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Message from the Chair

Mairead E. Connor

As we emerge from this long and difficult winter, we can look back and see that our Section persevered despite the obstacles the weather put before us. Being from Syracuse, I have to admit that we think that City people are wusses when it comes to snow. However, during the week of the Annual Meeting in New York City, I developed a new respect for the New Yorkers who had to navigate five-foot high snow piles in the middle of 5th Avenue and ruts almost as deep on the side streets.

This was the scene I faced arriving in the City on the day of the Executive Committee Meeting in January. My cab could not travel the Manhattan side streets without some friendly help from the pedestrians telling the driver how to downshift and drive in deep snow. The snowbanks on the avenues were higher than the cab itself. I fully expected that we would have poor attendance due to the weather. But, to my surprise and delight, we had more diehards attending the Executive Committee meeting that day than we had seats! I guess nothing can keep those dedicated EC members away from a good meeting (and meal, I might add). Thank you all for your perseverance and loyalty to the Section and the EC for persevering that difficult night.

The Annual Meeting CLE program the next day was a great success. It was extremely well-attended and reviewed by the membership generally. Again, many thank yous to Stephanie Roebuck and Ron Dunn, our CLE Co-Chairs, who put together this terrific program! The Worker Misclassification Issues plenary was stocked

Inside

NYSBA

with information and excellent presentations. Thank you to Sharon Stiller, one of our Legislation Committee Co-Chairs, for organizing and heading up the panel consisting of Jennifer Brand, Executive Director of the Joint Task Force on Misclassification from the State DOL. The second plenary on the ethics of discontinuing the attorney-client relationship contained more than the usual challenging situations for us to ponder and chew on. Thank you to John Gaal for his continuing excellent work on keeping us all out of ethical trouble, and to Cara Greene, a new Ethics Committee Co-Chair, and Laura Harshbarger for their excellent preparation work and interesting presentations.

The afternoon workshops were all so timely and interesting, it was hard to choose which one to attend. Thanks to Al Feliu, our Chair-Elect, for assembling a super panel on confirming, vacating and modifying arbitration awards, consisting of David Garland, The Honorable Shirley Werner Kornreich, Geoffrey Mort and David Singer. Thank you also to Sheryl Galler for her work on the second workshop on restrictive covenants in the internet age with highly experienced and interesting presenters Barbara Harris and Wendi Lazar, one of new Diversity Co-Chairs. The workshop, "Get Out of My Facebook!," which addressed discipline for off-duty conduct in the public sector, contained fantastic presentations by Howard Miller, Jay Siegel, and James Tuttle. The fourth workshop concerned the NLRB developments under the Obama Board, which was chaired by Rhonda Ley, Regional Director of NLRB Region 3, and timely and interesting presentations by Barry Saltzman and Steven Swirsky.

Many thanks and kudos go to Professor Leigh David Benin, from Adelphia University, who was our lunch speaker. Prof. Benin presented a multi-media presentation concerning "Remembering New York's Triangle Fire One Hundred Years Later" that made history come alive with stories of his own relative who was caught as a victim in the fire and the fire's impact on American labor history and reform. In all, it was a very successful Annual Meeting.

Many of the Section's Committees are hard at work on their mission and assignments. The Past Chairs Advisory Committee has done its homework with a survey of past chairs to develop committee reforms. I have appointed a committee of current committee chairs to provide valuable feedback on their ideas and to report back so that we can develop a productive consensus on how to make some fundamental changes in the committee structure of the Section. Al Feliu, our Chair-Elect, has put together a survey that has gone out to the membership in an effort to assess what we have done right and where the Section can improve its value to the members in the future. The new Membership Committee Co-Chairs, Chris D'Angelo and Alyson Mathews, will take this data and use it to increase membership and value the Section can offer its members. Thank you to all who took a few minutes to complete the survey and help us in this important effort.

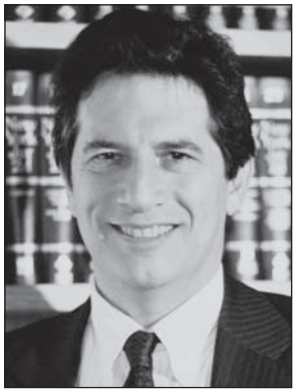
The Section also participated in the Association's annual diversity reception during the Annual Meeting week. Thank you to Jill Rosenberg, Alan Koral, Rick Rossein, and current Diversity Fellow Molly Thomas-Jensen for helping out and representing our Section at this important event. Our Section's Diversity Fellows were also guests at our Diversity Luncheon that week in New York City where the fellows had an opportunity to network and become more acquainted with some of the Section's leadership. Hopefully, the Fellows will continue to be more involved in Section activities in a meaningful way that uses their great talents and exposes them to Section activities and opportunities.

At the Annual Meeting, I was very honored to present a gift to Linda Castilla, our NYSBA Section Liaison, who is retiring at the end of this year. Linda has devoted herself to our and other Sections for 25 years of service. Her dedication to the organization of our meetings and guidance to our Section over these years will be sorely missed. We all wish Linda the very best in this next phase of her life!

Finally, I am very pleased to announce that the members at the Annual Meeting welcomed our new Chair-Elect Designee, John Gaal, from Bond, Schoeneck & King in Syracuse, by an overwhelming vote of confidence. Congratulations to John, who will take the reins on June 1, 2012! Our Chair-Elect, Al Feliu, will be taking over for me as Chair this year at our Spring transitional Executive Committee meeting on June 3. I wish Al all the best in his endeavors to continue the great work of our Section and continue to make the Section accessible and valuable for all New York State labor and employment practitioners.

Mairead E. Connor

From the Editor



Philip L. Maier

I would like to express my thanks to the authors for sharing their expertise with the labor and employment law community. Articles addressing recent developments of note in social media issues were contributed by Sharon Stiller, Seth Greenberg, Mercedes Colwin and Elizabeth Lorell. These discussions are a good resource for anyone with a need or an interest in learning more about this developing area of employment law. Bran Noonan's article discusses the recently enacted Wage Theft Prevention Act and Susan Corcoran, Michael Hekle and Johanna Fuller discuss recent developments regarding worker misclassifications, while Christina Fletcher provides an interesting article concerning employer liability for sexual favoritism. I submitted an article about jury duty service, since I believed the editor would accept it, along with Andrew Andela, a soon-to-be graduate of Cornell Law School who had an internship with the Public Employment Relations Board last summer in the New York City office. John Gaal and Donald Dowling have again contributed to our knowledge of ethics and international employment issues by their regular columns.

I would also like to offer my congratulations to Anshel Kaplan for capturing first prize in the Dr. Emanuel and Kenneth Stein Memorial Law Student Writing Competition. His article addresses the scope of protection under section 704(a) of Title VII of the Rights Act of 1964.

Philip L. Maier

A Lawyer's Guide to the Top 13 Social Media Issues

By Sharon P. Stiller

Introduction

For most people, including employees, a day does not go by without accessing a social media site.

Employees may frequent social media sites, even while at work. Social media sites include Facebook, Twitter, MySpace, You Tube, LinkedIn, Foursquare and Plaxo. Other social media sites include Orkutin Brazil and India, QQin China, Skyrockin France, VKontaktein Russia, Cywoldin South Korea, and Muxlim, which focuses upon Muslim society. The methods of communicating vary from blogs, to wikis, to instant messaging (IM), text messaging, and use of sites such as ResearchGATE for scientists and researchers.

Businesses are also using social media extensively. They may use it to promote and market a business and to build their brand.

Kodak's former Chief Marketing Officer explained it well in Kodak's *Guide to Social Networking*:

> Why do I take the time to use social media like Twitter and Facebook? Because in today's media landscape, it's vitally important to be where our customers are. Kodak has always embraced this marketing philosophy, and today that means being active in social media.
>
> The exciting thing about social media is it offers the opportunity to engage in two-way conversations with your customers. What better way to know how to best serve your customers than to hear directly from them? Social media has enabled new ways to initiate conversations, respond to feedback and maintain an active dialogue with customers.

http://www.kodak.com/US/images/en/corp/aboutKodak/onlineToday/Social_Media_9_8.pdf.

Businesses also may use social media defensively by defending against potential negative communications about the business in the workplace.

In this context, the ease of utilizing social media and the speed at which items are posted greatly enhance the potential for damage. For example, in 2009, a Michigan mayor accidentally posted a link to sensitive employee information on this Twitter account. He posted a link to a report that had personal information on 65 city employees, including the Social Security numbers of six of those employees. The report also included information regarding wages and other garnishments.

Twitter is a service that allows users to send messages of up to 140 characters known as "tweets" to its web site and directly to interested users or "followers" who subscribe to get updates from a particular user. The City responded to the security breach by providing employees with a free subscription to an identity theft protection service.

What happens when technology collides with employer regulation of conduct at work or conduct that affects work or customers? This article explores some of the common issues.

"[T]he ease of utilizing social media and the speed at which items are posted greatly enhance the potential for damage."

Issue 1: Must an Employer Monitor E-mail?

While it is unlikely that a court will require that an employer monitor e-mail, it is unwise not to monitor e-mail. The reasons for doing so are many.

An employer cannot ignore harassment in the workplace or close its eyes to what is rampant. In 1997, for example, Chevron Oil Company paid $2.2 million to settle a sexual harassment lawsuit brought by female employees who alleged that the company had permitted employees to use its e-mail system to disseminate sexually offensive materials, including a message discussing the "25 Reasons Beer is Better than Women." In the author's own practice, it is common to find e-mails attached as "evidence" in many hostile environment lawsuits.

It is therefore important to be aware of what is happening at the workplace, and monitoring helps employers to accomplish this.

Moreover, if an employer is charged with knowledge of what is happening at the workplace, it will also be charged with obviating the inappropriate behavior, so effective monitoring is needed to create effective remediation. The New Jersey Superior Court has held that "an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activity, lest it result in harm to innocent third-parties." *Doe v. XYC Corp.*, 382 N.J. Super. 122, 887 A.2d 1156 (App. Div. 2005).

This, of course, means that if an employer takes on the duty of monitoring, it must actually do so, and then take prompt and effective remedial actions if inappropriate conduct is revealed.

Issue 2: Can Employers Monitor an Employee's Use of Personal E-Mail at Work?

Employers can monitor work-related e-mail. While the Electronic Privacy Communications Act protects electronic communications from interception, it generally does not prevent an employer from intercepting e-mails or other electronic communications because the exceptions permit monitoring with consent, or by the provider of services, and permits intracompany communications. In *Fraser v. Nationwide Mutual Ins. Co*., 352 F.3d 107 (3d Circ. 2003), the court rejected a defense that the employer had improperly intercepted e-mails.

It is a good idea for an employer to have a policy that e-mail is for work use only (although this is an oft-debated question) and permitting monitoring of all e-mails. Some employers go so far as to have a logon which provides that: "I hereby consent that all information and communications may be monitored."

The question becomes more difficult when an employee accesses personal e-mail at work. The pivotal issue is whether the employee has a reasonable expectation of privacy in the personal account, if used at work. Establishing a reasonable expectation of privacy has proved difficult for employees, particularly if an employer has a policy prohibiting the use of personal e-mail at work. See, e.g., *United States v. Hassoun*, 2007 W.L. 141151 (S.D. Fla. 2007) (in light of employer's written policies, employee had no reasonable expectation of privacy in his office computer); *Garrity v. John Hancock Mutual Life Ins. Co*., 2002 WL 974676 (D. Mass. 2002) (employee had no reasonable expectation of privacy, even though folders were marked personal). See also *U.S. v. Butler*, 151 F. Supp. 2d 82 (D. Me. 2001) (there was no reasonable expectation of privacy in a computer that was part of a university network system).

Nonetheless, some e-mails may be off limits no matter what, such as those e-mails between an employee and counsel. In *Stengart v. Loving Care Agency Inc.*, 201 N.J. 300, 990 A.2d 650 (N.J. 2010), the appeals court ruled that a company that was sued by a former employee alleging sexual harassment and constructive discharge was not entitled to read and copy pre-suit e-mails that the employee exchanged with her attorneys through her personal e-mail account while using a company computer. The e-mails were drafted on the Company's computer, and the Agency's e-mail policy confirmed that there was no privacy in e-mails on the company computer.

Issue 3: Can an Employer Monitor an Employee's Social Media Use?

Similar to monitoring e-mails, an employer can monitor an employee's social media use, so long as it does not violate any statute or ethics rule. Courts have upheld terminations resulting from an employer's monitoring of an employee's social media discussions.

But employers must be careful about surreptitious conduct. Employers and attorneys alike have suffered adverse consequences from surreptitiously monitoring social media use, when they have had to engage in subterfuge or duress in order to access the media.

Some state laws as well as the federal Stored Communications Act (SCA), 18 U.S.C. § 2701, prohibit intentionally accessing or exceeding authorization to access a facility in which an electronic communication is provided and thereby obtaining access to an electronic communication stored in the system.

In 2009, a Newark, New Jersey jury found that restaurant managers who surreptitiously monitored employees' postings in a MySpace gripe group violated state and federal laws protecting the privacy of Web communications. *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J. 2009).

Two servers were fired for criticizing their employers in the postings. The jury found that the restaurant violated the SCA as well as the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J. S.A. 2A:156A-27.

The postings called managers "stupid corporate f***s" and "d*** suckers," among other things. However, a password was needed to enter the forum. Although the employer claimed that another employee consensually provided the password, the fired employees' attorney argued that the employee only gave up her password under duress.

The court found that sufficient evidence supported a finding that the managers violated the SCA by knowingly accessing a chat-group on a social media website without authorization. Evidence indicated that although the witness had provided her log-in information to her manager, she had not authorized access by the managers to the chat-group, she felt she had to give her password to the manager, she would not have given the information to other co-workers, and she felt she would get in trouble if she did not provide her password. Evidence demonstrated that the managers accessed the chat-group on several occasions, even though the chat-group was intended to be private and accessible only to invited members.

A decision from the U.S. Court of Appeals for the Fourth Circuit allowed punitive damages under the SCA, even absent a showing of actual damages where an

employer had accessed an employee's personal e-mail account after she left the company, without the employee's authorization. *VanAlstyne v. Elec. Scriptorium Ltd.*, 560 F.3d 199, 28 IER Cases 1441 (4th Cir. 2009).

A similar conclusion was reached by the Philadelphia Bar Association's Professional Guidance Committee, which issued an advisory opinion on the question of whether a lawyer could, within the bounds of the Rules of Professional Conduct, ask another person to contact a witness on Facebook or MySpace in order to "friend" them and gain access to the information on their personal profiles. The Committee found that the proposed conduct would violate ethical prohibitions against misconduct and requirements for truthfulness in statements to others. See *Philadelphia Bar Ass'n Professional Guidance Comm'ee Opn.* 2009-02 (March 2009).

Interestingly, more surreptitious conduct may be occurring than we realize. Apparently, surreptitiously operating government agencies can access social media as an investigatory tool. Recently, the Electronic Frontier Foundation, a San Francisco-based civil liberties group, obtained a 33-page document demonstrating that the FBI was engaged in covert investigations on social media services.

In addition to not gaining access surreptitiously, an employer cannot use information gathered from social media in order to screen out applicants based on a protected category. Also, an employer cannot violate statutory privileges in obtaining e-mails, such as the attorney client privilege. *Stengart v. Loving Care Agency Inc.*, supra, 201 N.J. 300, 990 A.2d 650 (N.J. 2010).

Issue 4: Can an Employer Terminate an Employee Because of Social Media Content?

On May 3, 2010, syndicated newspapers published a column which read as follows:

> Dear Abby:
>
> My wife was hired for an administrative position. On her first day of work, they called her into the human resources director's office and told her she was being "let go" because of her website.
>
> The site has photos of her when she worked as a model for a large department store. They are in no way provocative or overly revealing. Photos of our children are also on the site.
>
> The HR director told her that one of the other (internal) applicants had Googled her and had seen the site. An image so upset the other applicant that she made a formal complaint, which caused my wife's dismissal!
>
> We consulted a lawyer and contacted the local Equal Employment Opportunity Commission only to be told that North Carolina is an "at will" employment state and that the employer did nothing wrong. We feel their actions were wrong. Is there anything that can be done?
>
> —Yankee in Confederate County
>
> Dear Yankee:
>
> I'm sorry, but the answer is no. In most states there is a presumption of "at will" employment unless you have a written contract to the contrary. However, the employer cannot terminate an employee for an illegal reason—such as age, religion, gender, sexual orientation or a disability. It does not appear from your letter that your wife was terminated for an illegal reason, but what happened stinks anyway.

Termination for this type of conduct is not uncommon. In fact, a survey by the American Management Association in 2006 reported that 26% of employers had terminated an employee for violating the employer's e-mail policies; this was a 9% increase of the 17% termination rate reported in 2001. As many as 34% of employers fired workers for excessive personal use of the Internet.

Here are some of the most recent cases permitting termination for internet, e-mail or social media content:

Marshall v. Mayor and Alderman of City of Savannah, 366 Fed Appx. 91 (11th Cir. 2010: The 11th Circuit upheld a district court decision that a probationary firefighter failed to plead a retaliation claim based on gender, when the fire bureau chiefs met with her to discuss reprimanding her for posting official photographs of bureau employees on her personal internet pages along with scantily clad photographs of herself.

These photos included a picture of firefighters from the Department, which she obtained without permission from the city's web site. Marshall labeled this picture "Diversity." Another photograph, captioned "Fresh out of the shower," depicted her posing bare-shouldered. The other revealed Marshall's backside. According to the record, it apparently was difficult to tell what clothing, if any, she was wearing. She titled that picture, "I model too—this is from like my second shoot!"

The Department learned about Marshall's MySpace photographs from an anonymous caller in February 2007. The caller suggested that the social network account contained images that "may conflict" with the way the Department wanted to be portrayed. She was issued a written reprimand for violating Department policy, and then ultimately terminated for her "denial" of violation

of the Fire Department's policy. She claimed that her termination violated her First Amendment right "to freely communicate on a completely personal basis where no real or imagined damage" to her employer had been demonstrated. The court determined that her "speech" in disseminating photographs on her MySpace page was not entitled to First Amendment protection. The 11th Circuit also pointed out that she did not demonstrate that male firefighters were treated differently, and she was fired for more than merely social network postings.

Pacenza v. IBM Corp., 363 Fed Appx. 128 (2d Circ. 2010): Summary judgment in favor of the employer was upheld, where the 54-year old employee who suffered from post-traumatic stress disorder was fired purportedly because he violated company policies by accessing sexual materials on the internet while at work. The Court held that the employer's reason for termination was legitimate and non-discriminatory and was not shown to be pre-textual. The conduct was a clear violation of IBM's policies, and there was no showing that he was singled out or treated more harshly than similarly situated non-disabled employees.

Calandriello v. Tennessee Processing Center, LLC, 2009 WL 5170193 (M.D. Tenn. 2009): The Court dismissed a discrimination claim, finding a sufficient non-discriminatory reason for his termination based upon loss of confidence resulting from an allegedly bipolar employee's (1) admitted viewing of military and violent web sites (including ones providing news about serial killers) on his work computer; and (2) altering an inspirational poster to say that the image of a well known serial killer was inspirational. The employee had claimed that his use of the Internet did not violate company policy because he was "told by my supervisor to surf the internet when I had no project to work on" and other employees were constantly searching the Internet.

Cervantez v. KMGP Services Co. Inc, 349 Fed. Appx. 4 (5th Circ. 2009): The Court found that violation of the employer's computer use policy, which prohibited access to pornographic sites, was a legitimate reason for discharge and that the employee failed to show that this was pre-textual. In language that may prove helpful in these types of cases, the Court noted that the fact that the logs produced by the employer were inconsistent did not prevent summary judgment, since actual innocence is irrelevant if the employer reasonably believed the proffered reason and acted in good faith.

County of Sacramento, 118 Lab. Arb. Rep. (BNA) 699, 702 (2003) (Riker, Arb.): In a union setting, the Court will consider the equities despite the employer's policy. In one case an employer promised an employee confidentiality when interviewing her as part of a sexual-harassment investigation. The employee disclosed that she had used an internal computer system to send sexually explicit messages to a co-worker. The interviewer stated that the information she provided would not "be reported to her supervisor or co-workers, unless there was a need to know." The arbitrator reasoned that the one-day-suspension of the employee should be reduced to a written reprimand, in part because it was based on her confidential disclosures.

Schools are not immune from these issues; in some respects, conduct is scrutinized even more when children are involved.

In *Snyder v. Millersville University et al.*, Case No. 07-1660 (E.D. Pa. 2007), a student was denied an educational degree based on information that the school learned from the student's MySpace account. She posted an e-mail about the students she was student teaching and a supervising teacher, accompanied by a photo of herself in a pirate's cap holding a cup, and captioned with "drunken pirate." When she was rated unsatisfactory in her student teaching and denied a degree, she sued, claiming violation of her free speech rights among other claims. In another incident, it was reported that a Sociology professor was escorted off the campus of East Stroudsburg University. The Newspaper reported that in February, 2010 the associate professor had posted on her Facebook page, "Had a good day today, didn't want to kill even one student." Earlier, she had written, "Does anyone know where I can find a very discrete hitman, it's been that kind of day." Chronicle of Higher Education, 2/28/2010 .

In *A.B. v. State*, 863 N.E.2d 12212 (Ind. Ct. App), a minor posted expletive-filled comments on a MySpace page purportedly in the name of the middle school principal; when he was held as a juvenile, the court found that the comment was political speech aimed at the principal's policies and protected under the Indiana constitution. But see *J. S. v. Blue Mountain School Dist,* 2007 WL 954245 (M.D. Pa. 2007), where the students posted MySpace comments on pages purportedly in the names of the principals, the punishment was upheld.

The rules may be different for public employees, who enjoy a free speech right. See, e.g., *Richerson v. Beckon*, 337 Fed. Appx. 637 (9th Circ. 2009) (teacher disciplined for blogging about what it was like inside a school district; her transfer did not violate her First Amendment rights since the speech had a significantly deleterious effect).

Issue 5: Is It Legally Permissible to Use the Internet or Social Media to Conduct Background Checks?

Employers commonly perform "Google" searches of applicants as part of the reference check process. A 2009 CareerBuilder survey found that 45% of employers report that they use social media sites to research job candidates.

It has been estimated that at least 50 million individuals in the U.S. maintain "blog" diaries of their daily activities and at least 100 million post profiles on social media sites. These sites are commonly used to check up on an applicant.

Why is it important to verify credentials? The answer is that it is remarkable how many employees lie about their credentials. In 2002 Bausch & Lomb's chief executive, Ronald Zarella, was found to have lied about having a master's degree in business administration from NYU. Kenneth Lonchar, finance chief of Veritas Software, resigned in 2002 after the company learned he misstated his educational credentials, including falsely claiming to hold an MBA from Stanford. Sandra Baldwin, president of the U.S. Olympic Committee, left office in 2002 after admitting she lied about having a Ph.D. in English (she never actually completed her dissertation). See *White Lies on Resumes Raise Red Flags for Employers - Investing - Economy - SmartMoney.com,* http://www.smartmoney.com/investing/economy/white-lies-on-resumes-raise-red-flags-for-employers-21201/?hpadref=1#ixzz0nTJWEr6O.

According to the 2009 Screening Index released by ADP, a human-resources and payroll provider, 46% of employment, education or credential reference checks conducted in 2008 revealed discrepancies. That's up from 41% in 2006.

Because information posted on the Internet is voluntary, employers generally are not restricted from accessing information. However, employers may not engage in misrepresentation or surreptitious means to gain entry to a site deemed to be private, as explained in more detail in the beginning of this article.

Some of the most common reasons for rejecting applicants based on Internet background checks are:

- Candidate posted provocative or inappropriate photographs or information: 53%
- Candidate posted content about drinking or using drugs: 44%
- Candidate made derogatory statements about their previous employer, co-workers or clients: 35%
- Candidate demonstrated poor communication skills: 29%
- Candidate made discriminatory statements: 26%
- Candidate lied about qualifications: 24%
- Candidate shared information from a previous employer: 20%

On the other hand, some employees have been hired *because of* their online profiles. Some of the reasons include:

- Candidate's profile demonstrated personality and a good fit: 50%
- Candidate's profile supported the applicant's professional qualifications: 39%
- Candidate was creative: 38%
- Candidate showed solid communication skills: 35%

There are restrictions set forth under the Fair Credit Reporting Act , 15 U.S.C. § 1681 et seq. to obtaining background information without an employee's permission. The FCRA only applies when outside third parties are used to collect the information, and the provisions may readily be complied with by obtaining the employee's consent for a background check. In 2003, Congress passed the Fair and Accurate Credit Transactions Act ("FACT") which specifically excludes from the definition of consumer report an investigation of: (1) suspected misconduct relating to employment; and (2) compliance with federal, state or local laws and regulations or any preexisting written policies of the employer.

Along with complying with the Fair Credit Reporting Act, employers must always remember that just as they cannot negatively use information about a protected category related by the applicant, so, too, employers are prohibited from taking adverse action based upon a protected category learned through viewing social media.

Issue 6: Do Laws Controlling an Employee's Off-Duty Conduct Impact Upon an Employer's Ability to Use Social Media, or to Terminate for the Content of an Employee's Social Media? What About Off-Duty Conduct Laws or Searches Involving Public Employees? Does It Matter if the Employer's Equipment Is Used?

Several states protect off-duty conduct. New York, for example, has a "lawful activities" law, which protects employees engaging in recreational or certain political activities off duty, while not using work equipment, or work property. See N.Y. Labor Law § 201-d. Other states with similar laws include California (Cal. Lab. Code §§ 96(k), 98.6; Illinois (820 Ill. Comp. Stat. § 55/1-120 (limited to use of lawful products); Minn. Stat. § 181.938 (limited to lawful consumable products); Wisc. Stat. § 111.321.

To date, it is unclear whether anyone has attempted to use these statutes to protect his or her off-duty communications. To provide protection, it will have to be found that use of social media constitutes a recreational or political activity, which is not much of a stretch. However, to the extent that the communication is made at work or involves work-related activities, it may not find protection under these laws.

There are also Fourth Amendment and free speech protections available to public employees. The parameters of some of the protections have preliminarily been set by the United States Supreme Court when it decided the case of *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010). There, the United States Supreme Court determined that a city acted reasonably in reviewing sexually explicit personal text messages transmitted on pagers provided by the police department in connection with work. The employees claimed that acquiring transcripts of the messages constituted an unreasonable search in violation of the Fourth Amendment. While holding that the conduct of the police department was reasonable, the Supreme Court declined to set general standards relating to social media use. The Court noted that:

> The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.… Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.… At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

City of Ontario v. Quon, supra, 130 S.Ct. 2619, 2629–30 (2010).

Issue 7: Can an Employer Regulate Whether Employees Spend Work Time Visiting Social Media Sites?

A 2009 survey conducted by Deloitte LLP concludes that 55% of all employees visit social media sites at least once a week. However, only 20% of the employees admit visiting these sites during working hours.

