.6.
18. *Id.* at § 1002.5(o).
19. *Id.* at § 1002.18.
20. *Id.* at § 1002.40.
21. *Id.* at § 1002.19.
22. *Id.* at § 1002.21.
23. *Id.* at § 1002.22.
24. *Id.* at § 1002.23.
25. *Kelley v. Main Eye Care Associates, P.A.*, 37 F. Supp. 2d 47, 54 (D. Me. 1999); *Fink v. City of New York*, 129 F. Supp. 2d 511, 520 (E.D.N.Y. 2001) (stating that military status is a motivating factor in an employment decision if "the defendant relied on, took into account, considered, or conditioned its decision on that consideration").
26. 20 C.F.R. § 1002.5(n).
27. *Id.* at § 1002.139(c).
28. *Id.* at § 1002.34(c).
29. *Id.* at § 1002.35.
30. 38 U.S.C. § 4303(4)(a)(i).
31. 20 C.F.R. § 1002.40.
32. *Id.* at § 1002.42(c).
33. *Id.* at § 1002.74(b).
34. *Id.* at § 1002.85(d).
35. *Id.* at § 1002.88.
36. *Id.* at § 1002.103.
37. *Id.* at § 1002.122.
38. *Id.* at § 1002.149.
39. *Id.* at § 1002.153(a).
40. *Id.* at § 1002.163(a).
41. *Id.* at § 1191(a).
42. *Id.* at § 1002.165.
43. 26 U.S.C. § 4980B.
44. 20 C.F.R. § 1002.167(b).
45. *Id.* at § 1002.181.
46. *Id.* at § 1002.191.
47. 42 U.S.C. §§ 12101, *et seq.*
48. *See Rogers v. City of San Antonio*, 2003 WL 1566502 (W.D. Texas).

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Trends in Organizing Activity: Card Check and Neutrality Agreements

By Alice Winkler

It should come as no surprise that in an ongoing effort to combat the declining union membership rate, the organized labor movement is being forced to reinvent itself by developing new strategies and tactics to increase its membership. The unionized workforce in the United States has fallen from approximately 20.1% in 1983 to only 12% in 2006, a figure that is down one-half of a percentage point from the size of the unionized workforce in 2005.[1] Union membership for government workers was most recently tallied to be 36.2%, while union membership in the private sector was only 7.4%.[2] In hard numbers, unions lost 326,000 members in 2006, and there are only 15.4 million unionized employees in the United States.[3]

Not surprisingly, key labor organizations are dedicating huge amounts of money to organizing activity. The AFL-CIO has created a $22.5 million "strategic organizing fund," and the Change to Win Coalition has committed to spending $750 million annually for organizing activity, while the United Auto Workers will be transferring $50 million out of its strike fund for this purpose.[4] Similarly, the American Federation of State, County and Municipal Employees imposed a $3 per member dues increase in an effort to increase its organizing and political activity budget by $35 million and the Laborers' International Union has increased its dues by 25 cents per hour in order to raise a projected $104 million dollars for organizing activity, effectively tripling its support for regional organizing campaigns.[5]

Card Check and Neutrality Agreements

But beyond throwing money at the problem, the organized labor movement has committed itself to utilizing strategic tactics that support organizing activity at the regional and grassroots level. Over the course of the past ten years, it has increasingly turned to the utilization of card check and neutrality agreements to run organizing campaigns that are more likely to succeed.

Card check agreements are contractual arrangements between a union and employer where the employer agrees to recognize the union on the basis of a majority count of authorization cards submitted by employees rather than a traditional NLRB-run secret ballot election. Generally, card check agreements are negotiated hand-in-hand with neutrality agreements whereby employers agree to refrain from taking a position on union certification during the course of an organizing campaign.

The reasons for the trend towards the use of card check agreements are complicated. There is a perception among labor organizations that traditional NLRB secret ballot elections hinder their organizing efforts. They complain that the rules for these elections are overly technical, utilizing strict voting criteria, subject to a lengthy hearing and appeal process and are ultimately more time consuming and costly than card check certifications. Advocates of organized labor also argue that a typical organizing campaign subjects employees to extensive intimidation by management, and that card checks as an alternative are more flexible voting tools, requiring the employee to simply fill out a card indicating his or her preference for the existence of a worksite union.

Labor advocates further assert that neutrality agreements level an unequal playing field in the workplace where management typically has the upper hand in influencing employees against unionization. They maintain that when employers agree to be neutral, organizers can focus on getting their message across to the employees rather then engaging in a heated battle with management. They also argue that ultimately, neutrality agreements benefit employers who can expect less disruption to the workplace and avoid costly expenditures in opposing organizing activity if they agree to remain neutral during an organizing campaign.

Alternatively, opponents argue that card check agreements strip employees of the confidentiality protections inherent in an NLRB-run secret ballot election, subjecting them to blatant voting intimidation by coworkers and union organizers. They assert that employees who sign authorization cards often do not have a clear understanding of the implications of their decisions, and are easily cajoled to sign them with promises of prizes and bonuses. Ironically card check agreements are viewed by some employer advocates as inherently undemocratic in that they open the door to coworker intimidation by doing away with the secret ballot election.

Similarly, these advocates maintain that neutrality agreements do a disservice to employees by depriving them of valuable knowledge that they need in order to make a reasoned decision on whether a union would best serve their interests. In this respect, opponents view neutrality agreements as depriving employers of their statutory right under the National Labor Relations Act (NLRA) to communicate with their employees.[6] While it can be argued that this right may be limited via negotiation, opponents of the use of neutrality agreements maintain that the end result is an absurd limitation on an employer's ability to effectively relay information to its own workforce.

Benefits to Organized Labor

There is no question however, that a strategy of utilizing card check and neutrality agreements has been more successful in promoting union certifications than traditional organizing campaigns that culminate in a secret ballot election. Unions won 56.8% of all NLRB representation elections in fiscal year 2005.[7] However, according to Stewart Acuff, Organizing Director for the National AFL-CIO, unions are successful 80% of the time in card check elections.[8] Of the three million workers reported as newly organized by the AFL-CIO between 1998 and 2003, fewer than 20% were added through the formal NLRB election process.[9]

Although card check elections and neutrality agreements can exist independently, they are most effective when utilized together. One study found that union success rates hovered around the 45% mark when only a neutrality agreement was in effect, climbed to 62.5% with only a card check agreement in place, and rose to 78% when a card check agreement in conjunction with a neutrality agreement had been implemented.[10]

Political Activity

The matter is squarely on the table in Washington, with competing bills being progressed through Congress. The Employee Free Choice Act[11] seeks to allow unions to implement card check elections at will and in all likelihood, if passed, will herald the end of the traditional NLRB supervised secret ballot election. Alternatively, the Secret Ballot Protection Act[12] seeks to amend the NLRA and eliminate a union's ability to circumvent the NLRB election procedure completely, making it an unfair labor practice to recognize a union that has not been certified in an NLRB election.

At the state level, California Government Code, sections 16645–16649, prohibiting employers from using state funding to promote or impede organizing activity on their properties, was upheld by the Ninth Circuit in a finding that it was not preempted by the NLRA.[13] In New York, a similar statute, Labor Law section 211-a, is currently making its way through the appeals process. Although it was initially found to be preempted by the NLRA in District Court,[14] on appeal it has since been reversed and remanded in order to resolve a variety of factual issues regarding the application of the relevant preemption doctrines.[15]

Benefits to Management

Notwithstanding legislative efforts, the current tone of organizing activity is imbedded with the utilization of card check and neutrality agreements. There are a variety of reasons why management might consider executing a card check and neutrality agreement. In some situations, an employer may be motivated to buy industrial peace and strengthen an existing relationship with a union that already represents employees in some parts of its company. Alternatively, it may be in management's interest to execute a neutrality agreement in exchange for a union's support on a key business initiative. There is no question that the execution of a neutrality agreement eliminates the employer's need to wage a costly and disruptive campaign to maintain a union-free workplace.

One of the more positive examples of the implementation of a neutrality agreement can be found in the relationship between Cingular Wireless, the largest wireless telecommunications carrier in the country, and the Communications Workers of America (CWA). Rather than fight the CWA's organizing activity, Cingular agreed to execute a neutrality agreement in order to develop a solid ongoing partnership with the CWA.[16] As a result, the CWA has organized approximately 18,000 Cingular employees, and endorsed Cingular's acquisition of AT&T Wireless.[17] In addition, Cingular has been adopted as the carrier of choice for unions and union-friendly companies.[18] Similarly, when the SEIU negotiates with nursing homes that are amenable to neutrality agreements, it often utilizes its political power to assist them in getting government funding.[19]

Once the conversation is initiated, employers can negotiate the language of a particular neutrality agreement on their own terms. For example, in a card check agreement with Verizon, the CWA agreed that a 55% majority would be necessary for the union to win representation rights, and ultimately did not achieve certification.[20] Neutrality agreements may contain provisions that govern a union's access to employees, regulate union and employer behavior during the course of the campaign, and provide for a dispute resolution procedure in the event the campaign does not run smoothly.

The League of Voluntary Hospitals and Homes of New York and 1199SEIU have agreed to "*Organizing Rules of Conduct*" whereby 1199SEIU conceded card check elections and agreed not to deter employees from attending voluntary meetings run by management. In exchange, the League agreed that employers would not hold mandatory group meetings or initiate one-on-one conversations with employees regarding matters of representation, and were to refrain from advising employees from voting against the union.[21] These rules also contain an arbitration procedure in the event of a dispute regarding their application during an organizing campaign.[22] Neutrality agreements negotiated by the CWA, United Auto Workers, and United Steel Workers of America throughout the country have standard language prohibiting employers from helping or hindering the unions' organizing effort, but allowing them to communicate facts to employees, limited in some cases to responses to inquiries.[23]

On a grander scale, the SEIU regularly negotiates "triggers" in situations where it is attempting to organize entire industries or regions that historically have not been

unionized. In order to obtain neutrality agreements from individual employers in a sector that is predominantly non-union and who would be at a competitive disadvantage if faced with the prospect of collective bargaining, the SEIU implements a "trigger" in its neutrality agreements whereby it will not engage the employer in collective bargaining until a set percentage of the industry has been successfully organized. Using this mechanism, the SEIU was able to organize 6,000 janitors in New Jersey in a five-year period, subsequently raising their pay from minimum wage to $11 per hour, and has formed a historic local with 5,300 janitors in Houston, Texas.[24]

Corporate Campaigns

In circumstances where employers have not been agreeable to executing card check and neutrality agreements, unions have resorted to the use of the "corporate campaign" to achieve their goals.[25] Corporate campaigns are well-strategized comprehensive efforts by unions to utilize all available tools at their disposal including political, legal and community pressure to compel management to comply with their demands. Tactics that are used vary from negative publicity to political pressure, interference with capital projects, the pursuit of shareholder resolutions, the initiation of regulatory roadblocks and more. They are increasingly being utilized in the health care industry, a sector that has no prospects for being outsourced abroad and is currently in the throes of bitter organizational activity. In the ten years between 1990 and 2000, NLRB elections in this sector increased by approximately 48% while the overall number of elections dropped by 6%.[26]

In one corporate campaign, the SEIU worked with community groups, local clergy and activists in New Haven, Connecticut to stop Yale-New Haven Hospital from building a $430 million cancer center. Its strategy involved arguing that the hospital had not addressed environmental impact concerns effectively, and filing a class action lawsuit against the hospital on behalf of former uninsured patients, claiming they had been denied free medical care, charged exorbitant fees and wrongfully pursued by bill collectors.[27] Ultimately the corporate campaign was stopped by an agreement whereby the hospital agreed to neutrality and made a commitment to invest extensively in the community and the SEIU abandoned its demand for a card check election.[28]

In another corporate campaign against Sutter Healthcare in Sacramento, California, when management balked at signing a master contract with the SEIU for all its hospitals, the SEIU initiated a campaign which consisted in part of using its political influence to initiate audits by the California Public Employee Retirement System that resulted in 13 Sutter hospitals being cut from Blue Shield of California.[29] Additionally, it disseminated reports that Sutter had overcharged the uninsured, pressured the state to revoke Sutter's tax exempt status, contacted donors to dissuade them from contributing money to Sutter hospitals, and attempted to prevent Sutter from completing a bond issue to raise money for capital improvements.[30]

In response to extreme union tactics, some companies have turned to the courts. Note that in situations where an employer files a lawsuit against an employee during an organizing campaign, the employer may be found to have committed an unfair labor practice if the lawsuit is without a reasonable basis in law or fact.[31] However, this past summer Sutter Healthcare was awarded a $17.3 million judgment in connection with a libel lawsuit against UNITE HERE.[32] The union had mailed postcards to potential maternity ward patients alleging that the laundry service utilized by the hospital did not properly clean linens.[33] If the award is upheld on appeal, it may have devastating financial consequences for the union.

In another lawsuit, *Pichler v. UNITE HERE*,[34] a group of Cintas employees alleged that their privacy rights were violated when the union found their home addresses by tracing the license plates on cars in the company parking lot. The information gathered enabled the union to progress its corporate campaign by visiting the employees in their homes and researching the basis for initiating a variety of legal actions against Cintas including EEOC charges, OSHA violations and NLRB charges.

The lawsuit by the employees, funded by Cintas, complained of the violation of the Drivers Privacy Protection Act of 1994 (DPPA), which prohibits the disclosure of personal information gleaned from motor vehicle records. In granting the employees' motion for summary judgment, the union's contention that the organizing activity came within an exception in the DPPA for the gathering of information in connection with litigation was rejected on the ground that the exception applies to investigations related to existing litigations rather than investigations in contemplation of the initiation of lawsuits.[35]

Challenge to the Recognition Bar Doctrine in Voluntary Recognitions

But what is by far the most serious outstanding issue with which organizational activity under card check agreements is being challenged today is the potential holding in a case that is currently before the NLRB: *Dana Corp and Metaldyne Corp*.[36] Much to the disappointment of proponents of the utilization of card check elections, the NLRB has agreed to consolidate and review these two cases where employees at two separate sites filed a decertification petition weeks after their employers voluntarily recognized the UAW at each facility via card check elections. In agreeing to hear the case, the NLRB chose not to apply the long-standing recognition bar doctrine, which precludes a challenge to a union's status for a reasonable time after it has been initially recognized in order to give it an opportunity to establish itself. The majority ruled that the increased utilization of recognition agreements

versus the "superiority of Board-supervised secret ballot elections"[37] warrants a more critical review of the circumstances underlying each of these cases.

Conclusion

Consequently, it is clear that the strategies being utilized by the labor movement to turn around declining unionization statistics, albeit successful, are under attack by employers and receiving unwanted attention from the NLRB. The extent to which card check and neutrality agreements continue to be a viable tool for organizational activity will be dependent upon a variety of factors. While they can certainly be legislated out of existence depending on the mood in Congress, the current Congressional demographics make this outcome unlikely. More importantly, if legislation has no negative impact on the use of these types of organizing tools, union organizers will have to be increasingly careful in the tactics they utilize to achieve these agreements in order to withstand judicial scrutiny and avoid further penalties by the courts. In any event, the NLRB's decision in the *Dana and Metaldyne* case will determine the lasting impact that a successful card check campaign will have once a voluntary recognition has occurred.

Endnotes

1. United States Bureau of Labor Statistics, Union Members Summary, January 25, 2007. Note that 1983 is the first year for which the Bureau of Labor Statistics maintains union membership data.
2. *Id.*
3. *Id.*
4. Clifton, *Unions Hold California in a Headlock*, The Telegraph, November 15, 2006, http://www.macon.com/mld/macon/business/16013443.htm.
5. *Id.*
6. 29 U.S.C. § 158(c).
7. NLRB Annual Report (2005) at 16.
8. Sostek, *Unions Yes or No? As State AFL-CIO Convention Comes to Pittsburgh, Unions, Employers Push for Changes to Voting Procedures*, Pittsburgh Post Gazette, April 4, 2006, at A7.
9. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa Law Review 815, at 828 (2005).
10. Eaton and Kriesky, *Union Organizing Under Neutrality & Card Check Agreements*, 55 New York State School of Industrial and Labor Relations, Industrial and Labor Relations Review 42, at pp. 51-52 (October 2001).
11. S. 1925 and H.R. 3619.
12. H.R. 43434.
13. *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006) (en banc).
14. *Healthcare Ass'n of New York State, Inc. v. Pataki*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005).
15. *Healthcare Association of New York et al. v. George Pataki et al.*, Docket No. 05-2570-cv. (2d Cir. Dec. 2006).
16. Richtell, *In Wireless World, Cingular Bucks the Antiunion Trend*, New York Times Final, February 21, 2006, at 1.
17. *Id.*
18. *Id.*
19. Kirkland, *Andy Stern: The New Face of Labor*, Fortune, October 16, 2006, at 122.
20. Reice and Berner, *Unions favor card check recognition in organizing; But the NLRB may rule, or Congress may legislate, to restrict this strategy. Seeking new members; Voluntary recognition; Card check recognition; Advantages for employers; Recent NLRB ruling*, The National Law Journal, January 10, 2005 at 17; Richtell, *supra* note 16.
21. Collective Bargaining Agreement dated May 7, 2004 between 1199SEIU and the League of Voluntary Hospitals and Homes of New York, *Union Organizing Rights* (Attachment A) at pp. 141–151.
22. *Id.* at pp. 146–148.
23. Eaton and Kriesky, *supra* note 10 at 47.
24. Kirkland, *supra* note 19.
25. The utilization of corporate campaigns is not limited to organizational activity. They have been used to influence corporate activity in a variety of social awareness campaigns such as the campaign against Nike to refrain from using child labor.
26. Roberts, *Keeping Unions at Bay*, Trustee, February 1, 2004, at 20.
27. *Id.*
28. See Bass, *A "Win-Win-Win" Deal Struck on Cancer Center*, New Haven Independent, March 22, 2006, http://www.newhavenindependent.org/HealthCare/archives/2006/03/deal_struck_on.html. To date, although it seemed as though the dispute between the SEIU and Yale New Haven Hospital had been settled with this breakthrough agreement, allegations that the hospital was in violation of it were upheld in a decision by Arbitrator Margaret Kern on December 13, 2006, and the union election originally scheduled for December 20 and 21 was postponed. See Paul Bass, *Union Election Off, Arbitrator Says Hospital Broke Law*, New Haven Independent, December 13, 2006, http://www.newhavenindependent.org/archives/2006/12/union_election.php.
29. Haugh, *The New Union Strategy: Turning the Community Against You*, Hospitals & Health Networks, May 1, 2006, at 32.
30. *Id.*
31. *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983) (the filing of a non-meritorious civil action constitutes bad faith and an unfair labor practice).
32. *Sutter v. UNITE HERE*, Cal. Super. Ct., S-CV-13978 (Placer Co. Calif., Super. Ct. July 21, 2006).
33. Interestingly, the union did not take this action to pressure Sutter Health in its own dealings with UNITE HERE, but was attempting to influence Sutter's janitorial vender, with whom it was engaged in a labor dispute.
34. *Pichler v. UNITE HERE*, E.D. PA 04-2841, Aug. 30, 2006.
35. Statutory damages under the DPPA are a minimum of $2,500 per claimant. In this case, the court stayed the payment of damages to all but the named Plaintiffs pending the outcome of the appeal. The class may encompass upwards of 2,000 individuals.
36. *Dana and Metaldyne Corporation*, 341 NLRB No. 150 (June 7, 2004).
37. *Id.*

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Canada Opens the Door to U.S. Injunctions: The Impact of the Supreme Court of Canada Decision in *Pro Swing Inc. v. Elta Golf Inc.*

By Peter N. Mantas

A recent decision of the Supreme Court of Canada has important implications for New York labor and employment lawyers and their clients, who may wish to enforce a U.S. court order in Canada. On November 17, 2006, in the case of *Pro Swing Inc. v. Elta Golf Inc.*,[1] the Supreme Court held that the time had come to recognize important changes in international commerce, labor mobility and technology, and to reverse the long-standing common law principle in Canada preventing a litigant from enforcing foreign non-monetary judgments.

The effect of this judgment by Canada's highest court is that an injunction obtained before a New York court may now be enforced in Canada. For example, an employer may now enforce a restrictive covenant in Canada, even though it obtained an order from a New York court with respect to that covenant. However, there are certain requirements and caveats. These important restrictions, which may affect whether enforcement of the foreign non-monetary judgment may be obtained in Canada, are discussed below. Note that a U.S. judgment will still require certain legal formalities in order to be enforced, and these may vary depending on the U.S. state and Canadian province in question.

Pro Swing was not an employment case. It was an intellectual property case. However, its applicability stretches beyond the field of intellectual property. The significance of the judgment is truly in the area of private international law, and its effect will be on a wide range of legal disciplines, including employment law.

The facts of *Pro Swing* are relatively simple. Pro Swing was a U.S. company that owned a trademark for a type of golf club: "Trident." Elta Golf was a Canadian company that sold products that resembled the Trident trademark on its website. In 1998, Pro Swing sued Elta Golf in Ohio for trademark infringement and dilution, use of a counterfeit mark, unfair competition and deceptive trade practices. Shortly after the commencement of the lawsuit, the parties entered into a settlement agreement which included a consent decree of the Ohio court.

Five years later, Pro Swing learned that Elta Golf was violating the consent decree and started a new legal proceeding in Ohio. Elta Golf did not defend. Pro Swing then obtained an order for contempt, and a confirmation of the earlier consent decree. The court further ordered a combination of monetary and non-monetary relief.

Following the Ohio judgment, Pro Swing filed a legal proceeding in Ontario, where Elta Golf did business. Pro Swing sought recognition of the 1998 consent decree and 2003 court order. Elta Golf defended by arguing that the U.S. orders were not final judgments for a fixed sum of money, and could therefore not be enforced in Canada. The effect of Elta Golf's position, if sustained, would be to force Pro Swing to litigate the entire "Trident" dispute in Ontario, notwithstanding the earlier orders obtained. In short, Pro Swing would be back to square one.

Unfortunately for Pro Swing, the law in Canada as stated by Elta Golf was correct. Traditionally, a distinction was drawn in Canada between the enforcement of foreign monetary and non-monetary judgments. The theory behind this distinction was that non-monetary relief was a form of equitable remedy, and such remedies should be enforced only by a domestic court. Pro Swing sought to change the law.

The issue of the enforceability of the Ohio orders came before a motions court judge, who held that the principles in the 1990 Supreme Court of Canada case of *Morguard Investments Ltd. v. De Savoye*[2] paved the way for the enforcement of non-monetary judgments. The judge held further that the enforcement of non-monetary judgments should not be without limit, and that various requirements would still have to be met. In particular, the terms of the foreign order had to be final and conclusive. The judge then proceeded to find for Pro Swing, with the exception of certain aspects of the 2003 order.

Elta Golf appealed to the Ontario Court of Appeal. The Court of Appeal agreed with the lower court judge that the time had come for the law to change, but found that on the facts of this case, certain requirements had not been met, in particular, that the consent decree and order in this case were ambiguous with respect to the scope of their extraterritorial application. Pro Swing then sought and was granted leave to appeal to the Supreme Court of Canada.

The Supreme Court unanimously agreed that the time had come for the law to change, and for the prohibition against recognition of foreign non-monetary judgments to be lifted. Moreover, the court agreed further that certain requirements would have to be met for such an order to be enforced in Canada.

However, the court split 4-3 in its applicability of this new jurisprudence to the facts of this case. The major-

ity agreed with the Court of Appeal and denied Pro Swing its relief. Writing for the majority, Madam Justice Deschamps stated that the order's extraterritorial scope was uncertain. In addition, the majority found that the 2003 order was quasi-criminal in nature. The dissenting minority, in a decision written by Chief Justice Beverley McLachlin, agreed with the lower court and held that Pro Swing's claim should be granted.

Of interest to U.S. practitioners are the general principles set forth by the court, in which all judges were essentially in agreement. In the majority decision, Madam Justice Deschamps explained the need for change in the common law, in the face of significant and recent developments in business:

> Modern-day commercial transactions require prompt reactions and effective remedies. The advent of the Internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalization of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The Court has been asked to change the common law. The case for adapting the common law rule that prevents the enforcement of foreign non-money judgments is compelling. But such changes must be made cautiously. Although I recognize the need for a new rule, it is my view that this case is not the right one for implementing it.[3]

While she concluded that the law should change, this was not the appropriate case for her and the majority in which such a change should be implemented. Nevertheless, she set forth certain relevant factors that had to be considered before enforcement, as a guide to courts dealing with this issue:

> I agree that the time is ripe to revise the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments. However, such a change must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system.[4]

The relevant factors to be considered in whether the foreign non-monetary judgment should be enforced was not a fixed list or precise exercise. Madam Justice Deschamps concluded as follows:

> The evolution of the law of enforcement does not require me, at this point, to develop exhaustively the criteria a court should take into account. As cases come up, appropriate distinctions can be drawn. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one.[5]

With this judgment, which is binding on all courts in Canada, the long-standing prohibition under common law against enforcement of foreign non-monetary damages came to an end. However, New York practitioners must be aware that for such a U.S. order to be enforceable in Canada, it must comply with certain requirements. These include, but are not limited to, the need for the order to be final, in the sense that it does not require further interpretation, and that it be issued by a court of competent jurisdiction. New York practitioners should also be aware that, as would occur in the U.S., this new direction in the law will result in further case law among lower courts. Those developments, both at the trial and appellate levels, will be significant in defining the various circumstances under which this law can be used.

Endnotes

1. 2006 SCC 52 (CanLII).
2. 1990 CanLII 29 (SCC), [1990] 2. S.C.R. 1077.
3. *Pro Swing, supra*. at para. 1.
4. *Id*. at para. 15.
5. *Id*. at para. 31.

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An Arbitrator's View of Past Practice

By Sharon Henderson Ellis

The following is adapted from a presentation given for the Labor Arbitration Institute in October 2006.

In most of life, "the way we've always done it" has a lot to do with the way we do things now. Labor arbitration and contract interpretation are no different.

Because a definition of terms is always useful, here's a good one of past practice: "a pattern of prior conduct so consistently undertaken in recurring situations that the parties come to see that conduct as the appropriate course of action in the particular circumstance."

In labor arbitration, proof of past practice can be introduced for any one of three purposes: to clarify ambiguous language or fill in general language; to establish a freestanding and unwritten practice as binding; and to support an assertion that clear contract language has been amended by mutual agreement as demonstrated by the parties' long-standing practice.

First Usage: Clarifying Ambiguous Language

The single most important use of past practice, the simplest, and the one most frequently used, is using evidence of the parties' past practice to fill in details where contract language is general or using it to clarify contract language that is ambiguous or, at least, arguably ambiguous.

Using past practice to clarify ambiguous language normally involves one question only: Is the language in dispute in fact ambiguous or, is it clear on its face? If it is ambiguous, it needs external evidence—the parties' past practice—to determine its meaning.

I think we have all been at arbitrations where one side states in its opening that it will be presenting evidence of past practice to clarify an ambiguity in the contract language in dispute *and* the other side responds that he or she will vehemently object if external evidence is used to vary the plain meaning of the language.

An example of general language that needs past practice to fill in important detail would be, "Employees shall be given preference based on years of service." What is the preference for? Could it be for promotion, vacation selection, shift selection? Evidence of the parties' practice can fill in those missing details.

An example of contract language that is ambiguous or has more than one plausible meaning is the simple statement, "Grievances must be filed in 10 days." In a case involving whether a grievance was timely filed, past practice evidence might be offered to prove that the term "days" means either work days or calendar days.

Once the meaning of language in a CBA has been clarified or filled in by past practice, the practice cannot be ended or changed unless both parties agree. In other words, the clarifying practice, while unstated in the Agreement itself, is as much a part of the contract as the words that are written in black and white. So, once the meaning of language in a CBA has been clarified by past practice, no one can change it unless both sides agree.

To summarize, the most important use of past practice is to provide assistance in interpreting collective bargaining agreements when they contain terms that are not entirely clear or complete.

"The single most important use of past practice, the simplest, and the one most frequently used, is using evidence of the parties' past practice to fill in details where contract language is general or using it to clarify contract language that is ambiguous or, at least, arguably ambiguous."

