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Message from the Chair

Donald L. Sapir

OYER, OYER, OYER, it is my privilege to announce that the Labor and Employment Law ("LEL") Section's official blog / blew, entitled *WorkLawNY.com*, is now up and running. It can be accessed at http: / / nysbar.com / blogs / worklawny / . The blog adds value to your Section membership, **if you use it**. To use the blog, you only need a computer with access to the Internet. No information technology savvy is required. Just click on the blog's web address and you are ready to receive the benefits of the blog.

What is the blog? It is a part of the Section's Web site (a weblog) that provides concise summaries of the very latest LEL-related federal and state court and agency decisions, statutes, regulations, news and other developments of interest to the LEL Bar. The blog summaries will contain links to the full decision, news article, or other item that is summarized. The blog also provides links to the Web site home pages of the U.S. Department of Labor, the EEOC, the NLRB, the NYS Department of Labor, the NYS Employment Relations Board and PERB, NYSBA, and the LEL Section, and contains announcements and information about CLE programs of interest to the LEL Bar.

In its infancy, the blog has four Section member volunteers, who are providing the blog postings: Seth Greenberg, Matt Lampe, Ruth Raisfeld, and Chris D'Angelo. We want to increase the number of volunteer blog posters to contain multiple representation from each LEL Section constituency (management, union, individual employee, neutral, academic, government) to ensure fairness and

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neutrality in postings and to minimize the burden of any one blog poster to two to four blog postings per month. We also hope to recruit blog posters from each LEL-related agency to make sure that we post information regarding all of the latest agency developments.

Each posting to the blog will identify the name of the person responsible for the blog posting. All postings are required to set forth the summary in a concise non-biased way. If you are interested in becoming a volunteer blog poster, please contact me at . Also, if you receive a slip opinion, advice memo, or other ruling or item that you believe is of interest to the LEL Bar, please e-mail it to for posting on the blog.

The potential for the blog is enormous. It is our hope that the blog will be so informative with breaking news and rulings that when you sit down at your desk in the morning, you will want to visit the Section's blog. It will help keep you abreast of the latest developments in labor and employment law, will be a portal to LEL-related agency Web sites, and will increase your productivity.

Our Section's Annual Meeting was a rousing success. On Thursday, January 28, simultaneous programs were hosted by the Section's Equal Employment Opportunity Law Committee, the Labor Relations Law and Procedure Committee, and one was jointly hosted by the Labor Arbitration Committee and Alternative Dispute Resolution Committee. Among those present for the programs and in attendance at the single reception held immediately after were: the Regional Directors of NLRB Regions 2, 3 and 29, the New York District Director of the EEOC, the Commissioners of the NYSDHR and NYCHRC, other officials of significance to LEL practitioners, and many of the state's leading mediators and arbitrators. It was an exceptional opportunity for practitioners to hear the latest news, developments and initiatives of the agencies, and to engage in one-on-one conversations with people who may control the outcome of their clients' cases. To be sure that you receive notification of next year's Thursday afternoon programs and reception and an opportunity to attend (space is limited), I urge you to join and participate in the work of a Section Committee responsible for hosting the programs and reception.

The Annual Meeting CLE program held on January 29 at the New York Hilton was a sold-out event, with more than 300 lawyers attending. We were treated to a top-notch CLE lineup that included plenary sessions on: (1) issues resulting from changes in the workplace caused by the virtual world; and (2) changes in the shifting balance between duty owed to client confidentiality and duty of disclosure owed to a tribunal and adversaries pursuant to the new rules of professional conduct. Workshops were held on claims invoking the Lily Ledbetter Fair Pay Act, global mobility in employment, and claims brought under Civil Service Law §§ Sections 71, 72, 73 and 75. Several lawyers could be seen in hallways catching up with rarely seen law school friends, colleagues from former jobs, and discussing cases with their adversaries in a setting that was removed from the adversarial milieu.

At the Annual Luncheon, the Section's blog was unveiled and attendees received a tutorial presented by Jim McCauley showing how to get the most value from the blog. Last year's Chair, Alan Koral, received a gift from the Section as a small token of appreciation for his many hours of service to the Section. Law student winners of the Section's writing contest (re-named the Emanuel and Kenneth D. Stein Award) and the Section's service award (the Samuel Kaynard Award) were presented by our Law School liaisons, Norma Meacham and Prof. Merrick Rossein.

After the luncheon, various substantive committees of the Section, and the District Representatives who are liaisons between the Section and the membership, were seen busy at work discussing new CLE programs, new initiatives for our members, positions on substantive law that would be mutually beneficial to all constituencies, and cutting-edge issues of labor and employment law. There is always room for additional committee members. If you wish to become active in the Section's programs and activities, to network with other members / leaders of the LEL Bar, to provide position statements for the NYSBA on matters of concern to LEL lawyers, to provide CLE programming for the LEL Bar and to assist with outreach to serve the public and to elevate the image of the LEL Bar in the eyes of the public, let me know of your interest in joining a Section Committee.

I am pleased to report that the state of the LEL Section is strong and is running on all cylinders. We are hovering around 2,500 lawyers; we are financially sound; we are taking active measures to become more diverse, and we are providing tremendous opportunities and value for our members. Thanks for your continued support.

Don Sapir
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From the Editor

Philip L. Maier

I hope by the time this edition is published that it has stopped snowing. If it hasn't, there are some interesting articles which you can read while indoors that hopefully will assist you in your practice. If it has stopped, you should probably read them anyway.

I would like to express my thanks to the authors for sharing their expertise with the labor and employment law community. Specifically, I would like to thank Donald Dowling and Norma Meacham for the articles concerning employee investigations. Robert Stulberg and Laureve Blackstone's article concerning the recent changes to the New York City Human Rights Law and Daniel Moar and Stacey Budzinski's article concerning mixed-motive discrimination claims under the Americans with Disabilities Act provide very interesting reading. Richard Zuckerman's article about actions an employer may take unilaterally is especially important in the present economic climate. Peter Ausili's article about using technology at trial in federal proceedings is essential reading for federal court practice, and no issue would be complete without John Gaal's contribution concerning ethics.

I would also like to offer my congratulations to Jason Jendrewski for capturing first prize in the Emanuel and Kenneth D. Stein Memorial Writing Competition. His article addresses the federal government's seizure of drug testing records. When talk turns to baseball and drugs, springtime is not far behind.

Please take note of the technology conference scheduled for April 28-30 at New York University, co-sponsored by our Section. A description of the conference is included on p. 52 in this issue, and it promises to be both interesting and informative.

Philip L. Maier

Conducting Internal Employee Investigations Outside the U.S.

By Donald C. Dowling, Jr.

When an American employee falls under suspicion of some type of on-job wrongdoing—be it bribery, sabotage, accounting fraud, sexual harassment, antitrust collusion, or some other wrongful act—conscientious and compliant U.S. multinationals have a good idea how to respond. By now, after so many highly publicized corporate scandals, strategies for conducting a domestic-U.S. internal investigation are becoming increasingly similar, although "best practices" differ depending on the context. (*See* Laura Brevetti, "Self Detection: So Key, So Difficult," *New York Law Journal*, July 13, 2009, at S2.)

In conducting an internal investigation *overseas*, a U.S. multinational may feel tempted to pull out its domestic-U.S. kit of state-of-the art investigation tools and strategies. But employment and data protection laws differ widely outside the U.S., which means American investigation strategies need significant retooling before export. After all, no multinational investigating illegality abroad can afford to be accused, itself, of illegality in how it conducts its investigation.

This is a 30-point checklist for adapting common U.S.-style internal investigation strategies to workplaces outside the U.S. Because laws in every country differ, as do the details of every internal investigation, this discussion cannot point out each legal hurdle that might impede an investigation anywhere in the world. Rather, this is an issue-spotting overview of the data and employment law issues likely to arise when a U.S. multinational conducts a U.S.-style investigation internationally. These 30 points are divided into four stages of an internal investigation: (I) launching an international investigation framework, (II) initial response to an allegation / suspicion, (III) interviewing witnesses, and (IV) communications, discipline, and remedial measures.

Stage I. Launching an International Investigation Framework: *Create a cross-border framework or protocol for how headquarters will conduct internal investigations into allegations or suspicions of workplace misconduct arising outside the U.S.*

1. **Implement a Code of Conduct**: Impose a code of conduct that prohibits all acts considered wrongful. Most major U.S. multinationals already impose on their worldwide workforces internal ethics codes that spell out the specific infractions their employees, worldwide, may not commit. These codes usually prohibit: insider trading, environmental crimes, bribery / payments violations, intellectual property infractions, accounting improprieties, discrimination / harassment, and other offenses. Some codes include an express provision addressing internal investigations. Be sure both the content and the launch (roll out) procedures of a global code comply with law in each affected jurisdiction. (*See* Donald C. Dowling, Jr., "Global Codes of Conduct," chapter 4 in *Compliance Guide for Executives* (Lexis / Matthew Bender 2009).)

2. **Launch a Whistleblower Hotline**: The *raison d'être* for a whistleblower hotline is to elicit allegations of wrongdoing, which then need to be investigated. Implement and communicate any international hotline consistent with applicable law. Sarbanes-Oxley-regulated multinationals must offer report "procedures" for the "confidential, anonymous submission by employees" of "complaints and concerns regarding questionable accounting or auditing matters" (Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, at § 301). Even non-SOX-regulated multinationals commonly outsource international hotlines to specialist hotline-answering firms. But hotline law in Europe is surprisingly complex. For example: Germany, Netherlands and other EU member states require consulting with employees before launching a hotline; Belgium, France, Spain and other states require making government filings to disclose a

hotline or get affirmative government approval; France, Germany and other states allow hotlines for reporting only a limited pool of infractions; France and Spain prohibit an employer from saying hotlines accept anonymous calls (*see* Donald C. Dowling, Jr., "Sarbanes-Oxley Whistleblower Hotlines Across Europe: Directions Through the Maze," 42 ABA *The International Lawyer* 1 (2008)). Also, in Hong Kong employees should consent to a hotline.

3. **Build Channels for Cross-Border Data Transfers**: In cross-border investigations, information identifying employees almost inevitably gets transmitted back to headquarters. Before undertaking a specific investigation, build channels allowing the legal "export" of investigation data. This is a keen issue in jurisdictions like Belgium and the Netherlands where laws impede cross-border transmissions of *workplace accusations* specifically. In Europe these channels include "model contractual clauses," "safe harbor," and "binding corporate rules." If existing channels fail expressly to cover "investigation" data, expand them. In Hong Kong an appropriate data-export channel can be employee-signed data-transfer consents (*see, e.g.*, Donald C. Dowling, Jr. and Jeremy Mittman, "International Privacy Law," chapter 14 in *Proskauer on Privacy* (PLI pub.)). Start early: Building these channels takes time, and it will be too late after a specific allegation or suspicion sparks an actual investigation.

4. **Grant Necessary Data Subject Access**: A basic investigatory best practice is to keep investigation files confidential to safeguard the integrity of the investigation and to protect witness / whistleblower confidentiality. Counterintuitively, data laws can actually require turning investigation notes and files over to targets or witnesses. In EU jurisdictions, employee "data subjects" enjoy broad rights to access, and to request deletion or "rectification" of, employer-maintained documents identifying them. In jurisdictions such as Hungary, employee rights are particularly strong. One EU opinion says investigation targets need to be notified they are being investigated as soon as there is no substantial risk that notice "would jeopardize" the investigation. (Opinion 1 / 2006, Article 29 Working Party, 00195 / 06 WP 117 (Feb. 1, 2006).) Balance the vital need for investigatory confidentiality against employees' legal rights. Work out a position before an investigation target demands immediate access. Articulate a defensible business case for delaying employee access.

5. **Disclose Investigation Procedures**: An in-house investigation framework or protocol is considered a system for processing employee data. As such, some jurisdictions require employers to disclose investigation frameworks to employee "data subjects" and to local government data agencies, and to inform and consult with employee representatives over investigation procedures (like U.S. "mandatory subject of bargaining" rules). This disclosure / consultation step will seem intrusive to U.S.-based multinationals, but having taken the step frees up an organization to conduct a broader investigation once the need arises. Government agents and employee representatives may be skeptical of investigation frameworks, so articulate a clear business case. Separately, be sure to declare "investigation procedures" as one express purpose for human resources data processing. Include "investigation purposes" as an express data-processing purpose in: data privacy policies, employee data processing notifications / consents, and EU-to-U.S. "model contractual clauses," "safe harbor," or "binding corporate rules" (see ¶ 17).

Stage II. Initial Response to an Allegation/ Suspicion: *Conduct a thorough and legally compliant initial response to an allegation or suspicion of misconduct outside the U.S.*

6. **Appoint an Investigation Team**: When a specific suspicion or allegation of wrongdoing outside the U.S. merits an internal investigation, decide who will supervise, and who else will be on the investigation team. No one on the team should have a conflict of interest. Consider including someone from the internal audit function and an in-house or outside lawyer subject to privilege (see ¶ 13). Include a local who is sensitive to local issues. Select a team competent in investigatory technique, familiar with applicable law, and experienced enough internationally to understand how investigations abroad differ from those in the U.S.

7. **Impose Immediate Discipline if Necessary**: Even where a target's guilt seems clear at the outset, an employer usually should not impose discipline until completing the investigation. After all, a chief purpose of an internal investigation is to find out whether discipline is appropriate, and suspending or terminating a seriously implicated employee early can compromise an investigation. But U.S. headquarters too often overlooks the fact that some jurisdictions impose a tight deadline—only a few days or weeks—to invoke an act of misbehavior as good-cause support for discipline. In Belgium, for example, an employee termination for good cause "must occur within three working days from the moment the facts are known to the [employer]; the facts must be notified to the dismissed [employee] by registered mail within three working days from the date of dismissal." (Carl Bevernage, "Belgium," chap. 3 in *Interna-*

tional Labor & Employment Laws vol. IA (ABA/BNA 2009), at 3-38.) The clock here can start as soon as an employer gets a credible allegation, not after it completes a full-blown internal investigation. Research and account for any such rules.

8. **Define Investigation Scope**: Decide on the scope of any specific investigation. Factor in: factual issues to investigate, legal issues in play, logistical, linguistic, and geographic barriers. In some cases a corporate board of directors resolution will be necessary, which can delimit scope. Where an allegation is anonymous, the fact of anonymity itself may restrict the permissible scope of the investigation: Under law in some countries an anonymous tip is *per se* less credible and hence weaker "probable cause" employment law support for conducting a broad investigation leading to discipline. (*See* Donald C. Dowling, Jr., *supra* ¶ 2, 42 ABA *The International Lawyer* 1, 11-16, 43-44.)

9. **Comply with Investigatory Procedure Laws**: Procedural laws in some jurisdictions reach internal investigations. Some jurisdictions actually prohibit non-government employers from conducting quasi-criminal internal investigations on the theory that private parties cannot intrude on the exclusive policing authority of government law enforcers. Identify any such rules and adapt the scope of an investigation accordingly or conduct the investigation outside the territorial reach of any such restriction. Comply with laws requiring the disclosure of evidence to law enforcement (see ¶ 27).

10. **Research Substantive Law**: Internal investigations seek evidence of wrongdoing and illegality, which raises an implicit question: *What* is wrong and illegal? In many overseas investigations a U.S. multinational's investigators focus on possible violations of U.S. laws with extraterritorial effect (federal trade sanctions laws, antitrust laws, discrimination laws, Foreign Corrupt Practices Act, Alien Tort Claims Act, etc.), but may overlook *local* substantive laws. A bribery investigation outside the U.S., for example, should investigate both FCPA violations and any violation of local domestic bribery law.

11. **Draft an Investigative Plan**: Any investigative plan outlining the specific investigation should account for data subject access rights (¶ 4) to the plan itself.

12. **Safeguard Confidentiality**: Work out a way to contain information about the specific allegation and the investigation. Disclose information about the allegation and investigation only to those who need to know (investigation team, retained experts, counsel), resisting the temptation to keep too wide a circle of management informed. Unless a self-identified whistleblower expressly consents otherwise, data laws may mandate preserving whistleblower confidentiality—which can be a challenge where circumstances point to a source. Transmit investigation data internationally in compliance with legal restrictions (¶ 3).

13. **Secure legal advice and attorney/client privilege**: If the investigation team does not include in-house or outside counsel, decide who will advise on legal questions. Account for lawyer-as-witness and privilege issues. (*See* John Nathanson, "Walking the Privilege Line," *New York Law Journal*, July 13, 2009, at S8.) Preserving attorney/client privilege in many jurisdictions may be fairly straightforward as to *outside* counsel but murkier as to *in-house* lawyers. Jurisdictions like Hungary do not recognize a viable in-house lawyer privilege. A broad overview published in *Inside Counsel* (12/07 at p. 50) lists the "EU member states that recognize privilege for the in-house bar" as "Denmark, Germany, Ireland, Luxembourg, Netherlands, Portugal, Romania, Spain, UK." But the *Akzo Noble* case seems inconsistent, as to the Netherlands (*Akzo Noble Chem. v. Commission*, EU Court of 1st Inst., cases T-125/03 and T-253/03 (Sept. 17, 2007) (privilege does not reach internal investigation report by Dutch in-house lawyer)). Check into privilege in each affected country.

14. **Account for U.S. Government Enforcement Issues**: Some investigations outside the U.S. respond to inquiries or enforcement actions of U.S. agencies like the Department of Justice [DOJ], the Securities Exchange Commission [SEC], and the Equal Employment Opportunities Commission. These investigations raise the special issues of privilege waiver and advancing defense fees that are subject to changing U.S. government positions (*cf.* the SEC Seaboard Report and the DOJ McNulty Memorandum that had replaced the DOJ Thompson Memorandum and DOJ McCallum Memorandum, then withdrawn). Addressing these issues *outside the U.S.* gets complex; indeed, the various U.S. government positions here have been criticized in the international context to the extent they have been said to ignore issues under foreign law. Proceed carefully.

15. **Safeguard Disclosures to and from Experts**: Retained outside experts (forensic accountant, computer specialist, translator, etc.) should contractually commit to upholding confidentiality and applicable data laws. Safeguard the attorney/client privilege over disclosures to experts (¶ 13). In some jurisdictions an expert's report that identi-

fies specific individuals may be subject to disclosure (¶ 4).

16. **Impose an Enforceable Litigation Hold**: A common practice among U.S. multinationals is to require employees to preserve data possibly relevant to an internal investigation by ordering them to suspend routine data destruction practices such as automatic e-ail deletion. Outside the U.S. these litigation-hold instructions present few problems, although in some jurisdictions an overbroad "do not delete" order in place too long will need to be balanced with the data law prohibition against retaining obsolete personal information.

17. **Secure Evidence *Within* Management's Physical Custody**: Collect and preserve relevant documents and electronic files that management can readily access. Data laws in Argentina, Europe and elsewhere may prohibit management from "processing" for investigatory purposes even information already in company files unless the reasons the data had originally been collected expressly included "investigatory purposes"—which too often will *not* be the case. As such, be sure a stated reason for processing / storing documents is for internal "investigatory purposes" (see ¶ 5).

18. **Gather Evidence *Outside* Management's Physical Custody**: Gathering documents / data / files that identify individuals but are not in management's readily accessible files (such as e-mails warehoused on the company server or employee Internet-use records) can be a challenge in jurisdictions with tough data laws. The employer may have expressly purported to reserve its "right" to gather this evidence, but in many jurisdictions this reservation-of-right may be unenforceable. Get tailored data and employment law advice before searching e-mails / Internet access / physical work spaces, before ordering polygraphs or drug tests, before launching new surveillance tools, and before surreptitiously monitoring employees to catch a wrongdoer in the act.

Stage III. Interviewing Witnesses: *Interview witnesses in a way that complies with local employment and data-protection laws.*

19. **Verify Sources**: Verify the source of an allegation, where possible. Check whether an accuser will stand by his or her accusations.

20. **Notify Target and Witnesses**: Data law in some jurisdictions can require notifying targets and implicated witnesses that investigation notes identify them, and can require offering them limited access to a pending-investigation file (¶ 4). Where necessary, tell the target and witnesses about the investigation file and inform them of their data-law rights—even though doing this conflicts with the common investigatory practice of keeping an evolving investigation confidential. Strike a balance that complies with legal mandates. Genuinely "anonymizing" names / identities in an investigation file, although rarely practical, eliminates this data-law disclosure obligation.

21. **Instruct Witnesses to Cooperate, as Permissible**: American employers often want to instruct employee witnesses to "cooperate" with an investigation. But outside of U.S. employment-at-will, forcing employees to "cooperate" raises employment law challenges. Overseas employees may in effect invoke a legal right to remain silent analogous to the right against self-incrimination in a U.S. criminal investigation. Rules in Europe in the whistleblowing context affirmatively forbid employers from unilaterally imposing mandatory reporting rules that force witnesses to disclose incriminatory information about co-workers. (*See* Donald C. Dowling, Jr., *supra* ¶ 2, 42 ABA *The International Lawyer* 1, 44-45.) An employer order (as opposed to a request) to "cooperate" with an investigation is arguably the same as an impermissible mandatory reporting rule. As such, discipline for "refusing to cooperate" may not be for good cause.

22. **Comply with Consultation and Representation Rules**: Local labor laws may require consulting with employee representatives before interviewing a slate of employee witnesses, and some jurisdictions require allowing a representative to accompany an employee witness in an interview, analogous to American *Weingarten* rights (*NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975)). Grant any mandatory interview-context consultation and representation rights.

23. **Give *Upjohn* Warnings**: A lawyer interviewing American employee witnesses for an employer often gives so-called *Upjohn* warnings (*Upjohn v. U.S.*, 449 U.S. 383 (1981)), telling employees he represents the employer and may be covered by confidentiality obligations and attorney / client privilege, but that the employer can waive its privilege and offer up interview information to third parties, including law enforcement. (*See* Robert Jossen & Neil Steiner, "The *Upjohn* Pitfalls of Internal Investigations," *New York Law Journal*, July 13, 2009, at S4.) As U.S. law, *Upjohn* is not necessarily authoritative abroad, but *Upjohn*-style warnings in many contexts are a clear best practice internationally. Also warn witnesses not to discuss the case with others: An employee discussing a case could violate data laws.

Stage IV. Communications, Discipline, Remedial Measures: *Memorialize, preserve, and report on investigation results, and take disciplinary and remedial steps, consistent with applicable employment, data and criminal laws.*

24. **Involve the Audit Function**: If an investigation uncovered financial impropriety, monetary losses, or bribery / improper payments, address the accounting and financial-statement issues. Throughout any such internal investigation, be sure to manage strategy with inside and outside auditors. Comply with U.S. Foreign Corrupt Practices Act accounting (payment-disclosure-reporting) rules and other applicable mandates.

25. **Impose Post-Investigatory Discipline**: Where the wrongdoer was not already disciplined at the outset of the investigation (¶ 7), discipline consistent with the investigation's findings. Comply with local substantive law on good cause for discipline and with local disciplinary / grievance procedures. In France, UK, and elsewhere, even for-cause terminations of the obviously guilty must follow detailed procedures. Comply with rules against retaliation, such as rules protecting against "victimizing" a whistleblower.

26. **Report to Upper Management**: Consider the pros and cons of delivering an oral versus a written report to upper management detailing the investigation outcome, keeping in mind restrictions on "exporting" investigation data (¶ 3). Data protection laws and privilege rules may weigh against a written report. Limit the circle of upper management with access to the report to those with a demonstrable need to know.

27. **Disclose to Authorities Appropriately**: Consider disclosing to local police evidence of criminal acts uncovered in the investigation. Absent a valid order, data law in some jurisdictions may actually restrict an employer's freedom to volunteer, even to law enforcement, personal information learned in an investigation. Reporting to police could also raise an employment law challenge—employees might argue that a "denunciation" amounts to improperly imposed discipline. On the other hand, local law in some jurisdictions *requires* denunciation: In Slovakia, for example, parties with knowledge of a criminal act must notify authorities (Slovak Crim. Code no. 300 / 2006).

28. **Ensure External Communications Comply**: Ensure any disclosures in internal employee communications, public filings, or press releases that mention the investigated incident are defensible. Heed applicable data-law restrictions against disclosing personal information, against transmitting personal information internationally, and against invading personal privacy. Stay cognizant of libel theories in applicable jurisdictions.

29. **Implement Appropriate Remedial Measures**: Implement remedial measures—steps to prevent the problem from recurring, such as new work rules and new oversight / security / monitoring / surveillance tools. New remedial measures must comply with substantive law such as data protection rules that restrict employee monitoring. Also comply with procedural rules: Under vested / acquired rights concepts outside U.S. employment-at-will, new and materially-tighter terms / conditions of employment may have to be consulted with employees or representatives. Indeed, in the U.S. domestic labor-union context, new surveillance measures are a mandatory subject of bargaining (*Brewers v. Anheuser-Busch*, 414 F.3d 36 (D.C. Cir. 2005)).

30. **Preserve Investigation Data Appropriately**: Preserve the investigation file (notes, reports, interview transcripts) consistent with law and investigatory best practices. In some jurisdictions, file-preservation can conflict with the data-law duty to purge personal information after it becomes obsolete, when no compelling business case for retention remains. This can mean destroying an investigation file surprisingly soon after an investigation ends—within two months, under one influential EU recommendation (Opinion 1 / 2006, *supra* ¶ 4) although an employer might be able to justify retaining a file until the statute of limitations runs (*see* Donald C. Dowling, Jr., *supra* ¶ 2, 42 ABA *The International Lawyer* 1, 51). One way to retain a file in compliance with this mandate would be to redact names and other information identifying specific people.

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Exporting U.S. best practices for conducting an international investigation into a suspicion or allegation of employee wrongdoing requires planning and flexibility. Adapt U.S.-style investigatory strategies for the very different realities of the outside-U.S.-workplace environment. Comply with the strict data and employment laws overseas.

Donald C. Dowling, Jr. is International Employment Counsel at White & Case LLP, where he leads a team of lawyers advising U.S.-based multinational clients on cross-border employment law compliance, on issues such as global codes of conduct, global reductions-in-force, and on multi-jurisdictional employee investigations.

LIKE A NATION ITSELF: An Analysis of Recent Decisions Affirming "The Uniquely Broad and Remedial Purposes" of the New York City Human Rights Law

By Robert B. Stulberg and Laureve D. Blackstone

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"It isn't like the rest of the country—it is like a nation itself—more tolerant than the rest in a curious way."

