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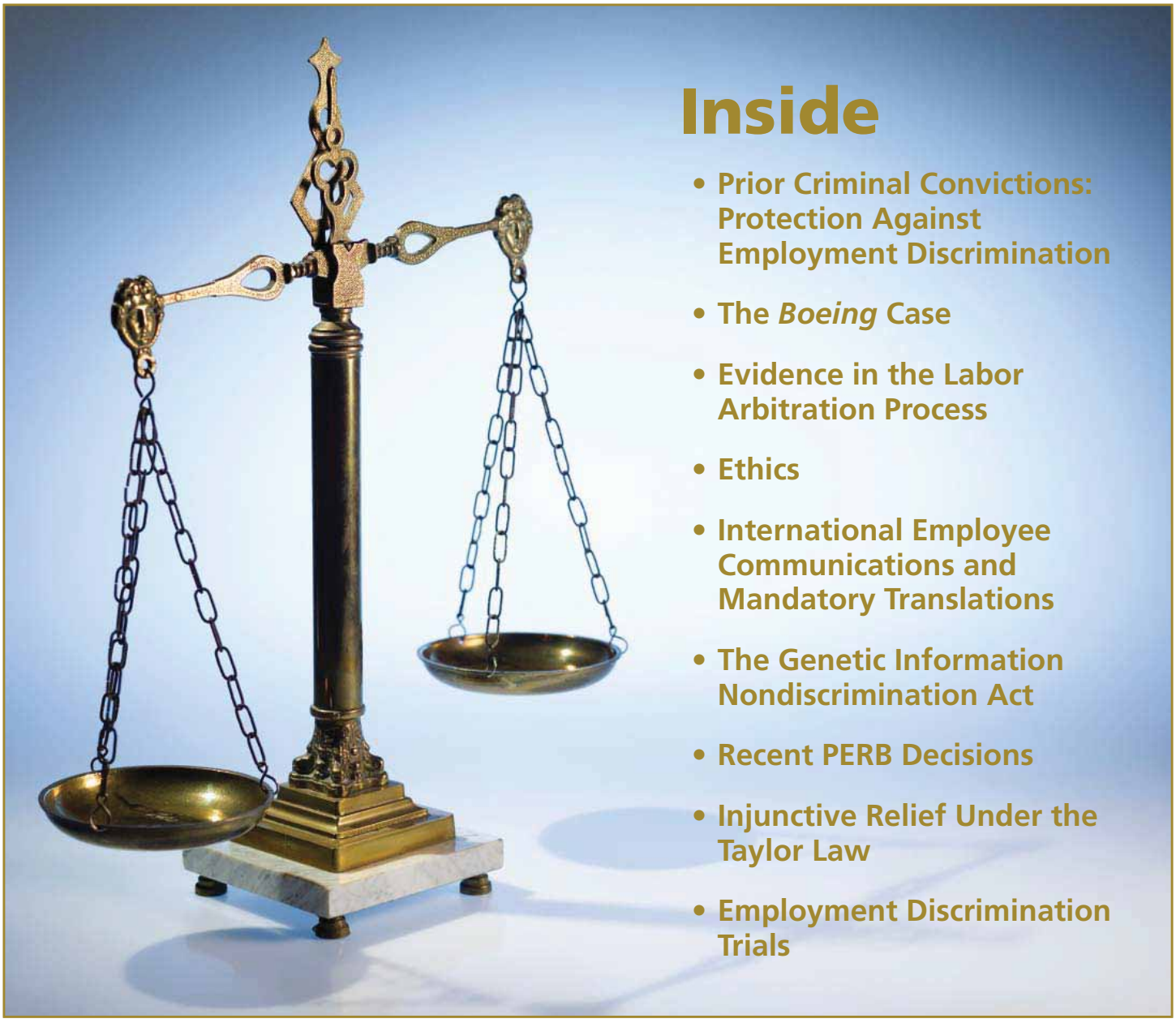

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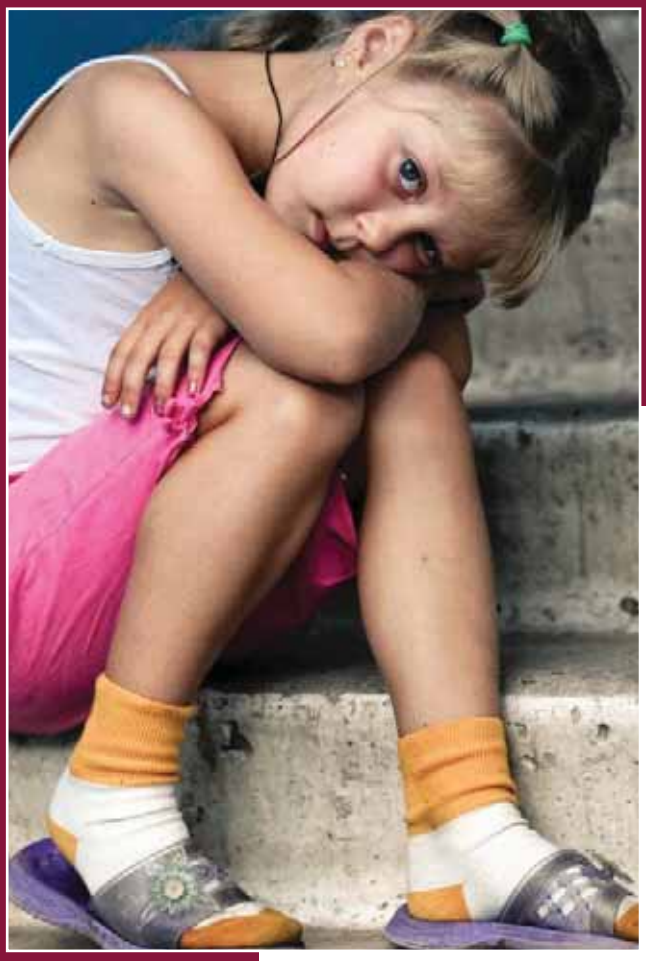

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Message from the Section Chair

A Winning Team

A new Spring is upon us, and with it Spring training and the hope of fans of 30 teams that this will be their year to shine. General managers have made trades and acquired players, managers have selected their starting lineups, and all that is left is to play the games. Proper planning is necessary to the success of any team, but is not sufficient. The team itself must play the game, execute the manager's game plan, and, if all goes well, claim victory.

Our Section's Executive Committee has worked hard over the Fall and Winter to restructure our committees and our Section's Bylaws and to put leaders in place to execute on what we believe to be an effective game plan—for both the short and long term—destined for success. If we are to be successful, we need leadership from our committee chairs and active participation by our membership in Section and committee activities. Committee meetings and CLE programs must be scheduled, dynamic speakers recruited, our diversity plans implemented, and cutting edge articles, reports, and studies issued. With the longer horizon in mind, our new Mentoring Program has been launched with approximately thirty mentees which we hope will provide the next generation of Section leadership so desperately needed if our Section is to remain strong and viable for years—even decades—to come.

Our Executive Committee (our Section's general manager and manager) has put together a strong, dynamic, and winning team with the goal of providing a more rewarding and valuable experience for our membership. You can show your support for this new and dynamic team by actively participating in committee activities and meetings and supporting our Section's many initiatives. In this way, our Section can remain the positive force for labor and employment law practitioners in New York that it has been since its creation over three decades ago and to help nurture and mentor the next generation of labor and employment law practitioners.

Alfred G. Feliu

Protection Against Employment Discrimination Based on Prior Criminal Convictions— An Overview of Correction Law Article 23-A

By Philip L. Maier

New York state law provides limited protection for those individuals claiming discrimination in employment due to a prior criminal conviction. This statutory protection can be found in Article 23-A of the Corrections Law, §750 et seq.[1] The purpose of the Act, as stated in Governor Hugh Carey's memorandum approving the legislation, is to promote the reintegration of a past offender into society and to reduce the incidence of recidivism. It applies to both public and private employers to which an individual applies for a license or application for employment.[2] The Act's policy prohibiting discrimination in hiring an employee based upon a criminal record also prohibits terminations on that same basis.[3]

The significance of this statutory protection may increase given the implementation of several early release programs resulting in a decrease in the prison population. According to the New York State Department of Correctional Services, the prison population has dropped by 19% since its peak in December 1999, and dropped nearly 8% from the beginning of 2007 through the end of 2009. While some of this reduction can be attributed to a lower crime rate, a number of newly enacted laws have resulted in the early release of mostly non-violent drug offenders.[4] Government is also under increasing financial constraints, giving an even greater incentive to find more cost effective ways of addressing criminal behavior consistent with public safety. In light of the readmission to society of those who have a criminal conviction in their background, and the possibility that this trend will continue, it is of greater importance for employers and prospective employees to be aware of the protection which is provided. This article will provide an overview of this statutory provision highlighting significant case law interpreting it.[5]

1. Article 23-A of the Corrections Law

Correction Law §752 prevents discrimination against persons convicted of one or more criminal offenses when applying for any license or employment. The two specific exceptions carved out from this protection are when there is a direct relationship between the criminal offense and the license sought, or the issuance or continuation of the license or employment would create an unreasonable risk to "the safety or welfare of specific individuals or the general public."[6] The phrase "direct relationship" is defined by the statute while there is no such definition for the phrase "unreasonable risk."[7]

Section 753 sets forth eight criteria that a public agency or private employer shall consider when making a determination pursuant to §752.[8] If a person is denied a license or employment, the agency or employer shall, upon request, provide a written statement of reasons within 30 days upon request setting forth the reasons for the denial. Section 754 provides that in the event a person challenges an action by a public agency, that action is reviewable in an action pursuant to Article 78 of the Civil Practice Law and Rules (CPLR). An action by a private employer is reviewable in a proceeding brought in the Division of Human Rights, and, concurrently, the New York City Commission on Human Rights.[9]

The Court of Appeals set forth the framework to analyze the exceptions in §752 and the interplay between that provision and §753 in *Bonacorsa v. Van Lindt*.[10] In that case, the Court of Appeals held that the New York State Racing and Wagering Board (Board) did not abuse its discretion when it denied an owner-trainer-driver license to the petitioner. Bonacorsa had been convicted of federal charges in connection with a scheme to fix horse races. Subsequent to his time served, he received a certificate of good conduct from the New York State Board of Parole. Petitioner argued that in light of this certificate, he was entitled to a presumption of rehabilitation under §753(2), which gave him a prima facie entitlement to the license. The Board argued that the denial was appropriate because there was a direct relationship between the conviction and the license sought. The Court phrased the issue as to whether the presumption of rehabilitation applies when a license is denied based upon the direct relationship exception and, if so, whether the Board retains discretion to deny the license based upon the factors in §753 (1). It answered both questions in the affirmative and found that the Board acted properly in denying the license.

The Court recognized that as a general rule, employers cannot deny a license or employment solely on the basis of ex-offender status. The Court stated, however, that an analytical distinction is employed depending upon whether the direct relationship or unreasonable risk exception is at issue. The Court reached this conclusion because the phrase "direct relationship" is defined by statute, and it stated that the eight factors do not assist in making a determination as to whether a direct relationship exists.

It agreed with the petitioner that the presumption of rehabilitation created by a certificate of good standing nevertheless applies even though the direct relationship exception was applicable.[11] The Court construed the phrase "in making a determination pursuant to section seven hundred and fifty-two" found in §753 to mean that notwithstanding a direct relationship, an employer has the discretion to determine, after reference to the eight factors, whether an employment application should be granted or a license should be issued.[12] The Court also stated that the eight factors should be considered to determine if an unreasonable risk exists and whether that exception therefore applies. In this regard, the Court therefore construed the phrase in §753, "in making a determination pursuant to section seven hundred and fifty-two," to mean a determination as to whether the unreasonable risk exception actually applies.

Under both exceptions, however, even when a presumption of rehabilitation applies, it does not create a *prima facie* entitlement to the license or position, since it is only one of the eight factors to be considered.

A. Direct Relationship Exception

In *Marra v. City of White Plains*,[13] the Appellate Division reversed and remanded to the City for a determination whether a license to operate a rooming house should be denied to an applicant who had prior criminal convictions for burglary, receiving stolen property, and attempted extortion and conspiracy. The City had denied the application on the basis, in part, of the exceptions set forth in §752. The Court rejected this conclusion, finding that the City failed to adequately consider the factors set forth in §753. The Court reviewed prior cases in which a license or employment had been denied on the basis of the existence of a "direct relationship." For example, the Court stated the direct relationship exception is satisfied when the prior offense was related to the industry or occupation at issue[14] or if the elements of the criminal offense have a direct impact on the ability to perform duties related to the license or application.[15] The Court concluded that the City did not properly weigh the factors set forth in §753, and stated there was no support for the conclusion that granting the license would constitute an unreasonable risk.

In *Al Turi Landfill, Inc. v. New York State Department of Environmental Conservation*,[16] the Court found that a decision by the Department of Environmental Conservation denying an application to expand a landfill facility was supported by substantial evidence. The Commissioner had denied the petitioner and its principals' application because of federal tax-related crimes spanning several years, finding that this demonstrated a lack of fitness which outweighed the benefit of the landfill expansion. The Court agreed with the Appellate Division that the elements of the criminal conduct—"dishonesty, lack of integrity in conducting business, and a willingness to mislead the government"—had a direct relationship to the duties and responsibilities involved with holding the license for which petitioner applied.[17] Accordingly, the judgment dismissing the petition was affirmed.

In *Matter of City of New York et al. v. New York City Civil Service Commission et al.*,[18] the Appellate Division confirmed a decision of the New York City Civil Service Commission reinstating petitioner to the position of watershed maintainer. Huggins, the petitioner, had been deemed not qualified for the position, the duties of which entailed the inspection, repair, maintenance and operation of the City's watershed areas and reservoir and aqueduct systems. He had prior convictions for attempted robbery, sexual abuse, criminal possession of a weapon, and theft of transportation services. The Court found that there was a rational basis for the Commission's decision. There was no direct relationship between the offenses and the position, nor would he present a threat to public safety.

B. Unreasonable Risk Exception

The courts have also had the opportunity to review cases involving the unreasonable risk exception. In *Matter of Arocha v. Board of Education of the City of New York*,[19] the Court found that the Board of Education's decision to deny a teaching license was not arbitrary or capricious. The petitioner, at the age of 36, had been convicted nine years earlier of selling cocaine to an undercover officer. The Court found that the Board had considered the evidence submitted by the petitioner in support of his application, and had reviewed the statutory criteria to determine whether he posed an unreasonable risk.

The Court stated that the presumption of rehabilitation which attached due to the certificate of relief from disabilities was just one of the eight factors which the Board was obligated to weigh. It was not required to rebut the presumption, but could evaluate that one factor in conjunction with the other evidence presented regarding the remaining criteria in Correction Law §753.

In *Boatman v. New York State Department of Education*,[20] the Appellate Division reversed a Supreme Court decision which granted a petition finding a violation of Correction Law §750. In that case, petitioner had an 18-year-old felony drug conviction, a 14-year-old possession of a controlled substance conviction and a 10-year-old conviction for criminal mischief. These convictions were revealed during a background check performed in connection with his application for a custodial position at school district middle school. Boatman submitted only the certificate of relief from disabilities in support of his position at the administrative hearing.

The Court reversed on the grounds that the underlying administrative decision was neither arbitrary nor capricious. The Court stated that if the determination is supported by a rational basis, it is not the Court's place

to substitute its own judgment for that of the body it reviewed.[21] The Court stated that the District could come to a rational basis in finding that the petitioner constituted an unreasonable risk due to the fact that the crimes were committed as an adult and that he would have frequent contact with children. The Court further noted that it is the petitioner's burden to establish that a clearance should have been granted, and this burden was not met.

2. Judicial Review of Employer Decisions

As demonstrated by the cases discussed above, courts will not disturb the denial of an application for a license or employment when the employer has reviewed and weighed the statutory criteria, and in the context of the public sector, when the decision is not arbitrary or capricious. In *Grafer v. New York City Civil Service Comm.*,[22] for example, the Court held that there was a rational basis to find an applicant not qualified for a firefighter position based on prior drunk driving convictions and his previous employment record.[23]

As demonstrated by a recent ruling of the Court of Appeals, however, an employer's failure to consider the criteria set forth in §753 may result in a finding that the employer violated the Act. In *Matter of Acosta v. New York City Department of Education, et al.*,[24] the Court of Appeals affirmed an Appellate Division decision and held that the Department of Education (DOE) acted arbitrarily by failing to comply with the requirements of the Correction Law when it denied Acosta's application for a security clearance. The facts presented by the Court paint a sympathetic portrait of a petitioner, who at the age of 17, was convicted of first degree robbery, and paroled after having served three years in jail. The Court concluded that, since that time, she had become "a productive and law-abiding member of society."[25] She earned a bachelor's degree, provided volunteer assistance to inmates, started a family, and held responsible positions at two separate law firms. She left her law firm position in order to spend more time with her family and held a part-time position with a not-for-profit corporation that provides educational services to the DOE. Her job duties were primarily concerned with clerical activities and she did not provide instruction to any students.

Having disclosed her prior conviction, Acosta was notified that she would be interviewed at the DOE's offices. In accordance with the advice on the letter informing her about the interview, she submitted a personal statement explaining the circumstances of her conviction and also documents demonstrating her achievements subsequent to her conviction. The DOE denied her application, finding that she posed an "unreasonable risk" to the safety and welfare of the school community due to the serious nature of her conviction. In accordance with its contract with the DOE, Acosta's employer subsequently terminated her employment since her application was denied.

The Court found that the DOE acted in an arbitrary manner since it failed to consider all the factors set forth in Corrections Law §753 when determining that Acosta constituted an unreasonable risk. This record did not show that the DOE considered the documentation submitted in support of her application. Further, the affidavit submitted by the DOE stated that as a general policy it takes a closer look at first-time applicants for security clearances for people with criminal histories who have not worked with children. The Court concluded that this policy, together with the failure to consider all the information submitted, was nothing more than a pro forma denial of her application. The exceptions under the Correction Law may only be resorted to upon a consideration of each of the factors enumerated in Corrections Law §753.[26]

The dissent argued that the Court engaged in a reweighing of the factors and disagreed with the conclusion reached by the DOE. The real difference was not the procedural irregularities pointed to by the majority, but the fact that the majority would have come to a different conclusion than the DOE. Even if the DOE did make a mistake, this does not mean that it acted in such an arbitrary manner as to annul its ruling.

Ex-offenders do have limited statutory protection allowing them to be reintegrated into society despite their prior conviction(s). The standard of review, however, affords employers and entities issuing licenses a wide degree of latitude in passing upon whether one of the exceptions to this protection applies. Employers would nevertheless be well advised to be aware of the statutory protection offered and familiar with its exceptions.

Endnotes

1. Article 23-A is entitled "Licensure And Employment of Persons Previously Convicted of One or More Criminal Offenses."
2. Section 751. The Act does not apply when there is a mandatory "forfeiture, disability or bar imposed by law.…" An action brought against a public employer shall be pursuant to the provisions of article seventy eight of the civil practice law and rules and an action commenced against a private employer shall be commenced in the division of human rights. *See* section 755.
3. *Givens v. New York City Housing Auth.*, 249 AD2d 133, 677 NYS2d 479 (1st Dept 1998).
4. These programs include Shock Incarceration, Work Release, Comprehensive Alcohol and Substance Abuse Treatment, Willard Drug Treatment, Merit Time, and Limited Time Credit Allowance programs. Additionally, the Rockefeller Drug laws were revised granting the opportunity of an earlier release to inmates. See www.docs.state.ny.us/FactSheets/PrisonClosure2011.html.
5. Notwithstanding the protections afforded by the statute, an employee may still be fired for lying on an employment application. Therefore, the termination of an employee for failure to accurately disclose a criminal record does not result in employer liability. *See Smith v. Kingsborough Psychiatric Center,* 35 AD3d 751, 828 NYS2d 419 (2d Dept 2006); *Stewart v. Civil Service Commission of New York*, 84 AD2d 491, 446 NYS2d 948 (1st Dept 1982).

6. Section 752, entitled *Unfair discrimination against persons previously convicted of one or more criminal offenses*, states:

> No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:
>
> (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
>
> (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public.

7. Section 750(3) states that "'direct relationship' means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question."
8. Those criteria are: the public policy in favor of encouraging employment of those previously convicted, the specific duties and responsibilities of the license or employment sought or held, the bearing the conviction will have on the person's fitness to perform one or more of the duties or responsibilities, the period of time which has passed since the offense(s) was committed, the person's age at the time the offense(s) was committed, the seriousness of the offense(s), any information produced in regard to the person's rehabilitation and good conduct, the legitimate interests of the agency or employer in protecting property, safety and the welfare of specific individuals and the general public. Section 753(2) also states that consideration shall be given to a certificate of disabilities or a certificate of good conduct issued to the applicant, and that such a certificate shall create a presumption of rehabilitation with regard to the offense(s).
9. *See also* Executive Law, Article 15, §297(9) which provides that any person claiming to be aggrieved by an unlawful discriminatory practice retains the right to proceed in any court of appropriate jurisdiction.
10. 71 NY2d 605 (1988).
11. Section 750(3) states that "'direct relationship' means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity or job in question."
12. *Citing Marra v. City of White Plains*, 96 AD2d 17 (1983).
13. 96 AD2d 17 (2d Dept. 1983).
14. *Matter of Schmidt & Sons v. New York State Liq. Auth.*, 73 AD2d 399, *affd*, 52 NY2d 751 (1980), (conviction for fraud in interstate beer sales warranted denial of application of liquor license); *Matter of Barton Trucking Corp v. O'Connell*, 7 NY2d 299 (1960) (conviction for extortion in a garment truck racketeering operation warranted denial of license to operate a truck in garment district). *See also Rosa v. City University of New York,* 13 AD2d 162, 789 NYS2d 4, *lv. to appeal den.*, 5 NY3d 705, 801 NYS2d 252 (1st Dept 2004), public policy not violated when arbitrator upheld termination of business law and ethics professor who was convicted of stealing money from clients.
15. *Matter of Stewart v. Civil Serv. Comm*, 84 AD2d 491 (1982) (prior convictions for assault, possession of a weapon, possession of stolen property and larceny warranted denial of employment as traffic enforcement agent).
16. 98 NY2d 758 (2002).
17. *Id*. at 761.
18. 30 AD3d 227 (2006).
19. 93 NY2d 361 (1999).
20. 72 AD3d 1467, 900 NYS2d 174 (3rd Dept 2010).
21. *Citing Arocha*, at 363, *supra*. *See also Matter of Peckham v. Calogero*, 12 NY3d 424 (2009); *Matter of Gallo v. State of NY Office of Mental Retardation & Dev. Disabilities*, 37 AD3d 984 (2007).
22. 181 AD2d 614 (1992).
23. *See also Al Turi Landfill, Inc. v. New York State Department of Environmental Conservation*, *supra; Bonacorsa v. Van Lindt*, *supra.*
24. 16 NY3d 309, 921 NY2d 633 (2011).
25. 16 NY3d 309, at 316, *supra*.
26. *See also Gallo v. State, Office of Mental Retardation and Developmental Disabilities*, 37 AD3d 984, 830 NYS2d 796 (3d Dept 2007); *Black v. New York State Office of Mental Retardation and Developmental Disabilities*, 20 Misc. 3d 581, 858 NYS2d 859 (2008.)