Elements of a Past Practice

Before looking at the second use of past practice, let's review what are normally considered to be essential elements of a practice if it is to be considered binding. They are *clarity* and *consistency*, *longevity*, *repetition*, *mutuality* and *appropriate subject matter.*

- Under the *longevity* test, the course of dealing must occur over a substantial period of time, usually several years.
- Under the *clarity* or *consistency* test, the conduct follows a consistent or, at least predominant, pattern; for example, being applied 90% of the time.
- To meet the test of *repetition*. the course of dealing must have occurred on several occasions and been applied to more than a single employee. However, in instances such as a Christmas bonus, conduct is repetitious even if it occurs only once per year.
- *Mutuality* is the most important of all the elements but also the most difficult to ascertain. When an arbitrator declares that a past practice is binding,

he or she is really saying that on some level, the parties have evidenced, through their conduct, an unspoken agreement to do things a certain way. Mutuality requires knowledge of the asserted practice and acceptance by both parties. It is often stated that a party accepts a practice if the party allows it to continue without objection. Arbitrators have been willing to find that the requisite mutuality may be *implied* from the parties' actions or from their mere acquiescence in a given course of conduct.

- *Appropriate subject matter.* If a practice involves a basic managerial function rather than an employee benefit or working condition, management cannot be precluded from changing it.

Second Usage: Establishing That Where the Agreement Is Silent on a Subject, a Freestanding Past Practice is Nonetheless Binding

Let's move now to the second use of past practice evidence; that is, using it to establish that a particular past practice or way of doing things is binding and can't be changed during the term of the parties' collective bargaining agreement, even though it is unwritten and not part of the Agreement.

When Management discontinues a benefit or changes a long-standing practice that the Union thinks will affect its members' comfort, convenience, or economic well being, the Union will file a grievance alleging that the practice is binding and cannot be eliminated or changed. In essence, the Union argues that a freestanding practice, nowhere stated in the Agreement, has become an implied and binding condition of employment.

We're all familiar with the theory of Management's reserved rights: that management has the right to run its operation as it sees fit. The exception is the obligation or rights set out in express terms in the CBA. So where did the idea come from that there are matters that Management never agreed to in bargaining that can, nonetheless, limit its right to make certain changes?

The concept that supports the view that some practices are binding although they are not stated in the Agreement is called the Theory of Implied Obligations. This theory means that when the Union sits down with Management to negotiate a CBA, Union members can rely on the fact that conditions and practices that have existed for some time will be continued whether the parties get around to memorializing them in the Agreement or not. In other words, there are practices such as wearing lipstick or using the facilities without asking permission that employees assume will not be changed even if the practice is not negotiated into the Agreement.

The concept of implied obligations is not as far-fetched as it may appear. In 1960, the concept was embraced by the United States Supreme Court in the *Warrior & Gulf* decision in the "Steelworkers' Trilogy." The Court wrote:

> It is not unqualifiedly true that a [cba] is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, . . . There are too many people, too many problems, too many unforeseen contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledge so plain a need unless they stated a contrary rule in plain words.
>
> A collective-bargaining agreement is an effort to erect a system of industrial self-government . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement . . . The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . . *United Steelworkers v. Warrior & Gulf*, 363 U.S. 574 (1960).

Following the Court's pronouncement, arbitrators are more willing to find that some unwritten practices become part of the CBA. One arbitrator wrote, "Custom can, under some unusual circumstances, form an implied term of a contract. Where the Company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the Contract was entered into upon the assumption that that customary action would continue to be taken."[1] However, arbitrators are careful not to read too much into the Agreement that is not there. In short, they are trying to give the parties what they bargained for, no more and no less.

This brings us to the crucial area of *subject matter.* Some practices, however long-standing, concern such ba-

sic managerial functions that they can be changed at any time without offending the theory of past practice. On the other hand, if the nature of the practice is such that at contract signing, the union had a reasonable and realistic expectation that it would continue, the practice is likely to be found binding. If the nature of the practice is such that the union should have been aware that the practice was subject to change, the practice will likely be found non-binding. Union Attorney Robert Schwartz, in his guide for unions titled *How to Win Past Practice Grievances*,[2] calls this the Rule of Reasonable Expectations.

While applying the Rule of Reasonable Expectations is probably the simplest way of distinguishing between subject matter that may become a binding condition and subjects that may not, several attempts have been made to come up with names to distinguish two categories of subject matter. The categories have, for example, been called major or minor conditions of employment, employee benefits versus operational decisions, mandatory subjects of bargaining versus permissive subjects of bargaining and so on. I like to call the two categories, "employee benefits or working conditions" on the one hand and "basic managerial functions" on the other.

To take an extreme example of a basic managerial function that could not be the subject of a binding practice, suppose a manufacturing company had never had a layoff in 50 years. For purposes of this hypothetical, at least, we can argue that it was a consistent and long-standing practice not to have employee layoffs. However, assume that the Company experiences a drastic drop in customer orders. Just for fun, assume that the Company manufactures ladies' undergarments and garters are one of its more profitable product lines. One day everyone shows up for work and learns that pantyhose has just been invented. Overnight an entire line of products has to be eliminated and to remain profitable the Company has to lay off its garter workers.

Here, obviously, the Union would not prevail on a claim that it was a binding past practice that there be no layoffs. Adjusting a Company's manpower needs is a basic managerial function and therefore not an appropriate subject matter for a binding practice. Other clear managerial functions include the product the company makes, the equipment and tools it uses, production standards, job classifications and so on.

On the other hand, practices that involve matters of comfort, convenience, safety or the economic well-being of the employees may arguably become binding unless and until renounced at a subsequent contract negotiation. Examples of matters that may become the subject of a binding past practice are: swapping shifts on holidays; paid lunch break; uniform allowance; a short-shift the day before Thanksgiving; arriving late and leaving early in inclement weather; free parking; Union office space and so on.

Some practices involve areas that are both a management function and an employee benefit. It is conceivable, for instance, that the color of the walls in a manufacturing plant, clearly an area of management prerogative, might also come to be considered an employee benefit if Management tries to paint white walls a dark or depressing color the employees hate. The Union could try to make the case that the white walls are an employee benefit and, therefore, a binding practice.

Third Usage of Past Practice

The third usage is the little-used theory of interpreting a past practice to vary clear contract language. Sometimes parties, over long periods, disregard clear contract language and substitute a predictable pattern. When a party wants to revert to the plain language of the agreement, one side will assert that the practice has effectively amended the clear language by conduct. Such cases do not arise frequently. Most arbitrators do not vary clear contract language based on practice.

However, veteran arbitrator Alex Elson notes that on occasion clear contract language may indeed be varied by practice. It is not unknown for the language in an agreement negotiated on a national level to be amended by practice in local manufacturing plants in different parts of the country. In these instances, where local custom and practice occur far from the site of the original agreement, the wise arbitrator will consider the circumstances.

Hurdles

Having demonstrated the necessary elements to establish a binding past practice—appropriate subject matter, longevity, clarity, consistency and mutuality—what hurdles remain to a conclusion that the practice is binding? There are at least two.

The first and most familiar is language in the contract that *restricts* a conclusion that a practice is binding although not stated in the Agreement. Over the years, Management has taken steps to ensure that all obligations are expressed in writing and that it does not end up being restricted by practices deemed to be binding. Management has achieved or attempted to achieve this goal using "zipper clauses" and "integration clauses," also, by defining grievances narrowly.

Richard Mittenthal, the arbitrator renowned for his 1961 paper analyzing the Past Practice doctrine,[3] spoke on the subject again in 1994, where he observed that times had changed and the number of opportunities to use past practice had been substantially reduced. He suggested that modern collective bargaining agreements are less general and more complete. More significantly, it was his opinion that as the parties have become more sophisticated and used attorneys more often, Management has

taken steps to ensure that all obligations are expressed in writing.

Because the impact of "zipper clauses" and such provisions is still very much in flux, it is not possible to state with any assurance how such clauses are interpreted and applied by arbitrators. The cases normally turn on very specific facts but may also be affected by an arbitrator's particular bent.

These clauses are phrased in several different ways. Some might read, for example,

> The parties acknowledge that during the negotiations that resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the entire understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement.

or,

> It is the intent of the parties that the provisions of this agreement will supersede all prior agreements, understandings, and practices, oral or written, express or implied, between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.

In the Greenbaum, Bornstein, Gosline treatise *Labor & Employment Arbitration*,[4] Arbitrator Ira Jaffee reviews the case law, such as it is, and concludes that these cases turn very much on the precise language used in these zipper or integration clauses—whether, for example, the term past practice is actually used. In some agreements there is both a zipper clause and a maintenance of benefits clause.

Some clauses, such as the language cited by Arbitrator Mittenthal in a UAW Agreement, leave no room for argument. In that case the contract stated, "It is agreed that all past practices and customs not specifically spelled out in the Agreement will hereby be abolished, null and void."

Even before zipper clauses, however, management had ways of trying to preclude past practice from being considered binding or an implied part of the Agreement. Even something as simple as defining a grievance as an item that regards "the application and interpretation of the specific terms of the Agreement" can be effective. In these cases, the affected party, normally Management, may claim that the past practice grievance does not fit that description and is not arbitrable. Similarly, a party may assert that the familiar admonition to arbitrators that they shall not "add to, subtract from, or modify the Agreement" means practices cannot be grafted onto the Agreement.

When these challenges to arbitrability have been raised, arbitrators have apparently reached different conclusions, some finding that the grievances are arbitrable because a well-established past practice is in fact an implied term of the Agreement. The First and Eighth Circuits have cited the *Warrior & Gulf* decision for the strong presumption regarding arbitrability—that it should not be denied unless there is positive assurance in the Agreement that the parties intended that the matter not be subject to arbitration.

While "zipper clauses" are more prevalent, some parties have put a "maintenance of benefits" clause in their contracts. In these instances, past practices are normally preserved with no difficulty.

In addition to the challenge of correctly interpreting contract language that arguably *restricts* an arbitrator's ability to find a practice binding, there is the subtle and nuanced distinction an arbitrator must make between what constitutes binding past practices and what is simply "mere happenstance" or a method that was chosen simply because it was a convenient method of doing things at the time.

Dean Harry Shulman, frequently cited along with Dick Mittenthal in the area of past practice, warned that the wrong use of the past practice principle could "place past practice on a par with written agreements and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important, matters which in the future may be found to have been past practice."[5]

Shulman pointed out that the binding quality of a practice is not due to the fact that it is a past practice but rather to the agreement (or mutuality) on which it is based. He wrote:

> there are other practices . . . [that] . . . may be mere happenstance, [that is, methods that developed without design or deliberation]. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of

contractual provisions to the contrary, subject to change in the same discretion.

While everything Shulman says is true, it is also true that an unwritten practice that is based on mutual agreement is subject to change only by mutual agreement.

Finally, it is important to note that if a practice warrants the status of a binding freestanding practice, it may not be changed during the term of the parties' Agreement. It can only be halted or changed when and if Management renounces it during negotiations for a successor Agreement or when the circumstances that gave rise to the practice have changed.

The classic example of changed circumstances is the practice of providing free parking. When the Company relocates to a downtown location with much less Company-owned or leased land, it is no longer required to provide free parking.

"Because arbitrators possess the authority to rule on implied agreements and binding unwritten practices, the crucial question is how to exercise that authority wisely."

In sum, what a thoughtful arbitrator is doing in these cases is trying to preserve the parties' agreement, spoken and unspoken, and not trying to change it. I'm sure the parties want arbitrators to give them what they bargained for, no more and no less. Because arbitrators possess the authority to rule on implied agreements and binding unwritten practices, the crucial question is how to exercise that authority wisely.

Endnotes

1. *Standard Oil Co.*, 16 LA 73 (1951).
2. Work Rights Press, 3d Ed.
3. *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1018 (1961).
4. M. Bender 1997, 2 vols.
5. *Ford Motor Co., UAW*, 19 LA 237, 242 (1952).

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The Ultimate (Forum) Shopping Trip: Choice-of-Law and the Expatriate Employee

By Donald C. Dowling, Jr.

Probably the most common international employment law question that New York employment lawyers confront is: *Which country's employment laws apply to expatriates?* While this is a key question in arranging any expatriate posting (abroad often called a "secondment"), when a multinational client needs to fire an expat, this question becomes vital. Terminated expats who can "forum shop," it has been said, have "powerful ammunition in negotiations over compensation."[1]

Expat assignment and "secondment" posting documents often include choice-of-law provisions that call for home (headquarters) country law to apply. These home-country choice-of-law clauses are especially common among U.S. companies that want to extend American-style employment-at-will overseas. But does a choice-of-law clause really let a multinational sidestep the local employee protection and severance pay laws of an expat's "host" country? Short answer: Not usually. In fact, a broad home-country choice-of-law clause will often restrict an employer's flexibility, and often is not advisable.

This article first examines which country's law covers expats, and then addresses the strategy of using choice-of-law clauses in expat assignment documents. The starting point here is the mandatory application of local law in a host country. Generally, each country's employee protection laws are "mandatory rules" that protect even employees who try to opt out of them by contract, such as by a choice-of-law clause. Therefore, even a robust expat choice-of-law clause usually will not divest local (host-country) employment protection laws from applying. And these employee protection laws that apply mandatorily are laws that get to the heart of employment: firing, pay, hours, rest, vacation, overtime, safety, wages, labor unions, mandatory benefits, discrimination, non-compete/trade secrets and more.

General Rule Applies Stateside

This general rule that employee protection laws trump expat choice-of-law clauses may seem heavy-handed, but Americans need to remember: We impose it ourselves. Imagine, hypothetically, if a Mexican bank were to decide to transfer a secretary (with a U.S. work visa) from Mexico City to New York. She signs a contract calling for the law of her and her employer's home country: Mexico. Now imagine that, once her place of employment becomes New York, our secretary earns less than minimum wage, gets sexually harassed, suffers a workplace-safety violation, and is asked not to sign a union card. If she files claims with the U.S. Department of Labor, the EEOC, OSHA, and the NLRB (or New York state agencies), the bank's "choice-of-Mexican-law clause" defense will almost surely fail: The American and New York legal systems will not enforce most prior waivers of employee protection laws, on public policy grounds. Just because the prior waiver in this context happens to take the form of a choice-of-law clause is no distinction. Just as a contract to work for less than minimum wage is void under the U.S. Fair Labor Standards Act, a contractual selection of some foreign country's wage law is equally void, if that country's protections are less than those of the FLSA.

It works the same way overseas. The employment protection laws of the place of an expat's employment apply even notwithstanding a contractual selection of home country law. The expat almost always enjoys a right at least to the local minimum protections, regardless of what rights he might have purported to sign away. Because mandatory notice and severance pay, not employment-at-will, govern abroad, this doctrine is especially significant as to *American* expats working overseas. Once an American expat's place of employment becomes a foreign country, that expat (regardless of the text of his contract) usually steps out of employment-at-will and enters a cocoon of protection: the "indefinite employment" regime of the host country.

Refinements to General Rule

But there are six refinements to this general rule:

1. **Long business trips:** While the law of the place of employment generally controls, which country is the "place of employment" can sometimes be unclear, for example, as to an employee temporarily working abroad (on a long business trip), as to an expat recently arrived in a host country, and as to mobile employees (flight crews, sailors, executives and salespersons with international territories or offices outside their residence country). For these people, a *fact question* can arise as to which country is the "place of employment" (or, in Europe, which country is "habitually" the place of "work").

2. **Non-mandatory rules:** While employee protection laws are mandatory rules that cannot be contracted around, an expat's choice of law can control topics that steer clear of employee protection statutes, such as certain expat benefits and pension, Social Security, compensation, and tax arrangements, especially where there is a tax treaty. This principle underlies the emerging "global employment company" strategy, and is especially relevant as to highly compensated expats with complex benefits packages.

3. **The "Communist and Arab" exception:** A handful of countries, mostly Communist nations like China and Cuba, actually have separate sets of employment laws for locals and foreigners. These countries are less hostile to expat choices of law. Also, a few Arab country laws mandating end-of-service payments may apply to locals only.

4. **Extraterritorial reach:** Very few countries presume to extend their employment laws to protect their citizens working abroad. But there are some exceptions, the U.S. being the key one:

   U.S. discrimination law: Ever since a 1991 U.S. Supreme Court decision was overturned by an act of Congress (the Civil Rights Act of 1991), U.S. discrimination laws have reached U.S. citizens working abroad for U.S.-"controlled" multinationals, *even though host country laws simultaneously apply*. For example, an American professor fired from the Tokyo campus of a Boston college could bring both a Japanese reinstatement claim and a U.S. age discrimination charge, regardless of any choice-of-law provision, and even if the college considered him a "local hire," not an expat. Damages might get offset, but the Japanese and U.S. lawsuits are independent causes of action. Indeed, these double-barreled claims are increasingly common. However, overseas reach is largely confined to *discrimination* laws; most other U.S. employment laws do not apply abroad.[2]

   U.K. work for benefit of U.K. entity: Most U.K. citizens working outside the U.K. for a U.K. employer are subject to the general rule and cannot invoke U.K. employment laws (absent a U.K. choice-of-law clause). Recent cases, though, carve out narrow exceptions for those Britons stationed abroad but performing services directly for the benefit of a U.K. domestic entity (such as a foreign correspondent writing for a London newspaper), and for Britons stationed overseas in a U.K. foreign enclave (such as a U.K. embassy or military base).[3]

   Venezuelan citizens: Venezuelan employment law reaches outside Venezuela to protect Venezuelan expats who were hired in Venezuela but are now working abroad.[4]

5. **Europe's Rome Convention:** European Union countries are all parties to a choice-of-law treaty called the Rome Convention, which European lawyers tend to talk about as *enforcing* expat choice-of-law clauses. A March 2005 article by German lawyers, for example, says the Rome Convention leaves Europeans "free to agree upon the law of the country that shall be applicable to the *employment* contract."

   But the text of the Rome Convention actually reinforces the general rule that "in a contract of *employment*, a choice-of-law . . . shall not have the result of depriving the employee of the protection afforded to him by . . . *mandatory rules* of law."[5] Sure enough, French appeals courts in Grenoble and Paris, for example, have invoked the Rome Convention to impose the French employment code over less-favorable provisions in Texas and German law, notwithstanding home-country choice-of-law clauses. So terminated expats in Europe, even those coming from the U.S.,[6] generally follow the usual rule and can select the law more favorable to them: any choice-of-law country *or* the country "in which [they] habitually carr[y] out [their] work."[7]

6. **The "trick the expat" strategy:** An expat-practices consultant at one major HR consulting firm used to recommend putting into Americans' expat contracts a U.S. choice-of-law clause, even if unenforceable. His theory: American employees are skeptical of overseas labor courts, so a choice-of-U.S.-law clause might convince a U.S. expat not to sue abroad, but rather to accept U.S. employment-at-will. These days, though, expats are increasingly sophisticated, and ethical strategies are perhaps best if not overly tricky.

Is a Home-Country Choice-of-Law Clause in an Expat Agreement Really a Bad Idea?

Because mandatory employee protection laws of a host country place of employment will apply notwithstanding a contractual expat choice-of-law provision, a *home*-country choice-of-law provision in expat "secondment" documents can backfire, because it can let an expat "cherry-pick" the stronger protections between two legal systems. Without any choice-of-law clause, only one country's laws will usually apply the law of the host country (place of employment). However, in addition to that, and notwithstanding what an expat agreement may say, certain home-country employment doctrines may reach abroad with extraterritorial effect, especially if the expat and the employer are American, British, or Venezuelan.

In other words, usually a clause in an expat agreement that purports to apply home-country law will not divest host-country law from applying, but will actually *add* home-country legal rights to the employee's arsenal of potential claims. Therefore, a best practice in drafting expat documents may often (if not always) be to select no law at all, or else to select only the law of the host country that becomes an expat's place of employment.

However, especially in agreements with highly compensated expats, a multinational employer may have a legitimate interest in applying non-mandatory doctrines of home-country law to benefits/Social Security/tax issues. Some companies are even experimenting with a strategy of a "global employment company" that employs expats worldwide. In those situations, the employer might opt for a tailored choice-of-law provision that covers *contractual* issues only (as opposed to mandatory aspects of employment law), and expressly excludes those topics on which host country law applies by force of public policy.

Endnotes

1. P. Frost and A. Harrison, "Company Uniform," *The Lawyer* (London), Dec. 11, 2006, at 21.
2. *E.g., Carnero v. Boston Scientific*, 433 F.3d 1 (1st Cir. 2006), *cert. den.* 6/26/06 (Sarbanes Oxley whistleblower protections do not reach abroad); *Beck*, DOL case no. 2006-SDX-00003 (ALJ opinion of 8/1/06) (same).
3. *Serco v. Lawson*, [2006] UKHL 3 (House of Lords 1/26/06); *Saggar v. Ministry of Defence*, [2005] EWCA Civ. 4133 (Sup. Ct. of Judicature 4/27/05).
4. Venez. Labor Code art. 78.
5. Art. 6(1) (emphasis added); *see also* arts. 3(3), 7.
6. *See* Rome art. 2.
7. Rome art. 6(2)(a).

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A volunteer to write a regular legislative column for this *Newsletter*. It has been several years since we've had regular reports on State labor and employment legislation. Please contact the Editor at 718-428-8369 or mceneaneyj@aol.com if you are interested in taking this on. Thanks.

Applicability of the Hatch Act to Municipal Officers and Employees

By Sung Mo Kim

Municipal officers and employees in New York State, like all citizens, are encouraged to participate in the political process. However, because municipal officials are vested with the public's trust, they have the responsibility to ensure that their political activity does not compromise that trust. In particular, municipal officers and employees must comply with certain laws that were enacted to ensure that the public maintains its trust in government. Such laws may be either state, local, or even federal. Although Article 18 of the General Municipal Law, the state law regulating municipal conflicts of interest, contains no restrictions on political activity, some local codes of ethics do.[1] Moreover, many municipal public servants are also subject to the federal Hatch Act, a fact that they may not know or may not clearly understand. This article will attempt to outline some of the important provisions of the Hatch Act of which municipal employees should be aware.

"The Hatch Act, like many state and local laws that restrict a public servant's political activity, was enacted to ensure that the influence of partisan politics in government institutions was limited and to protect public servants from perceived pressure from political parties to work on political campaigns or give political contributions."

What Is the Hatch Act?

The Hatch Act is federal legislation that restricts the political activity of certain government employees. The Hatch Act, like many state and local laws that restrict a public servant's political activity, was enacted to ensure that the influence of partisan politics in government institutions was limited and to protect public servants from perceived pressure from political parties to work on political campaigns or give political contributions. The common perception is that partisan politics' influence in government institutions and on municipal employees leads to ineffective, inefficient, and partial government institutions. The provisions of the Hatch Act, which are primarily concerned with candidacy or support for candidates in partisan elections, attempt to ensure that the government institutions' impartiality and integrity are not compromised.

How Is It Administered?

The Hatch Act is administered by the United States Office of Special Counsel (the "OSC"), an independent federal body that, in addition to the Hatch Act, administers two other federal statutes, the Civil Service Reform Act and the Whistleblower Protection Act. In its efforts to promote compliance with the Hatch Act, the OSC issues advisory opinions to persons seeking guidance about political activity under the Hatch Act, including municipal officers and employees to whom the Act might apply.

To Whom Does It Apply?

The key to understanding the Hatch Act is to know to whom it applies. Therefore, before municipal officials determine what political activity they are prohibited from participating in under the Hatch Act, they must first find out whether they are even subject to the restrictions imposed by the Act.

While the Hatch Act is a federal law, it applies not only to individuals employed by an agency in the federal executive branch[2] but also to individuals principally employed[3] by state, county, or municipal executive agencies in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency.[4]

To determine whether he or she is subject to the Hatch Act, a municipal employee must assess whether he or she performs duties in connection with a program financed by federal monies. State and local programs that typically receive federal funding include, for example, public welfare, housing, transportation, and law enforcement. If a municipal employee performs duties in connection with an activity financed in whole or in part by a federal loan or grant, it will not matter that he or she receives his or her salary from non-federal monies; that he or she has no authority or discretion on how those federal funds are spent; or that the federal monies fund only a small portion of the program; he or she will be subject to the Hatch Act. Furthermore, if a municipal employee is subject to the Hatch Act, he or she will continue to be covered by the Hatch Act even when he or she is on annual leave, sick leave, leave without pay, or administrative leave. Therefore, an employee running for office in a partisan election may not avoid the requirements of the Hatch Act by taking a leave of absence.

In addition, the Hatch Act can apply even to employees of a private, not-for-profit organization if it receives federal funding and if federal legislation other than the

Hatch Act contains a provision that the recipient not-for-profit should be treated as a state or local agency for the purposes of the Act, such as, for example, the Head Start Program[5] or Community Service Block Grant.[6]

The Hatch Act, however, does not apply to municipal employees who exercise no functions in connection with an activity financed in whole or in part by federal loans or grants. Nor does it apply to individuals employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a state or political subdivision thereof (officers and employees of school districts that are supported by state funds are thus not subject to the Act), or by a recognized religious, philanthropic, or cultural organization.[7] Note also that the Act does not apply to employees of the legislative or judicial branches.

Needless to say, any municipal employee who works in a program receiving *any* federal funding should check to see whether he or she is covered by the Hatch Act.

What Activities Does It Prohibit?

Once a municipal officer or employee determines that he or she is subject to the Hatch Act, he or she must know what political activities the Hatch Act prohibits. The Hatch Act prohibits those municipal officials subject to its provisions from, among other things: (1) using their official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for office; (2) directly or indirectly coercing, attempting to coerce, commanding, or advising a state or local employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; and (3) running as a candidate for public office in a partisan election, that is, in an election in which any candidate represents, for example, the Democratic or Republican party.[8] As described earlier, these restrictions are primarily concerned with candidacy or support for candidates in partisan elections.

What Activities Are Permissible?

While the Hatch Act prohibits some conduct by municipal employees concerning partisan elections, as described above, it does not prohibit municipal employees from: (1) running as a candidate for public office in nonpartisan elections, that is, elections where candidates are running with no party affiliation; (2) holding elective office in political parties, clubs, and organizations; (3) campaigning for candidates for public office in partisan and nonpartisan elections; (4) contributing money to political organizations; and (5) attending and giving a speech at a political fundraiser, rally, or meeting.[9]

What Happens When a Violation Occurs?

When a municipal employee who is subject to the Hatch Act violates the Act by, for example, running for office in a partisan election, he or she could be subject to prosecution by the OSC.

The OSC has not only an advisory function, as discussed above, but also investigative and prosecutorial functions; thus, the OSC is charged not only with interpreting the Hatch Act but also with enforcing violations of the Act. Complaints alleging violations of the Hatch Act can be made to the OSC, which will then investigate the allegation to determine whether the evidence and facts warrant prosecution before the Merits Systems Protection Board (the "MSPB"), an independent quasi-judicial agency that is authorized to adjudicate Hatch Act violations brought by the OSC. Alternatively, when the severity of the violation does not warrant prosecution, that is, when the violation is not sufficiently egregious, the OSC may issue a warning letter to the employee involved.

When an alleged violation is prosecuted before the MSPB, the employee and the state or local agency employing him or her are entitled to be represented by counsel.[10] After a hearing, the MSPB must determine whether a violation of the Hatch Act occurred and, if so, whether such violation warrants the dismissal of the employee.[11] If the MSPB finds that the violation warrants dismissal from employment, the employing agency must either remove the employee or forfeit a portion of the federal assistance equal to two years' salary of the employee.[12] If the MSPB finds that the violation does not warrant the employee's removal, no penalty is imposed.

Closing Remarks

A municipal employee who has questions about the Hatch Act is not left without help to interpret the Act's provisions. As described above, the OSC is available to provide advice and guidance to municipal employees about political activity under the Hatch Act. The easiest way to learn more about the Hatch Act and to stay clear of any violations of the Hatch Act is to seek the OSC's advice.

Additional information on the Hatch Act, the OSC, and the MSPB can be found on the following website: http://www.osc.gov/hatchact.htm.

Finally, one should emphasize that municipal employees who wish to be politically active may also be subject to restrictions imposed by their local municipal laws. The Hatch Act does not supersede nor negate the need to comply with additional restrictions imposed on municipal employees by their respective municipal laws. In New York City, for example, the political activity of a City public servant whose duties are in connection with a federally funded program must comply not only with the provisions of the Hatch Act but also with the provisions of the City's laws, including those found in the City's Conflicts of Interest Law. Many municipalities in New

York State have similar restrictions on the political activities of their officers and employees.[13]

"Violations of the Hatch Act can produce serious consequences, not only for the individual employee but also for the municipality."

Violations of the Hatch Act can produce serious consequences, not only for the individual employee but also for the municipality. Municipal attorneys are thus well advised to instruct their clients about the provisions of the Act and the need to comply.