Unless a state statute prohibits monitoring work time, there is no other impediment to an employer monitoring how much time employees spend on productive activities or on non-productive activities, such as visiting social media sites.

In addition, in some contexts, the employee's job duties may require visiting social media sites. For this reason, if the employer is using social media as part of its own marketing strategy, it will need to consider the need for employees to be involved in that strategy in developing an appropriate policy on usage.

Issue 8: Can an Employer Be Held Liable for an Employee's Conduct on a Network?

The FTC has issued regulations that set forth strict regulations on employees' use of social media to discuss a product or service offered by an employer. 16 CFR § 255.1(d) (2009) The Guidelines provide that:

> Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failure to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made in the course of their endorsements.

Under these guidelines, an employee must disclose his or her relationship, each time s/he endorses an employer's product or service. A positive comment on Twitter or Facebook could be deemed to be an endorsement if it "reflects [the employee's] opinions, beliefs, or experiences" about the employer's product or service.

The guidelines apply to endorsements made using "new media" such as blogs and social media sites, and FTC enforcement actions could be brought against a company whose employees comment on company products for services without disclosing the employment relationship.

The practical import, then, is that the employer should prohibit all communications about products or services or at least prohibit communications without the employer's approval and prior consent. In addition, the policy should require that if an employee makes any comment, the employee must disclose the employee's relationship with the employer. Last, the policy should provide that all employees must report any communications coming to their attention that violate the policy.

Similarly, the SEC in a guidance issued in 2008 (Release No. 34-58288 (August 1 2008)) made it clear that a company employee "speaking" from a company interactive forum may never be deemed to be acting in an individual capacity, so that the company may be liable for all employee statements made in that capacity.

Issue 9: Can an Employer Restrain an Employee or Ex-Employee from Defaming the Employer on a Network?

An employer may validly terminate an employee for making derogatory comments about the employer on the internet (See *Varian Med. Sys., Inc. v. Delfino,* 113 Cal. App. 4th 272 (2003), rev'd on other grounds (holding that an employer may terminate an employee who posted derogatory comments about the company and company executives).

In *Ramos v. Madison Square Garden Corp*, 257 A.D.2d 492 (1st Dept. 1999), the court refused to grant an injunction against an employee's defamatory statements, on the ground that there is an adequate remedy at law (post-publication damages) and relief in the nature of prior restraint is disfavored. But see *Aguilar v. Avis Rent-A-Car System, Inc.*, 21 Cal. 4th 121 (Cal. 1999) (granting a limited workplace injunction prohibiting racial epithets in the workplace).

Issue 10: Can an Employer Obtain Damages from a Network Site for Disparaging Comments Made by an Employee?

In general, the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230 et seq., provides immunity to operators of websites in most situations involving communications by third parties. In *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W. D. Tex. 2007), the court held that these immunity provisions insulated the network from liability for a negligence claim alleged by the victim of sexual abuse by an online predator.

Issue 11: Are There Any Special Issues Involved When Employees Illegally Post Trade Secrets or Confidential Information?

Even in cases where an employee allegedly misappropriated trade secrets and was in danger of posting copyrighted material, the court found that enjoining the posting would violate the First Amendment as a prior restraint. *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745 (E.D. Mich. 1999). But there can be tremendous repercussions if employees or former employees post trade secrets or confidential information.

If employees post copyrighted material on an employer-operated blog and permission hasn't been given by the copyright owner nor is it a "fair use" under the Copyright Act, thereby exposing the employer to potential liability, the owner can request the removal of infringing content.

While there may be some common law protection, employers should have confidentiality agreements with employees, which should prohibit disseminating confidential information of the employer as well as the employer's clients or customers. Moreover, the agreement and/or policies should explicitly prohibit posting any confidential information on any Internet site, or removing or copying it.

Issue 12: Are There Any Special Protections Available or Other Considerations for Union Employees?

The NLRB has held that an employer does not violate the NLRA by having a policy prohibiting employees from using e-mail for non job-related solicitations. *The Guard Publishing Co. d/b/a The Register-Guard*, 351 NLRB No. 70 (12.16/2007). See, e.g., *City of Okmulgee,* 124 Lab. Arb. Rep. (BNA) 423, 430 (2007) (Walker, Arb.); Kuhlman Elec. Corp., 123 Lab. Arb. Rep. (BNA) 257, 262 (2006) (Nicholas, Arb.) (new policy on use of computers and internet is not contrary to CBA and does not materially, substantially, and significantly affect the terms and conditions of employment); but see California Newspaper Partnerships, 350 N.L.R.B. No. 89 (Sept. 10, 2007) (employer must bargain with union over policy forbidding use of e-mail accounts to send messages about union affairs).

In Sears Holdings, 18-CA- 19081 (December 2009), the NLRB issued an Advice Memorandum finding that a social media policy did not violate Section 8(a)(1) because it could not be reasonably interpreted as chilling Section 7 activity. That social media policy provided as follows:

> [I]n order to ensure that the Company and its associates adhere to their ethical and legal obligations, associates are required to comply with the Company's Social Media Policy. The intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates.
>
> **Prohibited Subjects**
>
> In order to maintain the Company's reputation and legal standing, the following subjects may not be discussed by associates in any form of social media:
>
> - Company confidential or proprietary information
> - Confidential or proprietary information of clients, partners, vendors, and supplier
> - Embargoed information such as launch dates, release dates, and pending reorganizations
> - Company intellectual property such as drawings, designs, software, ideas and innovation
> - Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects
> - Explicit sexual references
> - Reference to illegal drugs
> - Obscenity or profanity
> - Disparagement of any race, religion, gender, sexual orientation, disability or national origin…

However, the NLRB has filed a complaint against American Medical Response of Connecticut, Inc., contending that the non-unionized company illegally fired an employee for criticizing her supervisor on her personal Facebook page. (get cite)

In *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Circ. 2002) a pilot claimed he was wrongly disciplined and was critical of labor concessions on his blog. The Ninth Circuit Court of Appeals found that the content of the blog represented protected union activity and lacked the actual malice needed to make it defamatory.

Employees have been disciplined for conduct involving the internet, even though the employee is a union member. See, e.g., *Dep't of Veterans Affairs* (Hoffman, Arb.) (supervisor observed grievant repeatedly using computer for non-work related matters and calling other employees over to view his computer or announcing news to them and so requested a review of his internet usage); *Dept. of Veterans Affairs* (Petersen, Arb.) (e-mails evidencing a slowdown were discovered when someone alleged harassment and defamation; the arbitrator reduced the discharge to a written reprimand because that was the penalty for a slowdown under the employer's progressive discipline policy); *Tesoro Ref. & Mktg. Co.*, 120 Lab. Arb. Rep. (BNA) 1299, 1303 (2005) (investigation where employee posted hate group poster with listed URL); *A.E. Staley Mft. Co.*, A.E., 119 Lab. Arb. Rep. (BNA) 1371 (2004) (Nathan, Arb.); *MT Detroit*, 118 Lab. Arb. Rep. (BNA) 1777 (2003) (Allen, Arb.) ("chat room" operator informed company that an employee had posted a message containing offensive racial language); *State of Minn*., 117 Lab. Arb. Rep. (BNA) 1569 (2002) (Neigh, Arb.) (extensive investigation of chain of pornographic e-mails and related computer use based on complaint from one employee that she viewed a naked woman on co-worker's computer screen).

The same issues arise in relation to union members' conduct when that conduct takes place through using electronic methods of communication. There may be secondary picketing issues if mass e-mails are sent to employees by others soliciting membership or support or if employees use e-mail to put economic pressure on a secondary employer to stop doing business with a primary employer.

Issue 13: Should Employers Have a Policy? If so, What Should It Contain?

Of course, the best practice is to have a policy which addresses not only computer use, licensing and access to the internet, but also the new issues evolving concerning social media. However, it is not sufficient to simply have a policy. It is incumbent upon employers to have policies that actually reflect what they do and to enforce their policies, as well as to train employees regularly about what is expected and what is prohibited. Policies related to these issues include a workplace anti-harassment policy (including using the computer, internet or social media), a computer and e-mail policy (including cell phones, if company issued, and prohibiting personal use of the computer at work), a social media policy prohibiting use of company logos, trademarks or names or making statements about the company except as authorized by the company, a confidentiality and trade secrets policy, a no solicitation, no distribution policy, and a noncompetition policy if enforceable in your jurisdiction. There is no one-size-fits-all policy for every employer, since, for example, an employer who is using social media as part of its own strategy will need to take that into account in developing appropriate policies.

Fundamental aspects of a policy depend on the organization, but should include:

1. Employees should be warned against any postings which contain:
    a. Confidential information: Employees should be warned that they must keep the employer and customers' proprietary information confidential;
    b. Discriminatory statements or sexual innuendos regarding anyone associated with the employer (including customers);
    c. Defamatory or derogatory statements about anyone associated with the employer (including colleagues and customers);
    d. Any illegal conduct using the computer or software; and
    e. Endorsements of company products or services.
2. Policies should also warn:
    a. Against using company logos, or other identifying marks without company permission;
    b. Making any reference to company services or products;
    c. Adding any unlicensed software to the company's computer systems;
    d. Adding any software to the company's computer system without company approval;
    e. Accessing any personal or inappropriate sites from work, including but not limited to pornographic or dating sites;
    f. That all use of the computer during work may be monitored and there is no privacy right in any account or information accessed during work or from the work-related computer;

g. Requiring review of any material before it is posted on the employer's website;

h. Prohibiting copying other material to publish on the employer's website;

i. Requiring professionalism in all postings and publications; and

j. That all computer use may be monitored.

3. Employees should also be required to:

a. Provide all passwords for accounts used during work time to management;

b. Report all violations of company policy;

c. Obtain management approval before sharing any data; and

d. Obey all standards for linking.

4. Managers should be warned against any postings which contain:

a. An informal review of an employee such as recommending someone on LinkedIn or "friending" a subordinate on Facebook; and

b. Making any statements about colleagues on a social media site.

Conclusion

Social media is a powerful tool and it can be powerful weapon. We are just beginning to develop the rules of engagement governing conduct relating to social media. This article contains some of these rules but certainly more will develop, as we attempt to harness this powerful tool in a way that is fair to both employers and employees.

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Ethics Matters

By John Gaal

Q I am representing a client in a litigation matter. Although I knew he was unemployed at the time I undertook the representation, I did not think he would fall so far behind in his bills to me. He paid on time for the first six months, but it has now been eight months since the last payment and I will soon have to get ready for trial, which will only cause the billings to increase significantly. I am in a small office and this is starting to create a financial drain on my firm. Can I tell him I simply can no longer continue to represent him unless he comes current in his billings? Should I have included in my engagement letter with him the right to discontinue representation in the event he was more than 30 days late on his bills?

A Withdrawing from representation of a client, especially in a litigated matter, is not always that easy. Rule 1.16(c) of New York's Rules of Professional Conduct allows an attorney to withdraw from representation of a client at any time if it can be done without a material adverse effect on the interests of the client. Obviously, in your situation—with an impending trial—that is not the case. However, withdrawal is also permitted, even if there might be an adverse effect, if, among other things, the client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." NY Rule 1.16(c) (5). Mere non-payment is not enough; there must be a deliberate disregard of the obligation. As a result, inadvertent or de minimus failures are generally insufficient to permit withdrawal. *See* NYSBA Formal Opinions 598 and 805. An inability to pay can, but does not necessarily, meet this "deliberate disregard" standard.

An added complication is that your representation is occurring in the context of litigation. Rule 1.16 (d), not surprisingly, provides that where the rules of a tribunal require its permission for withdrawal, New York's Rules of Professional Conduct also require that permission. And virtually every court requires permission before counsel of record can withdraw, typically employing a "good cause" standard.

Under both judicial standards and ethics rules, a number of factors come into play in determining whether non-payment in the midst of litigation provides grounds for withdrawal. For example, an important consideration is how much money is owed and how long has it been owed. *See Liberty Mutual Ins. v. RPC Leasing*, 2008 U.S. Dist LEXIS 96101 (E.D.N.Y. 2008). The more significant the amount owed and the longer it has been owed, the more likely withdrawal will be permitted. *See Stair v. Calhoun*, 722 F Supp 2d 258 (E.D.N.Y. 2010). Another consideration is how much money has the client already paid for the legal services in question. If the client has paid a large amount leading up to trial and owes a relatively small amount to finish up, those arrears may not rise to the level of a "deliberate disregard." *See* NYSBA Formal Opinion 598.

Where you are in the proceeding/representation can also make a difference in this analysis. Obviously, it will be more difficult to secure permission to withdraw on the "eve of trial," where the harm to the client is its greatest, than at the start of litigation. *Id*. Another factor which can come into play is whether the client's course of conduct exhibits a continuing effort to try to meet his payment obligation, such as by making payments from time to time as possible.

"Withdrawing from representation of a client, especially in a litigated matter, is not always that easy."

See Stair v. Calhoun, supra; Forchelli, Curto, Deegan Schwartz Mineo Chon and Terrana v. Hirsch, 2010 U.S. Dist LEXIS 63436 (E.D.N.Y. 2010). And where the lawyer was aware of the client's financial condition at the outset of the representation (e.g., unemployed), the client's later inability to pay may not be enough. *See Forchelli, Curto, Deegan Schwartz Mineo Chon and Terrana v. Hirsch, supra*. Courts have also considered whether the client has attempted to help contain legal fees or, to the contrary, has caused them to run higher because of his own conduct and/or lack of cooperation as a factor warranting consideration. *See Stair v. Calhoun, supra*. In fact, the client's failure to cooperate is often noted in conjunction with his failure to meet his financial obligations as a basis for withdrawal. Courts will also consider the financial impact on the law firm involved, thus recognizing the difference in the burden of a late/non-paying client for a solo practitioner and for a National Law Journal 200 law firm. *Id*.

Finally, not to be discounted in the analysis is the impact of withdrawal on the litigation itself. *Id.* Needless to say, a court with a heavy docket may be less likely to allow a withdrawal for non-payment if it would significantly impact the court's own scheduling.

Even where withdrawal for non-payment is justified, a lawyer must take steps, to the extent "reasonably practicable," to avoid foreseeable prejudice to the client, including providing reasonable notice to the client of the intention to withdraw, allowing sufficient time for the substitution of counsel, and providing the client with all papers and property to which the client is entitled. *See* NY Rule 1.16 (e); NYSBA Formal Opinion 598.

As to whether you would have been able to "walk away" from your client in this case if your engagement letter provided that the failure to pay within 30 days would, without more, warrant withdrawal, the answer is "no." You cannot alter the permissible bases for withdrawal by the terms of an engagement letter. *See* NYSBA Formal Opinion 805. Consequently, a blanket "authorization" in an engagement letter permitting withdrawal for a failure to pay within 30 days, regardless of the "material adverse effect" on the client, and whether the failure constitutes a deliberate disregard of the payment obligation, would not trump the Rules of Professional Conduct. While clearly stating payment expectations is always a good practice, and while such language may help you in a case where the client does not stand to be materially harmed by the withdrawal, in your circumstances, it would not have made a difference.

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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Employers Beware! The New Requirements in New York's Wage Theft Prevention Act

By Bran Noonan

During the last days of his term in December 2010, Governor David Paterson signed into law the Wage Theft Prevention Act ("WTPA"), which took effect on April 9, 2011. The WPTA amends, among other sections, portions of Section 195 of Article 6 of the New York Labor Law, which addresses employers' notice and recordkeeping requirements. This sweeping act has been characterized as including "some of the nation's strongest protections against wage theft," after New York State had "lagged behind other states on the issues."[1] The act actually comes less than two years after the state legislature amended Section 195 in 2009, in order to impose increased notice requirements on employers as part of an effort to protect workers against underpayment. That amendment, along with the new WTPA, have both coincided with a recent wave over the past several years by the federal government and state governments to crack down on wage and hour abuses. Expanding on the 2009 amendment, the WPTA adds rather expansive and onerous requirements that will apply to all employers regardless of their size. Accordingly, employers will need to reevaluate and update their notice, recordkeeping and payroll policies and procedures, particularly in light of the fact that the WPTA also applies stiff penalties for non-compliance.

The Written Notice Requirements

The WTPA significantly expands the notice requirements under Section 195(1), which was recently amended in 2009. Prior to the 2009 amendment, Section 195(1) only required employers to provide their employees with notice at the time hiring of their rate of pay and regular pay day, but not necessarily in writing.[2] This basic statutory requirement remained in effect and unchanged since the section was enacted in 1966.[3]

With the advent of the 2009 amendment, employers were required to provide newly hired employees, for the first time, with written notice of their rate of pay and regular pay day at the time of hiring.[4] For non-exempt employees, the written notice had to also state the employee's regular hourly rate and overtime rate, such as $10.00 per hour and overtime rate at $15.00 per hour. Employers had to present the written notice to the employee "at the time of hiring" and obtain written acknowledgement from the employee of his or her receipt, which the employer had to retain for six years. While the statute did not expressly define the meaning of "at the time of hiring," the New York Department of Labor ("NY DOL") later stated that the notice had to be given "before any work is performed."[5] The NY DOL has also advised that employers are not permitted to satisfy the notice requirement by incorporating the required terms in offer letters or other unofficial forms. However, such guidance fails to effectively address every sort of employment scenario. For instance, employees who undergo training during their first week of work would not be performing any work but would likely be on payroll. While best practices might be to present the notice to such employees upon their first day of training, an employer might be deemed in compliance if it presented the notice following the training at the time actual work commenced.

"This sweeping act [the Wage Theft Prevention Act] has been characterized as including 'some of the nation's strongest protections against wage theft…'"

Building off the 2009 amendment, the WTPA significantly increases the notice requirements under Section 195(1) in both terms of the information employers must provide and the frequency in which they must provide it. The subsection will now require employers to provide newly hired employees, at the time of hiring, written notice of the following: (1) the employee's rate of pay, (2) the basis for the employee's pay (e.g., hourly, daily, weekly, salary, commission, and so forth), (3) allowance claimed as part of the minimum wage (e.g., tips, meals, or lodging allowances), (4) the employee's regular pay day, (5) the name of the employer, including whether the employer is "doing business as" under any other name, (6) the employer's address, and (7) the employer's telephone number.[6] Not only must this notice be provided to newly hired employees, but employers are now required to provide the notice to all existing employees on an annual basis on or before February 1 of each year.

As with the 2009 amendment, employers must continue to obtain a written acknowledgement of the notice signed by each employee and retain it for six years. A particularly glaring addition to the law, however, is that the form must be given to employees in English and the employee's primary language. The NY DOL is authorized to prepare various template forms for employers to utilize, which shall be in English and one additional language the NY DOL chooses.[7] If an employee identifies a language in which a NY DOL template is unavailable, the employer will be deemed in compliance with the language requirement by providing an employee with only an English-language notice. But until the NY DOL issues

template forms, employers will have to ensure that their notices are dual-language compliant.

If the employer makes any changes to any of the information contained in the written notice, the employer must notify the employee, in writing, of the change at least seven days prior to the change.[8] If the change happens to be reflected in the employee's wage statement, the employer is relieved from having to provide the advanced written notice. The statute does not state that the changes must be reflected in the wage statement before becoming effective. Yet, any changes would likely have to be set forth in the wage statement either by the effective date of the change or the first wage statement following the change. The statute also neither expressly requires the employee to acknowledge the changes nor requires the advance written notice to be multi-lingual. In any event, the increased notice requirements under Section 195(1) will require employers to update their policies and remain diligent in adhering to the new requirements.

The Wage Statement Requirements

Along with amending the notice requirements, the WPTA also increases the extent of information employers must include on wage statements provided to each employee pursuant to Section 195(3). This subsection, which was not altered by the 2009 amendment, had consistently required employers to "furnish each employee with a statement every payment of wages, listing gross wages, deductions, [and] net wages."[9] With the WPTA, Section 195(3) will now require wage statements to include the following information: (1) the dates the payment of wages covers, (2) the name of both the employee and employer, (3) the employer's address and telephone number, (4) the rate and basis of pay, (5) gross wages, (6) deductions, (7) allowances (if applicable), and (8) net wages.[10] Additionally, if an employee is not exempt from overtime, the wage statement must include the employee's overtime rate, the number of regular hours worked, and the number of overtime hours worked. While an employer was only required to retain these records for three years under Section 195(4), employers will now have to preserve the records for six years.

Penalties for Non-Compliance with Section 195

Within the WTPA, the state legislature coupled the new substantive requirements with a punitive sanctions employers will be subjected to for violating Sections 195(1) and (3), in addition to committing general wage violations.[11] According to the legislature, the current penalties in place "are minimal and offer little deterrent" against employers committing wage abuses.[12] By subjecting employers to financial sanctions, employers would presumably have a greater incentive to comply with the new statute.

In an effort to compel compliance with the new requirements under Sections 195(1) and (3), the WPTA imposes financial penalties for violating each subsection. If an employer fails to comply with the notice requirement under Section 195(1) within ten business days of the employee's first day of employment, the employee may bring a civil action to recover $50 per week during which the violation continues, not to exceed $2,500.[13] If an employer does not provide an employee with the required wage statements under Section 195(3), the employee can bring a civil action to recover $100 per week during which the violation continues, not to exceed $2,500.[14] Even though damages are capped at $2,500 for both notice and wage statement violations, a court can award other relief, including attorneys' fees and costs,[15] which could lead to an increase in litigation and could significantly impact businesses financially. The WPTA does, however, provide employers with two affirmative defenses to liability. An employer may avoid liability if (1) the employer made complete and timely payments to the employee, or (2) the employer reasonably believed in good faith that it did not have to provide the notice to its employees.[16] Despite the availability of the defenses, the cost of litigation, particularly for smaller businesses, may outweigh an employers' decision to ever litigate an action to conclusion and to use the defenses to overcome liability.

The state legislature also added a rather atypical penalty in the WTPA for wage violations. Under Section 219-c, the NY DOL is empowered to require employers to disclose their violations of Section 195, among others sections, in what is seemingly an attempt to use the force of shame to compel an employer into compliance.[17] The NY DOL may require an employer to post a notice internally for up to one year that is visible to its employees and summarizes the employer's violations. If the violation constituted willful underpayment of an employee, the NYS DOL could order the employer to post a notice of the violations to the general public for a period up to 90 days. Given the imposition of penalties for non-compliance with Sections 195(1) and (3), it will be important for employers to ensure they are in complying with the new requirements.

The Impact of the WPTA on Employers

The WTPA will undoubtedly have a significant impact on employers. Initially, employers will have to invest time and money updating and implementing their notice, payroll, and recordkeeping policies and procedures. Mid-size and small business without human resource departments or in-house counsel will be particularly burdened by the new requirements under Section 195. For example, the unprecedented dual-language requirement may require employers to expend recourses ensuring the notice

is properly translated, which could be onerous for a small business that employs individuals with varying primary languages. Another foreseeable problem for businesses with limited personnel resources is that Section 195(1)(a) requires an employer to provide its employees with any "other information as the [NY DOL] deems material and necessary."[18] However, mid-size and small businesses may not always be able to stay abreast of newly issued requirements, especially if such requirements are often and regular. This leaves such businesses particularly susceptible to committing violations unintentionally and potentially exposing them to financial penalties. Accordingly, it is imperative that employers, at a minimum, modify their policies to comply with the new law and regularly review the NY DOL's website for relevant information and guidance.

Endnotes

1. Sam Dolnick, Worker's Safeguards Strengthened by N.Y. Law, NY Times (Dec. 13, 2010).
2. N.Y. Lab. Law § 195(1), Subd. 1. L.2009, c. 270, § 1.
3. N.Y. Lab. Law § 195(1), added L.1966, c. 548, § 2.
4. N.Y. Lab. Law § 195(1).
5. Guidelines for Written Notice of Rates of Pay and Regular Payday, http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/lshmpg.shtm.
6. N.Y. Lab. Law § 195(1)(a) (effective Apr. 9, 2011).
7. N.Y. Lab. Law § 195(1)(b) (effective Apr. 9, 2011).
8. N.Y. Lab. Law § 195(2) (effective Apr. 9, 2011).
9. N.Y. Lab. Law § 195(3) (effective Apr. 9, 2011).
10. N.Y. Lab. Law § 195(3) (effective Apr. 9, 2011).
11. The WTPA includes several increases in penalties for underpaying and retaliating against employees. However, because this article primarily addresses changes to Sections 195(1) and (3), it does not focus on all the penalties under the WTPA. Accordingly, the penalties mentioned in this article are not exhaustive of those included in the WTPA.
12. S8380-2009 Memo available at http://open.nysenate.gov/legislation/bill/S8380-2009.
13. N.Y. Lab. Law § 198(1-b) (effective Apr. 9, 2011).
14. N.Y. Lab. Law § 198(1-d) (effective Apr. 9, 2011).
15. N.Y. Lab. Law § 198(1-b) and (1-d) (effective Apr. 9, 2011).
16. N.Y. Lab. Law § 198(1-b) and (1-d) (effective Apr. 9, 2011).
17. N.Y. Lab. Law § 219-c(1) and (2) (effective Apr. 9, 2011).
18. N.Y. Lab. Law § 195(1) (effective Apr. 9, 2011).

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A Private Right for Public Service: Should New York Provide a Private Cause of Action for Jurors Who Suffer Adverse Employment Consequences Because of Jury Service?

By Philip L. Maier and Andrew Andela

Employees who serve as jurors in New York State do so at the peril of their employment status. If an employee is discharged for performing jury duty service, or otherwise suffers an adverse employment action, that employee does not have a viable private cause of action for such treatment. This may come as an unwelcome surprise to the 600,000 people who annually serve as jurors in the state court system.[1] In light of the strong at will employment doctrine maintained by the Courts, any hope that an employee has recourse if fired for jury service is illusory. This article will address the statutory framework and case law surrounding the issue of employee protection for jury duty service, and present an overview of the treatment of this same issue by other jurisdictions.

"In light of the strong at will employment doctrine maintained by the Courts, any hope that an employee has recourse if fired for jury service is illusory."