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The *Boeing* Case: Charting a Course Through Turbulent Issues

By Andrew I. Bart

Introduction

The National Labor Relations Board (the "Board") flew last year into the center of a partisan storm as a result of its complaint dated April 20, 2011[1] ("Complaint") filed against the Boeing Company ("Boeing" or the "Company") alleging that Boeing violated Sections (a)(1)[2] and (a)(3)[3] of the National Labor Relations Act (the "Act") due to: (1) Boeing's allegedly coercive statements that it would remove work performed by the units represented by the International Association of Machinists and Aerospace Workers Union, District Lodge 751 ("IAM") because of past strikes and that it would remove work if the units struck in the future; and (2) Boeing's decision, as a result of the past strikes, to transfer its second 787 Dreamliner assembly production line and a sourcing supply program for the line from IAM bargaining units in the Puget Sound area to Boeing's non-union site in South Carolina. The Complaint itself sought, as part of the remedy of restoring the status quo *ante*, that Boeing be ordered to relocate the second aircraft assembly production line to back to Washington State and that such production be undertaken by IAM unit employees in Washington State using the supply chains maintained by the units.

The ensuing turbulence resulting from the Board's decision was intense. The U.S. House of Representatives even passed a bill (the "Protecting Jobs from Government Interference Act") in September 2011 amending Section 10(c) of the Act to prevent the Board from ordering an "employer…to restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding the location, entity, or employer who shall be engaged in production or other business operations, or to require any employer to make an initial or additional investment at a particular plan, facility or location."[4] Representative John Kline, the chairman of the House Education and Workforce Committee, pointedly commented that the bill "tells jobs creators they don't have to worry about an activist N.L.R.B. telling them where they can locate their businesses."[5]

In December 2011, the Board withdrew the politically charged Complaint (at IAM's request) as Boeing and IAM had reached a deal on a contract extension[6]; as part of the new four-year contract, Boeing, among other things, planned to increase output by 60 percent and promised to build a revamped 737 jet at a factory near Seattle while the employees agreed to pay more of their health costs.[7]

Yet, although the *Boeing* case is now closed, the crucial issues raised therein remain unsettled and are bound to arise in the future. In these tough economic times, where does the Board draw the line between an employer's legitimate business decision to relocate and/or close down a line of work or facility due to economic factors and one that is undertaken as retaliation for past or future labor actions and, as thus, is a clear violation of the Act? What about an employer's ability to be able to express legitimate economic concerns to its employees without concern that such statements will be interpreted as threats and thus constitute a violation of the Act? For more than 70 years, there have been no clear-cut answers to these questions.

"In these tough economic times, where does the Board draw the line between an employer's legitimate business decision to relocate and/or close down a line of work or facility due to economic factors and one that is undertaken as retaliation for past or future labor actions and, as thus, is a clear violation of the Act?"

To truly understand the import of the *Boeing* case and the issues raised therein, one must examine the specific arguments made by the Acting General Counsel and by Boeing's counsel, Board precedent regarding those issues, and the reasoning behind the administrative law judge's decision, in the *Boeing* case, to dismiss Boeing's motion to strike the Complaint.

Section 8(a)(1): Lawful Statements of Objective Fact vs. Coercive Statements

A. The *Boeing* Case: Allegations Regarding Coercive Statements/Boeing's Motion to Dismiss

1. Board Allegations Regarding Coercive Statements

In the Boeing matter, the Board alleged that the Company "made coercive statements to its employees that it would remove or had removed work…because employees had struck and [Boeing] threatened or impliedly threatened that the Unit would lose work in the event of future strikes" and thus violated Section 8(a)(1) of the Act. *See*, Complaint, p. 4. The allegedly coercive statements consisted of the following:

- On October 21, 2009, Boeing's President, Chairman, and CEO made extended statements in a quarterly earnings conference that he wanted to diversify the Boeing labor pool and labor relationship and about moving work to South Carolina due to "strikes happening every three to four years in Puget Sound";
- On October 28, 2009, Boeing informed employees that its decision to relocate the second line in South Carolina was made in order to reduce its "vulnerability to delivery disruptions caused by work stoppages";
- On December 7, 2009 Boeing management, in a *Seattle Times* article, attributed the "production decision to use a 'dual-sourcing' system and to contract with separate suppliers for the South Carolina line to past Unit strikes";
- On December 8, 2009, a Boeing executive, in a *Puget Sound Business Journal* article, attributed the "production decision to use a 'dual-sourcing' system and to contract with separate suppliers for the South Carolina line to past Unit strikes"; and
- On March 2, 2010, a Boeing executive, in a video-taped interview with a *Seattle Times* reporter, stated that the relocation was due to "past Unit strikes, and threatened the loss of future work opportunities because of such strikes."

See, Complaint at pp. 4-5.

2. Boeing's Motion to Dismiss

Boeing moved to dismiss the Complaint for failure to state a claim or, in the alternative, to strike the remedy contained therein ("Motion"). Boeing argued that "[t]he statements are plainly lawful. They accurately recite the factors that Boeing was considering (in the case of the October 21, 2009 earnings call) or had considered (in the case of the other four statements) in deciding where to locate its second 787 assembly line, including the company's pressing need for production continuity in Everett [Washington]. The complaint conjures a violation of Section 8(a)(1) only by flagrantly misquoting and mischaracterizing the statements." *See*, Motion, p. 14.

B. What Constitutes Lawful Employer Speech

In evaluating statements that allegedly violate Section 8(a)(1), the Board applies the "objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or the success or failure of such coercion." *Dorsey Trailers Inc. Northumberland, PA Plant*,[8] *citing Joy Recovery Technology Corp*.[9]

The Supreme Court set forth the standard for protected employer speech under the Act in *NLRB v. Gissel Packing Corp.*[10] by holding that:

> An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization…If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

The Board has found that employers may lawfully relate concerns raised by customers. *Curwood, Inc*.[11] Employers may refer to the possibility that unionization may lead to strikes that could harm consumer relationships as opposed to merely predicting "unavoidable consequences" as a result of such unionization. *Miller Industries Towing Equipment, Inc*.[12] In *Miller Industries Towing Equipment, Inc*., the Board reversed the administrative law judge's finding that statements by corporate executives violated Section 8(a)(1) of the Act by unlawfully threatening that unionization would result in employee layoffs. Specifically, the Board found that one executive's statements did not constitute a threat that unionization would lead to layoffs as "general references to 'possibilities' are inadequate…[t]he statements do not detail how or why the Union would force [the employer] to lay off employees… the [relied-upon] testimony…lacks any semblance of detail that would provide a reliable basis for concluding that [the executive] was making a threat."[13]

The Board found that other executive's remarks to employees, made the day before the scheduled union election, "merely communicated certain objective facts

and, devoid of threats or promises, offered his assessment on the possible impact of unionization on [the employer's] situation."[14] Of import was the finding that the chief executive officer "did not predict unavoidable consequences [from unionization] but offered his perspective that unionization could have some effect on [the employer's] business condition based on the conduct of its competitors."[15] The company's chief executive officer conveyed the following to the employees:

- He described the employer's condition and cited declining sales figures and the financial losses in the prior two years;
- He observed that two union competitors had gone bankrupt and that its current competitors were nonunion;
- He believed that competitors might use the unionization to a competitive advantage;
- He "voiced concern" about the possibility of a strike and that an interruption in business caused by a strike could harm customer relationships; and
- He told them that the union "could not help, and could even hurt, the [employer's] economic situation."[16]

The Board, simply put, "did not impute an unlawful threat in [the chief executive officer's] honest recounting of events beyond [the employer's] control…employees would reasonably understand that [he] was talking about the possible economic consequences of unionization, not a threatened retaliation for unionization."[17] *See also General Electric Co. v. NLRB*[18] (Employer's predictions that employees would lose holiday and vacation pay if they voted for the union was based on objective fact as national union agreement provided fewer holidays and was silent on vacation pay and was not an unfair labor practice. Prediction that unionization would lead to risk of strikes which would drive away customers was based on "objective factors" and was not an unfair labor practice); *Action Mining, Inc*.[19] (Board reversed administrative law judge's finding of a Section 8(a)(1) violation as, among other things, a letter from management to a company's employees "did not constitute a threat of retaliatory plan closure should employees choose the Union. Rather, it was part of an objective, fact-based expression of potential consequences of unionization beyond [the company's] control.")

C. Coercive Statements That Violate Section 8(a)(1)

However, the Board has repeatedly held that an employer violates Section 8(a)(1) by threatening to withhold work opportunities due to employees' exercise of their Section 7 rights. *Dorsey Trailers, Inc*.[20] (Supervisor's remarks that plant would close if workers went on strike violated Section 8(a)(1) as they were "not carefully phrased on the basis of objective fact conveying the employer's belief as to demonstratively probable consequences beyond its control."); *Kroger Co*.[21] (Employer's plan to put new facility on hold pending unionization violated Section 8(a)(1).)

In *Kroger Co*., the Board specifically found that a supervisor "simply placed blame for the freezer being put on hold on union unrest, friction, and labor disputes. [The supervisor] expressed clear and unequivocal anger, telling employees he was 'pissed,' and that if employees did not like working for [the company], they should quit...[w]hile [the] comments to employees did not expressly threaten loss of jobs…they were both intended to be, and were, threatening and coercive to employees in violation of Section 8(a)(1) of the Act."[22]

It should be noted, moreover, that the Board has found that employer predictions of strike disruptions or customer loss without any factual basis constitute unlawful threats that violate Section 8(a)(1). *Tawas Indus*.[23] (Plant manager offered "no objective basis for his prediction that other employers, fearing strikes, would not give their business to [the employer] if the employees voted to affiliate with the UAW. [He] offered no documentation for his statement. He identified no companies that had withdrawn business from UAW-organized firms or that would withdraw business from [the employer] if [the local] affiliated with the UAW."). *See also Laidlaw Transit, Inc*.[24] (Memo to employees violated Section 8(a)(1) as, among other things, its assertion that the company would lose a contract if they selected the union was not supported by objective facts set forth in the memo nor was there any evidence that any meetings thereafter discussed any objective facts to support the company's assertion.)

D. Boeing's Motion to Dismiss Denied: Section 8(a)(1) Claims

Boeing's motion was dismissed in its entirety on June 30, 2011 ("Decision"). With regard to the Section 8(a)(1) claims, Administrative Law Judge Clifford H. Anderson ("ALJ") held that "at this pre-evidentiary stage of the proceedings the Respondent [Boeing] has not established that the General Counsel cannot sustain any or all of the complaint allegations of 8(a)(1) violations of the Act." *See*, Decision, p. 17. Specifically, the ALJ found that no factual record had been established and "the context and circumstances applicable to the employees who heard/learned of the communications had] not been addressed." Decision, p. 8. He found that the "objective" test of impact of statements on employees requires a specific factual context; at that point, however, there was "no evidence whatsoever of the employees' state of affairs…or [of] the employees' knowledge of the issues underlying the 787 Dreamliner assembly line at relevant times." Decision, pp. 8-9.

Section 8(a)(3): Does the Transfer of Work Constitute an Unfair Labor Practice?

A. The *Boeing* Case: Allegations Regarding Transfer of Work/Boeing's Motion to Dismiss

1. Board Allegations Regarding Removal of Union Work

In the Boeing matter, the Board alleged that the company "made coercive statements to its employees that it would remove or had removed work…because employees had struck and [Boeing] threatened or impliedly threatened that the Unit would lose work in the event of future strikes" and thus violated Section 8(a)(3) of the Act. *See*, Complaint, p. 4. According to the Board, the alleged acts that constituted Section 8(a)(3) violations consisted of, among other things, the following:

- In October 2009, Boeing decided to transfer its second 787 Dreamliner production line of 3 planes per month to its non-union site in North Charleston, South Carolina and to transfer a sourcing supply program for its 787 Dreamliner production line from the Unit to its non-union facility in North Charleston, South Carolina, or to subcontractors.
- Boeing allegedly engaged in the decision to transfer both the production line and the sourcing supply program "because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities."
- Boeing's conduct in transferring the work was "inherently destructive" of the rights guaranteed employees under Section 7 of the Act.

See, Complaint, pp. 5-7.

2. Boeing's Motion to Dismiss

Boeing's argument to dismiss the Section 8(a)(3) allegations was:

- No violation of Section 8(a)(3) occurred because there was no allegation that an existing employee in Washington suffered an adverse employment action as a result of Boeing's decision to establish the new assembly line in South Carolina. Specifically it argued that "none of the [required] indicia of a change in …employees' terms and conditions of employment are present here: They have not been laid off, demoted, relocated, suffered a reduction in wages, benefits or work hours, or had their job duties changed as a result of the decision";
- Assuming *arguendo* that there was an adverse employment action, Boeing's actions were not motivated by anti-union animus. Essentially, the right to expand the 787 production and to place said work in another state was contemplated by the collective bargaining agreement and thus was not "inherently destructive" of collective bargaining rights because Boeing was merely exercising its bargained-for right under the collective bargaining agreement; and
- No Boeing statement contained any express/implied intent to discourage union membership or oppose collective bargaining—the statements were "replete" with praise for the IAM. The statements merely demonstrated that Boeing relocated its second assembly line "to help it weather any future disruption of production on the first 787 line…"

See, Motion, pp. 18-25.

B. Actions That Do Not Violate Section 8(a)(3)

The two-part test to determine whether an action violates Section 8(a)(3) is: (1) whether an employee's employment conditions were adversely affected; and (2) whether the adverse employment action was motivated by the employee's union or protected activities. *Wright Line*.[25] Assuming *arguendo* that an adverse employment action is undertaken, it must be shown to be: (1) inherently destructive of protected activity or (2) motivated by anti-union animus. *NLRB v. Great Dane Trailers, Inc*.[26] Thus, Section 8(a)(3) is not violated by "a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership." *Am. Ship Building Co. v. NLRB*.[27] The following employer actions were found not to have violated Section 8(a)(3):

- *Crane Company*:[28] Employer's shift of manufacture of furnace parts from one plant (whose workers were on strike) to another plant was not a violation of Section 8(a)(3) as, among other things, it was a change of a permanent nature

and was made for economic reasons to maintain operations during the strike;

- *Roman Cleanser Company*:[29] Employer did not violate Section 8(a)(3) by closing its Georgia plant (days after receiving notice from the union that it represented a majority of employees), discharging employees, and removing operations previously performed at that location to its North Carolina plant because the decision was made prior to the organization drive and was based solely on economic considerations. Specifically, the employer's president testified that, among other things, the employer made the decision more than a year before the union campaign and that "substantial savings" could be made by transferring the bottle-making operation to its North Carolina plant;

- *Texaco, Inc.*:[30] Suspension and discharge of picketing employees who, among other things, threw firecrackers and placed nails on the employer's driveway, did not violate Section 8(a)(3).

C. Employer's Removal of Work Found to Violate Section 8(a)(3)

The Board has held that a company's decision to relocate work or change its established policy may violate Section 8(a)(3) even though there has been no immediate impact on the employees and no actual financial loss. *Pittsburg & Midway Coal Mining Co*.[31] (Employer found to have violated Section 8(a)(3) by modifying its bonus policy so that any worker who engaged in a work stoppage would forfeit his or her bonus for the year even though "the Union did not thereafter call a [local work stoppage] and employees did not suffer the consequent loss of bonus payments…"); *Adair Standish Corp*.[32]; *see also Ford Motor Co*.[33] (Actual monetary loss is not a pre-requisite to establish a Section 8(a)(3) violation.)

In *Adair Standish Corp*.,[34] the Board held that the employer violated Section 8(a)(3) when it cancelled the delivery of a new printing press to one plant and redirected the press to another location due to the union activity despite that fact that the press had never been at the plant and, therefore, no work that had previously been at the plant had been lost.[35] The administrative law judge found that the following "turn of event smacks of a motivation tainted by organizational considerations" and did not believe that the change was made for "economic considerations." To wit:

- In March 1985, the employer purchased a high-powered press it intended to install in its plant to replace an older and slower press. Delivery was scheduled for July 1985;

- Union organizing began at the plant in June 1985 and the union won the election in September 1985; and

- In May 1986, the press was installed in another plant.[36]

The administrative law judge thus ordered that the press be moved back to the original planned location—an order which "put into effect what would have been the status quo ante, but for the discriminatory act of the [employer]."[37]

D. The ALJ Decision's in Regard to 8(a)(3)

The ALJ denied Boeing's motion to dismiss the 8(a)(3) allegations as he found that if a "work producing improvement such as...[an] expansion of assembly line [sic] is forgone or transferred away from the facility so that its benefit never arrives, in appropriate circumstances a violation…may be found." Thus, he rejected Boeing's argument that Section 8(a)(3) could not have been violated as a matter of law since only new or additional work was being denied to as yet unhired employees. *See*, Decision, p. 13. He also rejected Boeing's argument that its transfer of the work to the non-union facility in South Carolina could not be inherently destructive of employee rights under Section 7 of the Act; he agreed with the Board's position that—at the pre-evidentiary stage—the collective bargaining agreement does not limit the complaint. He stated that "[a] contract clause allowing an employer to locate work as it sees fit does not authorize that employer to do so for a reason prohibited by the Act." *See*, Decision, pp. 13-14.

Section 10(c): What Is the Appropriate Remedy for the Board to Pursue?

A. The *Boeing* Case

1. The Board's Sought Remedy

In *Boeing*, the Board sought the following remedy for the alleged unfair labor practices committed:

> (a) As part of the remedy…the [Board] seeks an Order requiring [Boeing] to have the Unit operate its second line of 787 Dreamliner aircraft assembly production in…Washington, utilizing supply lines maintained by the Unit in the Seattle…and Portland… area facilities.

(b) Other than…set forth…above, the relief requested…does not seek to prohibit [Boeing] from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its…South Carolina, facility.

See, Complaint, at pp. 7-8.

2. Boeing's Argument: Remedy Was Not a Return to Status Quo Ante and Was Unduly Burdensome

In its motion to strike the Complaint, Boeing argued, among other things, that:

- The Board's remedy was to order a return to the status quo *ante*. Assuming *arguendo* that Boeing had "transferred" work to its South Carolina plant, the appropriate remedy would be for it to re-hire and restore the terms and conditions of employment to those employees affected by the "transfer." By seeking an order that Boeing "operate" the assembly line in Washington, the Board was not seeking a return to the status quo as the second assembly line never existed in Washington and thus no work has been lost and no current employees had been harmed by the company's decision not to expand in Washington. The remedy was "untethered" to the restoration of the hire, pay or terms and conditions of the employment of any individual employee (Motion, p. 25); and
- The sought remedy was unduly burdensome as it "would impose immense economic burdens on Boeing; it would compromise a billion-dollar investment in South Carolina; it would require Boeing to invest many millions more to expand production capacity in [Washington], and it would disrupt Boeing's global supply chain and almost certainly disrupt deliveries to customers…In financial terms it is doubtless the most burdensome remedy ever requested in an NLRB proceeding…[t]he net effect an injunction requiring Boeing to move the second-line work to [Washington] would be to idle the Charleston facility, with obvious implications for the employees now working there (Motion, p. 26).

B. Section 10(c): Standard for Appropriate Remedy

Section 10(c) of the Act states in part that:

> If…the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board… shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.

The leading Supreme Court case in regard to the deference that courts must accord to the Board's ability to fashion an appropriate remedy is set forth in *Fibreboard Paper Products v. NLRB*.[38] The Supreme Court held, in relevant part, that Section 10(c):

> [C]harges the Board with the task of devising remedies to effectuate the policies of the Act.' *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence…." *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. Labor Board*, 319 U.S. 533, 540.

Thus, Board orders seeking to remedy an unfair labor practice must be remedial and a return to the status quo *ante*. *Phelps Dodge Corp v. NLRB*.[39] A common remedy in a Section 8(a)(3) case, for example, is to order laid-off employees to be reinstated with back pay. *See*, *e.g.*, *Lear Siegler, Inc*.[40] However, the return to the status quo *ante* cannot be "unduly burdensome" to the employer.[41]

C. ALJ's Decision Regarding the Remedy Issue

The ALJ denied Boeing's motion to strike the Board's remedy because, as the determination of an appropriate remedy is "highly fact intensive," it would thus be "particularly inappropriate" for him to limit or prohibit at the pre-evidentiary stage the "litigation of particular

remedies sought by parties for particular violations of the Act." He also found that "there is no…support in rule or decision for the proposition that an administrative law judge at the pre-evidentiary stage…should eliminate any party's right to seek particular relief for the violations of the Act alleged in the complaint." *See*, Decision, p. 17.

Conclusion

Although the Boeing case has now been closed, there is no doubt that the issues contained therein will arise in the future. An employer's decision to remove or relocate work to non-unionized facilities or to right-to-work states will ultimately involve the questions that were raised but ultimately not answered in the Boeing case. Employers will thus have to chart their own course through what might be some turbulent times.

Endnotes

1. *Boeing Company v. International Association of Machinists and Aerospace Workers* (Case 19-CA-32431).
2. Section 8(a)(1) of the Act provides, in relevant part, that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 rights are, in turn, defined as follows: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…"
3. Section 8(a)(3) of the Act provides, in relevant part, that "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…"
4. H.R 2587. The proposed amendment to Section 10(c) is made retroactive; it thus applies to any "complaint for which a final adjudication by the…Board…has not been made by the date of this Act." *See*, H.R. 2587.
5. Steven Greenhouse, "In Boeing Case, House Passes Bill Restricting Labor Board," *New York Times*, September 15, 2011, http://www.nytimes.com/2011/09/16/business/house-approves-bill-restricting-nlrb.html.
6. Steven Greenhouse, "Labor Board Drops Case Against Boeing," *New York Times*, December 9, 2011, http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html.
7. "Union Seeks to Dismiss Complaint Against Boeing," *New York Times*, December 8, 2011, http://www.nytimes.com/2011/12/09/business/boeing-machinsts-union-in-seattle-approves-new-contract.html.
8. 327 NLRB 835, 851 (1999).
9. 320 NLRB 356, 365 (1995).
10. 395 U.S. 575, 618 (1969).
11. 339 NLRB 1137, 1138 (2003).
12. 342 NLRB 1074, 1075-76 (2004).
13. 342 NLRB 1074, 1075 (2004).
14. 342 NLRB 1074, 1076 (2004).
15. *Id*.
16. *Id.*
17. *Id*.
18. 117 F.3d 627, 632-634 (D.C. Cir. 1997).
19. 318 NLRB 652, 656-57 (1995).
20. 327 NLRB 835, 851 (1999), *enfd. in pertinent part*, 233 F.3d 831 (4th Cir. 2000).
21. 311 NLRB 1187, 2000. (1993), *aff.*, 50 F.3d 1037 (11th Cir. 1995).
22. *Id.*
23. 336 NLRB 318, 321 (2001).
24. 297 NLRB 742, 744-45 (1990).
25. 251 NLRB 1083 (1980).
26. 388 U.S. 26, 33-34 (1967).
27. 380 U.S. 300, 311 (1965).
28. 165 NLRB 570, 574-75 (1967).
29. 188 NLRB 931, 931-32 (1971).
30. 279 NLRB 1259 (1986).
31. 355 NLRB No. 197, 5 (2010).
32. 290 NLRB 317, 318-19 (1988), *enfd. in pert. part*, 912 F.2d 854 (6th Cir. 1990).
33. 131 NLRB 1462, 1487 (1962).
34. 290 NLRB 317, 318-319 (1988), *enfd. in pert. part*, 912 F.2d 854 (6th Cir. 1990).
35. *Id*.
36. *Id*.
37. 290 NLRB 317, 319 at fn. 10.
38. 379 U.S. 203, 216 (1964).
39. 313 U.S. 177, 194 (1941).
40. 295 NLRB 857, 860 (1989).
41. 295 NLRB at 861.