Endnotes

1. *Cf*. N.Y. Civ. Serv. Law § 107 (prohibiting personnel actions based on political affiliation, activities, or contributions; compelling or inducement of political contributions; solicitation or receipt of political contributions in government offices; and promise of influence). *See also infra* note 13.
2. *See* 5 U.S.C. § 7322(1).
3. When a municipal employee has two or more jobs, his or her principal employment is that employment to which he or she devotes the most time, and from which he or she derives the most income. *See Smyth v. U.S. Civil Service Commission,* 291 F. Supp. 568 (E.D. Wis. 1968).
4. *See* 5 U.S.C. § 1501(4).
5. *See* 42 U.S.C. § 9851.
6. *See* 42 U.S.C. § 9918.
7. *See* 5 U.S.C. §§ 1501(4)(a) and (b).
8. *See* 5 U.S.C. §§ 1502(a)(1)–(a)(3).
9. *See* 5 C.F.R. §§ 151.111(a) and 151.122(e) and (f).
10. *See* 5 U.S.C. § 1505.
11. *See* 5 U.S.C. §§ 1505(1) and (2).
12. *See* 5 U.S.C. § 1506(a).
13. *See, e.g.*, Code of City of Beacon § 29-6(F); New York City Charter §§ 2604(b)(9), (11), (12), (15); Code of City of Newburgh § 34-2(B)(9); Code of City of Troy §§ 43-1(H), 43-6; Code of Town of Brookhaven § 28-6; Code of Town of Carmel § 13-3(M); Code of Town of Clifton Park §§ 17-4(A)(6), (7), (8); Code of Town of New Paltz § 15-3(J); Code of Town/Village of Harrison §§ 5-11(C), (D), 15-14; Code of Village of Hastings-on-Hudson §§ 18-3(A)(7), (B)(3). These provisions are all available on the General Codes website: http://www.e-codes.generalcode.com/globalsearch.asp. Just highlight the relevant municipality and type "ethics" into the Search box.

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This article originally appeared in the Fall 2006 issue of the *Muncipal Lawyer,* published by the Municipal Law Section of the New York State Bar Association.

Culture, Communication and Conflict in the Legal World

By Deb Volberg Pagnotta

How do professionals succeed? For lawyers, the reality is "communicate, communicate, communicate." As lawyers, we take for granted that communication, verbal and written, is pretty straightforward. Mere admission to law school somehow confers upon us higher communication abilities. And even if first-year law students have less than perfect communication skills, by graduation all that has been fixed. Right? Wrong.

Most law schools teach legal writing, appellate advocacy, sometimes even negotiation, mediation skills and client management. But most offer no training on how to communicate successfully in an increasingly diverse work environment with people of differing cultural backgrounds, values and beliefs. Yet, immediately upon graduation, lawyers daily are expected to communicate skillfully in multiple arenas and with multiple individuals, as business people, professionals, advocates, resources, employers, colleagues, even mentors.

As our world has become increasingly culturally diverse, our legal communication skills—and related conflict resolution skills—have lagged. Law firms, law schools, the courts and clients now consist of people of many different backgrounds, experiences, expectations, values and styles: in short, the legal world is now culturally diverse and we must recognize and acquire the skills necessary to best navigate this new landscape. Examining our cultural backgrounds, our communication skills and our approaches to conflict resolution—all of which daily inform our workplace effectiveness—may provide at least a preliminary map.

What is culture? "Culture" has been concisely described as a set of learned behaviors of a group of people who have their own language, values, rules of behavior, and traditions.[1] A culture can range in size from groups as small as a closely bonded band of friends, to fans of a particular sports team, to a city neighborhood, a type of law firm, geographic area, to ethnicity, gender, age, political association, military service, disability, and a host of other affiliations we may experience during our lifetime, intentionally, by birth or by other accident.

Even cultures that outsiders think of as homogenous are in fact often heterogeneous with profound internal differences. For example, the deaf and hard of hearing community is very diverse,

> differing greatly on the cause and degree of hearing loss, age at the onset, educational background, communication methods, and how they feel about their hearing loss. How a person "labels" themselves in terms of their hearing loss is personal and may reflect identification with the deaf community or merely how their hearing loss affects their ability to communicate. They can either be deaf, Deaf, or hard of hearing.[2]

Or consider the "Hispanic" community in the United State: while this population certainly shares some identifiable traditions and values (e.g., Spanish language usage, strong sense of family, Catholicism, traditional male and female "roles," musical forms, and celebration of certain holidays), numerous distinct subsets exist, whether by country, politics, immigration experience, economics, age, ethnicity, race, etc. To see how strongly individuals feel about cultural differences, try misidentifying a Cuban as a Puerto Rican or a Mexican. The legal community likewise consists of numerous subcultures with specific identifiable "cultural values": are you a litigator or in-house counsel; public or private sector; personal injury plaintiff-side or defense; employment practice, labor or management; criminal prosecutor or defense; solo practitioner or big firm? Whatever your practice is, to some degree it affects your view of the world and how others view you.

"As our world has become increasingly culturally diverse, our legal communication skills—and related conflict resolution skills—have lagged."

Being multi-cultural. Each of us is uniquely multi-cultural. From birth onward (if not before!), we each associate with, hold allegiance to and are shaped by a highly personal set of cultural experiences. Culturally governed or affected "attributes" include our sense of time and time consciousness, our food and eating habits, our dress and appearance, our relationships, family and organizational structures, beliefs and attitudes, mental processes, work habits and practices, and our very forms of communication. These behaviors and expectations may change over time influenced by geo-politics, social developments and even technology. What we believe today as obvious and self-evident is not what we, as a culture, necessarily believed 10, 20, 50 or 100 years ago.

In a classic and now outdated brain teaser designed to help us "think outside of the box," we were told that a child is brought into a hospital emergency room after a car accident in which his father is killed. The doctor in the emergency room says, "I can't operate on this child. He's my son." How can this be? The answer was that the doc-

tor is the child's mother. Implicit in this riddle, of course, was the automatic assumption that a doctor was a man. This notion has dramatically changed in the last 50 years: although in the 1950s only 5% of medical school graduates were women, by 2005, women represented nearly half of all graduates of medical schools in the United States.

Many other widely held beliefs, assumptions and practices have changed over the years, some more quickly than others. Up through World War II, our military was race-segregated; it wasn't until 1948 that President Truman signed Executive Order 9981, ending segregation in the United States Armed Forces. Lobotomies, now generally rejected as appropriate medical treatment, were routinely performed in the United States until the 1950s to control "undesirable" behavior, such as alcoholism, depression, epilepsy and criminal conduct. For centuries, letters were the preferred form of communication prior to telephones, e-mail, text messaging and voicemail.

Our daily actions and communications are shaped by the changing world around us—for example, now when we e-mail a colleague, we routinely expect an almost immediate reply. We each move through various environments in any given day and adjust our communications and expectations through the use of "pragmatics," our ability to shape our communication, intentionally or not, to the appropriate situation. For example, when I tell my 6-year-old child about the attacks of 9/11, I use very different language, concepts and format than I would in discussing that subject with an adult. We may swear profusely in the car or at work, but not in front of our grandmothers. And of course, we change our behavior not only situationally but with experience and age: we each display and use a variety of attributes based on past experience and present situation. (How many lawyers choose to sneer "whatever" at a judge?) For the most part, this article does not attempt to link particular values or styles to particular cultures. However, recognizing our own range of behavior patterns and beliefs related to cultural experience or affiliation—and those of others—often sheds light on how to approach a given situation or interpret a response.

Stereotypes versus generalizations. Isn't it wrong, though, to make general assumptions about different cultures? This writer distinguishes between "stereotypes" and "generalizations." A stereotype is a simplified, fixed and often derogatory image of all members of a particular culture or group—lawyers are dishonest, white men can't play basketball, straight men can't dance, Asians are short and Italians engage in organized crime. While we are reluctant to assign particular characteristics to any given culture, for fear of inadvertently offending by use of stereotype, by definition cultures *are* different and in fact are defined by those distinguishing characteristics. Generalizations about given cultures accurately may be made based on research, extensive observation and experience, about different groups. Many studies reflect these precise assignments of cultural differences.[3] For example, it is reported that women around the world typically talk more than men: women use about 20,000 words per day compared to men's 7,000.[4] (Even female elephants communicate more frequently than male elephants![5]) This may well be related to cultural or biological factors. To develop communication skills, infants must be extensively exposed to language during a narrow window of time. Hence it makes sense for women, as the primary caregivers, to talk more. It is useful to identify certain attributes or tendencies preferred or used within different cultures; this does not mean every individual associated with that culture holds that belief or acts in a particular manner.

Workplace-related values. Lawyers expressly, intuitively and implicitly use stereotypes and generalizations on a daily basis. Jury selection is only the most obvious. I've heard a law professor in class explicitly recommend that jury selection be based primarily on stereotypes: taxi drivers and Democrats will award higher verdicts to plaintiffs in civil matters but will vote for acquittal in a criminal case; in rape cases, the prosecution should select older men with daughters as jurors, because they will be more sympathetic, but reject women, as they will be hostile toward a female defendant, particularly if the defendant is better looking than the juror.

The level of sophistication in standards for jury selection has improved in the last 25 years. Trial attorneys now must be thoughtful in their use of stereotypes of all sorts during jury selection. In recent years, the Supreme Court has held that peremptory challenges based on race, gender and possibly ethnicity violate the Equal Protection Clause. (Debate remains, however, on the use of religion and "religious involvement."[6])

While lawyers need to tread carefully with the use of stereotypes in jury selection, it is possible through visual cues and *voir dire* to elicit information about culturally related attributes which might affect jury perception or understanding of any particular case. Some cultures, for example, prefer a direct, confrontational style in conflict; others tend toward a more cooperative "harmonizing" style. A juror with the former style might favor, or at least understand the motivation of, a defendant who has a history of physical confrontation. In the O.J. Simpson murder trial, for example, it has been speculated that the predominantly female, African American jury was less sympathetic to evidence of domestic violence toward the victim, based on cultural factors.[7]

The use of express stereotypes in jury selection is really only the tip of the iceberg when it comes to manifestation, expression and impact of our cultural attributes at the workplace. We all make constant judgments about others—clients, colleagues, opponents, juries—based on a host of visual and linguistic cues we perceive.[8] And most of the time, we do not even articulate these assumptions

to ourselves; we mistakenly assume it is merely a "gut" reaction or that everybody else perceives the situation the same way we do ("the right way").

Perception of time. For example, European-based culture is particularly focused on a sense of linear time and a concern for the immediate future. Great value is placed on time as a scarce and valuable commodity: "don't waste my time" and "time is money." This value is reflected in the practice of American lawyers: our legal system requires filing of papers by certain dates and time; we frequently bill on an hourly basis; we must appear in court on time or risk censure. We use calendaring software to track our every move. This contrasts with different cultural perceptions of time as plentiful, past and even present-oriented. Asian immigrants and Native Americans tend to revere the past and honor historic ties; African Americans tend to have a strong sense of both past and present references; and Hispanics often have a strong appreciation for the present and "being in the moment."[9] A client late to a court appearance, or even a meeting with you, is not necessarily being disrespectful, but just operating on a different set of assumptions. In preparing a client for litigation, therefore, be prepared to explain to the client the importance of punctuality in this legal system.

Status. How we assign status and respect is culturally related: some cultures designate status based on achievement; others on title and position. Think of whom you admire or respect and why. In the U.S., our politicians routinely emphasize their own humble roots, accurately or not.[10] We are enraged by athletes who "cheat" with steroids or performance-enhancing drugs; we ostensibly deride royalty; we stress individual achievement over team effort. Yet, in many cultures, title and position alone elicit overt respect and obeisance. Consider how you conduct yourself in front of a judge, whether or not you believe she or he merits your intellectual respect. Respectful behavior toward a religious leader, whether of your persuasion or not, is based on that person's position, not necessarily your own personal knowledge of that person's beliefs or achievements.

Moreover, *how* we demonstrate respect differs from culture to culture. I was startled to find my daughter's playmates in daycare calling out to me, "Deb, Deb!" I chastised one, saying "Excuse me, I'm grownup and you're not, so you can call me Mrs. Pagnotta." This reflected my age-based cultural preference. A Filipina client in her 60s repeatedly called me "Attorney Pagnotta," despite my frequent remonstrations to her to call me Deb. Her values required a show of respect to me simply because of my high status in her cultural perception. (Eons ago, of course, lawyers held a much higher level of esteem in this country than we presently enjoy: now, we've all been the butt of lawyer jokes.) How do you personally address a colleague, a client, a court clerk, a judge, an employee? While mainstream Americans often use first names immediately with a colleague, many other cultures prefer the use of an honorific. How you refer to clients or witnesses in court may telegraph your perception of them to the judge or jury—you may do this intentionally, but be careful if you haven't even thought about it. You may inadvertently offend.

Conflict perception and resolution. Lawyers routinely engage in conflict and conflict resolution (not always the same thing). Yet we often fail to recognize some of the most basic and significant aspects and patterns of conflict—those related to culture. Why is it that sometimes we get enraged by a particular situation when our opponent seems unfazed? Why do we sometimes walk away from an argument while our colleague seems committed to fighting it out then and there? How do we even know when we are in a conflict? How do we negotiate a settlement? The answers to these and many other conflict-related questions frequently relate to our cultural backgrounds.

Many cultures seek hard to avoid conflict, preferring to maintain harmony at almost any cost. Much of the vaunted Asian reluctance to say no relates to the desire to avoid unnecessary conflict and to allow parties to save face, embarrassing nobody. "Decision processes in Japanese boardrooms . . . are designed to avoid conflict and dissonance. . . . Japanese managers tend to deal with conflict with other managers by simple avoidance of the situation, whereas Americans are far more likely than Japanese to attempt persuasion."[11] The perception of the United States as an aggressive nation emanates from our direct and vocal approach to conflict: President Bush concisely symbolized that style in his 2003 terse challenge to Iraqis attacking American troops: "bring 'em on."[12] Americans of European ancestry tend to prefer a direct confrontation but "gentlemanly" and quietly expressed; African Americans often prefer a more passionate, emotional confrontation to demonstrate the sincerity of beliefs. Differences as basic as gender may affect our perceptions and reactions to conflict. Deborah Tannen, a sociolinguist who has long focused on gender differences in communication has noted:

> male speakers are more likely to be confrontational by arguing, issuing commands, and taking opposing stands for the sake of argument, whereas females are more likely to avoid confrontation by agreeing, supporting, and making suggestions rather than commands. . . . In other words, females may well fight, but males are more likely to fight often, openly, and for the fun of it.[13]

In some cultures, what you say is what you get. If you commit to an agreement "in principle," you have as good as signed the legal document. If you renege, your

reputation will be tarnished. What you say is what you mean. Yet in many other cultures, direct speech is far less important than context. For example, saying no, particularly to a person in higher authority, is considered to be very disrespectful. Thus, a person from that culture might respond to an offer with a "maybe," knowing that within that culture a maybe will be understood as a polite no. Or, that person may say "it's difficult" or "we will positively examine this issue thoroughly," with the intent of indirectly and politely communicating a definite no.

"We have painfully learned, through the last six years of international developments, that failing to recognize and take into account cultural differences has very serious consequences."

Negotiations are another area fraught with cultural differences. In much of the Middle East, participants in a conflict are expected to engage in heated, verbose and flowery exchanges of insults, with the assumption that a third party, well-respected by both sides, will step in to mediate before the combatants come to actual blows. In the U.S., however, we tend to look with horror at references to political figures as Satan and assume the speaker is either mad or looking to pick a fight.

This article has touched on only a few of many areas of cultural expectations and attributes which affect the practice of law. While it is impossible to know everything about a client, a colleague, a judge, a juror, a witness, a clerk, or employee, lawyers should seek to understand some of the basic differences. It is no longer safe to assume that we all think alike, or understand everything in the same way, or will react in identical fashion. We have painfully learned, through the last six years of international developments, that failing to recognize and take into account cultural differences has very serious consequences. As between the U.S. and Iran or Iraq—and as between lawyers in an increasingly diverse America—a rose is not a rose is not a rose.[14]

Endnotes

1. Padden, C. (1990) *Deaf in America: Voices from a Culture*, Harvard University Press.
2. http://www.nad.org/site.
3. As a small sampling, see, e.g., Kochman, T. (1981), *Black and White Styles in Conflict*, the University of Chicago Press; Nisbett, R.E. (2003) *The Geography of Thought: How Asians and Westerners Think Differently and Why*, Free Press, New York; Ting-Toomey, S. (1999) *Communicating Across Cultures*, The Guilford Press, New York; Hall, E.T. (1959) *The Silent Language*, Anchor Books, New York; Tannen, D. (1994) *Talking from 9 to 5: Women and Men in the Workplace: Language, Sex and Power*, Avon Books, New York.
4. Brizendine, L. (2006) *The Female Brain*, Morgan Road Books. Note there has been significant factual controversy over Brizendine's claim that women use 20,000 and men 7,000 words daily. However, my own observations and anecdotal evidence gathered over the last 50 years do concur with Brizendine's conclusion, undocumented though it might be. I'm sure some readers will disagree and I encourage you to let me know your observations!
5. Tannen, D. (2006) *You're Wearing That? Understanding Mothers and Daughters in Conversation*, Random House, New York.
6. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding a prosecutor may not use peremptory challenges to exclude jurors based on race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (prohibiting discrimination in jury selection on the basis of gender); *United States v. Martinez-Salazar*, 528 U.S. 304 (2000) (referring to "ethnic origin"); *Rico v. Leftridge-Byrd*, 340 F.3d 178 (3d Cir. 2003) (holding it was not objectively unreasonable to apply *Batson* to peremptory strikes of Italian Americans). *Cf. U.S. v. DeJesus*, 347 F.3d 500 (3d Cir. 2003) (holding the Equal Protection clause permits peremptory challenges based on religious involvement which might impair disposition to convict). However, see a 2003 *Wall Street Journal* article for an interesting discussion of what means "a jury of one's peers" (jewshindus.html).
7. *See, for example*, Locke, L.M., and Richman, C.L., *Attitudes Toward Domestic Violence: Race and Gender Issues*, Sex Roles: A Journal of Research, Vol. 40, Nos. 3–4, pp. 227–247, Feb. 1999. In assessing blame for domestic violence, researchers found that women relative to men blamed the husband more for the abuse, sympathized more with the wife, and rated the incident as more serious, and African American participants sympathized more with African American victims. In addition, participants blamed the African American husband less for the abuse than the European American husband.
8. *See* Karpf, A. (2006), *The Human Voice*, Bloomsbury Publishing, for a fascinating discussion of what we learn or assume about others based solely on a person's voice.
9. Ting-Toomey, S. (1999) *Communicating Across Cultures*, The Guilford Press, New York.
10. Bill Clinton ran a powerfully successful presidential campaign based on a narrative of achievement: "I was born in a little town called Hope"; here was a man who had overcome terrible adversity in childhood. Governor Mario Cuomo consistently referred to his immigrant parents who worked long, hard hours in a small grocery store. Governor Ann Richards famously mocked President George H.W. Bush as being "born with a silver foot in his mouth"; President George W. Bush in return cast opponent John Kerry as an effete, French-speaking, private-school, Ivy League intellectual. Donald Trump casts himself as a self-made man, while his detractors note that his father was a millionaire real-estate mogul, implying that Trump is not really a "Horatio Alger" rags-to-riches story.
11. Nisbett, R.E. (2003), *The Geography of Thought: How Asians and Westerners Think Differently. . . and Why*, Free Press, A Division of Simon & Schuster.
12. President Bush later expressed regret for his "bluntness" in making that comment. (http://abcnews.go.com/2020/Inauguration/story?id=406639&page=1).
13. Tannen, D. (1994*), Talking from 9 to 5: Women and Men in the Workplace: Language, Sex and Power*, Avon Books, New York.
14. Slackman, M., *Iranian 101: A Lesson for Americans: The Fine Art of Hiding What You Mean to Say*, New York Times, August 6, 2006.

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Dispute Resolution Programs: Design Considerations and Alternatives

By Diane M. Pfadenhauer

Introduction

Alternative dispute resolution programs became recognized in the workplace decades ago as unionized employers adopted formalized grievance systems, culminating in arbitration. Moving forward nearly a century later, employers have adopted a myriad of programs and practices that can be categorized as alternative dispute resolution programs. The reality, however, is that these initiatives are far from "alternative." Proactive organizations have recognized the benefits of such programs, and they typically exist in some form in almost every organization.

The general purpose of dispute resolution (DR) programs is to provide employees with a fair and private forum to resolve internal workplace disputes. At first glance, it is believed that organizations typically adopt such programs to avoid the costs of litigation. It is not at all uncommon for defense costs for a typical discrimination claim to exceed $150,000. An ADR program relieves the employer of the potential for large defense costs. In order for such a program to be truly effective, however, employers must focus not only on the traditional end-game-privacy and cost savings—but also on the establishment of a fair and equitable system that is perceived as such by employees.

The purpose of this article is to discuss the use of DR programs by non-union, private-sector employers and to provide practical guidance to ensure that the programs implemented both achieve organizational objectives and meet the needs of employees. It is presumed that the reader is well acquainted with the various options ranging from negotiation to various forms of mediation and arbitration and has decided that the implementation of such a program is in the best interests of the organization. The goal is to provide the reader with guidance on ensuring that the persons responsible for spearheading the program consider important elements so that it can be implemented without the organization falling into the invariable traps that will tempt it along the way.

Dispute Resolution Methods

Many organizations lack formal processes for DR. That notwithstanding, many have adopted informal, ad hoc methods that serve an adequate purpose of preventing disputes from escalating into costly and disruptive challenges for both the organization and employees. Typically, however, DR methods can be classified in three general areas. The first, ad hoc methods, relates to informal processes adopted by organizations. These tend to evolve over time and are significantly influenced by the culture of the organization or some key individuals. For example, a human resources professional with strong conflict resolution skills may be known as the "go to" person to resolve intra-company disputes. While the role of this individual may not be formalized into policy, he or she may possess the unique skills to have a significant impact on the prevention of litigation, employee satisfaction, and the reduction of workplace disruptions. Many organizations have such persons on board by chance. The proactive organization will recognize this and utilize that individual.

The second area relates to formal policies and procedures that require compliance on the part of employees and the organization. These include following a chain of command in the case of specific disputes, assigning roles that various internal parties may play in terms of dispute resolution, and taking subsequent remedial actions. Notwithstanding the introduction of a level of formality, much of the success of these programs is contingent upon the players involved, their individual skills, and the environment in which they operate.

The third area relates to the development and implementation of systems which are designed to be voluntary in nature, are generally a condition of employment, and may often use outside parties, such as investigators, mediators, arbitrators, or ombuds professionals to assist in either fact finding or rendering decisions. Typically the most formalized of programs, these are embodied in sophisticated policies, often involve the use of an alternative forum for resolving legal disputes, and have results that are usually intended to be legally binding on the parties.

Benefits of Effective Dispute Resolution Programs

The most effective dispute resolution program is one that preempts the spiraling nature of disputes gone wild. But, such a program requires that appropriate steps be in place long before the threat of litigation surfaces. Merely implementing a mandatory arbitration policy is not a dispute resolution program. While there are many benefits to such programs, the real savings is in the programs that provide for early intervention and prevent conflict from occurring or, in effect, nip it in the bud.

Maintaining Good Will Between the Parties

The DR program which focuses beyond legal compliance will ultimately promote and maintain good will between the parties by promoting and fostering communication and preventing or reducing conflict early on. In

addition, others in the workplace will judge the adequacy of the program on their own perception of its fairness. One that is viewed as objective and fair will more likely be embraced by not only employees, but management as well. In addition, the presence of an outsider in the dispute resolution process who assumes an adversarial posture may, at times, not be acting in the interest of promoting an ongoing, productive relationship between the parties. This may result not only in the predicted costs of litigation, but the loss of valuable skills in employees that the employer has invested heavily in. Thus, to promote a system that discourages employees from seeking outside intervention will help to maintain good will.

Reduction in Litigation and Related Costs

DR programs have been proven ultimately to reduce the overall cost of litigation faced by an organization. Some organizations have seen an 80% drop in employment-related lawsuits as a result of the implementation of ADR programs.[1] In addition, the resolution of a dispute through arbitration is typically final, once and for all, due to the limited instances where an arbitration decision can be overturned. A reduction in litigation does not, however, necessarily correlate with increased employee satisfaction, nor does it mean that organizational conflicts are in fact resolved at all. While reduction in litigation is clearly one benefit, there are others that focus on the softer elements of interpersonal conflict as well as other measurable outcomes.

Minimization of Workplace Disruption and Speed in the Resolution of Disputes

Generally, it takes parties twice as long to litigate a case than to arbitrate one. According to one recent study, the average employment discrimination case in litigation was resolved in about 680 days, while the average arbitration case took about 260 days.[2] While any conflict is proceeding through the steps of a DR program, there continues to be a cloud of disruption over the workplace. Employees are discussing the case, management is periodically asked to work on preparing the employer's defense, and the workplace continues to feel the tension of the ongoing dispute. Thus, the sooner it is resolved, the better.

Privacy

DR programs can be appropriate for employers who are sensitive to public scrutiny. In fact, this is one of the most often cited criticisms of such programs. Those who believe that justice is better served when the public is aware of the employer's misdeeds take the position that the lack of publicity serves to perpetuate discrimination or mistreatment of employees. Notwithstanding this seemingly pro-employee view, there are many employees who do not pursue matters against their employers out of a concern for negative publicity or fear of developing a reputation in the industry as a problem employee. For these individuals, the element of privacy is desirable.

Flexibility—Process and Remedies

For every organization, there can be a variation in design and management of a DR program. While there are hard and fast rules which have emerged through case law and EEOC guidance, each organization's culture is as unique as its people. As a result, organizations have a tremendous amount of flexibility in implementing proactive systems that are designed to minimize disputes, speed their resolution, and minimize expenses, long before the litigators become involved.

Enforceability

The enforceability of workplace DR programs typically hinges on several factors. One often cited is the lack of equal bargaining power between employers and employees. The employer typically drafts the policy, and the employees are asked to take it or leave it. Therefore, it is likely that employees will want to challenge a program that seemingly takes away their rights, and such challenges will focus on the fairness of the system. It is well known, however, that as a result of the *Gilmer*[3] decision, the arbitration of a workplace dispute is not a process that takes away an employee's rights, but rather serves as an alternative, yet equivalent, forum for resolving the matter. Therefore, when the program is viewed as being designed and administered in a manner that leans in favor of management, courts may refuse to compel arbitration.

Generally, the enforceability of a mandatory arbitration provision hinges on a variety of issues. These include voluntary consent by the employee, the employee's right to representation, the availability of neutral decision makers, the availability of statutorily protected remedies such as attorney's fees, the costs to be borne by the employee, access to relevant information and evidence, and limited review of a final and binding arbitration award.

Focus on Resolution of the Dispute, Not Winning at Litigation

DR programs are most effective when they are used to resolve conflicts long before the threat of litigation. Thus, the design of the program is critical to its success. A variety of studies have demonstrated time and again that the most effective programs are those that focus not only on legal compliance and litigation avoidance, but also focus on fairness.[4] In addition, organizational support and the availability of professional resources to assist employees will promote this goal. Some of the systems' characteristics that are important include:[5]

- Availability of expert resources to aid employees in the processing of their grievances
- Level of input employees have into the process

- Impartiality or degree of independence from management of the person making the actual decision
- Timeliness and speed of the process
- Consistency with which complaints are resolved
- Degree of top management and line management support of the program
- Extent to which the process fits the organizational culture

Policy Considerations

Having asserted that the most effective DR programs begin long before lawyers become involved, the following are the steps that an organization should consider when designing a program. Ideally, the organization will work closely with its employment lawyer in the development of a policy. However, it is incumbent on management to make policy decisions for the organization that can ultimately increase the overall effectiveness of the program.

At the outset, it is recommended that a task force be created to explore the viability of a DR program for the organization. On the task force should be representative stakeholders throughout the organization, legal representation, human resources, and operations management.

1. The Business and Human Resources Strategy

Every policy in an organization must embody the organization's overall mission and strategy. These influence the availability of internal resources to devote to DR programs. Organizations typically manage their employees like they manage their business. Thus, organizations in cut-throat, highly competitive industries typically manage their employees the same way, unless conscious effort is made to define how employees are to be treated. Any organization considering conflict resolution and DR programs must first ensure that they will dovetail with the business environment in which they operate.