—John Steinbeck

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John Steinbeck's view of New York City as a uniquely liberal jurisdiction resonates in a series of recent state and federal court decisions interpreting the New York City Human Rights Law ("NYCHRL").[1] Analyzing the NYCHRL in light of the Local Civil Rights Restoration Act of 2005 ("the Restoration Act") that amended it,[2] those courts have held that the City law is both more protective than comparably worded state and federal statutes, and unconstrained by judicial doctrines limiting those statutes. In this paper, we will examine these decisions and assess their impact on the practice of employment discrimination law in New York City.

A. The Restoration Act

In 2005, the New York City Council amended the NYCHRL, through the Restoration Act, "to 'ensure construction of the City's human rights law in line with the purposes of fundamental amendments to the law enacted in 1991,' and to reverse the pattern of judicial decisions that had improvidently 'narrowed the scope of the law's protections since its enactment.'"[3] Although the NYCHRL was, in many respects, more protective of victims than its federal and state counterparts,[4] trial and appellate courts had restricted the law's impact by analyzing it in the same way they had analyzed those counterparts.[5] In the Restoration Act, the Council sought to "underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes." Restoration Act, § 1. To that end, § 8-130 of the NYCHRL, as amended by the Restoration Act, states:

> The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.

B. *Williams* and Its Progeny

The import of this provision was not fully recognized until 2009, when state and federal appellate courts applied the Restoration Act in a variety of discrimination and retaliation cases. The first, and most expansive, of those decisions was *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009), a review of a grant of summary judgment against a *pro se* plaintiff's hostile work environment, sex discrimination and retaliation claims under the NYCHRL and the New York State Human Rights Law ("NYSHRL").[6] Although the court affirmed the lower court judgment, it rejected its analysis of the NYCHRL claims, which had relied on cases interpreting federal and state anti-discrimination statutes. The Restoration Act, the First Department held, "now explicitly requires an independent liberal construction analysis *in all circumstances*, even where state and federal civil rights law have comparable language" (emphasis added).[7] The court explained:

> …interpretations of state or federal provisions worded similarly to City HRL provisions may be used as aids in interpretation only to the extent that the counterpart provisions are viewed "as a floor below which the City's Human Rights Law cannot fall, rather than a ceiling above which the law cannot rise" (§ 1), and only to the extent that those state or federal law decisions may provide guidance as to the "uniquely broad and remedial" provisions of the local law.[8]

In so holding, the court emphasized that the City Council intended the NYCHRL to protect victims of discrimination:

> There is significant guidance in understanding the meaning of the term "uniquely broad and remedial…." In case after case, the balance struck by the Amendments favored victims and the

> interests of enforcement over the claimed needs of covered entities in ways materially different from those incorporated into state and federal law.
>
> The Council directs courts to the key principles that should guide the analysis of claims brought under the City HRL:… victims of discrimination suffer serious injuries, for which they ought to receive full compensation.[9]

The First Department reiterated these holdings in three more 2009 decisions: *Vig v. New York Hairspray Co.*, 885 N.Y.S.2d 74, 78 (1st Dep't 2009) (a "distinct" analysis must be performed for disability discrimination claims brought under the NYCHRL); *Phillips v. City of New York*, 66 A.D.3d 170, 180 (1st Dep't 2009) (NYCHRL claims require a distinct analysis, because the disability provisions of the NYSHRL and the NYCHRL are not equivalent); *Brightman v. Prison Health Serv., Inc.*, 878 N.Y.S.2d 357, 358 (1st Dep't 2009) ("[The NYCHRL] is more liberal than either its state or federal counterpart.").[10]

Six months after *Williams*, the Second Department acknowledged "the current liberalized standards of interpretation" of the NYCHRL, but held that the Restoration Act did not apply to cases filed before its effective date, October 3, 2005. *Barnum v. New York City Transit Auth.*, 62 A.D.3d 736, 738-39 (2d Dep't 2009). A subsequent Kings County Supreme Court decision held that "[a]lthough a First Department case, *Williams* is nevertheless binding on this court, at least until the Second Department issues a contrary ruling." *Lampner v. Pryor Cashman*, No. 10894/07, slip op., (Sup. Ct., Kings Co. Nov. 6, 2009) (citing *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984)).[11]

In October 2009, the United States Court of Appeals for the Second Circuit embraced the *Williams* holding in *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 277-78 (2d Cir. 2009). Vacating the lower court's dismissal of NYCHRL disability discrimination claims, the Second Circuit held that the City law "can no longer be read as co-extensive with federal law" because the Restoration Act has "confirm[ed] the legislative intent to abolish 'parallelism' between the [NYCHRL] and federal and state anti-discrimination law." [12] Quoting the *Williams* holding that interpretations of similarly worded state and federal statutes must be viewed "as a floor below which the [NYCHRL] cannot fall," the Second Circuit declared: "There is now a one-way ratchet." [13] The Second Circuit reiterated this doctrine in *Kolenovic v. ABM Indus. Inc.*, No. 09-0601-cv, 2010 WL 227660, at *1 (2d Cir. Jan. 21, 2010) (vacating a grant of summary judgment to the defendant on the NYCHRL claim because the NYCHRL hostile work environment claim "should have been evaluated separately from its federal and state counterpart[s]"). Lower federal courts in the Southern and Eastern Districts of New York have followed suit.[14]

C. The Fall of Parallelism

As a result of *Williams* and its progeny, courts have declined to apply to the NYCHRL well-established doctrines limiting the protections of state and federal anti-discrimination laws, including the "severe or pervasive" standard governing hostile work environment claims, the "but for" standard governing age discrimination claims, the "reasonable accommodation" standard governing disability discrimination claims, the affirmative defense to vicarious liability for supervisor harassment claims, and the "materially adverse" standard governing retaliation claims.

1. The "Severe or Pervasive" Standard

In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), the United States Supreme Court held that a hostile work environment is established when conditions are "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris*, 510 U.S. at 21. The Supreme Court described this holding as a "'middle path' between making actionable any conduct that is merely 'offensive and requiring the conduct to cause a tangible psychological injury.'" *Id.* The New York State Court of Appeals applied this standard to the NYSHRL in *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 309-10 (2004).

In *Williams*, however, the court held that "the [severe or pervasive] rule (and its misapplication) has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender."[15] Therefore, the court concluded, a more liberal rule was required for sexual harassment claims brought under the NYCHRL:

> The City HRL is now explicitly designed to be broader and more remedial than the Supreme Court's "middle ground," a test that had sanctioned a significant spectrum of conduct demeaning to women. With this broad remedial purpose in mind, we conclude that *questions of "severity" and "pervasiveness" are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability* (emphasis added).[16]

Cautioning that "the broader purposes of the City HRL do not connote an intention that the law operate as a 'general civility code,'" however, the *Williams* court recognized "an affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"[17]

Since *Williams*, both federal and state courts have declined to apply the "severe or pervasive" standard to claims brought under the NYCHRL. *Kolenovic v. ABM*

Indus. Inc., No. 09-cv-0601, 2010 WL 227660, at *1 (2d Cir. Jan. 21, 2010) (affirming summary judgment on state and federal claims, but vacating and remanding the NYCHRL claim, so that the district court can decide whether to exercise supplemental jurisdiction over it and how to interpret any applicable NYCHRL provisions); *Costantin v. New York City Fire Dep't*, No. 06-cv-4631, 2009 WL 3053851, at *19 (S.D.N.Y. Sept. 22, 2009) ("The City law…merely requires that a plaintiff show more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" (quoting *Williams*); *Dixon v. City of New York*, No. 03-cv-343, 2009 WL 1117478, at *1 (E.D.N.Y. April 24, 2009) (on reconsideration after *Williams*, permitting NYCHRL hostile work environment claims to go forward); *Zustovich v. Harvard Maint., Inc.*, No. 08-cv-6856, 2009 WL 735062, at *12 (S.D.N.Y. Mar. 20, 2009) (dismissing state, but not City, hostile work environment claim due to the "liberal pleading standard and protective nature of the [NYCHRL]"); *McHam v. City of New York*, Index No. 16278-2007, slip op. at 3 (Sup. Ct., Queens Co. Dec. 10, 2009) (under NYCHRL, "liability should be determined by the existence of unequal treatment and questions of severity and frequency reserved for consideration of damages"); *Lampner*, No. 10894/07, slip op. (Sup. Ct., Kings Co. Nov. 6, 2009) (plaintiff satisfied "petty slights or trivial inconveniences" threshold where he alleged that, due to his religious beliefs, defendant "put him in a cubicle, put another employee of lower rank in his office, took away his privileges, monitored his phone conversations, and encouraged him not to continue observing his religious tenets").[18]

2. The "But-For" Standard

In *Gross v. FBL Fin. Servs., Inc.*, No. 08-441, 557 U.S. __, 129 S. Ct. 2343 (2009), the United States Supreme Court held that a plaintiff alleging age discrimination under the Age Discrimination in Employment Act ("ADEA") must prove that age was the "but-for" cause of the employer's adverse decision.[19] The Court rejected the mixed-motive analysis, applicable in the Title VII context, where a plaintiff need only show that an improper consideration, such as race or gender, was a motivating factor in the adverse decision.[20]

At least one court has rejected the application of *Gross* to claims brought under the NYCHRL. *Weiss v. JP Morgan Chase & Co.*, No. 06-cv-4402, 2010 WL 114248, at *1 (S.D.N.Y. Jan. 13, 2010). The court in *Weiss* held that the "but-for" causation standard applicable to plaintiff's age discrimination claim under the ADEA is not applicable to plaintiff's claim under the NYCHRL, citing the Restoration Act and subsequent cases.[21] "[T]he NYCHRL requires only that a plaintiff prove that age was 'a motivating factor' for an adverse employment action."[22]

3. The Reasonable Accommodation Standard

Since *Williams*, state and federal appellate courts have acknowledged the "very different conception" of reasonable accommodation of disabled persons under the NYCHRL.[23]

In *Phillips*, the plaintiff claimed that she had been denied reasonable accommodation within the meaning of the NYCHRL when the City of New York had denied her request for a one-year medical leave on the ground that an employee in a non-competitive civil service title was not eligible for such leave.[24] In finding that the City had violated the NYCHRL, the First Department found that the City Council had made a policy choice "deem[ing] all accommodations reasonable except for those a defendant proves constitute an undue hardship."[25] The First Department held that, unlike the state and federal law concepts of "reasonable accommodation," "there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation…[a]nd there are no accommodations that may be 'unreasonable' if they do not cause undue hardship."[26]

In *Loeffler*, a widow and her children alleged that the defendant hospital had violated the NYCHRL by failing to provide her and her deceased husband, who were both deaf, with a sign language interpreter, which she contended was a statutorily required reasonable accommodation. The Second Circuit vacated the lower court's dismissal of the plaintiffs' disability discrimination and associational discrimination claims under the NYCHRL, in order for the district court to conduct "an independent liberal construction'" of those claims in the first instance.[27]

4. The *Faragher/Ellerth* Affirmative Defense

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), the United States Supreme Court held that although an employer was subject to vicarious liability to a victimized employee for a hostile environment created by a supervisor with immediate (or successively higher) authority over the employee, the employer could raise an affirmative defense to liability or damages by proving, by a preponderance of the evidence:

> …two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[28]

The plain language of the NYCHRL appears to preclude this affirmative defense. *See* NYCHRL § 8-107(13)(b) ("An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent…where: (1) the employee or agent exercised managerial or supervisory responsibility"), and one state court has so held. *Smallen v. New York Univ.*, No. 106564/06, slip op. (Sup. Ct., N.Y. Co. July 8, 2009).

In *Zakrzewska v. New School*, 598 F. Supp. 2d 426 (S.D.N.Y. 2009), however, the court noted that although "the plain language of Section 8-107 [of the NYCHRL] is inconsistent with" the *Faragher / Ellerth* defense, the applicability of that defense to sexual harassment and retaliation claims under the NYCHRL is not "free from doubt." For that reason, the *Zakrzewska* court certified the question for interlocutory appeal to the Second Circuit, and the Second Circuit certified it to the New York Court of Appeals.[29] As of February 2010, the Court of Appeals had not decided the question.

Since the question was certified to the Court of Appeals, two federal courts in the Eastern District of New York have avoided the issue. In *Suarez v. American Stevedoring, Inc.*, the court held that it did not need, at the summary judgment stage, to determine whether the *Faragher / Ellerth* defense applied.[30] The court dismissed plaintiff's disparate treatment claims under the NYCHRL because "'no construction of the NYCHRL, no matter how broad, would compel a different result.'"[31] In *Audrey v. Career Institute of Health and Technology*, the magistrate judge recommended that, because *Zakrzewska* had certified the *Faragher / Ellerth* question to the New York Court of Appeals, it was inappropriate to grant summary judgment to defendant on plaintiff's NYCHRL hostile work environment claim on the basis of the affirmative defense. The court noted, however, that if the Court of Appeals permitted the affirmative defense, the defendant should be permitted to renew its motion.[32]

5. The "Materially Adverse" Standard

Although the NYCHRL was amended in 1991 to proscribe retaliation "in any manner" (Administrative Code § 8-107[7]), state and federal courts interpreted that provision to make actionable only conduct that caused a materially adverse impact on terms and conditions of employment.[33]

In response to those decisions, the Restoration Act amended § 8-107(7) to emphasize that " [t]he retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity."

One year after the Restoration Act became law, the United States Supreme Court, in *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), held that a plaintiff alleging workplace retaliation must show "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (citations omitted). In *Williams*, the court noted that, although this standard was "similar" to the NYCHRL standard, the Restoration Act "specifically reject[ed] a materiality requirement."[34] Thus, the court held, "the language of the [NYCHRL] does not permit any type of challenged conduct to be categorically rejected as nonactionable."[35]

Since *Williams*, a number of courts have upheld the NYCHRL's broad retaliation prohibition. *Brightman*, 878 N.Y.S.2d at 358 ("Defendants' alleged retaliatory acts… also satisfy the requirement of the [NYCHRL] that they 'must be reasonably likely to deter a person from engaging in protected activity'"); *McHam v. City of New York*, Index No. 16278-2007, slip op. at 5 (Sup. Ct., Queens Co. Dec. 10, 2009) ("[t]he NYCHRL bars 'any manner' of retaliation, and 'need not result in an ultimate action with respect to employment…or in a materially adverse change in the terms and conditions of employment.… Retaliation is to be weighed in a context-specific assessment of whether conduct had a 'chilling effect' on protected activity—a judgment that a 'jury is generally best suited to evaluate...'" (quoting *Williams*, 61 A.D. 3d at 70–71.); *Winston*, 633 F. Supp. 2d at 48 (noting that the NYCHRL bars "any manner" of retaliation).

D. Extraterritorial Application

In 2009, state and federal courts also expanded the circumstances in which the NYCHRL can be given extraterritorial application. Prior to 2009, the courts applied the so-called "impact rule," which held that, in order to apply the NYCHRL to a claim, the impact of the alleged violation must be felt inside New York City.[36]

In *Hoffman v. Parade Publ'ns*, 65 A.D. 3d 48 (1st Dep't 2009), the court held that a non-resident can bring a claim under the NYCHRL and the NYSHRL when "the alleged discrimination occurred within New York City and New York State respectively."[37] Since the plaintiff—a traveling salesman who reported to and occasionally met with management in New York City, and who was terminated by the company's president via a telephone call made from New York City—had alleged that the termination decision was made in New York City, the court declined to dismiss the claim.[38]

Courts in the Southern and Eastern Districts of New York have adopted the *Hoffman* analysis. In *Rohn Padmore, Inc. v. LC Play, Inc.*, __ F. Supp. 2d __, 2010 WL 93109 (S.D.N.Y. 2010), the plaintiff, who worked primarily at his home in Los Angeles for a manufacturer located in New York City, was terminated via an e-mail sent from the company's New York offices.[39] The court concluded that the NYSHRL and NYCHRL "apply when a discriminatory act is committed in New York, even if the impact of that act is felt outside of New York."[40] In *Spilkevitz v. Chase Inv. Servs.*, No. 08-cv-3407, 2009 WL 2762451 (E.D.N.Y. Aug. 27, 2009), the court dismissed the NYCHRL claims where the plaintiff, who worked at a branch office of defendant in Long Island, alleged that she had complained about her mistreatment to a high-ranking employee at the defendant's New York City headquarters, but none of the other alleged conduct occurred in New York City.[41] Similarly, in

Popa v. PriceWaterhouseCoopers, LLP, No. 08-cv-8138, 2009 WL 2524625 (S.D.N.Y. Aug. 14, 2009), the court dismissed the NYCHRL claims because the plaintiff, who worked in defendant's Chicago and London offices, did not allege that "any of the alleged discriminatory or retaliatory acts occurred in New York." [42]

E. Conclusion

Recent decisions interpreting the NYCHRL have brought to fruition the vision of the Restoration Act's drafters: a uniquely liberal law dedicated to protecting and compensating victims of discrimination and retaliation, unfettered by judicial doctrines restricting the protections of similar state and federal statutes. From a plaintiff's perspective, the NYCHRL now provides a powerful avenue for asserting and vindicating discrimination and retaliation claims. While such claims still must be properly pleaded and supported, they are far less likely to be dismissed or rejected on summary judgment than their state and federal counterparts. From a defendant's perspective, the NYCHRL presents a formidable challenge, as claims under that law no longer can be viewed as carbon copies of their state and federal counterparts, and cannot be defended on grounds available under those counterparts.

Endnotes

1. N.Y.C. ADMIN. CODE §§ 8-101 *et seq.* as amended.
2. N.Y.C. LOCAL LAW NO. 85 (Oct. 3, 2005).
3. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62,67 (1st Dep't 2009), quoting N.Y.C. Council, *To amend the administrative code of the City of New York, in relation to the human rights law*, Report of the Governmental Affairs Div., Comm. on Gen. Welfare, Bill De Blasio, Chair, Aug. 17, 2005, *available at* http://www.antibiaslaw.com/sites/default/files/files/CommitteeReport081705.pdf.
4. As amended in 1991, the NYCHRL included, among other things, a prohibition against sexual orientation discrimination (§ 8-107), broad definitions of "gender" (§ 8-102(23)), "disability" (§ 8-102(16)) and "reasonable accommodation" (§ 8-102(18)), a prohibition against retaliation "in any manner" (§ 8-107(7)), uncapped punitive and compensatory damages (§ 8-502(a)), and a private right of action without administrative exhaustion (§ 8-502(a)).
5. *See* Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 Fordham Urb. L.J. 255, 256 (2006). This article has been cited as "an extensive analysis of the purposes of the [Restoration Act], written by one of the Act's principal authors." *Ochei v. Coler/Goldwater Mem. Hospital*, 450 F.Supp.2d 275, 283 n.1 (S.D.N.Y. 2006).
6. N.Y. Exec. Law § 296 (a)(1), (6), (7) (McKinney 2009).
7. *Williams*, 61 A.D.3d at 66 (emphasis added).
8. *Id.* at 66-67.
9. *Id.* at 68 (citations omitted).
10. Since *Williams*, another panel in the First Department has rejected the application of *Williams*. *See Brook v. Overseas Media, Inc.*, __ N.Y.S.2d __, 2010 WL 87513, at *1 (1st Dep't Jan. 12, 2010). That panel included Justice Richard T. Andrias, who concurred in the result only in *Williams*, but objected to the court's "deciding an issue that was raised neither below nor on appeal" (61 A.D.3d at 81-82). Justice Andrias also dissented in *Phillips*, 66 A.D.3d at 190-207.
11. N.Y.L.J., Nov. 12, 2009 (*available at* http://docs.google.com/View?id=dmnhqtn_136f2njv9dt).
12. *Loeffler*, 582 F.3d at 277–78.
13. *Id.* at 278.
14. *See Weiss v. JP Morgan Chase & Co.*, No. 06-cv-4402, 2010 WL 114248, at *1 (S.D.N.Y. Jan. 13, 2010); *Fowler v. Scores Holding Co., Inc.*, __ F. Supp. 2d __, 2009 WL 5178475, at *5 (S.D.N.Y. 2009); *Panzarino v. Deloitte & Touche LLP*, No. 05-cv-8502, 2009 WL 3539685, at *9-10 (S.D.N.Y. Oct. 29, 2009); *Costantin v. New York City Fire Dep't*, No. 06-cv-4631, 2009 WL 3053851, at *11 (S.D.N.Y. Sept. 22, 2009); *Fleming v. MaxMARA USA, Inc.*, 644 F. Supp. 2d 247, 268–69 (E.D.N.Y. 2009); *Winston v. Verizon Servs. Corp.*, 633 F. Supp. 2d 42, 48 (S.D.N.Y. 2009); *Zakrzewska v. New School*, 598 F. Supp. 2d 426, 437 (S.D.N.Y. July 27, 2009); *Dixon v. City of New York*, No. 03-cv-343, 2009 WL 1117478, at *1 (E.D.N.Y. April 24, 2009); *Zustovich v. Harvard Maint., Inc.*, 2009 WL 735062, at *11 (S.D.N.Y. Mar. 20, 2009).
15. *Williams*, 61 A.D.3d at 73.
16. *Id.* at 76 (emphasis added).
17. *Id.* at 79-80.
18. *See also Panzarino v. Deloitte & Touche LLP*, No. 05-cv-8502, 2009 WL 3539685, at *9-10 (S.D.N.Y. Oct. 29, 2009) (holding that "less egregious conduct than required under Title VII may support a hostile work environment claim under the NYCHRL" but granting summary judgment to defendant on NYCHRL claim, because, even under a liberal analysis, plaintiff had "failed to frame any genuine issue of fact as to a hostile work environment"); *Fleming v. MaxMARA USA, Inc.*, 644 F. Supp. 2d 247, 268–69 (E.D.N.Y. 2009) (holding that *prima facie* case of hostile work environment was not established where plaintiff alleged one racially charged remark made several years prior to her termination).
19. *Gross*, 129 S. Ct. at 2349.
20. *Id.*
21. *Weiss*, 2010 WL 114248, at *1.
22. *Id.*
23. *Phillps*, 66 A.D.3d at 180.
24. *Id.* at 172.
25. *Id.* at 182.
26. *Id.*
27. *Loeffler*, 582 F.3d at 277–78.
28. *Faragher*, 524 U.S. at 807.
29. *Zakrzewska v. New School*, 574 F.3d 24, 28 (2d Cir. 2009).
30. *Suarez v. American Stevedoring, Inc.*, No. 06-cv-6721, 2009 WL 3762686, at *26 (E.D.N.Y. Nov. 10, 2009).
31. *Id.* (quoting *Wilson*, 2009 WL 873206, at *29).
32. *Audrey v. Career Institute of Health and Technology*, No. 06-cv-5612, slip op. at 31 (E.D.N.Y. Jan. 12, 2010) (Report & Recommendation of S. Gold, U.S.M.J.).
33. *Williams*, 61 A.D.3d at 70.
34. *Id.* at 71 n.12.
35. *Id.*
36. *Shah v. Wilco Sys., Inc.*, 27 A.D.3d 169, 176 (1st Dep't 2005).
37. *Hoffman*, 65 A.D. 3d at 51.
38. *Id.* at 49, 57.
39. *Rohn Padmore* at 2010 WL 93109, *5.
40. *Id.* at *8.
41. *Spilkevitz*, 2009 WL 2762451, at *5.
42. *Popa*, 2009 WL 2524625, at *6.

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Federal Practice: Using Technology at Trial

By Peter J. Ausili

Introduction

To successfully bring or defend a federal civil action, trial counsel must learn how to use courtroom technology effectively. To do so, counsel must understand and appreciate the practical, legal, and ethical concerns raised by the use of courtroom technology. Although only a small percentage of federal civil actions reach trial, employment discrimination and other labor-related actions represent a significant percentage of those that do. Consequently, trial counsel handling labor and employment actions must learn not only how to use courtroom technology, such as document cameras, presentation software, and videoconferencing, but also must understand and appreciate the many practical, legal, and ethical concerns it raises, including its impact on the fact-finder and the various procedural and evidentiary issues related to presenting evidence and examining witnesses via technology. Below, I briefly discuss many of the fundamental concerns that guide the effective use of courtroom technology.

A. Preliminary Concerns

1. **Plan in advance**. Sufficiently before trial, counsel should determine what technology / equipment is available in the courtroom, what technology / equipment counsel desires to bring to and use in the courtroom, and whether opposing counsel will be using some form of technology, such as electronic exhibits or illustrative aids, during trial. Often, counsel on one side of the case is familiar with courtroom technology and plans to utilize it at trial. If opposing counsel is not familiar or comfortable with courtroom technology, he or she must decide whether his or her client will be at a disadvantage with the fact-finder if he or she does not also utilize courtroom technology and, at the very least, learn to respond appropriately to the other side's use of electronic exhibits and illustrative aids.

2. **Additional equipment**. Counsel should alert the court sufficiently before trial whether they intend to bring additional equipment into the courtroom.

3. **Videoconferencing**. Counsel should alert the court sufficiently before trial whether they intend to utilize technology that may need advance preparation and planning, such as videoconferencing.

4. **Backup equipment and alternative means**. Counsel and the court should determine what backup equipment or alternative means exist if the equipment fails. Counsel should have backup equipment available, such as a traditional overhead system, and paper copies of all exhibits and displays as a last resort (i.e., doing it the old-fashioned way).

   – If all files are on a laptop, counsel should have (1) an extra laptop containing the files; and (2) a backup copy of software and files on CD, floppy disk, etc.

   – Counsel should make sure the court has an extra light bulb for the projector, as bulbs are very expensive and may not be immediately obtainable.

5. **Operators of equipment**. Counsel should identify for the court the people who will be operating the equipment, whether co-counsel, paralegals or others. Operators should be especially responsive to instructions from the court (particularly if the court does not have a "kill switch"—an override function that allows the court to turn off the audio and / or video of a display upon an objection).

6. **Inspection and testing of court's equipment**. Counsel and their staff should request from the court an opportunity to inspect and test equipment in the courtroom, particularly to determine compatibility of their equipment to the court's equipment.

7. **Sufficient audio**. Counsel must confirm that the audio in the courtroom is sufficient. If supplemental audio equipment is needed, it must be compatible with the court's system.