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Evidence in the Labor Arbitration Process

By Jeffrey T. Zaino

Both sides in labor-management disputes often share a common goal—the desire to continue to enjoy a harmonious and profitable relationship post-dispute. This makes arbitration, with its focus on informality, speed, economy, and justice, an ideal process for resolving labor disputes.

While not often recognized, another major benefit of the arbitration process in these types of proceedings has to do with elasticity when it comes to rules of evidence. Most labor arbitrators are not bound by classic legal rules of evidence. There is no need for strict evidentiary rules to protect the parties because the process is private. The few exceptions that do exist involve statutory claims (e.g., discrimination claims) or agreements between the parties to apply these types of rules.

"[A]rbitration, with its focus on informality, speed, economy, and justice, [is] an ideal process for resolving labor disputes."

Flexibility regarding the rules of evidence can be an obvious benefit. Nevertheless, it makes questions regarding how an arbitrator should assess the weight and credibility of evidence, as well as the scope of evidence, all that much more critical.

The arbitrator's primary role is to determine the facts of the case and to render a decision. The *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, which outlines the standards of professional behavior expected of labor arbitrators, contains Part 5 (A) on evidence:

> **5. Hearing Conduct**
>
> **A. General Principles**
>
> **1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.**
>
> a. Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.
>
> b. An arbitrator may: encourage stipulations of fact; restate the substance of issues or arguments to promote or verify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.
>
> c. An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.

The *American Arbitration Association (AAA) Labor Arbitration Rules* also contain the following two Rules on evidence:

> **28. Evidence and Filing of Documents**
>
> The parties may offer such evidence as is relevant and material to the dispute, and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party. The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties except where any of the parties is absent in default or has waived the right to be present.
>
> All documents that are not filed with the arbitrator at the hearing, but arranged at the hearing or subsequently by agreement of the parties to be submitted, shall be filed with the AAA for transmission to the arbitrator or transmitted to the arbitrator directly if the parties agree. All parties shall be afforded the opportunity to examine such documents.
>
> Documents may be filed by regular or electronic mail or telephone facsimile, and will be deemed timely if postmarked or otherwise transmitted to the arbitrator or the AAA on or before the due date.
>
> **29. Evidence by Affidavit**
>
> The arbitrator may receive and consider the evidence of witnesses by affidavit,

> giving it only such weight as seems proper after consideration of any objection made to its admission.

Arbitrators are permitted to hear all evidence that the parties believe is pertinent to the dispute and an award could potentially be vacated on the basis that the arbitrator refuses to hear all relevant evidence. Section 10 (A) (3) of the Federal Arbitration Act states that courts may review arbitration awards if the arbitrator refuses "to hear evidence pertinent and material to the controversy.…" However, only a small percentage of awards are actually vacated on that basis. In a 2008 study of 573 random labor and employment arbitration cases in which a court decided a motion to vacate, there were only 11.9 motions to vacate based upon the allegation that the arbitrator failed to hear relevant evidence. Out of the 11.9 cases, 6.7 were vacated.[1]

It can be problematic, however, if the parties overcompensate and introduce too much or extensive amounts of evidence. This goes contrary to the basic tenets of the process and most in the profession understand the acceptable parameters with respect to introducing evidence. Also, to manage and properly control the flow of evidence, the arbitrator does have the authority to rule during a hearing or in the award against the propriety of specific evidence, and the threat of an award being vacated solely on the basis of evidence exclusion is minimal.

Absent a statutory requirement or party agreement, an arbitrator cannot subpoena a witness nor compel the testimony of a witness in a labor arbitration case. It should be noted, however, that the arbitration process is voluntary and the parties typically furnish what is requested by the arbitrator.

Weight and Credibility

The arbitrator is responsible for assigning weight to specific pieces of evidence and for determining the extent to which he or she believes a particular witness. Through education, training and experience, an arbitrator is well-suited to assess the weight and credibility of evidence. In making such decisions, an arbitrator typically relies on the following six (6) factors: whether or not statements "ring true"; conduct of witness on stand; whether witness speaks from firsthand knowledge or hearsay; the witnesses' experience in the matter on which he or she is testifying; inconsistencies in the testimony; and past record or personality of the witness.[2]

No one factor alone, but rather all of them taken together, will influence the weight and credibility an arbitrator attributes to evidence or witness testimony. It is common practice for arbitrators to note that they will receive any evidence "for what is worth."

Procedural Protections

Although almost all kinds of evidence are admissible in most labor arbitration proceedings, regardless of the ultimate weight attached to them by the arbitrator, some types of evidence are either inadmissible or the use should be accompanied by specific protections. In addition, there are practices which by common law rules or practices must be observed in arbitration to ensure a just proceeding. The following are some examples reprinted from an AAA Arbitration Case Preparation and Presentation manual:

> **Right to cross-examination**
> An arbitrator will not accept evidence if it is submitted only on condition that the other party not be allowed to see it. The parties not only have the right to see all evidence presented to the arbitrator but also to cross-examine witnesses making allegations. New information in post-hearing briefs can be grounds for demanding another hearing. There are certain exceptions to this general privilege, such as in the admission of hearsay evidence or affidavits from persons unable to attend the hearing. This deviation, however, from the normal procedure may frequently result in the disregarding of this evidence by the arbitrator or the assignment of a lesser weight to it.
>
> **Withholding evidence until hearing**
> In order to prepare an adequate defense or rebuttal, parties should be allowed access to all exhibits. There is also a firmly established custom prohibiting the withholding of previously known evidence until the hearing. At the very least, the opposing party may claim time to sufficiently consider such new evidence. In some cases, deliberate delay in withholding evidence can seriously damage the case of the party doing so. Sometimes the contract states that the parties must disclose during grievance negotiations any evidence available to them at that time. The only exception generally recognized is the instance of evidence only recently obtained by one of the parties and/or not previously known.
>
> **Improperly obtained evidence**
> Evidence obtained by illegal or unethical means, such as unauthorized searches or entrapment, may be refused by the arbitrator.

Offers of compromise
Offers to compromise during negotiations or in the early stages of the grievance procedure are not likely to be received by the arbitrator. If an offer to compromise is received by the arbitrator, it should be given little weight since they represent normal and desirable efforts to reach a settlement.

Outside testimony
Some cases are aided by the testimony of an outside witness. Arbitrators may try to restrict testimony of outside witnesses or obtain an agreement between the parties to the appearance of an outside witness. Testimony by doctors or other experts might be critical in some cases.

Inspection by arbitrator
The arbitrator may make personal investigation of a workplace or setting to get a better understanding of the case. This can be accomplished with the consent of both parties. The Code provides guidance to both arbitrators and advocates. Part 5 D explains that an arbitrator "should comply with a request of any party that the arbitrator visit a work area pertinent to the dispute prior to, during, or after a hearing. An arbitrator may also initiate such a request." Such plant visits should occur with safeguards to avoid any ex parte communication between the party and arbitrator.[3]

The labor arbitration process has evolved and it is far more adjudicatory than it was eighty-five years ago. This could be attributed to the influx of attorneys in the process, both the advocates and arbitrators. Nevertheless, most labor-management attorneys agree that strict adherence to formal evidentiary rules goes contrary to the fundamental objectives of the labor arbitration process, the objectives to have a just process that is both efficient and economical. Statutory requirements or mutual agreements by the parties to apply strict legal rules of evidence in a labor arbitration proceeding should remain the exception.

Endnotes

1. Michael Jedel, Helen Lavan, and Robert Perkovich, "An Analysis of Factors Present in Challenged and Vacated Labor and Employment Arbitration Awards," *Dispute Resolution Journal* 40 (November 2008-January 2009).
2. American Arbitration Association, "AAA Arbitration Case Preparation and Presentation for Labor-Management Professionals Manual," Tab 4 July 1997.
3. *Id* at Tab 4.

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Ethics Matters

By John Gaal

Q I am a lawyer who was recently terminated from my in-house position. I am pursuing a claim against my former employer, in which I am representing myself. In pursuing that claim, I would like to contact one of my former co-workers in the General Counsel's office who I think has useful information. While I know that my former employer is "represented" in connection with my claim, I seem to recall that notwithstanding the limitations placed on lawyers under the Rules of Professional Conduct prohibiting contact with a represented party, those Rules do not apply to clients—in other words, the actual parties to litigation may deal directly with one another. Since I am a "party" in connection with my claim, am I correct in assuming that I may engage in this direct communication?

A No, you are not correct. Rule 4.2 of New York's Rules of Professional Conduct provides:

> (a) In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

You are correct that this Rule is aimed at "lawyer" conduct and generally does not preclude direct communication between even adverse represented parties. As a result, a lawyer's client is usually able to freely reach out to a represented party without having to seek the consent of that other party's lawyer. See Rule 4.2(a), cmt. 11 ("Persons represented in a matter may communicate directly with each other.") (Moreover, under Rule 4.2(b), a lawyer for one party may cause this type of direct "client to client" communication with another represented party provided certain steps are taken. And where the client initiates the idea of direct communication, so that it is not "caused" by the client's lawyer, the lawyer may assist his client in that effort without taking the steps outlined in Rule 4.2(b). See New York City Bar Formal Opinion 2002-3).

In your case, however, you are both the client and the lawyer representing that client. Leaving aside the wisdom of being in that position, it would seem clear that in these circumstances any attempt by you to directly communicate with another represented party, without going through that other party's lawyer, falls within Rule 4.2(a)'s language: "In representing a client, a lawyer shall not communicate…with a person the lawyer knows to be represented…."

The New York State Bar Association's Committee on Professional Ethics, in Formal Opinion 879 (2011), recently reached this same conclusion, finding that Rule 4.2(a) applies to a lawyer acting in a pro se capacity. This Opinion traced the legislative history of this Rule, and its predecessors, and in reliance on this history and interpretations of predecessor versions of Rule 4.2(a), concluded:

> [T]he usual rights of nonlawyer parties to engage in direct communications are outweighed by the lawyer's professional obligations to the system of justice and the goal of protecting represented parties. Our view reflects the fact that lawyers, by virtue of their professional status, have a unique responsibility to the system of justice that requires them to subordinate their personal interest in having direct communications with represented individuals unless the exacting conditions stated in Rule 4.2 are satisfied.

The Committee noted that virtually all authorities who have considered this issue in the pro se context have reached the same conclusion.

The Committee, however, went further and determined that its "no contact" conclusion applies not only where a lawyer is acting pro se, but also in cases where the lawyer is represented by another lawyer. In other words, even where you appear solely as a "party" and are not "representing a client" (yourself), this Opinion concludes that the prohibition of Rule 4.2 applies and you may not engage in direct communications with a represented person. Although going beyond the literal proscription of Rule 4.2(a), the Committee found that this conclusion was warranted by the policy considerations reflected in the Comments to Rule 4.2:

> [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and uncounseled disclosure of information relating to the representation.

The Committee noted that these "policy reasons" apply with equal force whether a lawyer is "participating in the matter" while acting pro se, while being represented

by his own counsel, or while representing another client. (This conclusion, however, seems a bit questionable. Not only is it contrary to the explicit "in representing a client" language of Rule 4.2(a), it is inconsistent with interpretations of Rule 4.2(a) in other contexts. For example, in New York County Bar Association Formal Opinion 705, that Committee found that DR 7-102(a), the predecessor of Rule 4.2(a), did not apply to a lawyer acting in a non-lawyer, and therefore non-representative, capacity for an employer.)

Certainly if you are acting pro se, and under Formal Opinion 879 even if you are merely the "client" of another lawyer, you are precluded from communication with another represented person without the consent of that person's lawyer or unless otherwise authorized by law.

What is not clear from the facts you have provided is whether the individual with whom you wish to directly communicate is in fact "represented" for these purposes. Not every employee of an organization is deemed represented simply because the organization itself is represented. As pointed out in the Comments to Rule 4.2:

> [7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

See also Niesig v. Team I, 76 N.Y.2d 363 (1990). So whether Rule 4.2(a) precludes direct communication with this particular person will depend upon how the above applies to the particular circumstances of this matter. (Of course, even aside from whether the individual falls within the above definition of "represented," if she is represented by her own personal attorney in connection with this matter, Rule 4.2(a) will apply. It is also worth bearing in mind that a former employee, regardless of his or her former position, is not considered a represented person merely because his or her former organization is represented. *See Siebert & Co., Inc. v. Intuit, Inc.*, 2007 N.Y. LEXIS 990 (2007).)

Based upon this recent Opinion from the New York State Bar Association's Committee on Professional Ethics, your pro se status precludes you from having direct contact with a represented person unless that person's lawyer consents or you are otherwise authorized by law to do so.

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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English Is *Not* Your Exclusive Company Language: International Employee Communications and Mandatory Translations

By Donald C. Dowling, Jr.

Translating human resources policies and employee communications can be a million-dollar issue. The Texas Supreme Court once overturned a $1.6 million jury verdict for worker-compensation-retaliation in large part because the allegedly retaliatory act was consistent with a provision in a company handbook that the employer had communicated in Spanish to the monolingual Spanish-speaking worker plaintiff—the company had even had the worker sign a handbook acknowledgement "written in Spanish."[1] Whatever the cost to translate that particular handbook and acknowledgement was well worth $1.6 million.

The *Haggar Clothing* employer was unusual in that it translated documents for domestic American staff. Many multinationals take the completely opposite approach and avoid translating even HR communications for their non-English-speaking jurisdictions abroad. This strategy, while streamlined and frugal, risks violating foreign *workplace language laws*. Before issuing any English-only international employee communication, investigate and comply with applicable translation mandates.

In the old days (say, 20 or more years ago), multinationals ran global HR as siloed operations, with little day-to-day coordination from headquarters HR. In that bygone era almost all a multinational employer's communications to local workers at its plant in, say, Montreal, came from on-site Québécois personnel administrators—in French. Work rules for its office in, say, Tokyo came from on-site Japanese management—in Japanese. Benefit plans for its employees in São Paulo were drafted by local Brazilians—in Portuguese. Employment contracts in every country were in the local language, or at least in two-column, dual language format.

In many respects this regime continues even today. Multinationals' foreign local HR teams constantly generate routine local employment contracts, policies, benefits documents and HR communications for local workforces in the local language. The difference is that, on top of local communications, *headquarters* now steps in with intranets, e-newsletters, all-hands e-mails, and global policy/plan distributions, transmitting a new layer of global and regional HR documents to affiliate employees worldwide—often in English. These documents might be anything from internal news bulletins to routine email announcements to global HR policies/handbooks/codes of conduct/whistleblower hotline communications to global/regional bonus plans, sales incentive plans, compensation plans, benefits plans, equity plans—and more.

Issuing headquarters HR documents in English cuts down on translation delays, translation costs, the risk of a message getting "lost in translation," and eliminates the problem of issuing inconsistent, competing versions of the same document. Many American multinationals issue global HR communications in English because, they reason, fluency is necessary in today's globalized business world and anyone who comes to work for a U.S.-based company probably should understand English anyway. For that matter, even some multinationals headquartered in parts of the non-English-speaking world, such as Luxembourg and Scandinavia, are now starting to designate English their "official" language.

But a designation of English as "official company language" is for the most part symbolic; it offers no defense to an accusation of breaching a workplace language law. Indeed, an "official English" designation might itself be argued to evidence a prior intent to flout local language laws. Multinationals are powerless to exempt themselves from these laws. English-speaking countries tend not to impose language mandates, so multinationals often miss the legal issue here entirely, getting blindsided by foreign translation requirements.

An English-only stance can also spark unfair labor practices and labor disputes. In April 2011, 185 employees at the Saint-Marcellin-en-Forez, France plant of UK-based Morgan Thermal Ceramics went on strike because their "Anglo Saxon imperialist management" would "say 'hello' in French," but otherwise communicated only in English.[2]

The easy legal advice here is to tell every multinational to translate every cross-border workplace communication into every relevant language. But that approach is too burdensome, expensive and time-consuming to be practical. Multinationals headquartered in the English-speaking world inevitably issue certain cross-border employee communications in English. The question, therefore: *What are the precise legal constraints?*

Ascertaining overseas workplace language laws is trickier than it might seem. The world's workplace language laws impose very different types of mandates. The problem is that advisors tend to report, unhelpfully, that in their jurisdiction local translations are "necessary" or "required," or "must" or "should" be issued. This advice fails to distinguish high-risk countries where untranslated workplace communications are themselves flatly illegal from low-risk countries where translations are only theoretically "necessary" or "required" later, if the employer someday needs to enter a document as evidence in a local court.

We can categorize the world's workplace language laws into four tiers: (1) flat prohibitions (2) enforceability barriers (3) *de facto* language requirements and (4) hostile reception in local proceedings. Then, beyond legal compliance comes the problem that untranslated employee communications raise human resources and business issues. Here, we first discuss the four levels of workplace language laws and then we offer some thoughts on the HR and business issues.

Four Levels of Workplace Language Laws

1. **Flat prohibitions:** The world's toughest workplace language laws are the flat prohibitions, the absolute bans that punish employers for the act of issuing written communications to employees other than in the local language. Examples:

   - *France*, which sponsors an academy with the *raison d'etre* of upholding the integrity of the French language, imposes a statute called the *Loi Toubon* that in effect commands "Thou Shalt Communicate with Thy Local Employees Exclusively in French." The French labor code[3] imposes fines for issuing employment documents other than in French. In 2006 a U.S. *Fortune* 10 multinational was fined US$800,000 (halved on appeal from an initial fine of US$1.6 million) because U.S. headquarters had issued an English-language global benefits plan to subsidiary employees in France.
   - *Belgium* also flatly prohibits issuing documents to employees in foreign languages. Belgium's law grows out of the uniquely Belgian tension between Flemish Dutch and Walloon French, and so requires employee communications in the *regional* language. Where to draw regional lines sometimes gets disputed.
   - *Quebec* imposes a law that requires written employee communications in French.[4] Quebec allows opt-outs—individual employees can sign waivers declaring they speak English and accept English communications. But an employer cannot simply hire English speakers and demand opt-outs, because Quebec courts forbid employers from conditioning most jobs on fluency in English.[5]
   - In *Spain*, in some regions ("Autonomous Communities"), sectoral collective bargaining agreements bind all employers in certain industries, and require employee communications be in both co-official languages (Spanish plus the regional language, such as Catalan or Basque).
   - *Mongolia* requires that all employment documents be in Mongolian; violators are subject to fines.[6]
   - *Turkey* requires that human resources policies, if not all HR communications, be in Turkish; violators are subject to "administrative fines."

2. **Enforceability barriers:** Only relatively few jurisdictions impose these flat prohibitions that punish employers just for issuing untranslated communications. More common are countries like Chile, Macedonia, Poland and Russia with laws that *invalidate* untranslated employee communications, rendering them void even as to affected employees fluent in the document's language. Under these laws, for example, a multinational that issues an untranslated work rule or code of conduct is estopped from disciplining an employee for violating it. In one recent case the French Supreme Court invalidated an employer's bonus term sheet because it was written in English.[7] The terminated employee—who apparently had understood the term sheet perfectly well—won his full target bonus. The criteria by which his bonus should have been reduced had not appeared in French and so were unenforceable. (Under France's *Loi Toubon*, that employer might also have been fined.)

   - *Untranslated work orders unenforceable*: Venezuela plus a number of Central American countries including Costa Rica, El Salvador, Guatemala and Honduras impose laws that invalidate *work rules* not in Spanish. These laws are said to be a legacy of the era when American plantation bosses

barked English-language orders at banana workers, firing hapless uncomprehending locals. Because HR policies, handbooks and codes of conduct invariably contain "work rules," to be enforceable these must appear in Spanish.

- *Untranslated employment agreements unenforceable*: A number of countries including Egypt, Mali, Mozambique, Nicaragua and Ukraine affirmatively require that, to be enforceable, *employment agreements* be in the local language (or dual-language format). Slovakia requires that written "legal acts of employment relations" (presumably employment contracts and binding HR policies) be in Slovak.[8] Non-compliant documents are unenforceable.

3. ***De facto* language requirements**: Many countries require, by law, that employers submit certain documents to government agencies and certain other documents to workers or their representatives. These laws tend to be silent on language, but untranslated submissions will not usually comply. For example, imagine a hypothetical unionized Boston subsidiary of a German-headquartered company that tries to file a German-language qualified retirement plan with the U.S. IRS and DOL, and that then tries to submit a German-language benefits proposal to its Boston labor union local. These submissions do not likely comply with ERISA filing requirements and the National Labor Relations Act § 8(a)(5).

   It works the same way abroad. Countries from Haiti and Panama to Peru, Niger, Vietnam and beyond require employers to file employment agreements with local agencies. Almost every county requires submitting at least payroll data to government agencies, as well as, in many cases, other HR data filed with government labor, tax, social security and data protection authorities. Also, most countries require employers to turn over certain documents and proposals to employee representatives. France and Germany, for example, require giving draft HR polices, benefit plans and crisis plans to works councils and health and safety committees.

   Submitting these documents in a foreign language rarely complies. The translation burdens of European Works Councils alone are enormous. In essence, the laws that require these submissions are *de facto* translation mandates as to the specific documents submitted. For this reason, a multinational trying to launch a global code of conduct, a global whistleblower hotline, or a global pandemic policy can find itself under a *de facto* duty to translate in many jurisdictions. (But there are exceptions; in Scandinavia, for example, government agencies and even trade unions might accept certain English documents.)

4. **Hostile reception in local proceedings:** These workplace language laws, although important, are exceptional. Most jurisdictions impose no language law or translation mandate as to most routine HR communications. In non-English-speaking countries, issuing English-language HR communications is often legal, in that untranslated documents do not usually violate specific mandates. But everywhere on Earth, employees can argue that HR communications in foreign languages are *presumptively* unenforceable, especially as to staff not proficient in the language.

   To understand the dynamic here, take an American example. Think of Toyota's auto plant in Georgetown, Kentucky.[9] Imagine hypothetically if Toyota's Aichi, Japan headquarters were to issue to its Kentucky staff a global code of conduct and a global equity plan in its native language—Japanese. Imagine that Toyota's management then disciplined a Kentucky autoworker for violating some provision in the code. Also imagine that management invoked some term in the equity plan to cut off share-vesting rights of a terminating Kentucky executive. If the autoworker's obligation to follow the code of conduct and the terminated executive's rights under the equity plan became issues in local litigation, no judge in Kentucky is likely to hold these locals responsible for complying with, or understanding, Japanese-language texts. Remember, the Texas Supreme Court reversed a $1.6 million jury award in the *Haggar Clothing*[10] case in part because the employer had translated its policy for the plaintiff.

   It works the same way abroad. Multinationals often need to establish in overseas labor courts that local employees were bound to follow (or were on notice of) some HR policy or offering. Expect to have a tough time meeting that burden when the policy or offering has been issued in a foreign language—even if issued in the "global language" of English, and even if the document later gets translated, after-the-fact, to be admitted in local court. The multinational might argue that the employee in question himself speaks English, but a monolingual local judge may show sympathy for an employee claiming otherwise.

Human Resources and Business Issues

Any multinational can designate English as its "official company language." And many multinationals do. Official-English designations are meant to streamline

and speed employee communications and also to reduce costs. Indeed, in this age of constant, fluid HR communications—intranets, e-mails, global Human Resources Information Systems—having to stop and translate every routine HR communication into every possibly relevant language is, if not impossible, at least cumbersome, expensive, slow, and impractical.