Consistent with the business and human resources strategy is the need to have preliminary discussions regarding the ultimate goal(s) of the program. What are the end results the organization wishes to achieve by endeavoring to implement such a program and how will it measure its success?

2. Understand How Disputes Are Resolved in the Organization

Every organization has a current "system" for resolving disputes. These are seen in every handbook which mentions an "open door" policy. Notwithstanding this language in the handbook, each organization has a way of resolving disputes. These range from autocratic decision-making by a high-level executive to democratic systems which seek input, either formally or informally, from key stakeholders. Any DR program must be designed in a way that will work in concert with existing systems or replace, in a planned and concerted way, the existing system. In addition, the task force should review the following policies to begin the process of determining how a DR program will work with existing policies:

- Grievance procedures
- Open-door policies
- EEO / harassment policies
- Code of conduct / ethics
- Discipline / discharge
- Privacy
- Workplace violence
- Technology
- Workplace searches
- Performance appraisal / management

For each of these policies the task force should also have a clear understanding of the roles and responsibilities of management and employees. In addition, review the guidelines articulated under each of these policies with respect to the specific steps that management will take in the event of an alleged violation or complaint under the policy.

3. What Types of Disputes Will Be Covered?

The task force should carefully evaluate the types of disputes that will be addressed through the program. Are there certain disputes that will be handled outside of the DR system? In order to effectively make this determination, the task force should evaluate conflict, claim, and any other dispute history. What types of employee complaints have been lodged? What kinds of complaints became legal complaints? What costs have been incurred? What is the nature of these complaints? Frequency? Include any other metrics that the task force feels are relevant and helpful to making their recommendations.

4. Organization Culture, Hierarchy, Decision-Making and Politics

How does the "open-door" policy really work? Is it merely a statement in the handbook or is it a policy truly embedded in the corporate culture? Is the organization's culture formal or informal? Are its processes structured or unstructured? Are management and decision-making decentralized or centralized? Does local management operate independently on certain issues? Are there important stakeholders who can influence the treatment of employees who are not in the normal corporate hierarchy? An organization that is unwilling to fully adhere to the process or is willing to circumvent its own process should not consider such a program.

Organizational culture also influences communication patterns. How much information at the close of and during the DR process is the organization willing to share and with whom? Communication itself can often be the cornerstone of success and needs to be ongoing and continuous.

5. Due Process

Organizational research clearly demonstrates that the most effective DR programs are those that promote fairness and objectivity. Often, employees are less concerned about the outcome than they are about the process itself. Thus, if employees view the process as one that is fair and equitable, they are less likely to doubt it or ultimately challenge its findings. The following are some suggested concepts to discuss when designing a DR program:

- Are the individuals who are charged with administering the program properly trained?
- Are the individuals charged with administering the program trustworthy?
- Is the outcome of the process clearly explained to the complainant?
- Is there an appeal mechanism that is administered consistently and fairly and more than merely a "rubber stamp" for management?
- Are delineated timelines realistic and followed consistently?
- Are employees involved in the administration of the system?
- How impartial or independent of management is the fact finder in any investigation or review of a complaint?
- How impartial or independent of management is any decision-maker?
- Does the process itself fit within the organization's culture?
- Does top management support the program, or does it exercise discretion to resolve matters outside of the program in a seemingly arbitrary manner?

Legal standards of compliance for DR programs do not necessarily effectively address all of these due process issues. The gap between passing legal muster and one that addresses these due process issues is often the hallmark of a successful program versus a merely adequate program.

6. The Earlier the Intervention, the Better

DR programs that provide for a forum to resolve differences early on are more likely to reduce the instances where employees seek outside help to resolve their issues. Often, communication, failure to provide feedback, and personality conflicts can escalate into dangerous, embarrassing and costly conflicts for the organization. They often do not start out as lawsuit material but quickly develop into one. Quite frankly, the success of any DR program is sometimes best measured not by what happens in ensuing litigation or arbitration, but by what happens to resolve disputes before they ever get there.

7. Training of Management, Employees, and Administrators

Both employees and management will need to be trained in a variety of areas for any DR program to be successful. Specifically, managers must be skilled at: a) communicating and providing constructive feedback; b) evaluating performance; and c) resolving workplace conflicts. In addition, they must be trained on all of the company's policies that deal with performance and behavior so that they understand their roles and obligations, the obligations of employees, and their level of authority.

Employees need to be trained regarding the DR process so that they understand the types of issues which it covers. In addition, those responsible for administering the program need advanced training.

8. Structure of the Agreement, Consideration

When introducing a DR program for the first time, employers must consider the legal requirements regarding the possibility of the need for additional consideration to be provided to the employee in exchange for the employee agreeing to resolve his or her dispute through an alternative forum to litigation. Courts have found agreements to resolve disputes through mandatory arbitration viable when found in handbooks, employment applications, offer letters, and other such documents.[6] Obviously an employer will want to ensure that its process includes a signed employee acknowledgment, training or other communication to ensure the policy is understood, and ample time is provided for employees to review the materials.

9. Fear of Reprisal

No DR program can be effective if the style and culture of the organization dissuades employees from utilizing it out of fear of reprisal. Just as an open-door policy that is really a sham does nothing other than to take space in the handbook, so too does the DR policy that employees are afraid to use.

10. Use of Neutrals: Fact Finding and Decision Making

The American Arbitration Association has established clear guidelines regarding the qualification of arbitrators used to render a decision in the employment context. Specifically, the arbitrator must be knowledgeable of employment law, have no personal or financial interest

in the results of the proceedings, and have no relation to the underlying dispute or to the parties or their counsel that would create the appearance of bias.[7] While this rule is applicable to an arbitrator selected to resolve a dispute, it also sheds light on the need for neutral and objective parties to be involved in fact finding and investigating the nature of the employee's complaint. In any conflict where the investigator or fact finder is also the one who recommends discipline and then serves as judge and jury, objectivity is almost always questioned.

11. Cost Sharing

Related to the issue of fairness and objectivity is the concept of fee or cost sharing. An employee required to utilize arbitration to resolve a dispute with his or her employer often questions the neutrality of any outside expert (fact finder or arbitrator) who is paid by the employer. Viewed as a hired gun, the employee tends to question his or her objectivity. Notwithstanding this concern, an alternative view asserts that should an employer consider cost sharing with the employee, it must do so in a way so as to avoid making the process cost prohibitive for the employee. From the perspective of fairness, it is likely that the employer will need to explain the policy on cost sharing to employees. This decision will ultimately be a balance of what is legally required and what is perceived by employees as still promoting a fair resolution of the conflict.

12. How Will Program Results Be Measured?

All programs adopted by an organization must be evaluated for their effectiveness: did they produce the results that were desired? In addition, they must be evaluated on a cost-benefit basis as well. Did the outcome more than offset the costs (real and opportunity costs) of implementing the program? At the outset, it is important for the organization to consider how it will define the program's success and how it will measure it. In determining the program's success, the organization must look beyond the legal issues and evaluate the strategic implications such as the effect on organizational performance, workforce effectiveness, workplace satisfaction, etc.

Since each organization is unique, it is imperative for each to develop their own metrics to evaluate the program's effectiveness. Following the measurement of the effectiveness of the program, it is important to then make the appropriate changes necessary to improve upon the foundations already in place.

Conclusion

Dispute resolution programs have evolved over the decades into practices within organizations that are far from "alternative": they are now mainstream. Their organizational benefits have been proven time and again, and their existence has long since passed legal muster. Every organization that truly wishes to achieve the maximum benefits of a DR program must evaluate the myriad of issues unique to itself in order to design a program that will serve it well over the long haul. While DR programs are often considered novel or popular, they cannot be implemented effectively with a boilerplate approach. By considering the issues discussed here, an employer will have the opportunity to implement a program that is trusted, perceived as fair, and reduces disruption and conflict in the organization. Ultimately, this will enable the organization to increase the effectiveness of its workforce in the long term.

Endnotes

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2. David Sherwyn, *Mandatory Arbitration: Why Alternative Dispute Resolution May be the Most Equitable Way to Resolve Discrimination Claims*, CHR Reports, the Center for Hospitality Research, Cornell University (July 2006).
3. *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 59 U.S.L.W. 4407, 55 Fair Empl. Prac. Cas. (BNA) 1116, 56 Empl. Prac. Dec. (CCH) P 40704, 1991 WL 73843 (1991).
4. Donna Blancero and Lee Dyer, *Due Process for Non-Union Employees: The Influence of System Characteristics on Fairness Perceptions*, 35, 3 Human Resource Management, 343-359 (Fall 1996).
5. Donna Blancero and Lee Dyer, *Due Process for Non-Union Employees: The Influence of System Characteristics on Fairness Perceptions*, 35, 3 Human Resource Management, 343-359 (Fall 1996).
6. Peter Paul Nicolai, *Rethinking Employment Law Strategies: Part 2*, 56(4) Dispute Resolution Journal 53-63 (2001), available at ABI/INFORM Global Database (Document ID: 96928487).
7. American Arbitration Association Rules and Procedures: Employment Arbitration Rules and Mediation Procedures, July 1, 2006, Rule 12(b), available at www.adr.org/sp.asp?id=28481#the (last visited October 2, 2006).

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Decisions of the Public Employment Relations Board—2006

By Philip L. Maier

Interference and Discrimination

State of New York (Division of State Police)*, 39 PERB ¶ 3023 (2006)—**The Board affirmed an ALJ decision dismissing a charge alleging that the State violated the Act by denying an employee access to a PBA representative during an investigatory interview concerning a "critical incident" which involved an employee. Applying ***State of New York (Division of State Police), 38 PERB ¶ 3007 (2005), *conf'd* Alb. S. Ct. Dec. 27, 2006, in which the Court held that disciplinary procedures for New York State Police are prohibited subjects of negotiations, the Board held that the State had no obligation to negotiate the subject and dismissed the charge.

***County of Ulster and Ulster County Sheriff*, 39 PERB ¶ 3013 (2006)—**The Board affirmed an ALJ decision dismissing a charge which alleged a violation of the Act when the employer refused an employee's request to have a union representative present while being questioned by a superior officer. The ALJ found, based upon a credibility determination, that the union-represented employee did not request union representation in the investigatory interview. Lacking such a request, there can not be a finding that there was an interference with the right to representation.

***United Federation of Teachers and Bd. of Educ. of the City Sch. Dist. of The City of New York (Donaldson)*, 39 PERB ¶ 3002 (2006)—**The Board affirmed an ALJ decision which dismissed a charge alleging that the union violated its DFR and that the employer interfered with the charging party's rights under the Act. No exceptions were taken to that part of the charge dismissed as against the UFT. With regard to that aspect of the charge against the employer, the Board affirmed the ALJ decision finding that the charging party had waived his rights to file a charge since he had executed a waiver upon his resignation from service in settlement of charges brought against him. The Board's waiver analysis inquires as to whether the waiver covers the improper practice charge, whether it is unenforceable as against public policy, and whether it was clear and knowing. Finding the other exceptions to also be without merit, the balance of the charge was also dismissed.

Representation

State of New York*, 39 PERB ¶ 3022 (2006)—**The Board reversed an ALJ decision which held that certain titles should be removed from each unit, so that security related titles which are entitled to proceed to interest arbitration would not be in a unit with titles not entitled to invoke such a procedure. The Board stated that different impasse resolution procedures do not constitute a bright line test for fragmentation. The Board reiterated its prior holding in ***City of Lockport, 30 PERB ¶ 3049 (1997), wherein it stated that such a difference is a significant and important factor. This was not an initial uniting decision, and the Board seeks to have the fewest number of units possible compatible with the public interest. Once an initial unit is made, absent a compelling interest, the Board will not fragment, especially when there has been a history of meaningful negotiations and if the employer objects.

***Fashion Institute of Technology*, 39 PERB ¶ 3026 (2006)—**The Board reversed an ALJ decision and dismissed a unit placement petition seeking to place the titles Instructor for Saturday Live, Instructor for Summer Live, and Instructor for Middle School Live into the unit. The Board found that there was no separate position for the Live programs, in that there were only assignments. The Board stated that it had non-delegable jurisdiction over unit placement and clarification issues, and that it would not be bound by an arbitrator's decision on this issue. The "Live" Instructor is not a position listed in the recognition agreement, and the unit clarification portion of the petition was dismissed. Since there is no separate position in issue, the unit placement petition was dismissed. A position refers to a title with a duties description and specific qualification, as opposed to an assignment.

***Regional Transit Service Inc.*, 39 PERB ¶ 3027 (2006)—**The Board affirmed an ALJ decision placing certain titles in a bargaining unit. A unit placement petition is a mini-representation petition, in which the Board looks to similarities in terms and conditions of employment, and whether there is a conflict of interest among the members of the proposed unit. The nature and extent of the differences in terms and conditions of employment were not sufficient to create a barrier to effective negotiations. There were already white- and blue-collar titles in the unit, and this case shows that the distinctions can sometimes be blurred not necessitating separate units. With regard to one title, the Board stated that it has never adopted a *per se* rule that a supervisor be excluded from a unit, and there was no evidence that a managerial designation was appropriate. The Board also rejected the administrative convenience argument, stating that there was no evidence that the titles should be in a different unit or that a separate unit would be more administratively convenient.

***Monroe #1 BOCES*, 39 PERB ¶ 3024 (2006)—**The Board affirmed an ALJ decision dismissing the unit clarification portion but granting the placement portion

of a petition thereby accreting certain positions to the unit. The Board found that the ALJ correctly determined that the at-issue positions of signing skills coaches, ALS teacher assistants and notetakers shared a greater community of interest with the petitioner than with other units. The positions in issue had the same terms and conditions of employment and performed the same work duties, thereby outweighing factors that would lead to placement of these titles in another unit. The Board stated that while administrative convenience is a factor to be considered, community of interest is the most important factor in deciding unit placements.

***State of New York*, 39 PERB ¶ 3017 (2006)—**The Board denied exceptions which were filed by individuals who excepted to a Director's decision placing unrepresented employees in a unit represented by the Public Employees Federation. Pursuant to a procedure agreed to by the State and PEF, the State is able to initially designate newly created positions as managerial or confidential. Based upon a stipulation entered thereafter between the State and PEF in which they agreed that the employees were not managerial, the Director found that they shared a community of interest with the unit. The Board stated that there was nothing in the record before it that would lead it to conclude that the employees were "uniquely in possession of information relevant" to the Director's uniting decision and denied the exceptions.

***City of Rome*, 39 PERB ¶ 3009 (2006)—**The Board affirmed an ALJ decision which dismissed an application to designate the Director of Information Services as either managerial or confidential. The Board stated that the Director does not formulate policy and therefore is not a managerial employee under the Act. Additionally, the Director does not function in a confidential relationship or have access to confidential information. Accordingly, a confidential designation was not warranted.

***State of New York (Office of Parks, Recreation and Historic Preservation)*, 39 PERB ¶ 3007 (2006)—**The Board affirmed an ALJ decision finding that the titles Chief Regional Park Police 1, 2, and 3 were confidential. The employees holding these titles do not play a major role in policy making, nor do they have a major role in the administration of agreements or personnel administration, and were therefore properly found not to be managerial. Their duties, however, included assisting and acting in a confidential capacity to a person acting in a managerial capacity.

***Niagara Falls Bridge Commission*, 39 PERB ¶ 3008 (2006)—**The Board affirmed an ALJ decision which placed the newly created position of bridge maintenance foreman into the CSEA unit. In rejecting the argument that there was not a community of interest, the Board reiterated that separate units are not required for white- and blue-collar employees, and similar terms of employment may be sufficient to warrant inclusion in the unit. The Board also stated that the fact that the title is not listed in the recognition clause is not controlling, and there was no evidence to conclude that the title should be placed in a unit on the Ontario side of the Commission.

***Regional Transit Service, Inc.*, 39 PERB ¶ 3001 (2006)—**The Board affirmed an ALJ decision which granted a unit placement petition placing the titles of secretary of maintenance, secretary of transportation and data entry clerk into the petitioner's unit. Based upon the criteria traditionally utilized to determine the appropriateness of a unit under section 207 of the Act, the Board found that the clerical employees involved were appropriately accreted to the unit. There was no actual or inherent conflict of interest and the evidence demonstrated a community of interest. Accordingly, the exceptions were denied.

Good Faith Bargaining

***County of Erie and Erie County Medical Center Corporation*, 39 PERB ¶ 3036 (2006)—**The Board affirmed an ALJ decision which held that the Act was violated when the employer unilaterally imposed mandatory drug and alcohol testing and conducted background checks on employees who returned to the medical center pursuant to bumping rights. The Board rejected the argument that the employees were new employees and held that the imposition of the drug and alcohol testing violated the Act. Additionally, the Board found that a balancing of interests leads to the conclusion that criminal background checks are mandatorily negotiable.

***Town of Fishkill Police Fraternity, Inc.*, 39 PERB ¶ 3035 (2006)—**The Board affirmed in part and reversed in part an ALJ decision addressing the negotiability of demands submitted to interest arbitration. In assessing the appropriate test to be used to determine whether a bargaining demand is sufficiently related to a contract clause to establish its negotiability under *Cohoes*, the Board stated that the test is whether the demand seeks "to include, alter or delete a topic or category addressed specifically, or at least generally, in the parties' contract." Applying this test, the Board found certain proposals to be sufficiently related and thus bargainable under *Cohoes*.

***Sullivan County Patrolmen's Benevolent Association, Inc.*, 39 PERB ¶ 3034 (2006)—**The Board affirmed an ALJ decision which held that certain demands did not directly relate to compensation and were excludable from interest arbitration under section 209.4(g) of the Act. The Board held that demands for the payment of cash in the future for unused sick time and the manner of payments, allowing unit employees to be credited with days and then elect to receive pay for them at a later date, changing the rate of accumulation to convert vacation and sick leave to cash, and procedures relating to GML § 207-c benefits were not arbitrable under this standard.

***State of New York (Department of Correctional Services)*, 39 PERB ¶ 3033 (2006)—**The Board affirmed as modified an ALJ decision which dismissed a charge

alleging that the State violated the Act when it changed the practice and procedure by which correction officers were assigned to perform vacation relief functions. The ALJ reached the merits of the charge without first disposing of the jurisdictional issue. The Board held that the charge does not complain of a change in a past practice, as argued by the union, but of a change in an existing agreement. Since the Board does not have jurisdiction to enforce the terms of an agreement, the charge was conditionally dismissed and deferred to the parties' dispute resolution procedure. The Board rejected the contention that the State repudiated the agreement, since it did not deny the existence of the agreement or refuse to honor it without any colorable claim of right under the CBA. The Board further stated that were it to reach the merits, it would dismiss the charge since number of staff assigned is a managerial prerogative.

***Village of Rye Brook*, 39 PERB ¶ 3028 (2006)—**The Board affirmed an ALJ decision which dismissed that portion of a charge alleging that the Village transferred exclusive bargaining unit work in violation of the Act. The Board stated that the work alleged to have been transferred had not been exclusively performed, and therefore affirmed that portion of the ALJ decision. The ALJ also held that the Village violated the Act by refusing to bargain the impact of its decision to transfer unit work. The Board affirmed this portion of the ALJ's decision since there were no exceptions taken to the decision in this regard.

***New York City Transit Authority*, 39 PERB ¶ 3021 (2006)—**The Board affirmed an ALJ decision which dismissed a charge alleging that the employer and another union had entered into an illegal parity agreement. A parity agreement is illegal to the extent that it trespasses the negotiating rights of a union in that it is not party to the agreement. It imposes a burden on the non-party union to negotiate for employees outside its unit, thereby increasing the burden of negotiating for employees in its own unit. The agreement in issue sought by the NYCTA did not impose this type of burden upon the charging party, even though it may have put additional pressure on it. The charge was therefore dismissed.

Town of Orangetown*, 39 PERB ¶ 3012 (2006)—**The Board affirmed an ALJ decision dismissing improper practice charges filed when the Town refused to provide certain information that the PBA requested to defend disciplinary charges against two unit employees. The Board stated that pursuant to the Court of Appeals' decision in ***City of New York v. NYS Public Employment Relations Board, __ N.Y.3d __ (2006), 39 PERB ¶ 7006 (March 28, 2006), bargaining over police discipline is mandatory unless there is State legislation which commits this power to local officials. In the case consolidated with companion case to ***City of New York*, *supra*, *Town of Orangetown v. Orangetown Policemen's Benevolent Association*,** *supra*, the Court stated that the Rockland County Police Act is such a local law. Since it has no procedure available for the production of information, no such right exists under that law. The Board reiterated its holding in ***County of Ulster***, 26 PERB ¶ 3008 (1993) that there is no Taylor Law right to information in conjunction with a statutory proceeding in which a union may be providing representation to a unit employee. It therefore rejected the PBA's contention that subsequent Board case law rendered ***Ulster*** invalid. It distinguished this case from ***Town of Evans***, 37 PERB ¶ 3016 (2004), in which there was a contractual disciplinary procedure that was adopted in lieu of Civil Service Law 75 and 76, pursuant to which the grievance was filed. Since this case was governed by the Rockland County Police Act, and involved charges brought pursuant to a statutory non-contractual disciplinary procedure, ***Town of Evans***, *supra*, does not apply.

***State of New York (Department of Correctional Services—Elmira Correctional Facility)*, 39 PERB ¶ 3004 (2006)—**The Board reversed an ALJ decision which had found a violation of section 209-a.1(d) of the Act when the State unilaterally changed the manner in which unit employees working vacation relief are scheduled at the Elmira Correctional Facility. The practice alleged to have been violated is that a vacation relief officer (VRO) who bid for an assignment for less than two weeks had been able to keep his regularly scheduled days off. The Board determined that the subject at issue was nonmandatory since it related more to the State's interest in determining its manpower needs. The Board also stated that when the interests of the VROs in maintaining a fixed regular day off are balanced against the State's interests to provide correctional services, the State's interests predominate.

***County of Erie and Erie Community College*, 39 PERB ¶ 3005 (2006)—**The Board affirmed an ALJ decision which found that the employer transferred unit work to nonunit employees in violation of the Act. The work at issue is the purchasing of goods and services for the College valued at over $250. There was no doubt that the work had been performed exclusively, and the Board therefore turned to whether there had been a change in job qualifications. The Board stated that when it refers to a change in job qualifications, it means that an employer has decided that employees with different qualifications will perform the work better. That a task is reassigned to an employee with different qualifications does not mean that the qualifications for performing the work have changed. The Board rejected the argument that a local law relieves the employer from a bargaining obligation under the Act.

Duty of Fair Representation

***AFSCME, Council 66, Local 3933 (Alteri)*, 39 PERB ¶ 3015 (2006)—**The Board affirmed an ALJ decision which dismissed a charge alleging that the union violated its duty of fair representation by failing to file a grievance on behalf of Altieri. The Board held that the facts submit-

ted in support of the charge did not demonstrate that the union acted in an arbitrary, discriminatory or bad faith manner. There was also no evidence that the union failed to consult with the charging party. Accordingly, the charge was dismissed.

Impasse Procedures

***County of Monroe*, 39 PERB ¶ 3018 (2006)—**The Board affirmed a Director's determination that the unit was not eligible for interest arbitration since they were not members of an organized fire department, or any other unit that was so previously. Legislation was vetoed that would have included these employees within the compulsory interest arbitration provisions of the Act. Accordingly, the petition for compulsory interest arbitration was denied.

***New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority*, 39 PERB ¶ 3006 (2006)—**The TWU filed objections to a report and recommendation by the Director of Conciliation that a voluntary resolution of the collective bargaining agreement could not be achieved between the parties and that the matter therefore be referred to a public arbitration panel. The parties had entered into a memorandum of agreement (MOA) which was subject to ratification. The TWU membership failed to ratify the MOA, and the Authorities advised the TWU that the tentative agreement was no longer available. The Board found that pursuant to sections 209.5 of the Act and sections 205.10 through 205.20 of the Rules of Procedure, the Director had conducted an exhaustive investigation, and determined that a voluntary agreement could not be reached. The absence of any reference to mediation in the language of section 209.5 required that the Board employ a slightly different test in determining whether impasses under this section should proceed to arbitration. The Board stated that the Rules require a finding that a voluntary resolution, with or without mediation, is improbable under the existing circumstances. Factors such as the parties' bargaining history, the relationship between the parties, and the number and nature of the issues in dispute suggest that the parties cannot successfully negotiate a new agreement.

Practice and Procedure

***Board of Education of the City School District of The City of Buffalo*, 39 PERB ¶ 3029 (2006)—**An ALJ deferred a charge alleging a violation of sections 209-a.1(a), (d) and (e) when an employer changed the health insurance carrier. The Board affirmed the rejection of the union's contentions that the employer refused to bargain in violation of the Act, that it changed the terms of an expired agreement, and that it repudiated the agreement in violation of the Act. The Board held that it was appropriate to defer when a determination of the grievance was likely to be dispositive. It also stated that since the employer did not disavow the existence of the agreement or act without any colorable claim, a repudiation claim was not viable.

***City of New York*, 39 PERB ¶ 3030 (2006)—**The Board affirmed a Director's decision dismissing the charge for failure to properly plead the alleged violations of the Act, failure to file for impasse and that the City can not violate section 209-a.2(c). The Board, in affirmed on the grounds stated by the Director, also noted that it did not appear that the police officers employed by the City Department of Environmental Protection would not constitute a police force within the jurisdiction of the Act.

***Westchester County Health Care Corporation (Davis)*, 39 PERB ¶ 3031 (2006)—**The Board dismissed exceptions to a decision since the party filing the exceptions failed to file with the Board proof of service of the exceptions upon the Village.

***Village of Cattaraugus*, 39 PERB ¶ 3022 (2006)—**The Board dismissed exceptions to a decision since the party filing the exceptions failed to file with the Board proof of service of the exceptions upon the Village. The Board reiterated that timely service upon other parties is a component of timely filing, and that it has dismissed exceptions that have not been timely filed.

***Town of Kortright*, 39 PERB ¶ 3025 (2006)—**The Board affirmed a Director's decision dismissing a petition for certification/decertification for failure to comply with the Board's Rules of Procedure. Specifically, the petitioner failed to simultaneously file with the petition proof of showing of interest, and a declaration of authenticity was not filed. The Board reiterated that it has strictly applied its rules regarding the showing of interest requirement, and rejected the argument that the official form of the petition is unclear. Accordingly, the petition was dismissed.

United Federation of Teachers (Fearon)*, 39 PERB ¶ 3020 (2006)—**The Board denied a motion for reconsideration of a prior decision, ***United Federation of Teachers (Fearon), 37 PERB ¶ 3029 (2004). The Board cautioned the moving party again about making numerous frivolous motions which waste the agency's time and money, and stated that such action may result in sanctions being sought.

***Board of Education of the City School District of New York*, 39 PERB ¶ 3014 (2006)—**The Board reversed and remanded a decision to an ALJ, finding that a charge should not have been dismissed as untimely. The charge alleged a violation of the Act due to the transfer of exclusive unit work, the failure to bargain concerning the transfer of that work, and the failure to provide information that was requested. The union shop steward was aware that nonunit employees began to perform unit work, and he informed a union official of this fact. In determining that the charge was not untimely, the Board stated that the record did not establish that the shop steward was "empowered to bind the union to notice of the assignment," and that the inquiry to the union official was not sufficient notice to the union. The Board also held that it was a violation of the Act not to bargain with

the union in response to their demand to do so. Since the matter was remanded, the Board reserved decision on the exceptions filed considering the information request.

***District Council 37, AFSCME, AFL-CIO (Rudin-Moore)*, 39 PERB ¶ 3010 (2006)—**The Board dismissed exceptions filed by the charging party since they were not timely served on the other parties to the proceeding.

***New York State United Teachers (Birthwright)*, 39 PERB ¶ 3011 (2006)—**The Board dismissed exceptions filed by the charging party since they were not timely served on the other parties to the proceeding.