Almost any discussion about job protection for non-unionized employees in New York begins with New York's version of the employment at will doctrine. In *Murphy v. American Home Products* [2] the Court of Appeals reaffirmed the vitality of the employment at will doctrine in New York State. In that case, the Court dismissed a complaint alleging, among other causes of action, that the plaintiff was discharged for disclosing to corporate management personnel alleged accounting improprieties done by other corporate personnel officials. The Court declined to adopt a public policy exception to the employment at will doctrine, finding that such action was best left to the legislature. As a result, absent a "constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired."[3] Numerous cases have reinforced the extent to which New York is an employment at will state and that it does not recognize any exceptions to this doctrine based upon public policy.[4]

In declining to find that such a cause of action was warranted, the Court noted that employees are not without certain statutory protections which serve both their and the public's interest. One such protection noted by the Court is Judiciary Law §519, which the Court stated protects employees from discharge or other penalty due to an absence from employment because of jury duty service. Notwithstanding the implication in *Murphy* that this statutory provision affords some protection to employees, lower courts have consistently found that Judiciary Law §519 does not create a private cause of action for employees who are discharged due to jury duty service.[5]

1. Section 519 of the Judiciary Law

Section 519 of the Judiciary Law states that a juror who notifies his or her employer prior to commencement of the term of service "shall not, on account of absence from employment by reason of such jury service, be subject to discharge or other penalty."[6] Based upon this provision, an employee after notice to an employer, shall be released from employment for the duration of the jury duty. An employee is not entitled to payment during this period, and an employer employing more than 10 employees is permitted to withhold wages except for forty dollars during the first three days of jury duty service. Non compliance by an employer with this section constitutes a criminal contempt, punishable pursuant to Judiciary Law, Article 19 §§750[7] and 751.[8]

In the few cases which have addressed the subject, New York Courts have uniformly held that an employee who is dismissed for serving jury duty does not have a private civil cause of action against an employer under this statute.[9] In *DiBlasi v. Traffax Traffic Network*,[10] the Appellate Division stated that an employee could not maintain causes of action for either a violation of Judiciary Law §519, or a wrongful/retaliatory discharge in violation of public policy under Judiciary Law §500. In that case, DiBlasi was directed to report to jury duty and made several unsuccessful attempts to his notify employer that he would not be able to work that day due to jury duty. He was directed to report to work the next day but instead reported for jury service. By letter dated that same day, DiBlasi was terminated for failing to comply with requirements of an employee manual relating to advance written notice of absence from work. Plaintiff apparently conceded that the statute does not provide a private cause of action, and instead relied upon the

Court's "inherent power" under Judiciary Law §500 to implement the public policy of §519. The Court in *DiBlasi* concluded, however, that a private cause of action for a civil remedy is not an implied right under Judiciary Law §519. In light of *Murphy*,[11] the Court also dismissed the cause of action based upon Judiciary Law §500, since New York does not recognize a cause of action for wrongful discharge based upon public policy. The Court did, however, note the anomaly that *Murphy* cited Judiciary Law §519 in support of its argument that employees do have protection in New York State notwithstanding the employment at will doctrine.

Similarly, in *Gomariz v. Foote, Cone, & Belding Communications, Inc.*[12] the Appellate Division affirmed the Supreme Court's dismissal of a complaint in which a plaintiff alleged a cause of action based upon Judiciary Law §519. The case does not recite the facts alleged, but states simply that the statute does not expressly provide for a private right of action. It then examined whether a private cause of action can be implied by the statutory scheme, and found that it did not.

2. Private Cause of Action?

A statute by its express terms may provide for a private cause of action to enable a plaintiff to redress a violation of the statute itself.[13] In the absence of such express statutory authority, however, the Courts have found that there may be an implied cause of action upon which suit could be brought. Both *Gomariz* and *DiBlasi*, however, concluded that neither an express nor an implied cause of action is created by Judiciary Law §519. Their analysis relied upon *Sheehy v. Big Flats Community Day* [14] and *Burns Jackson Miller Summit & Spitzer v. Lindner.*[15] In these cases, the statutes in question did not expressly provide a private cause of action. As result, much of their analysis focused upon whether a private cause of action could be implied from the statutory scheme.

In *Burns Jackson Miller Summit & Spitzer v. Lindner*, *supra (Burns Jackson)* the Court did not find a private cause of action to exist. In that case, two law firms sued for damages as a result of an illegal transit strike in 1980. The Court found that the Taylor Law,[16] which regulates the bargaining relationship between public sector unions and public employers, and prohibits public employees from engaging in strikes,[17] did not provide a private cause of action for violations of its provisions. The Court stated that while the law firms could be construed to fall within the class to which the statute was intended to protect, the provisions of the Taylor Law and its legislative history demonstrate that there was no intent to create a private right. The Court also found that implication of a private right would be inconsistent with the legislative purpose and statutory scheme.[18] As stated in a later decision by the Court of Appeals, *CPC International Inc. v. McKesson Corporation et al.*:[19] "[I]n short, a private cause of action is implied where it can be shown that plaintiff belongs to the class of legislatively intended beneficiaries and that a right of action would clearly be in furtherance of the legislative purpose" (citing *Burns Jackson Miller Summit & Spitzer,* at 329).

Likewise, in *Sheehy*, the Court of Appeals declined to find a private cause of action based upon Penal Law §260.20(4), which makes it illegal for anyone but a parent or guardian to give a minor alcoholic beverages. In that case, Sheehy sued for injuries resulting from a car accident in which she was injured while crossing the road. She was a minor and alleged that she had been drinking at a number of locations which had been negligent for serving her. The Court stated, at 633, that a private cause of action exists if it meets the test set forth in *Burns Jackson Miller Summit & Spitzer v. Lindner*, *supra*: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme."[20] The Court stated that the plaintiff met the first two criteria, but that finding a private cause of action to exist would be inconsistent with the legislative scheme. The Court stated that the Legislature adopted General Obligation Law §11-101, (the Dram Shop Act) which sets forth a scheme pursuant to which individuals may recover damages for the sale of or procurement of alcohol, and which, as interpreted, does not create a cause of action for those persons themselves injured as a result of the consumption of alcoholic beverages. Additionally, General Obligation Law §11-100, which creates a cause of action for persons injured as a result of furnishing alcoholic beverages to a minor, does not create a cause of action for persons in Sheehy's position.

Courts have addressed whether an implied cause of action exists under a particular statute in a variety of contexts. Though an in-depth examination of those cases is not the purpose of this article, it seems clear that when the legislature has enacted a comprehensive statutory enforcement scheme, the courts will not find an implied cause of action.[21] In *Hammer v. American Kennel Club*, 1 NY3d 294, 803 NE2d 766, 771 NYS2d 493 (2003) the Court affirmed the dismissal of an action alleging cruelty to animals due to a tail "docking" requirement for show dogs. The existence of statutes addressing the enforcement of animal protection was persuasive to the Court in not finding a private action under the statute relied upon by plaintiff.[22] Additionally, in *Palaez v. Seide*,[23] the Court of Appeals affirmed the dismissal of complaints in a consolidated appeal which alleged injuries due to lead paint poisoning. The plaintiffs had alleged a breach of a special relationship between them and the municipal defendants. The Court stated that a private right of action must exist to establish such a relationship. After review-

ing the provisions of the Public Health Law, the Court concluded, at 401, that "[T]he enactment contemplates a program of oversight in which the role of the government is, in the main, administrative and advisory." As a result, the Court found that a private right of action was not implied since it would be contrary to the legislative scheme.[24]

The Appellate Division did find a private civil action to exist in *Negrin v. Norwest Mortgage*.[25] In that case, the plaintiff asserted a private cause of action based upon the imposition of certain charges in connection with the payoff of her mortgage in violation of Real Property Law §274-a and General Business Law §349. The Court found that the first two prongs of the *Burns Jackson* test were satisfied. In addressing the third, the Court was not persuaded by the defendant's "strenuous" assertion that to find an implied cause of action would be contrary to the legislative scheme. In this regard, the Court, at 47, stated that since "there is no regulatory agency that would otherwise enforce compliance with the [statute]… the recognition of a private right would do no harm to the legislative scheme."

Additionally, in *Izzo v. Manhattan Medical Group, P.C.*,[26] the Appellate Division, found a private right of action under Education Law §6810, which sets forth the manner in which a prescription shall be issued. The failure to comply with the statutory direction gave rise to a private cause of action of wrongful death brought by the estate of the decedent who died of a drug overdose.

The Courts in *DiBlasi* and *Gomariz* did not engage in a detailed discussion regarding whether a private cause of action could be implied under Judiciary Law §519. In *DiBlasi*, the Court stated that the plaintiff was clearly within the protected class, and finding a cause of action would further public policy. However, it stated, at 686, that finding an implied cause of action "would require blatant disregard of the existing statutory scheme." In support of this position, the *DiBlasi* Court noted that legislation amending Judiciary Law §519 granting a civil remedy was vetoed by then-Governor Pataki.[27] *Gomariz* simply stated, at 316, that the plaintiff failed to satisfy the test set forth in *Sheehy*, and that the "legislative history of the statute indicates that the purpose was to provide for the adequate functioning of the jury system and not to compensate employees terminated for fulfilling jury duty."

3. The Federal and State Approaches

Thirty states have adopted explicit statutory protection for citizens serving jury duty. Ten others, including the District of Columbia, have statutes which specify the remedies available to employees if subject to adverse action due to jury service. Eleven others, including New York make it a violation of law to take such adverse action, but effectively leave the employee without a remedy. The federal government has passed legislation creating an explicit cause of action and provides counsel to represent adversely affected juror-employees.

In the federal system, the Jury Systems Improvements Act[28] grants employees an express cause of action for adverse employment action taken by an employer against an employee for that employee's jury service in the federal court system.[29] The Act protects permanent employees from adverse employment actions by reason of jury service, provides for legal and equitable relief, and the assessment of penalties. The statute also provides for the appointment of counsel to represent an employee, and for counsel fees paid to an attorney retained by an employee. Since there is a remedy at law available to an employee, it has been held that there is a Seventh Amendment right to a jury trial under this statute.[30]

The states have taken a variety of approaches to protection of employees called for jury duty service. Some state statutes provide expressly for a private cause of action for adverse employment actions taken because of jury duty service, and also may criminalize such actions by making it a misdemeanor and or imposing a fine. Other state statutes are silent regarding whether a private cause of action exists, thereby in effect leaving the issue to the courts.

a. Explicit causes of Action

The following states have adopted statutes which expressly provide a civil cause of action for those jurors aggrieved by adverse employment action taken because of their jury duty service: Alabama,[31] Alaska,[32] California,[33] Colorado,[34] Connecticut,[35] Delaware,[36] Georgia,[37] Hawaii,[38] Idaho,[39] Illinois,[40] Iowa,[41] Kansas,[42] Kentucky,[43] Louisiana,[44] Maine,[45] Massachusetts,[46] Minnesota,[47] Missouri,[48] Montana,[49] Nevada,[50] New Hampshire,[51] New Jersey,[52] North Carolina,[53] North Dakota,[54] Ohio,[55] Oregon,[56] Rhode Island,[57] Utah,[58] Washington,[59] and Wyoming.[60] The following states have statutes which specify the remedies available to employees who have been subject to adverse action because of jury duty service: Arizona,[61] Arkansas,[62] District of Columbia,[63] Nebraska,[64] Oklahoma,[65] Tennessee,[66] Vermont,[67] Virginia,[68] and Wisconsin.[69] Some states, like New York, have statutes which do not specifically state that an employee has a cause of action, but nevertheless make it a violation of the statute to take adverse action against an employee for jury service. These states, together with the few that make no mention of adverse employment actions, are: Florida,[70] Indiana,[71] Maryland,[72] Michigan,[73] Mississippi,[74] New Mexico,[75] South Dakota,[76] Texas,[77] and West Virginia.[78]

4. Should Employees Who Suffer an Adverse Employment Action Because of Jury Duty Have a Private Cause of Action?

Even assuming that the states which do not explicitly grant a cause of action have not adopted one by case law, New York is in the minority of states granting protection for those called to public service. Granting protection for jury duty service serves two main interests. The State has an interest in preserving the integrity of the jury system, and the employee has an interest in being free of employment discrimination due to jury service. The power to subject an employer to a contempt proceeding instituted by the attorney general's office or a local district attorney may adequately address the State's interest, but is of questionable value in resolving the issues confronting an employee who has lost his or her job. The fine or jail sentence imposed pursuant to a finding of contempt[79] does not make an employee whole for the losses suffered from an adverse employment action. Unlike other states, New York's statute makes no mention of back pay, health insurance or reimbursement for other tangible adverse employment consequences. Presumably, institution of contempt proceedings would require the assistance of the aggrieved employee. There is not, however, much incentive for the out-of-work employee to assist when he or she will not benefit from the relief awarded. There may be even less incentive for an employee who was able to find a new job to ask his or her new employer to take the day off to assist in bringing contempt charges against a former employer.

The remedy of contempt has the effect actually of criminalizing a workplace dispute. A contempt proceeding, however, is not the optimum venue to determine whether the employee's discharge from employment was caused by jury service, or whether that adverse employment action was merely coincident and had been planned prior to the actual discharge. The mandatory nature of jury service raises the equity of imposing a duty on citizens without any corresponding right to protect themselves from adverse action caused by their jury service.[80] A logical extension of a citizen's right to not be discharged for jury service, as stated in the statute, calls for a meaningful remedy in the event that right is abridged.

Notwithstanding *DiBlasi* and *Gomariz*, a cogent argument can be made that an implied cause of action already exists inherent in the statute. As stated at the outset, in *Murphy* the Court of Appeals commented that Judiciary Law §519 protects employees from discharge or other penalty due to an absence from employment because of jury duty service. Therefore, the Court of Appeals has indicated, though in dicta and without detailed analysis, that Judiciary Law §519 provides a basis for a cause of action for wrongful discharge due to jury service. Nothing has been found in the legislative history to support the contention that a private cause of action was not intended by the legislature.

Applying the criteria set forth in the *Burns Jackson* test leads to the conclusion that, especially with the perspective of the *Murphy* court, an implied cause of action exists. There should be no doubt that a person discharged from jury service would be a potential plaintiff in the class designed to benefit from the statute, and that a private right of action would promote the legislative purpose. In this latter regard, finding that a cause of action exists would promote the ability of citizens to serve as jurors without adverse employment consequence, which is the purpose of the statute. It also can be persuasively argued that the creation of such a right would be consistent with the legislative scheme. There is no enforcement mechanism in place which would be disturbed by a private cause of action. The contempt power set forth in the statute does not establish a comprehensive statutory scheme evidencing a legislative intent to preclude a private cause of action, and the legislative scheme is not undermined or impeded by that type of action. To the contrary, a private cause of action would work to promote the legislative purpose of not having jurors discharged because they perform mandatory jury service.

"[Should] New York provide a cause of action for those employee-jurors subject to an adverse employment action because of jury service[?] It seems clear that it should."

At this point, given the state of the law, and without the Court of Appeals having had the opportunity to act, legislative action is required to recognize a private cause of action under Judiciary Law §519. If deemed appropriate, as done in the majority of other jurisdictions, the legislature could expressly state that a cause of action exists. It could then address the nature of relief available, specifying, for example, whether damages are limited to a fixed compensatory amount, and whether an award of punitive damages or attorney fees is appropriate. A period of limitations should also be addressed.

The question posed at the outset is whether New York should provide a cause of action for those employee-jurors subject to an adverse employment action because of jury service. It seems clear that it should. A private cause of action creates a benefit to society and to the individual which outweighs any costs of, in effect, insulating employers from liability for discriminating against an employee on the basis of jury duty service. It is suggested here that what we regard and value should not be without remedy. If we value jury service, the State should allow those who are aggrieved due to adverse actions taken because of jury service a right to remedy that wrong.

Endnotes

1. www.courts.state.ny.us/home.htm; nyjuror.gov.
2. 58 NY2d 293 (1983).
3. *Murphy* at 305. *See Weiner v. McGraw Hill*, 57 NY2d 458 (1982) (an express provision in an employee handbook may give rise to a cause of action for breach of contract). *But see Sabetay v. Sterling*, 69 NY2d 329 (1987) (no liability based upon an implied covenant in an employment handbook).
4. *See Smalley v. The Dreyfus Corp.*, 10 NY3d 55 (2008) in which the Court stated that allegations of fraudulent inducement to enter into and remain employees of Dreyfus did not state a cause of action. *See also Horn v. New York Times*, 100 NY2d 85 (2003) in which the Court held that a doctor's adherence to medical confidentiality rules, which was alleged to be the cause of her termination, did not state a cause of action. *Cf. Weider v. Skala*, 80 NY2d 628 (1992), in which the Court held that an attorney who alleges that he was fired for insisting upon compliance with the attorney Code of Professional Responsibility had a viable cause of action since, as the Court stated, compliance with the Code was inseparable from his position as an attorney in the firm.
5. The Court in *Murphy* also referred to Executive Law §296 (1) which bars the discharge of an employee for opposing unlawful discriminatory practices or filing a complaint or participating in a Human Rights' Law proceeding, and Labor Law §215 which offers protection for participating in a proceeding under the Labor Law as examples of statutory protections.
6. Judiciary Law §519. Right of juror to be absent from employment

   > Any person who is summoned to serve as a juror under the provisions of this article and who notifies his or her employer to that effect prior to the commencement of a term of service shall not, on account of absence from employment by reason of such jury service, be subject to discharge or penalty. An employer may, however, withhold wages of any such employee serving as a juror during the period of such service; provided that an employer who employs more than ten employees shall not withhold the first forty dollars of such juror's daily wages during the first three days of jury service. Withholding of wages in accordance with this section shall not be deemed a penalty. Violation of this section shall constitute a criminal contempt of court punishable pursuant to section seven hundred fifty of this chapter.

7. Judiciary Law §750 states: Power of Courts to punish for Criminal contempts.

   > A court of record has power to punish for a criminal contempt, a person guilty of…subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury or subpoenaed witness service.

8. Judiciary Law §751 states: Punishment for criminal contempts.

   > [P]unishment for a contempt, specified in section seven hundred fifty, may be by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court of sitting, or both, in the discretion of the court.

9. It is difficult to determine the extent to which employees have been subject to adverse action since it does not appear that any such records or reporting system of such alleged violations is maintained.
10. 256 AD2d 684, 681, NYS2d 147 (3d Dept 1998).
11. Note 2.
12. 228 AD2d 316, 644 NYS2d 224 (1st Dept 1996).
13. See Labor Law §740, *Retaliatory action by employers*, which gives limited to protection to "whistleblowers" under certain circumstances.
14. 73 NY2d 629 (1989).
15. 59 NY2d 314 (1983).
16. Public Employees' Fair Employment Act, Civil Service Law §200 et seq.
17. *Supra*, §210.
18. The Court also dismissed all the common law causes action brought by the firms.
19. 70 NY2d 268, at 276 (1988). The Court in *CPC Intl.* held that an implied cause of action was inconsistent with the Martin Act's legislative purpose.
20. *See also CPC International v. McKesson Corp.*, *supra*.
21. *Hammer v. American Kennel Club*, 1 NY3d 294, 803 NE2d 766, 771 NYS2d 493 (2003) in which the Court affirmed the dismissal of an action alleging cruelty to animals due to a tail "docking" requirements for show dogs.
22. Agriculture and Markets Law §353.
23. 2 NY3d 186, 810 NE2d 393, 778 NYS2d 111 (2004).
24. *See also Uhr v. East Greenbush Cent Sch Dist*, 94 NY2d 32, 698 NYS2d 609, 720 NE2d 886 (1999) in which the Court found that no private right existed under the Education Law to create liability when a school district failed to administer a scoliosis test.
25. 263 AD2d 39, 700 NYS2d 184 (1999).
26. 164 AD2d 13, 560 NYS2d 644 (1990).
27. Senate Bill No. 714.
28. U.S.C.A., Title 28, Section 1875.
29. This statute states:

   > (a) No employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. b) Any employer who violates the provisions of this section –
   >
   > (1) shall be liable for damages for any loss of wages or other benefits suffered by an employee by reason of such violation;
   >
   > (2) may be enjoined from further violations of this section and ordered to provide other appropriate relief, including but not limited to the reinstatement of any employee discharged by reason of his jury service; and
   >
   > (3) shall be subject to a civil penalty of not more than $5,000 for each violation as to each employee, and may be ordered to perform community service.
   >
   > (c) Any individual who is reinstated to a position of employment in accordance with the provisions of this section shall be considered as having been on furlough or leave of absence during his period of jury service, shall be reinstated to his position of employment without loss of seniority, and shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such individual entered upon jury service.
   >
   > (d)(1) An individual claiming that his employer has violated the provisions of this section may make application to the district court for the district in which such employer maintains a place of business

and the court shall, upon finding probable merit in such claim, appoint counsel to represent such individual in any action in the district court necessary to the resolution of such claim. Such counsel shall be compensated and necessary expenses repaid to the extent provided by section 3006A of title 18, United States Code.

(2) In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel a reasonable attorney's fee as part of the costs. The court may tax a defendant employer, as costs payable to the court, the attorney fees and expenses incurred on behalf of a prevailing employee, where such costs were expended by the court pursuant to paragraph (1) of this subsection. The court may award a prevailing employer a reasonable attorney's fee as part of the costs only if the court finds that the action is frivolous, vexatious, or brought in bad faith.

30. *Hill v. Winn-Dixie Stores, Inc.*, 934 F2d 1518 (1991).
31. Ala. Code 1975 §12-16-8.1.
32. West's Alaska Statutes Annotated §09.20.037.
33. West's Annotated California Labor Code §230.
34. C.R.S. §13-71-134.
35. Connecticut General Statutes Annotated §51-247a.
36. West's Delaware Code Annotated §4515.
37. West's Code of Georgia Annotated §34-1-3(a).
38. West's Hawai'i Revised Statutes Annotated §612-25.
39. West's Idaho Code Annotated §2-218.
40. West's Smith-Hurd Illinois Compiled Statutes Annotated § 305/4.1; § 310/10.1.
41. I.C.A. §607A.45.
42. West's Kansas Statutes Annotated §43-173.
43. Baldwin's Kentucky Revised Statutes Annotated §29A.160.
44. West's Louisiana Statutes Annotated, 2006 Louisiana Code RS 23 §965.
45. Maine Revised Statutes Annotated §1218.
46. Massachusetts General Laws Annotated 234A §61.
47. Minnesota Statutes Annotated §593.50.
48. Vernon's Annotated Missouri Statutes §494.460.
49. West's Montana Code Annotated, Title 39-2-901. The Montana statute bears special mention. Montana has legislatively adopted a wrongful discharge cause of action. While not specifying jury duty as a ground under the statute, generally, it provides a cause of action for employees who have completed probation and are terminated in violation of public policy, without good cause, or in contravention of the terms of a written personnel policy.
50. West's Nevada Revised Statutes Annotated §6.190.
51. Revised Statutes Annotated of the State of New Hampshire §500-A:14.
52. New Jersey Statutes Annotated §2B:20-17.
53. West's North Carolina General Statutes Annotated §9-32.
54. West's North Dakota Century Code Annotated §27-09.1-17.
55. Baldwin's Ohio Revised Code Annotated §2313.18.
56. Oregon Revised Statutes §10.090.
57. West's General Laws of Rhode Island Annotated §9-9-28.
58. West's Utah Code Annotated §78B-1-116.
59. West's Revised Code of Washington Annotated §2.36.165.
60. West's Wyoming Statutes Annotated §1-11-401.
61. Arizona Revised Statutes Annotated §21-236.
62. West's Arkansas Code Annotated §16-31-106.
63. District of Columbia Official Code 2001 Edition §1-612.03.
64. West's Revised Statutes of Nebraska Annotated §25-1640.
65. Oklahoma Statutes Annotated Title 38 §34.
66. West's Tennessee Code Annotated §22-4-106.
67. West's Vermont Statutes Annotated Title 21 §499.
68. West's Annotated Code of Virginia §18.2-465.1.
69. West's Wisconsin Statutes Annotated §756.255.
70. West's Florida Statutes Annotated §905.37.
71. West's Annotated Indiana Code §33-28-5-24.3.
72. West's Annotated Code of Maryland §8-501.
73. Michigan Compiled Laws Annotated §600.1348.
74. West's Annotated Mississippi Code §13-5-35.
75. West's New Mexico Statutes Annotated §38-5-18.
76. South Dakota Codified Laws § 16-13-41.1.
77. V.T.C.A., Civil Practice & Remedies Code §122.0022.
78. West's Annotated Code of West Virginia §52-1-21.
79. *See* note 7.
80. Pursuant to the procedures set forth in Judiciary Law §527, the commissioner of jurors may institute a proceeding for noncompliance against a person who fails to respond to a juror qualification questionnaire or fails to attend after being summoned.

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The New Water Cooler: How Social Media Has Transformed the "Workplace" for Public Employees

By Seth H. Greenberg

From snail mail to electronic mail, rotary phone to mobile phone, and paper diary to online blog, technology has transformed the way we communicate with each other and convey our innermost thoughts and feelings. In many ways these types of technologies have made life easier and more complicated all at the same time. And this complication is even more pronounced in the workplace, where employees' opinions, criticisms, and rumor-milling leave an electronic footprint that remains long after the delete button is pressed.

Social media—an umbrella term that I broadly define as the integration of communication technology with socialization—has great implications for employee's expression of speech, even more so for public servants than for workers in the private sector. Social media is expressed in various forms, more notably through social networking sites and blogs, but also through text messaging, photo and video sharing, podcasts, mashups, wikis, and other mediums.

"Social media…has great implications for employee's expression of speech, even more so for public servants than for workers in the private sector."

The purpose of this article is to address the proliferation and use of social media and the effect it has for public employees in their workplace. Specifically, this article will (1) provide an overview of certain communication technology and uses, focusing on social networking sites, blogs, and mobile devices' text and picture messaging features, and (2) provide some fundamental legal principles applicable to public employees' use of such social media. While courts and arbitrators are only just beginning to address social media specific issues, the current judicial framework for dealing with public employment issues is well established and appears to equally apply in the social media context.

Social Networking Sites

Social Networking Sites (SNS) are online communities of internet users, usually linked into or grouped by those who share some commonality, like interests, friendships, family, hobbies, religion, politics, and the like. SNS are designed to make their users feel like what they post is private or secret, when in fact the whole idea behind such sites is to share information. Their simple features make these sites addictive and act as a type of truth serum, encouraging people to tell-all. Thoughts can be communicated in seconds through one's cell phone or simply with a few strokes at a computer's keyboard, at work, on the road, or in the comfort of home.

Public employees participate on SNS every day. Unfortunately, they do so during working hours and sometimes on their employer's computer. But what government workers fail to recognize is that even what they do off duty, on their personal devices, and off premises can lead to discipline, including termination. Simply put, social media blurs the line between the personal and professional life. Some examples of government employees being disciplined for their use of a SNS are:

- In January 2009, a Washington State Patrol Cadet was forced to resign after officials received a complaint about content on his Facebook page. His Facebook page, which was accessible only to people who were on his "friends" list, displayed photos of himself in uniform posing next to his police cruiser and photos of himself drinking out of a pitcher of beer.[1]
- One month later, on February 26, 2009, Fox News reported that officials in Harrison, New York were "consulting outside lawyers to determine what they can do about racist and sexist comments appearing on police officers' Facebook pages." The article explains, "One Harrison detective reportedly made watermelon and fried chicken jokes about President Obama. He and others reportedly ridiculed the mayor, Joan Walsh, with sexual comments."[2]
- In 2008, a North Carolina school district fired one and disciplined seven other teachers or other school employees for offensive postings on Facebook. In one instance, an elementary school teacher had listed "drinking" as a hobby. In another, a high school special education teacher had posted "I'm feeling pissed because I hate my students!"[3]
- That same year, yet another North Carolina teacher was disciplined for posting that she was teaching in the "ghetto."[4]
- Also in 2008, a Connecticut high school teacher sued a school district unsuccessfully after his employment contract was not renewed as the result of the district's discovering images and conversations with students on his MySpace profile.[5]

- Similarly, in 2008, a Pennsylvania student teacher also sued unsuccessfully after she was denied her teaching certificate because of comments posted on MySpace profile page. The 25-year-old student teacher posted a picture on MySpace showing her in a pirate costume and drinking from a cup with a caption that read "Drunken Pirate." She also invited students to become her online "friends," talked with students about personal issues online, and made comments about a colleague. Officials at her college asserted that her MySpace profile promoted drinking and that her online conduct was inappropriate. Therefore, they refused to grant her a teaching degree.[6]
- Most recently, in April 2011, a New Jersey teacher was suspended pending an investigation over comments she made that she felt like a "warden" and that her students were "criminals."[7]

Many unique and medium specific complications arise concerning SNS. For Facebook, for example, does it matter that a user limits his "friends" to 30, intending to keep what he shares limited and more private, while another user has thousands of "friends," accepting any and all "friend" requests? Arguments have been offered, and will continue to evolve as each SNS platform continues to be created and modified.