We have discussed four levels of workplace language laws—flat prohibition, enforceability barriers, *de facto* language requirements, and hostile reception in local proceedings. But because these mandates are the exception (again, most employee communications in most jurisdictions do not *have* to be translated), the question often shifts from whether a multinational employer *can* issue English-language global HR communications to whether it makes *business sense* to issue English documents in non-native-English-speaking countries. Whether to translate more often raises business and human resources issues than strictly legal analysis.

Even where legal, distributing untranslated HR documents to non-English-speaking workforces does not always make business sense, and can be bad HR. English is not quite the *lingua franca* of international business that Americans think it is. Much of the world, and many key executives, do not speak fluent English. Even a book titled *English as a Global Language*[11] concedes that "English-monolingual companies are increasingly encountering [communication] difficulties as they try to expand in those areas of the world thought to have the greatest prospects of growth, such as East Asia, South America, and Eastern Europe—areas where English has traditionally had a relatively low presence."

Translating key employee communications is usually a good HR practice and often makes good business sense. The purpose of any employee communication, after all, is to get a message across to staff. We all understand messages best in our native tongues. And translating respects ethnic diversity. American employees working stateside for multinationals based overseas well understand the frustration and exclusion of conversations and documents in headquarters language.

Of course, English is in some respects unique because it is a *lingua franca* and a common denominator among many. The fact remains, though, that most people on Earth do not speak it.

Endnotes

1. *Haggar Clothing v. Hernandez,* 164 S.W. 3d 386, 387 (2005).
2. *The Telegraph,* UK, 4/20/11.
3. Arts. R1325, L1221-3, L1321-6.
4. Charter of French Lang., bill 101, at arts. 4, 46.
5. *Cf. Pouliot c. Quality Inn*, 2011 QCCRT 214 (CanLII).
6. Mongolia Law on Official Language of the State, art. 5.4.
7. *Cass. Soc.* 09-67492, June 2011.
8. Slovak Act No. 270/1995 Col.
9. *Cf.* www.toyotageorgetown.com.
10. *Supra* note 1.
11. David Crystal (Cambridge Univ. Press, 2d ed., 2003), at 19.

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A Primer on Title II of the Genetic Information Nondiscrimination Act of 2008 and Its Implementing Regulations

By Heather A. Giambra

I. Introduction

On May 21, 2008, Congress enacted the Genetic Information Nondiscrimination Act of 2008 ("GINA"). Title II[1] of GINA, which took effect on November 21, 2009, prohibits discrimination in employment on the basis of "genetic information."[2] The Equal Employment Opportunity Commission ("EEOC") issued its final regulations implementing Title II of GINA on November 9, 2010. This article is intended to familiarize the reader with the provisions of Title II of GINA and its implementing regulations and to explore areas of the statute that are expected to give rise to future litigation.

Title II of GINA makes it an unlawful employment practice for an employer to discriminate against an employee, applicant or former employee in hiring, discharge or with respect to other terms and conditions of employment, on the basis of genetic information.[3] GINA further prohibits employers from limiting, segregating or classifying employees in any way that would deprive or tend to deprive an employee of employment opportunities, or otherwise affect the employee's status as an employee because of genetic information.[4] GINA also makes it unlawful for an employer to request, require or purchase genetic information with respect to an employee or a family member of the employee.[5] In addition, Title II of GINA requires that employers who come into possession of genetic information of an employee maintain that information in a separate file and treat it as a confidential medical record of the employee in accordance with the Americans with Disabilities Act, 42 U.S.C. §12101, et. seq. ("ADA").[6] GINA also places certain limitations of the disclosure of genetic information.[7] Each of these prohibitions/requirements will be discussed in detail below.

A. Employers Covered by GINA

GINA applies to both public and private sector employers with 15 or more employees, employment agencies, labor organizations and joint labor-management training or apprenticeship programs.[8] Indian tribes and bona fide private clubs (other than labor organizations) that are exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986 are not governed by GINA.[9] While not specifically set forth in the regulations, the supplementary information to the EEOC's GINA regulations notes that, because the statute defines employers to include employers as defined by Title VII of the Civil Rights Act of 1964 ("Title VII"), and because numerous courts have held that Title VII did not intend to create individual liability, there is no individual liability under GINA.[10]

B. Genetic Information

GINA defines genetic information as including information about (1) an individual's genetic tests; (2) the genetic tests of an individual's family members; (3) a family member's medical history (the manifestation of disease or disorder in an individual's family members); (4) an individual's request for, or receipt of genetic services, or the participation in clinical research that includes genetic services by the individual or family members of the individual; and (5) the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using assisted reproductive technology.[11] Genetic information does not include information about the sex or age of an individual, the sex or age of family members, or information about the race or ethnicity of the individual or family members that is not derived from a genetic test.[12]

C. Genetic Tests and Genetic Services

"Genetic test" is defined as "an analysis of human DNA, RNA, chromosomes, proteins or metabolites that detects genotypes, mutations, or chromosomal changes."[13] Examples of genetic tests include (1) tests to determine whether an individual has a certain genetic marker evidencing a predisposition to a particular disease; (2) carrier screen using genetic analysis to determine the risk of conditions such as cystic fibrosis, sickle cell anemia, or spinal muscular atrophy in future offspring; (3) amniocentesis and other evaluations used to determine the presence of a genetic abnormality in a fetus; (4) newborn screening that uses DNA, RNA, protein or metabolite analysis to detect genotypes, mutations or chromosomal changes; (5) preimplantation genetic diagnosis performed on embryos created using in vitro fertilization; (6) pharmacogenetic tests that detect genotypes, mutations or chromosomal changes that indicate how an individual will react to a drug; (7) DNA testing to detect genetic markers associated with information about ancestry; and (8) DNA tests that reveal family relationships, such as a paternity test.[14] In addition, a test to determine the presence of a genetic predisposition for alcoholism or drug use is a genetic test.[15]

"Genetic test" does not include an analysis of proteins or metabolites that does not detect genotypes, mutations or chromosomal changes.[16] Thus, medical tests that test for the presence of a virus that is not composed of human DNA, RNA chromosomes, proteins or metabolites are not "genetic tests."[17] Likewise tests for infectious diseases that may be transmitted through food handling, complete blood counts, cholesterol tests and liver function tests are not considered "genetic tests."[18] Tests for the presence of alcohol or illegal drugs are not "genetic tests."[19]

"Genetic services" include genetic tests, genetic counseling (obtaining, interpreting or assessing genetic information) and genetic education.[20] The supplementary information provided with respect to Section 1635.3(e) of the EEOC's GINA regulations notes that "making an employment decision based on knowledge that an individual has received genetic services violates GINA even if the covered entity is unaware of the specific nature of the services received or the specific information exchanged in the course of providing them."

D. Family Members

Included in GINA's definition of "genetic information" is the genetic information of an individual's "family members" and information about the manifestation of a disease or disorder in an individual's family members. Therefore, a proper understanding of the definition of "family members" is important. GINA defines the family members of an individual as anyone who is a dependent of that individual as a result of marriage, birth, adoption or placement for adoption[21] and any relative of the first-degree, second-degree, third-degree of fourth-degree.[22]

The Section-by-Section Analysis of this provision of the regulations notes that spouses and adopted children are included within the definition of family members, even though their genetic information will have no bearing on whether the employee protected by GINA might acquire a disease or disorder. This indicates that Congress intended to prevent employers from discriminating against employees because of concerns over potential increased health insurance rates.

GINA defines relatives of the first-degree as an individual's children, siblings and parents.[23] Second-degree relatives include an individual's grandparents, grandchildren, uncles, aunts, nephews, nieces, and half-siblings.[24] Great-grandparents, great-grandchildren, great-aunts, great-uncles and first cousins are relatives of the third-degree.[25] Fourth-degree relatives include great-great-grandparents, great-great-grandchildren and first cousins once removed (i.e., the children of the individual's first cousins).[26] Interestingly, GINA defines "family member" broader than the healthcare industry does. The American Medical Association's form intake questioner for an adult medical history includes information about only first- and second-degree relatives and some third-degree relatives (cousins). Thus, it appears that, by including all relatives of the fourth-degree in GINA's definition of family member, Congress intended to provide broad protection against employment discrimination on the basis of genetic information.

II. The Prohibition of Discrimination on the Basis of Genetic Information

Congress used language similar to that used in Title VII of the Civil Rights Act of 1964, to set forth the employment practices prohibited by GINA. Specifically, GINA provides that it is unlawful for an employer "(1) to fail or refuse to hire or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions or privileges of employment of the employee, because of genetic information with respect to the employee, or (2) to limit, segregate, or classify the employee of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information."[27] The use of this language evinces Congress' intent to prohibit a broad range of employment practices. The Section-by-Section Analysis to the EEOC's regulations specifically notes that this broad language indicates that Congress intended to prohibit harassment on the basis of genetic information.[28]

GINA also prohibits retaliation against any individual because such individual has opposed any act or practice made unlawful by GINA, or because such individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under GINA.[29] The Section-by-Section Analysis to the EEOC's regulations notes that given the similarities in the anti-retaliation provisions of GINA to those of Title VII, the proper standard for determining what constitutes retaliatory conduct under GINA will be the same standard used in Title VII cases, as announced by Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*.[30] Thus, to constitute retaliation, conduct need not be related to employment and it need not rise to the level of an adverse employment action, so long as it is "materially adverse" and "well might" dissuade a reasonable person from making or supporting a charge of discrimination.[31]

At the present time there is no cause of action available under GINA for disparate impact. The statute specifically excludes claims for disparate impact on the basis of genetic information from coverage.[32] However, it is possible that at some time in the future claims for disparate impact will be permitted. GINA provides for the establishment, in May of 2014, of a commission, to be known as the "Genetic Nondiscrimination Study Commission" to review developments in the science of genetics and to make recommendations to Congress regarding whether a disparate impact cause of action should be included under GINA.[33]

III. The Prohibition on Requesting, Requiring and Purchasing Genetic Information

GINA also makes it unlawful for employers to acquire the genetic information of their employees. Specifically GINA prohibits employers from requesting, requiring or purchasing genetic information with respect to an employee or a family member of an employee unless one of six enumerated exceptions is applicable.[34] A "request" includes "conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information, actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health in a way that is likely to result in a covered entity obtaining genetic information."[35]

The statute sets forth six specific exceptions to the general prohibition on requesting or requiring genetic information including (1) where an employer inadvertently requests or requires the family medical history of the employee or family member of the employee; (2) where health or genetic services are offered by the employer, including as part of a wellness program, provided certain conditions are met; (3) where the employer requests or requires family medical history from the employee to comply with the certification provisions of the Family Medical Leave Act, 29 U.S.C. §2601, et seq. ("FMLA") or a similar state family and medical leave law; (4) where the employer purchases documents that are commercially and publicly available (newspaper, magazines, periodicals and books) which contain family medical history; (5) where the information is obtained in the course of genetic monitoring of the biological effects of toxic substances in the workplace, provided certain conditions are met; and (6) where the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification, and requests or requires employee genetic information to be used exclusively for quality control and/or to detect sample contamination.[36]

A. Inadvertent Requests

The GINA regulations make it clear that if an employer acquires genetic information in response to a lawful request for medical information,[37] the request will only be considered inadvertent if the employer directs the individual or entity providing the information not to provide any genetic information.[38] The regulations provide that where the following "safe harbor" language is used when requesting medical information, any receipt of genetic information in response to the request will be deemed inadvertent. The safe harbor language set forth in the regulations is as follows:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.[39]

The regulations note that failure to give the safe harbor notice set forth above will not prevent an employer from establishing that receipt of certain genetic information was inadvertent if the request for medical information was not likely to result in the employer obtaining genetic information (i.e., where an overly broad response is received in response to a specifically tailored inquiry).[40]

Importantly, it is mandatory for employers to instruct the healthcare professionals they use to provide employment-related medical examinations, not to collect any genetic information, including family medical history, as part of any employment-related medical examination.[41] Employers are required to take "reasonable measures" within their control if they learn that the healthcare provider is requesting or requiring genetic information in connection with employment-related medical examinations.[42] These "reasonable measures" selected by the employer will depend on the facts and circumstances under which the healthcare provider requested the genetic information, and may include no longer using the service of any healthcare provider who continues to request or require genetic information after being instructed not to do so.[43]

There are additional situations in which the exception for inadvertent acquisition of genetic information may be applicable, including when information is obtained passively in the course of casual workplace conversation, commonly referred to as talk around the "water cooler." Thus, where a manager or supervisor acquires an individual's genetic information by overhearing a conversation, receiving it from the individual or a third party, or by receiving it directly during casual conversation or in response to an ordinary expression of concern, the acquisition will be deemed inadvertent.[44] Thus, the regulations note that a general health inquiry such as "How are you?" or "Did they catch it early?" or "Is you child feeling better today?" which elicits a response

containing genetic information, will be deemed an inadvertent acquisition.[45] However, the exception will not apply if the employer follows a general question with more probing health-related inquiries, such as asking whether other family members have the condition or whether the individual has been tested for the condition.[46] In addition, unsolicited acquisition of genetic information (i.e., receipt of an email about the health of an employee or an employee's family member) will be deemed inadvertent acquisition.[47] Finally, where a manager or supervisor is given permission by an employee to access a social media platform maintained by the employee (i.e., the manager and the employee are Facebook friends) and the manager acquires genetic information about the employee or employee's family members via that social media platform, the acquisition will be deemed inadvertent.[48]

B. Wellness Programs and Providing Health and Genetic Services

The second exception to GINA's prohibition on the acquisition of an employee's genetic information where health or genetic services are offered by the employer, including such services offered as part of a wellness program, provided that (1) the employee provides prior, knowing, voluntary and written authorization; and (2) only the employee and licensed healthcare professional or board certified genetic counselor involved in providing the services receive individually identifiable information concerning the results of the genetic services; and (3) any individually identifiable genetic information provided in connection with the services is only available for purposes of those services and shall not be disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees.[49]

1. Knowing Authorization

To be knowing, the authorization must (1) be written so that it is likely to be understood by the individual from whom the genetic information is being sought; and (2) describe the type of genetic information that will be obtained and the general purpose for which it will be used; and (3) describe the restrictions on disclosure of genetic information.[50]

2. Written Authorization

The regulations permit the authorization to be provided in electronic format, provided that the electronic authorization is required before the program will permit the individual to answer any questions that request genetic information.[51]

3. Voluntary Authorization

The GINA regulations provide that this exception applies only where the provision of genetic information is "voluntary," which means that the employer cannot require an employee to provide genetic information and cannot penalize employees who choose not to provide genetic information.[52]

Many wellness programs offer financial incentives for employees to participate. GINA does not prohibit financial incentives, but it requires that where they are offered, they be equally available to employees who elect not to provide genetic information. Thus, the regulations explain that an employer "may not offer a financial inducement to individuals to provide genetic information, but may offer financial inducements for completion of health risk assessments that include questions about family medical history or other genetic information, provided the covered entity makes clear, in language reasonably likely to be understood by those completing the health risk assessment, that the inducement will be made available whether or not the participant answers questions regarding genetic information."[53] Thus, to be voluntary, a health risk assessment that offers a financial inducement to individuals that complete it, which contains questions seeking genetic information, must specifically identify the questions that seek genetic information and must inform the individual providing the information that they need not answer the questions seeking genetic information to receive the financial inducement.[54]

Employers may also offer financial inducements to encourage individuals who have voluntarily provided genetic information (i.e., in a health risk assessment) that indicates that they are at increased risk of acquiring a health condition in the future to participate in disease management programs or other programs designed to promote a healthy lifestyle. However, to comply with GINA these programs must also be offered to individuals with current health conditions and/or to individuals whose lifestyle choices put them at an increased risk of developing a condition.[55]

Importantly, in offering financial inducements in an employee wellness program, employers must be cognizant of the need to comply with the requirements of the ADA and the Health Insurance Portability and Accountability Act ("HIPAA"). Specifically, if a financial inducement that requires individuals to meet certain health goals is included in a wellness program, an employer must make reasonable accommodations to the extent required by the ADA. If the wellness program provides medical care, the program may constitute a "group health plan" and therefore, may be required to comply with the special requirements for wellness programs that condition rewards on an individual satisfying a standard related to a health factor, including the requirement to provide an individual with a "reasonable alternative" under HIPAA when it is "unreasonably difficult due to a medical condition to satisfy," or "medically inadvisable to attempt to satisfy" the otherwise applicable standard.[56]

4. Disclosure of Genetic Information in the Aggregate

The GINA regulations state that employers are only permitted to receive information obtained through health or genetic services offered by the employer (including

employee wellness programs) in aggregate terms that do not disclose the identity of specific individuals. In the Section-by-Section Analysis of 29 C.F.R. §1635.8, the EEOC indicated that where an employer receives genetic information in aggregate terms that, for reasons outside the control of the provider of the information or the employer, make the genetic information of a particular individual readily identifiable with no effort on the employer's part (such as where the number of participants is small), there will be no violation of GINA. However, efforts undertaken by the employer to link the genetic information to a particular employee will violate GINA.

C. FMLA Certification

The third exception permits employers to request family medical history to comply with the certification provisions of the FMLA or state or local family and medical leave laws, or pursuant to a policy that permits the use of leave to care for a sick family member and requires employees to provide information about the health condition of that family member to substantiate the need for the leave.[57]

D. Commonly and Publicly Available Sources

GINA is not violated where an employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books) which contain family medical history or where the employer obtains such information through electronic media, such as information communicated via television, movies or the Internet.[58] This exception does not apply to medical databases or court records.[59] The Section-by-Section Analysis of the regulations notes that while the statutory language of this provision references only "family medical history," the EEOC reads this exception as applying to all "genetic information," obtained through commercially and publicly available sources, and will not limit it exclusively to family medical history.[60] The regulations note that media sources with limited access, such as social networking sites (i.e., Facebook, Linked In, MySpace) and other media sources which require a specific individual's permission to access them, or to which access is limited to members of a particular group, are not considered "commercially and publicly available" unless it can be demonstrated that access is "routinely granted to all who request it."[61] Importantly, even where the source from which the genetic information is obtained is "commercially and publicly available," if the employer seeks access to the source with the intent of obtaining genetic information, or if the source is one from which the employer is likely to acquire genetic information (i.e., a website that focuses on issues such as genetic testing of individuals), this exception will not apply.[62] The Section-by-Section Analysis of this section of the GINA regulations states that, "the requirements and prohibitions of GINA do not apply to acquisitions of genetic information outside the employment context." Thus, it appears that where an employer can demonstrate that the source from which genetic information was acquired was accessed by a manager or human resource professional outside his or her role as an employer, the GINA prohibition on acquiring genetic information will not apply. However, in the event that genetic information about an employee is acquired, whether through a commercially and publicly available course or outside the employment context, that information may not be used to discriminate in the employment context.

E. Genetic Monitoring

GINA permits employers to engage in genetic monitoring of the biological effects of toxic substances in the workplace, as long as that monitoring meets certain requirements.[63] These requirements are that (1) the employer must provide written notice of the genetic monitoring to the employees; (2) the employee must provide prior, knowing, voluntary and written authorization for the genetic monitoring, or the monitoring must be required by federal or state law; (3) the employee must be informed of his/her individual monitoring results; (4) the monitoring must be in compliance with any federal and/or state genetic monitoring regulations; and (5) the employer, excluding any licensed healthcare professional or board certified genetic counselor, may receive the results of the monitoring only in aggregate terms that do not disclose the identity of the specific employees.[64] Employers may not retaliate or otherwise discriminate against any individual because he/she refuses to participate in a voluntary genetic monitoring program that is not required by federal or state law.[65] Employees who refuse to participate in voluntary genetic monitoring programs should be informed of the potential dangers of forgoing genetic monitoring, including the potential for exposure to toxins in the workplace and the possible consequences that might result if such exposure is not identified. Importantly, the employer may not take any adverse employment action because an employee refuses to participate in a voluntary genetic monitoring program.

1. Prior, Knowing, Voluntary, Written Authorization

To satisfy the requirement of a prior, knowing, voluntary, written authorization, the employer must use an authorization form that (1) is written in a manner that is reasonably likely be understood by the individual from whom the authorization is sought; (2) describes the genetic information that will be obtained; and (3) describes the restrictions on disclosure of genetic information.[66]

2. Results of Genetic Monitoring

When genetic monitoring is conducted, regardless of whether the testing is required by federal or state law, GINA requires that each individual monitored receive his/her individual monitoring results[67] and that the employer receive the results only in "aggregate terms that do not disclose the identity of specific individuals."[68] Consistent with its position in cases dealing with employer-provided health or genetic services, the EEOC

states in the Section-by-Section Analysis applicable to the genetic monitoring provision that there will be no violation of GINA where an employer receives information only in aggregate terms, but is able to identify the genetic information of specific individuals for reasons outside the employer's control and with no effort on its part.

F. Employers Who Engage in DNA Testing

Employers who engage in DNA testing for law enforcement purposes such as in a forensic laboratory or for purposes of human remains identification are permitted to request or require genetic information from their employees for the sole purpose of using that information for analysis of DNA identification markers for quality control to detect sample contamination.[69] The Section-by-Section Analysis of the GINA regulations relative to this exception notes that this is a "very limited exception" and that a proper analysis will not allow an employer to obtain health-related genetic information.

G. Manifested Disease in a Family Member

Within the confines set by the ADA, employers may make medical inquiries with respect to a manifested disease, disorder or condition of an employee, because information about a manifested disease of an *employee* is not "genetic information" pursuant to GINA. However, information about a manifested disease, disorder or condition of a *family member of an employee* is considered "family history" and, therefore, it is considered "genetic information" under GINA. Thus, under the express language of the statute, there is potential for a conflict to arise when an employer employs two or more members of the same family and has a need to request information about a manifested disease of one of the family members, perhaps in the course of identifying a reasonable accommodation for that employee under the ADA. While GINA permits the employer to acquire this information with respect to the employee with the manifested condition, it prohibits the acquisition of this information with respect to the family member(s) also employed by the employer because, with respect to them, it is considered "genetic information." To eliminate this conflict, the GINA regulations make clear that an employer does not violate GINA's prohibition on the acquisition of genetic information when it "requests, requires or purchases information about a manifested disease, disorder, or pathological condition of an employee…whose family member is an employee for the same employer."[70] Similarly, where an employee's family member with a manifested disease, disorder or pathological condition is voluntarily receiving health or genetic services through a program provided by the employer, the employer will not violate GINA by seeking information about that manifested disease, disorder or condition.[71] The GINA regulations state that an employer "does not unlawfully acquire genetic information about an employee when it asks the employee's family member who is receiving health services from the employer if her diabetes is under control."[72]

IV. Confidentiality Requirements and Limitation on Disclosure of Genetic Information

GINA also requires that employers maintain genetic information about their employees in a confidential manner and it limits the circumstances under which the employer is permitted to disclose an employee's genetic information.[73]

A. Confidentiality Requirements

GINA requires employers who possess genetic information about their employees to maintain that information in separate medical files and to treat it as a confidential medical record of the employee. Employers will be considered to have satisfied the confidentiality requirement if they maintain the genetic information in accordance with the confidential medical records requirements set forth in Section 102(d)(3)(B) of the Americans with Disabilities Act,[74] which requires that the information be "maintained on separate forms and in separate medical files" and that it be "treated as a confidential medical file."[75] Genetic information may be maintained in the same file in which the employer maintains confidential medical information subject to the ADA.[76] If an employer receives genetic information orally, that information need not be reduced to writing.[77] Genetic information acquired through commercially and publicly available sources is not considered "confidential genetic information" and it is not subject to the confidentiality provisions of the GINA regulations. However, it may not be used to discriminate against the individual.[78]

The GINA regulations clarify that "genetic information placed in personnel files prior to November 21, 2009, need not be removed and a covered entity will not be liable under this part for the mere existence of the information in the file."[79] However, the Section-by-Section Analysis of this section of the GINA regulations notes that in the event the personnel files of an employee containing genetic information acquired prior to November 21, 2009 must be disclosed, for any reason, that genetic information must be removed. In addition, because most genetic information will also be considered "medical information" which has been subject to the ADA's confidentiality requirements since 1992, it is not anticipated that removing such information from personnel files will impose a significant burden on employers.