Court of Appeals' Decisions

***Professional Staff Congress v. PERB*—36 PERB ¶ 4547 (2003), *rev'd in part*, 37 PERB ¶ 3006 (2004), *rev'd and remanded sub nom, Professional Staff Congress—City Univ. of New York v. Pub. Empl. Relations Bd.*, 21 A.D.3d 10, 38 PERB ¶ 7009 (1st Dept 2005), *lv. granted*, 6 N.Y.3d 705, 39 PERB ¶ 7002 (2006), *motion to dismiss on the ground of mootness denied*, 7 N.Y.3d 780, 39 PERB ¶ 7008, *rev'd*, 2006 N.Y. LEXIS 3190, 2006 Slip Op. 7395 (Oct. 17, 2006), 39 PERB ¶ 7010 (2006)**—**The Court of Appeals reinstated a Board decision which had been reversed by the Appellate Division. The union, the Professional Staff Congress (PSC), alleged that the City University of New York (CUNY) violated the Act by failing to bargain and by unilaterally implementing an intellectual property policy. The Board dismissed the charge, holding that CUNY was privileged to unilaterally implement the policy by virtue of waiver language in the contract. It further held, however, that it was not obligated to bargain after the expiration of the contract since the waiver language remained in effect after the expiration of the contract. This latter portion of the holding was reversed by the Appellate Division. The Court of Appeals reversed this portion of the Appellate Division decision, finding that the waiver clause in the contract precluded an obligation to bargain concerning this policy. The Court of Appeals, stated, however, that the demand to bargain the waiver clause and the intellectual property policy had not been sufficiently linked.

The Patrolmen's Benevolent Association of The City of New York v. New York State Public Employment Relations Board*; __ N.Y.3d __, 2006, N.Y. LEXIS 584, 2006 N.Y. Slip Op. 2288 (March 28, 2006); *Town of Orangetown et al. v. Orangetown Policemen's Benevolent Association et al*.**—The Court held that police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials. In doing so, it affirmed an Appellate Division decision upholding PERB's determination that five subjects in the expired CBA between the City and the PBA could not be submitted to interest arbitration since they were prohibited subjects of bargaining. The subject of discipline under the City Charter and Administrative Code is left to the discretion of the Police Commissioner. In ***Town of Orangetown, the Court affirmed the Appellate Division decision which held that a clause of the CBA between the parties was invalid because the Rockland County Police Act commits police discipline to the discretion of local authorities. The Court recognized the strong policy in favor of a collective bargaining over terms and conditions of employment. It further recognized, however, that there are cases in which a public policy, here, the policy in favor of strong authority in police disciplinary cases, is strong enough to warrant exclusion from collective bargaining. The Court found that the Legislature by virtue of legislation has committed police discipline to the authority of the Commissioner and the Orangetown Board. Legislation of this kind overcomes the presumption in favor of collective bargaining where police discipline is involved.

***Poughkeepsie Professional Firefighters' Association, Local 596, IAFF, AFL-CIO, et al. v. New York State Public Employment Relations Board*, __ N.Y.3d __, 2006 N.Y. LEXIS 569, 2006 N.Y. Slip Op. 2289 (March 28, 2006)**—The Court affirmed an Appellate Division decision which affirmed a PERB decision that held that a proposal concerning a review process for the review of a determination of eligibility for firefighter benefits under section 207-a of the General Municipal Law was not a mandatory subject of bargaining. After a PERB decision holding that the union's demand for a *de novo* review of the City's determination of a firefighter's initial and continuing eligibility for 207-c benefits was nonmandatory since it impinged upon the City's exclusive statutory authority to make initial eligibility determinations and termination decisions, the union revised its proposal in the next round of bargaining. The union deleted "de novo" from its proposal, and stated that the City would have exclusive authority to initially determine eligibility. The City objected claiming that the changes were merely cosmetic, since an arbitrator would still make a decision on the merits of the proposal. PERB found the proposal still to be nonmandatory, since it sought a review of the underlying claim. The Court stated that this case did not present a case of statutory interpretation, but of whether there was a reasonable reading of the proposed contract language by the Board. Finding no irrationality in PERB's conclusion that the demands set forth were not a review procedure, but a redetermination procedure "in derogation of the City's non-delegable statutory right to make initial determinations," the Court affirmed.

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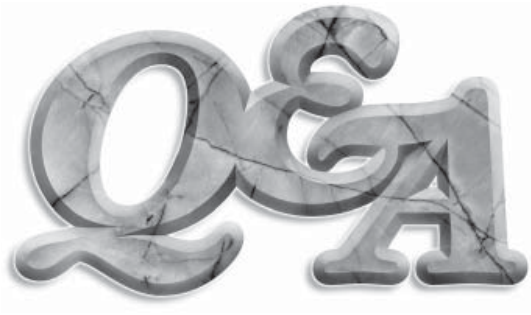
Ethics Matters



By John Gaal

Q I represent an individual with a possible race discrimination claim against a major employer in town. My client was denied employment with the company recently and he is convinced it is due to his race. While he has some good reason for this belief, in looking at all the facts, it is also possible that there might be a marginal, albeit legitimate, "qualifications" issue. To better determine whether something unlawful is going on, I am thinking of hiring someone to pose as a minority applicant for the position (which has yet to be filled). They would present fictitious qualifications that would clearly be superior, so that if rejected about the only plausible explanation would be discrimination. I was all set to do this when I started reading about all of the trouble folks at Hewlett-Packard found themselves in as a result of something called "pretexting." Do I have anything to worry about?

A "Pretexting" is often described as someone pretending to be someone they are not in order to gain some information that might not otherwise be available to them. What you are proposing to do—have someone pretend to be a fictional person with fictional qualifications—would fall within the definition of pretexting.

"Pretexting, when it involves lawyers, principally implicates two provisions of New York's Code of Professional Responsibility."

Based upon news reports, the pretexting in the Hewlett-Packard situation involved a private investigator apparently retained as part of an investigation into leaks of confidential information by a member of the company's Board of Directors. The investigation was conducted under the supervision of a company lawyer. Using personal information the company had about its individual Board members, telephone service providers were contacted by someone pretending to be those Board members and their personal phone records were obtained.

Pretexting, when it involves lawyers, principally implicates two provisions of New York's Code of Professional Responsibility. Disciplinary Rule 1-102 (a) provides that a lawyer shall not "(4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." It also provides, in subsection (a)(2), that a lawyer may not "circumvent a Disciplinary Rule through actions of another."

If you were to pretend to be an applicant for the position in question and submitted a fictitious resume, your conduct would clearly violate the literal language of DR 1-102(a)(4). Similarly, under the general principle that "you cannot do through another that which you are not permitted to do yourself . . . . ," you would violate DR 1-102(a)(4) if you hired, or were otherwise involved in assisting, someone else to engage in the pretexting conduct that you could not engage in personally.

But as is the case in most ethics contexts, whether the specific pretexting activity you have outlined is unethical may be a little more complicated. First, courts generally have recognized the value of "discrimination testers" in a number of cases, giving this method of deceit greater legitimacy than other types.[1] In addition, at least one ethics authority has recognized that pretexting in the form of using employment discrimination testers to ferret out discrimination is not an ethical violation because the societal good in eliminating discrimination outweighs any incidental deceit.[2]

There is even some case support for the conclusion that this limited pretexting may not be improper. For example, in *Gidatex v. Campaniello Imports, Ltd.*,[3] the court recognized that an attorney's involvement with undercover investigators to pose as consumers to secure information from a retailer of the same type that would generally be provided to any consumer is not the kind of misrepresentation the Code was intended to prohibit. Similarly in *Apple Corps. Ltd., MPL v. Int'l Collectors Soc.*,[4] the court held that using investigators to pose as customers to determine if a company was selling items it was prohibited from selling was not an ethical breach. Based on these two decisions, the Southern District of New York recently observed that "the prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means."[5] In recognition of the societal good at stake, Oregon recently amended its ethics rules to explicitly permit this type of activity: Oregon Rule 8.4(c) (permitting certain types of covert activities in furtherance of investigations into violations of civil or criminal laws).

But not all authorities recognize the argument that a "greater good" justifies the use of deceit. Here in New York, the Second Department has upheld discipline for a lawyer involved in deceitful conduct even though it was engaged in to protect another individual from harm, expressly rejecting the argument that the "ends" justify the "means."[6] And the Eighth Circuit, in *Midwest Motor Sports*

v. Arctic Cat Sales, Inc.,[7] indicated that conduct similar to that approved in *Gidatex* and *Apple* would violate a rule very similar to that in play in New York. Even Oregon, prior to recent amendments to its Code to explicitly permit limited pretexting, had ruled that deceptions by lawyers or their investigators in the course of ferreting out wrongdoing was an ethical violation.[8]

As of today, we have limited authoritative guidance in New York, and that which does exist appears to be in conflict. On the one hand, the Appellate Division, in *In re Malone*, has rejected the "ends justify the means" approach to justify deceitful conduct by a lawyer. On the other hand, the Southern District, in *Gidatex* and *Cartier*, has suggested that there is some latitude and lesser "degrees of deceit" may be permissible in New York. On balance, while proceeding as you have described may ultimately be determined to be permissible, it is not risk free.

Endnotes

1. *See, e.g.*, *Village of Bellwood v. DeWired*, 895 F.2d 1521 (7th Cir. 1990).
2. Arizona Bar Opinion, Opinion 99-11 (1999); *see also* Isabella and Salvi, "Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct," 8 Georgetown Journal of Legal Ethics 791 (1995).
3. 82 F. Supp. 2d 119 (S.D.N.Y. 1999).
4. 15 F. Supp. 2d 456 (D.N.J. 1998).
5. *Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354 (S.D.N.Y. 2005).
6. *In re Malone*, 105 A.D.2d 455 (2d Dep't 1984).
7. 347 F.3d 693 (8th Cir. 2003).
8. *In re the Complaint against Daniel J. Gatti*, 8 Pa. 3d 966 (Or. 2000); see also *In re Ositis*, 330 Ore. 366 (Or. 2002).

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

An Employee's Right to Hibernate in the Winter Without Being Fired

By James M. Rose[1]

A motion in a recent case brought to our attention an unusual claim that federal statutes permitted an employee to hibernate in winter without being fired.

The employee, Chris Le Bair, worked for the Department of Defense (DOD). He claimed that he was suffering from Seasonal Affective Disorder (SAD). This is one of the "diseases" that have been newly discovered thanks to the miracles of modern science and the willingness of the health insurance industry to pay the claims of doctors who discover and treat the new disorders. The discovery of new diseases is in direct proportion to doctors' willingness to be paid extravagant sums of money to treat them, and to be expert[2] witnesses in court advocating the existence of diseases and disorders for which someone other than the plaintiff ought to be required to foot the bills.[3]

SAD is a disorder brought on by the change in the seasons. In the Northern Hemisphere as winter approaches and settles in, the days grow shorter and the nights grow longer. The lack of sunlight and warmth causes those who suffer from SAD to become depressed, surly, and to long for longer periods of sleep.[4] Scientists speculate that ancient man may have hibernated in caves like bears in winter when food was scarce. Those of us less descended from ancient man with more of a genetic memory of ancient habits may still long to sleep through winter.[5] SAD is recognized as a distinct disorder by the American Psychiatric Association[6] in its diagnostic manual, DSM-III.[7]

Chris Le Bair wrote a note to his employer that requested an unpaid leave of absence for the winter. His note began "Oh DOD, poor DOD, I'm feeling oh so SAD."

The basis of his request was the Family and Medical Leave Act of 1993 (29 U.S.C. §§ 2601 *et seq.*).[8] While the public is aware that this law applies to leaves for pregnancy and illness of family members, it is less well known that it also allows for a medical leave by the full time employee[9] himself for up to twelve weeks[10] if he suffers from a "serious health condition."[11]

The expert witness, Sir Kay D. N. Writhem, submitted a certification to DOD,[12] and then said in an affidavit in support of the motion that, in his opinion, SAD comes within the purview of the statute because it is a "serious health condition." His conclusion is based upon that fact that "It's no joke" and "When someone suffers from depression he is too serious, and ought to lighten up."

He categorized Le Bair's SAD depression as bi-polar depression.[13] Therapy involving bright lights and tanning salons proved ineffective[14] because the plaintiff would then be required to travel through the cold and dark to go to and from work.[15]

Le Bair used to take the bus, but standing in the cold and dark caused him to become so depressed he often went home and did not even try coming to work.

What plaintiff needed as a medical treatment (to be paid for by his health insurance), Sir Kay opined, was to travel to a warm climate closer to the equator where the days are longer.[16] His mental condition would then "lighten up."[17]

The statute itself defines "serious health condition" as one that requires continuing treatment by a health care professional. The expert wrote that no health care provider worth a Medicare payment could not find a medical condition that does not require more than one treatment. Since SAD recurs each winter, it qualifies.

The case is still unresolved in court. Its report arose because of a motion to postpone a pre-trial deposition of Le Bair until "after the winter months."

Le Bair concluded that his condition was a handicap, because he was a person with a disability under the Vehicle and Traffic Law.[18] Vehicle and Traffic Law § 404-a provides that a mental disability which causes an unusual hardship in utilizing public transportation entitles a person to a handicapped license plate. Le Bair has now applied for one. The Commissioner of Motor Vehicles has asked DOD to transfer Le Bair to Hawaii.

Endnotes

1. White Plains, New York. The Federal Law in this article has been satirized for your protection.
2. "Expert" has been defined as an ordinary person who testifies about his work more than one hundred miles away from his office. The word is made up of two components—"ex" meaning former and "spurt" meaning drip under pressure.
3. And thereafter should be recognized as disorders in the courts.
4. B. Bowen, "Winter Depression," *Science News*, July 25, 1992, p. 62.
5. This article does not address whether the Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, protects sufferers from SAD as disabled persons ("the equinoctically challenged").
6. A group that is, by sheer coincidence, paid to treat it.
7. R.N. Rosenthal, *Seasons of the Mind* (Bantam Books, 1989), p. 157.

8. Effective August 8, 1993 (except for parts that are not).
9. A full time employee is one who has been employed for more than twelve months (not necessarily consecutive) with that employer, and who worked more than 1,250 hours in the previous year. The term is meant to exclude part time employees. If an employee takes twelve weeks off each year for his illness, three weeks vacation, and five sick days he is still (barely) a full time employee, but comes close to the 1,250 hour minimum unless he works some overtime.
10. 29 U.S.C. § 2612(a)(1)(D).
11. 29 U.S.C. § 2611(11)(b).
12. As required by 29 U.S.C. § 2613(b)(3).
13. Specifically north polar and south polar. At the poles it is dark half the year, and SAD would be particularly devastating.
14. And only alleviates the condition for about 60% of sufferers according to *Science News*, September 23, 1989, p. 198.
15. And was not available because Le Bair's health insurance company, Indigo Cross, would not cover tanning salon bills.
16. And possibly to take Sir Kay with him for therapy sessions on the beach.
17. He quoted Dr. Jimmy Buffet, "Changes in latitudes, changes in attitudes."
18. Vehicle and Traffic Law § 1203-c.

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at non-lawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authorized publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication; and
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, New York 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: http://www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

LABOR MATTERS
Labor Law: Is It Still There?

By Frank Flaherty

This article continues the review of "classic" labor law, which was initiated in the Summer 2003 *L&E Newsletter* and supplemented in two subsequent editions of the same publication.

There continues to be a dearth of new and novel issues, for a variety of reasons, including the continued "free fall" of union membership, the split in the membership ranks of the AFL-CIO, with several of the more aggressive unions going it alone in a newly formed organization named "The Chance to Win Federation." The breakaway unions, including the Service Employees, Teamsters and Unite Here tend to stress the organizing needs of these international unions. In addition, several of the unions continue to direct their energies towards restricting the growth of Wal-Mart by pushing for local legislation impacting health care costs, increased wages and other benefits. Still other unions have opted to take behind-the-scenes roles in the immigration debacle that has "handcuffed" our Congress in recent months, by organizing demonstrations and marches supporting the role of the immigrants, regardless of whether these individuals are legal or not.

"There continues to be a dearth of new and novel issues . . . including the continued 'free fall' of union membership, the split in the membership ranks of the AFL-CIO, with several of the more aggressive unions going it alone in a newly formed organization named 'The Chance to Win Federation.'"

Another facet of the problem is the membership of the National Labor Relations Board, which could be described as the "police person" for our national work force and their employers. During 2005, the Board operated with only two or three members, since the politically paralyzed Congress failed to act on earlier nominations. The President made recess appointments early in 2006, including Dennis P. Walsh, Democrat, a former member and Peter N. Kirsanow, Republican, a management attorney. The latter nomination and appointment has recently been described as "deliberately provocative" by a Democratic Senate staffer.[1] Sounds almost like the rhetoric surrounding the recent nomination of Justices Roberts and Alito to the Supreme Court, so it may be a while before the Senate confirms the President's NLRB nominations. However, for the moment the Board should enjoy a full complement of personnel. Under the provisions of these recess appointments, these members will serve until the Senate adjourns its 2007 session or they are confirmed. In addition to the individuals mentioned above, the Board membership includes Robert Battista, Chair, and Peter Schaumber (both Republicans) and Wilman Liebman, a Democrat.

With full membership, the Board can now address some issues that have been bypassed because of their significance, including use of "e" mail for union activities, board-sponsored elections versus card check majorities to gain union recognition, refining the definition of a supervisor and other electronic and security issues that now impact the work place.

Other noteworthy happenings since this column last appeared include:

- Morton Bahr stepped down as President of the Communication Workers of America (CWA). He served more than 20 years, leading the world's largest telecommunications union from the break-up of the Bell System in the early 70s, the growth of the Baby Bells and through the severe economic and employment crunch caused by wild competition, rise of cellular phones and mergers. Today, with the pending merger of the reconstituted AT&T and Bell South, the American telephone industry appears once again to be almost a monopoly, at least as far as land lines are concerned. Bahr was a good union leader and expanded the vision of his organization to the public sector, which helped to soften the membership losses in the telephone industry. Larry Cohen replaced Bahr as head of the CWA.[2]
- The United Steel Workers Union entered into a merger with PACE (Paper and Oil Chemical and Atomic Workers) and was renamed United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. Fortunately, it will be known as United Steelworkers, for short. Thus was created the largest industrial union in North America, with more than 860,000 members.[3]
- The Equal Employment Opportunity Commission (EEOC) released its activity report for Fiscal

Year 2004.[4] The Agency handled more than 19,000 discrimination complaints, which represented a 6 percent decline from a year earlier. The breakdown as to type of cases filed included:

Retaliation (Reprisal)	7,700 +
Age	5,400 +
Race	5,000 +
Sex vs. women	4,600 +

Release of this data naturally led to strong suggestions by knowledgeable management labor attorneys as to how employers could avoid litigation on a variety of employment issues and especially how the boss could "dodge the bullet" of retaliation claims, which often is the only "smoking gun" in a discrimination case. Examples of positive behavior by employers that were recommended include:

- Positive communication with employees
- Listening to employees and responding to their questions
- Ensuring that current employees are not overlooked when hiring from the outside to fill a vacancy
- Recognize employee accomplishments
- When termination is necessary, ensure that it is done in a dignified way, if possible
- Fully investigate any employee claim
- Employers should have anti-retaliation statements in their discrimination and harassment policies and these policies should be communicated and enforced with the work force.[5]

To heighten interest in this subject, EEOC widely publicized a negotiated settlement with the huge financial company Morgan Stanley for $54 million to settle certain sexual harassment charges. In addition, Baltimore Gas & Electric Company, which operated a power plant in Maryland, agreed to pay $5 million to a class of African-American employees at the facility to resolve a group of racial discrimination claims. These are but two examples of what can happen if an employer doesn't act promptly and properly to ensure a non-discriminatory work environment.[6]

During the summer of 2005, major employment issues were publicized concerning the automotive and airline industries. The airline industry announced the loss of more than 44,000 jobs and later General Motors indicated that in the next 3 years, it would close 12 plants in North America, with an accompanying elimination of at least 30,000 or more jobs.[7]

These announcements and the accompanying media coverage caused me to go back to my clipping file to try and put these massive restructuring actions into better perspective.

My search uncovered a clipping from 1981 entitled "Detroit Gets a Break From UAW," which appeared in *Business Week* and trumpeted the success of Ford in negotiating changes in work rules that provided plant management more operating flexibility and perhaps improved productivity. The author describes the UAW, Ford and General Motors as being in general agreement that "the disastrous state of the auto industry, which is more than $1 billion in the "red" so far this year [1981] after losing a staggering $4.2 billion in 1980, demands strong action on both sides."[8] Yet, today, 25 years later, we continue to lament the elimination of thousands upon thousands of jobs in the U.S.-owned auto industry. Why has it taken so long to correct a known problem? Was it lousy management, poor quality practices–restrictive work rules—such as a 48 minute per shift bathroom break found in the *current* Ford labor agreement—or a combination of all of the above and a lot more?[9] It makes one wonder: What will the U.S. auto industry and the UAW look like 25 years hence—in 2032? Or maybe they won't exist!

In the same file, I found another slightly more upbeat clipping from the *New York Times*, which was written in November 1981 in honor of a meeting held in New York City to commemorate the centennial of the American Labor Movement, then 15-million strong. The author quoted numerous luminaries of the American Labor Movement, including Lane Kirkland who was then President of AFL-CIO, that a revolution was in progress, driven by computer technology, telecommunications and the internationalization of management and production. How labor responds to these forces, according to the writer, would determine the shape and power that the movement possesses in the 21st century.

An interesting segment of the *Times* article describes an issue that receives very little media coverage and is a major difference between labor and management hierarchy in the manner in which leadership is handled. In the typical international union, there is a bureaucratic two-track structure: one track is for union staff, economists, editors and lawyers; the other track is for *elected* union leaders. Frequently, talented staff cannot rise in the organization and they leave. In contrast, industry plans for succession—promising executives are groomed for higher positions. But in the labor movement there is no infusion of new blood and new ideas—it is a closed system.[10]

It would seem apparent that at least some of these massive layoffs or terminations are caused by contracting out practices to foreign and usually economically advantageous nations. Yet, in researching for material to

complete this article, I encountered some warning flags of unexpected problems that have arisen—and could do so again—when work goes overseas.

We have read and perhaps frequently experienced the same work performed in India for American companies. Late in 2005, it was reported from New Delhi that four Indian individuals were arrested for the theft of information both personal and business from American firms that had subcontracted work to Indian call centers, resulting in losses of more than $600,000.[11] We are all aware of the problems with identity theft and the anguish which accompanied the recent theft of a Veterans Affairs employee's laptop with hundreds of thousands of names and personal information of U.S. veterans. Clearly, U.S. corporations have to demand greater responsibility and security from the foreign companies they do business with each year.

Analogous to the problem in India but at another level, the Norwegian Data Inspectorate, an arm of the Norwegian Government, announced plans to prosecute the Norwegian Society for Sea Rescues (Norway's Coast Guard) for improperly accessing employees' e-mails without the employees' consent and without them being present at the time of access.

About the same time, the Internet Rights Forum, a body of public and private sector experts that advises the French government on Internet law and regulatory issues, announced new guidelines. These guidelines recognize an employee's right to discuss their employer and workplace activities on "Blogs" (Personal Web Sites), but the right must be balanced by respect for the employer's image and professional secrets. The guidelines also caution that updating "Blogs" should not be done at work or without the employer's consent.[12]

These observations are included as a cautionary note to readers who are responsible for advising clients on international staffing issues and to alert them for the need of continuous training and caution in either contracting out work or establishing operations overseas. In addition, similar and unthought-of other issues are sure to reach our shores in the next few years.

During the past year, our profession lost several "bright-line" practitioners of labor law and its associated disciplines, who helped shape the American labor scene. At the top of this list was Peter F. Drucker, the political economist, teacher, author, consultant and social theorist. He defended the need for business to be profitable but constantly preached that employees were a resource, not a cost. His greatest impact came from his writings. He published more than 30 books, which have sold tens of millions of copies, and authored a monthly Op-Ed column in the *Wall Street Journal* from 1975 to 1995. He died on November 11, 2005 at age 95.[13]

Another widely traveled and innovative mediator and arbitrator, whose activities placed him in the forefront of major national labor disputes, was Ronald W. Haughton, who died on July 4, 2005.[14] He estimated that he was involved in the resolution of more than 4,000 disputes in both the public and private sector. Haughton organized the New York City Board of Mediation for Community Disputes during the administration of Mayor John Lindsay in 1970. During his career he was co-director of the Institute of Labor & Industrial Relations at the Universities of Michigan and Wayne State and an impartial arbitrator for the UAW and Ford. He also headed the Federal Labor Relations Authority created in 1979 to resolve disputes involving Federal employees who were unionized. His career included work for the War Labor Board and subsequently he served under Presidents Johnson, Carter and Reagan in resolving labor disputes ranging from the auto industry to grape growers and tobacco workers.

"Clearly, U.S. corporations have to demand greater responsibility and security from the foreign companies they do business with each year."

Closer to home was the loss of Harold R. Newman in December 2005.[15] Mr. Newman was the former chairman of the New York State Public Employment Relations Board (PERB) and served that agency from 1967 until his retirement in 1990. PERB exists to resolve public sector disputes through mediation, fact finding and arbitration. Frequently, he found himself caught in the middle of disputes between the State of New York and the unions representing teachers, transportation workers, and other employees, who challenged the Taylor Law, which forbids strikes by public employees. Readers who work or reside in New York City will quickly remember that these issues and problems still exist, with the illegal strike by bus and subway workers in December 2005.

I would be remiss if I didn't include in this list of those to be remembered Frederick Shea, a retired former managing partner of the Kelly-Drye Law Firm in New York City. Fred was truly an honorable man who represented a number of major management clients in their dealings with labor.[16] Further, before the formal establishment of the New York State Bar Association's Labor and Employment Law Section in the early 1970s, Fred shepherded a small group of labor and management attorneys who met periodically to discuss matters of current interest. It was this nucleus that was subsequently energized by Frank Nemia and became a full-fledged Section in the New York State Bar Association.

All in all, there has been little new or different on the classic labor scene, therefore the above comments have

been a potpourri of what I believe was of interest during the period of approximately January 2005 through early 2006.

"The irony of this situation is that older workers could be the best thing to happen in the workplace."

In conclusion, I would like to raise an issue that I feel sure will receive greater attention as we move further into the 21st Century, and that is the use or non-use by industry of older workers. It is widely accepted that decreased birth rates plus the exodus of the "baby boomers" from the work force in the next two decades will lead to a serious brain drain in American industry. Those of us who are participating in the third act of our lives appear to be a ready source of experience and talent in many areas and subjects and are readily available, yet somehow we seem to be dismissed by the current managerial generation. Our TV and newspapers almost daily refer to this phenomenon of individuals aged 65 and older being dismissed, denied hiring, forced into retirement and in a variety of other ways suffering some form of discrimination in the workplace because of his or her age. The irony of this situation is that older workers could be the best thing to happen in the workplace. They don't need health insurance, since they have Medicare; are not burdened by paying for run-away college tuition; seeking 401(K) funds; or looking for a balance between raising children and creating a career. Generally such people are seeking part-time employment, where their experience and training can not only be used on the job but also used to assist new and younger employees to become more productive and profitable to the employer. Stay tuned—this subject will be receiving greater attention with every page change on the calendar.

Endnotes

1. Bureau of National Affairs (BNA)—*Labor Relations Reporter*, Vol. 178 at 196 (Nov. 2005).
2. BNA—*Labor Relations Reporter*, Vol. 177 at 441 (Sept. 2005).
3. *N.Y. Times*, p. PA 18 (Jan. 12, 2005).
4. BNA—*Labor Relations Reporter*, Vol. 177 at 32 (Apr. 2005).
5. BNA—*Labor Relations Reporter*, Vol. 178 at 179 (June 2005).
6. BNA—*Labor Relations Reporter*, Vol. 177 at 372 and 417 (July-Aug. 2005).
7. William J. Holstein, *N.Y. Times*, p. BU10 (June 5, 2005).
8. *Business Week*, p. 94 (Nov. 30, 1981).
9. BNA—*Labor Relations Reporter*, Vol. 178 at 230 (Nov. 2005).
10. *N.Y. Times*, p. E 3 (Nov. 15, 1981).
11. BNA—*Labor Relations Reporter*, Vol. 178 at 178 and 181 (Nov. 2005).
12. BNA—*Labor Relations Reporter*, Vol. 178 at 178 and 181 (Nov. 2005).
13. *N.Y. Times*, p. A 13 (Nov. 12, 2005).
14. *N.Y. Times*, p. A 17 (July 15, 2005).
15. N.Y. Times, p. C 17 (Dec. 14, 2005).
16. Lisa Belkin, *N.Y. Times*, p. 1, Sec. 10 (July 2, 2006).