Privacy advocates argue that the nature of the SNS privacy settings implies some greater expectation of privacy in SNS content posted by a user/employee. But the inkling is that courts may not be buying that argument. In Canada, in 2007, an Ontario Superior Court found that a plaintiff in a motor vehicle accident had no reasonable expectation of privacy in posts to his Facebook page given the number of people (366 "friends") who had been granted access.[8] While the case was not workplace related, the court's rationale may easily be transferred to the public employment context.

The popularity of social networking sites cannot be understated. Facebook, Twitter, MySpace, and LinkedIn are generally accepted as the top four such sites, with Facebook clearly the industry leader. In fact, if Facebook were a nation, it would be the third largest in the world, having more than 500 million active users. And Facebook is only seven years old! According to its website, people spend over 700 billion collective minutes per month on the popular site.[9] Notably, there are more than 200 million active users accessing Facebook through their mobile devices.[10] It can be almost guaranteed that those users have posted at least one update during working hours. By March 2009, MySpace boasted about 125 million users. While its popularity has waned since then, it still generates a lot of web traffic. Nearly half of all U.S. adults have either a MySpace or Facebook account.[11] LinkedIn, the SNS for professionals, claims to have more than 100 million users in 2011, nearly double compared to the previous year. By far the fastest growing SNS, however, is Twitter. In September 2009, Twitter had 50 million live accounts. By March 2011, it had approximately 200 million registered users and the rate of tweeting is about 1,200 per second.[12] Twitter focuses on small bursts of information (limit of 140 characters for every "tweet") and is currently being utilized by politicians, celebrities, sports figures, as well as by police officers, teachers, electricians, and others.

Employees are increasingly learning that there is no such thing as a separate online persona and a work persona; they are one in the same. Thus, participation on a SNS can directly impact one's ability to perform job functions effectively. On March 11, 2009, *The New York Times* described "The Officer Who Posted Too Much on MySpace."[13] An officer had posted he was feeling "devious" and that he was "watching 'Training Day' [a movie starring Denzel Washington as a crooked cop] to brush up on proper police procedure." Later that day he arrested someone. At trial, the defense counsel cross-examined the officer regarding his MySpace comments suggesting that his actions were less than credible and based on something less than the truth. The officer responded, "You have your Internet persona, and you have what you actually do on the street. What you say on the Internet is all bravado talk, like what you say in a locker room." Except that trash talk in a locker room is not preserved on a digital server or subject to subpoena. Ultimately, the defendant was found not guilty of most charges, negating the distinction sought by the arresting officer.

Issues of on-duty injuries, claims that one is incapable of performing so-called "light duty," and workers' compensation investigations are increasingly relying on current and historical SNS pages. In *Romano v. Steelcase*,[14] a New York Supreme Court was asked to grant defendant access "to Plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information on these [SNS] which are believed to be inconsistent with her claims in this action concerning the extent and nature of her injuries, especially her claims for loss of enjoyment of life." In granting the defendant's request, the Court explained, that "[p]laintiffs who place their physical condition in controversy, may not shield from disclosure material which is necessary to the defense of the action," including disclosure of one's SNS pages that may reveal the plaintiff "has an active lifestyle." This includes posts describing travels, pictures indicating plaintiff engaged in activities that she claims she was incapable of performing, and of course, other images that may indicate her enjoyment of life.

Information intended for public posting or publication, whether by e-mail, entry on a SNS, or inclusion on an online journal, have far less constitutional protection than other forms of speech. The lesson is: Employees Beware! What you share online, you share to the world.

Blogs, Public Discussion Boards, and Other Websites

Blogs (short for "web log") are online journals where people can post diary entries about their personal experiences, hobbies, thoughts, news, and other items. There are approximately 75,000 new blogs created every day and about 18 blogs updated every second. Blogs can take many forms. Public discussion boards represent forms of blogs. YouTube, a video sharing website on which users can upload and share videos, is one big video blog. In fact, Twitter, while included as a SNS, is technically a micro-blogging platform.

A recent study by Nielson showed that more than 66% of people who use the internet visit SNS or blogging websites, and that 10% of all time spent online is spent on such sites. That same study also found that SNS and blogging combined have surpassed e-mail use in popularity.[15]

Public employees have been disciplined for their posts to blogs and other similar websites. For example:

- In January 2009, a Washington police officer was terminated while at the police academy because of comments he posted on his blog about his academy experiences. The probationary officer commented about the rigorous testing he had to go through, posted pictures of himself getting sprayed with pepper spray in the face, and even showed training videos he was required to watch. Notably, however, he made "disparaging comments [ ] about the maturity of some of his anonymous classmates."[16]
- In 2007, in *Curran v. Cousins*, at issue was a correction officers' union website with a message board. Some members posted comments like "pull the trigger on the N*****!!!" referring to the black sheriff. Other posts referred to the sheriff as a "pimp" with certain employees as his "whores" and others as his "house slaves." Clearly derogatory, the First Circuit upheld discipline and concluded the speech was disruptive to the efficient functioning of the correctional department.[17]
- In 2007, a Virginia teacher was terminated after school officials found a YouTube video which showed a clip of the teacher on a cable television show discussing and demonstrating his ability to paint with his buttocks while wearing a swimsuit.[18]

One of the most famous online case involving public employee conduct is the 2004 U.S. Supreme Court's decision in *City of San Diego v. Roe*.[19] There, a San Diego police officer was fired after the Department discovered him selling videos on eBay that showed the officer stripping off a police uniform and engaging in conduct of a sexually explicit nature. The Court found there was no First Amendment violation, concluding that Roe's speech did not inform the public about a matter of public concern and acknowledged that his conduct, while off-duty, was detrimental to the police department.

Mobile Devices

There is no such thing as a traditional mobile phone these days. There are smart phones, which allow their users to send text messages, take and transmit pictures, check e-mails, watch videos, access the internet, and open and modify documents. Portable e-book readers like the Kindle and the Nook have been joined by the iPad to offer even newer forms of communication technology or digital media. These devices allow us to video chat and transmit messages almost instantaneously.

In 2008, U.S. mobile subscribers sent and received more text messages than phone calls, averaging nearly 360 text messages per month compared to 204 phone calls.[20] To show just how increasingly popular text messaging has become, consider that from January through June 2008, there were about 385 billion text messages carried across mobile phone networks yet during that same six-month period in 2009, more than 740 billion such messages were carried, nearly double. As far as picture messaging goes, from January through June 2008, approximately 4.6 billion such messages were sent compared to more than 10.3 billion text messages in the same period during 2009.

Mobile phones also allow their users to access the internet, post to one's Facebook page or send out a Tweet. Forty percent of adult cell phone owners use phones to access internet, email, or instant messaging, and 76% take pictures with their phones.[21]

In 2010, the U.S. Supreme Court was asked to decide a case that many legal experts expected to offer guidance with regard to privacy in electronic communications, specifically with regard to mobile devices. In *City of Ontario v. Quon*,[22] the City had audited a police officer's text messages, uncovering hundreds of personal texts including some of a sexual nature. The texts were sent from and received by the officer on a city-issued pager. According to practice, however, the officer reimbursed the City for all overages resulting from personal use. Although the City had a "Computer Usage, Internet, and E-Mail Policy," the policy didn't apply to text messages.

Disappointing to many lawyers, a unanimous Court refused to decide the case on privacy grounds. Rather, it assumed that the officer had a reasonable expectation of privacy and that the City's review of text messages constituted a search within the meaning of the Fourth Amendment. Finally, it posited that "the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere."[23] Based upon these assumptions, the Court conducted an analysis of the search and ultimately concluded it was reasonable. Justice Kennedy,

writing for the Court, acknowledged the pervasiveness of cell phone and text message communication on and off-duty. Yet, the Court kicked the proverbial "online privacy can" down the road, rejecting a "broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment."[24]

Fundamental Legal Principles

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law...abridging the freedom of speech." This prohibition was made applicable to the states and local governmental agencies by the Fourteenth Amendment. It is the starting point of all legal analysis into public employee speech.

The U.S. Supreme Court has spoken directly to public employee free speech rights on several significant occasions. In *Pickering v. Board of Education*,[25] the Court held a teacher could not be fired for speaking out against a school board's handling of revenue proposals. Fifteen years later, in *Connick v. Myers*,[26] the Court said an assistant district attorney circulating a survey about job satisfaction and workplace issues was not protected speech as it was a matter of personal interest rather than one of public concern. Combined, these two cases created what is known as the Pickering-Connick test for public employee free speech.

The Pickering-Connick test asks: (1) is the speech a matter of public concern? and (2) if so, the interests of employee speaking as a citizen must be balanced against the interests of the government in promoting the efficiency of services performed and delivered by it.

And in 2006, in *Garcetti v. Ceballos*,[27] the Court found that a district attorney's criticism regarding the legitimacy of a warrant was not protected speech, explaining that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[28]

These three cases—*Pickering, Connick*, and *Garcetti*—when read together, provide a framework under which to analyze most public employee speech and appear to also apply to speech expressed using social media forms. In other words, when a teacher posts pictures on Facebook or comments on her blog, the analysis of that speech will most likely center around whether she is speaking as parent or taxpayer (i.e., private citizen) and on whether the comments were made about something that happened in the classroom (i.e., official duties).

In *City of San Diego v. Roe, supra*, the Court described that "[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of the publication.... [T]ypically matters concerning government policies that are of interest to the public at large."

Many municipalities, school districts, police and fire departments, and other governmental units are increasingly adopting social media guidelines in response to increasing liability resulting from employees' online behaviors. In March 2010, for example, three Nebraska correctional officers were fired for posting certain comments on Facebook about using force against inmates. For example, one post states: "When you work in a prison, a good day is getting to smash an inmate's face into the ground…for me today was a VERY good day."[29]

But simple adoption of a social media policy is not enough. To be truly effective, employees must be reasonably notified that there exists a policy and must be schooled as to its guidelines.

When a government employee participates in social media during working hours and using the employer's computer, that employee has very little protection under the law. Engaging in such conduct off-duty and utilizing one's personal computer gives greater protections. There, the employer must show a nexus between the employee's conduct and his employment. Does the employee's behavior harm the employer's reputation? Does the conduct render the employee unable to or adversely affect performance of duties? Does the conduct lead to a refusal, reluctance, or inability of other employees to work with the offending employees? These days, great deference seems to be afforded to the employer in conducting Pickering-Connick balancing test.

Stay tuned, though. Treatment of social media by employers is evolving and so is the law. The U.S. Supreme Court's 2010-11 Term even includes a case, *Borough of Duryea v. Guarnieri*, which again involves speech of public employees. The issue there, as described by a well-known blog covering the U.S. Supreme Court, is: "Whether government employees are protected from retaliation under the First Amendment's Petition Clause when they complain to the government about matters of purely personal (as opposed to public) concern."[30] No decision was issued as of the date this article was submitted.

Lessons Learned

There are four lessons to which public employees must take heed with regard to social media participation. First, a public employee's expectation of privacy is limited. In January 2010, Facebook founder Mark Zuckerberg proclaimed, "Privacy is dead. Privacy is no longer a social norm. People no longer have an expectation of privacy in social media." For public employees who use social media, his edict serves as more than a warning sign, but a signal that the workplace has changed forever.

Second, a government worker's right to free speech is not absolute. Until the U.S. Supreme Court or the New

York State Court of Appeals offers us more, long settled legal principles will continue to guide arbitrators, judges, and other third party neutrals in their analyses of public employee misconduct and social media.

Third, you can and will be disciplined, including termination, for certain off-duty conduct. If in doubt, leave it out, goes an old maxim. The same applies in blog posting, Facebook status updates, comments on a discussion board, or other online participation.

Finally, we all leave digital or electronic footprints. This is so even when you press the delete button and even where you are not an active participant. In December 2009, then Google Chief Executive Eric Schmidt aptly stated in a CNBC interview, "If you have something that you don't want anyone to know, maybe you shouldn't be doing it in the first place."[31]

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Sex, Lies, and Videotape: Cyber Liability Issues in a Digital World

By Mercedes Colwin and Elizabeth F. Lorell

MySpace. Facebook. Friendster. Blogs. AboveThe Law.com. You won't find these terms in the latest edition of Black's Law Dictionary. But they are appearing with greater frequency in legal memoranda and briefs, law journal articles and court opinions.

The explosive growth of social networking sites and computer-based platforms people use to express their opinions and to communicate with each other is reshaping the legal landscape in dramatic ways. Lawyers and clients venturing onto this terrain are confronting legal issues of first impression in the federal and state courts.

Indeed, the absence of settled precedent in "cyberlaw" presents significant challenges to a wide variety of clients, whether they are school districts or Fortune 500 companies. Underscoring cyberlaw's unpredictability is the inherent difficulty in applying decades-old legal precedent to emerging technologies. Two cases from two federal district courts in the Third Circuit starkly illustrate this clash, both of which are discussed in the article. In addition, this article discusses a case involving efforts to invoke the justice system to punish an online prank that went too far and a case in which a local prosecutor sought to indict a group of teenagers for the act popularly known as "sexting." The article then goes on to address other cyberspace-based platforms similar to MySpace.com, and discuss how they can bring unwanted attention to your law firm, your clients, or your company. Finally, the article proposes a set of "best practices" to help you navigate the pitfalls that so often dot the terrain in cyberspace.

I. Cases Involving Cyber Law

A. MySpace Mayhem—Protected Speech or Punishable Offense?

It all started with a computer, an Internet connection, and an idea. Justin Layshock, a high school senior from Western Pennsylvania, was not particularly fond of his principal, Mr. Trosch. So he decided to play a prank on Mr. Trosch. On or about December 10, 2005, he logged on to his grandmother's computer, and signed onto MySpace.com ("MySpace").[1] The Court described MySpace.com as "a very popular Internet site where users can share photos, journals, personal interests and the like with other users of the Internet."[2] On MySpace, Layshock created a "parody profile" of Mr. Trosch.[3] "No school resources were used to create the profile but for a photograph of [Mr. Trosch] that [Layshock] copied from the school's website[.]"[4] The "parody profile" depicted Mr. Trosch answering a number of "non-sensical answers to silly questions[.]"[5]

For example,

> In response to the question "in the past month have you smoked?," the profile says "big blunt." In response to a question regarding alcohol use, the profile says "big keg behind my desk." In response to the question, "ever been beaten up?," the profile says "big fag." The answer to the question "in the past month have you gone on a date?" is "big hard-on." The profile also refers to [Mr.] Trosch as a "big steroid freak" and "big whore." The profile also reflected that [Mr.] Trosch was "too drunk to remember" the date of his birthday.[6]

"[T]he absence of settled precedent in 'cyberlaw' presents significant challenges to a wide variety of clients.... Underscoring cyberlaw's unpredictability is the inherent difficulty in applying decades-old legal precedent to emerging technologies."

Word of Layshock's prank spread quickly through the school. In fact, Mr. Trosch learned of the unflattering MySpace profile from his daughter, also a student at Layshock's school.[7]

Discipline was swift. On December 21, 2005, Layshock and his mother were summoned to a meeting with the school district's superintendent and Mr. Trosch's co-principal, where Layshock admitted his involvement in the prank.[8] He was immediately suspended from school, and was ultimately prohibited from attending his high school graduation ceremony.[9]

On January 27, 2006, Layshock filed a lawsuit against the school, in which he alleged that the punishment meted out by the school violated his First Amendment right to engage in free speech.[10] He also alleged that the school's disciplinary policies and rules were unconstitutionally vague and/or overbroad.[11]

At the district court, both parties moved for summary judgment.[12] The Court framed its task as "balanc[ing] the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning."

This was not the first federal court to confront the thorny issue of student free speech. In fact, the United States Supreme Court faced a similar question more than 30 years ago in *Tinker v. Des Moines Independent Community School District*.[13] In *Tinker*, the Supreme Court held that school officials have a right to prescribe and control conduct in schools consistent with fundamental constitutional safeguards.[14] Yet the Court also rather famously observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15]

More recently, the Supreme Court revisited the *Tinker* issue in 2007 in *Morse v. Federick*.[16] In *Morse*, the Supreme Court rejected a First Amendment challenge brought by a student who was disciplined by his school for unfurling a banner which proclaimed "Bong HiTS 4 Jesus."[17]

Layshock, however, marked the first time a court was asked to consider a First Amendment challenge to a disciplinary measure as a result of a phony MySpace profile. Here, the Court reviewed both *Tinker*, *Morse*, and its progeny, and concluded that as an initial matter, the school had to "establish that it had the authority to punish the student."[18]

The Court then determined that the school *had not* established that authority. Critical to the Court's decision granting partial summary judgment in favor of Layshock was the fact that the school had "not established a sufficient nexus between [his] speech and a substantial disruption of the school environment."[19] Unlike *Morse*, where the conduct occurred just shortly after the students were dismissed from class to view the running of the Olympic torch, the conduct in *Layshock* occurred off-campus, *i.e.*, at the student's grandmother's house, where he logged onto her computer and created the phony MySpace profile.[20] This off-campus conduct created "gaps in the causation link between [Layshock's] speech and a substantial disruption of the school environment."[21] Thus, the Court held that the discipline imposed on Layshock violated his First Amendment free speech rights, and he was therefore entitled to a trial on damages.[22]

Particularly interesting in the Court's analysis is the notion that the conduct occurred off-campus. Although it is true that Layshock logged onto the website at his grandmother's house, the record before the Court also revealed that many other students knew about the impostor profile because they, too, had viewed the MySpace profile from their home computers. Indeed, the wide dissemination of the impostor profile—potentially to the millions of individuals with access to MySpace, including the other students at Layshock's school who viewed the MySpace page about Mr. Trosch—appears to cast doubt on the theory that Layshock's conduct was confined to a single personal computer with insufficient links to the school. Although the apparent takeaway from *Layshock* is that the *situs* of the conduct is dispositive, another district court within the Third Circuit took a contrary view.

The facts of *Layshock* and *Snyder v. Blue Mountain School District*[23] are essentially indistinguishable. Like the student in *Layshock*, the student in *Snyder* created an impostor MySpace profile of her high school principal, "which indicated, *inter alia*, that he is a pedophile and a sex addict."[24] Although the profile did not identify the principal by name, "it identified him as a principal and included his picture which had been taken from the school district's website."[25] As in *Layshock*, the discipline in *Snyder* was swift. The student received a ten-day suspension from school. And like the student in *Layshock*, she brought a lawsuit against the school, also alleging that the school's disciplinary action violated her First Amendment right to free speech.[26]

In its analysis of the parties' respective motions for summary judgment, the Court examined *Tinker*, *Morse*, and several other cases balancing the free speech rights of public school students with the right of school administrators to maintain an educational environment free from distraction. Here, however, the Court focused on the content of the MySpace profile, rather than where it was created. The Court noted that the profane language contained in the impostor profile greatly diminished its First Amendment protection, and that, based on *Morse*, the "school can validly restrict speech that is vulgar and lewd…and promotes unlawful behavior."[27]

The Court was not persuaded by the student's argument—met with success in *Layshock*—that she cannot be "punished for the website at school although she created it off campus."[28] The Court noted that there was a strong connection between the off-campus conduct, the creation of the impostor profile, and its "on-campus effect."[29] Indeed,

> [t]he website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website.[30]

The foregoing indicia of an on-campus connection was critical to the Court's decision dismissing the complaint, and it is perhaps what distinguishes it from *Layshock*. However, the similarities are striking enough to raise serious questions about the applicability of law developed in the pre-Internet age to issues that arise in cyberspace.

Both decisions were affirmed on appeal to the Third Circuit.[31] However, once the conflict between the rulings in *Layshock* and *Snyder* became apparent, the Third Circuit vacated the decisions and ordered *en banc* rehearings. It will certainly be interesting to see how the Third Circuit reconciles these conflicting decisions, and whether its future *en banc* ruling will provide some much-needed clarity in this complicated realm of cyberlaw.

B. MySpace Prank That Went Too Far

While the fallout from the pranks involved in *Layshock* and *Snyder* can largely be characterized as hurt feelings and bruised egos, few would dispute that a MySpace prank in Missouri had devastating consequences.

There, prosecutors charged that Lori Drew:

> with the help of her daughter and a family friend who worked for Ms. Drew, had created a phony identity and MySpace account for a teenage boy, "Josh Evans," on a computer in Ms. Drew's home in suburban St. Louis. According to evidence at the trial, Ms. Drew then used the account to conduct an online courtship with Megan Meier, an emotionally disturbed 13-year-old girl who had once been a friend of her daughter.[32]

When Drew abruptly ended the "relationship," Meier committed suicide.[33] Local authorities declined to prosecute, but federal prosecutors indicted Drew in Los Angeles, where MySpace maintains its servers, and she was convicted on charges of computer fraud.[34] That conviction was later vacated.[35]

Some have commented that the inability to convict Drew for her role in the hoax suggests a need to modify criminal statutes to prosecute crimes in the digital age, and once again shows how the advancement of technology has spawned new and complex issues of liability in cyberspace.

C. Sexting: Felony or Foolishness?

In what may be the first Court of Appeals case to ever define the term "sexting," the Third Circuit recently affirmed a ruling enjoining a district attorney in Pennsylvania from indicting a group of teenagers who used their cell phones to exchange nude or semi-nude photographs.[36] The facts of *Miller* are as follows: in October 2008, school officials in Tunkhannock, Pennsylvania, "discovered photographs of semi-nude and nude teenage girls, many of whom were enrolled in their district, on several students' cell phones."[37]

School officials seized the phones and turned them over to the local district attorney, who launched an investigation. Believing that a crime had been committed, the District Attorney ("DA") sent a letter to the parents of between 16 and 20 students "threatening to bring charges against those who did not participate in what has been referred to as an 'education program[.]'"[38] The program was designed to last six to nine months and was to focus on education and counseling.[39]

One of the photographs depicted two teenagers "wearing white, opaque bras."[40] Another showed a teenager "wrapped in a white, opaque towel, just below her breasts, appearing as if she just had emerged from the shower."[41]

Most of the parents objected to the program, and the threat of criminal charges. They filed temporary restraining order (TRO) enjoining the DA from initiating criminal charges for the photographs. The TRO was granted, and the DA appealed.[42]

In an extensive opinion, the Third Circuit held that a future prosecution would be a retaliatory act in violation of a parents' Fourteenth Amendment right to parental autonomy and a student's First Amendment right against compelled speech.[43] To that end, the Court held that the DA cannot assume the role of a parent and "impose on their children his ideas of morality and gender roles."[44] As to the students' First Amendment claim, the Court held that the "sexting" at issue was essentially a moral—and not legal—matter over which the DA lacked authority.[45]

The Third Circuit's decision is yet another example of how government officials have grappled with new and expanding modes of expression that involve issues of sex, morality and expression. It may also serve to alert parents of teenagers to monitor their children's cell phone usage.

II. Cyber Websites and Why Law Firms Need to Be Wary

A. An Online Battle Royale

Although MySpace serves as the starting point for our discussion of some of the legal issues in cyberlaw, it is certainly not the only source of "cybercontroversy." Take, for example, the AboveTheLaw.com website. That site permits readers to anonymously post comments about all things legal. In fact, some users frequently post negative comments about specific law firms, while others leak internal firm memo's that are subsequently published on the AboveTheLaw.com website. While it is true that law firms are much different than public schools, it seems reasonable to ask whether a First Amendment defense could be invoked by a government attorney who posts comments about issues of public concern on the AboveTheLaw.com website. Or whether a website like AboveTheLaw.com could be held liable for disseminating a firm's internal memo.

Of course, not all postings on websites like AboveTheLaw.com involve issues of public concern. And not all posters have altruistic motives. Take, for example, the case of Aaron Brett Charney. He sued the prominent law firm of Sullivan & Cromwell LLP in New York State court, and his sex discrimination complaint was displayed prominently on AboveTheLaw.com. The complaint, which is still available for download on AboveTheLaw.com, alleges, among other things, that a Sullivan & Cromwell partner threw a document at Charney's feet and remarked: "bend over and pick it up—I'm sure you like that[.]"[46]

What AboveTheLaw.com managed to do in this instance is take a rather acrimonious dispute between two parties and publish it to a much larger audience. Now consider the impact. Current and potential clients may become aware of the dispute and develop reservations about the firm. Sullivan and Cromwell employees may become aware of the firm's "dirty laundry" simply by logging on to AboveTheLaw.com. And plaintiffs like Charney may use the unwanted exposure as a leverage point in settlement discussions.

Sullivan and Cromwell hasn't been the only firm to find itself in the cyberspace spotlight.

One attorney became so incensed with his former employer, Levinson Axelrod, P.A., a New Jersey-based personal injury law firm, that he created a website named—what else—www.levinsonaxelrodreallysucks.com.

The site was created and is maintained by Edward Heyburn, a former Levinson Axelrod associate. His strong negative feelings about the firm, and his ongoing legal battles with Levinson Axelrod, are well-documented on the website. In fact, in May 2010, the United States District Court of the District of New Jersey granted in part and denied in part a motion by Heyburn to dismiss a lawsuit filed by Levinson Axelrod.[47] The lawsuit seeks damages for "cybersquatting, trademark infringement, false designation of origin, trademark dilution, trafficking in counterfeit marks, and fraud."[48] The opinion noted that a prior court order directed Heyburn to shut down the website he previously used to sling mud at Levinson Axelrod: www.levinsonaxelrod.net.[49]

In its May 3 decision, the Court held that all but one of Levinson Axelrod's claims against Heyburn could move forward. The only cause of action dismissed from the lawsuit was a claim predicated on the New Jersey Consumer Fraud Act, which, as a matter of law, does not apply to attorneys.[50]

While it appears that the firm's efforts to shut down the prior website—www.levinsonaxelrod.net—were largely successful, it is also evident that the firm has failed to quash the dissent still emanating from www.levinsonaxelrodreallysucks.com. In fact, the associate's quest to smear his former firm has gained traction. In November 2009, *The AmLaw Daily* posted an article on the Internet chronicling the back-and-forth between Levinson Axelrod and its web-based rival.[51] The article notes that the website's operator "calls one Levinson partner 'a used cars salesman with a law degree' and opines that another 'looks like death.'"[52] It is thus clear that efforts to contain the damage generated by these sorts of websites may often backfire. Perhaps one would conclude that in this situation, Levinson Axelrod faced a Hobson's choice.