8. **Reasonably viewable displays**. The display areas must be reasonably viewable to the jurors, judge, law clerk, and counsel (and even the public). Counsel should consider that the projection of material may reduce crispness of the characters or detail of the visual display as compared to the appearance of the same material on a computer monitor; accordingly, counsel may want to choose simpler fonts when enlarging, since fonts with more flourishes will be less crisp when enlarged.

9. **Special accommodations for trial participants**. Counsel should determine sufficiently before trial whether a participant at trial will need a special accommodation available through some form of technology. For instance, if a witness cannot communicate through sign language or handwriting, the witness may be able to do so through a computer or similar device.

10. **Hearing-impaired trial participants**. Judicial Conference policy is to accommodate hearing-impaired counsel, parties, and witnesses.

11. **Kill switch for court**. Counsel should inquire whether the court has a kill switch or override for removing electronic exhibits or illustrative aids from the jurors' view and hearing. Otherwise, responsibility for removing electronic exhibits or illustrative aids falls on counsel.

B. Court Reporting Concerns

1. **Availability of real-time reporting**. If real-time reporting is available, and the parties choose to use it, they should consult with the court reporter before trial to make sure that the appropriate equipment is available and appropriate connections can be made.

2. **Access to real-time transcript**. It must be determined who will have access to the real-time transcript. Some judges have real-time displays on the bench. If the court reporter provides real-time reporting, counsel may request access, although the costs may be significant.

3. **Witness-access issues**. Cross-examining counsel may not want the witness to have access to the real-time transcript. If the witness has access, cross-examining counsel may request that the monitor be turned off during cross-examination. However, counsel may find it acceptable for an expert witness to have access to the real-time transcript during cross-examination, particularly if lengthy hypotheticals will be posed to the expert witness.

4. **Instructing jurors on real-time displays**. If real-time display is used in the case, the court may want to instruct the jurors that the display will not be available to them.

5. **Accommodating hearing-impaired trial participants**. Because the court is authorized to accommodate hearing-impaired counsel, witnesses and jurors at court expense, this may include access to real-time reporting.

6. **Providing court reporter list of names, places, and special terms**. If real-time reporting is used, counsel should provide to the court reporter a list of names, places, and medical, technical or other special terms that will arise during the trial so that the percentage of untranslated words can be minimized.

7. **Level of real-time reporting service provided**. A basic level of real-time reporting allows counsel to see the translated text scrolling down the monitor as it is fed from the court reporter's computer. An enhanced level of service, so-called interactive real-time, allows counsel to annotate the transcript with notes as text is presented and to scroll back in the transcript even as new text is fed from the court reporter's computer. Counsel's notes are then maintained in a separate file, which can be displayed, searched, and printed with the transcript even after the transcript is finalized by the court reporter.

8. **Use of unedited real-time transcript**. Counsel should ask the court for direction on the use that can be made by counsel of the unedited real-time transcript. Typically, counsel may use the unedited real-time transcript only for counsel's notes and, therefore, may not read from it in questioning witnesses or in arguing to the jury. Rather, the court reporter will read from the reporter's notes or counsel must await the certified, edited copy of the transcript. Thus, counsel generally is limited to using the unedited real-time transcript for counsel's own notes. Moreover, if Internet access is available from the courtroom, counsel can stream the real-time transcript to co-counsel or other support personnel outside the courtroom.

9. **Cost of real-time reporting**. Counsel should seek to share the costs of real-time reporting with opposing counsel.

10. **Ability to see and hear displays/exhibits**. As in any case, counsel should be sure that the court reporter is sufficiently able to see and hear the displays and exhibits.

C. Jury Concerns

1. **Ability to see and hear displays/exhibits**. The jurors must be able to see and hear the exhibits and displays. The monitors should be of sufficient size and within a reasonable distance from the jurors. The court should be asked to remind the jurors to bring required glasses for reading and/or distance.

2. **Colorblind or color-deficient jurors**. If any juror is colorblind or color-deficient, counsel may have to alter the colors of displays.

3. **Hearing-impaired jurors**. Judicial Conference policy is to accommodate hearing-impaired trial participants, which would include otherwise qualified jurors.

4. **Effectiveness of visual presentation with prospective jurors**. Counsel should consider whether a television-oriented presentation will be more effective than a paper-oriented presentation with

particular jurors given the nature of the issues presented and the evidentiary matter relied on.

5. **Court's introductory explanation of courtroom technology**. Counsel should request that the court explain to the jurors the different types of equipment and the technology that is available to the parties for use in the case, including:
   - monitors and touch-screen technology
   - evidence camera
   - projector and screen
   - real-time reporting equipment
   - laptop computers
   - videoconferencing and teleconferencing equipment
   - audio equipment
   - hearing assistance equipment
   - sidebar white noise
6. **Court's preliminary instructions via technology**. If counsel will rely on a significant amount of technology during the case, the court may be urged to present preliminary jury instructions on a monitor or projection screen as a way to introduce technology into the case. If so, the court should be urged to use a method which introduces the text paragraph by paragraph so that jurors follow along rather than read ahead.

D. Opening Statements

1. **Use of technology in opening statements**. Counsel should determine what exhibits / displays can be used in the opening statement.
2. **Advance ruling on exhibits/displays**. Generally, counsel should (or may be required to, depending on local rules or an individual judge's practices) disclose to opposing counsel exhibits / displays counsel intends to use during the opening statement to avoid interruption and delay of the proceedings. Counsel should consider obtaining an advance ruling from the court as to the use of such exhibits / displays during opening statement. However, counsel should consider whether it is more important not to provide opposing counsel an opportunity to preview aspects of the opening statement.
3. **Use of exhibits/displays in opening statements**. The basic rule is that documents and other evidentiary material that will be admissible at trial can be used in the opening statement.
4. **Use of different format**. If an exhibit is not presented in its same format, it may be objectionable. For example, computer-driven displays may add, *inter alia*, titles, labels, colors, highlights, motion, or sound; or text may be enhanced with color highlighting, callout boxes, or lines; or various documents may be pasted on one display. If an objection is made, counsel must be prepared to readily modify the presentation to overcome the objection.
5. **Simple bullet-point presentation**. Counsel new to using technology in the courtroom should consider using a simple bullet-point presentation during the opening statement. As a rule of thumb, if counsel can say the words in the display without objection, then counsel can put those words in a simple bullet-point presentation, just as counsel traditionally is permitted to use an easel or chalkboard to list bullet points. For example, in a case involving alleged breach of a sales contract, counsel can include a very simple bullet-point presentation to present the basic elements that must be proven (existence of a contract, agreed upon price or method of determining price, performance, and damages), and then continue bullet points for each of the elements.
6. **Sophisticated bullet-point presentation**. Counsel may consider a more sophisticated bullet-point presentation, such as using a visual display with the full text of a document on one-half of the monitor and bullet points on other half of the monitor. However, caution must be used in not making the presentation argumentative. Thus, counsel should carefully consider whether the points used are literal or fair characterizations of actual text or whether they are argumentative or unfair characterizations of actual text. Opposing counsel must be prepared to digest the visual presentation and make prompt objections, particularly if opposing counsel has not been afforded a preview of the bullet-point slides.

E. Objections to Evidentiary Exhibits at Trial

1. **Completeness**. One of the main objections likely to be interposed to evidentiary exhibits that are displayed electronically is "completeness," whether dealing with documents, photographs or videos. Rules 106 and 611(a) of the Federal Rules of Evidence ("Fed. R. Evid.") are particularly relevant in this regard. Fed. R. Evid. 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered

contemporaneously with it." Fed. R. Evid. 611(a) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." By its terms, Fed. R. Evid. 106 applies to "a writing or recorded statement," which would include documents, videotapes, and audiotapes; given that limitation, Fed. R. Evid. 611(a) can be applied by the court to cover materials not within Fed. R. Evid. 106. A completeness objection may arise, for example, where examining counsel displays to the witness only a portion of a written document in a slide. If counsel uses callout boxes to extract and highlight relevant portions of the text without showing the balance of the document, opposing counsel would have a completeness objection to the showing of the document, which is a writing under Fed. R. Evid. 106. The objection is easily overcome if the full document is available for display on the evidence camera, which can be used to zoom into relevant text during the examination of the witness. Completeness objections arise similarly for photographs and videotapes. For instance, if a digital photograph is "cropped," that is, only a portion of the photograph is displayed, opposing counsel may have a completeness objection to the showing of the portion of the photograph. Similarly, if a digitally recorded video is edited or excerpted to shorten the playing time or if the order of the video is rearranged, opposing counsel may have a completeness objection to the showing of the portion of the video or the rearranged video.

2. **Unfairness**. Another objection that is frequently interposed to evidentiary exhibits displayed electronically is "unfairness." Fed. R. Evid. 403 is particularly relevant in this regard. Fed. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." An unfairness objection may arise for a document, photograph or video. For instance, if a document is shown in a different color or without margins, opposing counsel may have an unfairness objection. If a digital photograph is "resized," that is, reduced or enlarged, opposing counsel may have an unfairness objection to the resized photograph. Similarly, if a digitally recorded video is edited or played at a speed other than normal, or if still images from the video are used, opposing counsel may, depending on the circumstances, have an unfairness objection to the use of the edited video, the use of a different speed, or the use of the extracted image.

F. Objections to Illustrative Aids at Trial

1. **Procedure for dealing with objections**. Counsel should consider in advance of trial the manner in which the court will deal with objections to illustrative aids that are created and displayed electronically. For instance, the court may adopt a procedure whereby illustrative aids must first be displayed only to the court and opposing counsel (i.e., outside the view of the jurors) just prior to being used with a witness on direct examination. Or the court may direct or counsel may agree that illustrative aids be disclosed sufficiently prior to trial or examination of the witness. Thus, counsel should inquire in advance whether and how copies of illustrative aids should be made available to opposing counsel and the court. During cross-examination, on the other hand, a court probably would be reluctant to require advance disclosure of illustrative aids since that may unduly compromise the effectiveness of the cross-examination.

2. **Unfairness**. Counsel must be prepared to raise objection to illustrative aids. One of the main objections likely to be interposed to illustrative aids is "unfairness." The unfairness may arise for any number of reasons including, for instance, the use of labels, colors, or various text treatments such as callout boxes, underlining, and highlighting of text from documents. Unfairness may also arise where motion or sound is used, or where a time line is utilized and the time intervals are chosen to make the time period appear longer or shorter than the actual time period. Unfairness may also occur where illustrative aids are used to repetitively present a certain point.

3. **Other common objections**. Other common objections include leading, argumentative, narrative, no foundation, misstates evidence, assumes facts not in evidence, and calls for lay opinion not meeting the requirements of Fed. R. Evid. 701.

4. **Animations and digitally altered photographs**. Objections commonly arise as to animations and digitally altered photographs. For example, a digitally recorded photograph may be altered to make it look more like the relevant scene actually looked at a time relevant to the action. It may be that the witness can testify that the altered photograph substantially reflects all aspects of the scene at the relevant time and counsel could argue

for its admission into evidence. In any event, the altered photograph may serve the same purpose as a drawing of the relevant scene and therefore serve as an illustrative aid. As for animations, generally they are offered as illustrative aids to assist an expert in testifying and to assist the jury in understanding the expert's testimony. An unfairness objection is commonly asserted as to animations, with the objection generally grounded in the variations that inevitably exist between the alleged actual occurrence or event and the portrayal of that occurrence or event by the visual and audio presentation of the animation.

G. Preserving Illustrative Aids for the Record

1. **Preserving illustrative aids for the record**. Counsel must be prepared to preserve illustrative aids for the record. For example, if the witness marks a photograph displayed on a monitor, counsel must determine in advance the method for making a copy for the record.

H. Videoconferencing

1. **Notice of videoconference use**. If videoconferencing will be used at trial, counsel should notify the court sufficiently before trial so that the appropriate connections can be arranged.

2. **Rule for presenting witness by videoconference**. Remote transmission of testimony is permitted under the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") under certain conditions. Fed. R. Civ. P. 43(a) provides: "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." While this showing may be excused upon the parties' consent, the court is not bound by a stipulation and can insist on live testimony. Remote transmission typically has been permitted for witnesses who are (1) incarcerated; (2) incapacitated; (3) remotely located and only peripherally involved in the trial; or (4) children. However, as the Advisory Committee explains, remote transmission "cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." Advisory Committee Note to Fed. R. Civ. P. 43. As the Advisory Committee further explains: "The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place." *Id.* While the Advisory Committee also notes that depositions, including video depositions, ordinarily "provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses," good cause and compelling circumstances may exist where "[a]n unforeseen need for the testimony of a remote witness . . . arises during trial" and likely exist "if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness." *Id.* Nevertheless, the Advisory Committee suggests that the required showing may be more difficult to make where the party "could reasonably foresee the circumstances offered to justify transmission of testimony." *Id.* In any event, notice should be given to opposing counsel and the court "as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying." *Id.*

3. **Audio vs. video transmission**. The Advisory Committee suggests that audio transmission, without video images, may be sufficient in some circumstances; but "[v]ideo transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission." *Id.*

4. **Safeguards for remote transmission**. Safeguards must be adopted by counsel and the court to ensure: (1) accurate transmission of the testimony; (2) accurate identification of the witness; (3) protection against influence of the witness by those present with the witness; and (4) adequate opportunity for opposing counsel to object to the use of remote transmission. As the Advisory Committee suggests, advance notice should be "given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission" to ensure opposing parties "the opportunity to argue for attendance of the witness at trial…, [and] the opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony." *Id.*

5. **Backup equipment or means**. Backup should be available if problems arise during the videoconferencing.

6. **Rule rejected for criminal cases**. Notably, in April 2002, the United States Supreme Court rejected a proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure, as recommended by the Judicial Conference, that would have allowed the court to permit live, two-way video presentation of testimony in criminal cases, provided it was in the interest of justice and the requesting

party showed exceptional circumstances, appropriate safeguards for the transmission, and the witness was unavailable within the meaning of Fed. R. Evid. 804(a)(4)-(5).

I. Closing Arguments

1. **Leeway accorded counsel in use of illustrative aids**. During closing argument, counsel is not limited to using only exhibits offered into evidence or illustrative aids used during opening statements or at trial. Given the leeway typically accorded counsel during closing argument, counsel can present new materials to the jury, such as illustrative aids adding new or different visual or audio effects.

2. **Using illustrative aids to make closing arguments more effective**. Appropriate use of illustrative aids can make a closing argument more effective by making it shorter, more orderly, more logical, and more persuasive. In complex cases, or those with a large number of exhibits and/or witnesses, illustrative aids can facilitate a summary of the evidence to make it more easily recalled and understood from that party's perspective.

3. **Advance ruling on illustrative aids**. Counsel should seek advance approval from the court as to illustrative aids that counsel intends to use in closing argument to avoid or mitigate interruption, delay, and prejudice. However, counsel should consider whether it is more important not to provide opposing counsel an opportunity to preview aspects of the closing argument.

4. **Alterations of digital photographs or videos**. Given the leeway counsel enjoys during closing argument, it may be fair game for counsel to use digitally altered photographs or videos for purposes of argument (provided the alteration is made obvious to the jury and court) to enhance the logic or persuasiveness of counsel's argument or detract from the logic or persuasiveness of opposing counsel's argument.

5. **Use of edited real-time transcript**. If real-time recording was used during trial, counsel can request that the real-time transcript be edited and certified before closing argument. The edited, certified transcript can then be used for closing argument, with relevant portions shown to the jury on the monitors or projection screen.

J. Jury Instructions and Jury Review of Evidence

1. **Court's jury instructions via technology**. Whether or not the court provided preliminary jury instructions via technology, the court may present final jury instructions on a monitor or projection screen. If so, the court should be urged to use a method which introduces the text paragraph by paragraph so that jurors follow along rather than read ahead.

2. **Jury review of electronic exhibits**. During deliberations, the jurors are entitled to review the evidence presented in the case, including electronic exhibits. To the extent that electronic exhibits were presented in the case and are available on paper copies, the court may decide to present the paper copies to the jurors. However, if the exhibits are in digital records for which there are no paper copies, the parties may consider placing the material on a CD for viewing by the jurors, preferably via a laptop computer and monitor. This procedure is similar to providing the jurors with a player for traditional videotapes and audiotapes.

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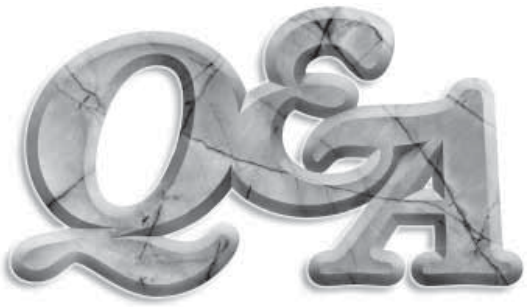
Ethics Matters



By John Gaal

Q I am representing an employer in a recently filed federal class action lawsuit. No class has been certified at this point. I would like to have direct contact with current employees who fit within the class description, to gather information I think will be useful in defeating a certification request. Do I need to worry about Rule 4.2 of the Rules of Professional Conduct?

A Rule 4.2 provides that "[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." Thus, this no-contact rule prohibits direct communication by a lawyer with a represented party (in the matter at hand), without the other lawyer's prior consent.

Obviously, named plaintiffs / class representatives would be off limits to *ex parte* contact because they are clearly represented by class counsel.

The issue your situation presents is whether putative class members prior to class certification are also considered "represented" by class counsel. A few courts have recognized that even prior to certification, class counsel owe some level of fiduciary duty to putative class members, even if a "full" attorney-client relationship has not yet been formed. In a minority of cases, courts have recognized that as a result of even this limited fiduciary relationship, there is sufficient "representation" to trigger coverage under the no contact rule. *See, e.g., Gates v. Rohm and Haas Company*, 2006 U.S. Dist. LEXIS 85562 (E.D. Pa. 2006).

The overwhelming majority view (including in the Second Circuit), however, is to the contrary. Prior to class certification, putative class members are not considered represented by class counsel and therefore are "fair game" (from an ethics perspective) for unilateral contact by the defense counsel. *E.g., Van Germert v. Boeing Co.*, 590 F. 2d 433 (2d Cir. 1978), *aff'd on other grounds*, 444 U.S. 472 (1980); *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F. 2d 770 (2d Cir. 1972); *Bell v. Addus Healthcare, Inc.*, 2007 U.S. Dist. LEXIS 69221 (W.D. Wash. 2007); *Parks v. Eastwood Insurance Services, Inc.*, 235 F. Supp. 2d 1082 (C.D. Cal. 2002); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239 (N.D. Cal. 2000); *Garrett v. Metropolitan Life Ins. Co.*, 1996 U.S. Dist. LEXIS 8054 (S.D.N.Y. 1996); *Bower v. Bunker Hill Company*, 689 F. Supp. 1032 (E.D. Wash. 1985); *Cf. Schick v. Berg*, 430 F.3d 112 (2d Cir. 2005) (applying Texas law in a malpractice lawsuit, the Second Circuit stated that unnamed class member was not a client of class counsel prior to class certification).

The Restatement echoes this view:

> A lawyer who represents a client opposing a class in a class action is subject to the anti-contract rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.

Restatement (Third) of the Law Governing Lawyers, § 99, cmt. 1 (1998). The ABA's Standing Committee on Ethics and Professional Responsibility has taken the same position. ABA Formal Opinion 07-445 (2007).

This application of Rule 4.2 allows defense counsel to have *ex parte* contact with pre-certification putative class members not only in order to gather information to help defeat class certification, but even for the purpose of trying to settle their claims on an individual basis, and even if doing so may undermine the viability of class certification itself. *E.g., Christensen v. Kiewit-Murdock Investment Corporation*, 815 F. 2d 206 (2d Cir. 1987); *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F. 2d 770 (2d Cir. 1972); *In re MAT Five Securities Litigation*, 2008 U.S. Dist. 63008 (S.D.N.Y. 2008); *Bublitz v. E.I. DuPont de Nemours*, 196 F.R.D. 545 (S.D. Iowa 2000).

Once certification occurs, including oral certification of the class, class members are uniformly considered represented for purposes of Rule 4.2. *Tedesco v. Mishkin*, 629 F. Supp. 1474 (S.D.N.Y. 1986).

In a collective action, the principles are generally the same, but their application is a bit different. In a traditional class action, once the class is certified, members are represented unless and until they opt out of the class. *E.g., Parks v. Eastwood Insurance Services, Inc.*, 235 F. Supp.

2d 1082 (C.D. Cal. 2002). In a collective action, initial certification leads to an opt-in opportunity. Putative class members in a collective action are normally not considered represented by class counsel for these purposes until they actually opt into the class. *Id; but see Bowens v. Atlantic Maint. Corp.*, 546 F. Supp. 2d 55 (E.D.N.Y. 2008) (holding that once class certification occurs in a FLSA collective action, communication is improper even with *potential* opt-in class members).

Different from both the traditional class action and the collective action is the EEOC "class action." The EEOC is able to seek what amounts to class-wide relief without having to comply with the formal class action rules of Federal Rule of Civil Procedure 23. *See General Telephone Co. v. EEOC*, 446 U.S. 318 (1980). In these situations, the EEOC is not strictly representing any individual but rather is serving a broad public purpose. As a result, the absence of any "certification," coupled with the difference in the relationship that exists between the EEOC and those individuals whose claims it is pursuing and the relationship that exists between class counsel and class members, have led some courts to more closely review the actual EEOC / individual relationship before finding Rule 4.2 implicated. For many courts, the mere fact that an individual is within the group of persons who are allegedly aggrieved is insufficient to bring them within the coverage of Rule 4.2; instead there must be an actual attorney-client relationship established with the EEOC before Rule 4.2 will bar defense communications. *E.g., EEOC v. Joslin Dry Goods Company*, 2007 U.S. Dist. LEXIS 7741 (D. Colo. 2007); *EEOC v. Albertson's Inc.*, 2006 U.S. Dist. LEXIS 72378 (D. Colo. 2006); *EEOC v. Morgan Stanley & Co., Inc.*, 206 F. Supp. 2d 559 (S.D.N.Y. 2002); *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827 (N.D. Ind. 2002); *EEOC v. TIC-The Indus. Co.*, 2002 WL 31654977 (E.D. La. 2002).

If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John Gaal at (315) 218-8288.

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Investigations of Workplace Misconduct

By Norma G. Meacham

By law, to protect both the employer and potential victims, complaints of discrimination or harassment require a formal investigation. Even without a legal mandate to investigate, employers must undertake an investigation to ensure that alleged employee misconduct is substantiated and can support disciplinary action. Investigations or compliance audits also are critical to ensure that administrative functions meet legal enforcement requirements for a host of wage and hour laws or code of conduct compliance that is industry specific.

Documentation of the investigative process is critical to preventing further discrimination, harassment, misconduct and potential liability for the employer. It is important to undertake any investigation promptly and thoroughly, as soon as the employer is aware of the complaint. Case law requires an effective investigation to be prompt, thorough, comprehensive, neutral and with a reasonable conclusion based on the facts ascertained.

Certain minimal standards must be observed in the investigative process, including:

- maintaining confidentiality, to the extent possible;
- ensuring that the investigation is conducted neutrally and without bias;
- ensuring that facts are not pre-judged; and
- ensuring that questions are open-ended and do not prejudice the process.

Other important caveats include maintaining the privacy of all parties and emphasizing to all parties that there will be no retaliation for making a complaint or pursuing it unless the complaint was brought forward maliciously and with knowing falsity.

To achieve each of these goals it may be necessary to place the accused on administrative leave during the course of the investigation. It also may be crucial to separate the complainant and the accused during the investigative process and, depending on the outcome, at the conclusion of the investigation.

It also is advisable to give all witnesses the opportunity to have a union representative or another person present if the witness so chooses. Although *Weingarten* rights attach to anyone who may be subject to disciplinary action, it is equally important to address the anxiety that strict fact witnesses may have during the course of an investigation. If having an observer present assists the investigator in obtaining cooperation of witnesses, it is worth offering representation.

Defining the Complaint

When conducting an investigation, it is critical to define the context of the complaint.

- Has the complaint been filed as part of an internal investigation that defines procedures to be followed?
- What company policies, state or federal law or regulations are implicated by the complaint or the facts uncovered during an investigation?
- What actions must be taken at the outset to protect the complainant and / or accused?
- What actions must be taken to protect the client?

Often these defining parameters will assist you in pursuing facts to support or refute the substance of the complaint. It is important that the complainant is informed that an investigation is being undertaken based on the complaint filed and that the complainant is given a copy of any relevant policies, complaint procedures and avenues of appeal.

Method of Investigation

The investigator determines the method of investigation. The complaint defines the substance of the investigation. During the course of the investigation additional facts may be uncovered that suggest a different direction to the complaint and / or investigation. However, all investigations require that certain steps are taken.

1. Initial Meetings with Complainant and Review of Written Complaint, if any.
2. Methods of Corroboration of Complainant's Complaint.
    a. Witness interviews and statements, first-hand observation versus hearsay or complainant report only.
        i. Witnesses identified by complainant
        ii. Witnesses identified by proximity / presence or observation
    b. Documentary evidence (text messages, cell phone calls or voicemail, computer records, e-mail, calendars or written documents).
    c. Gifts.
    d. First person—journals, notes, diaries.
3. Review of Business Records.

a. Computer e-mail.

b. Files, including medical records if applicable and prior complaints, if any.

c. Security access—doors, phones, computers.

d. Phones.

e. Personnel files of complainant, accused and / or witnesses.

f. Manager / supervisor files.

4. Reconciliation of Data, Evidence.

   a. Can the credibility of the witness(es) be reconciled? Is there an ulterior motive? Outward signs supporting or refuting the complaint? Has this person previously been involved in similar circumstances?

5. What is the Reputation of Complainant / Accused?

6. What are the Relative Relationships of the Complainant and the Accused? Co-workers? Colleagues? Supervisor / subordinate? High-ranking officer of the company?