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How to Respond to a Breach of an Employer's Computer Systems—Legal Obligations, Practical Guidance and Preventive Strategies

By Diane Windholz and Richard Greenberg

Instances of identity theft, stolen laptops, unauthorized entries into electronic databases and similar attacks on personal data have significantly increased both in regard to their frequency and the number of persons affected. According to Javelin Strategy & Research, which compiles data for the Federal Trade Commission, identity theft will affect approximately 10 million Americans this year and cost those affected $56.6 billion. For example, in April 2006, a laptop containing personal information of 196,000 current and former Hewlett-Packard employees was stolen from a California restaurant parking lot. One month later, an electronic data file containing addresses, Social Security numbers and dates of birth of over 25 million veterans was stolen from the home of a Veterans Affairs employee. And in September 2006, two laptops containing 25,000 Social Security numbers and other personal information of University of Texas students were stolen from a faculty member's home.

To combat the epidemic, nearly all states have enacted legislation of one form or another intended to protect individuals from identity theft. Such legislation includes codifying the crime of identity theft, increasing civil and criminal penalties, requiring specific protections for certain types of information such as Social Security numbers, and requiring entities doing business in a particular state to provide notice when there has been a breach of personal information maintained by the entity.

With the eighth highest percentage of identity theft in the country, New York State has enacted significant protective legislation in the past two years, including the August 2005 Information Security Breach and Notification Act ("the Act"). Other enacted measures include "Consumer Communication Records Privacy Act," the "Disposal of Personal Records Law," the "Security Freeze Law," the "Anti-Phishing Act" and legislation restricting disclosure and use of Social Security numbers. This article summarizes the Act and provides legal and practical guidance as to compliance as well as proactive preventive measures all New York employers should consider implementing.

The Act, which has been effective since December 9, 2005, requires employers to notify affected employees of any breach of an employer's computer systems containing "private or personal information." "Private or personal information" includes Social Security numbers, driver's licenses or other identification numbers, and financial account numbers. The Act requires employers to provide expedient notification in one of the following manners:

- Written notice to the affected individual(s);
- Electronic notice to the affected individual(s), provided that the notice recipient has expressly consented to receiving notice in electronic form and a log of each notification is kept by the business;
- Telephone notification to the affected individual(s), provided that a log of each notification is kept by the business; or
- Substitute notice—if a business demonstrates to the state attorney general that the cost of providing notice would exceed $250,000 or that the affected class of subject persons to be notified exceeds 500,000, or the business does not have sufficient contact information, substitute notice shall consist of *all* of the following:
  - E-mail notification when the business has an e-mail address for the subject persons;
  - Conspicuous posting of the notice on the business' web page, if the business maintains one; or
  - Notification to major statewide media.

When notification is necessary, the Act also requires written notification to three (3) New York State offices: (i) the N.Y.S. Attorney General (AG); (ii) the N.Y.S. Office of Cyber Security and Critical Infrastructure Coordination (CSCIC); and (iii) the Consumer Protection Board (CPB). See http://www.cscic.state.ny.us/security/securitybreach/index.htm. In the event of a failure to comply with the Act, the Attorney General of New York may commence a legal action for non-compliance. Failure to provide prompt notice can result in injunctive relief, liability for actual losses suffered by an employee who did not receive notice, and if a court finds an employer knowingly or recklessly failed to provide notice, a civil penalty of up to $150,000.

In addition to providing the above described notice when mandated, employers should also consider taking the practical measures below in the event of a breach. Employers also should consider many of these measures even if there has not yet been an ultimate determination as to whether a breach occurred.

- Purchase fraud prevention and detection programs on behalf of employees;
- Sponsor seminars or information sessions to educate employees about identity theft recovery;
- Provide employees with contact information for credit reporting agencies;
- Provide employees with suggested actions to take to protect their credit; and
- Rebuild employer-employee trust by taking steps to prevent future breaches and assuring affected employees that such measures are in place.

A sample notification letter appears on the next page in this issue (Appendix 1) that both satisfies the Act's requirements and fosters the rebuilding of trust with affected employees.

Of course, the best way to manage a system breach is to avoid it altogether. Below are some preventive strategies:

1. Perform an internal audit designed to (i) identify information maintained in the organization that is subject to breach notification laws; (ii) map the flow of that information throughout the organization; and (iii) assess the risks of unauthorized access and disclosure. This internal audit should include locating information that is maintained by third parties on behalf of the organization.
2. Determine whether it is possible to collect, reformat and/or maintain the information in a way that would cause it not to be "personal information" as defined in the Act.
3. Consider encrypting all personal information maintained by the company.
4. If personal information must be maintained and encryption is not possible in all cases, adopt policies and procedures to strengthen the privacy and security of that information. Measures required under the HIPAA privacy and security regulations are a good model for this purpose.
5. Develop protocols to be followed when the organization learns of a breach of personal information—identify who is in charge of determining whether there has been a breach, whether notification is required, how notice will be provided, who will prepare the notice, what the notice will contain, etc.
6. For companies in multiple jurisdictions, instead of trying to deal with each state's requirements individually, consider formulating one common policy based on all of the applicable states that will satisfy all of the requirements in the respective states.
7. Train employees accordingly.
8. Develop a record retention policy so that records are maintained no longer than is necessary; destroy information no longer needed.
9. Obtain written assurances from third parties that receive or maintain personal information on your behalf that they are aware of and prepared to comply with these and similar laws.
10. Monitor legal developments, including pending federal legislation which may affect the state laws discussed in this article.

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This article originally appeared in the Winter 2006 issue of *Inside*, published by the Corporate Counsel Section of the New York State Bar Association.

APPENDIX 1

Date

Dear Employee:

We have recently discovered a situation that warrants your attention. It appears that certain employee data maintained on our systems, including but not limited to [INSERT PRIVATE OR PERSONAL INFORMATION], may have been accessed by an unauthorized individual. Steps to ensure that our systems have all practical measures in place to prevent such a potential issue from arising at any time in the future are currently being refined. We are committed to ensuring that all employee data and other information is secure and will continue to ensure that the systems are regularly audited and that those with access to the systems are properly screened.

While there is nothing to indicate that anyone who may have improperly accessed the system has utilized any data for any purpose, we are notifying all employees of this issue and providing suggestions as to measures you may wish to take to protect yourself (and information regarding actions we are taking to help you implement such suggested measures).

The attached document issued by the Federal Trade Commission lists certain precautions that individuals can take to protect themselves from being victims of identity theft. These measures include requesting credit reports and placing security freezes on accounts. Instructions on how to request your credit report through the appropriate agency are included in the attachment. While there is a nominal fee associated with having a credit report run, to ensure that you have the resources necessary to obtain such reports, we have set up a special account number to reimburse you for the cost of securing your credit reports. To recoup the cost, submit an expense report and charge the amount to the account number which may be obtained from Human Resources. [Documents are contained on FTC website.]

Additionally, within the next few weeks, we will hold informational sessions led by an expert in the field of identity theft. Attendance is not mandatory; however, we encourage all employees to attend to assuage concerns and gain a better understanding of what can be done to prevent identity theft. A schedule for these sessions will be provided shortly.

We hope this issue never arises again and, as noted above, we are taking the utmost precautions to reduce our potential risk exposure and avoid these types of potential issues going forward. To assist us, we ask that each and every employee be vigilant about reporting any violation of company policy or process to their manager and Human Resources.

Thank you for your cooperation and patience regarding this matter. If you have any further questions, please contact Human Resources.

Very truly yours,

Management
ABC Corporation

Pandemic Preparedness: Guidelines for Formulating a Pandemic Flu Response Plan

By Ashley Z. Hager

Media reports are full of warnings about the threats Americans face from hurricanes, terrorist activity, and now the possibility of an avian flu pandemic. Many employers think that because they have developed an emergency response plan that entails computer system backups and facility evacuation processes, they are prepared for any emergency that might occur. While these types of plans may be effective responses to incidents that threaten the physical workplace, they are not nearly sufficient to address the types of issues that will arise if an avian flu pandemic breaks out among workers. This article provides a broad outline of the steps employers should take now, before a pandemic strikes, to prepare for the widespread and severe effects that such an outbreak would have on their workforce.

What Is Avian Flu?

Since 2003, an increasing number of human cases of the avian flu have been reported throughout eastern Asia and the Middle East. Most human cases of avian flu result from direct or close contact with infected poultry or contaminated surfaces or materials. In humans, avian flu results in typical flu-like symptoms (sudden high fever, cough, sore throat, and muscle aches) as well as eye infections, diarrhea, pneumonia, severe respiratory diseases, and other life-threatening complications. The mortality rate is alarming, as more than half of the people infected with the especially virulent flu strand have died.

To date, there has been no sustained human-to-human transmission of the virus. However, health professionals are concerned that a new virus subtype capable of human-to-human transmission will evolve from the continued outbreak of the highly pathogenic virus in poultry, ultimately resulting in a flu pandemic.

Is Avian Flu Really Something to Worry About?

Many experts believe that it is not a question of "if" the avian flu virus will mutate to the point where it is transmissible from human to human, but "when" that mutation will occur. Once the virus has mutated, the effects are likely to be widespread and severe. Because avian flu viruses do not commonly infect humans, there currently is no commercially available vaccine to protect humans in the event of a sustained outbreak. Further, unlike the seasonal flu typically affecting humans, all age groups may be at risk for infection, not just "at risk" groups such as children and the elderly. Thus, an especially severe pandemic could lead to high levels of illness, death, social disruption, and economic loss.

What Steps Can Employers Take Now to Prepare for a Flu Pandemic?

1. Develop a Pandemic Flu Contingency Plan

As a first step, employers should begin formulating a pandemic flu contingency plan and establishing a response team or advisory council to develop and implement that plan. Responsibilities of the response team or council under that contingency plan may include:

- Planning for the severe impact a flu pandemic could have on the employee population;
- Reviewing the company's supply chain to determine where and how it might be vulnerable during a pandemic;
- Preparing for potential interruptions in infrastructure, such as telecommunications;
- Anticipating increased or decreased needs from customers during a pandemic and making the financial preparations required;
- Coordinating communications to employees about the flu, the current level of threat and the company's pandemic response plan;
- Coordinating with local and federal health and disaster response agencies; and
- Establishing procedures for activating and terminating the company's pandemic response plan.

This article will focus on the portions of a pandemic response plan that pertain to employees.

2. Anticipate and Plan for Increased Human Resources Shortages

Past flu outbreaks suggest that a pandemic would wash over a particular geographic area two or three times over a twelve- to eighteen-month period, with each wave of the outbreak lasting for six to eight weeks. Many experts recommend that employers should plan for up to 40% employee absenteeism during the two-week peak of an outbreak, with lower levels of absenteeism during the weeks before and after that peak. Employee absences could result from, among other things, the employee's own illness or death, the need to care for family members who are ill, the need to care for children whose schools are closed, and a desire to volunteer in the community (e.g., with the Red Cross or National Guard). Also, some employees may simply be unwilling to come to work because they feel safer at home.

Therefore, employers should identify critical functions within each business unit or department and determine how to keep those functions operational despite the anticipated absenteeism. Ideas include cross-training employees, increasing the ability for employees to telecommute (e.g., by enlarging the capacity of remote online access systems), creating teams of employees who can be rotated in to perform the critical tasks, and altering business operations (e.g., limiting or shutting down operations in affected areas). Because managers are as likely to be affected by the pandemic as everyone else, employers should also ensure that there are back-ups for management who will be making key decisions during a pandemic.

3. Take Steps to Isolate Sick Employees

To slow the spread of the flu among employees, employers should develop a screening process for determining whether employees are fit to work. This screening process should be designed to prohibit employees who have the symptoms of the flu or who have been exposed to someone with the flu from coming onto the premises. In addition, a procedure should be developed to remove affected employees from the premises without unnecessarily exposing other workers to the virus.

Employers should also review their existing compensation, benefits, sick leave and family and medical leave policies to consider how they should be modified in order to deter sick employees from continuing to come to work. At the same time, certain other policies (such as vacation, holiday and bereavement leave policies) may have to be altered to encourage employees who have not been exposed to the flu to come to work. Some employers have decided to provide enhanced or lengthened sick time for employees during a pandemic because they want to prevent employees from coming to work while they are infectious due to financial concerns or concerns that they will lose their jobs if they are absent. Other employers have determined that the widespread absenteeism and other effects of a pandemic will have such a negative effect on the business that they will have to reduce the compensation and benefits provided to employees during a pandemic.

4. Develop an Employee Communication Plan

In an emergency, individuals often turn to their employers for reliable information and support. Consequently, employers should develop and distribute to their employees materials containing basic information about:

- The virus itself (e.g., signs and symptoms of the flu and how the flu is transmitted);
- The progress of the pandemic, both internationally and domestically;
- Steps employees can take to prepare and protect themselves and their families (such as stockpiling necessary items, obtaining Tamiflu, engaging in proper hygiene techniques, and developing contingency plans); and
- The employer's pandemic preparedness and response plan.

Governmental agencies, international agencies, and industry groups should be regularly contacted for up-to-date information regarding the pandemic.

5. Consider Legal Implications of Prevention and Response Strategies

Finally, employers should be aware that a number of federal and state laws may be implicated by the development and implementation of effective response plans and strategies. For example, as employers extend and amend existing policies and develop and implement strategies to manage extended employee absences, they may be required to bargain over the changes under the National Labor Relations Act or pay additional overtime under the Fair Labor Standards Act to non-exempt employees working an alternative work schedule. Likewise, employers will need to comply with any pandemic preparedness guidelines or regulations promulgated by the Occupational Safety and Health Administration ("OSHA"). Other laws that may be implicated include the Americans with Disabilities Act, workers' compensation laws and the Health Insurance Portability and Accountability Act ("HIPAA").

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This article originally appeared in the Winter 2006 issue of *Inside*, published by the Corporate Counsel Section of the New York State Bar Association.

"Unfit and Unsuitable for Employment": The Disparate Impact of Credit Checks on the Job Prospects of Women, Minority, and Immigrant Workers

By Jennifer Quintana

Introduction

"While you are otherwise qualified for the position, your unsatisfactory credit history has rendered you unfit and unsuitable for employment." This is what the federal government said regarding a job applicant who had applied for a position with the Small Business Administration (SBA) Disaster Relief office.[1] The applicant had previously worked for the federal government for fourteen years, but had spent some time without a job prior to applying for the SBA position. During his period of unemployment, he fell behind on bills. Now, in his attempt to find a job so he would no longer have this problem, he was told he was barred from doing so because of his blemished credit history.

This is not a science fiction scenario, nor is it an example of an outdated employment practice. This is what happened to a plaintiff in a 1999 employment discrimination case, and it is also an increasingly common scenario for job applicants in all employment contexts. A growing number of employers are relying on the information contained in applicants' credit reports to help them weed out applicants who are irresponsible, dishonest, or who will prove unfaithful to the company. And as long as they comply with the procedural requirements imposed by federal and state laws governing this practice, they are free to do so.

Although the law protects job applicants from employers who use this practice as a proxy for discrimination or for other unsanctioned purposes, it does nothing to protect those whose credit history reflects their membership in a group that has been historically discriminated against with respect to jobs, lending practices, and other financial status matters. Women, minorities, and immigrants belong to such groups, and as such they are the ones suffering most from the effects of this new employment trend.

This article will explore the growing use of "credit checks" as a pre-employment screening device, and its disproportionate impact on historically disadvantaged groups. In light of the weakness of the protections provided by "fair credit reporting" laws for such job applicants, this article will emphasize the use of Title VII disparate impact claims as a tool for those who are at an unfair disadvantage in the job market due to their membership in a protected status group.

Employers' Use of "Credit Checks" as a Pre-employment Screening Tool

Credit Reports

Credit reports are increasingly being used by employers to screen job applicants.[2] A "credit report" is a record of a person's credit history, including information about the origin of their debts (e.g., loans, credit cards), payments made, and amount still owed. Most lenders and creditors (and collection agencies working to collect debts on behalf of service providers) report this information to credit reporting agencies (hereinafter referred to as "agencies").[3] These agencies[4] compile this information in credit reports and sell it to creditors who in turn use it to determine whether or not to grant someone additional credit, and on what terms. In addition to its consequences for accessing new credit opportunities, this information may also affect the terms of one's existing credit relationships. For example, most credit card companies check their customers' credit reports regularly and will increase a customer's interest rate in response to any negative information contained in them, even if the negative information reflects problems with a different account.[5]

A key feature of most credit reports is the credit score, commonly known as the "FICO" score. This number presumably reflects a person's creditworthiness by reflecting factors such as: whether and how often payments are made on time; for how long a person has had a business relationship with each creditor; the remaining balance on outstanding accounts; the number and frequency of new credit accounts opened; the types of credit held; and the number of inquiries made for the purpose of securing new accounts.[6] The exact nature and meaning of one's score and the effect of one's actions on that score vary according to one's particular circumstances. For example, a person with a good payment history will be judged more harshly (i.e., will suffer a larger negative change in credit score) for one late payment than will a person with a long history of such late payments.[7]

The Use of Credit Reports by Employers to Screen Job Applicants

Recently newspapers throughout the country have reflected a growing concern about employers' increasing use of job applicants' credit reports in making their hiring decisions.[8] One reason for this concern is that the nation's debt and delinquency rates are rising to record levels,[9]

meaning that the use of credit reports to deny access to jobs is affecting an increasing number of people.

The use of credit reports as a pre-employment screening device is legal, and primarily regulated by the federal Fair Credit Reporting Act (FCRA).[10] The FCRA governs, among other things, employers' access to job applicants' or employees' credit reports and the use of the information contained in the reports as the basis for an adverse employment action (e.g., denial of a job or promotion). Under the Act, a potential employer may request a job applicant's credit report from an agency if the employer "intends to use the information for employment purposes,"[11] i.e., to "evaluat[e] [the applicant] for employment, promotion, reassignment or retention as an employee."[12]

The Act also provides protections for job applicants whose potential employer makes such a request. For example, employers are required to notify an applicant if a credit report (or other "consumer report" covered by the Act[13]) will be requested for purposes of evaluating the applicant, and to get the applicant's written permission before requesting the report.[14] If the employer decides to take an adverse action based on information in the report, she or he must first provide the applicant with a copy of the report consulted and information about the applicant's rights under the FCRA.[15] Individuals aggrieved by an employer's actions with respect to the use of a credit report in a hiring decision may sue for damages if the employer has exhibited willful or negligent noncompliance with the terms of the Act.[16] Employers can be held criminally liable for knowingly and willfully obtaining an applicant's credit report for an impermissible purpose.[17]

The financial services industry is commonly associated with credit checks,[18] since access to and responsibility for money is a key component of many employees' jobs in this field. Credit checks are also commonly associated with high level employment positions, regardless of industry.[19] However, a review of employers' justifications for using credit checks reveals that credit checks affect many people in lower level jobs, and have the potential to affect many more in the future.

For example, one of the most common justifications for the use of credit checks is that an applicant with personal financial difficulties is more likely to steal or, at the very least, more likely to be irresponsible with money.[20] In keeping with this logic, any position involving access to money or goods on the job could merit a credit check, including bank tellers,[21] retail workers,[22] and, in at least one case, prison guards (since they "might be more susceptible to bribes").[23]

Other alleged justifications for employers' use of credit checks are even more potentially far reaching, due to their non-specific, open-ended nature. For example, employers and others who support the practice cite increased security concerns,[24] the need to defend against claims of negligence[25] and discrimination[26] in hiring, the need for a tie-breaker when faced with otherwise equally qualified candidates,[27] and convenient access to the information as reasons for using credit checks.[28] These rationales standing alone would not necessarily constitute a legitimate defense of this hiring practice if challenged.[29] However, they illustrate a growing tendency among business managers, human resource professionals, and others to rationalize and embrace the practice, lending support to those employers who can legitimately use it and encouragement to all employers to look for ways of doing so.

Criticisms of Employers' Use of Credit Reports to Screen Job Applicants

Given that employers are increasingly basing their hiring decisions on information contained in credit reports, it is imperative that individuals have full control over the accuracy of the information contained in them. However, managing one's credit report to ensure that it is as accurate and as positive as possible can be a complex and time consuming process. Individuals may challenge and correct information they find on their credit reports, and under a new law it is now possible to access one free credit report per year from each of the major credit reporting agencies without providing a reason.[30] However, because some lenders average credit scores from multiple agencies, thorough vigilance requires requesting one free report from each of the three major agencies every year, and checking that none contains inaccurate information and that any positive information is reflected in all three.

Maintaining good credit history and improving bad credit history can also be frustrating, due to the often counter-intuitive nature of credit scores. For example, opening too many accounts can lower one's score by increasing the number of credit inquiries, but closing accounts (even if unused) can also be harmful since it negatively affects account "longevity."[31] Also, if a credit account is a "joint" account, the actions of anyone listed on the account may affect the others' credit scores.

Another problematic feature of credit reports is that they reflect—and punish people for—the actions of what many consumer advocates consider a highly flawed credit and lending industry. Credit card companies have been criticized for their unfair use of penalty interest rates,[32] insufficient disclosure regarding billing and payment terms,[33] predatory marketing practices,[34] and for their lack of regulation generally.[35] Ex-presidential candidate John Kerry recently brought the credit industry into the national spotlight with his proposals for reform, criticizing, among other things, their use of "fine print that is so fine that you not only need high-powered specs, you need a magnifying glass to read what it says."[36] Lending institutions of all kinds have been accused of redlining and reverse redlining,[37] false advertising,[38] and

other fraudulent and deceptive methods.[39] Given the pervasiveness and variety of unfair practices attributed to credit and other lending industries, it is highly questionable whether credit reports truly reflect the characteristics of the individuals they purportedly represent.

Critics of the use of credit checks have also begun to challenge employers' position that "the best predictor for future behavior is past behavior"[40] with respect to credit history and job performance. The predictive value of an applicant's credit history is heavily promoted by the industry that sells this information to employers,[41] but a recent University of Kentucky study offers hard evidence for the first time that credit checks "do not have any validity in predicting the job performance of employees."[42] In addition to finding no correlation between bad credit and unsatisfactory job performance, the study found several instances of a *positive* correlation between negative credit history and positive job performance ratings.[43] According to a researcher in charge of this study, there has never been a study showing that a person's credit history is a predictor of job performance.[44]

One reason why the predictive value of one's credit report is suspect is that bad credit can result from many things having nothing to do with an applicant's job worthiness. Divorce, periods of illness or unemployment, and identity theft are all common reasons for blemishes on a person's credit report.[45] Credit reports do not list the reasons behind a negative credit history, and employers are under no duty to inquire about or consider the reasons behind it in making their hiring decisions.

The Disproportionate Impact of "Credit Checks" on Historically Disadvantaged Groups

Special Problems Faced by Women, Minorities, and Immigrants

Although credit checks are problematic for anyone with less than perfect credit, certain populations—specifically women, minorities, and immigrants—are more adversely affected by them than others. It is common knowledge that these groups are disproportionately represented among the poor and among those in low-wage jobs,[46] which in turn makes them more likely to have the kinds of money problems which show up on one's credit report. Another problem is that of widespread discrimination against them by credit and lending industries. Minorities, immigrants and women are often denied credit or targeted by creditors and lenders with fraudulent and deceptive practices.[47] As a result, they are more likely than others to lack credit history altogether or to accumulate unmanageable debt—which would be reflected in their credit reports—from inflated interest rates and other unfair terms.

Finally, cultural and sociological factors present additional barriers for these groups with respect to establishing good credit. Women are far more likely than men to be victimized by domestic abuse, which impedes their ability to develop or manage their own credit history apart from that of their partner.[48] Minorities and immigrants tend more often than whites to rely on non-standard institutions (e.g., credit unions, check-cashing services) for their financial activities, and as a result have either no credit or credit which reflects their reliance on non-traditional institutions (another negative credit check factor).[49] People in this situation also more often fall prey to abusive lending terms, uninsured savings arrangements, and other practices which bear on one's ability to maintain financial health generally and good credit in particular. Immigrants suffer additional disadvantages which make them susceptible to credit-related problems, such as lack of English skills and lack of information about financial procedures and institutions in this country.[50]

Title VII Disparate Impact Claims as a Tool for Protected Status Groups

Statutory protections such as the FCRA do little to solve the problems faced by groups with a history of discrimination which puts them at a categorical disadvantage with respect to their ability to develop, manage, and maintain good credit. As long as employers are allowed by law to utilize credit history to bar access to jobs, such groups will always be at a relative disadvantage, regardless of what rights they may have within that paradigm.[51]

One way to combat the inequitable effects of credit checks is to challenge them on a case by case basis in the courts. According to the Equal Employment Opportunity Commission (E.E.O.C.), credit checks may violate civil rights laws when they are used as the reason for an adverse employment decision against a member of a historically discriminated group.[52] This is because Title VII of the Civil Rights Act of 1964[53] protects women, minorities, immigrants and others from employers' behaviors which may not intentionally discriminate against them, but which do so nonetheless.

The Act makes it unlawful for employers with fifteen or more employees to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[54] In 1991 the Act was amended to include a "disparate impact" cause of action, which allows plaintiffs to allege theories of unintentional discrimination.[55] Such theories had been used successfully in the courts before this amendment,[56] but had been significantly weakened by the Supreme Court's 1989 decision in *Wards Cove Packing Co., Inc. v. Antonio*.[57] In response to *Wards Cove*, the legislature codified the disparate impact cause of action in Title VII to ensure that this powerful tool would continue to be available in civil rights cases.[58]

Under a disparate impact cause of action, if an employer's practice is shown to have a demonstrably disproportionate effect on the discriminated group as compared with other applicants or employees,[59] discrimination is established and an employer may not rely on an absence of intent to discriminate as a defense. However, employers may defend by claiming "that the challenged practice is job related for the position in question and consistent with business necessity."[60] That is, the practice must be known to identify job applicants who possess "the minimum qualifications that are necessary to perform the job in question successfully."[61]

The business necessity requirement can be a powerful tool for plaintiffs who can develop the evidence necessary to prove a prima facie disparate impact case.[62] If employers are challenged to defend the assertion that a positive credit history is "necessary" to an employee's ability to perform satisfactorily on the job, it is likely that they will lose, given the recent findings by researchers that credit history has no predictive value with respect to job performance.[63] Other common justifications for the use of credit checks are also likely to fail the "business necessity" test: an employer's fear of negligent-hiring claims, the need for a good "tie-breaker" when faced with equally qualified applicants, and the convenience of ordering up a credit report are all clearly unrelated to a determination of an applicant's ability to perform on the job.

The recent publicity and growing concern about the use of credit checks by employers suggests that there may soon be a surge of cases challenging the practice under Title VII of the Civil Rights Act as discriminatory and unrelated to business necessity. One potential case is that of an African-American woman who filed a complaint with the E.E.O.C. in June this year charging that the company Johnson & Johnson discriminated against her by denying her a job based on her credit report.[64] As one lawyer involved in the case explained: "The use of credit checks to screen job applicants is a growing phenomenon among employers. That is unfortunate. Not only are credit scores private information unrelated to job performance, the practice perpetuates prior discrimination in our society against minority families."[65]

Conclusion

As long as there are people who—through no fault of their own—are denied wealth-building opportunities, the practice of utilizing credit history as an indicator of one's personal characteristics will be unfair and inefficient. Unless the fair credit reporting laws are amended to bar employers' access to credit history information, job applicants who belong to a protected status category under Title VII will have to challenge the practice on a case by case "disparate impact" basis in the courts. Given the alarming increase in employers' use of credit checks, and given that women, minorities, immigrants and others concentrated in low-wage jobs are likely suffering their effects in disproportionate numbers, there is a great need for litigation to challenge the practice as part of the larger fight to achieve equity in the workplace.

Success in the courts is possible, but it may be slow. Therefore it is important to complement litigation with a multifaceted approach to resolving this problem. More studies are needed to show that credit checks are not related to job performance. Such information can be used by litigants to support their arguments in court that credit checks do not satisfy the "business necessity" requirement. They can also be used to convince employers not to use credit checks as part of their hiring procedures in the first place.[66] Community education is also important. Immigrants need to fully understand the rights and ramifications that go along with using and applying for credit cards, bank loans, and mortgages in this country; women need to be encouraged to develop their own credit histories apart from that of their husbands and other partners; and African-Americans and other minorities need to increase their communities' awareness about their rights and options with respect to mainstream financial institutions. Finally, legislative activism is necessary to convince lawmakers to ban the use of credit reports by employers altogether.