In addition to the websites discussed here, there are a host of others dedicated to dissecting the legal profession. They include: The *Wall Street Journal* law blog (www.blogs.wsj.com/law); www.judged.com (billed as "insider source for real, unfiltered intelligence on law firms around the world"); and www.ratethecourts.com (where visitors can post comments about judges under the cloak of anonymity). It is important that readers look at these websites to see how much of the previously uncirculated private opinion has now been opened for millions to get at the click of the button.

III. Best Practices

So how can you avoid having your internal memorandum shared with the world via sites like AboveTheLaw.com, and what can be done to avoid the types of discontent that spawn websites such as www.levinsonaxelrodreallysucks.com?

First, keep in mind that anything you publish, whether in print or in e-mail, can easily be shared. If written communication—such as an internal memorandum—is necessary to effectively manage your operation, require each recipient to agree to maintain its confidentiality.

Second, follow the Golden Rule. Broadcasting abrasive e-mails late at night and early in the morning can foment unhappiness and lay the groundwork for an extensive cyberbattle.

Third, create and disseminate a comprehensive Internet usage policy that expressly prohibits anyone from posting information about your firm on any websites. You can also install software that blocks access to sites like AboveTheLaw.com.

Of course, this is not an exhaustive list of steps you can take to avoid the situations discussed in this paper, and you will have to tailor your decisions to the needs of your firm or your business. Moreover, it may be helpful to learn the lingo of cyberspace. To that end, included at the end of this article are the "Top 50 Popular Text Terms Used in Business," and the "Top 50 Acronyms Parents Need to Know, both courtesy of www.netlingo.com.

Conclusion

The advent of cyberspace presents a complex set of challenges for attorneys, their firms, their clients as well as for schools, parents and children. In the absence of legislative enactments and legal decisions, we caution that all of us, in order to protect our colleagues and families from cyber disaster, need to find creative and safe ways to navigate the unfamiliar—and constantly shifting—terrain of cyberspace.

Endnotes

1. *Layshock v. Hermitage School District*, 496 F. Supp.2d 587, 590-591 (W.D. Pa. 2007), *aff'd,* 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted, op. vacated* (April 9, 2010).
2. *Id.* at 591.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 593.
9. *Id.* at 593-94.
10. *Id.* at 594.
11. *Id.*
12. *Id.* at 590.
13. 393 U.S. 503 (1969).
14. *Id.* at 503.
15. *Id.*
16. __ U.S. __, 127 S.Ct. 2618 (2007).
17. *Id.*
18. *Layshock*, 496 F. Supp.2d at 600.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 601.
23. No. 3:-7cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), *aff'd,* 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted, op. vacated* (April 9, 2010).
24. *Id.* at *1.
25. *Id.*
26. *Id.* at *3.
27. *Id.* at *6.
28. *Id.* (Footnote omitted).
29. *Id.* at *7.
30. *Id.*
31. *See Layshock v. Hermitage School Dist.*, 593 F.3d 249 (3d Cir. 2010); *see also J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 593 F.3d 286 (3d Cir. 2010).
32. Rebecca Cathcart, *Conviction Is Tossed Out In MySpace Suicide Case*, N.Y. Times, July 3, 2009, at A4.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).
37. *Id.* at 143 (footnote omitted).
38. *Id.* at 144.
39. *Id.*
40. *Id*.
41. *Id*.
42. *Id.* at 145.
43. *Id.* at 150.
44. *Id.* at 151.
45. *Id.* at 152.
46. *Charney v. Sullivan & Cromwell LLP*, Index No. 07100625 (Sup. Ct. N.Y. Co. 2007).
47. *See Axelrod v. Heyburn*, Civ. No. 09-5627, 2010 WL 1816245 (D.N.J. May 3, 2010).
48. *Id.*
49. *Id.* at * 1.
50. *Id.* at *4.
51. http://amlawdaily.typepad.com/amlawdaily/2009/11/jerseyfirms.html.
52. *Id.*

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Top 50 Popular Text Terms Used in Business

AFAIC—	As Far As I'm Concerned
ASAP—	As Soon As Possible
BHAG—	Big Hairy Audacious Goal
BOHICA—	Bend Over Here It Comes Again
CLM—	Career Limiting Move
CYA—	Cover Your A** -or- See Ya
DD—	Due Diligence
DQYDJ—	Don't Quit Your Day Job
DRIB—	Don't Read If Busy
EOD—	End Of Day -or- End Of Discussion
EOM—	End Of Message
EOT—	End Of Thread (meaning: end of discussion)
ESO—	Equipment Smarter than Operator
FRED—	F***ing Ridiculous Electronic Device
FUBAR—	F***ed Up Beyond All Recognition (or Repair)
FYI—	For Your Information
GMTA—	Great Minds Think Alike
HIOOC—	Help, I'm Out Of Coffee
IAITS—	It's All In The Subject
IANAL—	I Am Not A Lawyer
KISS—	Keep It Simple Stupid
LOPSOD—	Long On Promises, Short On Delivery
MOTD—	Message Of The Day
MTFBWY—	May The Force Be With You
MYOB—	Mind Your Own Business
NRN—	No Reply Necessary
NSFW—	Not Safe For Work
NWR—	Not Work Related
OTP—	On The Phone
P&C—	Private & Confidential
PDOMA—	Pulled Directly Out Of My A**
PEBCAK—	Problem Exists Between Chair And Keyboard
PITA—	Pain In The A**
QQ—	Quick Question -or- Cry More
RFD—	Request For Discussion
RFP—	Request For Proposal
SBUG—	Small Bald Unaudacious Goal
SME—	Subject Matter Expert
SNAFU—	Situation Normal, All F***ed Up
SSDD—	Same Sh** Different Day
STD—	Seal The Deal -or- Sexually Transmitted Disease
SWAG—	Scientific Wild A** Guess -or- SoftWare And Giveaways
TBA—	To Be Advised
TBD—	To Be Determined
TWIMC—	To Whom It May Concern
TIA—	Thanks In Advance
WIIFM—	What's In It For Me
WOMBAT—	Waste Of Money, Brains And Time
WTG—	Way To Go
YW—	You're Welcome

* Information was obtained from Netlingo.com on May 17, 2010

Top 50 Acronyms Parents Need to Know

8—	Oral sex
1337—	Elite -or- leet -or- L337
143—	I love you
182—	I hate you
1174—	Nude club
420—	Marijuana
459—	I love you
ADR—	Address
AEAP—	As Early As Possible
ALAP—	As Late As Possible
ASL—	Age/Sex/Location
CD9—	Code 9—it means parents are around
C-P—	Sleepy
F2F—	Face-to-Face
GNOC—	Get Naked On Cam
GYPO—	Get Your Pants Off
HAK—	Hugs And Kisses
ILU—	I Love You
IWSN—	I Want Sex Now
J/O—	Jerking Off
KOTL—	Kiss On The Lips
KFY -or- K4Y—	Kiss For You
KPC—	Keeping Parents Clueless
LMIRL—	Let's Meet In Real Life
MOOS—	Member Of The Opposite Sex
MOSS—	Member(s) Of The Same Sex
MorF—	Male or Female
MOS—	Mom Over Shoulder
MPFB—	My Personal F*** Buddy
NALOPKT—	Not A Lot Of People Know That
NIFOC—	Nude In Front Of The Computer
NMU—	Not Much, You?
P911—	Parent Alert
PAL—	Parents Are Listening
PAW—	Parents Are Watching
PIR—	Parent In Room
POS—	Parent Over Shoulder -or- Piece Of Sh**
pron—	porn
Q2C—	Quick To Cum
RU/18—	Are You Over 18?
RUMORF—	Are You Male OR Female?
RUH—	Are You Horny?
S2R—	Send To Receive
SorG—	Straight or Gay
TDTM—	Talk Dirty To Me
WTF—	What The F***
WUF—	Where You From
WYCM—	Will You Call Me?
WYRN—	What's Your Real Name?
zerg—	To gang up on someone

* Information was obtained from Netlingo.com on May 17, 2010

New York State's Response to Misclassified Workers

New York State Tightens Its Stance Against Worker Misclassification

By Susan M. Corcoran, Michael R. Hekle and Johanna Fuller

New York employers may want to think twice before classifying workers as independent contractors. If not, they may wind up writing the Internal Revenue Service and similar state agencies a check for unpaid taxes, penalties and interest assessments for workers found to be incorrectly classified. Since late 2007, there has been a significant upsurge in the number of government agency investigations and court proceedings arising from organizations' advertent and inadvertent avoidance of unemployment insurance taxes, workers' compensation coverage and other related laws in New York State.

In the past couple of years, the misclassification of workers as independent contractors has come under increased scrutiny from federal and state government agencies, legislators, pro-labor organizations and employee advocacy groups. Efforts to establish clearer guidelines and impose greater sanctions on employers who misclassify workers has been motivated, in good part, by the adverse financial impact misclassification has had on federal and state governments. A Cornell University study found New York State loses approximately $175 million a year in unemployment insurance taxes due to the misclassification of employees as independent contractors. In a similar federal study, conducted by the General Accountability Office, the erroneous misclassification of workers as independent contractors reduces federal income tax revenues by an estimated $4.6 billion yearly.

Employers that classify workers as independent contractors do not pay state unemployment insurance taxes, workers' compensation premiums, or federal Social Security and Medicare contributions, on behalf of that individual. Independent contractors are not governed by minimum wage and overtime laws, protected under discrimination statutes, nor are they permitted to participate in the formation of unions. Legislators also point to the economic advantages employers who misclassify workers, as independent contractors, have over competitors that properly classify similar workers as employees. Recognizing "times are tough for employers," the State Department of Labor is vigilantly pursing worker misclassification cases to level the playing field for law-abiding businesses. As a result, New York employers have recently found themselves subject to more Department of Labor misclassification audits triggered by employee and former employee complaints, participation in a *targeted industry*, or based upon the issuance of a disproportionate number of IRS 1099 Forms during the tax year.

As of February 1, 2010, the inter-agency New York State Joint Enforcement Task Force on Employee Misclassification reported that it has assessed over $11 million in unemployment insurance taxes, approximately $1.3 million in unemployment insurance fraud penalties, and in excess of $1.5 million in workers' compensation fines and penalties based on roughly $400 million in unreported wages. Criminal charges also are being levied against some employers.

"New York employers may want to think twice before classifying workers as independent contractors. If not, they may wind up writing the Internal Revenue Service and similar state agencies a check for unpaid taxes, penalties and interest assessments for workers found to be incorrectly classified."

From its beginning in 2007, the Task Force has been very active in the investigation and prosecution of employers that misclassify workers. The Task Force has uncovered more than 31,500 instances of employee misclassification and conducted 65 enforcement "sweeps" from 2007 through 2009. An example of the Task Force's scope was its June 8, 2010 finding that 12 out of the 21 subcontractors on a construction site at Rochester Institute of Technology misclassified over 200 employees as independent contractors. The Federal Government is also getting involved in the crackdown on misclassified workers through an initiative to audit 6,000 companies in the course of a three-year span.

The New York Task Force members consist of representatives from an assortment of key agencies/offices including the Commissioner of Labor, representatives from the New York State Workers' Compensation Board, and the Workers' Compensation Fraud Inspector General. The Task Force is responsible for facilitating the filing of complaints and the identification of potential violators. To this end, the Task Force seeks ways in which affected agencies can "pool, focus and target investigative and enforcement resources."

Legislative Initiatives

In January 2009, the New York Legislature introduced Bill A403 seeking to amend the state labor law by requiring any person or business entity contracting with the State to submit a list of independent contractors hired. Under the bill, a $10 fee per independent contractor would be paid upon submission of the list. The fee was intended to finance the prevailing wage enforcement fund that would be used to prosecute violations related to the misclassification of independent contractors. The bill was referred and remained in committee.

At the federal level, then-Senator Barack Obama introduced S. 2044, the Independent Contractor Proper Classification Act. This bill would have limited the availability of the "safe harbor" provisions in the Revenue Act of 1978 by permitting workers to petition the IRS for a determination of their status as an independent contractor/employee. The bill also mandated employers post notices informing workers of their right to challenge their classification as an independent contractor. In September 2007, S. 2044 was read twice and then referred to the Committee on Finance. Similar bills also have been presented and have not been passed into law.

Introduced on April 22, 2010, Senator Sherrod Brown (D-OH) presented the Employee Misclassification Prevention Act. On June 17, 2010, a hearing was conducted on the bill that included New York State Department of Labor Commissioner Colleen Gardner speaking in favor of the legislation. The primary purpose of this legislation is to prevent the misclassification of employees. The bill has remained in committee. Similarly, on September 15, 2010, the Fair Playing Field Act of 2010 was introduced by Senator John Kerry (D-MA) as an amendment to the Internal Revenue Code. This bill attempts to clarify individuals' employment status through federal tax laws. In addition, a number of state governors have issued Executive Orders and state laws to protect against employee misclassification.

Litigation and Related Actions

No profession appears immune from scrutiny on this subject. For example, the medical profession was recently thrown into upheaval regarding its use of independent contractors based upon a decision involving a gastroenterologist's Title VII discrimination claim. While physicians on hospitals' medical staffs have long been considered independent contractors, this may no longer be the case. The U.S. Court of Appeals for the Second Circuit has ruled that a lower court erred by granting summary judgment to a Buffalo-area hospital when it held that *as a matter of law* physicians were independent contractors and not employees for purposes of Title VII. The Second Circuit found that indicia of "employee status" was a question of fact for a jury to decide.

Based on the foregoing, New York employers should continue to follow Department of Labor and IRS guidelines regarding the classification of workers as employees or independent contractors. Some of the more common factors include:

- Independent contractor status is more commonly found where the asserted contractor has the ability to take on work from multiple sources, determine how a project will be completed, and decide what workforce to employ to work the project;
- An independent contractor's services should not be the same or overly similar to contracting company's core operations;
- A true independent contractor is typically paid by the job, not by the hour, and should not receive employee benefits;
- An independent contractor agreement outlining the independent contractor's responsibilities, such as payment of all payroll taxes and workers' compensation liabilities, should be executed by the parties; and
- An independent contractor should not be supervised or subject to the daily work rules of the employer or required to participate in employer training.

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Dangerous Liaisons? An Analysis of Employer Liability for Sexual Favoritism in the Workplace

By Christina J. Fletcher

I. Introduction

In 2005, the California Supreme Court held in *Miller v. Department of Corrections* that sexual favoritism in the workplace may establish a claim of sexual harassment under a hostile work environment theory.[1] Following the *Miller* decision, the national media and legal commentators heralded it as "a ruling that significantly expanded the law on sexual harassment in the workplace"[2] and forecast "a new definition of sexual harassment."[3] The decision was deemed a "victory" for "the unloved" workers who "can no longer be treated as second class citizens because they are not putting out."[4] The defense and plaintiff's bar both classified the case as "groundbreaking"[5] and "sound[ing] [an] alarm" to employers who were "scrambling for cover" in the wake of the decision.[6] The idea that a sexual favoritism claim can expand a wholly consensual sexual relationship into sexual harassment of employees *uninvolved* in that sexual relationship made these admonishments seem warranted.

Has the outcry surrounding *Miller* and claims of sexual favoritism come to pass? While the past few years have seen an increasing rise in lawsuits containing allegations of "sexual favoritism," courts considering these claims have applied a rigorous analysis, and, at least in New York, claims grounded in sexual favoritism—even those with salacious facts—have not had a good track record at surviving either 12(b)(6) motions to dismiss, or motions for summary judgment.

This article will provide an analysis of the recent treatment of such allegations by New York courts, as well as an overview of the legal standard governing sexual favoritism allegations in today's legal landscape.

II. What Is Sexual Favoritism?

This new twist on a traditional sexual harassment claim occurs when a supervisor provides preferential job benefits to a subordinate with whom he is having a consensual sexual relationship to the detriment of other subordinates.[7] The concept of sexual favoritism expands a sexual harassment claim beyond those actually in the workplace relationship to other individuals in the workplace who claim they were affected by the relationship.[8] The facts of the *Miller* case provide an illustrative example of unlawful sexual favoritism in action.

The events in *Miller* occurred at prison facilities run by the state's Department of Corrections.[9] Beginning in 1994, Plaintiffs Miller, a correctional officer, and Mackey (her assistant) heard from other employees that the warden of the prison (Kuykendall) was having a consensual sexual relationship with three different female subordinates (Patrick, Brown, and Bibb).[10] During the time that the relationships occurred, Patrick, Brown, and Bibb received various job benefits ranging from desirable transfers, promotions for which there were better qualified candidates, special assignments, and work privileges.[11] The three women bragged to coworkers about their power over the warden to effectuate the transfers and promotions.[12] Significantly, Brown was able to win numerous promotions over Plaintiff Miller, even though Miller had a higher rank, superior education, and greater experience.[13]

"The [Miller] decision was deemed a 'victory' for 'the unloved' workers who 'can no longer be treated as second class citizens because they are not putting out.'"

Within a year and a half, Brown was promoted to the position of associate warden. Other employees were outraged at the pace of her promotions and complained that to achieve higher-ranking positions they would have to "F [their] way to the top."[14] Things got worse for Miller when Yamamoto, a female chief deputy warden who was *also* rumored to be engaged in a sexual relationship with Brown, began interfering with plaintiff's duties, including countermanding her orders, imposing upon her additional onerous duties and threatening her with reprisals.[15] When Miller complained to the warden, he did nothing to discipline Yamamoto and instead stated that he was unable to help Miller due to his relationship with Brown and Brown's relationship with Yamamoto.[16] The facts proffered by plaintiffs also provided evidence of conduct that affected the workplace in general: employees witnessed the warden and one of his lovers fondling each other, and at various times the three women were seen fighting over the warden in emotional scenes at work.[17]

Plaintiffs eventually complained to internal affairs about the situation and, as a consequence, were subjected to additional ostracism and harassment.[18] In one instance, Brown followed Plaintiff Miller home after an angry confrontation at work, resulting in a court order that required Brown to stay away from Miller.[19] Suffering from increasing stress and humiliation at work, plaintiffs resigned from the Department.[20]

Plaintiffs filed a lawsuit in California State Court alleging, among other things, that the warden's sexual favoritism constituted discrimination and sexual harassment.[21] The trial court granted summary judgment for defendants and the Court of Appeals affirmed, concluding that a supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, nonfavored employees.[22] The Court of Appeals found that the plaintiffs had not stated an actionable hostile work environment claim because, although they had "demonstrated unfair conduct in the workplace," the preferential treatment of the lovers did not rise to a "concerted pattern of harassment sufficiently pervasive to have altered the conditions of their employment on the basis of sex."[23] As explained below, the unanimous Supreme Court of California reversed the rulings of the lower courts.

The Legal Standard for Sexual Favoritism Claims

In reversing the dismissal of Plaintiffs' claims, the unanimous Supreme Court of California held that "an employee may establish an actionable claim of sexual harassment…by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."[24] In so holding, the Court relied almost exclusively on Equal Employment Opportunity Commission ("EEOC") policy guidance regarding employer liability for sexual favoritism, issued by the EEOC in 1990.[25] The Court applied this "widespread" standard to the facts of *Miller* and concluded that the "evidence proffered by [the] plaintiffs, viewed in its entirety, established a prima facie case of sexual harassment under a hostile work environment theory."[26] The *Miller* court found that the plaintiffs were able to show "far more than that a supervisor engaged in an isolated workplace sexual affair and accorded special benefits to a sexual partner"; the plaintiffs demonstrated the impact of widespread favoritism on the work environment and that this had created an atmosphere that was "demeaning to women."[27] The Court rejected the defendant's contention that recognition of a sexual favoritism cause of action would result in regulation of personal relationships because the Court found that it "is not the relationship, but its effect on the workplace, that is relevant."[28] The Court reasoned that the negative effect on the non-favored employees and work environment that resulted from the warden's affairs diminished concerns the Court may have had about intruding on the privacy of the relationships.[29]

Prior to *Miller*, the overwhelming majority of previous rulings throughout the federal circuits had consistently held that consensual sexual relationships in the workplace do not constitute discrimination based upon sex or sexual harassment, but rather reflect the "personal preference" of a supervisor to engage in relations with one employee over another.[30] By in large, the courts acknowledged that it was "unfair"[31] for a supervisor to provide job benefits to a subordinate with whom he is in a sexual relationship while denying benefits to other employees; yet the courts refused to recognize such a situation as rising to a level where it creates a cause of action for sexual harassment on behalf of the non-sexually favored employees.[32]

In addition, in the Title VII context, sexual harassment claims based upon sexual favoritism in the workplace tended to fail because such claims lacked the causal connection between the alleged discriminatory/harassing act and plaintiff's protected class (usually gender). For example, in the leading case of *DeCintio v. Westchester County Medical Center*,[33] the Second Circuit relied on the definition of "sex" in Title VII to hold that consensual sexual relationships do not constitute sex discrimination. The *DeCintio* court's rationale was that because an employee of the opposite sex could have suffered the same negative impacts from the supervisor's sexual favoritism, the non-favored employee was not disadvantaged because of his gender.[34] Thus, if a male supervisor prefers a female subordinate with whom he is having a sexual relationship, a male employee is disadvantaged in the same way as other female employees. Because there was no disparate treatment based upon sex, plaintiff's sexual harassment claim failed. Consequently, pre-*Miller*, it seemed that most sexual favoritism claims were dead in the water.

How New York Courts Are Handling Sexual Favoritism Today

When evaluating sexual favoritism allegations, New York Courts have continued to require the causal connection between the purported favoritism and the plaintiff's gender required by the *DeCintio* court. If plaintiff cannot show that the favoritism-generated actions were because of plaintiff's gender (and not just because the supervisor preferred the employee with whom he is having a sexual relationship), plaintiff's claim will fail. Even when faced with the sort of egregious facts and "widespread" sexual favoritism evidenced in the *Miller* case, New York Courts are routinely dismissing sexual favoritism claims where the plaintiff fails to show that the supervisor's favoritism did not disadvantage those of plaintiff's own gender, rather than employees of both genders. This is a high bar for plaintiffs.

Three recent New York district court decisions on sexual favoritism highlight the substantial hurdle plaintiffs face in bringing sexual favoritism claims. In *Krasner v. HSH Nordbank AG*,[35] Plaintiff (a male) brought a multitude of scandalous allegations regarding sexual harassment and favoritism in the workplace against his employer and the supervisor he accused of engaging in the prohibited sexual favoritism. Plaintiff, a Vice-Presi-

dent and Head of Corporate Services, was supervised by Defendant Kiser, Defendant HSH's General Manager and Chief Operating Officer.[36] Plaintiff alleged Defendants' workplace was "an atmosphere infected with overt sexism, where career advancement based on sexual favoritism was accepted, and where male supervisors promoted a sexist and demeaning image of women in the workplace in which women's advancement was governed by a 'casting couch.'"[37] Defendants were accused of supporting a "culture of widespread sexual favoritism…stemming from several male managers' open, public intimate relationships with [female] subordinates whom they later favored in the workplace."[38] Plaintiff named numerous male managers who engaged in sexual relationships with subordinates, and also recounted a business trip where his supervisor, Kiser, forced him to go to a strip club where Plaintiff witnessed Kiser "engaging in sexual acts with the strippers."[39]

Plaintiff's most specific allegations of sexual favoritism were with regard to Kiser, whom he alleged had a relationship with Melissa Campfield, the most junior member of Plaintiff's department.[40] Plaintiff alleged that Kiser's relationship with Campfield resulted in her being advanced and promoted at the expense of the career advancement and reputations of other far more senior and qualified employees, even though Campfield was viewed as a "consistent underperformer."[41] Kiser's purported favoritism of Campfield resulted in her being given a separate office and laptop, while similar requests by another female employee with more experience than Campfield were denied.[42] Kiser also arranged for Campfield to attend a business trip to Germany—"an unprecedented junket for someone in such a junior position"—where Plaintiff alleges Kiser and Campfield spent time privately together.[43] In addition, Plaintiff had issued a management directive to his team that employees were prohibited from sending text messages on their company BlackBerries, but Kiser and Campfield exchanged over 500 text messages in July alone.[44] Moreover, Kiser gave Campfield prestigious assignments directly, even taking them away from other employees to whom they had originally been assigned, including Plaintiff and other senior employees.[45] After Plaintiff complained to human resources about Kiser and his liaisons, Plaintiff was stripped of substantial responsibilities, forced to undergo humiliating scrutiny of his work, and ultimately terminated.[46]

Even in the face of all of these detailed factual allegations of sexual favoritism, Defendants prevailed on their 12(b)(6) motion to dismiss.[47] The *Kranser* court explained that "Plaintiff does not allege, and proffers no facts that remotely suggest, that a female supervisor in his position would not have experienced exactly the same consequences from Kiser's preferential treatment of Campfield. Nothing in the facts alleged plausibly connects any of the actions taken against Krasner to his sex."[48] "Even the allegations of 'widespread sexual favoritism' through male supervisors' relationships with female subordinates reveal that this purported favoritism is alleged by [Plaintiff] to disadvantage women (by subjecting them to differential demands for sexual favors), not men (by denying them advantages open to compliant women)."[49] Plaintiff simply failed to demonstrate the "prohibited causal factor requirement" that a sexually hostile environment "is one that is *discriminatorily* hostile to an employee based on *his or her* sex."[50] Plaintiff's hostile environment claim thus failed, as did his retaliation claim for complaining about Kiser's affair with Campfield, because the court found that it was not protected activity under Title VII.[51]

While dismissing Plaintiff's claims of sexual favoritism in the instant case, the *Kranser* court cautioned that claims of sexual favoritism may survive, if properly asserted under governing legal standards. As explained by the Court: "This is not to say that widespread sexual favoritism or the perpetration of offensive stereotypes of women through other means can never serve as the foundation for a sexual discrimination claim, on a hostile environment theory or otherwise, by a person of either gender.… This may occur, for example, if the sexualized atmosphere of the workplace created a hostile environment for women by making submission to the sexual advances of their male supervisors a condition of employment and discriminated against men by foreclosing job benefits reserved for compliant women."[52] Thus, in attempting to establish a claim of harassment based upon sexual favoritism, a New York plaintiff would be wise to raise the sort of allegations the *Krasner* court highlights as actionable (if they exist), or face dismissal.