7. Meeting with the Accused to Review Allegations and Mitigating Factors, if any.

Conclusion of the Investigation

The investigator gathers facts and makes recommendations based on those facts and a critical analysis of applicable policies and law. Even if the facts are not all in accord, it is important for the investigator to make certain credibility determinations which are stated in the report. If one witness is at odds with ten other witnesses, with rare exceptions, that one witness's credibility will be questioned absent some underlying motivation of the ten oppositional witnesses. The recommendations will include an analysis of any violations of law or policy and recommended corrective action. Such corrective action could include re-emphasizing policy, training, reassignment of the wrongdoer, counseling or discipline up to and including termination. Most importantly, the wrongful conduct must end immediately and preventive action must be taken to minimize the risk that such conduct will reoccur in the future. All parties must be informed that there cannot be any retaliation for filing or pursuing a complaint. It is critical that the complainant is informed of the outcome of the investigation, the steps to be taken if those steps involved the complainant and whether the complaint has been substantiated. It is appropriate to reiterate the available appeal process. Similarly, the accused must be informed of the outcome of the investigation, the consequences of the conclusions and the steps, if any, that the accused must now take. This process of investigation, recommendations and conclusion of the process are all very sensitive and require a timely response.

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Municipal Labor and Employment Law in Tough Economic Times

By Richard K. Zuckerman

Tough economic times can present our municipal clients with difficult financial and political problems which we, as municipal lawyers, are often called upon to solve. This article will describe and discuss some of the labor relations-related legal and practical issues which we and our clients need to anticipate and address. It will also present and analyze a variety of creative options available to our clients in successfully confronting and resolving those issues.

Introduction

While it is important to be able to present to and discuss with our clients the options which follow, there is a more macro-level-type of consideration that I believe needs to be a part of any discussion about what to do with our unions and personnel. I describe it as being careful to counsel our clients to do "the right thing." Phrased another way, just because a client *can* unilaterally do something does not necessarily mean that the client *should* do it. Our role as counsel includes ensuring that this global consideration permeates any discussion about the "what, who, when, where, why and how" of the decision-making process.

Factors our clients should consider prior to making any union or personnel-related decision include, among others, the impact of the decision upon the affected employees and their union, financial and political considerations, public relations and the court of public opinion, and the client's short- and long-term goals and the impact that the options under review will have on each. While each one may be critically important and self-evident in nature, it is surprising how often one or more is ignored or simply forgotten during the rush to act. Failure to take the time to think them through may cause our clients to make decisions for today which will come back to haunt them, their employees and unions.

With these thoughts in mind, let us turn to an analysis of some of the types of labor-related decisions a municipal client may unilaterally make, i.e., which the client may implement without prior negotiations with, and the consent of, its affected unions.

Examples of Decisions Which the Courts and PERB Have Held an Employer May Unilaterally Implement

Abolishing Employee Jobs/Positions

An employer's decision to eliminate jobs due to economic reasons need not be negotiated.[1] The decision must be made in "good faith," i.e., for economic or efficiency reasons, and not in order to skirt an employee's tenure and/or disciplinary hearing rights.[2] There are also several potentially applicable statutory, administrative and/or collective bargaining agreement-based layoff and/or recall procedures which need to be considered and implemented in a layoff situation.[3]

As is true with regard to almost all of the examples provided in this article, be sure before acting to confirm that your client's decision is not prohibited or restricted in some way by your collective bargaining agreement. Check for a provision in the contract that constitutes an affirmative waiver of the union's duty to bargain over the terms and conditions of employment related to your decision. Remember that, in almost all instances, there will be a duty to bargain over the "impact" of a unilaterally imposed decision following a demand to do so by the affected union.[4]

Eliminating or Reducing Services to the Public

An employer does not normally need its union's permission before eliminating or curtailing services to the public.[5] The employer may, as a result, unilaterally curtail the level or extent of those services by, e.g., reducing the number of hours during which the services will be offered and then shortening employees' workweeks to conform to the new hours of operation.[6] The critical Taylor Law-related aspect of this type of decision is that the New York State Public Employment Relations Board ("PERB") will require proof of an actual curtailment of services to the public. It will not be sufficient to implement a plan that is only "more efficient" in that it produces the same level of work or services in less working time, or involves having only a "skeleton crew" working.

In order to meet this "curtailment of services" standard, the employer will have to be able to establish its business reasons for the curtailment. It will also likely be required to prove that the curtailment in fact reduced the hours during which services were provided to the public, that affected employees were, as a result, working fewer number of hours, that they were all working the same number of hours following the curtailment (e.g., going from a 35- to a 28-hour week), and that those hours covered the same period of time (e.g., 9:00 a.m. to 4:00 p.m.).[7]

Of more critical importance, of course, is whether an employer which implements these actions can concomitantly and proportionately reduce employee salaries. Although the case law is confusing and at times somewhat contradictory, the answer appears to be yes.[8]

Not Filling Vacancies

This is also known as "attrition." PERB has held that a union's demand that vacancies be filled, or that they be filled within a defined period of time, restricts the employer's right to effect a staff reduction and is, therefore, non-mandatory.[9]

Reducing or Changing Staffing Levels

An employer has the inherent right to determine staffing levels. This includes deciding how many people will be at work at any given time, as well as how many people will perform a particular task such as riding in a patrol car or on a piece of fire apparatus.[10] Because safety is a mandatory subject of negotiation,[11] PERB will implement a balancing test when an action implicates both staffing and safety concerns. Where an action raises a safety issue, but it is outweighed by the employer's right to establish staffing requirements, the staffing issue must be dealt with, but as part of impact negotiations.[12]

Changing Hours/Days of Operation

As was discussed earlier, it is a management prerogative to decide the time span during which work is to be performed. An employer may, accordingly, decide to increase, reduce or simply shift its hours of operation.[13] *How* the work is to be performed within that time frame may, however, be mandatorily negotiable.[14]

Restricting the Use of Leave Time

The number of employees an employer hires and chooses to place on duty at any given time is a managerial prerogative.[15] An employer may, therefore, unilaterally reduce the number of available vacation slots so that more employees are on duty at a particular time,[16] even though a reduction in the amount of leave available to an employee must be negotiated.[17]

Assigning Bargaining Unit Work to Non-Unit Personnel

This is known as, among other things, "subcontracting" (having someone not in the bargaining unit do the work) "civilianizing" (having a civilian rather than, e.g., a police officer, perform the work) and "privatizing" (having private sector employees perform the work). An employer may assign unit work to non-unit personnel in some, but not all, situations.

For example, if the "work" has not been exclusively performed by unit members for a sufficient period of time, there will be no duty to bargain over the decision to subcontract the work.[18] Alternatively, if the reassigned tasks are not substantially similar to those previously performed by unit members, the work may be reassigned without prior negotiation.[19] The decision by a school district to subcontract certain programs and services to a BOCES is a non-mandatory subject of negotiation.[20]

Where there is a significant change in the job qualifications of the personnel needed to perform the work, there may well be no duty to bargain over the decision to remove the work from the unit.[21] In this situation, a balancing test is invoked, with the interests of the employer and the unit, both individually and collectively, weighed against the other. The transfer of job functions from uniformed to civilian employees and, conversely, from civilian to uniformed employees, constitutes a *per se* change in job qualifications and, thus, a change in the level of service.[22] An employer may also act unilaterally if required to do so due to an outside decision beyond its control.[23]

If negotiations are required over a decision, the employer is responsible for initiating and, absent an emergency, concluding negotiations with the union prior to effectuating the decision.[24] Even if there is no duty to bargain over the decision to reassign the unit's work, the employer will still, as previously noted, likely have to bargain over the impact of the decision upon a timely demand by the union that it do so.[25]

Implementing Sick Leave Control Policies

An employer may unilaterally impose certain sick leave management policies.[26] Some specific items, such as requiring an employee to provide a doctor's note,[27] rescheduling work for the purpose of controlling sick leave abuse,[28] and changing the time when employees must notify an employer of an impending absence[29] are, in contrast, mandatorily negotiable.

Implementing General Municipal Law §§ 207-a- and 207-c-Related Policies and Procedures

An employer may unilaterally implement procedures and policies designed to effectuate the employer's rights pursuant to these statutes.[30] Certain specific items, such as implementing procedures which involve a change in the extent or amount of employee participation in the process, may have to be negotiated.[31] Similarly, discontinuing fringe benefit and other payments provided by practice to employees on a GML § 207-a or 207-c leave of absence must be negotiated, even if there is no statutory entitlement for the employees to receive them.[32]

Assigning Certain Additional or New Job Duties

An employer may unilaterally assign job duties which are an inherent aspect of the duties and functions of the position.[33] If, however, the performance of these additional duties lengthens the workday or significantly increases employees' workload, then the employer must negotiate the assignment.[34] Likewise, requiring employees to perform duties which are not within the inherent nature of their job is a mandatory subject of bargaining.[35]

Changing Class Size

The number of students assigned to a class may be unilaterally changed by the employer.[36] Here too, though, the impact of a change in class size is a mandatory subject of bargaining,[37] and also requires compliance with both the Commissioner of Education's Regulations addressing class size[38] and any applicable contractual restrictions.

Changing Active Employee Insurance Benefits

An employer may unilaterally change an insurance plan and/or the benefits provided by the plan if the employer does not, in doing so, change a preexisting term and condition of employment.[39] The employer may, however, otherwise have to negotiate changes to insurance benefits which materially change terms and conditions of employment,[40] including a change in the plan itself, eliminating dual coverage,[41] changing the amount of the premium paid by employees[42] and changing the amount of employees' co-payments.[43]

Employers may have somewhat more discretion to unilaterally effect changes in retiree insurance benefits. New York law[44] requires participating employers to pay a minimum of 50% of the cost of individual premium or subscription charges for the coverage of retired employees and 35% for the coverage of their dependents who are enrolled in the statewide health insurance plans. If an employer is contributing more than the minimum levels set forth in the law, then it may in many instances unilaterally reduce to the minimum levels its contributions for retirees' health insurance premiums, unless there is a contrary agreement between the employer and the retiree and/or union.[45] Be aware, though, that an employee who retires during or following the expiration of the collective bargaining agreement is deemed to be an active employee for negotiability purposes.[46]

If an employer makes a representation that it will pay a certain cost for the insurance premiums for a retiree, and the retiree relies upon this promise in deciding to retire from employment, and the employer nevertheless unilaterally reduces its contributions for the retiree, the employer may be estopped and/or otherwise contractually precluded from unilaterally reducing its preexisting insurance contribution level.[47]

While many public employers may make these decisions without union consent, school districts, BOCES and special act schools are prohibited from doing so unless there is a corresponding diminution in these benefits for their active employees.[48] On September 4, 2008, Governor Paterson vetoed Senate Bill Number S-6457, which would have prohibited all public employers from unilaterally diminishing health insurance benefits or contributions made on behalf of retirees or their dependents below the current level unless there was a corresponding diminution in benefits for the active employees.

Implementing Public Safety Employee Disciplinary Procedures

Because employee discipline is a *prohibited* subject of bargaining for certain police, and possibly other public safety units, the employer may establish procedures needed to implement the disciplinary procedures affecting covered employees, and may also refuse to implement previously bargained procedures.[49] Whether this applies to a particular unit depends upon, among other things, the law or rule governing the affected employees and when it became applicable.[50]

Filing a Managerial/Confidential Petition

Certain managerial and/or confidential employees may be removed from the bargaining unit and made a part of management if they meet the requisite PERB-established standards. A managerial employee is defined as one who "formulates policy" or "may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of the agreement or in personnel administration, provided that the role is not of a routine or clerical nature, and requires the exercise of independent judgment."[51]

Whether an employee is confidential is determined by the application of a two-part test. The employee must be designated to assist a managerial employee in the delivery of specific duties[52] and act in a confidential capacity to the managerial employee.[53]

Implementing Employee Evaluation/Attendance Monitoring/Supervisory Policies

These may be unilaterally implemented, provided that there is no change in the nature or extent of the employee's involvement in the process.[54]

Creating a New Position and Establishing the Initial Salary

The creation of a new position and establishment of the initial salary are both managerial prerogatives.[55] Bargaining may be required with respect to the step placement of a newly hired employee on the salary schedule where a past practice exists regarding same.[56]

Changing the Type of Equipment to Be Used

Determining the type of equipment to be used by employees does not require decisional bargaining.[57]

Unilateral Action in an Emergency Situation: Compelling Need

An employer may unilaterally implement an otherwise negotiable decision where there is a "compelling need" to act in an emergency-type situation, provided that the employer has negotiated to impasse on the issue, and provided further that the employer continues to

negotiate following implementation.[58] Financial problems are neither a compelling nor emergency situation.[59]

Areas in Which the Courts and PERB Have Required Employers to Successfully Negotiate With Their Unions Before Acting

Furloughing Employees

While an employer may unilaterally direct employees not to report to work, it may not unilaterally decide that the employees should not be paid during their absences.[60] There may not, however, be a duty to bargain if the employer has an existing practice of offering voluntary furloughs and/or is contractually privileged to act.[61]

Implementing a Lag Payroll

This is a mandatory subject of negotiation.[62]

Delaying Step Movement

An employer may not, in the absence of a contractual right or practice to do so, unilaterally delay employees' step movements after a contract has expired.[63]

Substituting Part-Time Employees for Full-Time Employees

An employer may not unilaterally replace full-time employees with part-time employees if there has been no change in the nature or level of services.[64]

Changing the Procedures Pursuant to Which Overtime Is Earned or Paid

While management generally has the right to decide whether overtime is needed, compensation for overtime work is a mandatory subject of negotiation.[65] This includes cost-savings efforts such as eliminating overtime payments until employees have actually worked the applicable federal Fair Labor Standards Act work cycle and/or not counting leave time as time worked for purposes of calculating overtime entitlements.

Discontinuing Employment Perks

These include employer-provided meals,[66] free bottled water[67] and coffee,[68] and free parking.[69]

Early Retirement/Separation Incentives

These are mandatorily negotiable even though (because) they provide a benefit to employees.[70]

Conclusion

Whether the particular action your client is considering falls within the ambit of a non-negotiable management prerogative will ultimately depend upon the specific circumstances before you, as well as any applicable contract provisions, rules, procedures and practices and the current state of the law at PERB. When in doubt about how to provide counsel about the applicable law, be guided by the following principle stated by PERB nearly 40 years ago: "…decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees."[71] When in doubt about everything else, be guided by the principle known as: "Do the right thing."

Endnotes

1. S*ee, e.g., City Sch. Dist. of New Rochelle*, 4 PERB ¶ 3060 (1971); *Burnt Hills-Ballston Lake Cent. Sch. Dist*., 25 PERB ¶ 3066 (1992).
2. *See, e.g., Matter of Young v. Bd. of Educ. of Cent. Sch. Dist. No. 6, Town of Huntington*, 35 N.Y.2d 31 (1974); *James v. Broadnax*, 182 A.D.2d 887, 581 N.Y.S.2d 900 (3d Dep't 1992); *Currier v. Tompkins-Seneca-Tioga BOCES*, 80 A.D.2d 979, 438 N.Y.S.2d 605 (3d Dep't 1981).
3. *See, e.g.*, N.Y. Civ. Serv. Law §§ 80, 80-a, 81, 85, 86; N.Y. Educ. Law §§ 2510, 2585, 3012; 3012-a; 3013; 3031; 8 N.Y.C.R.R. Part 30.
4. *See, e.g., West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46 (1974).
5. *See, e.g., City Sch. Dist. of New Rochelle*, 4 PERB ¶ 3060 (1971); *Burnt Hills-Ballston Lake Cent. Sch. Dist*., 25 PERB ¶ 3066 (1992).
6. *See, e.g., Lackawanna City Sch. Dist.*, 13 PERB ¶ 3085 (1980); *but see County of Broome*, 22 PERB ¶ 3019 (1989) (an employer may not unilaterally reduce employees' hours if the total hours or services provided by the employer are not actually reduced).
7. *Id.; see also Oswego School District*, 5 PERB ¶ 3011 (1972), *aff'd*, 6 PERB ¶ 7008 (3d Dep't 1973).
8. *See, e.g., Lackawanna City Sch. Dist.*, 12 PERB ¶ 4552 (1979), *rev'd*, 12 PERB ¶ 3122 (1979), *on remand*, 13 PERB ¶ 4543 (1980), *aff'd*, 13 PERB ¶ 3085 (1980) *and compare with Schuylerville Cent. School District*, 14 PERB ¶ 3035 (1981), *Rush-Henrietta Central School District*, 27 PERB ¶ 4631 (1994); *Vestal Central School District*, 15 PERB ¶ 3006 (1982), *aff'd*, 16 PERB ¶ 7020 (3d Dep't 1983); *Onondaga Cortland Madison BOCES*, 37 PERB ¶ 3025 (2004).
9. *See, e.g., Niagara Falls Police Captains & Lieutenants Ass'n*, 33 PERB ¶ 3058 (2000).
10. *See, e.g., City of White Plains*, 9 PERB ¶ 3007 (1976); *State of New York (Dep't of Transp.)*, 27 PERB ¶ 3056 (1994); *Town of Carmel*, 31 PERB ¶ 3006 (1998); *Lake Mohegan Fire District*, 41 PERB ¶ 3001 (2008).
11. *See, e.g., City of New Rochelle*, 10 PERB ¶ 3078 (1977), *aff'd*, 11 PERB ¶ 7002 (2d Dep't 1978).
12. *See, e.g., City of White Plains, supra; Lake Mohegan Fire District, supra*.
13. *See, e.g., Lackawanna City Sch. Dist., supra*.
14. *See, e.g., Starpoint Cent. Sch. Dist.*, 23 PERB ¶ 3012 (1990).
15. *See, e.g., Matter of Int'l Ass'n of Firefighters of City of Newburgh, Local 589 v. Helsby*, 59 A.D.2d 342, 399 N.Y.S.2d 334 (3d Dep't 1977), *lv. denied* 43 N.Y.2d 649 (1978).
16. *See, e.g., State of New York (Dep't of Corr. Serv.–Elmira Corr. Facility)*, 39 PERB ¶ 3004 (2006), *citing Town of Carmel*, 31 PERB ¶ 3006 (1998), *conf'd*, 267 A.D.2d 858, 701 N.Y.S.2d 169 (3d Dep't 1999).
17. *See, e.g., State of New York (Div. of Military & Naval Affairs) v. New York State PERB*, 23 PERB ¶ 4592 (1990), *aff'd*, 24 PERB ¶ 3024 (1991), *aff'd*, 26 PERB ¶ 7001, 187 A.D.2d 78, 592 N.Y.S.2d 847 (3d Dep't 1993).
18. *See, e.g., Manhasset Union Free Sch. Dist.*, 41 PERB ¶ 3005 (2008), *aff'd*, 42 PERB ¶ 7004 (4th Dep't 2009), *on remand*, PERB Case No. U-26091(7/23/2009); *County of Onondaga*, 24 PERB ¶ 3014 (1991); *Niagara Frontier Transp. Auth.*, 18 PERB ¶ 3083 (1985).
19. *See, e.g., Niagara Frontier Transp. Auth.*, 18 PERB ¶ 3083 (1985).
20. *See, e.g., Vestal Cent. Sch. Dist.*, 30 PERB ¶ 3029 (1997), *aff'd*, 94 N.Y.2d 409 (2000) (employer's decision to contract with BOCES for printing services was not mandatorily negotiable); *Webster Cent. Sch. Dist. v. Public Employment Relations Bd.*, 75 N.Y.2d 619 (1990) (Education Law § 1950 reflects Legislature's intention that school districts' decisions to participate in cooperative educational programs not be subject to mandatory negotiation).

21. *See, e.g., West Hempstead Union Free Sch. Dist*, 14 PERB ¶ 3096 (1981); *Town of Mamaroneck*, 33 PERB ¶ 3010 (2000), *quoting Fairview Fire Dist.*, 29 PERB ¶ 3042 (1996) (substitution of civilian employees for police officers reflects an employer's determination that the specialized training and skills of a police officer are not needed to complete the work).
22. *Fairview Fire Dist*., 28 PERB ¶ 4608 (1995), *citing State of New York Dep't of Corr. Servs. v. Kinsella*, 27 PERB ¶ 3055 (1994) (employer's civilianization of uniformed services represented "a *de facto*" change in qualifications), *aff'd*, 29 PERB ¶ 3042 (1996); *see also County of Suffolk*, 38 PERB ¶ 4547 (2005) (where no employee suffered loss of employment or benefits as a result of the transfer of work from police officers to civilians, the balance of employer and employee interests tips in the employer's favor); *see also County of Suffolk*, 38 PERB ¶ 4575 (2005) (county did not violate its duty to bargain when it transferred work from police officers to civilian police operations aides).
23. *See, e.g., Germantown Cent. Sch. Dist.*, 25 PERB ¶ 4573 (1992), *aff'd*, 26 PERB ¶ 3003, *aff'd*, 205 A.D.2d 961, 613 N.Y.S.2d 957 (3d Dep't 1994) (unilateral subcontracting out school cafeteria services upheld because the district was on austerity and statutorily precluded from operating the program).
24. *See, e.g., Wappingers Cent. Sch. Dist*., 19 PERB ¶ 3037 (1986).
25. *See, e.g., Wappingers Cent. Sch. Dist*., 26 PERB ¶ 3014 (1993).
26. *See, e.g., Poughkeepsie City Sch. Dist*., 19 PERB ¶ 3046 (1986).
27. *See, e.g., Triborough Bridge & Tunnel Auth.*, 15 PERB ¶ 3124 (1982).
28. *See, e.g., County of Nassau*, 18 PERB ¶ 3034 (1985).
29. *See, e.g., Spencerport Cent. Sch. Dist*., 16 PERB ¶ 3074 (1983).
30. *See, e.g., City of New York*, 40 PERB ¶ 6601 (2007), citing *Schenectady Police Benevolent Ass'n v. New York State PERB*, 28 PERB ¶ 7005 (1995); *but see Vill. of Highland Falls*, 40 PERB ¶ 4525 (2007), *aff'd on other grounds*, PERB Case Nos. U-26843, 26844 (July 23, 2009).
31. *See, e.g., Town of Orangetown*, 40 PERB ¶ 3008 (2007) (employer could not unilaterally prohibit employees from videotaping and/or audiotaping initial medical evaluation).
32. *See, e.g., County of Nassau*, 23 PERB ¶ 4595 (1990).
33. *See, e.g., State of New York (SUNY Stony Brook)*, 33 PERB ¶ 3045 (2000).
34. *See, e.g., South Jefferson Cent. Sch. Dist*., 13 PERB ¶ 3066 (1980).
35. *See, e.g., Fairview Fire Dist.*, 12 PERB ¶ 3083 (1979).
36. *See, e.g., Pearl River Union Free Sch. Dist.*, 11 PERB ¶ 3085 (1978).
37. *See, e.g., Orange County Community Coll. Faculty Ass'n*, 10 PERB ¶ 3080 (1977).
38. 8 N.Y.C.R.R. § 100.2 (i), (j).
39. *See, e.g., Unatego Cent. Sch. Dist.*, 20 PERB ¶ 3004 (1987), *aff'd*,134 A.D.2d 62, 522 N.Y.S.2d 995 (3d Dep't 1987), *motion for lv. to appeal denied*, 71 N.Y.2d 805, 529 N.Y.S.2d 76 (1988); *see also County of Dutchess*, 32 PERB ¶ 4559, *aff'd*, 32 PERB ¶ 3047 (1999), *aff'd*, 274 A.D.2d 930, 712 N.Y.S.2d 187 (3d Dep't 2000).
40. *See, e.g., County of Nassau*, 14 PERB ¶ 4550 (1982).
41. *See, e.g., City of Mount Vernon*, 18 PERB ¶ 3050 (1985), *aff'd*, 18 PERB ¶ 7018 (Sup. Ct., Albany Co. 1985), *aff'd*, 126 A.D.2d 824, 510 N.Y.S.2d 742 (3d Dep't 1987).
42. *See, e.g., Triborough Bridge & Tunnel Auth.*, 27 PERB ¶ 3076 (1994).
43. *See, e.g., County of Yates*, 22 PERB ¶ 3017 (1989).
44. N.Y. CIV. SERV. LAW § 167(2)(a).
45. *See, e.g., Lippman v. Sewanhaka Cent. High Sch. Dist.*, 17 PERB ¶ 4521, *aff'd*, 17 PERB ¶ 3049 (1984), *rev'd*, 104 A.D.2d 123, 483 N.Y.S.2d 446 (3d Dep't 1984), *aff'd*, 66 N.Y.2d 313 (1985).
46. *See, e.g., Triborough Bridge & Tunnel Auth.*, 29 PERB ¶ 3012 (1996).
47. *See, e.g., Allen v. Bd. of Educ. of the Union Free Sch. Dist*., 168 A.D.2d 403, 563 N.Y.S.2d 422 (2d Dep't 1990), *appeal dismissed*, 77 N.Y.2d 939 (1991).
48. 2008 N.Y. Sess. Laws Ch. 43.
49. *See, e.g., Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Employment Relations Bd.*, 6 N.Y.3d 563 (2006).
50. *See, e.g., Town of Walkill*, PERB Case No. U-27426 (July 23, 2009) and cases cited therein.
51. *See, e.g., Town of Dewitt*, 32 PERB ¶ 3001 (1999), *quoting* N.Y. CIV. SERV. LAW § 201.7(ii).
52. *See* Civil Service Law § 201.7(a)(ii).
53. *See, e.g., State of New York (Office of Parks, Recreation & Historic Preservation)*, 39 PERB ¶ 3007 (2006).
54. *See, e.g., Newburgh Enlarged City Sch. Dist*., 20 PERB ¶ 3053 (1987); *Triborough Bridge & Tunnel Auth. & Metropolitan Trans. Auth.*, 21 PERB ¶ 3065 (1988).
55. *See, e.g., Averill Park Cent. Sch. Dist.*, 10 PERB ¶ 4560 (1977).
56. *See, e.g., Bellmore Sch. Union Free Sch. Dist.*, 34 PERB ¶ 3009 (2001).
57. *See, e.g., City of White Plains*, 9 PERB ¶ 3007 (1976).
58. *See, e.g., Bd. of Educ. of Enlarged City Sch. Dist. of City of Jamestown, NY*, 6 PERB ¶ 3075 (1973) (implementation of school calendar); *see also Wappingers Cent. Sch. Dist*., 5 PERB ¶ 4512 (1972), *aff'd*, 5 PERB ¶ 3074 (1972) ("compelling need" found where school district, just before the start of a new school year, unilaterally changed teachers' workload where the school district had negotiated with the union to impasse and recognized its continuing obligation to bargain).
59. *See, e.g., County of Chautauqua*, 22 PERB ¶ 3016 (1989) (county's interest in economic savings did not constitute a "compelling need" that relieved it of its duty to negotiate over the subcontracting of laundry services).
60. *See, e.g., State of New York (SUNY Albany)*, 16 PERB ¶ 3050 (1983).
61. *See, e.g., Patchogue-Medford Union Free Sch. Dist*., 28 PERB ¶ 3026 (1995).
62. *See, e.g., County of Orange*, 12 PERB ¶ 3114 (1979), *aff'd*, 76 A.D.2d 878, 428 N.Y.S.2d 724 (2d Dep't 1980); *see also Ass'n of Surrogates & Supreme Court Reporters (City of New York) v. State of New York*, 79 N.Y.2d 39 (1992) (State statute imposing a lag payroll held to violate the U.S. Constitution's contract clause).
63. *See, e.g., Cobleskill Cent. Sch. Dist*., 16 PERB ¶ 4501, *aff'd*, 16 PERB ¶ 3057 (1983), *aff'd*, 105 A.D.2d 564, 481 N.Y.S.2d 795 (3d Dep't 1984), *appeal denied*, 64 N.Y.2d 1071 (1985).
64. *See, e.g., County of Broome*, 22 PERB ¶ 3019 (1989).
65. *See, e.g., Spring Valley PBA v. Vill. of Spring Valley*, 80 A.D.2d 910, 437 N.Y.S.2d 400 (2d Dep't 1981).
66. *See, e.g., City of Newburgh*, 16 PERB ¶ 3030 (1983).
67. *See, e.g., County of Nassau*, 32 PERB ¶ 3034 (1999).
68. *See, e.g., County of Nassau*, 25 PERB ¶ 4555 (1992).
69. *See, e.g., NYC Trans. Auth.*, 24 PERB ¶ 3013 (1991).
70. *See, e.g., Windsor Ass'n of Office Personnel & Sch. Aides*, 17 PERB ¶ 3062 (1984).
71. *City Sch. Dist. of New Rochelle*, 4 PERB ¶ 3060 (1971).