Endnotes

1. *Dobson v. Alvarez*, CA 3:98-CV-0187-R, 1999 U.S. Dist. LEXIS 2902, at *5 (D. Tex. 1999).
2. Of all companies surveyed in 2004, 35% reported that they do pre-employment credit checks, compared with 19% in 1996. Andrea Coombes, *Bad Credit Can Scuttle Job Offer; Legality of Potential Employers Making Inquiries is Questionable*, CHARLOTTE OBSERVER, June 28, 2004, at 3D.
3. Kathleen Pender, *Keeping Score with Payments*, S.F. CHRON., March 25, 2004, at C1.
4. The three main national credit reporting agencies are Equifax, Experian, and Trans Union. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *See, e.g., id*.; *see also* Susan Todd, *Employers' Use of Credit Checks is on the Rise*, SUNDAY STAR-LEDGER, August 22, 2004, § 3, at 1; Coombes, *supra* note 2; Mary Challender, *Trying to Climb Back*, DES MOINES REG., June 13, 2004, *at* 10.
9. In 2003 consumer debt increased to a record high of more than $2 trillion, mostly attributable to credit cards. CONG. REC. S7416 (June 24, 2004), *at* http://thomas.loc.gov/cgi-bin/query/D?r108:1:./temp/~r108AFeFXi::. By the end of 2003, a record number of credit card accounts were delinquent. Pender, *supra* note 3. Currently, individuals with credit card debt owe a record average of $9,205. *Kerry Proposes Crackdown on Credit Card Abuses*, DAILY TIMES, December 16, 2004, *at* http://www.dailytimes.com.pk/default.asp?page=story_29-8-2004_pg5_24.
10. 15 U.S.C. §§ 1681-1681u. Some state laws provide additional protections to job applicants whose credit reports may be subject to scrutiny by potential employers. *See, e.g.*, Cal. Civ. Code § 1785.20.5(a) (stricter requirements than federal FCRA regarding an applicant's right to access a copy of the credit report used by an employer for hiring purposes).

11. 15 U.S.C. § 1681b(a)(3)(B).

12. 15 U.S.C. § 1681a(h).

13. A credit report is one of several types of "consumer reports" governed by the Act. A consumer report is "any written, oral or other communication of any information by a consumer reporting agency bearing on a [person's] credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the [person's] eligibility for" the purposes authorized under the Act. 15 U.S.C. § 1681a(d).

14. 15 U.S.C. §§ 1681b(b)(2)(A)(i)-(ii).

15. 15 U.S.C. §§ 1681b(b)(3)(A)(i) & (ii).

16. 15 U.S.C. §§ 1681(n)-(o).

17. 15 U.S.C. § 1681(q).

18. *See, e.g., Job Hunting? Don't Let Bad Credit Stand in the Way*, AKRON BEACON J., July 14, 2004, at 1; Pender, *supra* note 3.

19. Challender, *supra* note 8.

20. *See, e.g., id.*; Coombes, *supra* note 2; *see also E.E.O.C. v. American Nat. Bank*, No. CIV.A.76-26-N, 1979 WL 25, at *33 (E.D.Va.) (defendant employer's use of credit checks legitimate and job-related since "experience had taught defendant that individuals with credit problems found the temptation [to steal] particularly difficult to resist"), *rev'd on other grounds*, 652 F.2d 1176 (4th Cir. 1981).

21. *See, e.g., E.E.O.C. v. American Nat. Bank*, 1979 WL 25, *33 (bank legitimately used credit checks of job applicants because "[m]any of defendant's employees, particularly tellers, were exposed daily to a great deal of money").

22. In a 2003 survey of retailers, pre-employment credit checks were among the top five job applicant screening practices that retail employers said they would increase in 2004. Coombes, *supra* note 2.

23. Todd, *supra* note 8.

24. *See, e.g.,* Barbara L. Johnson, *Current Developments in Employment Law*, 2003 A.L.I.-A.B.A. C.L.E. COURSE OF STUDY 783, 789; Coombes, *supra* note 2; Stacy A. Teicher, *Judged by the Content of Your Credit Report*, CHRISTIAN SCI. MONITOR, March 1, 2004, *at* http://www.csmonitor.com/ 2004/0301/p14s01-wmgn.html.

25. *See, e.g.,* Johnson, *supra* note 24, at 789; Society for Human Resource Management, *Credit History Not a Good Predictor of Job Performance and Turnover*, January 26, 2004, *at* http://siop.org/Media/News/credithistory.htm.

26. *See, e.g.*, Kathy Perkins, Esq., *Commentary: Smart Hiring Practices Can Reduce Employer Liability*, DAILY REC., May 19, 2003, *at* http://www.kcdailyrecord.com/login.cfm.

27. *See, e.g.,* Todd, *supra* note 8; Andrea Coombes, *Bad Credit Can Kill Job Offer: Pre-employment Screening Discriminatory, Lawsuit Claims*, CHARLESTON GAZETTE, June 19, 2004, at 6A.

28. *See, e.g.*, Matthew W. Finkin, *From Anonymity to Transparence: Screening the Workforce in the Information Age*, 2000 COLUM. BUS. L. REV. 403, 429-30; Todd, *supra* note 8.

29. See later discussion of Title VII disparate impact claims.

30. Sam Hananel, *Credit Report Program Starts in 13 States*, December 1, 2004, AP story, *at* http://story.news. yahoo.com/news?tmpl=story&cid=509&ncid=509&e=12&u=/ap/20041201/ap_on_bi_ge/credit_reports.

31. Teicher, *supra* note 24.

32. *See* Jeff Gelles, *Credit-Card Rules Give a Little Shove: For Those on the Edge, Rate Spikes are Ruinous*, PHILA. NEWS, September 12, 2004, Lifestyle Section.

33. *See Kerry: Credit, Loan Rules are Unfair to Middle Class*, USA TODAY, August 26, 2004, *at* http://www.usatoday.com/news/politicselections/nation/president/2004-08-26-kerry_x.htm.

34. CONG. REC. S7416 (June 24, 2004), *at* http://thomas.loc.gov/cgibin/query/D?r108:1:./temp/~r108 AFeFXi::.

35. *See* Gelles, *supra* note 32 ("Consumer advocates have long argued that changes are necessary in the rules governing credit-card companies, which for the last 25 years have operated virtually free from regulation on rates or contract terms.").

36. *See Kerry: Credit, Loan Rules are Unfair to Middle Class, supra* note 33.

37. Redlining is the practice of denying credit to communities on a discriminatory basis; reverse redlining is the practice of discriminating by offering those communities only the most expensive types of credit. NATIONAL CONSUMER LAW CENTER, CREDIT DISCRIMINATION § 8.1 (3d ed. 2002).

38. *See* Thomas Dickerson, *New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes*, N.Y.ST. BAR ASS'N J., September 2004, at 16 (discussion of consumer protection statutes, *e.g.*, New York State's GBL § 350, regarding false advertising).

39. *See id*. at 10-11 (discussion of consumer protection statutes, *e.g.*, New York State's GBL § 349, regarding deceptive and misleading business practices); Charu A. Chandrasekhar, Note, *Can New Americans Achieve the American Dream? Promoting Homeownership in Immigrant Communities*, 39 Harv. C.R.-C.L. L. Rev. 169, 182 (Winter 2004) (predatory lenders exploit immigrants via abusive lending practices, such as offering loans with overly high interest rates).

40. Todd, *supra* note 8.

41. Challender, *supra* note 8.

42. Society for Human Resource Management, *supra* note 25.

43. Several workers in the study who had the highest number of late payments on their credit report had received among the most positive job performance ratings from their employers. Teicher, *supra* note 24.

44. Challender, *supra* note 8.

45. *See* Todd, *supra* note 8; Teicher, *supra* note 24; *see also Dobson v. Alvarez*, CA 3:98-CV-0187-R, 1999 U.S. Dist. LEXIS 2902 (D. Tex., 1999) (after 14 years working for the federal government, plaintiff was denied a job for having developed credit problems due to a period of unemployment).

46. African-American and Latino households currently represent less than one-tenth of the wealth of white households. Press Release, Pew Hispanic Center, Wealth Gap Widens Between Whites and Hispanics (October 18, 2004), *at* http://www.pewhispanic.org/site/docs/pdf/Wealth%20Press%20Release.pdf. Women currently earn less than three-fourths of what men earn, and African-Americans and women are more likely than white men to work in low wage jobs. RANDY ALBELDA, ROBERT W. DRAGO, & STEVEN SHULMAN, UNLEVEL PLAYING FIELDS: UNDERSTANDING WAGE INEQUALITY AND DISCRIMINATION 39 (2001). 24.5% of immigrant-headed households received public assistance in 2002, compared with 16.3% of non-immigrant households. Center for Immigration Studies, Immigrants in the United States—2002 (November 2002), *at* http://www.cis.org/articles/2002/back1302.html.

47. Credit reporting companies have been known to use different credit scoring systems for white and minority applicants. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING §14.9.2 (5th ed. 2002). Minority borrowers often either get no credit or are forced into utilizing the most expensive kinds of credit. NATIONAL CONSUMER LAW CENTER, THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES § 11.1.1.4 (2d ed. 2000). Mortgage industry lenders often take advantage of immigrants' lack of English and lack of familiarity with how the industry operates in this country. Chandrasekhar, *supra* note 39. Women are more likely than men to lack credit history. New York State Consumer Protection

Board, Consumer Law Help Manual: Credit and Credit Reporting (January 12, 2004), *at* http://www.consumer.state.ny.us/clahm/Clahm-Credit_Reporting.htm.

48. *See* Eliza Hirst, Note, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. POVERTY LAW & POL'Y 131, 135 (Winter 2003).

49. Many minorities and others who have been historically discriminated against do not borrow from traditional sources, resulting in either no credit or bad credit. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING, *supra* note 47, *at* § 14.9.1. Approximately 25% of Latinos do not have bank accounts, and many have no credit history. Chandrasekhar, *supra* note 39, *at* 208-09.

50. *See* Cultural Barriers Stymie Latino Homeownership, Center for Immigration Studies listserv (August 9, 2004), *at* http://syninfo.com/ian/PRIVATE/2004/08/17/2004081705292217.html.

51. Some state legislators have recognized this fact, and are trying to change state law so that credit checks are banned or extremely limited. *See, e.g.,* RI H.B. 5771 (RI 2003) (bill prohibiting "employers or their agents from requesting or requiring that perspective [sic] employees provide credit information").

52. *See* Coombes, *supra* note 27 (E.E.O.C. position is that "excluding people with poor credit may have a disparate impact on some minority groups and therefore may be discriminatory under civil rights law").

53. 42 U.S.C.A. § 2000(e) *et seq*.

54. 42 U.S.C.A. § 2000e-2(a)(1).

55. *See* 42 U.S.C.A. § 2000e-2(k).

56. *See, e.g., Griggs v. Duke Power*, 401 U.S. 424 (1971).

57. 490 U.S. 642 (1989).

58. *See* KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS, Vol. 1, § 20.01 (2d ed. 2002) (The inclusion of a disparate impact cause of action "is based on a congressional choice that those practices that in fact have an adverse impact on the employment aspirations of protected groups are illegal unless they can be justified by business necessity—even if the practices do not reflect hostile intent.").

59. A common guideline used in making this determination is the "four-fifths" rule, in which "[a] selection rate for any [protected] group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." E.E.O.C., Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (1978).

60. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i).

61. *Lanning v. SEPTA*, 181 F.3d 478, 490 (3d Cir. 1999).

62. Courts generally require statistical evidence that the effect of the challenged practice on the protected group at issue is disproportionately adverse compared to its effect on other actual applicants for the job. SPRIGGS, supra note 58, at § 20.01. Where such information is not available, it is possible to use other types of evidence, such as regional or national data. *Id.,* 2004 Supplement, § 3.02(2)(a)(i). However, where an employer has a policy of checking applicants' credit history, it is most likely that the information will be available to the plaintiff. *See Khan v. Sanofi,* No. 01Civ.11423JSMDF, 2002 WL 31720528, *at* *4 (plaintiff was entitled to the "broad discovery" he sought with respect to defendant employers' records of other applicants' credit histories, since in employment discrimination cases plaintiffs "may employ 'liberal civil discovery rules' to obtain 'broad access to employer's records' in order to generate a statistical analysis to show . . . disparate impact" (quoting *Avillan v. Digital Equipment Corp.*, 91 Civ. 8594 (LBS), 1994 U.S. Dist. Lexis 6454, *at* *4 (S.D.N.Y. May 17, 1994)).

63. *See supra* notes 42 and 43.

64. *See* Johnson & Johnson Charged with Job Discrimination, online newsletter of Lieff Cabraser Heimann & Bernstein, LLP (law firm), *at* http://www.discriminationcaseagainstjj.com/; Press Release, Lieff Cabraser Heimann & Bernstein, LLP, Johnson & Johnson Charged With Using Discriminatory Credit Checks to Deny African American Applicants Jobs: Landmark Challenge to the Growing Use of Credit Checks for Hiring (June 15, 2004), *at* http://www.lieffcabraser.com/press_ releases/jj_press_01.htm.

65. Johnson & Johnson Charged with Job Discrimination, *supra* note 64.

66. The results of the University of Kentucky study which found no correlation between credit history and job performance (*see supra* notes 42 & 43) convinced one bank to cancel its policy of using credit reports in its hiring decisions. Teicher, *supra* note 24.

This article was one of the third-place winners in the 2005 Dr. Emmanuel Stein writing competition.

Wage Discrimination and the Double-Helix of Comparable Worth and Unionism

By Leslie A. Saint

I. Introduction: Societal Notions of Worth in the Workplace

Race, sex and class are at the forefront of numerous societal issues. In fact, every year incidents depicting the intersection of race, sex and class in our society headline newspapers, news magazines, and news channels around the country. Besides reading and watching these issues unfold, individuals have daily experiences with them in the *workplace*. Related to the workplace is the economical market, which guides how society monetarily values individuals in the workplace. One of the outcomes of having an economical market that determines the wages of those in the workplace is the presence of a wage gap, which is the difference in earnings between the individuals with the highest and lowest wages in a group.[1] The wage gap concept is a primary example of how one's class, race and gender intersect, thereby illustrating the inequalities present in the workplace. When the wage gap is analyzed according to race, class, and sex, it depicts the pervasiveness of these characteristics as "signifiers of society-wide inequalities."[2]

The wage gap concept has been applied to differences in average wages between groups, such as the difference between male and female workers, which is commonly referred to as the gender wage gap.[3] Researchers in the social sciences, particularly labor economists and industrial psychologists, have conducted studies on both gender and racial wage gaps with respect to wage discrimination.[4] Shortly after Title VII of the Civil Rights Act of 1964 began to affect employment trends in the labor market, researchers addressed the gender wage gap in terms of race.[5] Since Title VII prohibited discrimination on the basis of race, color, religion, sex, or national origin in employment, it was said to have an influence on the earnings of Black men and women.[6] Researchers assessed the racial wage gap by comparing the wages of Black men to White men and Black women to White women.[7] One theory that has been applied to the wage gap concept and wage discrimination is comparable worth, which aims at eliminating wage disparities based on sex.[8]

The purpose of this article is to explore the courts' approach to comparable worth as a ground for a plaintiff to assert a sex- or race-based wage discrimination claim. This article argues that the courts have been reluctant to open a door for the entrance of comparable worth as a basis for a wage discrimination claim because of the perception that the market is a *neutral* factor for determining wages in the workplace. Hence, this article proposes that if unions implement comparable worth theory in their collective bargaining strategies, they may become a voice for those workers who struggle with race, sex, and class-based issues in the workplace, especially with regard to their wages and ultimately with respect to their *worth* as working members of society.

II. A Historical Look at Title VII and Wage Discrimination

The current statutes prohibiting discrimination on the basis of sex and race developed through the efforts of the Civil Rights Movement of the 1950s and 1960s.[9] One such statute, The Equal Pay Act (EPA) of 1963, is significant because it was the first federal legislation prohibiting discrimination on the basis of sex.[10] Title VII, which was enacted a year after the Equal Pay Act, is significant for Black women because it provides them with a legal right to seek justice on claims of racial discrimination.[11] Nevertheless, Cathy Scarborough, author of "Conceptualizing Black Women's Employment Experiences," argues that Title VII's significance for Black women is limited because of the ambiguities in its legislative history regarding the intersection of sex and race.[12] Scarborough writes, "Although Black women were discussed in the congressional debates leading to the passage of Title VII, the legislative history of the Act does not provide an established policy or even a guideline for addressing their problems."[13] Thus, even though Title VII's legislative history suggests that Congress intended to eliminate "all aspects of discrimination,"[14] the Act has not *yet* fully addressed the specific concerns of discrimination that Black women have historically faced and continue to face in various forms today.[15] Before turning to illustrations of how these legislative efforts did not fully address the concerns of Black women compared to those of White women, specifically in terms of their wages, this article begins with a brief overview of civil rights legislation.

A. Civil Rights Legislation of the 1960s

The two legislative acts of the Civil Rights Era of 1960s enacted to combat workplace discrimination were the Equal Pay Act (EPA) of 1963, which focused primarily on wages, and Title VII.[16] Female plaintiffs have been successful in litigating sex discrimination in pay claims under both the Equal Pay Act and Title VII.[17] For example, in *Corning Glass Works v. Brennan*, the Secretary of Labor brought a case against Corning Glass Works on the ground that it had a different pay rate for its female and male inspectors, which violated the Equal Pay Act.[18] Corning Glass Works argued that this difference in pay was justified because the day shift work, which the women held before state law permitted them to work at night, was "not performed under similar working conditions

as night shift work."[19] In making its ruling, the Supreme Court deferred to the Second Circuit's analysis of the congressional intent of the Equal Pay Act:

> By proving that after the effective date of the Equal Pay Act, Corning paid female day inspectors less than male night inspectors for equal work, the Secretary implicitly demonstrated that the wages of female day shift inspectors were unlawfully depressed and that the fair wage for inspection work was the base wage paid to male inspectors on the night shift. The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of *simple justice* to the employees themselves, but also as a matter of *market economics*.[20]

Corning Glass Works is significant because it is the only Supreme Court case in which plaintiffs brought their claims solely under the Equal Pay Act.[21] Furthermore, the Court's analysis illustrates the role that it placed on the "market" as an indicator of what defines equal pay. The Court's reliance on the market becomes a recurring element in its rationales for the rulings of later cases under the EPA and Title VII.

Several years after *Corning Glass Works*, the Court was faced with what has become one of the most widely critiqued cases in the field, *County of Washington v. Gunther*, the premier case advancing a claim of sex discrimination under Title VII.[22] In *Gunther*, four women prison guards who worked in the women's section of the Oregon county jail system and received wages that were substantially lower than that of male guards who worked in the men's section brought Title VII claims of sex discrimination.[23] The plaintiffs (respondents on appeal) presented direct evidence of the county setting the wage scale for female guards at a level that was lower than both the wages of the male guards and the wages in a survey of the outside job market.[24] The district court held that the County of Washington did not violate Title VII in paying the women prison guards less because their jobs were not "substantially equal" to the responsibilities of the male guards, who supervised more prisoners.[25] The Court of Appeals reversed, and the Supreme Court affirmed on the ground that a plaintiff need not satisfy the Equal Pay Act's standard of "equal or substantially equal work" to advance a Title VII claim. To illustrate the lower court's analytical fallacy, the Court provides the following example:

> In practical terms [petitioner's argument that only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII] means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay.[26]

Thus, the *Gunther* Court held that a plaintiff can bring a Title VII claim if she has direct evidence of an employer's intention to depress a woman's salary because of her sex, and she does not have to meet the EPA's requirement of showing "equal or substantially equal work."[27] The *Gunther* Court places great significance upon a Title VII plaintiff having direct evidence to assert a claim, and the plaintiffs clearly had this evidence according to the court:

> Respondents contend that the County of Washington evaluated the worth of their jobs; that the county determined that they should be paid approximately 95% as much as the male correctional officers; that it paid them only about 70% as much, while paying the male officers the full evaluated worth of their jobs; and that the failure of the county to pay respondents the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination. Thus, respondents' suit does not require a court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.[28]

The Court does not, however, address whether a plaintiff can bring a Title VII claim if she has circumstantial evidence from which her employer's discriminatory animus can be inferred. If the *Gunther* Court had addressed this issue, as an alternative method in which a plaintiff can meet her evidentiary burden, it would provide further guidance for courts that have used the opinion as a foundation for their analysis of similar claims, such as gender-based wage discrimination claims.

While the *Gunther* Court established the evidentiary burdens that a Title VII plaintiff must meet and addressed the practicality of these burdens in light of the EPA requirements, it was careful not to extend these burdens to formulate the analytical framework for a plaintiff to potentially advance a comparable worth claim.[29] The Court's reluctance in this regard is evidenced through its comment that "Respondents' claim is not based on the controversial concept of 'comparable worth,' under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."[30] It is not possible to determine the thought process that the Court went through in deciding *Gunther* and its precedent; nevertheless, the Court's analysis illustrates the factors that it considered in these cases. Taking a closer look at the factors in its analysis, we can speculate about why the Court was reluctant to

establish a basis for comparable worth claims. One reason is that comparable worth theory was having an impact in legislative debates where it gained the reputation as a controversial theory. Further, there may have been a split in how the members of the Court viewed the theory with some member not thinking highly of the theory, perhaps regarding it as weak and too idealistic. A final possible reason for the Court's reluctance is that it was fearful of what such a revolutionary theory could do to the status quo, especially to the market forces, a factor which the Court heavily relied on in its reasoning on the issues of sex and wage discrimination.

B. Comparable Worth: A Synopsis of Legal Interpretations

Controversy is inevitable with the introduction of a new theory, especially a theory that has the potential to change legislation. The controversy surrounding comparable worth theory was particularly strong because if it became legislation, it would undoubtedly require society to reevaluate the manner in which it determines an individual's worth in the workplace. For example, it would challenge society to acknowledge that subjective biases have indeed played a role in determining an individual's worth in the workplace. Furthermore, it would illustrate that one of the factors that the courts have heavily relied upon, market forces, is not as objective as it appears to be on its face. In his analysis of the labor market and the potential for comparable worth theory to function in the labor market, Harvard Law School Professor Paul Weiler writes, "real world labor markets leave a good deal of leeway for countless managerial judgments about how to classify, value, and pay certain jobs in comparison to others. The existence of such discretion makes possible, though not inevitable, the exercise of sex discrimination."[31]

According to Weiler, considering that the EPA and Title VII were enacted in response to the concerns about the market's role in depressing women's wages, "it would seem rather farfetched to suppose that the market would suddenly assert itself with force sufficient to rule out any such illegitimate influence upon rates of pay for those distinctive jobs into which women have, by and large, been channeled."[32] Weiler's analysis remains true today, twenty years later, because of the lack of attention that comparable worth has received since it was introduced in the early 1980s.

When comparable worth was first introduced and implemented, it was viewed as a concept which had the potential to address issues in which past gender-based pay equity policies had been unsuccessful.[33] When conducting comparable worth studies, the sexual groupings of jobs that are compared have to be comparable or similar in worth to require equal or proportionally equal compensation.[34] Proponents of comparable worth support the theory as an explanation for sex discrimination in pay on three bases. The first basis is statistical findings on occupational segregation that show that there is a concentration of women in particular occupations, which leads to job crowding of women in particular types of jobs that are subsequently labeled as "typically female jobs."[35] Secondly, women as a class are paid less than men because the "typically female jobs" many women hold have a lesser value and thus correspondingly lower wages, than those that men on average hold. The third basis is that the concentration of women in low-paying occupations accounts for a significant part of the wage gap between men and women.[36] Ultimately, accepting comparable worth theory requires a minimization of subjective criteria in the workplace by counteracting these criteria with objective, non-discriminatory measures, which are thought to more accurately measure an individual's worth.

Economists and social scientists advanced the theory of comparable worth in the early 1980s, to address the fact that the relative wages of women had not significantly changed since the enactment of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.[37] For example, prior to the passage of civil rights legislation in the 1960s, which aimed to help women combat sex discrimination, the wage ratio between males and females ranged from 50% to 75%.[38] This disparity remained the same in the 1980s.[39] Unlike the Equal Pay Act and Title VII, comparable worth is a job evaluation theory that compares occupations based on their intrinsic worth or difficulty.[40] Then director of the Equal Employment Opportunity Commission (EEOC), Eleanor Holmes Norton, described the theory as "the civil rights issue of the 1980s" because of its potential to address issues left unresolved by past legislation.[41] Looking back on Norton's use of the phrase "civil rights issue" in light of present-day issues, it is arguable that comparable worth remains a "civil rights issue" because it has the potential to address issues about sex, race, and class, and more importantly the intersection of these three concepts. The theory of comparable worth is based on the historical premise that, "a society politically and culturally dominated by men steered women into certain jobs and kept the wages in those jobs below what the jobs were worth, precisely because most of the holders were women."[42]

Comparable worth is empirical in nature in that it provides an evidentiary basis through "analytical techniques . . . for determining the relative worth of jobs that involve different levels of skill, effort, risk, responsibility, etc."[43] In other words, comparable worth is an analytic technique that uses objective factors to test the theory that female employees are systematically steered into certain jobs that are devalued merely because they are female-dominated. Given that comparable worth has played a role in the legal discussion of gender wage discrimination, I propose that comparable worth may have the potential to address issues unique to the female racial wage gap between Black and White women, the impetus

for this article. In other words, "whenever one acknowledges that job evaluations have allowed the introduction of subjective biases in the way wages are paid, then it is a small step to move from correction of gender biases to correction of racial biases."[44]

The following part of this article has a two-fold purpose. The first goal is to provide a synopsis of the different interpretations of sex- and race-based wage discrimination claims under the EPA and Title VII after comparable worth's introduction, to highlight how different jurisdictions have analyzed comparable worth. The second goal is to further the discussion of the underlying policy issues through an analysis of how the courts define intent and equal work with respect to a plaintiff's evidentiary burden, the use of direct and circumstantial evidence in developing the analytical framework for advancing sex- and race-based wage claims, and the courts' reliance on the market/economy as a factor in their overall reasoning.

1. Breaking Ground: The 9th Circuit and AFSCME

The 9th Circuit was the first jurisdiction to consider whether a plaintiff could advance comparable worth theory in making a Title VII or EPA claim. Given the controversy surrounding comparable worth at this time period, it was not surprising that the court held in *American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) v. State of Washington* that a plaintiff could not bring a Title VII claim under comparable worth theory.[45] In this pivotal case, *AFSCME* brought a Title VII class action suit against the State of Washington, alleging sex-based wage discrimination on behalf of a class of "state employees who have worked or do work in job categories that are or have been at least seventy percent female."[46] About ten years before AFSCME initiated its claim, the State had failed to implement a compensation scheme accounting for comparable worth, after a management consultant had determined that there was a 20% wage disparity between the employees working in predominately male and female jobs.[47] This 20% wage disparity was determined after the consultant had evaluated jobs on four criteria with a maximum number of points allotted to each criteria: knowledge and skills, mental demands, accountability and working conditions.[48]

The district court held that the State of Washington violated Title VII by discriminating on the basis of sex by paying females who worked in jobs that were predominately female less than they paid males who worked in jobs that were predominately male, where the jobs held by both males and females were of comparable worth.[49] The Court of Appeals reversed the lower court's decision on the ground of employer deference to the market.[50] The court structured its analysis on the premise that the State of Washington was lawfully using "a compensation system that is responsive to supply and demand and other market forces . . ." [51] Furthermore, the court determined that AFSCME did not prove disparate treatment because it did not meet the burden of showing that the State had a discriminatory motive in setting its wage structure to pay men more than women who were in comparable jobs:

> The inference of discriminatory motive which *AFSCME* seeks to draw from the State's participation in the market system fails, as the State did not create the market disparity and has not been shown to have been motivated by impermissible sex-based considerations in setting salaries . . . Neither law nor logic deems the free market system a suspect enterprise . . .[52]

The court also found that AFSCME failed to prove adverse impact because it did not meet the burden of showing that one of the State's facially neutral employment practices had a disproportionately adverse impact on women, a protected group under Title VII.

The 9th Circuit based its approach to comparable worth on its reading of the legislative history of Title VII. According to the court, the statute's legislative history shows that Congress did not intend to place burdens on employers to evaluate and restructure the value of jobs that have been determined by labor market factors, collective bargaining, or nondiscriminatory employer decisions.[53] Hence the court's clear annunciation that "We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market."[54] On one hand, it can be argued that this case was ground-breaking because it symbolized comparable worth's "entrance" into the courts. On the other hand, the court's rationale clearly illustrates its reluctance to advance the theory as either an alternative or complementary tool to the already well-established tools that a plaintiff can use to plead and prove a race- or sex-based wage discrimination claim.