B. Limitations on Disclosure of Genetic Information

In addition, an employer that lawfully possesses genetic information (except for genetic information acquired through commercially and publicly available sources) may not disclose that information except (1) to the employee (or family member if the family member is receiving genetic services) at the written request of the employee (or family member); (2) to an occupational or other health researcher if the research is conducted in compliance with the regulations and protections provided for under 45 C.F.R. Part 46, which governs research

involving human subjects; (3) in response to a court order, but only as expressly authorized by that order and only where the employer informs the employee or family member that the information was disclosed pursuant to the order; (4) to government officials investigating compliance with GINA; (5) in connection with the employee's compliance with the certification provisions of the FMLA or other state and family medical leave laws; and (6) to a federal, state or local public health agency provided the disclosure is limited to information about the manifestation of a contagious disease that presents an imminent hazard of death or life-threatening illness, and the employee whose family member is the subject of the disclosure is notified of the disclosure.[80]

It should be noted that the exception for disclosure of genetic information pursuant to a court order is an extremely limited exception requiring that the genetic information disclosed be carefully tailored to the specific terms of the court order.[81] The Section-by-Section Analysis of this provision of the GINA regulations notes that "this exception does not allow disclosure in other circumstances during litigation, such as in response to discovery requests or subpoenas that are not governed by an order specifying that genetic information must be disclosed."

V. Enforcement and Remedies for Violations

GINA incorporates by reference the enforcement and remedy provisions already in place for redressing other types of employment discrimination.[82] Thus, the enforcement mechanism applicable and remedies available to employees covered by Title VII are applicable to GINA as well.[83] Prior to instituting litigation, employees must first exhaust their administrative remedies by filing a charge of discrimination on the basis of genetic information with the EEOC. The EEOC will investigate the charge and, where the EEOC believes a violation of GINA has occurred, the agency will attempt to conciliate the matter. The EEOC has the power to commence litigation in its name to compel compliance with GINA.

An aggrieved individual may recover pecuniary and non-pecuniary damages, including compensatory and punitive damages under GINA.[84] GINA also incorporates the statutory cap on combined compensatory damages for future pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life and punitive damages, based on the size of the employer as set forth in 42 U.S.C. §1981a(b)(3).[85]

In addition, GINA authorizes the court, in its discretion, to allow the prevailing party in GINA litigation, reasonable attorney's fees and costs. Expert witness fees may be included as part of the attorney's fees award.[86]

Injunctive relief, including reinstatement, hiring, back pay and other equitable remedies available under Title VII are also available under GINA.[87]

The GINA regulations require that employers post a notice describing GINA's applicable provisions in a conspicuous place, where notices to employees and applicants for employment are customarily posted.[88] The EEOC has issued a revised EEO poster incorporating this information which satisfies this requirement. A willful violation of this posting requirement is punishable by a fine of not more than $100 for each separate offense.[89]

VI. Employers in the Healthcare Industry

Employers who provide healthcare service (i.e., hospitals, clinics and doctors' offices) may have employees who are also patients of the employer. Where this is the case, there are additional issues of which the employer must be aware with respect to confidentiality and storage of medical records and genetic information.

A. Compliance with the HIPAA Privacy Rule

GINA makes it clear that it is does not limit the rights or protections provided under any other federal or state statute that provides equal or greater protections.[90] In this regard, the GINA regulations specifically state that they do not apply to genetic information that constitutes "protected health information" subject to the HIPAA Privacy Rule. Thus, employers subject to the HIPAA Privacy Rule must continue to apply the requirements of that Rule, not the requirements of GINA Title II and its implementing regulations, to genetic information that is also protected health information.[91] The Section-by-Section Analysis of this provision of the GINA regulations provides the following example of genetic information that is also protected health information subject to the HIPAA Privacy Rule:

> If a hospital subject to the HIPAA Privacy Rule treats a patient who is also an employee of the hospital, any genetic information that is obtained or created by the hospital in its role as a healthcare provider is protected health information and is subject to the requirements of the HIPAA Privacy Rule and not those of GINA. In contrast, however, any genetic information obtained by the hospital in its role as employer, for example, as part of a request for leave by the employee, would be subject to GINA Title II.

Thus, employers covered by the HIPAA Privacy Rule must first determine in which context genetic information of an employee was acquired, and then apply the applicable provisions of either HIPAA or GINA.

B. Combining Personal Medical Records and Occupational Health Records

Another area of concern for employers in the business of providing healthcare services is whether a

healthcare service provider should have access to the personal health information of its employees who have received treatment unrelated to their employment, and conversely, whether, in its role as a healthcare service provider, the entity should have access to the occupational health records of a patient who also happens to be an employee. The EEOC has issued guidance, in the form of an Informal Discussion Letter, addressing this topic. Confidentiality Requirements (5/31/2011) (EEOC Informal Discussion Letters) (http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_ confidentrequre.html) (Last visited August 22, 2011). In this letter, the EEOC reviews the provisions of the ADA, which limit an employer's ability to access the personal medical records of an employee or applicant and the provisions of GINA, which place further limitations on when an employer may request personal health information which is also "genetic information." The EEOC concludes that because both the ADA and GINA strictly limit an employer's right to access such information, there is a real possibility that maintaining personal medical records and occupational health records in the same file could result in a violation of the ADA or GINA or both. Thus, it is recommended that employers maintain this information separately.

VII. Conclusion

While Title II of GINA has been in effect since November 21, 2009, the case law interpreting its provisions remains limited. This may be due in part to the fact that the claim is relatively new. The EEOC reports receiving 201 charges alleging a GINA violation in fiscal year 2010 and 245 charges alleging a GINA violation in fiscal year 2011. Thus, the total number of GINA charges filed is relatively small and some of those charges are likely still winding their way through the administrative process at the EEOC. The case law that has developed, deals primarily with the pleading standards. Stay tuned for future decision addressing substantive developments under GINA.

Endnotes

1. Title I of GINA, which is not the subject of this article addresses the use of "genetic information" in health insurance.
2. 42 U.S.C. §§2000ff, et seq.
3. 42 U.S.C. §2000ff-1(a)(1); 29 C.F.R. §1635.2(c).
4. 42 U.S.C. §2000ff-1(a)(2).
5. 42 U.S.C. §2000ff-1(a)(3).
6. 42 U.S.C. §2000ff-5(a).
7. 42 U.S.C. §2000ff-5(b)(1)-(6).
8. *See,* 42 U.S.C. §2000ff-1–42 U.S.C. §2000ff-4.
9. 29 C.F.R. §1635.2(d).
10. 42 U.S.C. §§2000e, et seq.
11. 42 U.S.C. §2000ff (4)(A) and (B); 29 C.F.R. §1635.3 (c)(1)(i)-(v).
12. 42 U.S.C. §2000ff (4)(C); 29 C.F.R. §1635.3 (c)(2).
13. 42 U.S.C. §2000ff (7)(A).
14. 29 C.F.R. §1635.3(f)(2)(i)–(viii).
15. 29 C.F.R. §1635.3(f)(4)(ii).
16. 42 U.S.C. §2000ff (7)(B).
17. 29 C.F.R. §1635.3(f)(3)(ii).
18. 29 C.F.R. §1635.3(f)(3)(iii)–(iv).
19. 29 C.F.R. §1635.3(f)(4)(i).
20. 42 U.S.C. §2000ff (6)(A)–(C); 29 C.F.R. §1635.3(e).
21. 29 C.F.R. §1635.3(a)(1).
22. 29 C.F.R. §1635.3(a)(2).
23. 29 C.F.R. §1635.3(a)(2)(i).
24. 29 C.F.R. §1635.3(a)(2)(ii).
25. 29 C.F.R. §1635.3(a)(2)(iii).
26. 29 C.F.R. §1635.3(a)(2)(iv).
27. 42 U.S.C. §2000ff-1(a)(1)–(2).
28. *See,* Section-by-Section Analysis of 29 C.F.R. §1635.4.
29. 42 U.S.C. §2000ff-6(f); 29 C.F.R. §1635.7.
30. 548 U.S. 53 (2006).
31. *Id*. at 57-58.
32. 42 U.S.C. §2000ff-7(a); 29 C.F.R. §1635.5(b).
33. 42 U.S.C. §2000ff-7(b).
34. 42 U.S.C. §2000ff-1(b).
35. 29 C.F.R. §1635.8(a).
36. 42 U.S.C. §2000ff-1(b)(1)–(6).
37. Lawful requests for medical information may include a request for documentation to support a request for reasonable accommodation under the ADA or state law, where the disability or need for accommodation is not obvious; a request in support of an employee's request for leave under the FMLA, a state family and medical leave law or other state leave of absence statute or where an employee complies with the FMLA's return to work certification requirements. 29 C.F.R. §1635.8(b)(1)(i)(D)(*1*)–(*3*).
38. 29 C.F.R. §1635.8(b)(1)(i)(A).
39. 29 C.F.R. §1635.8(b)(1)(i)(B).
40. 29 C.F.R. §1635.8(b)(1)(i)(C).
41. 29 C.F.R. §1635.8(d).
42. *Id.*
43. *Id*.
44. 29 C.F.R. §1635.8(b)(1)(ii)(A)–(B).
45. 29 C.F.R. §1635.8(b)(1)(ii)(B).
46. 29 C.F.R. §1635.8(b)(1)(ii)(B).
47. 29 C.F.R. §1635.8(b)(1)(ii)(C).
48. 29 C.F.R. §1635.8(b)(1)(ii)(D).
49. 42 U.S.C. §2000ff-1(b)(2)(A)–(D).
50. 29 C.F.R. §1635.8(b)(2)(i)(B)*(1)–(3).*
51. 29 C.F.R. §1635.8(b)(2)(i)(B).
52. 29 C.F.R. §1635.8(b)(2)(i)(A).
53. 29 C.F.R. §1635.8(b)(2)(ii).
54. It should be noted that, while GINA permits financial inducements to be offered for participation in a wellness program, subject to the conditions set forth above, the ADA does not specifically address, and the EEOC has not taken a position as to, whether employers may be permitted to offer a financial incentive for employees to participate in a wellness program that includes disability-related inquiries such as questions about the employee's current health status on a health-risk assessment. *Incentives for Workplace Wellness Programs*, June 24, 2011 (EEOC Informal Discussion Letters) (http://www.eeoc.gov/eeod/fois/

letters/2011/ada_gina_incentives.html) (last visited August 22, 2011).

55. 29 C.F.R. §1635.8(b)(2)(iii).
56. 29 C.F.R. §1635.8(b)(2)(iv).
57. 42 U.S.C. §2000ff-1(b)(3); 29 C.F.R. §1635.8(b)(3).
58. 42 U.S.C. §2000ff-1(b)(4); 29 C.F.R. §1635.8(b)(4).
59. 42 U.S.C. §2000ff-1(b)(4); 29 C.F.R. §1635.8(b)(4)(i).
60. *See,* 29 C.F.R. § 1635.8 (b)(4).
61. 29 C.F.R. §1635.8(b)(4)(ii).
62. 29 C.F.R. §1635.8(b)(4)(iii)–(iv).
63. 42 U.S.C. §2000ff-1(b)(5).
64. 42 U.S.C. §2000ff-1(b)(5)(A)–(E).
65. 29 C.F.R. §1635.8(5).
66. 29 C.F.R. §1635.8(5)(i)(A)–(B).
67. 29 C.F.R. §1635.8(b)(5).
68. 29 C.F.R. §1635.8(b)(5)(iii); 42 U.S.C. §2000ff-1(b)(5)(C) and (E).
69. 42 U.S.C. §2000ff-1(b)(6); 29 C.F.R. §1635.8(6).
70. 29 C.F.R. §1635.8(c)(1).
71. 29 C.F.R. §1635.8(c)(2).
72. *Id*.
73. 42 U.S.C. §2000ff-5.
74. 42 U.S.C. §12112(d)(3)(B).
75. 42 U.S.C. §2000ff-5(a).
76. 29 C.F.R. §1635.9(a)(2).
77. 29 C.F.R. §1635.9(a)(3).
78. 29 C.F.R. §1635.9(a)(4).
79. 29 C.F.R. §1635.9(a)(5).
80. 42 U.S.C. §2000ff-5(b)(1)–(6).
81. 42 U.S.C. §2000ff-5(b)(3)(A)–(B).
82. 42 U.S.C. §2000ff-6.
83. Employees covered by the Government Employee Rights Act of 1991, or the Congressional Accountability Act of 1995 or Chapter 5 of Title 3, of the United States Code or Section 717 of the Civil Rights Act of 1964 are subject to the procedural requirements of those statutes respectively.
84. 42 U.S.C. §2000ff-6(a)(3); 29 C.F.R. §1635.10(b)(1).
85. 42 U.S.C. §2000ff-6(a)(3); 29 C.F.R. §1635.10(b)(1).
86. 42 U.S.C. §2000ff-6(a)(2); see also 42 U.S.C. §1988(b)–(c); 29 C.F.R. §1635.10(b)(2).
87. 42 U.S.C. §2000ff-6(a)(3); 29 C.F.R. §1635.10(b)(1); see also 42 U.S.C. §2000e-5(g).
88. 29 C.F.R. §1635.10(c)(1).
89. 29 C.F.R. §1635.10(c)(2).
90. 42 U.S.C. §2000ff-8(a).
91. 42 U.S.C. §2000ff-8(a); 29 C.F.R. §1635.11(d).

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Recent PERB Decisions Clarifying the Scope of Bargaining for Interest Arbitration Involving Deputy Sheriffs

By Alyson Mathews

The Public Employment Relations Board recently issued decisions clarifying the analysis of the arbitrability of proposals submitted to interest arbitration involving deputy sheriffs.[1] These decisions reaffirmed and reversed prior Board precedent.

The arbitrability of proposals submitted to interest arbitration involving deputy sheriffs is governed by Civil Service Law § 209.4(g), which was added to the Public Employees' Fair Employment Act in 2005. That section provides that the parties may submit to interest arbitration issues "directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits."[2] It further provides that "non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed by law" are nonarbitrable.[3] This language is identical to that in Section 209.4(f), which governs the arbitrability of proposals submitted to interest arbitration involving investigators, senior investigators and investigator specialists of the State Police as well as forest ranger captains and correction officers employed by the State.

The phrase "directly relating to compensation," as it appears in both sections, has been the source of much litigation. When the Board was first presented with a case involving the interpretation of Section 209.4(g), it looked for guidance to its decisions interpreting Section 209.4(f).[4] The leading case interpreting Section 209.4(f) was (and remains) *State of New York (Governor's Office of Employee Relations) and New York State Police Investigators Association* ("*State Police*").[5]

In *State Police*, the Board held that "the correct interpretation of the phrase 'directly relating to compensation' is one which makes a proposal arbitrable according to the degree of the relationship between the proposal and compensation."[6] The Board elaborated upon this interpretation as follows:

> The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole, predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent *directly* relates to compensation. A demand has compensation as its sole, predominant or primary characteristic only when it seeks to effect some change in amount of level of compensation by either payment from the [employer] on behalf of an employee or the modification of an employee's financial obligation arising from the employment relationship (e.g., a change in an insurance co-payment). If the effect is otherwise, then the relationship of the demand to compensation becomes secondary and indirect and the subject is, therefore, excluded from the scope of compulsory interest arbitration under the language of § 209.4(e).[7]

In applying this test, the Board in *State Police* found arbitrable the union's demands that the State absorb some or all of the education costs for unit members' dependents and the funeral costs for a unit member who died in the line of duty. Even though these demands were arguably for contingent benefits, the Board found them to be indistinguishable from insurance benefits which were specifically included as arbitrable in Section 209.4(e) subjects. The Board found nonarbitrable the union's demands for time off from work without loss of pay including, but not limited to, demands for an increase in the amount of leave time for which a unit member could accrue and be compensated upon separation from service.

The State Supreme Court affirmed the Board's decision. With regard to the union's leave time demands, the Court noted that they could eventually confer an economic benefit. That they represented "potential compensation" did not, however, make them nonarbitrable. To the contrary, the demands' sole, predominant or primary purpose was to maintain a unit member's wages during an absence from work. Since the demand would not effectuate a change in the level of compensation, the Court affirmed that it was nonarbitrable.[8]

The Board applied the *State Police* jurisprudence in the first three cases in which it interpreted Section 209.4(g). In *County of Putnam*, the Board found nonarbitrable the union's demands to amend the sick leave accrual and payout schedule and establish a sick leave incentive bonus. The Board held that, based upon the Supreme Court's *State Police* decision, these were demands for potential compensation and were, therefore, not directly related to compensation.[9]

In *County of Ulster*, the Board held that the union's demand regarding the sick leave accrual rate was non-

arbitrable. It noted that the demand concerned time off without a loss of pay. Rather than changing a unit member's compensation, the demand sought to maintain it. As a result, the demand was not directly related to compensation.[10]

The Board also found nonarbitrable the union's demand for membership dues and agency shop fee deductions. It held that these demands did not "meet the test for compensation" because there was "no nexus between the dues deduction and the unit members' relationship to the County."[11]

Finally, in *County of Sullivan*, the Board found nonarbitrable the union's demand to permit unit members to convert overtime payments to compensatory time and defer payment for compensatory time, holiday pay, accrued vacation time and/or accrued sick leave and, upon separation from employment, place these monies in a health insurance on retirement account.[12]

In the recent *County of Orange* decision, however, the Board reviewed these three decisions and clarified the framework within which to analyze demands submitted to interest arbitration involving deputy sheriffs. The Board held that its previous decisions transformed *dicta* in the Supreme Court's *State Police* decision with regard to a demand for "potential compensation" into administrative mantra. That *dicta*, the Board noted, was only related to leave accumulation proposals that did not seek to increase the level of compensation. In contrast, the Board's previous decisions required that a proposal be directly related to actualized compensation to be deemed arbitrable. The Board held that no requirement exists.[13]

As a result, the Board reversed *County of Putnam* to the extent that it held that a proposal seeking a change in compensation received for an employee's nonuse of sick leave was nonarbitrable because it represented "potential" compensation. The Board found that the primary characteristic of that demand was the monetization of sick leave.[14]

Likewise, the Board reversed *County of Sullivan* to the extent that it relied on *County of Putnam* to conclude that demands to permit conversion of overtime compensation into compensatory time and permit the subsequent "remonetization" of leave time into cash or to be applied to retiree health insurance were nonarbitrable. The Board reaffirmed its holding in *County of Sullivan* that a unitary demand that includes an increase in leave accumulation and compensation for that leave time does not satisfy the *State Police* test.[15]

Since *County of Orange*, the Board has issued four decisions analyzing Section 209.4(g). In *County of Tompkins*, the Board found nonarbitrable the union's mandatory on-call, General Municipal 207-c and reduction of the work schedule demands. The on-call demand included procedures for the timing and posting of on-call assignments and the distribution of the on-call schedule, all of which the Board held were not directly related to compensation. The union's 207-c procedure included nonarbitrable subjects such as the content of the medical information release form. This made the demand unitary and, therefore, nonarbitrable.

Lastly, the Board rejected the union's argument that a reduced work schedule demand would result in an increase in unit members' hourly pay rates and was, therefore, directly related to compensation. The Board disagreed, noting that unit members were not paid on an hourly basis. Thus, the demand primarily related to additional time off from work.[16]

The Board found arbitrable the county's proposal that retroactive pay increases only be available to members who were on the payroll when the interest arbitration award is issued. This was consistent with the Board's previous decisions on this issue. The Board also found arbtitrable the union's demand that members receive overtime for travel time associated with training. The Board rejected the county's argument that this demand was governed by the Fair Labor Standards Act and, therefore, nonarbitrable.[17]

In *County of Madison*, the Board reviewed the arbitrability of the union's demands to increase sick leave accumulation and limit to 30 days the suspension of an employee who was served with a disciplinary notice and who filed a grievance to contest it. With regard to the 30-day suspension demand, the Board rejected the union's argument that the demand primarily related to rate of pay. The Board held that, while the demand would change an employee's compensation, it was inextricably intertwined with disciplinary procedures, which are specifically excluded from arbitration pursuant to Section 209.4(g).[18]

Consistent with *County of Tompkins*, the Board also found arbitrable the county's proposal regarding the retroactivity of the wage increases.

In *County of Clinton*, the Board, pursuant to its *County of Orange* decision, found nonarbitrable the union's demand to modify the rate of sick leave accumulation and arbitrable the union's demands to convert unused sick leave into cash upon retirement and for an incentive for the nonuse of sick leave.[19]

Lastly, in *County of Chenango*, the Board reversed *County of Ulster* insofar as it found nonarbitrable a demand for the deduction of membership dues and agency shop fees. The Board noted that its decision in *County of Ulster* was not based upon the *State Police* test or the language of Section 209.4(g). The Board held that mandatory deductions decrease the level of compensation an employee receives from his/her employer and place a

financial obligation on the employee which arises from the employment relationship.[20] As a result, the demand was arbitrable.

Consistent with *County of Orange* and its progeny, the Board found nonarbitrable the union's unitary demand to increase the number of holidays and require overtime pay for employees who work holidays.[21]

Taken as a whole, the Board's recent decisions clarify the rules of the game with regard to deputy sheriff interest arbitration. They make clear that a demand for an increase in leave time may not be submitted to interest arbitration, but one for compensation for unused leave time may be submitted. The Board's *County of Orange* decision advised that, to avoid potential scope of bargaining issues, parties should separate proposals regarding leave accumulation from those regarding compensation for unused leave time upon separation from employment. The Board's decisions following *County of Orange* unambiguously demonstrate to advocates the consequences of submitting these unitary demands.

What remains to be seen is the impact of the Board's *County of Orange* decision with regard to the interpretation of the phrase "directly relating to compensation." The decision significantly narrows the application of the "potential compensation" test to only those proposals seeking a change in the amount of time off from work without loss of pay.

While the Board has provided advocates with much guidance about how it views those issues differently than its predecessor, there are many subjects upon which it has not yet opined including, but not limited to, those subject matters covered by the phrase "issues relating to eligibility for overtime compensation" and disciplinary procedures with monetary components. With that said, the Board's decision in *County of Orange* potentially results in more proposals being deemed to be directly related to compensation, thereby widening the scope of deputy sheriff interest arbitration.