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Mixed-Motive Causation Under the Americans with Disabilities Act

By Daniel B. Moar and Stacey L. Budzinski

The Supreme Court's recent decision in *Gross v. FBL Financial Servs., Inc.*[1] casts significant doubt on the applicability of the existing mixed-motives causation test to discrimination claims brought under the Americans with Disabilities Act ("ADA"). This article examines the law on mixed-motive discrimination claims brought under the ADA and whether the burden-shifting "motivating factor" test remains applicable after *Gross*.

I. Background

Mixed-motives cases are those cases where employment decisions, such as hiring and firing, are based on both legitimate and discriminatory reasons.[2] For example, if an employer considered both an employee's sex and poor work performance record in making a termination decision, a case brought challenging that decision would be a mixed-motives case.

"The Supreme Court developed the mixed-motives framework because Title VII prohibits an employer from making employment decisions 'because of' an employee's race, color, religion, sex, or national origin, but the statute does not define how a plaintiff proves a decision was made 'because of' discrimination."

A. *Price Waterhouse v. Hopkins*

The Supreme Court recognized mixed-motives cases and developed a specific causation standard for them in Title VII cases in *Price Waterhouse v. Hopkins*.[3] The Supreme Court developed the mixed-motives framework because Title VII prohibits an employer from making employment decisions "because of" an employee's race, color, religion, sex, or national origin,[4] but the statute does not define how a plaintiff proves a decision was made "because of" discrimination. In *Price Waterhouse*, the employer argued that the "because of" standard requires that an employee prove that the discriminatory factor was given "decisive consideration" in the employment decision.[5] The employee, however, argued that the "because of" standard merely required that the discriminatory factor play "any part" in the employment decision.[6]

The *Price Waterhouse* Court's response was to develop a burden-shifting standard that initially requires a Title VII plaintiff to prove that discrimination played a "motivating factor" in an employment decision, but then once such a showing is made, allows an employer to defeat all liability by proving by a preponderance of the evidence that it would have made the same decision even had it not considered the discriminatory factor.[7] Thus, the "motivating factor" test requires a two-step causation inquiry. First, the employee must show that discrimination was a motivating factor in an employment decision. Second, if the employee makes such a showing, the burden then shifts to the employer to show that it would have made the decision anyway based on legitimate factors.

B. The Civil Rights Act of 1991

Following *Price Waterhouse*, Congress passed the Civil Rights Act of 1991[8] to reverse part of that decision and other Supreme Court decisions.[9] The summary and purpose of the committee reports on the Civil Rights Act of 1991 (the "Act") tell us that the Act was intended to respond to recent Supreme Court decisions by "restoring civil rights protections that had been dramatically limited by [its] decisions and to strengthen existing protections and remedies available under the federal civil rights law to provide more effective deterrence and adequate compensation for victims of discrimination."[10]

The Act was Congress's second attempt to address the Court's alleged curtailment of civil rights. The first attempt, the Civil Rights Act of 1990, was passed by Congress, but met the President's veto. The veto by President George H. W. Bush represented his view that the Act would fail to eliminate discrimination in the workplace and create inducements for quotas. Congress failed to garner the votes necessary to override the veto, and in 1991 Congress and the President reached a compromise to pass the 1991 Civil Rights Act.

Section 107(a) of the Act partially reverses *Price Waterhouse* by allowing a plaintiff to prevail even if nondiscriminatory motivations exist and the employer can show that it would have taken the same action in spite of the discriminatory purpose.[11] However, the Act also limits a plaintiff's remedies in mixed-motive cases where the employer can show that the same action would have been taken even in the absence of the improper motivating factor. In those instances, the court may only grant declaratory relief, an injunction, and attorney's fees and costs directly attributable to these claims; it cannot grant damages, enter an order requiring admission, reinstatement, hiring, promotion, or require back wages to be paid.[12]

The legislative history found in the introduction to a House Committee report states that "…other laws modeled after Title VII [including the ADA and ADEA] should be interpreted in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII."[13] Similarly, the House Committee report states "…mixed motive cases involving disability under the ADA should be interpreted in a manner consistent with the prohibition against all intentional discrimination in Section 5 of this Act."[14] However, introductions to committee reports are not binding law and were not incorporated into the final statute.

Price Waterhouse was handed down just one week prior to Congress beginning negotiations over the proper statutory provisions of the ADA. The *Price Waterhouse* decision was a fractured plurality opinion with no clear holding. Thus, when Congress amended Title VII to explicitly state a motivating factor standard, it did so to ensure that there could be no doubt that it was codifying that aspect of the *Price Waterhouse* plurality decision supporting a motivating factor standard. Congress did not, however, make the same explicit endorsement of the motivating factor standard in the ADA. Despite the language in the committee reports relating to the Act, the ADA makes no reference to the motivating factor standard that the Act's legislative history asserts should be read into the statute.

If the Congress had wanted to endorse a motivating factor standard for the ADA, it could have easily added a conforming amendment to follow the amendment to Title VII. For example, Congress added Section 17 of the Act to address the statute of limitations and right to sue under both the ADEA and Title VII. To address "lingering confusion" between the two statutes, Congress specifically added a conforming amendment to the ADEA that eliminates the dual limitation scheme for filing charges and initiating litigation and replaces it with a single two-year charge-filing requirement.[15] Congress understood its ability to expressly make changes to other laws in the Act; however, it made no similar amendment to the ADA. The exclusion of a conforming amendment should be construed as a cautionary sign against simply reading Title VII language into other non-discrimination laws.[16]

Given that the ADA was passed in the midst of debates over the proper amendment to the Civil Rights Act, Congress was aware of the strengths and weaknesses of Title VII and likely knew of the challenges that needed to be addressed in light of recent Court decisions, including *Price Waterhouse*. With this in mind, Congress expressly addressed disparate impact by incorporating a specific provision into the ADA.[17] However, Congress did not address the burden under mixed-motive cases by incorporating a provision into the ADA or adding a conforming amendment as it did with the ADEA. It is strange that Congress would have remained silent on its choice of causation standard for the ADA, merely assuming that a motivating factor standard would apply while explicitly pursuing disparate-impact provisions in both the Act and the ADA.

C. ADA Mixed-Motives Cases After *Price Waterhouse*

Most of the circuit courts subsequently issued decisions applying the *Price Waterhouse* motivating factor test to mixed-motives cases brought under the ADA.[18] The ADA makes it illegal to discriminate "on the basis of disability,"[19] a similar standard to Title VII's prohibition on discrimination "because of" race, color, religion, sex, or national origin.[20] Therefore, the circuit courts frequently examine the statutes together.

Several circuit courts concluded that the mixed motives standards of Title VII apply to the ADA because the ADA expressly provides that the remedies available under Title VII are available in ADA actions and.[21] Title VII provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[22] Under the ADA, "[t]he remedies, procedures, and rights set forth in [Title VII] shall be the remedies, procedures, and rights… provide[d] to any persons alleging discrimination on the basis of disability in violation of [the ADA]."[23] Therefore, the courts reasoned, the ADA incorporates the motivating factor standard of Title VII for mixed-motives cases.[24]

An additional reason the circuit courts provided for applying a motivating factor standard to ADA claims was to comply with the purpose of the ADA.[25] The ADA states that its purpose includes providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[26] The courts reasoned that applying a motivating factor standard complies with this purpose. For example, in rejecting the employer's argument that it could face liability only if its employment decision were made "solely" because of disability discrimination, the Eleventh Circuit stated:

> [A] standard that imposes liability only when an employee's disability is the sole basis for the decision necessarily tolerates discrimination against individuals with disabilities so long as the employer's decision was based—if ever so slightly—on at least one other factor. A liability standard that tolerates decisions that would not have been made in the absence of discrimination, but were nonetheless influenced by at least one other factor, does little to "eliminate" discrimination; instead it indulges it.[27]

Several circuit courts have concluded that the legislative history of the Civil Rights Act of 1991 mandates that the motivating factor test apply to ADA mixed-motives claims. In *Parker v. Columbia Pictures Indus.*,[28] for example, the Second Circuit noted that in the Civil Rights Act of 1991, Congress had defined the meaning of "because of" as a motivating factor standard. The Second Circuit recognized that the Civil Rights Act amendment did not explicitly apply to the ADA, but it concluded that there was no evidence that Congress intended the "because of" standard to have a different meaning in Title VII and ADA cases. Instead, the Second Circuit concluded that the use of substantially identical language in Title VII and ADA "indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA as well."[29] Other courts similarly noted that Congress did not specifically amend the ADA in the Civil Rights Act to provide for a motivating factor standard, but dismissed this as immaterial in light of the legislative history of the Civil Rights Act. For example, in *Foster v. Arthur Andersen, LLP,*[30] the court wrote:

> [The Civil Rights Act of 1991] § 107(a) states only that it is amending Title VII; it makes no reference to the ADA, an omission that seems significant in light of the fact that other provisions of the Act expressly do so when provisions of more than one civil rights statute are to be amended.
>
> On the other hand, the legislative history of the Civil Rights Act suggests that Congress wanted the causation standard under the ADA to be the same as under Title VII.[31]

While the majority of the circuit courts addressing the issue concluded that the motivating factor standard applies to ADA mixed-motives cases, many of the circuit courts departed from *Price Waterhouse* by holding that even under the motivating factor standard a plaintiff must prove but-for causation. A "but-for" causation standard is a "hypothetical construct" in which the court asks whether the employment decision would have occurred anyway if the discriminatory factor had not been considered.[32] For example, if the employer would have fired the individual based on poor performance alone, then the employer's consideration of the employee's disability was not the "but-for" cause of the termination. In *Price Waterhouse*, the plurality expressly rejected the argument that "because of" required a "but-for" causation standard.[33]

Many of the circuit courts, however, have held that a mixed-motives ADA plaintiff must show "but-for" causation.[34] The circuit court decisions following *Price Waterhouse's* rationale in providing for a motivating factor standard, but then equating the motivating factor standard with but-for causation may simply reflect confusion over the meaning of the *Price Waterhouse* decision. If so, such confusion was anticipated by Justice Kennedy. Dissenting in *Price Waterhouse*, Justice Kennedy suggested that "the plurality decision may sow confusion."[35] Justice Kennedy argued that "[m]uch of the plurality's rhetoric is spent denouncing a 'but-for' standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard."[36]

In contrast to the majority of the circuit courts, which applied the motivating factor standard to ADA mixed-motives claims, the Sixth Circuit issued decisions predating *Gross* that reject applying the motivating factor standard in ADA cases. In *Layman v. Alloway Stamping & Mach. Co.*,[37] the Sixth Circuit rejected the application of the motivating factor standard to ADA mixed-motives cases. The Sixth Circuit's rationale in rejecting the motivating factor standard for ADA mixed-motives claims has some similarity to the Supreme Court's rationale in *Gross* in rejecting the motivating factor standard in ADEA claims.

First, the Sixth Circuit rejected the argument that the Civil Rights Act of 1991 amended the meaning of "because of" in ADA cases to provide for a motivating factor standard. The Sixth Circuit concluded that the motivating factor standard applied in Title VII cases because "Congress modified the statute expressly to adopt that standard," but that Congress did not make the same amendment to the ADA.[38] Similarly, the *Gross* decision indicates that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII."[39]

Second, the Sixth Circuit rejected the argument that the "because of" language alone, which appears in both Title VII and the ADEA, requires a motivating factor standard. The Sixth Circuit concluded that "[t]he modification of Title VII to adopt the 'motivating factor' standard suggests that the 'because of' language is not alone sufficient to trigger 'mixed motives' review."[40] The Supreme Court similarly concluded in *Gross* that the "because of" standard of Title VII alone does not mandate a motivating factor standard, but that rather such a standard is mandated by "Congress' careful tailoring of the 'motivating factor' claim in Title VII."[41]

II. *Gross v. FBL*

On June 18, 2009, a sharply divided Supreme Court issued its decision in *Gross v. FBL Financial Servs., Inc.* The 5-4 decision established that plaintiffs bringing disparate-treatment claims under the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action.[42] Following that showing, the burden of persuasion

does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

This case arose after FBL Financial Group ("FBL") transferred its employee Jack Gross, who was 54 years old, from his position as claims administration director to claims project coordinator. FBL also transferred many of Gross' duties to another employee, who was then in her forties, once reported to Gross, and had been assigned to the newly created position of claims administrative manager. Although Gross and the other employee received the same compensation, Gross considered his new position and the reallocation of duties to be a demotion because his co-worker assumed the functional equivalent of his former position, and his new position was ill-defined and lacked a job description or specifically assigned duties.[43]

The Court, in a majority opinion authored by Justice Thomas, stated, "[B]ecause Title VII is materially different with respect to the relevant burden of persuasion, this Court's interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse* and *Desert Palace, Inc. v. Costa* [44]…. This Court has never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now."[45] Moreover, the Court explained that the ADEA's text does not authorize an alleged mixed-motives age discrimination claim. The Court stated, "[U]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor…Congress neglected to add such a provision when it amended Title VII [through the Civil Rights Act of 1991]."[46] The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act.[47] To establish a disparate-treatment claim under this plain language, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision.

The Court also rejected the application of *Price Waterhouse*, explaining that it is not clear whether the Court would have adopted such a reasoning if it were to visit the issue today in the first instance.[48] In rejecting the application of *Price Waterhouse*, the Court explained that its decision was motivated in part by the difficulty faced by jurors when applying the burden-shifting framework. Justice Thomas opined that even if "*Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."[49]

Justice Stevens, dissenting, castigated the majority for its "utter disregard of our precedent and Congress' intent" by resurrecting a "but-for" standard long since rejected by both the Court and Congress. Justice Stevens asserted that "the most natural reading" of "because of... age" is to prohibit actions motivated in whole or in part by age, and that the dictionary definitions cited by Justice Thomas simply do not support the majority's conclusion. Justice Stevens further explained that it is not the job of the Court to reject as "unworkable" a mixed-motive framework drawn up by Congress, albeit under a slightly different statute.[50] Justice Stevens concluded that mixed-motive claims are viable under the ADEA and, based on the Court's decision in *Desert Palace*, do not depend on any distinction between direct and circumstantial evidence.

III. Lower Courts React to *Gross v. FBL*

The Supreme Court's decision in *Gross* is a lesson in both statutory interpretation and drafting. In light of the Court's decision, lower courts are taking a much closer look at the relationship between statutes, noting the need to "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[51] As a result of *Gross*, many district and circuit courts interpreting similarly phrased statutes, such as the Family Medical Leave Act ("FMLA"), the Jury System Improvement Act, and even the ADA, have begun to question whether the reasoning in *Gross* applies and alters the standard by which discriminatory conduct is evaluated. Additionally, some courts have questioned whether the reasoning in *Gross* should also be applied to statutes that do not utilize the precise "because of" standard found in the ADEA.[52]

According to the Fifth Circuit's recent decision in *Crouch v. JC Penney Corp., Inc.*, "[T]he Supreme Court's recent opinion in *Gross v. FBL Financial Services, Inc.*, raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework."[53] However, in its decision the court refrains from deciding the applicability of *Gross* and states, "[W]e need not reach this question, however, because Crouch cannot meet either standard [*Price Waterhouse* or *McDonnell Douglas*]." *Id.*

In *Crouch*, the plaintiff sued under both the FMLA and the ADA. In the analysis, the court cites *Gross* when deciding whether the plaintiff's claim of mixed-motive retaliation is proper under the FMLA. After rejecting the plaintiff's claim for lack of evidence, the court explains that "FMLA and ADA claims rise and fall together, because they employ the same burden-shifting framework" thus signaling the possibility that if the courts apply *Gross* in the FMLA mixed-motive retaliation cases, the same standard and analysis will also govern ADA claims.[54]

In *Williams v. District of Columbia*,[55] the district court applied *Gross* to the Jury System Improvement Act and explained that, unlike Title VII, the Jury System Improvement Act does not allow a plaintiff to establish discrimination by showing that [jury service] was simply

a motivating factor.[56] Despite recognizing that the plaintiff's jury service was likely a factor in the employer's decision, the court found for the defendant because the plaintiff could produce no evidence that the jury service was the "but-for cause" of the decision.[57]

The Seventh Circuit, in *Serwatka v. Rockwell Automation, Inc.*,[58] is the first court thus far to apply *Gross* in a mixed-motive case brought under the ADA.[59] In *Serwatka* the jury found that the plaintiff was perceived by her employer to be disabled, but would have been terminated regardless of her perceived disability. On appeal, the Seventh Circuit vacated the district court's decision and held that because there is no provision in the governing version of the ADA akin to Title VII's mixed-motive provision, an ADA plaintiff must show that his or her employer would not have fired him or her but for his or her actual or perceived disability—mere proof of mixed motives will not suffice.[60] The court explained that "like the ADEA, the ADA renders employers liable for decisions made 'because of' a person's disability, and *Gross* construes 'because of' to require a showing of but-for causation."[61]

The Seventh Circuit relied on the importance of implicit statutory language to place employers on notice of the proper basis for decision-making and applicable remedies. The court discussed the failure of Congress to add a provision to the ADA akin to Title VII's mixed-motive provision and noted that section 12117(a) of the ADA makes available to plaintiffs the same "powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 for Title VII plaintiffs… [however] the motivating factor amendment to Title VII is not a power, remedy, or procedure, it is, instead, a substantive standard of liability."[62] Thus, the Seventh Circuit held that mixed-motive claims were not proper under the ADA because Congress's failure to amend the ADA suggests that it had decided not to authorize mixed-motive claims under the ADA. The court refused to broadly construe a statute to provide causes of action and remedies not recognized by Congress.[63]

The decision by the Seventh Circuit logically construes both the Supreme Court's decision in *Gross* as well as Congress's intent when drafting the ADA. However, regardless of how the issue is ultimately resolved, there will likely be significant confusion in instructing juries in mixed-motives cases where there is evidence of discrimination under multiple statutes. For example, as a result of *Gross*, in mixed-motives cases where there is discrimination under both Title VII and the ADEA, Title VII's prohibition on making employment decisions "because of" race will warrant a motivating factor instruction. However, the ADEA's prohibition on making employment decisions "because of" age will not warrant such an instruction in the same case. As noted by Justice Stevens' dissent in *Gross*, this "will further complicate every case in which a plaintiff raises both ADEA and Title VII claims."[64]

Any confusion may be short-lived, however, as Congress will be holding hearings on the *Gross* decision and may "clarify the law's intent" through further legislation.[65]

Endnotes

1. 129 S. Ct. 2343 (2009).
2. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) ("In mixed-motives cases….there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.") (O'Connor, J., concurring); Lex K. Larson, *Employment Discrimination* § 8.09 (2d ed. 2009) ("[T]he term 'mixed motive' case describes the situation in which the plaintiff has provided sufficient evidence for a jury to find that there was a discriminatory motivation for the employer's actions and the employer seeks to prove that the action was motivated by nondiscriminatory as well as discriminatory reasons.").
3. 490 U.S. 228 (plurality opinion).
4. 42 U.S.C. § 2000e-2(a)(1), (2).
5. 490 U.S. at 237.
6. *Id.*
7. *Id.* at 258.
8. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in relevant part at 42 U.S.C. § 2000e-2(m)).
9. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) ("Two years after *Price Waterhouse*, Congress passed the 1991 Act 'in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Act of 1866 and 1964.'"); *Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000) (Alito, J.) ("Congress responded to Price Waterhouse with Section 107(a) of the 1991 Act, which amended Title VII.").
10. H.R. Rep. No. 102-40, pt 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697. In addition, Justice John Paul Stevens wrote that "[t]he Civil Rights Act of 1991 is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964. Section 3(4) expressly identifies as one of the Act's purposes 'to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.'" *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994).
11. *See* 42 U.S.C. 2000e-2(m).
12. *See* 42 U.S.C. § 2000e-5(g)(2)(B).
13. H.R. Rep. No. 102-40, pt 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.
14. *Id.*
15. *Id.* at 734.
16. *Gross*, 129 S. Ct. at 2349 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'").
17. *See* 42 U.S.C. §§ 12122(b)(3)-(7), 12113(a).
18. *See, e.g.*, *Katz v. City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996); *Olson v. State of New York*, 315 Fed. Appx. 361 (2d Cir. 2009); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000); *Buchsbaum v. University Physicians Plan*, 55 Fed. Appx. 40 (3d Cir. 2002); *Walton v. Mental Health Assoc. of Se. Pa.*, 168 F.3d 661 (3d Cir. 1999); *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Pinkerton v. Spellings*, 529 F.3d 513 (5th Cir. 2008); *Newberry v. East Tex. State Univ.*, 161 F.3d 276 (5th Cir. 1998); *Buchanan v. City of San Antonio*, 85 F.3d 196 (5th Cir. 1996); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300 (8th Cir. 1995); *Head v. Glacier NW., Inc.*, 413 F.3d 1053 (9th Cir. 2005); *Bell*

v. Kaiser Found. Hosp., 122 Fed. Appx. 880 (9th Cir. 2004); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996). Both the Sixth and Tenth Circuits, however, have issued decisions rejecting the possibility of a motivating factor standard in ADA mixed-motives cases and, instead, requiring plaintiffs to show that the adverse employment decision was made "solely by reason of" disability discrimination. *See Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 363-64 (6th Cir. 2007); *Fitzgerald v. Corrections Corp. of Am.*, 403 F.3d 1134, 1144 (10th Cir. 2005); *see also Despears v. Milwaukee County*, 63 F.3d 635, 636 (7th Cir. 1995) (stating a "sole cause" standard for an ADA claim), *overruled on other grounds as stated in Barrett v. Pearson*, 2009 U.S. App. LEXIS 23556, at *4, 2009 WL 3416658, at *1 (10th Cir. Oct. 26, 2009). The *Macy* decision expresses doubt as to the propriety of the "solely by reason of" standard, but indicates that it is bound to follow prior reported Sixth Circuit panel decisions. 484 F.3d at 364 n.2. The propriety of the standard is doubtful, given the Supreme Court's determination that "because of" does not mean "solely because of." *Price Waterhouse*, 490 U.S. at 242; *see also Head*, 413 F.3d at 1065 ("[W]e conclude that 'solely' is not the appropriate causal standard under any of the ADA's liability provisions."); *McNely*, 99 F.3d at 1074 ("[W]e believe that importing the restrictive term 'solely' from the Rehabilitation Act into the ADA cannot be reconciled with the stated purpose of the ADA.").