New York courts have not held differently where the plaintiff was a female alleging sexual favoritism. In *Foster v. The Humane Society of Rochester and Monroe County, Inc.*[53] Defendant prevailed on a Rule 12(b)(6) motion to dismiss on Plaintiff's Title VII claim of "gender-based hostile work environment" based upon the Defendant President's alleged sexual favoritism towards one of Defendant's donors.[54] Plaintiff (a female) alleged that the married President's affair with the married donor affected the performance of Plaintiff's duties in that she was "burdened with the responsibility to keep President Alice's relationship [with the donor] in hiding" and that the donor was "continually meddl[ing] in matters for which plaintiff was responsible" but, "if plaintiff disagreed with the donor's suggestions, or tried to limit his involvement, [the President] would override plaintiff and let the donor have his way."[55] After complaining about the President's affair, Plaintiff was terminated.[56] The court dismissed Plaintiff's claim, explaining that Plaintiff failed to allege facts sufficient to show actionable sexual favoritism in that she did not demonstrate "widespread favoritism" or "favoritism based upon coerced sexual conduct."[57] In addition the court found that "[t]he most significant flaw in this claim, [], is that plaintiff's allega-

tions do not indicate that her gender was causally related to the hostility that she allegedly faced."[58] "Nothing in the complaint suggests that plaintiff would have been treated any differently had she been a man."[59] The court held that Plaintiff's claim failed under the New York State Human Rights Law for the same reasons.[60]

A pro-se Plaintiff faced a similar fate on summary judgment in *Torres v. Do It Best Corp*.[61] Plaintiff Torres (a male) alleged that he was discriminated against on the basis of his gender because his supervisor assigned a lighter workload to females to whom the supervisor was "sexually attracted" and had "a fetish for."[62] The court granted Defendant's motion for summary judgment, finding that "although on its face Plaintiff's claim seems to allege that he, as a member of one sex, was treated differently than members of another sex, Plaintiff's deposition testimony reveals that the disparate treatment was based on sexual attraction and not on gender discrimination…such a claim is not cognizable under Title VII."[63]

"[W]hile sexual favoritism claims remain viable, New York courts have set a high bar, and there is no indication that 'a new definition of sexual harassment' has emerged in New York."

Conclusion

As a review of recent decisions suggests, even evidence of "widespread" sexual favoritism by a supervisor may not be enough to maintain a viable sexual harassment claim without establishing the causal relationship between the favoritism and the plaintiff's own gender. It appears a female plaintiff who cannot prove that a sexualized workplace atmosphere created a hostile environment for women by making submission to a male supervisor's sexual advances a condition of employment may not have a viable claim. Similarly, a male plaintiff who cannot prove that men were foreclosed from job benefits reserved for compliant women may not have a viable claim. As such, plaintiff's bar may begin hedging their sexual favoritism claims with other claims such as non-gender related wage retaliation claims permitted under the new Wage Theft Prevention Act (which may result in back pay, liquidated damages and reinstatement).[64] For their part, New York employers may attempt to protect themselves from sexual favoritism claims by prohibiting consensual supervisor-subordinate relationships through anti-fraternization or "no dating" policies.[65] Overall, while sexual favoritism claims remain viable, New York courts have set a high bar, and there is no indication that "a new definition of sexual harassment" has emerged in New York.[66]

Endnotes

1. 115 P.3d 77 (Cal. 2005).
2. Mireya Navarro, *Love the Job? What About Your Boss?*, N.Y. TIMES, July 24, 2005, § 9, at 1; *see also Workplace Romance May Create Hostile Work Environment for Other Employees*, JACKSON LEWIS LEGAL UPDATE, July 22, 2005, *available at* http://www.jacksonlewis.com/legalupdates/articleprint.cfm?aid=818 (characterizing the decision as a "significant expansion of sexual harassment law").
3. *Employment Law: When Sex Is Unfair*, THE ECONOMIST, July 23, 2005, at 46.
4. Mireya Navarro, *Love the Job? What About Your Boss?*, N.Y. TIMES, July 24, 2005, § 9, at 1.
5. Kim Curtis, *High Court Agrees Women Harassed*, MONTEREY COUNTY HERALD (July 19, 2005).
6. *California Ruling on Workplace Romance Sends Employers Scrambling for Cover*, JACKSON LEWIS LEGAL UPDATE, Aug. 8, 2005, *available at* http://www.jacksonlewis.com/legalupdates/article.cfm?aid=827.
7. Joan E. Van Tol, *Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism*, 13 INDUS. REL. L.J. 153, 162–63 (1991).
8. *Id.*
9. 115 P.3d 77 (Cal. 2005).
10. *Id.* at 81.
11. *Id.* at 82.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 83.
16. *Id.* at 83–84.
17. *Id.* at 83.
18. *Id.* at 84–85.
19. *Id.* at 84.
20. *Id.*
21. *Id.* at 85–86.
22. *Id.* at 86.
23. *Id.*
24. *Id.* at 90.
25. *Id.* at 88–90; EEOC OFFICE OF LEGAL COUNSEL, EEOC NOTICE NO. 915-048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 12, 1990), *available at* http://eeoc.gov/policy/docs/sexualfavor.html.
26. *Miller*, 115 P.3d at 90.
27. *Id.* at 93.
28. *Id.* at 94.
29. *Id.*
30. *See, e.g.*, *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003)(reasoning that "when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender"); *Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002) (stating that "Title VII does not, however, prevent employers from favoring employees because of personal relationships. Whether the employer grants employment perks to an employee because she is a protegé, an old friend, a close relative or a love interest, that special treatment is permissible"); *Womack v. Runyon*, 147 F.3d 1298, 1299–1301 (11th Cir. 1998) (following *DeCintio* and affirming dismissal of claim on issue of "whether preferential treatment based on a consensual relationship between a supervisor and an employee constitutes a cognizable sex discrimination cause of action under Title VII"); *Taken v. Okla. Corp. Comm'n.*, 125 F.3d 1366, 1370 (10th Cir. 1997) (explaining that "[f]avoritism, unfair treatment and unwise

business decisions do not violate Title VII unless based on a prohibited classification").

31. *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986).
32. *See* cases cited *supra*, note 30.
33. 807 F.2d 304 (2d Cir. 1986).
34. *See id.* at 308.
35. 680 F.Supp.2d 502 (S.D.N.Y. 2010).
36. 680 F.Supp.2d 502, 508 (S.D.N.Y. 2010).
37. *Id.*
38. *Id.* at 508–509.
39. *Id.*
40. *Id.* at 509.
41. *Id.*
42. *Id.* at 510. "The reasons for the disparity did not escape" the woman whose request was denied and who wrote in an email to another employee that "I guess if I want to sit in an office and have a laptop, I better start handing out some" b*** jobs. *Id.* at n. 4.
43. *Id.* at 509.
44. *Id.* at 509–510.
45. *Id.* at 510.
46. *Id.* at 510–11.
47. *Id.* at 522.
48. *Id.* at 517.
49. *Id.* at 514–15.
50. *Id.* at 514.
51. *Id.* 519–22.
52. *Id.* at 516.
53. 724 F. Supp. 2d 382 (W.D.N.Y. 2010).
54. 724 F. Supp. 2d 382, 391–92 (W.D.N.Y. 2010).
55. *Id.* at 386.
56. *Id.* at 387.
57. *Id.* at 392–93.
58. *Id.* at 392.
59. *Id.* at 394.
60. *Id.* at 397.
61. No. 07-CV-230 (CS)(LMS), 2008 WL 4974588 (S.D.N.Y 2008).
62. No. 07-CV-230 (CS)(LMS), 2008 WL 4974588, at *11 (S.D.N.Y Nov. 24, 2008).
63. *Id.*
64. Under New York's newly enacted Wage Theft Prevention Act, if an employer is found to have retaliated against an employee because the employee complained that the employer engaged in conduct that the employee, reasonably and in good faith, believed violated any provision of the New York Labor Law, then the employee may be entitled to reinstatement, back pay and front pay. The employee may also recover up to $10,000 in liquidated damages.
65. While New York Labor Law § 201-d prohibits discrimination based on lawful off-duty activities, the Second Circuit, as well as New York's Appellate courts, have held that romantic dating is not a protected "recreational activity" for the purposes of § 201-d, and that termination of employees for engaging in relationships with each other does not violate § 201-d. *McCavitt v. Swiss Reinsurance America Corp.*, 237 F.3d 166 (2d Cir. 2001); *State v. Wal-Mart Stores, Inc.*, 207 A.D.2d 150, 621 N.Y.S.2d 158 (3d Dep't 1995) (Definition of "recreational activities," for purposes of statute forbidding employer discrimination against employees because of their participation in legal recreational activities pursued outside of work hours, was unambiguous and did not include a dating relationship and, thus, employer's no-dating policy did not violate the statute.); *Hudson v. Goldman Sachs & Co., Inc.*, 283 A.D.2d 246, 725 N.Y.S.2d 318 (1st Dep't 2001) (Plaintiff's cause of action under Labor Law § 201-d(2)(c) was properly dismissed on the ground that romantic relationships are not protected "recreational activities" within the meaning of that provision, and male Plaintiff failed to state a cause of action for any form of discrimination where his female paramour, who was single, was also terminated, undermining any claim of discrimination on the basis of sex or marital status.).
66. *Employment Law: When Sex Is Unfair*, THE ECONOMIST, July 23, 2005, at 46.

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Global Employee Handbooks

By Donald C. Dowling, Jr.

Most every major American employer has issued an employee handbook telling U.S. staff how its workplace works. In addition to simply listing disciplinary rules, these "handbooks"—which increasingly exist electronically on an organization's intranet—summarize a wide range of day-to-day terms and conditions of employment. They cover topics as varied as, for example: office hours/work time/overtime, pay period, paid time off (absences, sickness policy, vacation, holidays), leave, benefits/health care/insurance, safety, security, dress code, smoking, expense reimbursement, moonlighting, access to employee emails/internet, confidentiality, "social networking," co-worker dating, anti-nepotism in hiring, "bounties" for recruiting new employees, discounts at local merchants, dispute resolution, and other subjects. Well-drafted U.S. handbooks include a conspicuous "employment-at-will disclaimer" saying the document is not an employment contract and reserving the employer's right unilaterally to change or revoke human resources policies at any time.

With employee handbooks so vital stateside, a U.S. employer venturing abroad might assume they are equally important internationally. Indeed, in addition to the business case for handbooks in the U.S., a multinational might have additional reasons to issue handbooks overseas: They could help align a multinational's far-flung HR operations across borders, and they could serve as a sort of cross-operational inventory of employee benefits, practices, rules and offerings.

Perhaps surprisingly, though, in most (but not all) overseas jurisdictions, the local home-grown employers tend *not* to issue employee handbooks. In some countries a detailed U.S.-style handbook is actually risky. Yet without a handbook, a U.S. employer can feel helpless, with no way to communicate basic workplace benefits, practices, rules and offerings. A multinational contemplating international handbooks therefore needs some strategy, and any international handbook strategy should account for four issues: Employment-at-will; the myth of the single global employee handbook; aligning local-jurisdiction handbooks; and alternatives to employee handbooks outside the U.S. We examine each.

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1. Employment-at-Will

U.S. employment-at-will contrasts starkly with the more regulated "indefinite employment" regimes of the rest of the world, and the difference is vital to international employee handbook strategy. Employment-at-will leaves unregulated basic aspects of the employment relationship that, abroad, tend to fall under local statutes (topics like vested/acquired rights, holidays, vacation, sick leave, capped hours, bonuses, notice before individual employment termination, severance pay). In addition, at-will employers tend to be reluctant to give rank-and-file workers detailed written contracts guaranteeing specific terms and conditions, even though elsewhere, binding work contracts and "statements of employment particulars" tend to be common, even legally mandated (and tend to cover topics like pay rate, benefits, bonus scheme, office location, work schedule).

With so many human resources topics in the U.S. left both unregulated and uncontracted-for, American employers end up applying divergent practices, particularly across industries. A U.S. bank, insurance company, or professional services firm might offer employees bonuses, sick leave, maternity leave, vacations, holi-

days, and severance pay, but a U.S. restaurant, retailer, or hotel might offer none of these, at least not fully paid. A newly hired U.S. worker starts a job ignorant of the new employer's benefits, practices, rules, and offerings. American employers therefore offer detailed handbooks, not only to communicate how they address these topics, but also to streamline "onboarding"/orientation and to insulate human resources staff from repetitive questions.

Outside the U.S., though, all this plays out differently. Local employment laws and work contracts—be they individual employment agreements, individual "statements of employment particulars," works council agreements, collective "enterprise level" trade union agreements, or collective "sectoral"/industry-wide union agreements—tend to dictate many of the same terms/conditions of employment discussed in U.S. employee handbooks. Outside the U.S., in theory, a new hire arrives at a job already understanding employer offerings dictated by statute and spelled out in employment agreements. A detailed employee handbook could therefore be redundant—or, at least, would play a less-central role as a communication piece. Additionally, whatever a handbook outside the U.S. might say about some term/condition of employment controlled by statute or contractual provision risks introducing contradictions or inconsistencies, unless the handbook clause parrots the text of the applicable statute or contract precisely.

- **Exception**. This explains why detailed employee handbooks are uncommon among local employers in much of the world. But there are exceptions—jurisdictions where handbooks can be common and helpful employer tools. In China, for example, a handbook can help comply with the 2008 Employment Contract Law. Handbooks are also fairly common in certain common law jurisdictions, such as Canadian provinces like Ontario, with conditions somewhat similar to the U.S.

Another problem with issuing employee handbooks outside the U.S. is that well-drafted American handbooks contain prominent "employment-at-will disclaimers" reserving the employer's right to change or revoke handbook provisions at any time (even without employee consent) and saying the handbook is not a binding contract. Not surprisingly, employment-at-will disclaimers are not necessarily enforceable outside employment-at-will. Elsewhere, under the "vested rights" doctrine, even a handbook with a disclaimer can lock an employer into benefits, practices, rules and offerings—in theory forever.

- **Example**. For example, countries outside the U.S. tend to require employers to grant national holidays as paid days off. Korea used to grant "Constitution Day," but at one point delisted that particular holiday—whereupon Korean employers immediately stopped granting it as a day off. But Korea branches of U.S.-based employers that had previously issued employee handbooks with a "Company Holidays" provision had a problem: They were stuck with a quasi-contractual obligation to grant Constitution Day because the handbook grant had become a vested right, impossible to remove absent employee consent.

2. The Myth of the Single Global Handbook

Notwithstanding these challenges, some multinationals have strong reasons to issue employee handbooks internationally. Taking a global approach to handbooks raises a threshold question: Can *one single* global handbook apply across workforces worldwide, without local amendments or riders? Or is a *series* of aligned but locally tailored documents—local handbooks or local addenda/riders to a master handbook—necessary, one per jurisdiction where the multinational employs people?

The answer is simple: The latter. As distinct from a global code of conduct, there is no such thing as a single global employee handbook (without local riders or addenda) that dictates detailed terms and conditions of employment across jurisdictions. This is for the simple reason that employee handbooks focus on workaday topics that necessarily differ across jurisdictions. Consider the basic example of holidays: The Fourth of July will be a day off only in the U.S., the fourteenth of July (Bastille Day) will be off only in France, and the fifth of May (*Cinco de Mayo*) only in Mexico. A single handbook's "Company Holidays" provision cannot possibly apply internationally unless it lists every holiday everywhere. Inevitably, tailored provisions will also be necessary to address all other inherently local topics, from vacation, office hours and overtime to pay period, benefits, site-specific security procedures—even smoking policy.

3. Aligning Local-Jurisdiction Handbooks

Given that a single global employee handbook without local amendments or riders is not viable, there is just one option for a cross-border handbook approach: aligned local handbooks, one per country (or else one global handbook plus a local rider/addendum per country). First, draft a template for the local handbooks (or the handbook riders/addenda) that has a place to address each specific term/condition of employment to be covered locally—holidays, vacation, office hours, overtime, pay period, benefits, security procedures, smoking policy and the like. Then involve overseas human resources to craft a local version of that template for each jurisdiction. Yet even this approach raises challenges:

- **Tension outside employment-at-will**. In "indefinite" employment countries outside U.S. employment-at-will, issuing local handbooks raises the problems already discussed: Handbooks are less vital communication tools, they can conflict with

local law and employment agreements, and they restrict employer flexibility.

- **Sloppy alignment**. Step 1 to globally aligning employee handbooks is drafting a single international template (or single handbook plus template rider/addendum), and step 2 is asking overseas human resources to craft local-country versions of the template (or local riders/addenda). But the real work begins at step 3: *editing for alignment*. Even if drafts of local handbooks (or riders/addenda) from English-speaking countries where the organization has large employee populations and top-notch HR professionals come back in good shape, drafts from smaller, more thinly staffed, non-English-speaking offices will need work. Some drafts will have too much detail, others too little. Many will be full of errors. U.S.-style handbooks being uncommon abroad, local HR staff may misconstrue the assignment, misunderstand the global template, or passively resist the project entirely. Local drafts are especially likely to need work if the headquarters template was too loose or if it covered topics that need special finesse outside the U.S.—for example, nepotism, co-worker dating, discrimination "protected groups," harassment, diversity, smoking/alcohol/drugs, social networking, business gifts. Someone at headquarters will need to roll up his sleeves and fix each local draft handbook, one section at a time—or risk issuing sloppy local documents.

- **Launch logistics**. After readying texts of local-version employee handbooks (or riders/addenda) the time comes to launch the local handbooks internationally. In the employment-at-will U.S., this step is simple: A non-union American employer simply communicates the handbook to the workforce. But outside the U.S., additional, often complex launch steps are necessary, such as: consultation/negotiation with local employee representatives; filings with government agencies; alignment with existing work rules/employment agreements; and mandatory translations. Signed employee acknowledgements raise extra issues. Take a country-by-country approach.

- **Updates**. Employers update their domestic U.S. employee handbooks when laws or conditions change. Obviously, updating a *network* of locally aligned handbooks multiplies the update challenge by the number of jurisdictions in play. Because local laws and collective agreements change everywhere, any multinational that issues a global network of local handbooks/riders/addenda takes on a big responsibility as to updates going forward—where updating is even possible in the face of local vested/acquired rights restrictions.

4. Alternatives to Handbooks Outside the U.S.

There are multinationals that have successfully issued comprehensive, aligned local employee handbooks across jurisdictions. But the high hurdles here dissuade others from going down this particular path. Some confine detailed handbooks only to jurisdictions where handbooks are common locally—the U.S., China, certain common law jurisdictions. But when a multinational lets go of the goal of a global handbook, how to fill the void? Without handbooks, how does a multinational inventory and communicate employee benefits, practices, rules, and offerings across worldwide workforces? Fortunately there are some viable substitutes here; which particular substitute is most viable depends on the specific reasons a given multinational considered a global handbook in the first place. Consider:

- **Global "welcome booklet."** While a detailed global employee handbook may be too granular to apply across lots of counties simultaneously, any multinational can issue a global "welcome booklet" telling new hires worldwide about big-picture topics like the organization's history, culture, values, and goals.

- **Global code of conduct.** U.S.-style employee handbooks are tough to globalize because they focus on inherently local topics. But a different cluster of workplace topics—those relating to corporate conduct/ethics—lend themselves more readily to a single cross-jurisdictional document. Indeed, most every major American multinational has issued a cross-border code of conduct or ethics that addresses issues like antitrust, insider trading, discrimination/harassment, Sarbanes-Oxley, bribery/improper payments/Foreign Corrupt Practices Act, company hotline, work rules, and compliance. Launching a global conduct code raises its own set of challenges, but when done right yields a vital tool supporting international compliance.

- **Aligned individual employment agreements.** In the U.S., detailed written individual employment agreements remain rare among rank-and-file employees. But outside the U.S. millions of workers enjoy ironclad guarantees under written work contracts and "statements of employment particulars." Indeed, in some countries these are legally mandated. Work contracts cover many of the topics in a U.S. employee handbook—but in form, they vary greatly from country to country. The cross-jurisdictional differences here are so frustrating that some multinationals actively align individual work contracts across borders. They craft a global employment agreement template from which they spin off a local contract form for each jurisdiction. This exercise can serve many of the same purposes

as a global handbook project while remaining sensitive to local conditions.

- **Global HR practices audit**. Sometimes a multinational embarks on a global employee handbook project because headquarters human resources feels it does not know enough about the organization's own overseas employee benefits, practices, rules and offerings. But where the main need is to educate headquarters, a global handbook is never the right tool. More appropriate would be an internal *global HR practices audit*. Distribute to local HR worldwide an "HR practices questionnaire" and then create aligned memos that inventory each local workplace's offerings. Contain distribution of these memos to HR managers—unlike a handbook, these memos are not for all hands.
- **Global *employer* handbook**. One innovative American multinational has pioneered the concept of a global *employer* handbook—an internal manifesto addressed to HR staff worldwide explaining the organization's core values and basic HR offerings in an effort to align HR internationally while leaving enough flexibility to adapt headquarters principles to the local realities of each particular workplace.

Multinationals increasingly pursue the best practice of aligning human resources across borders to the extent HR alignment furthers business objectives. A global employee handbook may—or may not—be the right tool for this process. The key is to focus on global HR alignment as the actual goal. Propagating international handbooks should not be an end in itself.

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"No, I Will *Not* Have Sex With You!": A Protected Activity Under Title VII?

By Anshel Joel Kaplan

I. Introduction

The Supreme Court[1] has recognized two forms of sexually abusive behavior by an employer to be unlawful under Section 703 of Title VII of the Civil Rights Act of 1964[2] ("Title VII"): "quid pro quo" sexual harassment and "hostile environment" sexual harassment.[3] Under Equal Employment Opportunity Commission ("EEOC") guidelines, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute "quid pro quo" sexual harassment when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment"[4] or when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[5] In contrast, that same conduct will constitute "hostile environment" sexual harassment when it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[6] The key distinction between the two is that to establish the former one must show that he or she sustained a tangible employment action, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,"[7] whereas to establish the latter one need not sustain a tangible employment action, but must demonstrate that the harassment was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[8]

Complementing these prohibitions, Section 704(a) of Title VII makes it unlawful to *retaliate* against an individual for "participating" in a Title VII proceeding or for "opposing" a practice made unlawful by Title VII.[9] Absent direct evidence, a plaintiff may establish a prima facie case of retaliation by demonstrating (1) that he or she engaged in a protected activity;[10] (2) that he or she suffered an adverse employment action; and (3) that a causal connection exists between the protected activity and the adverse employment action.[11]

In the context of retaliation claims, a split has developed among the circuits with respect to whether rebuffing a supervisor's sexual advances constitutes a protected activity pursuant to Section 704(a). The Fifth Circuit has held that rebuffing a supervisor's sexual advances does not constitute a protected activity. In contrast, the Eighth Circuit has held that such behavior does constitute a protected activity. This article, in congruence with the Eighth Circuit, takes the position that rebuffing sexual advances should, indeed, constitute protected activity under Section 704(a).

Part II will explain the relationship between Title VII's substantive provision—Section 703—and its anti-retaliation provision—Section 704. Part III will discuss the elements required to establish a prima facie case of retaliation. Part IV will explore the bifurcated nature of the anti-retaliation provision and its treatment by federal courts. Part V will examine the circuit split and—owing to the conclusory nature in which the circuit courts of appeals render their ruling—will delve into the rationale behind each approach using the reasoning from several district court opinions that have addressed the issue. Part VI will consider three reasons why rebuffing sexual advances *should* constitute a protected activity under Section 704(a). Finally, Part VII will conclude the article with a brief summary of the arguments contained herein.

II. Section 703 v. Section 704

Title VII is perhaps the most influential and extensive federal statute prohibiting discrimination in the workplace.[12] Originally enacted on July 2, 1964,[13] Title VII contains both a substantive provision[14]—Section 703—and an anti-retaliation provision[15]—Section 704. The substantive provision prohibits employment discrimination of "any individual…because of such individual's race, color, religion, sex, or national origin."[16] Moreover, Title VII's proscription extends to all "terms, conditions, or privileges of employment,"[17] including intangible aspects of employment such as environment as well as tangible issues like refusals to hire or promote.[18]

The existence of a substantive provision alone, however, would be of little value if fear of employer reprisal discouraged employees from exercising their rights under Section 703.[19] In fact, "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."[20] As one court stated, "[t]he creation of a right is often meaningless without the ancillary right to be free from retaliation for the exercise or assertion of that right."[21] For this reason, statutes regulating the employment relationship usually incorporate provisions forbidding employer retaliation against employees who seek vindication pursuant to the statute's substantive provisions—Title VII being no exception.[22] The anti-retaliation provision of Title VII thus provides employees who exercise their statutory rights on the basis of a protected characteristic enumerated in Section 703(a)(1)[23] with recourse to federal law to remedy the effects of any resulting retaliatory acts.[24]

III. The Prima Facie Elements

A plaintiff may prove unlawful retaliation using two methods: (1) by presenting direct evidence of such retaliation, or (2) by presenting indirect evidence.[25] Explaining the former method, the Sixth Circuit stated that "[d]irect evidence is that evidence which, if believed, *requires* the conclusion that unlawful retaliation was a motivating factor in the employer's action. Direct evidence proves the existence of a fact without any inferences or presumptions."[26]

However, even in the absence of direct evidence, a plaintiff can nonetheless maintain a retaliation claim utilizing indirect evidence.[27] According to most circuits,[28] to establish a prima facie case of retaliation using indirect evidence, the plaintiff must prove (1) that he or she engaged in activity protected by Title VII; (2) that he or she suffered an adverse employment action;[29] and (3) that a causal connection exists between the protected activity and the adverse employment action.[30] Some circuits, though, including the Second,[31] Sixth,[32] and Ninth,[33] require an additional element: the plaintiff must show that the employer was aware that the employee participated in the protected activity.[34]

IV. The Anti-Retaliation Provision, In-Depth

The anti-retaliation provision, Section 704(a) of Title VII, provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees…*because he has opposed any practice made an unlawful employment practice* by this title, or *because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing* under this title.[35]

As can be discerned from the above-quoted provision, protected employee conduct is described in two clauses—one general and one specific.[36] These clauses have been colloquially coined the "opposition clause" and the "participation clause," respectively.[37]

i. Participation Clause

Addressing the clauses in the reverse of their syntactic appearance in the statute, the "exceptionally broad protection" of the participation clause extends to persons who have "participated in any manner" in Title VII proceedings.[38] It protects employees who file formal charges with the Equal Employment Opportunity Commission ("EEOC")[39] or with other appropriate agencies.[40] However, even if a certain plaintiff has not "participated" in a Title VII proceeding, he is not without recourse. In such a case, when the practice complained of is also unlawful under Title VII, the opposition clause, discussed immediately *infra*, may provide protection.

ii. Opposition Clause

As delineated above, Section 704(a) not only shields employees from retaliatory acts levied as a result of their participation in a Title VII proceeding, but also protects employees from retaliation taken because the employee has "opposed any practice made an unlawful employment practice by this title."[41] Unfortunately for courts, the word "opposed" is not defined in the statute, and the pertinent legislative history lends no insight either.[42] The task of interpreting the meaning of protected opposition thus falls to the courts.[43]

Implicitly charged by Congress with their interpretive task, courts have reached a common law consensus regarding the scope of protected opposition, holding that it encompasses a far wider range of activities than does its sister clause.[44] In fact, opposition protected by Section 704(a) can take virtually any form,[45] including union grievances,[46] internal complaints,[47] external complaints to a federal agency,[48] Congress,[49] civil rights organizations,[50] and even public protests.[51] However, the outer boundaries and inner nuances of the opposition clause have not been definitively articulated.