At the time of its decision, the court probably did not realize the impact that its reliance upon the market would have on other courts deciding similar issues. For example, according to Weiler, "the consensus in the lower courts is that the market does provide a good legal answer to allegations of wage discrimination across comparably valued jobs."[55] Considering Weiler's observation in relation to my critique of how we can think of comparable worth as remaining a "civil rights issue," one concern that the court's decision raises is whether a female plaintiff can meet her burden of proving intentional wage discrimination by stating a claim that the market is not a neutral factor and has an adverse impact on women? A further concern is whether a female plaintiff who is a member of a minority group can meet her burden of proving intentional wage discrimination by stating a claim that the market is not a neutral factor and

has an adverse impact on women of her race? In order for sex-based wage discrimination claims to be viewed as a civil rights issue, the courts need to re-characterize their perception of the market as a *neutral* factor.

2. The 7th Circuit's Silence

In *American Nurses' Association v. State of Illinois*, one of two 7th Circuit cases that interpreted comparable worth, the court considered whether an employer's failure to achieve comparable worth could permit an inference of intentional discrimination.[56] The court framed the issue of proving illegal intent as being distinct from market-based disparities which an employer "passive[ly] accept[s]."[57] Two nurses associations, in addition to a number of independent nurses, the majority of whom were female, brought a claim against the State of Illinois on behalf of all state employees holding female-dominated jobs, such as nursing and typing, on the ground that the State did not pay comparable wages for comparable work, thereby violating Title VII.[58] In analyzing the issue, the court began with an analysis of *Gunther* and *AFSCME*, which led to its conclusion that an employer's knowledge of a wage disparity is not the same as the employer having the intent to cause or maintain the disparity.[59] The court held that proof of an employer's intent to discriminate cannot be inferred from the results of a comparable worth study or from the employer's decision not to implement the study's recommendations.[60] While the court's holding does not seem to add any depth to the question of intent, it should be given credit for its thorough analysis of the issue, because unlike the lower court, it did not simply dismiss plaintiffs' case after reading the term comparable worth in the complaint.[61]

In *Equal Employment Opportunity Commission v. Sears, Roebuck & Company*, the 7th Circuit considered the role of comparable worth and the burdens that each party has to plead and prove and defend in a Title VII sex-based wage discrimination suit.[62] The EEOC alleged that Sears did not hire or promote females into commission sales positions and did not pay female checklist management employees the same as the male managers who were similarly situated because they had nationwide discriminatory practices in effect.[63] The district court held that the EEOC did not meet its burden of proof and failed to adequately respond to Sears' evidence.[64]

In affirming the lower court's decision, the Circuit Court held that in the absence of direct evidence of intentional sex discrimination in setting wages, the EEOC had to meet the equal pay standard to prove its Title VII sex-based wage discrimination claim.[65] The rationale that the court provided for its holding was that under *Gunther*, direct evidence of intentional discrimination was required.[66] To further emphasize the role of intent, the court analyzed the comparable worth study that Sears had implemented in its executive compensation plan, noting that the dispositive factor is not whether the employer adopted a compensation program as result of a comparable study. The dispositive factor is rather, "whether the implementation of a compensation program in response to the study reflects discriminatory intent."[67] Unlike in *American Nurses' Association v. State of Illinois*, the court's articulation of the issue indicates that "intent" continues to be the underlying issue in cases alleging sex-based wage discrimination, whether or not a comparable worth program is in place.

3. The 11th Circuit: Reliance on *McDonnell Douglas/Burdine*

In *Miranda v. B &B Cash Grocery Store, Inc*., plaintiff, a female employer at one of defendant's grocery stores, brought a gender-based wage discrimination claim against defendant under Title VII and the Equal Pay Act.[68] In the store's history, there had been only two female managers.[69] Plaintiff held the position as a buyer and was responsible for buying grocery, meat, and dairy and non-food items for all of the defendant's stores.[70] Plaintiff, unlike her similarly situated co-workers, did not have any experience in store management prior to holding a buyer position.[71] Prior to holding this position, plaintiff was an inventory control clerk and her supervisor provided her on-the-job training with respect to the duties of a grocery buyer.[72] When her supervisor resigned, he recommended plaintiff for his position with a salary comparable to other similarly situated buyers.[73]

The company president decided to create two separate positions from the grocery buyer position.[74] While plaintiff was offered one of the positions, her salary was at least $200 a week less than that offered to the male employee who took the second newly created position.[75] The company president explained this salary disparity as being due to budgetary constraints.[76] Plaintiff made several verbal and written requests that her salary be raised to match the salary levels of the other buyers, all of whom were male.[77] Within less than two years of holding one of the buyer positions, the company eliminated plaintiff's position, again citing budgetary constraints as the reason.[78] Defendant offered plaintiff a position as a head cashier which she declined.[79]

To articulate the issue presented by plaintiff's claims, the court considered the *Gunther* Court's decision and the issues that developed as a result of its ruling. In my analysis of *Gunther*, I described the Court as "reluctant" to further its analysis by articulating the evidentiary burdens that a plaintiff advancing a comparable worth claim would have to meet.[80] In its analysis of the *Gunther* decision, the *Miranda* court stated similarly that "The Court, however, refused to elaborate on the respective burdens of proof for a gender-based wage discrimination claim made under Title VII and the effect of the affirmative defenses incorporated via the Bennett Amendment."[81] Rather than establish a new rule, the *Miranda* court applied the Supreme Court's articulation in *McDon-*

nell Douglas/Burdine of the respective burdens on plaintiffs and defendants to establish and defend disparate treatment gender-based wage discrimination.[82] Thus, in applying the *McDonnell Douglas/Burdine* framework, the court held that a plaintiff has the burden of proving a prima facie case of discrimination by the preponderance of the evidence.[83]

In *Miranda*, the plaintiff held the burden of establishing a prima facie case of sex discrimination under Title VII by demonstrating that she is female and that the job that she occupied was similar to higher paying jobs occupied by males.[84] The plaintiff in *Miranda* established a prima facie case through a showing that she is female and the description of her job responsibilities. In addition, witness testimony indicated that she had the same type of tasks as the other buyers but that her weekly salary was at least $200/week less than the similarly situated males.[85] If plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the pay disparity.[86] Here, the court held that the defendant's budgetary constraints met the legitimate, non-discriminatory requirement.[87] Additionally, plaintiff has the burden to establish by a preponderance of the evidence that defendant's proffered justifications are a pretext for gender-based discrimination.[88] While the defendant's proffered justifications appeared legitimate on their face, the court agreed with the trial court's holding that the reasons were pretextual considering plaintiff's testimony that the wage disparity continued after annual evaluations.[89] In addition to this fact, the court held that the company president's remark to plaintiff, that "any . . . man would be astounded to give you the title I'm giving you,"[90] indicated that he did not see plaintiff at the same level as the other buyers, but only "comparable to a lower-level employee at the store level, at least in part because she had worked primarily in female-dominated positions."[91]

Like the cases that preceded it, *Miranda* does not move comparable worth to the next level. In fact, the *Miranda* court did not even mention the term "comparable worth" in its opinion. Perhaps the court's use of the term "comparable" to describe the plaintiff and the male buyers with whom she worked implied that comparable worth was beneath the surface of plaintiff's claims. On its face, it appears that the *Miranda* court merely reiterates the *McDonnell/Douglas* framework. An in-depth look, however, at the concurring opinion shows that the *Miranda* court tried to make sense of the different and arguably inconsistent judicial approaches to the evidence that a plaintiff must bring in asserting a sex-based wage discrimination claim.[92] The concurring judge's outline and analysis of these different judicial approaches to the evidentiary bases for sex-based wage discrimination provides substance to the issues of circumstantial and direct evidence as they pertain to wage discrimination claims on the bases of race and sex:

> I am disturbed by a standard that requires direct evidence of sex-based wage discrimination in one case, but permits circumstantial evidence in an identical case brought upon a theory of race discrimination. [A] black woman claiming wage discrimination based on *color* would need to proffer circumstantial evidence only; however, the same wage discrimination claim based this time on *sex* would then require direct evidence. This is not logical. It seems to me that plaintiffs who bring *Gunther*-based claims should be held to the same standards as any other Title VII disparate treatment plaintiff.[93]

Considering that both sex and race are factors in comparable worth analysis, the concurring judge's opinion has direct implications for the evidentiary bases necessary for a plaintiff who seeks to include comparable worth in a wage discrimination claim. One of those implications is whether a comparable worth job evaluation, which is circumstantial evidence, is a sufficient evidentiary basis for a potential claim. While the concurring judge does not mention comparable worth in his opinion, his analysis of the different evidentiary standards for sex and race claims opens the door for further legal analysis of comparable worth. Thus, even though comparable worth is not a recognized ground for a plaintiff to bring a wage discrimination claim, it is nonetheless important to consider the evidentiary bases for a potential claim because it may highlight the underlying issues, such as intent, and how a plaintiff proves intent.

III. Developing Comparable Worth Through Unionism

The courts' reluctance to accept comparable worth as a basis for a sex-based or race-based wage discrimination claim raises the question of whether comparable worth is better left for labor unions to develop through collective bargaining, as an alternative method to combating wage discrimination outside of the EPA and Title VII. Before formulating an answer to this question, a foundation must be laid for understanding how unionism provides an alternative to antidiscrimination law, particularly for plaintiffs who claim to be the victims of wage discrimination because of their race or gender. One of the core functions of labor unions is to engage in collective bargaining to redistribute economic goods and benefits from management to the workers whom they represent.[94]

According to Professor Marion Crain, the greatest impact that unions can have is to represent nonunion women and minorities who comprise the majority of low-waged service workers.[95] Crain's thesis is based on the fact that this demographic of individuals is the "most

exploitable because they stand at the intersection of race, gender and class subordination."[96] As argued earlier in this article, one of the controversial aspects of comparable worth theory and perhaps one of the reasons why the courts have been reluctant to accept and apply the theory, is that it has the potential to illustrate that sex and race are often embedded within class discrimination.[97] Crain looks at this issue in the context of unions, whose members share class-identity and often gender and racial identities. This provides a starting point for answering the question of whether unions can provide an inroad to comparable worth because Professor Crain does not include comparable worth in her analysis. Similarly, in his discussion of gender equity and unionization, Professor Weiler focuses on gender equity in unionization, arguing that women who hold white-collar jobs and are unionized see almost two times a net improvement in their wages than similarly situated men.[98] Thus, moving both Professor Crain's and Weiler's arguments to the next level, it could be argued that among the "most exploitable" workers are Black women holding "female-dominated" jobs. Comparable worth could potentially help these workers, whose low wages are to an extent attributable to sex and race discrimination. If unions implemented comparable worth into their campaigns and collective bargaining agreements, which represent group-based rights, then they as a group could combat discrimination and low wages at an industry level.

A. The Beginnings of the Labor Movement and Discriminatory Tactics

One issue that arises from the argument that implementing comparable worth into union campaigning and collective bargaining could combat sex- and race-based wage discrimination is whether the history of sex and race discrimination by unions in the past is *sufficiently in the past* such that unions will organize Black women. Enacted during the 1930s, federal labor legislation aimed at protecting workers from the economic effects of the Great Depression.[99] From its very beginning, labor unions were criticized for discriminating against both women and Blacks by creating obstacles to their membership in unions.[100] The purpose behind this discrimination was to eliminate opportunities for women and racial minorities to compete with White men in the labor market.[101] Recent statistics show that in 1962, 19% of women were union members compared to 44% in 2003.[102] Nevertheless, discrimination continues to linger today:

> [U]nions have continued their historical pattern of gender bias into the present by continuing to use the male worker as a universal standard in union practice: most organizing campaigns, bargaining strategies, and pressure tactics assume that the relevant actors are male. Unions' reluctance to target female-dominated occupations and allocate sufficient resources for organizing them, and their unwillingness to address barriers to union activism posed by the double day worked by most women, have exacerbated the situation.[103]

Unlike its subtle discrimination against women, the labor movement overtly discriminated against Blacks by resisting the incorporation of antidiscrimination politics in the language and text of the labor laws and explicitly excluding Black workers from union membership.[104] For example, the laws specifically excluded protection for workers in the domestic and agricultural industry, the majority of whom were Black.[105] Thus, the exclusionary provision of the National Labor Relations Act of 1935 (NLRA) both encouraged and perpetuated this discrimination against Blacks and Title VII was necessary to mandate equal treatment.[106]

Given the double impact of discrimination against Blacks and women, Black women could only imagine the possibility of union membership in the early days of American unionism. The lingering effects of discrimination against Black women in the labor movement is evident from the statistics revealing the small number of Black women who are members of unions, compared to those statistics illustrating the benefit of union membership for Black women.[107] The most recent statistics on the percentage of Black women who are members of unions indicate that 15.6% of this demographic are union members.[108] According to the AFL-CIO, the median weekly earnings of Black women who were members of unions were 26% more than the earnings of their nonunion counterparts who are Black.[109] Besides higher earnings, Black women can benefit from the collective bargaining power of the unions in terms of employment benefits, such as health insurance, child care and flextime, pensions, paid family leave, staffing, training, and participating in decision-making in the workplace.[110] In general, these statistics paint the following picture: In those industries where there are opportunities to join unions, Black women who are union members have higher overall earnings, more opportunities to be proactive in their workplace, and enjoy a higher quality of life.[111]

B. Comparable Worth: Remedying Individual or Collective Injuries?

A single plaintiff who brings a sex-based wage discrimination claim under the EPA or a sex- or race-based wage discrimination claim under Title VII seeks a remedy for an injury committed by an employer. Essentially, the plaintiff is asserting an individual interest through the claim.[112] The counterpart to individual claims are collective claims, which are class-based.[113] According to Crain, if unions used antidiscrimination claims as an organizing technique, it would have a collective impact because both the interests of unionized workers as well as nonunion-

ized workers in the same industry are represented.[114] Thus, "[r]econceptualizing workers' rights to be free from discrimination in the workplace as collective and economic in character rather than as individual and personal should be a pivotal part of labor's agenda for the future."[115] Using the *Change to Win* campaign as an example of this industry-wide organizing strategy, Crain suggests that when the nonunion industry partners increase the wages and benefits of their employees in response to antidiscrimination claims, the union members gain more collective bargaining power with respect to making demands upon their union to set comparable wages and benefits.[116]

Proponents of comparable worth have argued that it is a theory worthy of legal analysis with regard to gender-based wage discrimination claims under the EPA and Title VII. As shown through both the cases and statistics, the EPA and Title VII have helped middle-class White women in the workplace with pay discrimination claims.[117] Unlike the EPA and Title VII, comparable worth, which aims to eliminate wage disparities between female-dominated and male-dominated occupations, has the potential to help women who are in female-dominated occupations obtain wages that reflect the content or worth of their jobs instead of reflecting the fact that their job is female-dominated.[118] Implementing comparable worth measures in industries with female-dominated occupations could help the individuals holding these jobs who are primarily women of color and low-wage workers.[119] In other words, comparable worth analysis considers both gender and race and through these two lenses, it ultimately reaches issues pertaining to class status.

In response to the arguments made by comparable worth proponents, the courts have decided either that comparable worth necessitates further evaluation or is unworthy of further evaluation because market forces neutrally determine whatever depression of wages exists. An analysis of the routes that courts have taken with respect to this theory suggests that a profound result of comparable worth becoming an accepted legal theory or legislation is that it has the potential to prove, through its implementation, that arguably much, if not all of race and gender discrimination is class-based discrimination and that race and gender are embedded within class-based discrimination. In other words, race and gender are closely tied to one's class. Therefore, in addressing the issues of low-wage workers, race and gender issues are also addressed because of the interrelationships between them.

Unionism appears to be an effective route to closing the wage gap between Black and White women because of the organizational strategies that unions employ in their effort to unionize a workplace. For example, unions have the discretion, within the limit of labor law, to account for the specific interests of women when designing their campaigns.[120] Furthermore, statistics clearly illustrate the union advantage for women, particularly for Black women.[121] If unions brought comparable worth to the bargaining table, union members could possibly see further gains made in their wages and benefits. Through their bargaining, unions essentially take the wages out of the market and into a collective bargaining agreement that addresses their wage concerns as a class, and these issues often include issues of race- and gender-based discrimination in wages. Thus, the wage provisions in the collective bargaining agreement provide an objective standard for setting wages for all employees that hold comparable jobs.

Given the persuasive elements within the arguments that comparable worth proponents advanced at its inception in the early 1980s, and that they continue to advance today, it is questionable why the court has not yet recognized comparable worth as a ground for relief. The answer seems to lie within an unstated, yet implicit notion underlying the theory of comparable worth, which is that there are social objectives governing the theory. The ultimate social objective of achieving gender equality is reflected in part by the statement: "Comparable worth is designed to deal with wage discrimination, not with some other social objective. It does not seek an advantage for women, but the elimination of a wage disadvantage that results solely from sex."[122] While this comment acknowledges comparable worth's core social objective, it suggests that there are no deeper social objectives to address in eliminating wage discrimination. However, wage discrimination is a remnant of societal behaviors. Therefore, another social objective of comparable worth theory is to minimize and eventually eradicate the stereotypes that society uses to determine which sex and/or gender is better suited for specific occupations.[123]

In *AFSCME*, the leading case on comparable worth theory, the court rejected comparable worth theory based on its judicial deference to both managerial prerogative and market forces.[124] In essence, the court's willingness to defer to managers and the market forces signifies that it did not perceive either of these factors as having played a role in creating wage discrimination. If the court had considered that stereotypes and misperceptions held by individuals in the workplace, particularly managers, had some influence on wage disparities that resulted from an individual's sex and/or race, then the court would not have been so willing to defer to their prerogative.[125] Similarly, if the court had considered the way the market contributes to the determination of an individual's wages, hence playing a role in wage discrimination, then it would not have been so quick to defer to market forces.[126] It appears therefore, that the court in *AFSCME*, like the commentator quoted above, overlooked the social objectives underlying wage discrimination.

IV. Conclusion

Until courts are able to acknowledge the social objectives underlying the main objective of combating wage discrimination, plaintiffs who bring a claim under comparable worth will not leave the courts with any relief on their claim. As for Black female plaintiffs, who would particularly benefit from claims brought under comparable worth, the court's acknowledgment of the underlying social objectives is even more critical because "[W]henever one acknowledges that job evaluations have allowed the introduction of subjective biases in the way wages are paid, then it is a small step to move from correction of gender biases to correction of racial biases."[127]

Considering the social objectives that underlie comparable worth, one could conclude that in order to fully understand how a comparable worth scheme would function in the workplace, one would first have to understand the workplace in a social science context. Similarly, it would benefit the court to be familiar with the social science context in order to understand why a plaintiff would bring a comparable worth claim. Social science essentially governs behaviors, which is one reason why there are wage disparities. Therefore, it is likely that if the court has a specific context in which to analyze the strengths and weaknesses of comparable worth, it might actually hold that a plaintiff can obtain relief under the theory.

If the court accepts comparable worth theory, the question that remains is whether the court has to recognize comparable worth based solely on sex in order to recognize it as a theory that can overcome disparities at the intersection of race and sex and subsequently class. If one were to answer this question based upon the analysis in this article the answer would be "no," because comparable worth theory is applicable to both race and sex. Considering that our behaviors also govern our conception of class, it would seem that applying comparable worth to issues with which class intersects would also be acceptable. Essentially, the hope is that the court will accept comparable worth theory for one type of claim, thereby opening doors for plaintiffs to assert the theory on similar claims that reflect notions of fairness and worth.

Endnotes

1. U.S. Department of Labor, Dictionary of Occupational Titles (1991).
2. Paul Frymer, Dara Z. Strolovitch & Dorian T. Warren, *Katrina's Political Roots and Divisions: Race, Class, and Federalism in American Politics*, Social Science Research Council, September 28, 2005, http://understandingkatrina.ssrc.org/FrymerStrolovitchWarren/.
3. *See* U.S. Dept. of Labor, Highlights of Women's Earnings in 2002, http://www.dol.gov.
4. *See* Mary Corcoran. & Greg J. Duncan, *Work History, Labor Force Attachment, and Earnings Differences between the Races and Sexes*, 14(1) J. Hum. Resources 3-20 (1979).
5. William A. Darity Jr., & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12(2) J. Econ. Persp. 63-90 (1998).
6. Paul Burnstein, *The Impact of EEO Law: A Social Movement Perspective*, *in* Legacies of the 1964 Civil Rights Act, 129-55 (Bernard Grofman ed., 2000).
7. Darity & Mason, *supra* note 5.
8. Julianne Malveaux, *Comparable Worth and Its Impact on Black Women*, *in* Slipping Through the Cracks 47, 48 (Margaret C. Simms & Julianne M. Malveaux eds., 1986 at 47).
9. Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 150-51 (William Morrow and Company, Inc.) (1984).
10. Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d) (2004). (The pertinent section, (d)(1) states: "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee").
11. Title VII of the Civil Rights Act (CRA) of 1964, 42 U.S.C. § 2000e (2004), § 703 [42 U.S.C. § 2000e-2] defines unlawful employment practices. ("It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employees, because of such individual's race, color, religion, sex, or national origin").
12. *See* Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 Yale L.J. 1457, 1465-67 (1989).
13. *Id.* at 1466.
14. S. Rep. No 867, 88th Cong., 2d Sess. 10 (1964).
15. *See* Scarborough, *supra* note 12, at 1467.
16. The exact wording of the Equal Pay Act (EPA) and Title VII are noted in footnotes 10 and 11, respectively.
17. *Corning Glass Works v. Brennan*, 417 U.S. 188, 192 (1974); *County of Washington v. Gunther*, 452 U.S. 161 (1981).
18. *Brennan*, 417 U.S. at 192.
19. *Id.* at 196. The law in Pennsylvania and New York was amended to permit women to work at night, prior to June 11, 1964.
20. *Id.* at 207.
21. Robert Belton, Dianne Avery, Maria L. Ontiveros & Roberto L. Corrada, Employment Discrimination Law: Cases and Materials on Equality in the Workplace 413 (7th ed. 2004).
22. *Gunther*, 452 U.S. 161.
23. *Id.*
24. *Id.* at 165.
25. *Id.*

26. *Id.* at 178-79.
27. *Id.* at 168.
28. *Id.* at 180.
29. *See* Paul Weiler, The *Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1747-48 (1986).
30. *Id.*
31. Weiler, *supra* note 29, at 1762.
32. *Id.*
33. *See* National Committee on Pay Equity, *Race and Pay Equity: Policy Brief*, http://www.pay-equity.org.info-racebrief.html (last visited Oct. 29, 2006) (hereinafter "National Committee on Pay Equity").
34. *Id.*
35. "Typically female jobs" are also known as "pink-collar jobs." The occupations that have been labeled as such include secretary, elementary school teacher and librarian.
36. *See* National Committee on Pay Equity, *supra* note 33, at 2.
37. Malveaux, *supra* note 8, at 48.
38. *Id.* at 48-49.
39. *Id.*
40. *Id.*
41. *Id.* at 47.
42. *American Nurses' Association v. State of Illinois*, 783 F.2d 717, 719 (1986).
43. *Id.*
44. Malveaux, *supra* note 8, at 56.
45. *American Federation of State, County, and Municipal Employees (AFSCME) AFL-CIO v. State of Washington*, 770 F.2d 1401, 1403-08 (9th Cir. 1985).
46. *Id.* at 1403. AFSCME's claim is based on Section 703(a) of Title VII, which states: "It shall be an unlawful employment practice for an employer—(1) to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's sex, or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities because of an individual's sex."
47. *Id.* at 1403.
48. *Id.*
49. *Id.* at 1405-07.
50. *Id.* at 1407.
51. *Id.* at 1406.
52. *Id.*
53. *See id.* at 1406-07.
54. *Id.* at 1406.
55. Weiler, *supra* note 29, at 1752.
56. *American Nurses' Association*, 783 F.2d at 720.
57. *Id.*
58. *Id.* at 718.
59. *Id.* at 722.
60. *Id.* at 730.
61. *See id.* at 718 (describing the district judge's ground for dismissal of the plaintiffs' complaint as "semantic manipulation").
62. *See Equal Employment Opportunity Commission v. Sears Roebuck & Company*, 839 F.2d 302 (1988).
63. *Id.* at 307.
64. *Id.* at 348.
65. *Id.* at 343.
66. *Id.* at 343.
67. *Id.* at 342.
68. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1521-22 (1992).
69. *Id.* at 1522.
70. *Id.* at 1522-23.
71. *Id.* at 1522.
72. *Id.* at 1523.
73. *Id.*
74. *Id.*
75. *Id.* at 1523.
76. *Id.* at 1523-24.
77. *Id.* at 1524.
78. *Id.*
79. *Id.* at 1525.
80. *See supra* Part II(A).
81. *See Miranda*, 975 F.2d at 1528.
82. *Id.*
83. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
84. *Miranda*, 975 F.2d at 1529.
85. *Id.*
86. *McDonnell Douglas Corp.*, 411 U.S. at 802.
87. *Miranda*, 975 F.2d at 1529.
88. *See McDonnell Douglas Corp.*, 411 U.S. at 804.
89. *Miranda*, 975 F.2d at 1529.
90. *Id.* at 1530.
91. *Id.*
92. *Id.* at 1535.
93. *Id.* at 1536.
94. Marion Crain, *Strategies for Union Relevance in a Post-Industrial World: Reconceiving Antidiscrimination Rights as Collective Rights*, LABOR LAW JOURNAL, 158, 158 (2006).
95. *Id.* at 159.
96. *Id.*
97. *See* the discussion *supra* Part II(B).
98. Weiler, *supra* note 29, at 1797.
99. *See* MICHAEL C. HARPER, SAMUEL ESTREICHER & JOAN FLYNN, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 82-90 (5th ed. 2003).
100. *See* Alice Kessler-Harris, *Where Are the Organized Women Workers?*, 3 FEMINIST STUD. 92, 96 (1985); *See also* Steven C. Pitts, *Organize . . . To Improve the Quality of Jobs in the Black Community: A Report on Jobs and Activism in the African American Community* (University of California-Berkeley Center for Labor Research and Education), May 2004, at 24.
101. *See* Kessler-Harris, *supra* note 100 at 92.
102. *Professional Women: Vital Statistics* (AFL-CIO Department for Professional Employees, Washington, DC), Mar. 29, 2004, at 3, http://www.pay-equity.org/PDFs/ProfWomen.pdf.
103. Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO L.J. 1903, 1944 (1994).
104. *See* Crain, *supra* note 94 at 161; The major legislation in the realm of labor law was the National Labor Relations Act (NLRA) of 1935, 29 U.S.C. §§ 151-169 (2004) of which Sec. 7 (§ 157) is

the centerpiece. In pertinent part it reads, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . "

105. *See* Pitts, *supra* note 100.
106. As industrial unionism became more popular, the industries used Blacks as strikebreakers, whereby they crossed picket lines for better pay.
107. AFL-CIO Department for Professional Employees, *supra* note 102.
108. *See* United States Department of Labor, Union Affiliation of Employed Wage and Salary Workers by Selected Characteristics, http://www.bls.gov/news.release/union2.t01.htm.
109. *Id.*
110. *See* Crain, *supra* note 94 at 1960.
111. *See* AFL-CIO Department for Professional Employees, *supra* note 102. (Noting that compared to their nonunion counterparts, "union women and men are more likely than nonunion workers to have health and pension benefits, and to receive paid holidays and vacations, and life and disability insurance").
112. *See* Crain, *supra* note 94 at 164.
113. *Id.*
114. *Id.* at 168, 169.
115. *Id.* at 169.
116. *Id.* at 168.
117. *See* Stephanie Luce and Mark Brenner, *Women and Class: What Has Happened in Forty Years?*, MONTHLY REVIEW 58(3), *available at* http://www.monthlyreview.org/0706lucebrenner.htm.
118. Linda Levine, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?* Congressional Research Service, 15 (2004).
119. *Id.*
120. *See* 150 N.L.R.B. at 1430-32.
121. *See* AFL-CIO Department for Professional Employees, *supra* note 102.
122. *Id.* at 25.
123. Virginia E. Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics*, 57(2) J. APPLIED PSYCHOL. 95-100 (1973).
124. *See id.*
125. *See id.* at 99.
126. *See* Pitts, *supra* note 100.
127. Malveaux, *supra* note 8.

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Deadlines for submission are January 15th, May 15th and September 15th of each year. If I receive your article after the submission date, it will be considered for the next issue.

Thank you for your cooperation.

Janet McEneaney
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L&E Newsletter

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ISSN 1530-3950 (print) ISSN 1933-8481 (online)

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