Endnotes

1. *County of Chenango and Chenango County Sheriff*, 45 PERB ¶ 3003 (2012); *County of Clinton and Clinton County Sheriff*, 44 PERB ¶ 3039 (2011); *County of Madison and Madison County Sheriff*, 44 PERB ¶ 3035 (2011); *County of Orange and Sheriff of Orange County and Orange County Deputy Sheriff's Police Benevolent Association, Inc.*, 44 PERB ¶ 3023 (2011). Pursuant to Civil Service Law § 209.4(g), interest arbitration is limited to deputy sheriffs "who are engaged directly in criminal law enforcement activities that aggregate more than fifty per centum of their service as certified by the county sheriff and are police officers pursuant to subdivision thirty-four of section 1.20 of the criminal procedure law as certified by the municipal police training council."
2. N.Y. Civ. Serv. Law § 209.4(g).
3. *Id.*
4. At the time, what is now Section 209.4(f) was found in Section 209.4(e).
5. 30 PERB ¶ 3013 (1997), *confirmed sub nom.*, *New York State Police Investigators Ass'n v. NYS PERB*, 30 PERB ¶ 7011 (N.Y. Sup. Ct. 1997).
6. *Id.*
7. *Id.*
8. *New York State Police Investigators Ass'n v. NYS PERB*, 30 PERB ¶ 7011 (N.Y. Sup. Ct. 1997).
9. *County of Putnam*, 38 PERB ¶ 3031 (2005).
10. *County of Ulster*, 38 PERB ¶ 3033 (2005).
11. *Id.*
12. *County of Sullivan*, 39 PERB ¶ 3034 (2006).
13. *County of Orange*, *supra* n. 1.
14. *Id.*
15. *Id.*
16. *County of Tompkins and Tompkins County Sheriff*, 44 PERB ¶ 3024 (2011).
17. *Id.*
18. *County of Madison and Madison County Sheriff*, 44 PERB ¶ 3035 (2011).
19. *County of Clinton and Clinton County Sheriff*, 44 PERB ¶ 3039 (2011).
20. *County of Chenango and Chenango County Sheriff*, 45 PERB ¶ 3003 (2012).
21. *Id.*

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Injunctive Relief Under the Taylor Law: A Primer

By David P. Quinn

Effective January 1, 1995, Civil Service Law Article 14 (the Taylor Law) was amended by adding § 209-a.4, which provides for injunctive relief in aid of improper practice charges before the New York State Public Employment Relations Board ("PERB") and the New York City Board of Collective Bargaining ("BCB"). This article takes a look at the statute and its history. It describes PERB's Rules of Procedure, and it offers some practice tips.

History

In *Schenectady PBA v. City of Schenectady*, 158 AD2d 849, 23 PERB ¶ 7507 (3d Dept 1990), the Appellate Division held that the Supreme Court was authorized to grant an injunction under the CPLR to enjoin the City from unilaterally implementing a polygraph test for represented police officers—conduct that was at issue in an improper practice charge before PERB. The Appellate Division observed: "But for the injunction, respondent would administer the polygraph, petitioner would have no relief and the PERB matter would be ineffectual." *Schenectady* was later cited as authority in *CSEA v. Hudson Valley Community College*, 24 PERB ¶ 7511 (Sup Ct Ulster County 1991), where the court enjoined the college from conducting a disciplinary hearing until the propriety of the disciplinary charges was decided by PERB in an improper practice proceeding.

Soon after *Schenectady* and *Hudson Valley Community College*, the Court of Appeals held that Supreme Court was not authorized to grant injunctive relief in aid of an improper practice charge that was pending before BCB. *See*, *Uniformed Firefighters Assn. of Greater NY v. City of New York*, 79 NY2d 236 (1992). The Court reasoned that judicial involvement in improper practice proceedings is "inconsistent with the basic purposes of the doctrine of primary jurisdiction" because it interferes with the authority of administrative agencies that have the "principal responsibility for adjudicating the merits of disputes requiring special competence…[and] expertise." *Id.*, at 241. It emphasized that "early judicial assessment of the merits in public sector labor disputes would be particularly inappropriate because such disputes often require a balancing of the interests and an evaluation of subtle questions for which no litmus test has yet been devised in an area where the courts have little experience or expertise." *Id.*

In response to *Uniformed Firefighters*, the Legislature passed legislation to amend the Taylor Law in order to empower charging parties in improper practice proceedings before PERB and BCB to apply directly to the Supreme Court for injunctive relief under CPLR Article 63. PERB and BCB were given no role in assessing the merits of the injunctions. Thus, the bill did not address the doctrine of primary jurisdiction that figured so prominently in *Uniformed Firefighters*.

Governor Mario Cuomo, though, appears to have had the doctrine of primary jurisdiction in mind when he vetoed the bill. While agreeing with the need for injunctive relief in appropriate circumstances, in his June 7, 1993 veto message, the governor stated: "[S]ince the special expertise for reviewing improper practice charges rests with PERB, I would prefer that the remedy be provided through PERB, instead of directly from the courts."

In the following year, the Legislature passed, and Governor Cuomo signed, the bill that now governs injunctive relief in improper practice proceedings before PERB and BCB (L. 1994, c.695). First effective on January 1, 1995, the statute expires every two years, but has, to date, been renewed each time. Its current incarnation expires on December 31, 2013.

The Statute

Under § 209-a.4 (a), a party filing an improper practice charge may petition the Board "to obtain injunctive relief, pending a decision on the merits of said charge by an administrative law judge, upon a showing that: (i) there is reasonable cause to believe an improper practice has occurred, and (ii) where it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating the maintenance of, or return to, the status quo to provide meaningful relief." Under § 209-a.4 (b), if PERB determines that both elements are shown, it is authorized to petition in Supreme Court, Albany County, to obtain the appropriate injunctive relief. Alternatively, PERB may authorize the charging party to file the petition, in which event PERB must be named as a necessary party in the judicial proceeding. Section 209-a.4 (d) authorizes the Court to grant the appropriate injunctive relief if the standards are satisfied. The statute contains identical language covering injunctive relief in aid of improper practice charges before BCB, except that such proceedings originate in New York County Supreme Court.

Practice Tip

The standards for a Taylor Law injunction are not the same as those for an injunction under CPLR Article 63. "A preliminary injunction may be granted under CPLR Article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate

success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." *Doe v. Axelrod*, 73 NY2d 748, 750 (1988). *See also*, *Gilliland v. Acquafredda Enterprises, LLC*, 92 AD3d 19 (1st Dept 2011). *Compare, PERB v. Town of Islip*, 41 PERB ¶ 7005 (2008)[1] (Court observed: "The applicable standard for granting injunctive relief [under the Taylor Law] differs significantly from the familiar three-part standard that applies to most requests for injunctive relief"). In addition, a CPLR injunction may require the moving party to post an "undertaking" sufficient to compensate the other party if the movant does not prevail in the underlying action. Under § 209-a.4 (b), no such undertaking is required for a Taylor Law injunction.

Practice Tip

As a rule, PERB does not authorize the charging party to petition the Court for the injunction. To date, consistent with the doctrine of primary jurisdiction, PERB has preferred to retain control over the theories advanced in support, particularly because it is the effectiveness of PERB's remedial order that is ultimately at issue. However, when PERB petitions for injunctive relief, the charging party is permitted, on motion, to intervene in the proceeding. *See, e.g., PERB v. City of Troy*, 28 PERB ¶ 7002 (1995). Intervention may be advisable because subsequent litigation can be undertaken by the charging party. *See, e.g., PERB v. City of Troy*, 28 PERB ¶ 7803 (3d Dept 1995). Be mindful, however, of the procedures associated with motions to intervene in civil proceedings. *See, e.g., PERB v. County of Monroe*, 42 PERB ¶ 7007 (2009) (motion to intervene denied).

Under § 204-a.4 (b), PERB has 10 calendar days after receipt of an application for injunctive relief to petition Supreme Court for the appropriate injunction or to authorize the charging party to initiate such a proceeding, or to issue a decision explaining why it is denying the application. If PERB does none of those things, the application is deemed denied. An application that is denied (or deemed denied) is subject to review under CPLR Article 78.

Practice Tip

Because the denial of an application for injunctive relief is not based on the record of a hearing, the standard of review is whether it was arbitrary and capricious, an abuse of discretion or affected by error of law under CPLR 7803. *See, e.g., NYS Supreme Court Officers Assn. v. PERB*, 35 PERB ¶ 7009 (2002); *Local 100, Transp. Workers Union v. PERB*, 28 PERB ¶ 7010 (1995). In *NYS Supreme Court Officers Assn. v. PERB, supra*, the Court also observed that it may not issue an injunction if it disagrees with PERB's denial.

If an injunction is granted, § 209-a.4 (d) requires the ALJ assigned to the underlying improper practice charge to establish a hearing schedule that will enable a decision to be issued in 60 days or, by mutual agreement, to extend that period. Under § 209-a.4 (g) improper practice charges that have injunctions must be given a preference over all other matters before the Board.

Under § 209-a.4 (e), if the ALJ sustains the charge the injunction continues to the extent it implements the ALJ's remedial order, unless the respondent satisfies the remedial order and files no exceptions with the Board or successfully vacates or modifies the injunction. If exceptions are filed, and the Board finds that the respondent has committed an improper practice, the injunction continues to the extent it implements the Board's remedial order. The injunction expires if the Board finds that no improper practice has occurred.

The Rules of Procedure

The rules governing applications for injunctive relief regarding improper practice charges before PERB are provided in §§ 204.15-204.18 of PERB's Rules of Procedure. In § 204.17, the Board delegated the responsibility for administering the Rules and for making the appropriate determinations to PERB's Office of Counsel, currently headed by the Associate Counsel and Director of Litigation.

Filing an Application for Injunctive Relief

Under § 204.15, a charging party may file an application for injunctive relief with PERB's Office of Counsel at the Board's Albany address (80 Wolf Rd., Room 500, Albany, NY 12205). If filed by mail, the envelope must bear the legend "INJUNCTIVE RELIEF APPLICATION."

Practice Tip

An application for injunctive relief is a separate filing from the improper practice charge, which must be filed with the Director of Employment Practices and Representation. If the I.P. and the application are filed in the same envelope, it is possible that one office or the other will not receive the material that is intended for that office in a timely fashion.

An application for injunctive relief consists of a form and supporting documents. The form is fairly self explanatory and may be downloaded from PERB's website [www.perb.ny.gov]. Section 204.15 (c) requires that the form be accompanied by a copy of the underlying charge and affidavit(s) of person(s) with personal knowledge of the relevant facts establishing that an injunction is warranted. The application must also be accompanied by "proof of the date of actual delivery" of the application and supporting documents to the respondent in an envelope bearing the legend "ATTENTION: CHIEF LEGAL OFFICER."

Practice Tip

The Office of Counsel will not consider the merits of an application for injunctive relief that fails to show that it has been actually delivered to the respondent. An application that includes an affidavit of service by mail on the respondent is not evidence that it has actually been delivered. If the application is served on the respondent by mail, evidence that it has been actually delivered could be an executed return receipt or some other acknowledgment of receipt, or tracking data from the delivery service showing delivery.

Practice Tip

The affidavit(s) in support of an application must be by person(s) with personal knowledge of the facts, and they are used by PERB to support its petition to Supreme Court for an injunction. Therefore, when preparing those documents, charging parties should be mindful that they will be carefully reviewed by the Court—not only the Office of Counsel. Conclusory allegations will not suffice. *See, e.g., NYS Supreme Court Officers Assn. v. PERB*, *supra*.

Practice Tip

A memorandum of law in support of an application for injunctive relief is optional, and is not used by the Office of Counsel as evidence in support of the injunction. However, it is here that the charging party can effectively argue to the Office of Counsel why the injunction is warranted, including PERB precedents regarding the merits of the charge and why the alleged harm is irreparable.

Filing a Response

Under § 204.16 (a), a respondent to whom an application has been delivered may (but is not required to) file with the Office of Counsel a verified response to the application within 5 calendar days of such delivery, unless an earlier time is directed by the Office of Counsel pursuant to § 204.16 (c). The response may be supported by affidavits of person(s) with personal knowledge of the facts asserted and a memorandum of law. The response (if any) must be accompanied by proof of service on the charging party. Unlike the application itself, actual receipt by the charging party is not a prerequisite to filing the response. Section 204.16 (a) defines filing as the date PERB receives the response. Therefore, the Rules permit filing by fax under certain circumstances.

Practice Tip

The time for a respondent to file a response (if it chooses) commences when it receives the application from the charging party, not when the Office of Counsel receives it. There is no need to call the Office of Counsel to find out whether it has received an application to which a response will be filed. Indeed, only after the charging party receives confirmation that the application has been delivered to the respondent may it file the application with the Office of Counsel. Therefore, occasionally, the Office of Counsel receives a response before it receives the application.

Under § 204.16 (b), the response is not deemed to be an answer to the underlying charge. Although the response may contain affirmative defenses to the charge, the failure to raise them in the response to the application does not constitute a waiver of those affirmative defenses in the underlying improper practice proceeding.

Practice Tip

Although a response is optional, if none is filed the Office of Counsel has only the charging party's evidence and arguments to consider. What may appear to be a meritorious application for injunctive relief may be rejected based on information provided in the response. Examples of such circumstances are where the respondent raises a meritorious affirmative defense or where the application is based on hearsay which is directly rebutted by the respondent's affidavit. Sometimes allegations of harm are questionable and the respondent has information that defeats them. Although the respondent always has the opportunity to answer PERB's petition to Supreme Court, nipping the application in the bud at the administrative level is usually less burdensome and costly.

Practice Tip

As with the application, the response must be directed to PERB's "Office of Counsel." If not so directed, the response might be delivered to the wrong office and cause unnecessary, if not seriously problematic, delays.

PERB's Review Process

When the Office of Counsel receives an application for injunctive relief, it first ascertains whether a charge has been filed with the Director of Employment Practices and Representation and, if so, whether that office is processing the charge. It then determines whether the application has been properly filed and is complete, including whether there is proof that it has been previously delivered to the respondent. If the answer to any of those questions is "no," the Office of Counsel will not process the application. Many applications for injunctive relief are denied based on this preliminary review.

PERB's Rules do not provide for replies or surreplies, and, because of the very tight time frame to decide the merits of an application, the Office of Counsel does not encourage them. For the same reason, the Office of Counsel does not usually pursue clarifications to allegations in the application and supporting documents regarding the merits of the application.

Practice Tip

Neither the statute nor the Rules provide a statute of limitations regarding applications for injunctive relief, nor do they prohibit a charging party from filing a new and improved application if an earlier one is deficient or denied on the merits. *See, e.g., Town of Orangetown (Orangetown PBA)*, 38 PERB ¶¶ 6006, 6008 (2005).[2] However, a second application alleging substantially similar facts will likely receive the same result. *See, e.g., New York State Unified Court System (McConnell)*, 41 PERB ¶¶ 6004, 6006 (2008).

Practice Tip

If possible, charging parties should seek injunctive relief sufficiently in advance of the alleged harm to enable the Office of Counsel to assess the merits and prepare a petition. *See, e.g., PERB v. City of Buffalo*, 34 PERB ¶ 7014 (2001) (PERB's petition for an injunction was denied as moot because the harm had already occurred).

Of the applications for injunctive relief that are processed, most have been denied on their merits—usually because the alleged harm is insufficient to warrant an injunction. In contrast to the threshold "reasonable cause to believe an improper practice has occurred," which is a comparatively low standard, the standard for the necessary degree of harm is high.

When considering the harm, the Office of Counsel is guided by PERB's jurisdiction and remedial authority under § 205.5 (d) of the Act. For example, in *CSEA & Village of Hempstead (Barrows)*, 42 PERB ¶ 6010 (2009), the Office of Counsel denied an application for injunctive relief associated with an alleged breach of the duty of fair representation under § 209-a.2 (c) of the Act, finding that the alleged harm was owing to the breach of the contract over which PERB lacks jurisdiction. Similarly, in *County of Suffolk (Communications Workers of America)*, 42 PERB ¶ 6008 (2009), an application was denied concerning conduct allegedly affecting the outcome of an election being conducted by the Suffolk County mini-PERB, which had jurisdiction to remedy the effect of the conduct on the charging party. To date, the Office of Counsel has not pursued injunctive relief where the harm is limited to pecuniary losses to individuals who have lost their jobs allegedly in violation of the Act, finding that reinstatement with back pay is an effective remedial order under § 205.5 (d) if a violation is found. *See, e.g., City University of New York (Professional Staff Congress)*, 42 PERB ¶ 6003 (2009).

On the other hand, in *PERB v. City of Troy*, *supra*, PERB obtained an injunction preventing the City from refusing to deduct and remit union dues and agency fees on the ground that the union required the funds to effectively represent the unit. Likewise, in *PERB v. Town of Lewiston*, 31 PERB ¶ 7005 (1998), PERB unsuccessfully sought an injunction to require a town to reinstate a cadre of union organizers and negotiators allegedly terminated in retaliation for their exercise of protected rights. The Court rejected PERB's argument that the employer's action had a chilling effect on the remaining unit employees. In *PERB v. State of New York*, 29 PERB ¶ 7006 (1996), PERB obtained an injunction against the State requiring it to resume payments into a union health fund that provided prescription drugs to all unit employees for a variety of life-sustaining purposes.

Perhaps the clearest illustration of irreparable harm warranting an injunction is where an employer unilaterally requires employees or a union to disclose confidential information, as in *City of Schenectady, supra*. If a violation is found, an order of the Board cannot restore the privacy interests so compromised. *See, e.g., PERB v. County of Monroe*, *supra*; *PERB v. Town of Islip*, *supra*; *PERB v. City of Buffalo*, 28 PERB ¶ 7008 (1995).

When the Office of Counsel decides to seek an injunction, it sends to each party a formal notice of intent that includes how and when it will proceed. As a rule, PERB seeks an injunction by Order to Show Cause and Petition, and requests a Temporary Restraining Order. In such cases, the notice of intent advises the respondent when PERB will appear in Albany County Supreme Court, affording it an opportunity to be heard on the request for the temporary relief. At that time the Court usually sets a time for the respondent to answer the petition and schedules a date for argument on the preliminary injunction.

As of this writing (January 2012), PERB has received 353 applications for injunctive relief since January 1995, representing 2.4% of the 14,321 I.P.s that were filed during the same period. Only 12 applications for injunctive relief (3.3% of those received) resulted in a judicial order. In addition to those already cited herein, the others are: *PERB v. County of Rockland*, 29 PERB ¶ 7002 (1996) (granted); *PERB v. County of Onondaga and Sheriff of Onondaga County*, 29 PERB ¶ 7010 (1996) (granted), *PERB v. Buffalo Water Board*, 30 PERB ¶ 7005 (1997) (denied), *PERB v. NYC Trans Auth.*, 36 PERB ¶ 7012 (2003) (granted), and *PERB v. Town of Orangetown*, 38 PERB ¶ 7015 (2005) (denied).

One of the reasons that so few meritorious applications for injunctive relief result in a judicial order is that

many are settled before a petition is filed or before the judgment is issued. Often, respondents are willing to voluntarily stay their hands regarding the at-issue conduct pending final disposition by the Board on the merits of the I.P. Although the Office of Counsel will consult with the charging party regarding such settlements, ultimately, if the Office of Counsel is satisfied that the alleged harm is no longer "irreparable" under the terms of the respondent's agreement, it will ask the charging party to withdraw the application, or it will deny it. *See, e.g., Town of Woodbury*, 40 PERB ¶ 6004 (2007). Occasionally, such settlement efforts resolve the underlying improper practice charge as well. However, because settlement efforts often take more than the statutory 10-days within which PERB must petition the Court, they are undertaken only if the respondent agrees to waive the timeliness of the petition—a waiver that many respondent's are willing to enter if it means that they might avoid costly litigation.

Conclusion

The Taylor Law has been amended several times to address deficiencies in PERB's remedial powers. The injunctive relief provision is the most recent. It is, as the others that preceded it, a tool to enable PERB to issue a meaningful remedial order in an improper practice proceeding that can effectuate the policies of the Act.

Endnotes

1. Unless otherwise specified, all injunctive relief decisions cited herein are from Albany County Supreme Court.
2. Between 1995 and 2002, decisions of the Office of Counsel denying applications for injunctive relief were in the form of brief orders, and none was published. In 2002, the Office of Counsel began publishing denial decisions (other than those for technical deficiencies) in the form of full PERB decisions, and, although not required under the statute, from 2002 until 2007, the office published decisions in like form explaining why it was going to seek an injunction. Because such decisions are not precedential, they were published only to serve as guides for practitioners. Currently, the office will publish a decision denying an application for injunctive relief only if it raises novel issues that will serve as further guidance to practitioners. It no longer publishes decisions explaining why it will seek an injunction.

Mr. Quinn has been employed with the New York State Public Employment Relations Board since 1984 and is currently its Associate Counsel and Director of Litigation. The opinions stated herein are his own and do not necessarily reflect those of the Board. He notes that much of the development of PERB's administration of the Taylor Law's injunctive relief provisions is the product of the work of his predecessors, Gary Johnson, William Busler and Sandra Nathan.

Winners and Losers: Employment Discrimination Trials in the Southern and Eastern Districts of New York

By Vivian Berger

I. Introduction

Scholars and practitioners have long known that employment discrimination plaintiffs have a difficult row to hoe. They fare poorly, both in comparison with plaintiffs in other types of actions and absolutely—losing much more often than winning. That is true at all stages of litigation: pre-trial, trial and appeal. Many studies have documented this state of affairs,[1] especially with regard to federal courts[2] since these keep generally reliable statistics.

Some writers have speculated about the causes of the phenomenon. Reasons cited have ranged from biased decision makers and overly defendant-friendly doctrine[3] to multiple practical considerations lending an advantage to the employer.[4] Parties, advocates and neutrals, however, are usually less concerned with the "why" than the "who" and "how much": who prevails, and to what extent? The better the players can quantify the risk-adjusted value of a case (or, from the opposite point of view, the defendant's exposure), the better they can decide the terms on which they should settle. Moreover, the sooner they can do so, the more they can save in transaction costs—above all, attorneys' fees.

The author, having previously written on the incidence of summary judgment in employment discrimination actions in New York's downstate federal courts,[5] has often been asked what happens to the ones that clear this hurdle if they actually go to trial. (Denial of a dispositive motion tends to focus the defense on making serious efforts to resolve the matter.) This article attempts to answer that question in a number of respects. Although the small number of verdicts, as compared with summary judgment decisions, precluded performing the sophisticated statistical analysis conducted in the earlier study, the results reported in this article should still give some useful guidance to those wishing to assess the risks or rewards of trial.

II. The Study: Methodology

The online system PACER affords access to docket sheets and documents in cases in the federal judicial districts. Among the parameters one can search are Case Status (open or closed), Filed Date, and Nature of Suit. The author retrieved all lawsuits under the headings 442 (Civil Rights: Jobs) and 445 (Americans with Disabilities—Employment), filed from January 1, 2004 through December 31, 2005 in the Southern and Eastern Districts of New York (SDNY and EDNY). Among closed cases, those culminating in a jury verdict or findings and conclusions by the judge at a bench trial (also referred to here as "verdicts") were winnowed out and tabulated.

This inquiry yielded a combined total for the two years of 57 trials: 32 in the SDNY; 25 in the EDNY. Since several cases had multiple plaintiffs and, occasionally, mixed verdicts—some plaintiffs prevailing, others losing—the figures were further broken down to reflect the actual number of plaintiffs in these trials. There were 78: 50 in the SDNY; 28 in the EDNY. Finally, the study also disaggregates defendants into private and public entities.

"[E]mployment discrimination plaintiffs… fare poorly, both in comparison with plaintiffs in other types of actions and absolutely—losing much more often than winning."