To clarify, though, the opposition clause's wider range of protection should not be confused with the "exceptionally broad protection" of the participation clause mentioned *supra*, as "the [p]articipation [c]lause covers a narrower range of activities than the [o]pposition [c]lause, but it affords those activities stronger protection."[52] The stronger protection—or more accurately, the advantage of invoking the participation clause—is that the employee need not prejudge the validity or reasonableness of the underlying claim.[53] The opposition clause, in contrast, covers a wider range of activities, but requires that the plaintiff meet additional hurdles, discussed immediately *infra*, before protection is warranted: First, the opposition must be lawful. Second, it must be nondisruptive. Third, and most pertinent to the topic of this Note, the opposing conduct must be taken in response to "an unlawful employment practice" under Title VII.

a. Lawfulness

Illegal activity by a plaintiff has been found to be outside the anti-retaliation provision's protection.[54] In *McDonnell Douglas Corp. v. Green*,[55] for example, the plaintiff and others engaged in a "stall-in" whereby they "illegally stalled their cars on the main roads leading to [the employer's] plant for the purpose of blocking access to it at the time of the morning shift change."[56] With the arrival of police, "[p]laintiff's car was towed away…and he was arrested for obstructing traffic."[57] Plaintiff subsequently "pleaded guilty to the charge of obstructing traffic and was fined."[58] Despite the fact that the plaintiff, "a long-time activist in the civil rights movement,"[59] was protesting "his discharge and the general hiring practices of [the employer]"[60] as being racially motivated, the

Court found that his conduct was unprotected by Section 704(a): "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it."[61]

b. Non-Disruptive

Courts have also been extremely reluctant to extend Section 704(a) protection to employees whose *means* of opposition significantly disrupts the work environment.[62] As the Fifth Circuit noted in *Rosser v. Laborers' International Union*,[63]

> Even though opposition to an unlawful employment practice is protected, such protection is not absolute. There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by § 704(a).[64]

Thus, a plaintiff must remember that a court will not hesitate to stunt the protection of Section 704(a) should the opposition be conducted in an overly disruptive manner.[65]

c. Taken in Response to an "Unlawful Employment Practice"

Even assuming the two aforementioned opposition clause requirements have been satisfied—namely, that the opposition in which plaintiff engaged was both lawful and non-disruptive—courts will nonetheless withhold statutory protection if they find that the conduct was not taken in response to an "unlawful employment practice."

The statutory language of Section 704(a) indicates that the activity the plaintiff opposes must *actually* violate Title VII.[66] However, courts have almost unanimously agreed that the opposition clause does not require the employment practice being complained of actually be unlawful.[67] The camaraderie and solidarity among jurisdictions dissipates rapidly, however, in the face of a simple question: if the opposition clause does not require the employment practice be, in fact, unlawful, what *does* it require? As far as the circuit courts of appeals are concerned, therein lies the question.

Historically, the circuits have subscribed to one of three possible standards: Some courts require only that the employee's opposition was taken as a result of a good faith, subjective belief that the employer violated Title VII.[68] In other words, a plaintiff may not cry discrimination merely as a smokescreen to prevent, for example, an impending discharge due to chronic tardiness; the belief that the employer discriminated against the employee, and thus violated Title VII, must be bona fide.[69] Other courts require only that the employee's belief that the employer violated Title VII be *objectively* reasonable.[70] In other words, the conduct of the employer must be such that a reasonable person would believe it constituted discrimination. Still other courts require that the employee show both subjective good faith *and* objective reasonableness.[71]

Thus, with regards to the validity of an underlying claim, it is evident that the opposition clause requires *something* beyond that of the participation clause[72]—be it a good faith, *subjective* belief that the employer violated Title VII, an *objectively* reasonable belief that the employer violated Title VII, or both. However, just *what* exactly it mandates will remain a mystery until the Supreme Court addresses the issue directly.[73] In the interim, though, at least one thing is almost unanimously true among federal courts: *the opposition clause does not require that the employment practice being complained of* actually *violate Title VII*.

Despite the general consensus among courts regarding the above three prerequisites—namely, that the opposition be lawful, non-disruptive, and need not *actually* violate Title VII—the outer boundaries and inner nuances of the opposition clause, as mentioned above, have not been definitively articulated. One such example of murky jurisprudence is whether rebuffing a supervisor's sexual advances constitutes a protected activity pursuant to Section 704(a). Put another way, assuming a plaintiff's opposition was lawful, was not overly disruptive, and was taken in response to an "unlawful employment practice,"[74] does the opposition clause protect a plaintiff who suffers an adverse employment action if the plaintiff's sole opposition was spurning a supervisor's sexual advances? The courts have divided on the issue, and it is this division we turn to next.

V. Circuit Split

A split has developed between the Fifth and Eighth Circuits regarding whether or not rebuffing a supervisor's sexual advances constitutes protected activity. The Fifth Circuit has held that rebuffing a supervisor's sexual advances does not constitute a protected activity. In contrast, the Eighth Circuit has held that such behavior does constitute a protected activity. Because of the terse and uninformative way in which each circuit delivers its holdings, however, reviewing various district court opinions is required to glean the underlying respective rationales.

i. Fifth Circuit Approach

In *LeMaire v. Louisiana*,[75] the plaintiff, Rene LeMaire, filed suit against his employer, State of Louisiana, Department of Transportation ("LaDOTD"), for, *inter alia*, unlawful retaliation.[76] The pertinent facts, as stated by the Fifth Circuit, were as follows: LaDOTD hired LeMaire

in March 2001 as a Bridge Operator.[77] Milton Endres was LeMaire's direct supervisor, and Rodney Jones was Endres' supervisor.[78]

About eight months into LeMaire's employment, Endres discussed openly "how he enjoyed being close to other men, and [how] his gay friends, who had [like him,] also been molested. [LeMaire and his friend] asked Endres to stop talking about these issues and tried to change the topic of conversation, but to no avail."[79] Moreover, LaMaire alleged that

> he was subjected to derogatory comments by Endres. Endres also allegedly told LeMaire that he (Endres) would make it impossible for LeMaire to transfer, so the only way LeMaire could get away would be to quit. Endres then ordered LeMaire to spray herbicide on a large area of the bank and lawn. Believing this order was in retaliation for having objected to Endres' sexually explicit stories, LeMaire left the job site to report the conduct to Jones.[80]

On October 8, 2004, LaDOTD filed a motion for summary judgment.[81] On October 6, 2005, in a single-page order, the district court granted LaDOTD's summary judgment motion, stating that "written reasons" for its decision would be "filed at a later date."[82] Those reasons were never filed, and LaMaire appealed.[83]

On appeal, the Fifth Circuit identified four different allegations of retaliation, only the first of which concerns our present issue: LaMaire's claim that Endres ordered him to spray herbicide[84] on June 15, 2002 in retaliation for LaMaire's rejection of sexual advances.[85] The court, in a rather curt and conclusory manner, held:

> To satisfy his prima facie obligation, LeMaire must produce evidence that he engaged in a protected activity.… At the time of Endres' order, LeMaire had not yet complained to Jones of Endres' conduct, so the only arguable protected activity was LeMaire's actual rejection of Endres' advances. *LeMaire, however, provides no authority for the proposition that rejecting sexual advances constitutes a protected activity for purposes of a retaliation claim under Title VII*.[86]

The court, "therefore, affirm[ed] the district court's order granting summary judgment to the extent that LeMaire argues that Endres' order to spray herbicide was retaliatory."[87]

ii. Eighth Circuit Approach

In *Ogden v. Wax Works, Inc.*,[88] the plaintiff, Kerry Ogden, sued her employer, Wax Works, Inc. for, *inter alia*, unlawful retaliation.[89] The facts, as stated by the Eighth Circuit, were as follows: Ogden was hired by Wax Works in 1987 as a sales manager.[90] In 1993, Robert Hudson became her immediate supervisor and accordingly was tasked with conducting annual performance evaluations, the completion of which was a prerequisite to a sales manager's yearly raise.[91]

Ogden alleged that Hudson sexually harassed her from the middle of 1994 until she left Wax Works in late 1995.[92] She "described three occasions on which Hudson subjected her to unwelcome physical advances:"[93]

> In late June-early July, 1994, an intoxicated Hudson grabbed Ogden by the waist and asked her to his motel room as the two were leaving a restaurant. Ogden refused the invitation, pushed Hudson away, and told him not to touch her. On St. Patrick's Day, 1995, an intoxicated Hudson twice put his arm around Ogden while the two were in a Sioux City bar with a group of employees. Each time Ogden pushed Hudson away and told him to leave her alone. Hudson made a similar advance in April, 1995, which Ogden rebuffed with a physical threat.[94]

Additionally, Hudson propositioned Ogden incessantly, asking her out to drinks, to a concert, to stay with him at his home to "party," and to his motel room during a convention.[95]

When Ogden spurned these advances and propositions, Hudson retaliated "by mistreating her at work"[96] and by refusing to conduct her 1995 performance evaluation.[97] The jury found in favor of Ogden, and the district court awarded her a panoply of damages, totaling nearly $500,000.[98]

On appeal, Wax Works argued in its brief,[99] *inter alia*, that

> Ogden claimed that she had engaged in protected activity by refusing his alleged advances at a bar in July of 1994, March of 1995, and April of 1995. There is absolutely no evidence that Ogden made a formal complaint to Hudson. Wax Works is unable to find any Eighth Circuit decisions where this court has held that such facts constitute a complaint necessary to establish a retaliation claim.[100]

Accordingly, Wax Works concluded that "[t]he facts presented at trial failed to created a sufficient claim of retaliation."[101]

In contrast, Ogden argued in its brief,[102] *inter alia*, that although "Ogden did not file a formal charge of harassment with the EEOC against Defendant,…she did engage

in 'other protected activity' as contemplated by Title VII."[103] Ogden went on to cite *Quarles v. McDuffie County*[104] for the proposition that spurning sexual advances constitutes protected activity under Section 704(a).[105] "The court in *Quarles* called the type of protected activity performed by Ogden, telling the harasser to stop, the 'most basic form of protected conduct' under Title VII."[106] Accordingly, Ogden concluded, "the jury was entitled to find that Hudson retaliated against her from May, 1995, through the end of her employment in September by refusing to do her evaluation so she could get her raise."[107]

Without much discussion, the Eighth Circuit sided with the plaintiff, stating: "We agree with Ogden. Employers may not retaliate against employees who 'oppose discriminatory conduct,'…and the jury reasonably concluded Ogden did so when she told Hudson to stop his offensive behavior."[108]

iii. The Respective Rationales

Owing to the rather conclusory nature in which the circuit courts of appeals render their rulings, further analysis is warranted to discern the respective rationales underlying each holding. District courts holding that rebuffing sexual advances does *not* constitute a protected activity[109] do so because "[i]f it were otherwise, every [sexual] harassment claim would automatically state a retaliation claim as well."[110] Therefore, "[a] retaliation claim, under these circumstances, is duplicative and unnecessary, and runs the risk of confusing a jury."[111]

In contrast, those district courts finding that rebuffing sexual advances *does* constitute a protected activity[112] do so for a reason that is deceptively simple and straightforward:

> Title VII makes it unlawful "for an employer to discriminate against any of his employees…because *he has opposed any practice made an unlawful employment practice by this subchapter*…" [Section 704(a)]. Sexual harassment is clearly an unlawful employment practice under Title VII…. Opposing sexually harassing behavior constitutes "opposing any practice made an unlawful employment practice" by Title VII, and accordingly it is activity protected by [Section 704(a)]. This comports with the purpose of Title VII's anti-retaliation provision. The victim of harassment should not fear retaliation if she resists sexually predatory behavior by colleagues or supervisors.[113]

Thus, the proponents of this approach look no further than the face of the statute and conclude that rebuffing sexual advances is, by definition, protected conduct.

VI. Rebuffing Sexual Advances *Should* Constitute Protected Activity

With a firm grasp of the circuit split and the underlying rationales of the opposing factions, this article advocates that courts find that rebuffing sexual advances should, indeed, constitute protected activity under Section 704(a) for the following reasons: (1) the rationale advanced by courts adopting the Eighth Circuit's approach is both simple and intuitive, (2) the rationale proffered by courts subscribing to the Fifth Circuit's school of thought is unconvincing, and (3) recent Supreme Court precedent supports an expansive reading of the opposition clause.[114]

i. The Rationale Underlying the Eighth Circuit Approach Is Intuitive

As indicated earlier, the rationale underlying the finding that rebuffing sexual advances constitutes protected activity is both simple and intuitive. Title VII straightforwardly makes it unlawful for an employer to discriminate against any of his employees "because he has opposed any practice made an unlawful employment practice by this subchapter…."[115] Unwelcome requests for sex are undoubtedly an unlawful employment practice.[116] Thus, rejecting such unwelcome requests for sex surely constitutes opposition to "any practice made an unlawful employment practice." Therefore, "rejecting sexual advances itself must comprise protected activity for which employees should be protected for opposing within the meaning of [Section 704](a)."[117]

ii. The Rationale Behind the Fifth Circuit Approach Is Unconvincing

As stated previously, district courts following the Fifth Circuit argue that "even the broadest interpretation of a retaliation claim cannot encompass instances where the alleged 'protected activity' consists simply of declining a harasser's sexual advances…. If it were otherwise, every [sexual] harassment claim would automatically state a retaliation claim as well."[118] Consequently, "[a] retaliation claim, under these circumstances, is duplicative and unnecessary, and runs the risk of confusing a jury."[119]

Preliminarily, however, before addressing the duplicative nature of a retaliation claim and any attendant jury confusion, it must be noted that, contrary to the above assertion, *not* every sexual harassment claim automatically states a retaliation claim. As explained above, "[s]exual harassment claims are traditionally broken down into two forms: sexual harassment in the form of a hostile work environment and quid pro quo sexual harassment."[120] With regards to hostile environment sexual harassment, a plaintiff must demonstrate only that the harassment was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[121] Put another way, in

order to establish a hostile environment claim, the harassment need *not* result in a tangible employment action—a *conditio sine qua non* of retaliation. Thus, to the extent that these courts refer to a hostile environment claim, it is less than certain "that every sexual harassment cause of action would necessarily make it possible for the plaintiff to bring a retaliation claim."[122]

With regards to quid pro quo sexual harassment, on the other hand, a straightforward example is in order to help make the Fifth Circuit's argument sufficiently clear. Distilled down to its bare essentials,[123] the paradigmatic behavior illustrative of quid pro quo sexual harassment is as follows: a male supervisor asks a female subordinate for sex, expressing that her continued employment depends on her cooperation. After refusing the supervisor's advances, she is fired. As indicated above, because "submission to [the supervisor's unwelcome sexual advance was] made…a term or condition of [her] employment," and because "rejection of [the supervisor's sexual advance was] used as the basis for employment decisions affecting [her]," the supervisor would be liable for unlawful quid pro quo sexual harassment.

However, if rebuffing sexual advances constitutes a protected activity, the argument goes, then each time a supervisor is liable for unlawful quid pro quo sexual harassment, he or she will ipso facto be liable for unlawful retaliation. Therefore, these courts hold that "[a] retaliation claim, under these circumstances, is duplicative and unnecessary, and runs the risk of confusing a jury."[124] However, this argument—that a retaliation claim is duplicative and unnecessary simply because a successful quid pro quo claim would automatically state a retaliation claim as well—makes a fundamental error in that it prejudicially overlooks certain plaintiffs.

If according to the Fifth Circuit spurning sexual advances cannot constitute a protected activity simply because every successful quid pro quo sexual "harassment claim would automatically state a retaliation claim as well," what happens to that unfortunate plaintiff who is *unsuccessful* on his underlying harassment claim?[125] If he also tried to establish a prima facie case of retaliation, the blanket rule delineated by the Fifth Circuit effectively bars him, as a matter of law, from establishing retaliation, *even if that plaintiff possessed a subjectively* and *objectively reasonable belief that the sexual advances were unlawful.* Flying in the face of such a result, it has been "repeatedly held that a plaintiff need not prevail on her Title VII discrimination claim or have opposed an action that in fact violated Title VII to win a retaliation claim."[126] All that is required by the opposition clause, as noted above,[127] is that the plaintiff have—at the very most—a subjectively and objectively reasonable *belief* that the employment practice violated Title VII. With imposition of this rule, however, these courts are, in effect, requiring just what is *not* required, namely, that the employment practice *actually* violate Title VII. To this plaintiff, therefore, the retaliation claim is anything but duplicative and unnecessary.

Having demonstrated the non-duplicative and necessary function a retaliation claim *in conjunction with* a quid pro quo claim might serve, the only remaining rationale advanced in defense of the Fifth Circuit's holding is "jury confusion." While jury confusion is a legitimate concern, it does not warrant the degree of concern these judges are affording it. First, jury confusion can arguably be dispelled completely, or at least largely obviated, by proper jury instructions from the court. Thus, considering the ease at which jury confusion can be, and regularly is, rectified by well-crafted jury instructions, barring a plaintiff from invoking the protection of the opposition clause simply because of "jury confusion" seemingly demonstrates nothing more than a court's attempt to shirk its responsibility.

Moreover, jury confusion does not even come close to the justification needed to intentionally ignore the plain language of a statute.[128] After all, a canon of statutory construction requires courts to follow a statute's plain language. As the Supreme Court noted, the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[129] Then, if "the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances,"[130] because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[131] Rare circumstances are those in which "the literal application of a statute… produce[s] a result demonstrably at odds with the intentions of its drafters…."[132] In light of these directives, one cannot seriously contend that a finding of protected activity under these circumstances produces a result demonstrably at odds with the intentions of Title VII's drafters. This is especially so in light of the fact that Title VII is a remedial statute.[133]

iii. Recent Supreme Court Precedent Supports an Expansive Reading

Though the Supreme Court has been asked to weigh in on this specific matter,[134] it has thus far chosen to remain on the sidelines.[135] The Supreme Court has, however, recently decided a case which is nonetheless quite relevant to retaliation cases which invoke the opposition clause. In *Crawford v. Metro. Gov't of Nashville & Davidson County*,[136] the Supreme Court decided whether, and to what extent, the opposition clause protected a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment.

a. Facts

The plaintiff, Vicky Crawford, worked for defendant, Metropolitan Government, for thirty years.[137] In 2001,

Gene Hughes was hired as the Metro School District's employee relations director.[138] In 2002, Metro's human resources department initiated an investigation after being made aware of "specific incidents of inappropriate behavior by Hughes."[139] During the course of the investigation, Metro's assigned investigator interviewed Crawford regarding Hughes' alleged behavior.[140] When asked if she had ever been sexually harassed by Hughes, Crawford responded that, indeed, she had.[141] At the conclusion of the investigation, no disciplinary action was taken against Hughes.[142] Metro did, however, subsequently terminate Crawford and two other employees who had also alleged sexual harassment by Hughes.[143] In June 2003, Crawford sued Metro for unlawful retaliation.[144]

b. Procedural History

The district court granted summary judgment in favor of Metro.[145] On appeal, the Sixth Circuit affirmed, "holding that the opposition clause demands *active, consistent* opposing activities to warrant…protection against retaliation, whereas Crawford did not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing."[146]

c. Holding

In an opinion by Justice Souter, the Supreme Court reversed, unanimously holding that Crawford's conduct fell squarely within the opposition clause of Section 704(a). Noting that the term "oppose" was left undefined by the statute, and thereby must carry its ordinary meaning, the Court employed the word's dictionary definition:

> "to resist or antagonize…; to contend against; to confront; resist; withstand," Webster's New International Dictionary 1710 (2d ed. 1958). Although these actions entail varying expenditures of energy, "RESIST frequently implies more active striving than OPPOSE." *Ibid.*; see also Random House Dictionary of the English Language 1359 (2d ed. 1987) (defining "oppose" as "to be hostile or adverse to, as in opinion").[147]

Thus, the Court resoundingly rejected the definition proffered by the Sixth Circuit, holding Crawford's statement to Frazier during the investigation is "covered by the opposition clause, as…[her] description of the louche goings-on would certainly qualify in the minds of reasonable jurors as 'resist[ant]' or 'antagoni[stic]' to Hughes's treatment…."[148] The Court continued its reasoning stating that

> "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to "oppose" slavery before Emancipation, or are said to "oppose" capital punishment today, without writing public letters, taking to the streets, or resisting the government. And we would call it "opposition" if an employee took a stand against an employer's discriminatory practices not by "instigating" action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons.…There is, then, no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.[149]

Thus, it seems rather clear the Supreme Court construes the opposition clause quite expansively.

However, Justice Alito wrote a concurring opinion, which Justice Thomas joined, agreeing with the Court's primary reasoning, but writing separately to emphasize "that the Court's holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct."[150] Though the majority is correct, Justice Alito continued, in that "oppose" does not denote "active, consistent" conduct, the "primary definitions of the term 'oppose' do…require conduct that is active and purposive."[151] Justice Alito cautioned, however, that one of the majority's chosen definitions seemingly requires less than active and purposive conduct, "defining 'oppose' to mean 'to be hostile or adverse to, *as in opinion*.'… Thus, this definition embraces silent opposition."[152] But, whether or not the opposition clause shields employees who engage in such opposition "is not before us in this case; the answer to that question is far from clear; and I do not understand the Court's holding to reach that issue here."[153]

Though the concurrence seems to militate towards limiting the expansiveness of *Crawford*, at least one commentator finds it interesting that Justice Souter's majority opinion neither makes the above point itself—which would, presumably, have negated the need for a concurrence in the first place—nor addresses why the concurring Justices' concerns are misplaced.[154] Picking up on this seeming irregularity, the commentator suggests that "some members of the Court [might] be willing to hold that [even] unspoken opposition could be a basis for a claim[.]"[155] Whatever the case may be, one thing is clear:

at least seven members of the *Crawford* Court read the opposition clause quite expansively, the implications of which are *res ipsa loquitur*: if silent opposition can form the basis of a retaliation claim, actively spurning the sexual advances of a supervisor by stating "no, I will not have sex with you" should, *a fortiori*, constitute protected activity.

VII. Conclusion

Retaliation claims have risen exponentially over the last two decades, nearly tripling from 1992[156] to 2009.[157] Prevalence, however, has unfortunately not afforded complete clarity to this burgeoning area of law; courts are still grappling to find the proper interpretation of certain facets of the Title VII statutory scheme. One such murky area about which courts have divergent views is whether rebuffing a supervisor's sexual advances constitutes a protected activity pursuant to Section 704(a). The Fifth Circuit has held that it should *not* constitute a protected activity, noting that the plaintiff in the case "provide[d] no authority for the proposition that rejecting sexual advances constitutes a protected activity."[158] In contrast, the Eighth Circuit has held that rebuffing sexual advances *should* constitute a protected activity, citing with approval a district court case within its circuit which deemed spurning a supervisor's sexual advances as being the "most basic form of protected conduct."[159]

Because the Circuits did not expound—that is, beyond relying on precedent or the lack thereof—the reasoning behind their respective approaches, proper analysis necessitated consulting various district court opinions to discern what exactly the Circuits are at odds over. On one hand, the reasoning proffered by those courts—adopted, apparently, by the Eighth Circuit—that hold rebuffing sexual advances *does* constitute a protected activity is simply because such a position is in accordance with the plain reading of the statute. On the other hand, the concern of those courts—adopted, apparently, by the Fifth Circuit—that hold rebuffing sexual advances does *not* constitute a protected activity is that if rebuffing sexual advances *does* constitute a protected activity, "every [sexual] harassment claim would automatically state a retaliation claim as well"[160] and would therefore be "duplicative and unnecessary, [while running] the risk of confusing a jury."[161]

This article advocates the approach taken by the Eighth Circuit—that courts find that rebuffing sexual advances should, indeed, constitute protected activity under Section 704(a). It does so by pointing out the palatable and intuitive nature of the Eighth Circuit's approach and by making several arguments as to why the approach adopted by the Fifth Circuit is harder to swallow.

First, *not* every successful sexual harassment claim automatically states a retaliation claim. To prove hostile environment sexual harassment one need only demonstrate that the harassment was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[162] Noticeably absent from the employee's requisite burden in a hostile environment claim is the necessity to prove that he or she sustained an adverse employment action, an indispensable component of a prima facie retaliation case. Thus, to the extent that these courts refer to a hostile environment claim, it is less than certain that every harassment claim would automatically state a retaliation claim as well.

Second, even assuming arguendo that every successful quid pro quo harassment claim would automatically state a retaliation claim as well, it does not follow that every resulting retaliation claim would be duplicative and unnecessary. Under the Fifth Circuit's rubric, because rebuffing a supervisor's sexual advances cannot constitute a protected activity, a plaintiff who is unsuccessful on his or her underlying quid pro quo claim would be barred—as a matter of law—from establishing a prima facie case of retaliation even if he or she possessed a subjectively and objectively reasonable belief that the sexual advances were unlawful. Such a result is incongruent with the interpretation adopted by the overwhelming majority of federal courts which hold that the opposition clause requires, at the very most, merely a belief—whether subjectively reasonable, objectively reasonable, or both—that the employment practice violated Title VII. Imposition of Fifth Circuit's blanket rule, however, effectively requires that the employment practice *actually* violate Title VII. To a plaintiff unsuccessful on his or her underlying discrimination claim, therefore, a retaliation claim under the circumstances would not only be necessary, but would be his or her sole remaining recourse under Title VII.

Third, the Fifth Circuit's approach unabashedly disregards the plain language of the statute, its sole justification being jury confusion. However, it would seem that carefully crafted jury instructions would dispel nearly all possible confusion arising from having to address the harassment claim in conjunction with the retaliation claim. Additionally, pursuant to the directives of the Supreme Court, one should only go beyond the unambiguous terms of the statute in "rare and exceptional circumstances."[163] And, employing the Supreme Court's definition of "rare"—that is, those cases where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters…"[164]—one can readily discern that regardless of jury confusion, courts need not, indeed *should* not, look past the plain language of Section 704(a) in answering this question, as that statute seemingly all but explicitly mandates that protected activity be found under these circumstances.

Finally, though the Supreme Court has thus far chosen not to tackle the issue directly, recent Supreme Court precedent has defined the word "oppose" in Section

704(a) using its ordinary meaning: "to resist or antagonize…; to contend against; to confront; resist; withstand" or "'to be hostile or adverse to, as in opinion."[165] Though a two-Justice concurrence took issue with the latter definition, the seven-Justice majority of the court construed the opposition clause quite expansively, possibly expansively enough to embrace even *silent* opposition to an unlawful employment practice. As noted above, the implications of this holding are self-evident: if silent opposition can constitute protected activity, actively spurning the sexual advances of a supervisor by stating "no, I will not have sex with you" should, *a fortiori*, constitute protected activity.