19. 42 U.S.C. § 12112(a). The ADA formerly had "because of" language parallel to Title VII, but in the ADA Amendments Act of 2008, Congress replaced the "because of" language with "on the basis of." *See* Pub.L. 110-325, § 5(a)(1).
20. 42 U.S.C. § 2000e-2(a)(1).
21. *Baird*, 192 F.3d at 470; *Buchanan*, 85 F.3d at 200 ("The remedies provided under the ADA are the same as those provided by Title VII.").
22. 42 U.S.C. § 2000e-2(m).
23. 42 U.S.C. § 12133.
24. *Baird*, 192 F.3d at 470; *Buchanan*, 85 F.3d at 200.
25. *Parker*, 204 F.3d at 337 ("Congress intended the statute…to cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action. Such a reading is consistent with the broad purpose of the ADA."); *McNely*, 99 F.3d 1068; *see also Walton*, 168 F.3d at 666 ("[I] n the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose—to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under on statute should inform the standards under the others as well.").
26. 42 U.S.C. 12101(b)(1).
27. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1074 (11th Cir. 1996).
28. 204 F.3d 326 (2d Cir).
29. *Id.* at 337. The Second Circuit took an arguably inconsistent position with respect to Age Discrimination in Employment Act (ADEA) claims. In *DeMarco v. Holy Cross High Sch.*, the Second Circuit rejected an argument that the motivating factor standard applied in ADEA cases because the Civil Rights Act of 1991 did not specifically amend the ADEA. 4 F.3d 166, 172 (2d Cir. 1993) ("We see no basis for concluding that the new Title VII standard applies to the ADEA, since Congress could have amended the ADEA along with Title VII, but did not."). Given that the Civil Rights Act also did not explicitly amend the ADA to provide for a motivating factor standard, the Second Circuit case law is difficult to square.
30. 1997 U.S. Dist. LEXIS 20754, 1997 WL 802106 (N.D. Ill. Dec. 29, 1997).
31. 1997 U.S. Dist. LEXIS 20754, at *20, 1997 WL 802106, at *6 (N.D. Ill. Dec. 29, 1997), *aff'd*, 168 F.3d 1029 (7th Cir. 1999).
32. *Price Waterhouse*, 490 U.S. at 240 ("But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.").
33. *Id.* ("To construe the words 'because of' as colloquial shorthand for 'but-for causation,'…is to misunderstand them.").
34. *See, e.g.*, *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008) ("The proper causation standard under the ADA is a 'motivating factor' test…discrimination need not be the sole reason for the adverse employment decision, [but[must actually play a role in the employer's decision making process and have a determinative influence on the outcome."); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999) ("To be a motivating factor, then, the forbidden criterion must be a significant reason for the employer's action. It must make such a difference in the outcome of events that it can fairly be characterized as the catalyst which prompted the employer to take the adverse employment action, and a factor without which the employer would not have acted."); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076-77 (11th Cir. 1996) ("we hold that the ADA imposes liability whenever the prohibited motivation makes the difference in the employer's decision, i.e., when it is a 'but-for' cause…. In everyday usage, 'because of' conveys the idea of a factor that made a difference in the outcome. The ADA imposes a 'but-for' liability standard."). In contrast, a recent Second Circuit decision, issued shortly before *Gross*, gave a significantly broader interpretation of the requirements of showing a motivating factor. *See Olson v. State of New York*, 315 Fed. Appx. 361, 363 (2d Cir. 2009) ("We have consistently held that a plaintiff in an employment discrimination case need not prove that discrimination was the sole motivating factor, the primary motivating factor, or the real motivating factor in the adverse employment action; she need only prove that discrimination was a motivating factor.").
35. *Price Waterhouse*, 490 U.S. at 283.
36. *Id.* at 281.
37. 98 Fed. Appx. 369 (6th Cir. 2004).
38. *Id.* at 376 n.3.
39. *Gross*, 129 S. Ct. at 2349.
40. 98 Fed. Appx. at 376 n.3.
41. 129 S. Ct. at 2352 n.5.
42. *Id.* at 2351.
43. *Id.* at 2347.
44. 539 U.S. 90, 94-95 (2003).
45. 129 S. Ct. at 2349.
46. *Id.*
47. *Id.* at 2350 (*citing Hazen Paper Co. v. Biggins*, 507 U. S. 604, 610 (1993)).
48. *Id.* at 2352.
49. *Id.* at 2352. *But see Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977) (reevaluating precedent that was subject to criticism and continuing controversy and confusion).
50. *Id.* at 2353.
51. *See Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1153 (2008).
52. *Brown v. J. KAZ, Inc.*, 581 F.3d 175, 182 (3d Cir. 2009).
53. 2009 U.S. App. Lexis 14362, at *7; 2009 WL 1885875, at *2 (5th Cir. July 1, 2009).
54. 2009 U.S.App. Lexis 14362, at *7; 2009 WL 1885875, at *3; *see also Rasic v. City of Northlake*, 2009 U.S. Dist. Lexis 88651, at *56-57; 2009 WL 3150428, at *17-18 (N.D. Ill. Sept. 25, 2009) (The district court

refused to apply the Supreme Court's decision in *Gross* to the plaintiff's FMLA claims because of the Seventh Circuit precedent that predates *Gross*. However, the court also noted that there is a serious question as to whether the mixed-motive theory of FMLA retaliation survives the Supreme Court's recent decision in *Gross v. FBL Fin. Servs., Inc.*, which it called on the Seventh Circuit to address.).

55. 644 F. Supp. 2d 103 (D. D.C. 2009).

56. *Id.* at 109.

57. *Id.*

58. 2010 U.S.App. Lexis 948; 2010 WL 137343 (7th Cir. Jan 15, 2010).

59. In *Doe v. Deer Mountain Day Camp, Inc.*, the district court for the Southern District of NewYork declined to apply *Gross* to a mixed-motives case under the ADA. 2010 U.S. Dist. LEXIS 3265, at *39-*40, 2010 WL 181373, at *8 (S.D.N.Y. Jan. 13, 2010). The court recognized that the Supreme Court's *Gross* decision might mandate a higher standard of causation, but because *Gross* did not expressly apply to the ADA, the district court continued to apply Second Circuit precedent as set forth in *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000). The district court nonetheless concluded that even if the higher "but-for" standard set forth in *Gross* applied, the plaintiff met that standard. 2010 U.S. Dist. LEXIS 3265, at *40 n.40, 2010 WL 181373, at *8 n.40.

60. 2010 U.S.App. Lexis 948, at * 14; 2010 WL 137343, at *4.

61. *Id.*

62. *Id.*

63. *Id.* (*citing McNutt v. Bd. Of Trustees of U. of Ill.*, 141 F.3d 706 (7th Cir. 1998) (refusing to allow a mixed-motive claim under Title VII because the omission of retaliation claims from 42 U.S.C. § 2000e-2(m) limits the relief that courts can grant).

64. 129 S. Ct. at 2357. When he served on the Third Circuit, Justice Alito expressed a similar concern about judges facing "the challenge of trying to make lay jurors understand that 'because of' means one thing as applied to the first claim and another thing as applied to the other claims." *Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 220 (3d Cir. 2000) (Alito, J.).

65. *See* United States House of Representatives Committee on Education & Labor Press Release, "Congress to Hold Hearings on Supreme Court's 'Gross' Ruling Regarding Age Discrimination, Says Chairman Miller," June 30, 2009, *available at* http://edlabor.house.gov/newsroom/2009/06/congress-to-hold-hearing-on-su.shtml; *see also* United States Senator Patrick Leahy Press Release, "Bicameral Legislation Will Protect Older Workers from Discrimination, Restore Civil Rights," October 6, 2009, *available at* http://leahy.senate.gov/press/200910/100609c.html (discussing the proposed "Protecting Older Workers Against Discrimination Act," which would reverse *Gross v. FBL Financial Servs., Inc.*).

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Scenes from the Labor and Employment Law Section

Annual Meeting Program

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Social Networking Takes the Stage at the NYSBA Annual Meeting

By William A. Herbert

The rapid growth and significance of social networking is reflected in the fact that it was the subject of two panel discussions at NYSBA's 2010 Annual Meeting. It was the sole topic at a plenary session at the Presidential Summit convened by NYSBA President Michael E. Getnick. It was also discussed by the panelists at a plenary session, entitled "A Brave New Workplace: Issues and Potential Solutions in the Virtual World," at the Annual Meeting of the Labor and Employment Section. The panelists at the latter session were Peter D. Conrad; Hanan B. Kolko; Norman G. Meacham; and Steven Sykes.

The legal implications of social networking for employers, unions and employees are immense, and largely unresolved at the present time. At the "Brave New Workplace" plenary session, the panelists were able to only scratch the surface of the multitude of labor and employment issues created by social networking.

For the uninitiated, social networking refers to interactive websites that permit individuals and companies to communicate with others. Such sites are utilized to form electronic communities for the distribution of various forms of information and photographs. Currently, the most well-known social networking sites are Facebook and Myspace. On the following page is a glossary of social networking terms, prepared by the law firm of Whiteman Osterman & Hanna LLP, which was distributed at the Section's Annual Meeting, for the purpose of familiarizing attendees of certain relevant core terms.

Social networking and many other important issues relating to new technologies in labor and employment law will be addressed in greater detail at the ABA Technology in the Practice and Workplace Committee Midyear Meeting scheduled to take place at New York University School of Law on April 28-30, 2010. The program is co-sponsored by NYSBA's Labor and Employment Section and the Center for Labor and Employment Law at New York University School of Law.

Glossary of Social Networking Terms

Blog

A Web site of commentaries on a particular subject, usually created by one individual. Blogs may be personal or corporate and may include photos and videos. A "blogger" is a person who maintains a blog. When a blogger is writing or posting something on his blog, he is said to be "blogging."

- **Common Blogging Web sites**: Blog Spot, Blogger, LiveJournal, Type Pad, and Hipcast

Buddy List

A collection of screen names in an instant messaging or e-mail program or online game or mobile phone.

Connection

A link between users of a network.

Friending

A method of making connections and acknowledge relationships in social networks. Friends can more easily chat with each other, manage invitations, follow each other's online activity, and find other friends.

Instant Messaging (IM)

Instantaneous person-to-person conversations over the Internet. Instant messaging is commonly referred to as "chatting" and involves typing to and receiving messages from the person you're chatting with.

- **Common Instant Messaging Platforms**: AOL Instant Messenger (AIM), Google Talk (GChat), Windows Live Messenger, Yahoo! Messenger, ICQ

Microblogging

A form of blogging involving very short messages (around 140 characters).

- **Common Microblogging Web sites:** Twitter, Plurk, Jaiku

Photo Messaging

Sending a picture to another person via cell phone.

Podcast/Vidcast/Vlog

A form of blogging that involves audio or video, rather than text. Podcasts are audio, while Vidcasts or Vlogs are video.

Privacy Settings

Settings that allow users to control who may or may not view various content on their personal pages. Privacy settings are available on most photo sharing and social networking sites.

- See included articles on MySpace and Facebook privacy settings

Profile

Information about a user, commonly found on social networking sites. A "profile" may contain details such as the user's name, hometown, interests, pictures, etc.

Sexting

Sending sexually explicit messages, photos, or video via cell phone.

Social Network

An online community of people. Social networks provide ways for users to interact through mediums such as e-mail and instant messaging services. In addition, social networking sites allow users to share information with other users, from personal biographical information, educational information, and work history to likes and dislikes, and hobbies.

- **Examples of Social Networking Web sites**: Facebook, MySpace, LinkedIn (business professionals), Flickr (photo sharing), Twitter

Status Updates

A microblogging feature of many social networking sites that allows users to update others, including updates on what they are doing and how they are feeling.

Tagging

Adding information to a web resource that identifies some aspect of that resource. Tagging is most frequently a reference to the identification of a person in a photograph posted on a Web site.

Text Messaging

Sending a short message containing text usually less than 160 characters, via cellular phone.

Unfriend

To remove someone as a "friend" on a social networking site.

Video Messaging

1. Talking to another person through the Internet. Participants in the conversation can see and hear the person they are talking to.
   - **Example of software supporting video messaging:** Skype
2. Sending a recorded video to another person via cell phone.

Wall

Individual space of a user of a social networking site where friends may post messages, photos, or Web links for the user, and others, to see. Posting on someone's wall generally allows all other users to see the content of that post.

The Wholesale Seizure of Major League Baseball's Confidential Drug Testing Records and the Consequences for the War Against Substance Abuse in America's Workplaces

By Jason B. Jendrewski

I. Introduction

Major League Baseball ("MLB") has been winning the battle to eradicate the use of steroids and other performance enhancing substances in the sport.[1] Detectable steroid use among its players has declined[2] and questions about the integrity of the game no longer monopolize front and back page headlines.[3] The chapter of MLB's so-called "Steroids Era" was to be officially closed with the December 13, 2007 release of the Mitchell Report, a 409-page "independent investigation into the illegal use of steroids and other performance enhancing substances by players in Major League Baseball."[4] However, on June 12, 2008, Congressmen Henry Waxman and Tom Davis inquired with MLB Commissioner Bud Selig and MLB Players Association Executive Director Donald Fehr about allegations concerning the suspension of MLB's drug testing program during the 2004 championship season.[5] Commissioner Selig's response articulates "an extraordinary, unforeseen set of circumstances" involving the federal government's seizure of MLB's drug testing records in what may be "the first time that law enforcement officials had sought large numbers of records from a private employer's workplace drug testing program as part of a criminal investigation."[6]

Protracted litigation between the MLB Players Association[7] and the federal government over the legality of the seizure threatens to disturb the tranquility achieved in MLB's highly sensitive drug testing arena, as the controversial seizure of MLB's 2003 drug testing records could reveal the identity of a significant number of players who were not named in the Mitchell Report nor linked to the Bay Area Laboratory Co-Operative ("BALCO"), the subject of the government's grand jury investigation.[8] Indeed, the "non-disciplinary and anonymous" testing conducted in 2003 is alleged to have resulted in 104 positive test results[9] and several star ballplayers' names—Alex Rodriguez,[10] Sammy Sosa,[11] Manny Ramirez,[12] and David Ortiz[13]—have already been leaked, causing widespread media attention and irreparable damage to the players, including reputational harm and potential loss of endorsement deals.[14] Barry Bonds has also endured negative consequences; even though he did not test positive in 2003, his seized urine sample was retested, revealing the presence of performance enhancing substances.[15] Each revelation has served to increase public scrutiny of MLB's drug program, notwithstanding that the test results occurred in 2003,[16] that conclusions reached about the names of players on the list are subject to conjecture,[17] and that MLB's drug program has been renegotiated three times since disciplinary testing was instituted in 2004.[18] The extensive media coverage surrounding the leaks underscores the magnitude of the litigation over the seized drug testing records.

"Protracted litigation between the MLB Players Association and the federal government over the legality of the seizure threatens to disturb the tranquility achieved in MLB's highly sensitive drug testing arena, as the controversial seizure of MLB's 2003 drug testing records could reveal the identity of a significant number of players…"

Even though three different federal district courts found the government's conduct to be unlawful as an unreasonable search and seizure in violation of the Fourth Amendment and ordered the return of the drug testing records,[19] the Ninth Circuit Court of Appeals has thrice considered the consolidated matter of *United States v. Comprehensive Drug Testing, Inc*. In its first consideration, the Ninth Circuit overturned the district court rulings.[20] Although this opinion was withdrawn, a divided Ninth Circuit three-judge panel issued a second lengthy opinion adverse to the MLB Players Association.[21] Despite these rulings, the Ninth Circuit reheard the case, sitting as a "limited en banc" panel with eleven circuit judges present and participating.[22] This time, however, the Ninth Circuit ruled in favor of the MLB Players Association in a 9-2 decision that found the government's conduct to be "an obvious case of deliberate overreaching … in an effort to seize data as to which it lacked probable cause."[23] The "limited en banc" panel consequently took occasion to set forth a series of guidelines for federal courts to follow regarding the issuance and administration of search warrants and subpoenas for electronically stored information.[24]

This "significant victory for the MLB Players Association"[25] likely will not be the end of the matter, though, as

United States Solicitor General Elena Kagan and 22 lawyers from the Justice Department and U.S. Attorney's offices have asked for an "unprecedented reconsideration" of the latest ruling before all 27 Ninth Circuit judges.[26] While the Ninth Circuit has not convened all of its judges for a single matter in over three decades, the government argues that "[t]he broad issues unnecessarily addressed in the en banc panel's opinion are of surpassing importance and compel that extraordinary action."[27] The legal battle could extend into 2011 or later, and regardless of whether the Ninth Circuit agrees to this request, Solicitor General Kagan ultimately could seek the review of the United States Supreme Court.[28]

The consequences of the ultimate disposition of this case are profound and extend well beyond the realm of professional sports.[29] The litigation "has implications for all Americans concerned about the government's authority to seize drug-testing results and other medical records without probable cause."[30] Indeed, the Chamber of Commerce of the United States of America ("U.S. Chamber of Commerce")—"the world's largest business federation, representing more than three million businesses and organizations of every size, in every sector and region"—participated as amicus curiae in support of the MLB Players Association and Comprehensive Drug Testing, Inc. ("CDT"), MLB's drug testing laboratory.[31] The U.S. Chamber of Commerce's involvement confirms that this case presents issues of widespread concern to the American business community.[32] Even Rob Manfred, MLB's Executive Vice President of Labor Relations, said, "[B]aseball to one side, there are important issues in this case. I think that's what caught [the judges'] attention."[33]

While scholarly discourse has principally concentrated on the significant concern that the Ninth Circuit's prior rulings jeopardize the privacy of electronic records and undermine the constitutional right against illegal search and seizure,[34] this article focuses primarily on how a reversal of the Ninth Circuit's latest ruling would threaten employers' efforts to maintain drug-free workplaces. Specifically, a ruling against the MLB Players Association would endanger the viability of voluntary workplace drug testing by conflicting with longstanding federal policies of curbing substance abuse in the workplace and promoting collective bargaining as the conduit through which to institute drug testing programs for unionized employees in the private sector.[35]

Part II of this article summarizes the facts of *U.S. v. Comprehensive Drug Testing, Inc.* Part III analyzes the significance of employee substance abuse and federal efforts to curb such abuse. Part IV examines federal labor policy and drug testing as a mandatory subject of collective bargaining, with an analysis of the implementation of MLB's Joint Drug Prevention and Treatment Program ("Joint Drug Program"). Finally, Part V evaluates the impact of this litigation on MLB's joint labor-management endeavor and the future of drug testing in unionized workplaces both within and outside of the professional sports industry.

II. The Facts of *United States v. Comprehensive Drug Testing, Inc.*

In April 2004—only a few months after President George W. Bush admonished the use of steroids and other performance enhancing substances in sports in his State of the Union address[36]—the federal government issued subpoenas to MLB's drug testing laboratories in connection with its investigation of BALCO's "alleged distribution of illegal steroids to enhance the performance of professional baseball athletes."[37] While the government had "probable cause to believe that at least 10 major league baseball players received illegal steroids from BALCO,"[38] it sought drug testing information for *all* Major League players.[39] Because both of MLB's drug testing laboratories—CDT in Long Beach, California and Quest Diagnostics, Inc. in Las Vegas, Nevada ("Quest")—resisted "production of even a single drug test," the government issued new subpoenas that sought information concerning only those players linked to BALCO.[40] As the drug testing records at issue were created pursuant to MLB's collective bargaining agreement, the MLB Players Association and CDT filed a motion to quash the subpoenas in the Northern District of California.[41]

In response to the motion to quash, the government applied for two search warrants, one of which was granted for CDT's Long Beach office and the other of which was granted for Quest's Las Vegas laboratory.[42] While the search warrants authorized "the seizure of drug testing records and specimens" for the ten players linked to BALCO, they also authorized "the search of computer equipment, computer storage devices, and—where an on site search would be impracticable—seizure of either a copy of all data or the computer equipment itself."[43] The government sought to determine the identity of the players by matching Quest's drug testing records with the identifying codes possessed by CDT.[44]

Jeff Novitzky and 11 other federal agents executed the search warrant for CDT on April 8, 2004.[45] The agents discovered a 25-page hard-copy document containing a master list of the names and identifying numbers of all Major League players tested during the 2003 season.[46] The identifying numbers found on this document were used to prepare an additional search warrant for the seizure of Quest's specimen samples.[47] In addition to obtaining the master list, a CDT director reluctantly provided the agents with a 34-page document containing a list of positive drug test results for eight of the ten players linked to BALCO, albeit intermingled with positive test results for 26 other players. Most significantly, however, another CDT director informed the agents about a computer directory identified as "Tracey" that contained CDT's entire sports drug testing files.[48] Because "Tracey"

contained "numerous subdirectories and hundreds of files," the computer investigative specialist agent recommended off-site analysis and the agents copied the entire directory for later review at government offices.[49]

Contemporaneously, a second search warrant in the District of Nevada was executed by another group of federal agents who were investigating Quest's Las Vegas laboratory.[50] This search warrant, however, listed the players by name, whereas the specimen samples were labeled by identifying number.[51] As a consequence, the agents failed to locate the specimens authorized for seizure.[52] Nevertheless, as discussed, the group of agents investigating CDT retrieved records that matched the identifying numbers to players' names.[53] The agents investigating Quest received this information and then applied for a third search warrant in the District of Nevada to seize the specimens by name *and* identifying number.[54] Upon receiving Judge Leavitt's authorization, the agents seized the specimens of the "then-identifiable" players linked to BALCO.[55] Pursuant to Federal Rule of Criminal Procedure 41(g) ("Rule 41(g)"), under which a party "aggrieved by an unlawful search and seizure of property… may move for the property's return,"[56] the MLB Players Association filed motions seeking return of the seized property.[57]

Subsequently, the government obtained a fifth search warrant in the Northern District of California, enabling it to seize all electronic data "regarding drug specimens, drug testing, specimen identification numbers, athlete identification numbers, and drug test results, retained by [CDT]…pertaining to the drug testing of Major League Baseball players, located within the copy of a CDT computer sub-directory…identified as the 'Tracey'…."[58] In response, the MLB Players Association filed another Rule 41(g) motion seeking return of any property seized in accordance with this newly issued search warrant.[59] Although the MLB Players Association's motion was granted and the government did not contest the order, the government contended that it retained the authority to review the directory based on a previously issued search warrant.[60]

Based on information obtained from the "Tracey" directory, the government sought additional search warrants permitting the seizure of "all specimens and records relating to more than 100…players who had tested positive for steroids."[61] A warrant authorizing the seizure of specimens from Quest was granted in the District of Nevada and a warrant authorizing the seizure of records from CDT was granted in the Central District of California.[62] Accordingly, the MLB Players Association filed Rule 41(g) motions for the return of property seized in accordance with these search warrants.[63] Judge Mahan granted the Rule 41(g) motion in the District of Nevada and ordered the return of all seized specimens, with the exception of the ten players linked to BALCO, as well as the reviewing agents' notes and memoranda.[64] Judge Mahan reasoned that "'[t]he government callously disregarded the affected players' [Fourth Amendment] constitutional rights' and that the government unreasonably refused 'to follow the procedures set forth in *United States v. Tamura*…with regard to the intermingled records seized in the Central District of California.'"[65] Judge Cooper similarly granted the Rule 41(g) motion in the Central District of California and ordered the government to return all evidence seized, with the exception of evidence pertaining to the ten named players.[66] The government has appealed both rulings.[67]

A third government appeal concerns grand jury subpoenas issued to Quest and CDT on May 6, 2004.[68] These subpoenas reached beyond the ten players linked to BALCO and called for the conveyance of all specimens and records of positive steroid tests related to MLB's drug testing program.[69] Although Quest complied with the government's demands and turned over "hundreds of pages of documents," the government agreed to defer CDT's compliance until the search warrant litigation was resolved.[70] Notwithstanding this understanding between the parties, the government later "revoked the indefinite deferral and instructed CDT to comply with the subpoena…."[71] Consequently, the MLB Players Association filed a motion to quash the subpoenas. Judge Illston granted the motion to quash, finding "that the government's conduct was unreasonable and constituted harassment."[72]

On appeal, the Ninth Circuit twice issued opinions favorable to the government[73]—first, on December 27, 2006, and second, on January 24, 2008—before most recently overturning the three-judge panel's latter decision and ruling in favor of the MLB Players Association.[74] As stressed by Judge Thomas, "The stakes in this case are high."[75] If the matter is again reheard en banc, as requested by Solicitor General Kagan, the Ninth Circuit will have one final opportunity to determine "whether the United States may retain evidence it seized from Major League Baseball's drug testing administrator, and enforce an additional subpoena, as part of an ongoing grand jury investigation into illegal steroid use by professional athletes."[76] To appreciate the significance of the question to be decided and its prospective consequences for drug testing in America's unionized workplaces, one must first understand the impact of employee substance abuse and the employer's role in promoting a drug-free workplace.

III. The Impact of Substance Abuse in the Workplace and the Role of Employers

A. The Significance of Substance Abuse in the Workplace

It has been written that "[n]owhere is the problem [of substance abuse] more apparent than in the workplace."[77] Estimates suggest that 77% of all illicit drug users in the United States are employed.[78] That percentage translates to a whopping 9.4 million substance abusing employees.[79] To combat such abuse, many employers

have relied on drug testing as a key component of a comprehensive approach to eradicating substance abuse in the workplace.[80] Indeed, over two decades ago when President Ronald Reagan signed an Executive Order mandating that all Federal agencies be drug-free,[81] the President's Commission on Organized Crime contemporaneously "urged all public and private employers to 'consider the appropriateness' of a drug testing program."[82] Irrespective of privacy considerations that are an inherent concern for any drug testing program,[83] it should be undisputed that workplace substance abuse is a significant social, moral, and economic problem.[84] Indeed, one management official explained, "I have read the Constitution many times, and have yet to find where it authorizes a person to climb up on a locomotive and operate a train carrying hazardous material while under the influence of drugs."[85]

B. Employer Interests in Maintaining a Drug-Free Work Environment

Employers have considerable interests in maintaining a drug-free workplace, as substance abuse "creates significant safety and health hazards and can result in decreased productivity and poor employee morale."[86] By and large, "[s]ubstance abusing employees often do not make good employees."[87] Studies indicate that substance-abusing employees are more likely than non-substance abusers to "change jobs frequently, be late to or absent from work, be less productive employees, be involved in a workplace accident, and file a workers' compensation claim."[88] For example, drug-using employees are three times more likely to be late for work and more than twice as likely to have switched their place of employment three or more times in the past year.[89] Moreover, an employer's medical costs are twofold for drug-using employees,[90] as employers often incur additional expenses due to health care claims like short-term disability.[91] Even non-substance abusing employees' productivity and morale may be impacted by working alongside a substance abusing co-worker.[92]

Based on the staggering findings presented above, it is clear that by helping to ensure safe and healthy workplaces, drug-free workplace programs can "add value to American businesses."[93] Accordingly, employers that have established successful drug-free workplace programs note "improvements in morale and productivity, and decreases in absenteeism, accidents, downtime, turnover, and theft."[94] In addition, such employers report "better [employee] health status" and a decline in the use of medical benefits by their employees.[95] Efforts to promote drug-free workplaces are so critical that in 2006 the United States Secretary of Labor announced the designation of an annual drug-free work week "to educate employers, employees and the general public about the importance of being drug-free as a component of improving workplace safety and health."[96]

C. The Importance of Drug Testing to Curb Substance Abuse

Drug testing is at the core of a successful drug-free workplace program.[97] In fact, the Occupational Safety and Health Administration[98] (OSHA) considers drug testing to be one of five key components to a "comprehensive drug-free workplace approach."[99] An employer is incentivized to implement a drug testing program in order to "deter employees from abusing [] drugs; prevent hiring individuals who use illegal drugs; be able to identify early and appropriately refer employees who have drug [] problems; provide a safe workplace for employees; protect the general public and instill consumer confidence that employees are working safely; comply with State laws or Federal regulations; [and] benefit from Workers' Compensation Premium Discount programs."[100] The benefits of having a drug testing program appear to outweigh the expense for many businesses, as the American Management Association reported in 2004 that the majority of employers in the United States had drug testing programs.[101] Employers commonly implement drug testing under the following circumstances:

> **Pre-Employment**—testing of job applicants typically after conditional employment offer has been made;
>
> **Reasonable Suspicion**—discretionary testing when employees exhibit observable signs and symptoms suggestive of substance abuse;
>
> **Post-Accident**—testing employed following work-related accidents to determine whether substance abuse contributed to property damage or personal injury;
>
> **Random**—testing performed on an unannounced, unpredictable basis in which employees are selected through a scientifically arbitrary selection process using identifying information;
>
> **Periodic**—testing administered uniformly often on an advance scheduling basis; and
>
> **Return-to-Duty**—single test upon an employee's completion of a substance abuse treatment program and subsequent return to work.[102]

While non-unionized employers possess the unilateral authority to implement drug testing programs at their whim, instituting drug testing for unionized employees is a far more challenging effort because, as is explained in Part IV below, the implementation of any such program requires the consent and participation of the union representing such employees.[103] That being said, unions tend to view random, suspicion-less drug testing as an unreasonable and invasive search violating the Fourth Amendment and infringing upon the privacy rights of employees.[104] For example, speaking about MLB's Joint

Drug Program, Marvin Miller, the former Executive Director of the MLB Players Association, explained that "[t]here's no evidence that's plausible to justify testing people indiscriminately. If the government wanted to do that, they'd have to go to court for each player tested and say, 'Here's evidence of probable cause that this player is a user of an illegal product.'"[105]

Given this viewpoint, it is not surprising that unions generally oppose employer efforts to institute drug testing in the workplace.[106] In fact, Mr. Miller declared that he "would never have agreed to any testing program [for MLB players] in the first place."[107] Despite these obstacles, the implementation of a drug testing program for unionized employees is an achievable goal through the collective bargaining process, and the institution of mandatory drug testing in MLB highlights the importance of confidentiality in gaining a union's consent to the establishment of a drug testing program for its membership.