From these figures, we compiled win-loss statistics. The final resolution on post-verdict motions or appeal determined winners and losers, but directed verdicts were not counted. This choice is, of course, debatable; some may be interested simply in what the fact-finder does. Yet it seems disingenuous to call an interim decision a victory. Combatants would rather carry the day in the war than a battle. In any event, only four results changed after trial (all in the SDNY).[6]

The article also reports awards (total, average and median amounts, post-remittitur) for pain and suffering and, where available, plaintiffs' attorneys' fees and costs, as well as the few instances of punitives. While it might have included economic damages in addition, these were omitted because back pay at least is determined by largely objective factors that the people involved can readily calculate. (Although this is less true of front pay, the matter is trivial since only three plaintiffs obtained future economic damages.) Further, such figures would have indicated plaintiffs' former and interim earnings and their periods of unemployment more than the intangible predilections of judges and juries that a study like this one tries to uncover.

Last, the author recorded the time from filing to verdict—once more, total, average and median; this is approximated in months. From the parties' perspective, it might be more meaningful to chart the time from filing to termination of the case since closure is not actually

attained until the disposition of post-trial motions or an appeal. However, using the time to judgment would involve deciding which judgment "counts" when, for example, a preliminary judgment embodies the verdict the jury returns, an amended judgment conveys the decision on post-verdict motions, and a later judgment or order relates to matters like attorneys' fees, costs and interest. (The Pacer category Date Terminated does not consistently reflect any of these possible dates.) In addition, many judgments are not appealed. The date of verdict thus has the virtue of being ascertainable in every case. In tried cases, it represents the minimum time from commencement of the action to what is colorably a disposition.

A closing word needs to be said about the so-called censored data. These are data that may be altered by events after the study's completion, which have the potential to alter outcomes. At the time of writing, six lawsuits filed in 2004 are still open—one only technically so, since it remains on the court's suspense docket pending the outcome of arbitration.[7] Further, out of the 2004 EDNY data set, one defense verdict is on appeal. Plaintiffs are also appealing two verdicts as well as two summary judgment grants arising from 2005 cases.[8]

While the number of actions still unconcluded is not de minimis, viewed in context it does not pose a significant risk of undercutting the study's results. The Administrative Office of the U.S. Courts reported that in 2006 only 3.2% of employment civil rights suits concluded by trial.[9] That office's statistics reveal, too, that appellate courts reverse defendants' trial wins less than 9% of the time; their pretrial victories are overturned in fewer than 11% of appeals.[10] In light of these realities, our numbers appear to be quite stable.

III. The Study: Results[11]

A. Who Wins, and How Often?

1. Win-Loss Rates

The 57 cases in our data set yielded 17 verdicts for the plaintiff (29.8%), 38 verdicts for the defense (66.7%), and two mixed verdicts (3.5%) (III.A).[12] The plaintiff victory rates in the districts are fairly close: 28.1% for the SDNY and 32.0% for the EDNY. The win rates for defendants were 65.6% (SDNY) and 68.0% (EDNY), respectively. (In the SDNY, the two mixed verdicts, which amounted to 6.3% of that district's total verdicts, account for the fact that plaintiff and defendant success rates add up to less than 100%.) Because a plaintiff's lack of legal representation virtually guarantees defeat, the author performed an alternative calculation omitting the two pro se trials in the SDNY (III.B). In this scenario, plaintiffs' victories rose to 30.0% in the SDNY and 30.9%, overall.

Generally, the study reveals that plaintiffs win in nearly a third of the cases—29.8% or 30.9%, depending on whether one counts the pro ses. But the underlying data do suggest a note of caution. While the rates for the sample years in the EDNY did not differ substantially (plaintiffs prevailed 35.3% of the time in 2004 and 25.0% in 2005) (II.A), they diverged dramatically in the SDNY. In 2004, plaintiffs lost in all but one of eleven trials, scoring only 9.1%; in 2005, they won in 8 of 21 trials, 38.1% of the time (I.A).[13] Very likely, 2004 was simply an unusual year in that district. A larger database—more years—would lessen the importance of annual variations. Yet as we will see in the next section, statistics obtained from other sources give some reason for confidence in a figure in the vicinity of one-third.

Another way in which the author looked at the data was to examine victory rates by number of plaintiffs rather than cases in order to see whether the presence of multiple plaintiffs had any relationship with outcome. In fact, it did. Of the 78 plaintiffs (there were four multi-plaintiff trials, two apiece in each of the districts), a total of 34, or 43.6%,[14] prevailed: 46.0% in the SDNY and 39.3% in the EDNY (III.C). Although correlation is not tantamount to causation, it makes sense that plaintiffs would fare better in tandem than alone: each one's story reinforces the others.' Yet the likely "spillover" effect has its limits. Interestingly, the two multi-plaintiff lawsuits in the SDNY produced mixed verdicts. In one of them, seven plaintiffs won and four lost; in the second, seven won and two lost.[15] Maybe hearing the testimony of numerous claimants attuned the juries to the relative merits of their cases, with the result that some suffered from comparison with others.

Finally, a word should be said about the prominence of retaliation claims in the plaintiff's victory column. Plaintiffs prevailed on this cause of action in thirteen of the seventeen cases they won—77.5% of the time.[16] Of the 34 victorious plaintiffs, 20 (58.8%) were successful on this ground.[17]

2. Private Versus Public Defendants

Finally, the study divides cases according to whether the defendant is a private entity or a governmental body. Twenty-six (45.6%) fell into the former category and 31 (54.4%) into the latter (III.E). At first blush, plaintiffs did better when they confronted a private defendant: ten out of 26 (38.5%) won (III.E.1), as opposed to seven out of 31 (22.6%) of those who sued a public employer (III.E.2).[18] Breaking down the numbers by district, one finds that plaintiffs in the SDNY had a 37.5% win rate against private institutions (III.E.1), compared with an 18.8% win rate against public bodies (III.E.2). The EDNY showed success rates for private-sector plaintiffs of 40.0% (III.E.1), as opposed to 26.7% for ones in the public sector (III.E.2).

Yet the apparent disadvantage suffered by plaintiffs suing the government disappears when verdicts are ana-

lyzed by number of plaintiffs, not just cases. Eleven out of 27 plaintiffs (40.7%) prevailed in private-entity cases (III.E.3). But of 51 plaintiffs suing public defendants,[19] 23 (45.1%) won (III.E.4)—roughly twice the percentage produced by tabulating cases alone. The putative "mutual-reinforcement effect" evinced in multi-plaintiff trials seemingly neutralized any hypothesized negative effect encountered by public-sector plaintiffs.

This leads to the question whether the public-private distinction makes an actual difference, or whether it is merely an artifact of the relatively small amount of data. (The difference is not statistically significant.) One might imagine that the fact that very large bodies like New York City, the Port Authority, and school districts are sued very often benefits them in litigation; "repeat players" tend to do better than "one-shotters."[20] By contrast, there are private defendants who have little or no experience with lawsuits—at least in the specialized employment arena. Given the mixed signals, however, we can arrive at no firm answer.

B. What Do Prevailing Plaintiffs Win?

1. Pain and Suffering Awards

Combined figures for the two districts yielded 32 pain and suffering awards—22 for the SDNY, ten for the EDNY—of which two had been reduced by remittitur.[21] The average emotional distress verdict was $225,239 (III.F.1). In the SDNY, the number was higher, but not substantially: $265,177 (I.F.3). The much lower number in the EDNY was $137,375 (II.D.3). Because of their sensitivity to outliers, especially large ones, averages tend to be misleading. Indeed, if one removes the biggest and smallest awards ($4,000,000[22] and $0.00, respectively), one arrives at an overall average of $106,922. Correspondingly "trimmed" data from the districts produce averages of $91,520 for the SDNY and $109,219 for the EDNY—a reversal in the sense that the EDNY's average now exceeds the SDNY's.

A more informative statistic for someone who wants to calculate the probability of an emotional damages award falling within a certain range is the median dollar amount. (The median is the middle value or values in a distribution). The combined median was $60,000 (III.F.2). The median in the SDNY was $50,000 (I.F.6); in the EDNY, it was $63,750–$80,000 (II.D.6). Plainly, most plaintiffs, even if they win, cannot expect to obtain a huge amount for pain and suffering. Since media reports often exaggerate both success rates and monetary recoveries of plaintiffs,[23] these litigants frequently need emphatic reality checks from their attorneys and mediators.

2. Attorneys' Fees and Costs

Although 17 cases from our data set resulted in a plaintiff's verdict, the author could find only 15 reports of the sum received on account of attorneys' fees and costs. (This is unsurprising because amounts arrived at by settlement will not generally appear on PACER in matters involving a private defendant.) The average amount, which included two agreed-upon numbers, both in the SDNY, was $267,659 (III.G.1). The district averages came to $396,367 in the SDNY (I.G.3) and $263,422 in the EDNY (II.E.3).

Large outliers again skewed the averages upward. The somewhat more informative medians were $165,000(combined districts) (III.G.2), $79,623-$141,308 (SDNY) (I.G.6), and $248,807 (EDNY) (II.E.6).

3. Punitive Damages

Mediators often hear plaintiffs' lawyers predict a punitive damages award in case of trial—even in quite routine cases. Our statistics do not bear them out. Only six, or 18.2%, of prevailing claimants received punitives (III.H). (Five were retaliation claimants; the sixth had won on sexual harassment.) The average award was $176,512 (III.H.1); the median, $50,000–$190,000 (average $120,000) (III.H.2). Significantly, the two extremely large amounts ended up heavily discounted: one, over $1.6 million, fell to $190,000, and another, $1.5 million, to $554,070, on remittitur; a third large award of $500,000 was reduced to $50,000 because of a statutory cap. Notably, such caps do not pose a risk to plaintiffs who prevail under New York State's or New York City's anti-discrimination law. (But the former does not authorize punitive damages.)

C. How Long Does It Take from Filing to Verdict?

The average time from filing of the complaint to verdict was 33.7 months in the two districts (III.I.1); the median was 30 months (III.I.2). The SDNY had an average and median, respectively, of 30.8 months (I.I.1) and 29 months (I.I.2). The corresponding figures for the EDNY were 37.5 months (II.G.1) and 34 months (II.G.2). (Seven months was the shortest period recorded in our database and 84 months (!) the longest; both these trials took place in the EDNY (III.I).)

Generally speaking, litigants should be counseled to expect the passage of at least two-and-a-half years before they can hope to see a verdict. But meaningful victories, in particular, will probably elicit post-verdict-motions and, if the defense loses, appeals. Thus even if a prevailing plaintiff clears these hurdles with verdict unscathed, the time it will take to lay hands on the money—though not quantified in this study—will, of course, be much longer.

IV. Prior Verdict Studies

1. Limits of Usefulness

To the extent a study draws on an extensive database, it generally inspires more confidence in its results. Supplementation of our work by others' research could ex-

pand our data both temporally and geographically. However, on the downside, such expansion risks concealing material differences among time periods and locations.

There have been many studies reporting verdicts in employment actions. Different ones rely on different sorts of data: some national,[24] some local[25]; others state[26] or state and federal.[27] They cover diverse periods of time. A number rely on published decisions[28] or lawyers' accounts,[29] while others obtain information directly from case files or governmental sources like Pacer or the Administrative Office of the U.S. Courts.[30] Some deal with all types of employment disputes,[31] while others deal solely with discrimination.[32]

Predictably, the data sets vary in reliability. For example, systematically compiled federal statistics, spanning years, are more likely to be trustworthy than those available from government bodies in most states. "Raw" data do not pose the problem of "publication bias" presented when a researcher uses decisions culled from case reports.[33] Information obtained from volunteer non-neutral parties like litigants' lawyers will be less representative, hence less reliable, than data procured from impartial sources. (These are particularly inclined to yield disproportionate numbers of plaintiff verdicts, especially ones with high damages.)[34]

Moreover, even dependable studies may suffer from a lack of comparability to each other and to one's own. First, authors utilize various coding conventions. Some, for instance, like us, count events after the verdict but do not consider directed verdicts in tabulating wins and losses; others use a different approach.[35] Then, the cases comprising the database may rely on divergent law. Even if one sets aside changes in doctrine over time,[36] the differences between state and municipal anti-discrimination statutes, where these exist, and federal law may undermine cross-regional comparisons[37]; so, too, may conflicting precedents handed down by the federal Courts of Appeal. In addition, dissimilarities in local culture surely affect trial results. In sum, geography matters—a lot.[38]

2. Selected Results

a. Verdict Rates

Because of the salience of location, as well as similarity in methodology, perhaps the most instructive comparator to our study is one done by the law firm Orrick Herrington & Sutcliffe of cases in the SDNY. As did we, the Orrick researchers examined PACER docket sheets for the relevant job discrimination categories. They looked for verdicts resulting from filings between December 1, 1999 and July 31, 2001; they did not take account of post-trial changes.[39] These amounted to 54 (a number almost the same as our total from both districts: 57). The plaintiff prevailed in 15 (27.78%) of the cases.[40] In our slightly later period, the comparable figures were 28.1% (SDNY) and 29.8% (combined districts). On their face, the two sets of results are similar enough to fall within sampling error. A caveat, however: a previous Orrick report on results from a slightly earlier period yielded a success rate for plaintiffs of 38%.[41]

Significantly, a number of other verdict surveys in federal courts, of varying degrees of comparability and reliability, produce win rates by employment plaintiffs ranging from 28.5% to 39.9%.[42] These lend rough support to our 29.8% finding (30.9%, excluding pro ses) in the two districts studied.

b. Plaintiffs' Monetary Recoveries

With regard to damages, the problems in comparing others' findings to ours become almost insurmountable. For one thing, authors almost never clearly report what their numbers represent. Terms such as "total jury award" may or may not include back pay—or may do so inconsistently, according to particular judges' practice respecting who makes this determination. Occasionally, too, writers use "jury" as a shorthand for lay and judicial decision makers. Even "total award" does not always include attorneys' fees and costs, while "compensatory" might refer to non-economic or economic damages or both. Furthermore, when surveys cover different time spans, true comparability would necessitate using constant dollars. (Some studies do so.) Finally, we do not know to what extent verdicts were lowered on account of damages caps inapplicable to cases governed by more generous non-federal law. Given these difficulties, we report only a few results of other surveys, all federal, "for what they are worth."

The Orrick SDNY study found "[a]verage [d]amages" of $405,596 and, more meaningfully, $80,000 "[m]edian [d]amages."[43] Another study, employing Administrative Office statistics for 1999-2000, recounts "[m]ean [d]amages" and "[m]edian [d]amages" of $336,291 and $150,500, respectively.[44] Updated from 2000 to 2005 dollars, these equate to $394,223 and $178,429.[45] A third survey, also based on data from the Administrative Office, reports "[e]stimated median awards" of $150,000 for cases concluded by trial in 2006[46] and $158,460 for cases concluded in 2000-2006.[47]

To the extent that these numbers comprise more than just emotional damages, one would expect them to be higher than our pain and suffering medians—$50,000 in the SDNY, $63,750–$80,000 in the EDNY and $60,000 combined—as, indeed, they are. (The $80,000 median amount in the Orrick Study would almost surely have risen, moreover, if converted to dollars from a later period.) More than that one cannot really say.

But the Orrick Study does offer one set of comparable monetary figures, for attorneys' fees and costs, for

which the average and median awards were $226,194 and $43,121, respectively.[48] Recall that our averages in this category came to $267,659 (combined districts) and $396,367 (SDNY); the medians were $165,000 (combined districts) and $79,625-$141,308 (average $110,466) (SDNY). Even accounting for inflation, the amounts we recorded seem to be substantially greater. Sampling error may well account for this discrepancy.[49]

c. Adjudication Time

According to the Orrick Study, the average time from filing to verdict in the SDNY was 30 months, while the median time was 28 months.[50] Our SDNY average and median came, respectively, to 30.8 and 29 months. The increase was, therefore, marginal.

"As compared with the average plaintiff, the mainly institutional defendants in employment discrimination cases are typically seasoned, high-stakes repeaters. Thus, it comports with theory as well as common sense that they win, and plaintiffs lose, more than half the time."

V. Conclusion: Our Results in Context

Both theory and practical experience counsel that the suits that survive to verdict do not represent disputes in general. The seminal Priest-Klein hypothesis predicts that the extreme cases—ones that plainly favor the plaintiff or the defense—will tend to be resolved by settlement.[51] (Of course, weak claims are also vulnerable to dismissal.) Otherwise stated, triable cases are more likely to be tried. Our survey's results should thus have greater value as guidance the closer a lawsuit gets to trial.

The model also posits that the weeding out of cases at either end of the spectrum will lead to an approximately even split in verdicts for plaintiffs and defendants.[52] Granted, our finding of a roughly one-third success rate for single plaintiffs does not bear out the 50-50 outcome prediction. Yet that conclusion applies only to parties who have equal stakes in the dispute and "equivalent information, experience, and skill."[53] Stake asymmetry correlates with whether parties are repeat players in litigation.[54] Because of concerns such as precedent and reputation, which transcend the immediate action, habitual litigants have greater stakes than "one-shotters"[55]; they also have a better chance of victory.[56] As compared with the average plaintiff, the mainly institutional defendants in employment discrimination cases are typically seasoned, high-stakes repeaters.[57] Thus, it comports with theory as well as common sense that they win, and plaintiffs lose, more than half the time. Furthermore, as we saw earlier, other research corroborate's this study's ballpark finding.

In closing, we stress that our claims for our work are fairly modest. Statistics can do no more than provide a useful background, not substitute, for detailed analysis of one's own case. Experienced practitioners should have a fairly good idea of witnesses' likely appeal to a jury, the range of potential damages awards, the proclivities of the presiding judge, and all of the other tangible and intangible factors affecting the decision when to settle and on what terms. We hope that our findings will usefully contribute to the overall efforts of attorneys and neutrals to provide a reality check to their clients confronted with the daunting prospect of trial.

Endnotes

1. *See generally* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUDIES 429 (2004) (dealing with pre-trial, trial and appellate stages).
2. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 110 (2009); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).
3. Minna Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1445 (2009).
4. *See* Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 489, 499-503 (2003).
5. Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks For Settling Employment Discrimination Lawsuits*, 23 HOFSTRA L. & EMP. L.J. 45 (2005).
6. One defendant got a post-verdict judgment as a matter of law. Another obtained an appellate decision holding that the trial judge should have given the defense judgment as a matter of law. A third was granted a new trial on a post-verdict motion. A plaintiff was awarded a new trial on one of his claims on appeal; the case then settled.
7. Three are from the SDNY. The three from the EDNY are related matters.
8. All of these appeals come from the SDNY. One involves a mixed verdict in an action brought by eleven plaintiffs; the four losers are appealing.
9. *See* Tracey Kyckelhahn & Thomas H. Cohen, *Civil Rights Complaints in U.S. District Courts, 1990-2006*, at 6 (Table 5) (2008). *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).
10. Clermont & Schwab, *supra* note 2, at 109 (Display 2). Notably, for an appeal from a grant of summary judgment to affect our data, it would have to end in reversal and the action would have to proceed to verdict rather than settle or otherwise terminate. The chances of this occurring are about .1069 X .032, or 0.34%—in short, minuscule. *See id.*
11. Parenthetical references in this section are to the Statistical Summary in the Appendix. This is divided into three parts, which report data from (I) the SDNY, (II) the EDNY, and (III) aggregate data.

12. Two trials in the SDNY and one in the EDNY were non-jury.

13. Technical note: the difference is statistically significant (a 95% confidence interval is from 31.0% to 73.7%). Thus, the difference does not evidently arise from sample error. But the reason for it is unknown.

14. Excluding the two pro se plaintiffs in the SDNY yields an almost identical statistic: 44.0%.

15. In the one multi-plaintiff trial in the EDNY, all three plaintiffs were victorious.

16. The breakdown between the two districts is as follows. Fifty-six and a half percent of successful plaintiffs in the SDNY won on a charge of retaliation; the corresponding figure for the EDNY was 63.6%.

17. Interestingly, the author's summary judgment study showed no higher survival rate for charges of retaliation than for most other kinds of claims. *See* Berger et al., supra note 5, at 60 (Table 5).

18. There were 22 defense verdicts (71.0%) as well as two mixed verdicts (6.5%) in the public sector. In the private sector, no cases were mixed. There were 16 defense verdicts—61.5% of the total.

19. Three out of four multi-plaintiff trials involved public defendants.

20. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

21. A SDNY award of $1,000,000 was reduced to $300,000. An EDNY verdict of $100,000 was remitted to $50,000.

22. *See Osorio v. Source Enterprises, Inc.*, 2007 WL 683985 (SDNY 2007) (stating reasons for court's denial of judgment as a matter of law, new trial, and remittitur).

23. *See* Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237 (2004).

24. *E.g.*, Kyckelhahn & Cohen, *supra* note 9.

25. *E.g.*, Charlotte L. Lanvers, *Different Federal District Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & PUB. POL'Y 381 (2006-2007).

26. *E.g.*, David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates For Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003).

27. *E.g.*, JURY VERDICT RESEARCH (JVR), EMPLOYMENT PRACTICE LIABILITY: JURY AWARD TRENDS AND STATISTICS (2008).

28. *E.g.*, Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 555-57, 576-77 (Table V) (2001).

29. *E.g.*, JVR, *supra* note 27. *See also* Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 199-200 (2010) (relying on JVR data).

30. *E.g.*, Nicholas C. Soltman, Comment, *What About "Me (Too)"? The Case For Admitting Evidence Of Discrimination Against Nonparties*, 76 U. CHI. L. REV. 1875, 1882 & n.85 (2009) (relying on Bureau of Justice report, which itself cites Administrative Office statistics).

31. *Cf.* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) (giving results in arbitration).

32. *E.g.*, Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209, 220-21 (2011); Lanvers, *supra* note 25.

33. A major concern is that published decisions yield an unrepresentative sample. *See generally* Peter Siegelman & John J. Donohue III, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133 (1990). For example, in the summary judgment study we co-authored, we found that to adjust for publication bias in our claim survival rates we had to multiply them by a 1.32 factor. *See* Berger et al., *supra* note 5, at 63.

34. Professor Seiner cites JVR statistics purporting to show that discrimination plaintiffs stand an almost two-thirds chance of prevailing at trial. JVR's data derive in part from "plaintiff and defense attorneys" and the media—hardly the most reliable sources. *See* Seiner, *supra* note 29, at 199-200 & n.170. Not surprisingly, JVR's results are unique.

35. *See, e.g.*, Kyckelhahn & Cohen, *supra* note 9, at 6 (Table 7 n.a) ("plaintiff winners" category includes both trial and directed verdicts); *Orrick's Survey of Trial Results in the S.D.N.Y.: A Study From December 1999 to July 2001* (Orrick Study), 2 NY EMP. L. & PRAC. 3 (2001) ("As the focus was on the trial of employment discrimination cases and not post-trial modifications of the verdicts, the statistics reflect the trial results and not the ultimate case results").

36. *See generally* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases For Trial*, 90 MICH. L REV. 319 (1991) ("An analysis of trial outcomes over a short period provides no more than a snapshot of the process of litigation. Its value as a long-term description depends on the stability of the rules that govern the game.")

37. The New York City Human Rights Law, for example, is more protective in many ways than analogous New York state and federal law.

38. Charlotte L. Lanvers's work furnishes an excellent illustration of this phenomenon. Her sample of cases showed that in the relevant period the plaintiff secured a favorable verdict 46% of the time in the Eastern District of Pennsylvania but only 28.6% of the time in the Northern District of Georgia. *See* Lanvers, *supra* note 25, at 410 (Table 5.1).

39. *See supra* note 35.

40. *See supra* note 35.

41. The filings occurred between April 1, 1997 and December 1, 1999. *See* Alfred G. Feliu, *Defense Verdicts Are in the Majority, the Orrick S.D.N.Y. Jury Verdict Survey Finds*, 2 N.Y. EMP. L. & PRAC. 3 (2001). (The title is inaccurate: the survey included some bench as well as jury trials.)