Though the jury will remain out until the Supreme Court conclusively settles the debate, the weight of the arguments militate towards a finding that the opposition clause of Title VII should, indeed, protect a plaintiff who suffers an adverse employment action even if the plaintiff's sole opposition was rebuffing a supervisor's sexual advances.

Endnotes

1. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (U.S. 1986).
2. 42 U.S.C. § 2000e-2. As an introductory and practical matter, it should be noted that when referring to Title VII, enforcement agencies, most courts, commentators, and practitioners refer not to the United States Code, but to the sections as found in the Act itself and that practice will be followed herein. This is due, in part, to the awkward and cumbersome numbering of the United States Code. Mack A. Player, Employment Discrimination Law 199, n.1, (West Publishing Co. 1988) [hereinafter Player]. Accordingly, 42 U.S.C. § 2000e will be referred to as Section 701, 42 U.S.C. § 2000e-1 as Section 702, 42 U.S.C. § 2000e-2 as Section 703, and so on.
3. Lex K. Larson, Employment Discrimination § 46.05 (2d ed. 2009) [hereinafter Larson].
4. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(1) (2009), *available at* http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/29cfr1604.11.pdf.
5. *Id.* at § 1604.11(a)(2).
6. *Id.* at § 1604.11(a)(3).
7. Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (U.S. 1998).
8. Meritor, 477 U.S. at 67 (internal quotations omitted).
9. "Participating" and "opposing" are discussed in greater detail *infra,* Part IV, titled: *The Anti-Retaliation Provision, In-Depth*.
10. That is, by "participating" in a Title VII proceeding or "opposing" a practice made unlawful by Title VII.
11. The prima facie elements are discussed in greater detail *infra,* Part III, titled: *The Prima Facie Elements*.
12. Harold S. Lewis, Jr. & Elizabeth J. Norman, Employment Discrimination Law and Practice 11 (West Group 2001) [hereinafter Lewis & Norman].
13. David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645, 645 (1995). Title VII was subsequently amended on November 21, 1991 when President George H. W. Bush signed into law the Civil Rights Act of 1991. *See* Roger Clegg, *A Brief Legislative History of the Civil Rights Act of 1991*, 54 La. L. Rev. 1459, 1471 (1994). The amendment was in response to a series of Supreme Court decisions handed down in May and June of 1989 that limited the rights of employees who had sued their employers for discrimination. *Id.* at 1459-63. The stated purposes of the amendment were to "provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace," to "confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII…," and 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." Civil Rights Act of 1991, Pub. L. 102-166, § § 3(1), (3), and (4), 105 Stat. 1071.
14. Section 703(a)(1).
15. Section 704(a).
16. Section 703(a)(1).
17. *Id.*
18. Lewis & Norman, *supra* note 12, at 11-12.
19. Douglas E. Ray, *Title VII Retaliation Cases: Creating A New Protected Class*, 58 U. Pitt. L. Rev. 405, 406 (1997).
20. Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005).
21. Hanson v. Hoffman, 628 F.2d 42, 52 (D.C. Cir. 1980).
22. Ray, *supra* note 19.
23. That is, on the basis of race, color, religion, sex, or national origin.
24. Larson, *supra* note 3, at § 34.01.
25. Abbott v. Crown Motor Co., 348 F.3d 537, 542 (6th Cir. Ohio 2003).
26. *Id.* It is noteworthy to mention that under the *indirect* method "[t]he ultimate burden of persuading the trier of fact…remains at all times with the plaintiff," i.e., it is only the burden of *production* that shifts to the defendant, not the burden of persuasion. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (U.S. 1981). When the plaintiff produces direct evidence, in contrast, "[t]he defendant's burden…is one of persuasion and not merely production." *See* Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1104 (11th Cir. Fla. 2001).
27. *Id.*
28. *See* Larson, *supra* note 3, at § 35.02 (stating that the D.C., First, Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted essentially the same formulation). *But see* Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under The Title VII Following Mattern: Will Courts Know It When They See It?*, 14 Lab. Law. 373, 373 (1998) (arguing that courts are unable to specifically delineate the requirements of a claim for retaliation under Title VII but they believe they "know retaliation when they see it").
29. For further explanation as to this prong, see Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53 (U.S. 2006) (holding that in order to prevail on a claim of retaliatory discrimination, "a plaintiff 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").
30. *See, e.g.*, Handzlik v. United States, 93 Fed. Appx. 15, 18 (5th Cir. Tex. 2004).
31. *See* Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 292 (2d Cir. N.Y. 1998) ("To establish a prima facie case of retaliation under Title VII, a plaintiff must show (1) that she was engaged in protected activity by opposing a practice made unlawful by Title VII; *(2) that the employer was aware of that activity;* (3) that she suffered adverse employment action; and (4) that there was a causal connection between the protected activity and the adverse action.") (emphasis added).
32. *See* Wade v. Knoxville Utils. Bd., 259 F.3d 452, 463 (6th Cir. Tenn. 2001) (same).

33. *See* Aguirre v. Chula Vista Sanitary Service & Sani-Tainer, Inc., 542 F.2d 779, 781 (9th Cir. Cal. 1976) ("A showing by plaintiff that he was discharged following protected activities *of which the employer was aware* establishes a prima facie case of retaliatory dismissal.") (emphasis added).

34. However, these seemingly distinct approaches are not, in fact, mutually exclusive and can be synthesized as follows: those circuits which require the fourth element of employer knowledge have simply parsed an additional element from what is implicitly already required. Stated differently, the circuits which lack this knowledge element have already assumed its inclusion as part of one of the other three elements. One court included knowledge as part and parcel of the first element, commenting, "[t]he Second and Ninth Circuits both explicitly make proof of the employer's knowledge part of the prima facie case of retaliation. We have assumed that this aspect is implicit in the first element of this Circuit's prima facie case…." Durkin v. City of Chicago, 341 F.3d 615 n.4 (7th Cir. Ill. 2003). After all, the court pointed out, "[a]n employer cannot retaliate if there is nothing for it to retaliate against." *Id.* at 615. Another court found that employer awareness was an integral component of the *third* element, stating "that to establish a 'causal connection,' plaintiff must show that the individual who took adverse action against him *knew of the employee's protected activity*." Williams v. Rice, 983 F.2d 181 (10th Cir. Okla. 1993) (emphasis added) (citation omitted). Thus, the two approaches can ultimately be said to walk the same street, albeit from slightly different directions.

35. Section 704(a) (emphasis added).

36. LARSON, *supra* note 3.

37. Crawford v. Metro. Gov't of Nashville & Davidson County, 129 S. Ct. 846, 850 (U.S. 2009). For purposes of clarity, the opposition clause is the portion "because he has opposed any practice made an unlawful employment practice by this title" and the participation clause is the portion "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

38. Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. Ala. 1969).

39. *See, e.g.*, Wells v. Hutchinson, 499 F. Supp. 174, 197 (E.D. Tex. 1980) ("Initially, it is necessary to identify the protected activity in which plaintiff engaged and for which he suffered discharge. In essence, plaintiff suffered retaliation for having filed a charge with the EEOC."). It should also be noted that former employees have been found to also have a cause of action for retaliation. *See* Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

40. *See, e.g.*, Kellner v. General Refractories Co., 631 F. Supp. 939, 944 (N.D. Ind. 1986) (finding that plaintiff's complaint to her local Human Relations Commission constitutes "participation").

41. Section 704(a).

42. *See, e.g.*, interpretive memorandum on H.R. 7152, 110 Cong. Rec. 7213 (1964); *See also* Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222, 230 (1st Cir. Mass. 1976) ("The statute says no more, and the…proceedings and floor debates over Title VII are similarly unrevealing.") (internal citations omitted).

43. Hochstadt, 545 F.2d at 230.

44. LARSON, *supra* note 3, at § 34.03.

45. PLAYER, *supra* note 2, at 275.

46. *See, e.g.*, Senter v. General Motors Corp., Inland Division 383 F.Supp. 222, 228 (D.C.Ohio 1974) ("Plaintiff has established… that disciplinary action taken against him by defendant . . ., was in retaliation for plaintiff's efforts to present a grievable issue of racial discrimination in accordance with the Collective Bargaining Agreement then in effect.").

47. *See, e.g.*, Carter-Obayuwana v. Howard Univ., 764 A.2d 779, 790-791 (D.C. 2001) ("[T]he protections of Title VII extend to an employee's informal complaints of discrimination to his or her superiors within the organization.").

48. *See, e.g.*, Hicks v. ABT Associates, Inc., 572 F.2d 960, 969 (3d Cir. Pa. 1978) ("[W]e believe that Hicks's complaint to HUD [Housing and Urban Development] would in any event be covered [by the opposition clause].").

49. *See, e.g.*, Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892, 896 (3d Cir. Pa. 1993) ("The trial judge determined that the letter to Congressman Robert Edgar implicated Title VII's protections. Although…the letter is not artfully drawn, we have little trouble agreeing that it sufficiently articulated Robinson's opposition.…").

50. *See, e.g.*, Johnson v. Lillie Rubin Affiliates, Inc., 1972 U.S. Dist. LEXIS 14663 (M.D. Tenn. Mar. 15, 1972) (finding a complaint within the boundaries of Section 704(a) when Plaintiff complained to National Association for the Advancement of Colored People [NAACP]).

51. *See, e.g.*, Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346 (9th Cir. Or. 1984) (finding that a nurse's press conference protesting poor care of black patients was protected opposition because it did not impede hospital goals or affect her duties as a nurse).

52. Koubaitary v. Parker-Hannifin Hydraulic Sys. Div., 2008 U.S. Dist. LEXIS 109632, 25-26 (W.D. Mich. June 27, 2008).

53. Johnson v. University of Cincinnati, 215 F.3d 561, 582 (6th Cir. Ohio 2000). This approach is sensible as "hinging an employee's protection from retaliation upon the ultimate success of the underlying discrimination claim puts the employee in the position of having to prejudge the validity of the claim and risk losing the protection from retaliation if his or her reasonable, good faith assessment of the merits turns out to be legally flawed." LARSON, *supra* note 3, at § 34.02[3]. Ultimately, allowing "an employer to retaliate against a charging party based on its unilateral determination that the charge was unreasonable or otherwise unjustified would chill the rights of all individuals protected by the anti-discrimination statutes." EEOC Compl. Man., No. 915.003, at 8-10 (1998) [hereinafter EEOC Compliance Manual], *available at* http://www.eeoc.gov/policy/docs/retal.pdf.

54. LARSON, *supra* note 3.

55. 411 U.S. 792 (U.S. 1973).

56. *Id.* at 794.

57. *Id.* at 795.

58. *Id.*

59. *Id.* at 794.

60. *Id.*

61. *Id.* at 803. However, as one commentator astutely points out, *McDonnell Douglas* does not inexorably lead to the conclusion that illegal activity precludes a finding of retaliation. *See* Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964*, 29 B.C. L. REV. 391, 403-04, (1988). Despite holding that the opposition conduct was illegal, the *McDonnell Douglas* Court nonetheless found that the plaintiff had established a prima facie case of discrimination. *See* McDonnell Douglas, 411 U.S. 792, 802 (U.S. 1973) ("In the instant case, we agree with the Court of Appeals that [plaintiff] proved a prima facie case."). The Court explained that, "while Title VII does not, without more, compel rehiring of [plaintiff], neither does it permit [defendant] to use [plaintiff's] conduct as a pretext for the sort of discrimination prohibited by § 703 (a)(1)." *Id.* at 803. Therefore, on remand, the Court ruled that the plaintiff must be given an "opportunity to show that [defendant's] stated reason for [plaintiff's] rejection was in fact pretext.… [Defendant] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *Id.* at 804. Thus, the fact that opposition conduct is unlawful does not per se preclude the establishment of a prima facie case of retaliation.

In such a scenario, the plaintiff would just need to show that the proffered impetus of the adverse employment action was a mere pretext for what was actually intentional discrimination.

However, federal courts who have dealt with the issue have seemingly ignored or overlooked this facet of *McDonnell Douglas*, concluding that illegal activity of any variety is unprotected by Section 704(a). *See, e.g.*, Mozee v. Jeffboat, Inc., 746 F.2d 365, 374 (7th Cir. Ind. 1984) ("[O]nly lawful activity is protected by § 704(a)"); Croushorn v. Board of Trustees, 518 F. Supp. 9, 25 (M.D. Tenn. 1980) ("Not all alleged 'opposition' activities are given immunity from retaliation, however. Two requirements not present in the context of the 'participation' clause must be met under the 'opposition' clause. First, the form of the 'opposition' must not be unlawful…."); Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. Cal. 1978) ("By the terms of the statute, however, not every act by an employee in opposition to racial discrimination is protected…. [T]he means of opposition chosen must be legal….").

62. R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard Into A Cognizable Framework*, 35 S. Tex. L. Rev. 95, 112 (1994).

63. 616 F.2d 221 (5th Cir. Ga. 1980).

64. *Id.* at 223.

65. To assess whether or not a plaintiff's manner of opposition goes too far, the First Circuit—in *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. Mass. 1976)—formulated a fact-specific balancing test. According to the *Hochstadt* court:

> [C]ourts have in each case to balance the purpose of the Act to protect persons engaging reasonably in activities opposing sexual discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel. Allowing an employee to invoke the protection of section 704(a) for conduct aimed at achieving purely ulterior objectives, or for conduct aimed at achieving even proper objectives through the use of improper means, could have an effect directly contrary to Congress' goal, by discouraging employers from hiring persons whom the Act is designed to protect.

Id. at 231. In conducting the assessment, the court further stated, "[t]he requirements of the job and the tolerable limits of conduct in a particular setting must be explored." *Id.*

66. Section 704(a) (mandating that the plaintiff not be discriminated against "because he has opposed any practice *made an unlawful* employment practice by this title") (emphasis added).

67. Thus, a plaintiff may be able to prevail on a retaliation claim even though a jury of his peers ultimately determines that the complained of activity was not, in fact, discrimination. "Although," one commentator points out, "it might initially seem counter-intuitive that an employer that never engaged in unlawful discrimination would nonetheless retaliate against an employee, it is actually unsurprising that an employer who did not initially discriminate might nonetheless respond negatively to an employee complaint. In fact, in the case in which an employer did nothing wrong, the employer might be that much more likely to respond negatively to an employee complaint because the employer might view the complaint as frivolous and the employee who made it as a troublemaker. Responding to such complaints requires time and energy on the part of the employer, and an employer who believes that a particular employee is likely to make a practice of filing frivolous complaints may deem it in his best interest to sever the employment relationship." Brianne J. Gorod, *Rejecting "Reasonableness": A New Look At Title VII's Anti-Retaliation Provision*, 56 Am. U. L. Rev. 1469, 1484 (2007). *But see* EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 306 (M.D. Ga. 1975) (ruling that plaintiff's opposition must be to an actual unlawful employment practice: "[w]here there is no underlying unlawful employment practice the employee has no right to make that accusation in derogation of the procedures provided by statute.").

68. *See, e.g.*, Monteiro v. Poole Silver Co., 615 F.2d 4, 10 (1st Cir. Mass. 1980).

69. *Id.*

70. *See, e.g.*, Jordan v. Alternative Res. Corp., 458 F.3d 332, 338 (4th Cir. Md. 2006) ("[W]e have…held that opposition activity is protected when it responds to an employment practice that the employee *reasonably believes* is unlawful. Because the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law") (citations omitted).

71. *See, e.g.*, Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. Ga. 1997) ("It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable."); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 707 (7th Cir. Ind. 2000) ("The plaintiff must not only have a subjective (sincere, good faith) belief that he opposed an unlawful practice; his belief must also be objectively reasonable.").

72. Keeping in mind that the participation clause does not require that the employee prejudge the validity or reasonableness of the underlying claim.

73. In Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (U.S. 2001), the Supreme Court's sole occasion in which to shed light on the question, the Court expressly declined to decide the issue.

74. In other words, the plaintiff has met the three above-mentioned prerequisites to invoking the opposition clause.

75. 480 F.3d 383 (5th Cir. La. 2007).

76. *Id.*

77. LaMaire, 480 F.3d at 385.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 386.

82. *Id.*

83. *Id.*

84. This was, presumably, outside the scope of his usual employment responsibilities. However, whether or not spraying for herbicide constituted an "adverse employment action," thereby satisfying the *second* prong of the prima facie case, was an issue the court expressly declined to decide: "LaDOTD did not move for summary judgment regarding Endres' order that LeMaire spray herbicide on the ground that it did not qualify as an adverse employment action. We, therefore, do not consider whether this activity satisfies the adverse employment action standard recently set by the Supreme Court in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006)." *Id.* at 389 n.4.

85. LaMaire, 480 F.3d at 389.

86. *Id.* (internal citations omitted) (emphasis added).

87. *Id.*

88. 214 F.3d 999 (8th Cir. Iowa 2000).

89. Ogden, 214 F.3d at 1002.

90. *Id.* at 1002-03.

91. *Id.* at 1003.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1003-04.

98. *Id.* at 1002.

99. Brief of Appellant Wax Works, Inc., Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. Iowa 2000) (No. 99-1643), 1999 WL 33651701.

100. *Id.* at 24-25 (internal quotations omitted) (internal citations omitted).

101. *Id.* at 28.

102. Brief of Appellee, Kerry D. Ogden, Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. Iowa 2000) (No. 99-1643), 1999 WL 33651703.

103. *Id.* at 29.

104. 949 F. Supp. 846 (S.D. Ga. 1996).

105. Id. at 853 ("[Plaintiff] alleges that she engaged in the protected conduct of telling her immediate supervisor…that he was harassing her. On at least two occasions, [plaintiff] claims that she told [her supervisor] that he was making her uncomfortable and that his harassment must stop. Clearly, [plaintiff] engaged *in the most basic form of protected conduct; namely, telling a harasser, who also was serving as her supervisor, to cease all forms of physical and verbal harassment*.") (internal citation omitted) (emphasis added).

106. Brief of Appellee, *supra* note 102, at 29-30.

107. *Id.* at 32.

108. Ogden, 214 F.3d at 1007 (internal citation omitted).

109. *See, e.g.*, Farfaras v. Citizens Bank & Trust of Chi., 2004 U.S. Dist. LEXIS 17612 (N.D. Ill. Aug. 24, 2004); Rashid v. Beth Isr. Med. Ctr., 1998 U.S. Dist. LEXIS 15602 (S.D.N.Y. Oct. 2, 1998); Rachel-Smith v. FTData, Inc., 247 F. Supp. 2d 734 (D. Md. 2003); Bowers v. Radiological Soc'y of N. Am., Inc., 57 F. Supp. 2d 594 (N.D. Ill. 1999); Finley v. Rodman & Renshaw, 1993 U.S. Dist. LEXIS 17308 (N.D. Ill. Dec. 7, 1993); Jones v. County of Cook, 2002 U.S. Dist. LEXIS 13075 (N.D. Ill. July 16, 2002); Del Castillo v. Pathmark Stores, 941 F. Supp. 437 (S.D.N.Y. 1996); Speer v. Rand McNally & Co., 1996 U.S. Dist. LEXIS 17071 (N.D. Ill. Nov. 14, 1996).

110. Del Castillo, 941 F. Supp. at 438-39. The basis for this assertion will be explained in greater detail *infra*.

111. Rashid, 1998 U.S. Dist. LEXIS 15602 at 6-7.

112. *See, e.g.*, Burrell v. City Univ. of New York, 894 F. Supp. 750 (S.D.N.Y. 1995); Armbruster v. Epstein, 1996 U.S. Dist. LEXIS 7459 (E.D. Pa. May 31, 1996); Little v. NBC, 210 F. Supp. 2d 330 (S.D.N.Y. 2002); Boyd v. James S. Hayes Living Health Care Agency, Inc., 671 F. Supp. 1155 (W.D. Tenn. 1987); Estes v. Ill. Dep't of Human Servs., 2007 U.S. Dist. LEXIS 11666 (N.D. Ill. Feb. 16, 2007); Laurin v. Pokoik, 2005 U.S. Dist. LEXIS 6728 (S.D.N.Y. Apr. 18, 2005); Fleming v. South Carolina Dep't of Corrections, 952 F. Supp. 283 (D.S.C. 1996); Black v. City & County of Honolulu, 112 F. Supp. 2d 1041 (D. Haw. 2000); Farrell v. Planters LifeSavers Co., 22 F. Supp. 2d 372 (D.N.J. 1998); Roberts v. County of Cook, 2004 U.S. Dist. LEXIS 8089 (N.D. Ill. May 7, 2004); Lange v. Town of Monroe, 213 F. Supp. 2d 411 (S.D.N.Y. 2002); Hoydic v. Genesco, Inc., 2008 Conn. Super. LEXIS 887 (Conn. Super. Ct. Apr. 10, 2008); McCulley v. Allstates Tech. Servs., 2005 U.S. Dist. LEXIS 41550 (S.D. Ala. June 21, 2005); Moberly v. Midcontinent Commun., 2010 U.S. Dist. LEXIS 45592 (D.S.D. May 7, 2010).

113. Roberts, 2004 U.S. Dist. LEXIS 8089 at 13-14.

114. Tangentially, and as a further support for arguments this section advances, it should be noted that remedial statutes, such as Title VII, must, according to a canon of statutory construction, be interpreted broadly. *See* Lawrence D. Rosenthal, *To Report Or Not To Report: The Case For Eliminating The Objectively Reasonable Requirement For Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1157 (2007). *See also* Bd. of County Comm'rs v. United States EEOC, 405 F.3d 840 (10th Cir. 2005) (noting that Title VII is a remedial statute and should be construed broadly); Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. N.J. 1994) (acknowledging that the anti-retaliation provision of Title VII should be broadly construed to further the goal of preventing employer retaliation). *See generally* Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53 (U.S. 2006) (noting that a limited construction of the anti-retaliation would "fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms," and that the provision should provide "exceptionally broad protection" for those who protest discriminatory employment practices).

115. Section 704(a).

116. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (U.S. 1986); *see also* EEOC.gov, *Sexual Harassment*, http://www.eeoc.gov/laws/types/sexual_harassment.cfm (last visited Aug. 3, 2010).

117. Farrell, 22 F. Supp. 2d at 392.

118. Del Castillo, 941 F. Supp. at 438-39.

119. Rashid, 1998 U.S. Dist. LEXIS 15602 at 6-7.

120. Fleming v. South Carolina Dep't of Corrections, 952 F. Supp. 283, 295 (D.S.C. 1997) (citing Katz v. Dole, 709 F.2d 251, 254 (4th Cir. Va. 1983)).

121. Meritor, 477 U.S. at 67 (internal quotations omitted).

122. Fleming, 952 F. Supp. at 295.

123. The five elements a plaintiff must prove to establish a prima facie case of quid pro quo sexual harassment are: (1) The employee belongs to a protected group; (2) The employee was subject to unwelcome sexual harassment; (3) The harassment complained of was based upon sex; (4) The employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment; and (5) Respondeat superior. *See* LARSON, *supra* note 3, at § 46.08[1][b].

124. Rashid, 1998 U.S. Dist. LEXIS 15602 at 6-7.

125. For an example of a case where a plaintiff lost his sexual harassment claim, but was successful on his retaliation claim, see Tate v. Exec. Mgmt. Servs., Inc., 546 F.3d 528 (7th Cir. Ind. 2008) ("The jury returned a verdict in Tate's favor on the retaliation claim and found against Tate on his sexual harassment claim.").

126. Fine v. Ryan Int'l Airlines, 305 F.3d 746, 752 (7th Cir. Ind. 2002).

127. *See supra*, Part IV(ii)(c), titled: *Taken In Response to an "Unlawful Employment Practice."*

128. For the plain reading of the statute, see *supra* Part VI(i), titled: *The Rationale Underlying the Eighth Circuit Approach is Intuitive*.

129. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (U.S. 1997).

130. Rubin v. United States, 449 U.S. 424, 430 (U.S. 1981) (internal quotations omitted).

131. United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 503 (U.S. 1994) (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (U.S. 1992)).

132. Griffin v. Oceanic Contractors, 458 U.S. 564, 571 (U.S. 1982).

133. *See infra* note 143.

134. Petition for Writ of Certiorari at 8, Tate v. Exec. Mgmt. Servs., Inc., 546 F.3d 528 (7th Cir. Ind. 2008) (No. 08-875), 2009 WL 75562 ("Certiorari is warranted to resolve the circuit split of whether an employee who rejects a supervisor's sexual advances has engaged in a protected activity.").

135. Tate v. Exec. Mgmt. Servs., 129 S. Ct. 1379 (U.S. 2009), *denying cert. to* Tate v. Exec. Mgmt. Servs., Inc., 546 F.3d 528 (7th Cir. Ind. 2008).
136. 129 S. Ct. 846 (U.S. 2009).
137. Crawford v. Metro. Gov't of Nashville & Davidson County, 211 Fed. Appx. 373, 374 (6th Cir. Tenn. 2006).
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 375. In specific, Crawford reported "that Hughes 'had asked to see her titties on numerous occasions,' that she would say 'Hey Dr. Hughes, [w]hat's up?' and he would 'grab his crotch and state 'you know what's up,'"…and that one time, "Hughes came into her office…grabbed her head and pulled it to his crotch." *Id.* at n.1.
142. *Id.* at 375.
143. *Id.*
144. *Id.*
145. Crawford, 129 S. Ct. at 850.
146. *Id.* (quotations omitted) (emphasis added).
147. Crawford, 129 S. Ct. at 850.
148. *Id.* at 851.
149. *Id.* (citation omitted).
150. *Id.* at 853.
151. *Id.*
152. *Id.* at 854.
153. *Id.* at 855.
154. *See* Kevin Russell, *Recap on Opinion in Crawford v. Nashville County*, Jan 26, 2009, http://www.scotusblog.com/2009/01/recap-on-opinion-in-crawford-v-nashville-county/.
155. *Id.*
156. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS (HISTORICAL), http://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm (last visited Aug. 23, 2010) (reporting that there were 10,499 claims of Title VII retaliation in 1992).
157. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Aug. 23, 2010) (reporting that there were 28,948 claims of Title VII retaliation in 2009).
158. LaMaire, 480 F.3d at 389.
159. *See supra*, Part V(ii), titled: *The Eighth Circuit Approach*.
160. Del Castillo, 941 F. Supp. at 438-39.
161. Rashid, 1998 U.S. Dist. LEXIS 15602 at 6-7.
162. Meritor, 477 U.S. at 67 (internal quotations omitted).
163. Rubin v. United States, 449 U.S. 424, 430 (U.S. 1981).
164. Griffin v. Oceanic Contractors, 458 U.S. 564, 571 (U.S. 1982).
165. Crawford, 129 S. Ct. at 850.

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