VI. Federal Labor Policy and the Institution of Drug Testing in Major League Baseball

A. The Aims of the National Labor Relations Act and the Obligation to Collectively Bargain Over Drug Testing

Federal labor policy strives to curtail industrial strife by encouraging collective bargaining[108] between employers and employees as a means of settling disputes over terms and conditions of employment.[109] Prior to the enactment of any statutorily protected right to organize and bargain collectively, President Woodrow Wilson articulated a vision for bringing democracy to industry. In his Presidential Message of May 20, 1919, President Wilson called for the enactment of "positive legislation,"[110] the object of which would be the "genuine democratization of industry, based upon a full recognition of the right of those who work…to participate in some organic way in every decision which directly affects their welfare."[111]

In many respects, the National Labor Relations Act of 1935 ("NLRA") codified this fundamental core philosophy in setting forth the legal landscape governing the private sector labor-management relationship.[112] The NLRA "creates a framework for mandatory negotiation"[113] between employers and unions and thereby seeks to stabilize the parties' relationship through the formation of a contract.[114] The NLRA is structured on the premise that "free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about adjustments and agreements which the Act in itself does not attempt to compel."[115] This policy of free and private collective bargaining is such a seminal feature of federal labor law that "no outside party or governmental agency has the authority to dictate a substantive result."[116] Even the National Labor Relations Board[117] ("NLRB")—the independent federal agency created to administer the NLRA—"may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[118] Accordingly, the government may supervise only the collective bargaining process and require bargaining parties to negotiate.[119] The underlying premise is that "collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole."[120]

Of chief importance, Section 7 of the NLRA grants employees "the right…to bargain collectively through representatives of their own choosing…."[121] The NLRA encourages "the making of voluntary labor agreements"[122] by imposing a mutual obligation on employers and unions to bargain "in good faith"[123] over "rates of pay, wages, hours of employment, or other conditions of employment"[124]—the mandatory subjects of bargaining.[125] The parties have "wide latitude" in their negotiations;[126] however, an employer has no duty to bargain over "managerial decisions, which lie at the core of entrepreneurial control."[127] Although a refusal to bargain over a mandatory subject constitutes an unfair labor practice,[128] the NLRA does not "compel either party to agree to a proposal or require the making of a concession."[129] Because "neither party is legally obligated to yield,"[130] a party may insist on a particular position indefinitely so long as it is "genuinely and sincerely held [and] it is not mere window dressing."[131] Consequently, "the agreements that emerge…reflect a balancing of different interests."[132]

As held by the NLRB, drug testing of current employees is a mandatory subject of bargaining.[133] The NLRB reasoned that compulsory drug testing is a term and condition of employment, as opposed to an entrepreneurial prerogative, because such testing is (1) "germane to the working environment" and (2) its implementation is "not among those 'managerial decisions which lie at the core of entrepreneurial control.'"[134] The NLRB determined that a drug testing requirement is a "'condition' of employment 'because it has the potential to affect the continued employment of employees who become subject to it.'"[135] In addition to impinging upon employment security, the NLRB explained that, like the use of a polygraph test, which was held to be a mandatory subject of bargaining,[136] the institution of drug testing constitutes "a change in an important facet of the workaday life of employees."[137] Accordingly, although private employers are not bound by the search and seizure provisions of the Fourth Amendment,[138] federal law does mandate that private employers bargain over the implementation of a drug testing program for unionized employees.[139]

B. The Institution of Drug Testing in Major League Baseball

The NLRB has asserted jurisdiction over MLB with respect to its employment of Major League players,[140] and, therefore, MLB is bound by the requirements of the

NLRA, including the duty to bargain in good faith over the implementation of a drug testing program for its players.[141] As explained by Commissioner Selig and Mr. Manfred:

> In professional sports…athletes are employees of their clubs and are represented for collective bargaining purposes by unions. The clubs must therefore bargain over terms and conditions of employment, including any drug policies for, and drug testing of, athletes. Given that positive drug tests can lead to fines, suspensions without pay, or both, it is not at all surprising that unions resist agreements containing broad prohibitions and requiring extensive testing.[142]

Despite several failed attempts to institute mandatory drug testing,[143] MLB and the MLB Players Association (collectively, the "Parties") reached a landmark agreement in 2002 that established MLB's Joint Drug Program.

Although historically opposed to mandatory drug testing,[144] the MLB Players Association agreed to the establishment of a compulsory testing program on the condition that "program testing"[145] with disciplinary consequences would be instituted only if more than 5% of players tested positive for steroids over the course of a season-long "survey testing" designed to evaluate the scope of steroid use in MLB.[146] When instituting the Joint Drug Program, the Parties recognized that "confidentiality of the [players'] participation in the Program [would be] essential to the Program's success."[147] Importantly, with regard to the initial survey testing, "after the results of all tests [had] been calculated, all test results, including any identifying characteristics, [were to be] destroyed in a process jointly supervised by the Office of the Commissioner and the Association."[148] Therefore, the Parties contracted for the survey tests to be both confidential and anonymous.[149] Indeed, "no one was ever supposed to know who tested positive," not even the players.[150] Such promises of confidentiality and anonymity were critical concessions for obtaining the MLB Players Association's agreement to the institution of a drug testing program for its membership.[151]

C. The Threat to MLB's Joint Drug Program Posed by the Federal Government's Seizure of Its Confidential Testing Records

The 2003 survey testing commenced and was completed according to the dictates of the Joint Drug Program. In total, 1,198 players were tested.[152] However, the federal government intruded upon the testing laboratories and seized the drug testing results before the Parties were able to destroy them (as per the terms of the collective bargaining agreement).[153] As discussed, although the federal government possessed a valid search warrant for the test results of 11 players, the investigators seized the confidential drug testing records of *all* players tested during the 2003 season.[154] This wholesale seizure of MLB's drug testing records breached the confidentiality presumption governing the Joint Drug Program and posed a "serious threat to the confidentiality and integrity of [the] program."[155]

As discussed, the sole purpose of the survey testing was "to determine the approximate magnitude of… steroid use with the goal of fashioning appropriate policies to address [the issue];"[156] the program was not implemented to punish individual players.[157] The Parties even acknowledged that legal over-the-counter nutritional supplements could result in adverse test results.[158] Accordingly, in an emergency response to this unforeseen event, the Parties agreed to a moratorium on drug testing during the 2004 season[159] because "players faced the realistic prospect of criminal prosecution based on evidence from a drug test that they were promised would be anonymous."[160] Indeed, MLB admits that the seizure "threatened the continued viability of the entire drug testing program."[161]

As a consequence of the government's seizure of "across-the-board"[162] testing data, the Parties revised the Joint Drug Program to include a provision whereby "all testing [] shall be suspended immediately upon the Parties learning of a governmental investigation."[163] Essentially, in the event of an investigation, the program would be suspended to "resist an attempt by law enforcement officials to premise a criminal probe on private drug testing results."[164] Whether such a provision is sufficient protection for the confidentiality of a drug testing program is speculative at best; however, in this particular case its adoption was indeed necessary given the problematic circumstances that the Parties faced. Based on the serious threat to the Joint Drug Program and the Parties' response, it is plausible that—as alleged by the U.S. Chamber of Commerce—the final disposition of *U.S. v. Comprehensive Drug Testing, Inc.* will have an impact that transcends these particular bargaining parties and affect labor-management relationships at other unionized workplaces throughout the United States.

V. *United States v. Comprehensive Drug Testing, Inc.* and Its Implications for the Future of Workplace Drug Testing

Employee substance abuse is a significant problem and an equally challenging one to solve, particularly in unionized work environments.[165] Nevertheless, it is "incumbent upon unionized employers to confront the issue in the workplace," and the method of drug testing employees "can be an effective weapon in the war against substance abuse."[166] However, an ultimate disposition of *U.S. v. Comprehensive Drug Testing, Inc.* that is adverse to the MLB Players Association's interests may serve to

undermine the future of voluntary workplace drug testing because a superseding decision that is consistent with the Ninth Circuit's first two opinions would likely have a detrimental impact on employers' efforts to implement drug testing or maintain existing programs for unionized workers.[167] Significantly, the Ninth Circuit's "limited en banc" panel recognized that the "risk to…the ability of the [MLB] Players Association to obtain voluntary compliance with drug testing from its members in the future…is very high."[168]

The U.S. Chamber of Commerce has communicated "two major concerns for the national business community" posed by the Ninth Circuit's prior decisions, one of which is relevant to this article.[169] Specifically, the troublesome consequence of a ruling similar to the superseded opinions is that such a decision would judicially sanction the governmental disruption of a privately negotiated collective bargaining agreement—in particular, a statutorily protected pact that attempted to tackle the "difficult issue" of workplace substance abuse.[170] The government's abuse of MLB's collectively bargained confidentiality provision upset the "delicate arrangement" negotiated by the Parties (undermining promises of confidentiality and anonymity)[171] and even has been declared a "union-busting tactic[]" by Marvin Miller.[172] Mr. Miller accused the government of engaging in a "witch hunt," noting that "the victims are the athletes" because "[t]hey're obviously the ones being hunted down here."[173]

While the U.S. Chamber of Commerce does not does not dispute the legitimacy of the government's interest in conducting a criminal investigation of illegal drug use in the workplace[174]—and neither does the MLB Players Association object to the seizure of drug testing records pertaining to the ten players linked to BALCO[175]—the primary concern is that the government seized thousands of drug testing records that included *every* Major League player.[176] By seizing the drug testing records for all players, the government unduly infringed upon rights protected by MLB's collective bargaining agreement. Indeed, the Supreme Court long ago declared (albeit in a distinctly different matter) that "[i]ndividual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so."[177]

Federal labor policy rests upon the fundamental assumption that the bargaining parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest."[178] Labor and management perspectives concerning workplace drug testing are at fundamental odds,[179] and privacy concerns are of paramount importance to unions when considering employer drug testing programs.[180] Consequently, if the Ninth Circuit (or possibly the Supreme Court) permits the government to engage in overbroad searches and seizures of workplace drug testing records, the ability of employers to negotiate drug testing programs will be jeopardized because employees' privacy interests cannot be assuredly protected.[181] Unions—and particularly those representing athletes in the professional sports industry—may be reluctant to rely upon employers' promises of confidentiality and would have a justifiable basis for resisting efforts to drug test their membership.[182] Indeed, Mr. Miller called the situation "unfair and anti-union" and explained that "[w]hen [the MLB Players Association] agreed on a testing program, I said, 'They're going to regret this, because you're going to see players going to jail.'"[183]

"[I]f the Ninth Circuit (or possibly the Supreme Court) permits the government to engage in overbroad searches and seizures of workplace drug testing records, the ability of employers to negotiate drug testing programs will be jeopardized because employees' privacy interests cannot be assuredly protected."

If the federal government is ultimately permitted to retain the identity of the 104 positive drug test results, there is speculation that the names of the baseball players involved will become public knowledge.[184] The resulting inability of the MLB Players Association to preserve the confidentiality of these drug testing results would likely frustrate future collective bargaining efforts as public revelation would cause irreparable damage to the players' careers and livelihood.[185] In the face of unwilling unions, employers have no alternative means of recourse because, as discussed, drug testing is a mandatory subject of bargaining and the NLRA "does not compel any agreement whatsoever between employees and employers."[186]

MLB's concern for the continuance of its drug testing program was legitimate and highlights the importance of confidentiality in gaining a union's consent to the institution of a drug testing program.[187] Indeed, Mr. Fehr explained that the initial agreement "attempted to strike a balance between the interest in conducting such tests and the privacy interests that Congress and the federal government have sought to protect when establishing programs for federal employees."[188] The importance of confidentiality is not surprising, given that drug test results are considered personal health information and restrictions are imposed on the sharing of such information.[189] Even in the context of workplace drug testing, an employee is required to sign a release in accordance with the Health Insurance Portability and Accountability Act (HIPAA) in order for an employer to receive the employee's test results.[190]

As confidentiality is essential to the credibility of any voluntary drug testing program, it is clear that effective federal labor policy demands that workplace drug testing programs be protected from unreasonable government interference. The integrity of any such program is crucial to its implementation and success, and if employers cannot guarantee protection from unrestrained governmental investigations, unions will be far less likely to agree to the implementation of drug testing programs in the future because promises of confidentiality and anonymity have been rendered illusory.[191] As Judge Thomas explained,

> [I]f the government may violate the confidentiality promised employees in collective bargaining agreements without any suspicion of criminal activity and simply seize confidential test records in the hope of finding incriminating information, no sensible union will agree to allow its employees to be tested. Therefore, although the government proceeds here under an apparent mission to root out all steroid use in baseball, and perhaps other sports, the result of its tactics will be quite the opposite.[192]

Accordingly, if the court of final appeal ultimately upholds the government's conduct, "it is difficult to imagine any sports union agreeing to drug testing in collective bargaining negotiations."[193] While any resulting "chilling effect" on the negotiation of drug testing policies through the federally mandated collective bargaining process would undermine the Congressional charge to eradicate the use of performance enhancing substances in professional sports,[194] the impact of a final decision unfavorable to the MLB Players Association would have "adverse effects extending far beyond professional sports."[195] Indeed, Judge Thomas acknowledged that "[t]he implications for employee testing in all industries are obvious."[196]

The disruption of MLB's collectively bargained agreement dealing with this important yet challenging issue would frustrate commendable efforts to tackle substance abuse at the workplace, undermine the long-standing federal policy of free and private collective bargaining to settle terms and conditions of employment like drug testing, and impede the national policy of promoting drug-free workplaces. Although the Ninth Circuit most recently ruled in favor of the MLB Players Association, the "limited en banc" panel failed to adequately address these monumental consequences in its decision.[197] Moreover, the Ninth Circuit's previous majority opinion only acknowledged MLB's collective bargaining agreement in a single footnote.[198] If the Ninth Circuit decides to rehear the case before all 27 circuit judges, or if the matter ultimately proceeds to the Supreme Court for final review, it is imperative that the court of final appeal give due consideration to these labor-oriented issues, demand return of MLB's seized drug testing records, and protect the viability of voluntary workplace drug testing in the United States.

Endnotes

1. During the 2009 championship season, only one Major League player tested positive for steroids. Michael S. Schmidt, *Number of M.L.B. Players Given Drug Exemptions Up Slightly*, N.Y. TIMES, Dec. 1, 2009, *available at* http://www.nytimes.com/2009/12/02/sports/baseball/02baseball.html. In 2008, only two Major League players were suspended under baseball's drug program. Associated Press, *Selig Warns GMs About Economic Turmoil as Meetings Begin*, ESPN.COM, Nov. 4, 2008, *available at* http://sports.espn.go.com/espn/print?id=3682935&type=story.
2. Senator Mitchell found that baseball's testing program has been "effective in that detectable steroid use appears to have declined." George J. Mitchell, *Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball*, Dec. 13, 2007, at 310, *available at* http://mlb.mlb.com/mlb/news/mitchell/index.jsp.
3. Commissioner Selig is "happy in a great sense that we've cleaned the sport up and we don't have to continue talking about things. The reason we're having an extraordinary year is that we're not talking about steroids anymore." Rick Hummel, *Bud Selig—MLB Commissioner—That Was Then*, ST. LOUIS POST-DISPATCH, Sept. 7, 2008.
4. *See* Mitchell, *supra* note 2.
5. *See* Letter from Henry Waxman, Chairman, House of Representatives Committee on Oversight and Government Reform, and Tom Davis, Ranking Minority Member, House of Representatives Committee on Oversight and Government Reform, to Allan H. (Bud) Selig, Commissioner of Major League Baseball (June 12, 2008); *see also* Letter from Reps. Waxman and Davis to Donald Fehr, Executive Director, Major League Baseball Players Association (June 12, 2008).
6. Letter from Allan H. (Bud) Selig, Commissioner of Major League Baseball, to Henry Waxman, Chairman, House of Representatives Committee on Oversight and Government Reform, and Tom Davis, Ranking Minority Member, House of Representatives Committee on Oversight and Government Reform (June 27, 2008) [hereinafter Selig Letter to Congress].
7. Comprehensive Drug Testing, Inc. is the other named party to the litigation.
8. The names of the players are under seal and have yet to be officially disclosed. *U.S. v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1090 n.4 (9th Cir. 2008) [hereinafter CDT II], *rev'd en banc*, 579 F.3d 989 (9th Cir. 2009) [hereinafter CDT III]. *See also* Michael S. Schmidt, *Drug Test Results from 2003 Could Soon Be in Evidence*, N.Y. TIMES, May 18, 2008, *available at* http://www.nytimes.com/2008/05/18/sports/baseball/18drugs.html?fta=y. Donald Fehr stressed that "[i]t would be terrible if [the list of positive test results were released to the public. It would be unfair. It would be inappropriate." Fehr expressed the hope and expectation "that everybody will honor their contractual arrangements." David Lennon, *Something to Fehr?: Union Chief Says Players' Names in Drug Positives Could Get Out*, NEWSDAY, Feb. 25, 2009. MLB Players Association General Counsel Michael Weiner shared Fehr's sentiments, explaining that "[s]ure, there are some people who say, 'Why don't we just get this story over with and get the list out? I think to do that would (1) be illegal, and (2) be wrong. It's illegal because it's covered by court order, and it would be wrong because a promise was made by the

commissioner's office and the union to every player who was tested in 2003 that the results would be anonymous." Ronald Blum, *Ortiz Says Supplements May Have Landed Him on List*, NEWSDAY.COM, Aug. 8, 2009, *available at* http://www.newsday.com/ortiz-says-supplements-may-have-landed-him-on-list-1.1357298.

9. Although the government's infamous list, which is sealed by a court order, is said to contain 104 names, MLB and the MLB Players Association dispute the number of players who tested positive in 2003 and suggest that "substantial scientific questions exist as to the interpretation of some of the 2003 test results." Barry M. Bloom, *MLB, Union Cast Doubt on List of Names*, MLB.COM, Aug. 8, 2009, *available at* http://mlb.mlb.com/news/article.jsp?ymd=20090808&content_id=6316054&vkey=news_mlb&fext=.jsp&c_id=mlb. MLB maintains that the number of players who tested positive was 96, while the MLB Players Association asserts that only 83 tests came back positive under the collectively bargained program and that the number of players who tested positive could have been even lower because some players were tested more than once. Barry M. Bloom, *In Response, Ortiz Denies Using Steroids*, MLB.COM, Aug. 8, 2009, *available at* http://mlb.mlb.com/news/article.jsp?ymd=20090808&content_id=6316054&vkey=news_mlb&fext=.jsp&c_id=mlb. Consequently, Michael Weiner warned that "the presence of a player's name on any such list does not necessarily mean that the player used a prohibited substance or that the player tested positive under [MLB's] collectively bargained program." Bloom, *MLB, Union Cast Doubt on List of Names*, *supra*. MLB similarly urged "the press and the public to use caution in reaching conclusions based on leaks of names" because of "the uncertainties inherent in the list." *Id.*

10. *See* Selena Roberts & David Epstein, *Sources Tell SI Alex Rodriguez Tested Positive for Steroids in 2003*, SI.COM, Feb. 7, 2009, *available at* http://sportsillustrated.cnn.com/2009/baseball/mlb/02/07/alex-rodriguez-steroids.

11. *See* Michael S. Schmidt, *Sosa Is Said to Have Tested Positive in 2003*, N.Y. TIMES, June 16, 2009, *available at* http://www.nytimes.com/2009/06/17/sports/baseball/17doping.html; Michael McCann, *Will steroids report lead to perjury investigation of Sammy Sosa?*, SI.COM, June 16, 2009, *available at* http://sportsillustrated.cnn.com/2009/writers/michael_mccann/06/16/sammy.sosa/index.html.

12. *See* Michael S. Schmidt, *Ortiz and Ramirez Said to Be on '03 Doping List*, N.Y. TIMES, July 30, 2009, *available at* http://www.nytimes.com/2009/07/31/sports/baseball/31doping.html; Matthew Futterman & Darren Everson, *Report: Ortiz, Ramirez Tested Positive for Steroids*, WALL ST. J., July 30, 2009, *available at* http://online.wsj.com/article/SB10001424052970204619004574320502341579622.html.

13. *Id.*

14. Jason Grimsley and David Segui are also alleged to be on the government's list. Associated Press, *Drug List Is a Never-Ending Pain for Baseball*, ESPN.COM, Aug. 20, 2009, *available at* http://sports.espn.go.com/espn/print?id=4412638&type=story. The "leakers"—likely attorneys with access to the list (or perhaps their staff members)—are in violation of a court order and in breach of their professional and ethical duties, and, therefore, they likely would be subject to criminal charges and lose their licenses to practice law. Michael McCann, *Remaining names on drug list likely to remain under seal indefinitely*, SI.COM, Aug. 26, 2009, *available at* http://sportsillustrated.cnn.com/2009/writers/michael_mccann/08/26/mlb.drug.list.ruling/index.html. On the other hand, each player who is alleged to have tested positive "finds himself in an extremely unfair position; his reputation has been threatened by a violation of the court's orders, but respect for those orders now leaves him without access to the information that might permit him to restore his good name." Bloom, *MLB, Union Cast Doubt on List of Names*, *supra* note 9. District Judge Cooper concluded that "those players as to whom the government did not already have probable cause…could suffer dire personal and professional consequences from disclosure of their test results." *CDT III*, 579 F.3d at 995.

15. *See* Michael S. Schmidt, *Bonds's Urine Retested, and Result Is a Positive*, N.Y. TIMES, Feb. 3, 2009, *available at* http://www.nytimes.com/2009/02/04/sports/baseball/04bonds.html; Michael S. Schmidt, *Union Official Says He Did Not Tip Off Rodriguez*, N.Y. TIMES, Feb. 9, 2009, *available at* http://www.nytimes.com/2009/02/10/sports/baseball/10orza.html.

16. Donald Fehr explained that "[t]he one thing that seems to have been lost in the recent press coverage is that for the last several years the program has been operating. Bud [Selig] has said repeatedly it's the toughest one around and it's been working very well. Whatever happened in 2003 happened, but it was in 2003." Lennon, *supra* note 8.

17. *See* Bloom, *MLB, Union Cast Doubt on List of Names*, *supra* note 9.

18. *See* Robert D. Manfred, Jr., *Federal Labor Law Obstacles to Achieving a Completely Independent Drug Program in Major League Baseball*, 19 MARQ. SPORTS L. REV. 1, 1-3, 9-12 (2009).

19. The United States District Courts for the District of Nevada and the Central District of California required the government to return the property seized pursuant to the search warrants. The United States District Court for the Northern District of California quashed the government's subpoenas. *CDT II*, 513 F.3d at 1090, *rev'd en banc*, 579 F.3d 989.

20. *See U.S. v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006) [hereinafter CDT I], *withdrawn*, 513 F.3d 1085 (9th Cir. 2008), *and rev'd en banc*, 579 F.3d 989 (9th Cir. 2009). The district court decisions were not published and remain under seal.

21. The second decision was issued by a three-judge panel on January 24, 2008 and totaled 119 pages. *See CDT II*, 513 F.3d 1085, *rev'd en banc*, 579 F.3d 989.

22. *CDT III*, 579 F.3d 989; *see U.S. v. Comprehensive Drug Testing, Inc.*, 545 F.3d 1106 (9th Cir. 2008) (ordering the case to be reheard en banc). *See also* Howard Mintz, *Appeals Court Will Decide Whether Feds Can Use Steroid Test Results of 100 Pro Baseball Players*, SAN JOSE MERCURY NEWS, Sept. 30, 2008, *available at* http://www.mercurynews.com/salpizarro/ci_10599728.

23. *CDT III*, 579 F.3d at 1000. *See* Michael S. Schmidt, *Court Rules U.S. Seized 2003 Tests Improperly*, N.Y. TIMES, Aug. 26, 2009, *available at* http://www.nytimes.com/2009/08/27/sports/baseball/27doping.html.

24. *See CDT III*, 579 F.3d at 1006-07. The court aimed "to strike a proper balance between the government's legitimate interest in law enforcement and the people's right to privacy and property in their papers and effects, as guaranteed by the Fourth Amendment." *Id.* at 994.

25. Schmidt, *supra* note 23.

26. Associated Press, *Feds Seek Rehearing of Baseball Drug List Ruling*, USA TODAY, Nov. 24, 2009, *available at* http://www.usatoday.com/sports/baseball/2009-11-24-drug-list-rehearing_N.htm.

27. The Ninth Circuit began employing 11-judge "limited en banc" panels in 1980, and it has not convened all of its judges to sit on a matter since then. *Id. See also* Christian Red & Michael O'Keeffe, *Resolution of Major League Baseball's Drug List Could Take Until 2011 or Later*, N.Y. DAILY NEWS, Nov. 10, 2009, *available at* http://www.nydailynews.com/sports/baseball/2009/11/10/2009-11-10_mlbs_drug_list_case_could_.html.