42. *See* Clermont & Schwab, *supra* note 2, at 129 (28.5%); Kyckelhahn & Cohen, *supra* note 9, at 6 (Table 6) (30.8%); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination as a Claiming System*, 2005 WIS. L. REV. 663, 695 (38.1%); Nielsen & Beim, *supra* note 23, at 251-53 (32.2%); Clermont & Schwab, *supra* note 1, at 441 (39.5%); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOLUTION J. 44, 48 (Table 1) (Nov. 2003-Jan. 2004) (36.4%); Michael Selmi, *supra* note 2, at 560 (39.9%).

43. Orrick Study, *supra* note 35.

44. Eisenberg & Hill, *supra* note 42, at 46, 49.

45. *See* Colvin, *supra* note 31, at 5 (Table 1) (2011).

46. Kyckelhahn & Cohen, *supra* note 9, at 6 (Table 6) (2006 dollars).

47. *Id.* at 7 (Table 7).

48. *See* Orrick Study, *supra* note 35.

49. A recent survey of federal district court decisions in 2004 and 2005 found that, of plaintiffs who prevailed in Title VII cases, approximately 29% were awarded punitive damages. Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 741 (2008). Our figure was 18.2%. Aside from using a different (national) database, this study would be subject to publication bias. *See supra* note 33. Because punitive damage awards (especially those of significant amount) are likelier to lead

to published opinions than non-awards, one would expect to see a greater percentage of punitive recoveries in a work based on reported decisions.

50. *See* Orrick Study, *supra* note 35.

51. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes For Litigation*, 13 J. LEGAL STUD. 1 (1984). In real life, though, stubborn, inexperienced or poorly represented litigants may furnish the exception to the rule.

52. *Id.* at 4-5. *See also* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 11, 116 (2007); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 912-13 (2006).

53. *See* Gross & Syverud, *supra* note 36, at 325.

54. *See* Peter Siegelman & Joel Waldfogel, *Toward a Taxonomy of Disputes: New Evidence Through the Prism of the Priest/Klein Model*, 28 J. LEGAL STUD. 101, 109-111 (1999).

55. *Id.*

56. *See* Priest & Klein, *supra* note 51, at 24-25. Explanation of why higher stakes influence victory falls beyond the scope of this article. *See id.* at 26-27.

57. *See* Siegelman & Waldfogel, *supra* note 54, at 109.

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Statistical Summary

I. SDNY: Employment Discrimination Cases

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A.	Verdicts/Cases	P Verdicts	D Verdicts	Mixed Verdicts
	2004 – 11[1] (34.4%)	1 (9.1%)	10 (90.9%)	0 (0.0%)
	2005 – 21 (65.6%)	8 (38.1%)	11 (52.4%)	2 (9.5%)
Total	32 (100.0%)	9 (28.1%)	21 (65.6%)	2 (6.3%)

B.	Verdicts/Cases Excluding 2 Pro Se-P Trials	P Verdicts	D Verdicts	Mixed Verdicts
	2004 – 11 (36.7%)	1 (9.1 %)	10 (90.9%)	0 (0.0%)
	2005 – 19 (63.3%)	8 (42.1%)	9 (47.4%)	2 (10.5%)
Total	30 (100.0%)	9 (30.0%)	19 (63.3%)	2 (6.7%)

C.	Verdicts/No.of Ps	P Verdicts	D Verdicts
	2004 – 11 (22.0%)	1 (9.1%)	10 (90.9%)
	2005 – 39 (78.0%)	22 (56.4%)	17 (43.6%)
Total	50 (100.0%)	23 (46.0%)	27 (50.4%)

D.	Verdicts/No. of Ps Excluding 2 Pro Se-P Trials	P Verdicts	D Verdicts
	2004 – 11 (22.9%)	1 (9.1%)	10 (90.9%)
	2005 – 37 (77.1%)	22 (59.5%)	15 (40.5%)
Total	48 (100.0%)	23 (47.9%)	25 (52.1%)

E.	Verdicts/Cases: Public or Private D	Private D	Public D
	2004 – 11 (34.4%)	6 (54.5%)	5 (45.5%)
	2005 – 21 (65.6%)	10 (47.6%)	11 (52.4%)
Total	32 (100.0%)	16 (50.0%)	16 (50.0%)

1.	Verdicts/Cases: Private D	P Verdicts	D Verdicts	Mixed Verdicts
	2004 – 6 (37.5%)	1 (16.7%)	5 (83.3%)	0 (0.0%)
	2005 – 10 (62.5%)	5 (50.0%)	5 (50.0%)	0 (0.0%)
Total	16 (100.0%)	6 (37.5%)	10 (62.5%)	0 (0.0%)

2.	Verdicts/Cases: Public D	P Verdicts	D Verdicts	Mixed Verdicts
	2004 – 5 (31.3%)	0 (0.0%)	5 (100.0%)	0 (0.0%)
	2005 – 11 (68.8%)	3 (27.3%)	6 (54.5%)	2 (20.0%)
Total	16 (100.0%)[2]	3 (18.8%)	11 (68.8%)	2 (12.5%)

3.	Verdicts/No. of Ps: Private D	P Verdicts	D Verdicts
	2004 – 6 (37.5%)	1 (16.7%)	5 (83.3%)
	2005 –10 (62.5%)	5 (50.0%)	5 (50.0%)
Total	16 (100.0%)	6 (37.5%)	10 (62.5%)

4.	Verdicts/No. of Ps: Public D	P Verdicts	D Verdicts
	2004 – 5 (14.7%)	0 (0.0%)	5 (100.0%)
	2005 – 29 (85.3%)	17 (58.6%)	12 (41.4%)
Total	34 (100.0%)	17 (50.0%)	17 (50.0%)

F. Ps' Verdicts: Pain and Suffering Damages Awards

2004 – 1) $50,000

2005 – 1) $3,500 2) $300,000 3) $250,000 4) $100,000 5) $75,000 6) $100,000
7) $15,000 8) $15,000 9) $250,000 10) $1,000,000 [$300,000][3] 11) $60,000
12) $60,000 13) $15,000 14) $40,000 15) $30,000 16) $15,000 17) $15,000
18) $4,000,000[4] 19) $30,000 20) $100,000 21) $10,400[5]

1. Average Pain and Suffering Damages Award (2004): $50,000
2. Average Pain and Suffering Damages Award (2005): $275,424
3. Average Pain and Suffering Damages Award (Combined 2004-05): $265,177
4. Median Pain and Suffering Damages Award (2004): $50,000
5. Median Pain and Suffering Damages Award (2005): $60,000
6. Median Pain and Suffering Damages Award (Combined 2004-05): $50,000-$60,000 (avg. $55,000)

G. Ps' Verdicts: Attorneys' Fees and Costs

2004 – 1) $79,623

2005 – 1) $21,012 2) $1,564,238 (11 Ps) 3) $270,000 (settled) 4) $978,947 (9 Ps)
5) $45,000 (ordered pursuant to stip.) 6) $70,806 7) $141,308

1. Average Attorneys' Fees and Costs (2004): $79,623
2. Average Attorneys' Fees and Costs (2005): $441,616
3. Average Attorneys' Fees and Costs (Combined 2004-05): $396,367
4. Median Attorneys' Fees and Costs (2004): $79,623
5. Median Attorneys' Fees and Costs (2005): $141,308
6. Median Attorneys' Fees and Costs (Combined 2004-05): $ 79,623-$141,308 (avg. $110,466)

H. Ps' Verdicts: Punitive Damages Awards (awarded to 3, or 13.0%, of prevailing Ps)

2004 – 1) $50,000[6]

2005 – 1) $1,622,500 [$190,000] 2) $20,000[7]

I. Verdicts/Cases	**Time from Filing to Verdict**										
2004 – 11	1) 16	2) 11	3) 49	4) 25	5) 62	6) 18	7) 24	8) 18	9) 27	10) 49	11) 10
2005 – 21	1) 30	2) 29	3) 47	4) 29	5) 25	6) 43	7) 38	8) 23	9) 17	10) 46	11) 37
	12) 17	13) 37	14) 21	15) 43	16) 9	17) 12	18) 30	19) 29	20) 37	21) 77	

1. Average Time from Filing to Verdict:

2004 – 29.1 mo.
2005 – 32.2 mo
Combined 2004-05 – 30.8 mo.

2. Median Time from Filing to Verdict:

2004 – 24 mo.
2005 – 30 mo.
Combined 2004 – 05:29 mo.

II. EDNY: Employment Discrimination Cases
Filed 1/1/04-12/31/05

A.	Verdicts/Cases	P Verdicts	D Verdicts
	2004 – 17 (68.0%)	6 (35.3%)	11 (64.7%)
	2005 – 8 (32.0%)	2 (25.0%)	6 (75.0%)
Total	25 (100.0%)	8 (32.0%)	17 (68.0%)

B.	Verdicts/No. of Ps	P Verdicts	D Verdicts
	2004 -18 (64.3%)	7 (38.9%)	11 (61.1%)
	2005 -10 (35.7%)	4 (40.0%)	6 (60.0%)
Total	28 (100.0%)	11 (39.3%)	17 (60.7%)

C.	Verdicts/Cases: Public or Private D	Private D	Public D
	2004 – 17 (68.0%)	9 (52.9%)	8 (47.1%)
	2005 – 8 (32.0%)	1 (12.5%)	7 (87.5%)
Total	25 (100.0%)	10 (40.0(%)	15 (60.0%)

1.	Verdicts/Cases: Private D	P Verdicts	D Verdicts
	2004 – 9 (90.0%)	4 (44.4%)	5 (55.6%)
	2005 – 1 (10.0%)	0 (0.0%)	1 (100.0%)
Total	10 (100.0%)	4 (40.0%)	6 (60.0%)

2.	Verdicts/Cases: Public D	P Verdicts	D Verdicts
	2004 – 8 (53.3%)	2 (25.0%)	6 (75.0%)
	2005 – 7 (46.7%)	2 (28.6%)	5 (71.4%)
Total	15 (100.0%)	4 (26.7%)	11 (73.3%)

3.	Verdicts/No. of Ps: Private D	P Verdicts	D Verdicts
	2004 – 10 (90.9%)	5 (50.0%)	5 (50.0%)
	2005 – 1 (09.1%)	0 (0.0%)	1 (100.0%)
Total	11 (100.0%)	5 (45.5%)	6 (54.5%)

4.	Verdicts/No. of Ps: Public D	P Verdicts	D Verdicts
	2004 – 8 (47.1%)	2 (25.0%)	6 (75.0%)
	2005 – 9 (52.9%)	4 (44.4%)	5 (55.6%)
Total	17 (100.0%)	6 (35.3%)	11 (64.7 %)

D. Ps' Verdicts: Pain and Suffering Damages Awards

2004 – 1) $80,000 2) $150,000 3) $100,000 [50,000] 4) $0[8] 5) $63,750 6) $0
2005 – 1) 500,000[9] 2) $400,000 3) $100,000 4) $30,000

1. Average Pain and Suffering Damages Award (2004): $57,292
2. Average Pain and Suffering Damages Award (2005): $257,500
3. Average Pain and Suffering Damages Award (Combined 2004-05): $137,375
4. Median Pain and Suffering Damages Award (2004): $50,000-$63,750 (avg. $56,875)
5. Median Pain and Suffering Damages Award (2005): $100,000-$400,000 (avg. $250,000)
6. Median Pain and Suffering Damages Award (Combined 2004-05): $63,750-$80,000 (avg. $71,875)

E. Ps' Verdicts: Attorneys' Fees and Costs

2004 – 1) $165,000 (settled) 2) $322,445[10] 3) $62,398 4) $475,570 5) $248,807[11]
2005 – 1) $517,435 2) $52,296

1. Average Attorneys' Fees and Costs (2004): $254,844
2. Average Attorneys' Fees and Costs (2005): $284,866
3. Average Attorneys' Fees and Costs (Combined 2004-05): $263,422
4. Median Attorneys' Fees and Costs (2004): $248,807
5. Median Attorneys' Fees and Costs (2005): $52,296-$517,435 (avg. $284,866)
6. Median Attorneys' Fees and Costs (Combined 2004-05): $248,807

F. Ps' Verdicts: Punitive Damages Awards (awarded to 3, or 30.0%, of eligible[12] prevailing Ps)

2004 – 1) 195,000 2) $1,500,000 [$554,070] 3) $500,000 [50,000][13]
2005 – $0

G. Verdicts/Cases Time from Filing to Verdict

2004 – 17	1) 42	2) 22	3) 63	4) 27	5)33	6) 35	7) 24	8) 34	9) 4	10) 24	11) 36	12) 49
	13) 68	14) 24	15) 7	16) 26	17) 84							
2005 – 8	1) 38	2) 63	3) 34	4) 22	5) 39	6) 32	7) 52	8) 19				

1. Average Time from Filing to Verdict:

2004 – 37.6 mo.
2005 – 37.4 mo
Combined 2004-05 – 37.5 mo.

2. Median Time from Filing to Verdict:

2004 – 34 mo.
2005 – 34-38 mo. (avg. 36 mo.)
Combined 2004-05: 34 mo.

III. Combined SDNY and EDNY: Employment Discrimination Cases

Filed 1/1/04-12/31/05

A.	Verdicts/Cases	P Verdicts	D Verdicts	Mixed Verdicts
	SDNY – 32 (56.1%)	9 (28.1 %)	21 (65.6%)	2 (6.3%)
	EDNY – 25 (43.9%)	8 (32.0%)	17 (68.0%)	0 (0.0%)
Total	57 (100.0%)	17 (29.8%)	38 (66.7%)	2 (3.5%)

B.	Verdicts/Cases Excluding 2 Pro Se-P Trials	P Verdicts	D Verdicts	Mixed Verdicts
	SDNY – 30 (54.5%)	9 (30.0 %)	19 (63.3%)	2 (6.7%)
	EDNY – 25 (45.5%)	8 (32.0%)	17 (68.0%)	0 (0.0%)
Total	55 (100.0%)	17 (30.9%)	36 (65.5%)	2 (3.6%)

C.	Verdicts/No.of P's	P Verdicts	D Verdicts
	SDNY – 50 (64.1%)	23 (46.0%)	27 (54.0%)
	EDNY – 28 (35.9%)	11 (39.3%)	17 (60.7%)
Total	78 (100.0%)	34 (43.6%)	44 (56.4%)

D.	Verdicts/No. of Ps Excluding 2 Pro Se-P Trials	P Verdicts	D Verdicts
	SDNY – 48 (62.7%)	23 (47.9%)	25 (52.1%)
	EDNY – 28 (37.3%)	11 (39.3%)	17 (60.7%)
Total	76 (100.0%)	34 (44.7%)	42 (55.3%)

E.	Verdicts/Cases: Public or Private D	Private D	Public D
	SDNY – 32 (56.1%)	16 (50.0%)	16 (50.0%)
	EDNY – 25 (43.9%)	10 (40.0%)	15 (60.0%)
Total	57 (100.0%)	26 (45.6%)	31 (54.4%)

1.	Verdicts/Cases: Private D	P Verdicts	D Verdicts	Mixed Verdicts
	SDNY – 16 (60.0%)	6 (37.5%)	10 (62.5%)	0 (0.0%)
	EDNY – 10 (40.0%)	4 (40.0%)	6 (60.0%)	0 (0.0%)
Total	26 (100.0%)	10 (38.5%)	16 (61.5%)	0 (0.0%)

2.	Verdicts/Cases: Public D	P Verdicts	D Verdicts	Mixed Verdicts
	SDNY – 16 (51.6%)	3 (18.8%)	11 (68.8%)	2 (12.5%)
	EDNY – 15 (48.4%)	4 (26.7%)	11 (73.3%)	0 (0.0%)
Total	31 (100.0%)	7 (22.6%)	22 (71.0%)	2 (6.5%)

3.	Verdicts/No. of Ps: Private D	P Verdicts	D Verdicts
	SDNY-16 (59.3%)	6 (37.5%)	10 (62.5%)
	EDNY-11 (40.7%)	5 (45.5%)	6 (54.5%)
Total	27 (100.0%)	11 (40.7%)	16 (59.3%)

4.	Verdicts/No. of Ps: Public D	P Verdicts	D Verdicts
	SDNY – 34 (66.7%)	17 (50.0%)	17 (50.0%)
	EDNY – 17 (33.3%)	6 (35.3%)	11 (64.7%)
Total	51 (100.0%)	23 (45.1%)	28 (54.9%)

F. Ps' Verdicts: Pain and Suffering Damages Awards

SDNY – 1) $50,000 2) $3,500 3) $300,000 4) $250,000 5) $100,000 6) $75,000
7) $100,000 8) $15,000 9) $15,000 10) $250,000 11) $1,000,000 [$300,000] 12) $60,000
13) $60,000 14) $15,000 15) $40,000 16) $30,000 17) $15,000 18) $15,000
19) $4,000,000 20) $30,000 21) $100,000 22) $10,400

EDNY – 1) $80,000 2) $150,000 3) $100,000 [50,000] 4) $0 5) $63,750 6) $0 7) 500,000
8) $400,000 9) $100,000 10) $30,000

1. Average Pain and Suffering Damages Award (Combined SDNY and EDNY): $225,239
2. Median Pain and Suffering Damages Award (Combined SDNY and EDNY): $60,000

G. Ps' Verdicts: Attorneys' Fees and Costs

SDNY – 1) $79,623 2) $21,012 3) $1,564,238 (11 Ps) 4) $270,000 (settled)
5) $978,947 (9 Ps)
6) $45,000 (ordered pursuant to stip.) 7) $70,806 8) $141,308

EDNY – 1) $165,000 (settled) 2) $322,445 3) $62,398 4) $475,570 5) $248,807
6) $517,435 7) $52,296

1. Average Attorneys' Fees and Costs (Combined SDNY and EDNY): $267,659
2. Median Attorneys' Fees and Costs (Combined SDNY and EDNY): $165,000

H. Ps' Verdicts: Punitive Damages Awards (awarded to 6, or 18.2%, of eligible prevailing Ps)

SDNY – 1) $50,000 2) $1,622,500 [$190,000] 3) $20,000

EDNY – 1) $195,000 2) $1,500,000 [$554,070] 3) $500,000 [50,000]

1. Average Punitive Damages Award (Combined SDNY and EDNY): $176,512
2. Median Punitive Damages Award (Combined SDNY and EDNY): $50,000-$190,000 (avg. $120,000)

I. Verdicts/Cases Time from Filing to Verdict

SDNY – 32 1) 16 2) 11 3) 49 4) 25 5) 62 6) 18 7) 24 8) 18 9) 27 10) 49 11) 10
12) 30 13) 29 14) 47 15) 29 16) 25 17) 43 18) 38 19) 23 20) 17 21) 46 22) 37 23) 17
24) 37 25) 21 26) 43 27) 9 28) 12 29) 30 30) 29 31) 37 32) 77

EDNY – 25 1) 42 2) 22 3) 63 4) 27 5) 33 6) 35 7) 24 8) 34 9) 41 10) 24 11) 36
12) 49 13) 68 14) 24 15) 7 16) 26 17) 84 18) 38 19) 63 20) 34 21) 22 22) 39 23) 32
24) 52 25) 19

1. Average Time from Filing to Verdict (Combined SDNY and EDNY): 33.7 mo.
2. Median Time from Filing to Verdict (Combined SDNY and EDNY): 30 mo.

Endnotes

1. This number does not include one case in which an initial P's verdict became a D's verdict on appeal. That case, which also appears on the 2005 SDNY docket, is recorded in the latter category.
2. The numbers do not add up exactly to 100% on account of rounding.
3. Numbers in brackets reflect amounts after remittitur.
4. P was also awarded $3,500,000 in compensatory damages on a defamation claim, which was brought together with charges of sexual harassment and retaliation.
5. $5,200 was awarded for sexual harassment and $5,200 on a battery claim. In another case, a plaintiff who had lost at trial secured a partial reversal on appeal. The case then settled, presumably for some amount of money.
6. A verdict of $125,000 punitive damages ($50,000 against the corporate defendant and $75,000 against an individual defendant) was reduced on account of a statutory cap.
7. The punitive damages were awarded on a battery claim, which was brought along with charges of sexual harassment. An award of $100,000 in another case was overturned when D prevailed on a new trial motion.
8. A "0" was recorded—and the verdict was counted for purposes of determining the average and median—only when the jury was given the option of awarding damages for emotional distress, and did not.
9. Fifty thousand of the $500,000, as well as the $400,000 and $100,00 amounts were awarded on an equal protection claim, filed with the discrimination and retaliation charges.
10. This figure includes $127,060 of attorneys' fees and costs on appeal.
11. One P, who prevailed solely on a NYS Human Rights Law claim, would not have been eligible for attorneys' fees.
12. One P, who prevailed under the EPA, would not have been eligible for punitive damages.
13. Fifty thousand dollars was the statutory cap.

Join the Newly Created Technology in the Workplace and Practice Committee

The NYSBA Labor and Employment Section has created a new committee: the Technology in the Workplace and Practice Committee. It will focus on the impact of technology on workplace-related issues including the use of social media by employers and employees, the privacy implications of new and existing computer-based technologies, developments under federal and state laws impacting the use of new technologies, ethical and privilege issues associated with electronic communications, and new developments in electronic discovery. The Committee will also address the intersection of new technologies with the practice of labor and employment law. We are planning upcoming events concerning electronic discovery in New York state courts and workplace legal issues concerning social media.

Both new and experienced attorneys are encouraged to join and participate in the Committee. If you are interested in joining, you should contact one of the Committee's co-chairs.

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Editor

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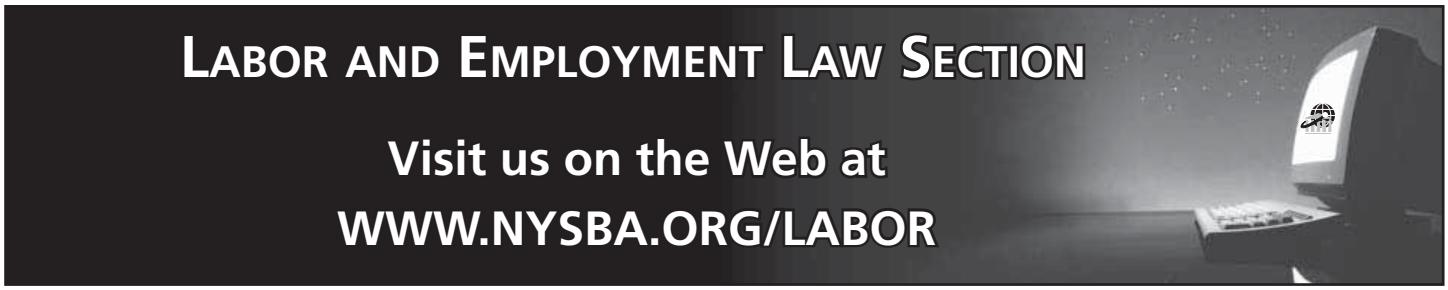

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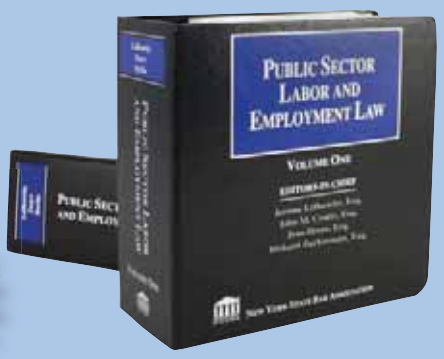

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