28. See Red & O'Keeffe, *supra* note 27. *See also* Associated Press, *Obama Appointee Mulls Drug Case Move*, ESPN.COM, Aug. 27, 2009, *available at* http://sports.espn.go.com/mlb/news/story?id=4427422; *Officials Believe Obama Election Win Could Help Baseball Return to Olympics*, THE CANADIAN PRESS, Nov. 5, 2008, available at http://canadianpress.google.com/article/ALeqM5jTU7tpWSDbuctyXMhnQeSx5ep9Kw.

29. *See CDT II*, 513 F.3d at 1116-17 (Thomas, J., dissenting in part).

30. Red & O'Keeffe, *supra* note 27.

31. Brief for Chamber of Commerce of the United States of America as Amici Curiae Supporting Appellees, *U.S. v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085 (9th Cir. 2008) (NOS. 05-10067, 05-15006 & 05-55354) *available at* http://www.uschamber.com/NR/rdonlyres/etgitubxdwbymhfnolqagjo3tnfojjvtood34nvhwormwb524jic6etywfdayywtwmouucyqsvnia6tbpzndnasuenb/us_v_comprehensive_drug_testing.pdf [hereinafter U.S. Chamber of Commerce Brief].

32. *See id.* at 1.

33. *Officials Believe Obama Election Win Could Help Baseball Return to Olympics*, *supra* note 28.

34. *See* Elizabeth Rocco, *"Inequality in the Game" vs. "Inequality in the Legal System": The Constitutionality of Searches and Seizures in* United States v. Comprehensive Drug Testing, 15 VILL. SPORTS & ENT. L. J. 33 (2008); Aaron Seiji Lowenstein, *Search and Seizure on Steroids: United States v. Comprehensive Drug Testing and Its Consequences for Private Information Stored on Commercial Electronic Databases*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 101 (2007); Derek Regensburger, *Bytes, BALCO, and Barry Bonds: An Exploration of the Law Concerning the Search and Seizure of Computer Files and an Analysis of the Ninth Circuit's Decision in* United States v. Comprehensive Drug Testing, Inc., 97 J. CRIM. L. & CRIMINOLOGY 1151 (2007); G. Robert McLain, Jr., United States v. Hill*: A New Rule, but No Clarity For the Rule Governing Computer Searches and Seizures*, 14 GEO. MASON L. REV. 1071, 1098-99 (2007); Samantha Trepel, *Digital Searches, General Warrants, and the Case for the Courts*, 19 YALE J.L. & TECH. 120 (2007).

35. *See CDT II*, 513 F.3d at 1116-17 (Thomas, J., dissenting in part).

36. President Bush called on "team owners, union representatives, coaches, and players…to get rid of steroids." President George W. Bush, 2004 State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

37. *CDT II*, 513 F.3d at 1089, *rev'd en banc by CDT III*, 579 F.3d 989. The facts set forth in this article are primarily cited from the Ninth Circuit's three-judge panel decision, as the most recent ruling only briefly reiterates the key facts. *See CDT III*, 579 F.3d at 993 ("The complex facts underlying this case are well summed up in the panel's opinion and dissent, and we refer the interested reader there for additional information.").

38. *CDT II*, 513 F.3d at 1089, *rev'd en banc by CDT III*, 579 F.3d 989.

39. *Id.* at 1090.

40. *Id.* Although the subpoenas covered eleven players, "[t]he government later decided not to seek drug testing evidence related to one of the eleven players" and withdrew document requests concerning that particular player. *Id.* at 1090 n.7.

41. *Id.* at 1090-91.

42. Magistrate Judge Jeffrey Johnson in the Central District of California issued a search warrant for the CDT office and Magistrate Judge Lawrence Leavitt in the District of Nevada issued a search warrant for the Quest laboratory. *Id.* at 1091.

43. *Id.* at 1091-92.

44. *Id.*

45. *Id.* at 1092.

46. *Id.* at 1092-93.

47. *Id.* at 1092.

48. *Id.* at 1092-93. The "Tracey Directory contained a huge number of drug testing records, not only of the ten players for whom the government had probable cause but hundreds of other professional baseball players, thirteen other sports organizations, three unrelated sporting competitions, and a non-sports business entity—thousands of files in all, reflecting the test results of an unknown number of people, most having no relationship to professional baseball except that they had the bad luck of having their test results stored on the same computer as the baseball players." *CDT III*, 579 F.3d at 1005.

49. The warrant provided: "If the computer equipment and storage devices cannot be searched on-site in a reasonable amount of time, then the computer personnel will determine whether it is practical to copy the data during the execution of the search in a reasonable amount of time without jeopardizing the ability to preserve the data." *CDT II*, 513 F.3d at 1092-93, *rev'd en banc by CDT III*, 579 F.3d 989.

50. *Id.* at 1093.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. FED. R. CRIM. P. 42(g).

57. *CDT II*, 513 F.3d at 1093, *rev'd en banc by CDT III*, 579 F.3d 989.

58. *Id.* at 1093 n.20.

59. *Id.* at 1093.

60. *Id.*

61. *Id.* at 1094.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1094-95. In *Tamura*, the Ninth Circuit held that the Fourth Amendment "barred the conversion of a specific warrant into a general one," *id.* at 1106, and set forth two methods of pre-search protocol and post-search review "by which the government could avoid such constitutional violations." *Id.* "First, if the government anticipated that on-site segregation of target documents would not be feasible in a reasonable amount of time, it can seek a preordained search warrant protocol allowing the seizure of such intermingled documents." *Id.* "Second, if the government obtained a search warrant without a preordained protocol for removing intermingled target and non-target data, but encountered an *unanticipated* need to seize units containing intermingled data, agents could seizure that unit and seal it pending post-search review." *Id.* at 1107 (emphasis in original).

66. *Id.* at 1095.

67. It should be noted that neither of the judges conducted an evidentiary hearing prior to granting the Rule 41(g) motions. *Id.* at 1094-95.

68. *Id.* at 1095.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *CDT I*, 473 F.3d 915, *withdrawn by CDT II*, 513 F.3d 1085, *and rev'd en banc by CDT III*, 579 F.3d 989.

74. *See CDT III*, 579 F.3d 989.

75. "The government claims the right to seize and retain—without warrant or even a suspicion of criminal activity—any patient's confidential medical record or other confidential personal information contained in a computer directory so long as it has a legitimate warrant or subpoena for any other individual patient's record that may be stored on the same computer." *CDT II*, 513 F.3d at 1117 (Thomas, J., dissenting in part).

76. *Id.* at 1089 (majority opinion).

77. Dennis J. Morikawa *et al.*, *Implementation of Drug and Alcohol Testing in the Unionized Workplace*, 11 NOVA L. REV. 653, 653 (1987).

78. Drugs in the Workplace: What an Employer Needs to Know, United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Division of Workplace Programs, *available at* http://workplace.samhsa.gov/DrugTesting/Files_Drug_Testing/FactSheet/factsheet041906.aspx [hereinafter Drugs in the Workplace].

79. *Id.*

80. Morikawa, *supra* note 77, at 654.

81. Two years later, in 1988, Congress passed the Drug-Free Workplace Act, which imposes various compliance obligations on grantees and recipients of Federal contracts of $25,000 or more. Making Your Workplace Drug Free—Employer Tip Sheet #1, National Clearinghouse for Drug and Alcohol Information, *available at* http://ncadi.samhsa.gov/govpubs/workit/ts1.aspx.

82. Morikawa, *supra* note 77, at 654 (quoting Daily Labor Rep. (BNA) No. 43, at A-12 (Mar. 5, 1986)).

83. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (recognizing urine tests as an intrusion upon expectations of privacy, but arguing that drug testing is necessary to prevent accidents and deaths in the safety-sensitive railroad industry).

84. "Problems related to alcohol and drug abuse cost America businesses roughly $81 billion in lost productivity in just one year." Drugs in the Workplace, *supra* note 78.

85. Janice Castro, *Battling Drugs on the Job*, TIME, June 21, 2005, *available at* http://www.time.com/time/magazine/article/0,9171,1075018,00.html?iid=sphere-inline-sidebar (quoting William Lacy, Vice President, Southern Pacific).

86. Workplace Drug Testing, U.S. Department of Labor, *available at* http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp [hereinafter Workplace Drug Testing].

87. Fact Sheet: Why You Should Care About Having a Drug-Free Workplace, *available at* http://www.workplace.samhsa.gov/WPWorkit/pdf/why_you_should_care_about_having_a_drug_free_workplace_fs.pdf [hereinafter Fact Sheet].

88. NIDA InfoFacts: Workplace Resources, National Institute on Drug Abuse, July 2008, *available at* http://www.drugabuse.gov/InfoFacts/workplace.html.

89. Drugs in the Workplace, *supra* note 78.

90. *Id.*

91. Workplace Drug Testing, *supra* note 86.

92. Fact Sheet, *supra* note 87.

93. Safety and Health Topics: Workplace Substance Abuse, U.S. Department of Labor, Occupational Safety and Health Administration, *available at* http://www.osha.gov/SLTC/substanceabuse/index.html [hereinafter Safety and Health Topics].

94. Drugs in the Workplace, *supra* note 78.

95. Fact Sheet, *supra* note 87.

96. *See* Press Release, U.S. Department of Labor, U.S. Secretary of Labor Announces Drug-Free Work Week (Sept. 22, 2006), *available at* http://www.dol.gov/opa/media/press/eta/ETA20061653.htm.

97. Drugs in the Workplace, *supra* note 78. Urinalysis is the most common method of drug testing and involves the analysis of an employee's urine sample to determine the presence or absence of drug metabolites (i.e., drug residues that remain in the body following drug use). Workplace Drug Testing, *supra* note 86. Other types of biological specimens used for drug testing include "hair follicle, oral fluid, sweat, and blood." Fact Sheet: Drug Testing Facts and Statistics, *available at* http://www.workplace.samhsa.gov/WPWorkit/pdf/drug_testing_facts_and_stat_fs.pdf (citing *Workplace Testing Survey: Medical Testing*, AMERICAN MANAGEMENT ASSOCIATION, 2004, *available at* http://www.amanet.org/research/pdfs/Medical_testing_04.pdf/) [hereinafter Drug Testing Facts and Statistics].

98. The Occupational Safety and Health Act of 1970 requires employers to provide a safe and healthy workplace for their employees. In accordance with this Act, the Occupational Health and Safety Administration was created by Congress to "promote the safety and health of America's working men and women by setting and enforcing standards; providing training, outreach and education; establishing partnerships; and encouraging continual process improvement in workplace safety and health." *See* OSHA's Role, *available at* http://www.osha.gov/oshinfo/mission.html.

99. The other components include a company policy, supervisor training, employee education, and employee assistance. Safety and Health Topics, *supra* note 93. The goal of the comprehensive drug-free workplace approach is to create "a workplace free of the health, safety and productivity hazards caused by employees' [substance] abuse." Workplace Drug Testing, *supra* note 86.

100. *Id.*

101. Drug Testing Facts and Statistics, *supra* note 97.

102. Workplace Drug Testing, *supra* note 86.

103. *See infra* text accompanying notes 121-139.

104. *See Mandatory Drug Testing for Workers Dates Back to 1980s*, NORTHWEST LABOR PRESS, Aug. 3, 2001, *available at* http://www.nwlaborpress.org/2001/8-3-01Drugs2.html.

105. Jerry Crasnick, *Miller: Athletes Victims of Witch Hunt*, ESPN.COM, Feb. 10, 2009, *available at* http://sports.espn.go.com/mlb/news/story?id=3896888.

106. *See id.*; *see also* Morikawa, *supra* note 77, at 654.

107. Crasnick, *supra* note 105.

108. Collective bargaining refers to the negotiation of an agreement governing the employment relationship between an employer and employees represented by a labor union. It is a "process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB v. Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485 (1960).

109. National Labor Relations Act, 29 U.S.C. § 151.

110. Presidential Message of May 20, 1919, 58 Cong. Rec. 40 (1919).

111. *Id.*

112. *See* 29 U.S.C. §§ 151-69.

113. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. On Gov't Reform*, 109th Cong. (2005) (statement of Robert D. Manfred, Jr., Executive Vice President, Major League Baseball), *available at* http://oversight.house.gov/features/steroids/march_17_hearing_testimony.htm [hereinafter Statement of Robert D. Manfred, Jr.].

114. *See* Local 224, *Int'l Bhd. of Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).

115. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

116. Statement of Robert D. Manfred, Jr., *supra* note 113. *See also Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d. Cir. 1987) (National labor policy "attaches prime importance to freedom of contract between the parties to a collective agreement.").

117. The NLRB has two primary functions: (1) to protect the freedom of employees to choose whether they desire to be represented by a union; and (2) to prevent and remedy unfair labor practices, which may be committed by both employers and unions. *See* Fact Sheet, National Labor Relations Board, *available at* http://www.nlrb.gov/About_Us/Overview/fact_sheet.aspx.

118. *NLRB. v. American Nat. Ins. Co.*, 343 U.S. 395, 404 (1952); *see also H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) ("[The NLRB] is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.").

119. *H.K. Porter Co.*, 397 U.S. at 102, 108.

120. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 678 (1981). "Freedom of contract is particularly important in the context of collective bargaining between professional athletes and their leagues. Such bargaining relationships raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solutions, leagues and their player unions would have to arrange their affairs in a less efficient way. It would also increase the chances of strikes by reducing the number and quality of possible compromises." *Wood*, 809 F.2d at 961.

121. 29 U.S.C. § 157.

122. *American Nat. Ins. Co.*, 343 U.S. at 402.

123. 29 U.S.C. § 158(d).

124. *Id.* § 159(a).

125. The Supreme Court distinguished mandatory from permissive bargaining subjects, holding that the duty to bargain is limited to "wages, hours, and other terms and conditions of employment. [However,] as to other matters…each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 349 (1958).

126. *Ins. Agents' Int'l Union*, 361 U.S. at 488.

127. Such managerial decisions outside the scope of the bargaining obligation are those which are "fundamental to the basic direction of a corporate enterprise." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

128. *See* 29 U.S.C. § 158(a)(5).

129. 29 U.S.C. § 158(d).

130. *Borg-Warner Corp.*, 356 U.S. at 349.

131. *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

132. Statement of Robert D. Manfred, Jr., *supra* note 113.

133. *See Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989).

134. *Id.* at 182.

135. *Id.* at 183.

136. *See Medicenter, Mid-South Hosp.*, 221 N.L.R.B. 670 (1975).

137. *Johnson-Bateman Co.*, 295 N.L.R.B. at 184.

138. "[T]he Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative…." *Skinner*, 489 U.S. at 614.

139. A unilateral change concerning a mandatory subject of bargaining, such as employee drug testing, violates Section 8(a)(5) of the NLRA and, therefore, a unionized employer would commit an unfair labor practice by instituting a drug testing program for its employees without first bargaining with the union to impasse. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962).

140. *See* Am. League of Prof'l Baseball Clubs & Ass'n of Nat'l Baseball League Umpires, 180 N.L.R.B. 190, 192 (1969) (declaring that professional baseball is an industry "in or affecting interstate commerce, and as such is subject to Board jurisdiction under the Act").

141. "Under federal law, drug testing is a subject of collective bargaining and, in this context, requires the agreement of the players associations." *See* Mitchell, *supra* note 2, at SR-13 n.8.

142. Allen H. Selig & Robert D. Manfred, Jr., *The Regulation of Nutritional Supplements in Professional Sports*, 15 STAN. L. & POL'Y REV. 35, 35 (2004).

143. *See* Mitchell, *supra* note 2, at 34-36, 39-40.

144. *See id.* at 51.

145. "[A]ll Players will be subject to two unannounced tests (an initial test and a follow-up test five to seven days later) for Steroids during the [] season…. If a Player tests positive in the Program Testing, he shall immediately be placed on the Clinical Track and shall be subject to discipline for further violations. The Program Testing shall continue for each season until less than 2.5% of Players tested test positive for Steroids for two consecutive seasons combined." Attachment 18 (Major League Baseball's Joint Drug Prevention and Treatment Program) to Basic Agreement Between the 30 Major League Clubs And Major League Baseball Players Association, effective Sept. 30, 2002, § 3(A)(2) [hereinafter 2002 Joint Drug Program].

146. "During the 2003 season (which shall include spring training but not include the post-season), all Players will be subject to two tests (one initial test and one follow-up test conducted not less than five and not more than seven days following the initial test) at unannounced times for the presence of Schedule III steroids.… In addition, the Office of the Commissioner shall have the right to conduct additional Survey Testing in 2003 in which up to 240 players, selected at random, may be tested." *Id.* § 3(A)(1). The Joint Drug Program called for a minimum of Survey Testing in each of the seasons covered by the collective bargaining agreement. *Id.* § 3(A)(6). More than 5% of the players tested positive during the 2003 survey testing, and, therefore, in 2004, Baseball instituted a mandatory drug testing program with penalties. Roberts & Epstein, *supra* note 10.

147. 2002 Joint Drug Program, *supra* note 145, at § 7.

148. *Id.* at Addendum A, § 2(iv).

149. *See CDT III*, 579 F.3d at 993.

150. Letter from Donald M. Fehr, Executive Director, Major League Baseball Players Association, to Henry Waxman, Chairman, House of Representatives Committee on Oversight and Government Reform, and Tom Davis, Ranking Minority Member, House of Representatives Committee on Oversight and Government Reform (July 2, 2008) [hereinafter Fehr Letter to Congress]. *See also* Schmidt, *Bonds's Urine Retested, and Result is a Positive*, *supra* note 15.

151. *See* U.S. Chamber of Commerce Brief, *supra* note 31, at 2.

152. Roberts & Epstein, *supra* note 10. As per the collective bargaining agreement, 240 players were selected for additional testing, and, thus, 1,438 tests were conducted during the 2003 survey testing. Associated Press, *supra* note 14.

153. According to the MLB Players Association, "officials began the process to have the tests destroyed" on November 14, the day after MLB announced that more than 5 percent of the players tested positive, but that on November 19 the union learned that the government had subpoenaed the test results and "could no longer do anything about destroying them." Michael S. Schmidt, *Union Official Says He Did Not Tip Off Rodriguez*, *supra* note 15.

154. *See* discussion *supra* Part II.

155. Mitchell, *supra* note 2, at 284 (quoting statement by the MLB Players Association).

156. *CDT II*, 513 F.3d at 1118 (Thomas, J., dissenting in part).

157. *See* U.S. Chamber of Commerce Brief, *supra* note 31, at 2.

158. *CDT II*, 513 F.3d at 1118 (Thomas, J., dissenting in part).

159. *See* Mitchell, *supra* note 2, at 58-59, 281-84.

160. Selig Letter to Congress, *supra* note 6.

161. *Id.*

162. Statement of Robert D. Manfred, Jr., *supra* note 113.

163. "[A] 'governmental investigation' shall mean any subpoena issued, warrant obtained, or other investigative effort employed

by any governmental body (including a court acting at the request of a private party) with the intention of securing information relating to the drug test results of a particular Player or particular Players (as opposed to the summary information referenced in Section 6.A. above). Notwithstanding the foregoing, any such subpoena, warrant or other effort to secure information (i) that is supported by individualized probable cause regarding a particular Player or Players, and (ii) in which the evidence supporting such cause did not arise from the operation of this Program, and (iii) in which the information requested or obtained relates only to that particular Player or those particular Players shall not be considered a 'governmental investigation' within the meaning of this Section 6. Moreover, a subpoena issued by a court at the request of a private party shall not be considered a 'governmental investigation' unless a court has issued an order requiring compliance with the subpoena or otherwise requiring the disclosure of the drug test results of a particular Player or particular Players." Attachment 18 (Major League Baseball's Joint Drug Prevention and Treatment Program) to Basic Agreement Between the 30 Major League Clubs and Major League Baseball Players Association, effective Dec. 20, 2006, § 6(C).

164. Statement of Robert D. Manfred, Jr., *supra* note 113.

165. *See generally* U.S. Chamber of Commerce Brief, *supra* note 31, at 3-5.

166. Morikawa, *supra* note 77, at 668.

167. *See* U.S. Chamber of Commerce Brief, *supra* note 31, at 3.

168. *CDT III*, 579 F.3d at 1003.

169. U.S. Chamber of Commerce Brief, *supra* note 31, at 2.

170. "The second concern presented by the panel's decision…is the potential for the government to search and seize, without probable cause, vast amounts of electronic information maintained by a business that is not the subject of a criminal investigation. The panel's decision permits such vastly overbroad searches and seizures of electronic data with no guarantee of judicial oversight. Given that electronic records are commonly used by businesses today, the specter of overbroad searches and seizures of electronic data, unsupported by probable cause and unchecked by the involvement of a neutral judicial officer, is deeply troubling to the business community." *Id.* at 2-3.

171. *Id.*

172. Crasnick, *supra* note 105.

173. *Id.*

174. U.S. Chamber of Commerce Brief, *supra* note 31, at 2.

175. *See generally CDT II*, 513 F.3d 1085, *rev'd en banc*, 579 F.3d 989.

176. The government also seized the drug testing records of athletes in other sports, although none of them are parties to this litigation. *See* U.S. Chamber of Commerce Brief, *supra* note 31, at 2.

177. *Int'l Ladies' Garment Workers' Union, AFL-CIO v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 740 (1961).

178. *Ins. Agents' Int'l Union*, 361 U.S. at 488.

179. *See supra* text accompanying notes 104-107.

180. *See Mandatory Drug Testing for Workers Dates Back to 1980s*, *supra* note 104.

181. U.S. Chamber of Commerce Brief, *supra* note 31, at 3.

182. *Id.* at 4.

183. Crasnick, *supra* note 105.

184. Tiffany D. Lipscomb, *Can Congress Squeeze the "Juice" Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports' Steroid Controversy*, 69 OHIO ST. L.J. 303, 319-20 (2008).

185. *See* Jorge L. Ortiz, *Ruling Could Expose 100-plus Tests*, USA TODAY, Dec. 28, 2006, *available at* http://www.usatoday.com/sports/baseball/2006-12-27-steroid-ruling-reax_x.htm.

186. *American Nat. Ins. Co.*, 343 U.S. at 402.

187. "[T]he confidentiality of the program had been a principal concern of the players and their union in the negotiation of the program…." Selig Letter to Congress, *supra* note 6.

188. Fehr Letter to Congress, *supra* note 150. *See Skinner*, 489 U.S. 602 (recognizing privacy interests implicated by urine testing of employees); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (noting that the unauthorized dissemination of drug testing results is a serious intrusion on privacy).

189. Workplace Drug Testing, *supra* note 86.

190. *See* Summary of the HIPAA Privacy Rule, *available at* http://www.hhs.gov/ocr/privacysummary.pdf.

191. *See CDT II*, 513 F.3d at 1117 (Thomas, J., dissenting in part).

192. *Id.* at 1143.

193. *Id.*

194. *See* Drug Free Sports Act, H.R. 3084, 109th Cong. (2005); Clean Sports Act of 2005, H.R. 2565, 109th Cong. (superseded by H.R. 1862); Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong.; Clean Sports Act of 2005, S. 1114, 109th Cong. (companion bill to H.R. 2565); Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005); Professional Sports Responsibility and Accountability Act, S. 1334, 109th Cong. (2005).

195. *See* U.S. Chamber of Commerce Brief, *supra* note 31, at 3.

196. *CDT II*, 513 F.3d at 1143 (Thomas, J., dissenting in part).

197. It should be noted, however, that the "limited en banc" panel acknowledged that the privacy and economic well-being of the ballplayers "could easily be impaired if the government were to release the test results." *CDT III*, 579 F.3d at 1001. The panel explained that "the [MLB] Players Association is aggrieved by the seizure as the removal of the specimens and documents breaches its negotiated agreement for confidentiality, violates its members' privacy interests and interferes with the operation of its business." *Id.* at 1002. "The risk to the players associated with disclosure, and with that the ability of the [MLB] Players Association to obtain voluntary compliance with drug testing from its members in the future, is very high. Indeed some players appear to have already suffered this very harm as a result of the government's seizure." *Id.* at 1003. *See also id.* at 993 (noting that the drug testing records at issue were created pursuant to MLB's collective bargaining agreement and explaining that players "were assured that the results would remain anonymous and confidential").

198. *CDT II*, 513 F.3d at 1091 n.8 (majority opinion), *rev'd en banc*, 579 F.3d 989 (9th Cir. 2009) ("The testing records at issue in these cases were created pursuant to a collective bargaining agreement between Major League Baseball and the players of Major League Baseball (represented by the Major League Baseball Players' Association).").

Jason Jendrewski is a third-year student at Brooklyn Law School and a graduate of Cornell University, School of Industrial Labor Relations. This article won first place in the 2009 Dr. Emanuel Stein Memorial Writing Contest sponsored by the Labor and Employment Law Section of the New York State Bar Association.

ABA Technology in the Practice & Workplace Committee Midyear Meeting, April 28-30, 2010 at New York University School of Law

Co-sponsored by the New York State Bar Association, Labor and Employment Law Section and the Center for Labor and Employment Law at New York University School of Law

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The 2010 Technology in the Practice & Workplace Committee Midyear Meeting will be held April 28-30 at New York University School of Law in New York City. The meeting begins on Wednesday, April 28 with an E-Discovery Workshop in the afternoon followed by a Welcome Reception from 6:30–8:00 p.m. General Sessions will be on Thursday from 8:30 a.m.–5:00 p.m. and Friday from 8:15 a.m.–1:00 p.m. A reception and dinner party is scheduled for Thursday, April 29.

The program agenda includes the following topics:

MODULE ONE—VIRTUAL AND PORTABLE WORKSPACES

Lost in (Virtual) Space: Virtual and Portable Workspaces and the Workplace
Social Networking
Cloud Computing
Virtual and Portable Workspaces and the Practice of Law
Traditional Labor Law and Virtual Workspaces

MODULE TWO—E-DISCOVERY AND TECHNOLOGY-DERIVED EVIDENCE—THE NEXT GENERATION

It's Not Just E-Mail Anymore: E-Discovery and Technology-derived Evidence and the Virtual Workplace
International E-Discovery
State and Administrative E-Discovery and Technology Practice

The full agenda is available at http://www.abanet.org/labor/mw/2010/tech/pdf/tech-agenda.pdf.

We look forward to seeing you at NYU School of Law in April.

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