NYSBA SPRING/SUMMER 2005 | VOLUME 30 | NO. 1

L&E Newsletter

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

A Message from the Chair

In January, more than 300 members gathered at the Section's Annual Meeting in New York City. The programs focused on a variety of issues in the public and private sectors, and the speakers addressed those issues in a lively and informative fashion. I believe that everyone in attendance will agree that the day was an unqualified success and an excellent beginning to an exciting year.

The day opened with the timely post-election topic "Four More Years: The Impact on Labor and Employment Law." Former Section Chair Rosemary Townley moderated the panel which included the Hon. Frederic Block, United States District Judge for the Eastern District of New York; Professor Sam Estreicher, New York University School of Law; Jonathan Hiatt, General Counsel of the AFL-CIO; and Tanya L. Menton, Vice-President for Litigation and Employment Practices at ABC.

The speakers' candid remarks caught the attention of the Daily Labor Reporter writer who was in the audience. On January 31, an article appeared quoting Mr. Hiatt as criticizing the National Labor Relations Board as "nakedly anti-union" and for engaging in a "radical partisan attack on unions." The DLR also noted that Professor Estreicher questioned the Board's many reversals of precedent, asking, "What gives them the wisdom to overturn precedents without input or participation from people affected by the statute?" Other Section members, of course, have diverse views about the current Board, and they had an opportunity to share those views.

Our subsequent plenary session, chaired by Sharon Stetler, "The New FLSA Regulations after Six Months: What Employers, Unions and Practitioners Need to Know," was similarly engaging. Members then selected

Inside

one of four workshops—"What Happens after Public Sector Disciplinary Hearings?," "Ethical Issues in the Deposition Context," "The Future of Neutrality Agreements and Other Recent Developments Under the National Labor Relations Act" and "The Most Important Contract You Will Ever Negotiate . . . the Retainer Agreement." Each workshop attracted a significant audience.

Finally, the meeting ended with cogent, thoughtful remarks by the Hon. Denise A. Cote, United States District Judge for the Southern District of New York. In the midst of issuing critical rulings in the World Com litigation, Judge Cote generously joined us to share her thoughts on the state of employment litigation in the federal courts.

I am delighted with the number of Section members who attended the Annual Meeting, the quality of the speakers' presentations and their written materials. I am especially pleased that Alan Koral, CLE Chair, and members of his Committee had invited many speakers who had not spoken before at Section events. Alan, the Executive Board and I are committed to ensuring participation by all Section members in all Section activities. If you are interested in participating in a CLE program, or if you have an idea about a CLE program, please contact Alan, any member of the Executive Committee or me.

Panels at our Annual Meeting and Fall Meeting, as well as other CLE programs, often are designed and developed by our Section's Committees. I urge you to review the opportunities offered by our Section's diverse Committees and to become involved in their work.

There are several CLE programs scheduled for later this year. For example, Bruce Millman and Ron Dunn are Co-Chairs of "Labor and Employment Law for the General Practitioner and Corporate Counsel" which will be held on three separate dates in three separate locations—May 6 in New York City, May 11 in Latham and May 20 in Rochester.

On May 25, the Section will co-sponsor a day long program—"The NLRA at 70: Where It Is and Where It Should Go"—with the ABA and the Association of the Bar of the City of New York's Labor and Employment Law Committee, chaired by Section member Dan Silverman.

In addition to union and management representatives, there will be an All Star cast of present and former Board officials—Marshall B. Babson, Robert J. Battista, Charles I. Cohen, Fredrick L. Feinstein, Lester A. Heltzer, Jerry M. Hunter, Peter J. Hurtgen, Wilma B. Liebman, Leonard R. Page, Arthur F. Rosenfeld and Peter C. Schaumer. John C. Truesdale, former Board Chair, will receive a well earned Lifetime Achievement Award.

On June 17 and 18, the Section will present a Litigation Institute at Fordham Law School in Manhattan. Co-Chairs Mike Curley and Arnie Pedowitz have designed a comprehensive program which will focus on the substantive law of restrictive covenants as well as the practical aspects of litigating these critical claims.

After a summer break, the Section will conduct a program on "Benefits Law for the General Practitioners." We all look forward to guidance from Co-Chairs Mark Brossman, Bill Frumkin and other speakers on these difficult, but important, topics.

Finally, from October 23 through 27, our Section will convene at Longboat Key in Florida to celebrate our 30th Anniversary. Our Section's trips to Florida, at five year intervals, are always memorable. A special thanks to Chair Emeritus Frank Nemia for supporting and continuing this tradition.

I, however, will not Chair the Longboat Key meeting. On May 24, the Section will hold its transition meeting, and Rich Zuckerman will become Chair. I wish Rick every success in the role. In the interim, I will continue to enjoy my time as Chair of the best Section in the New York State Bar Association.

Pearl Zuchlewski

From the Editor

It has been a while since I expressed our appreciation to the Association's Publications Department. Thanks to all for keeping us going, and especially to (in alphabetical order) Lyn Curtis and Wendy Pike, without whom this *Newsletter* would figuratively be in the gutter.

At the Annual Meeting in January, one of the plenary sessions was devoted to a discussion of the National Labor Relation Board's recent activist decisions. I asked Jonathan Hiatt, the General Counsel to the AFL-CIO, to allow us to publish his remarks in the *Newsletter*. He agreed, and his article is in this issue. It was written with Craig Becker, the AFL-CIO's Assistant General Counsel.

Also in this issue are an article by James Libson, taken from his recent remarks at International Law Weekend, about "worlds in collision" in cross-border employment law; a discussion of mitigation of damages in wrongful termination cases by Charles Diamond and Damon Montal; a compilation of 2004 ethics rulings by Ellen Mitchell; an explanation of the new Civil Rights Tax Relief Act, by tax attorney Parag Patel; and John Gaal's "Ethics Matters" column.

The second-prize winner in the Section's Dr. Emanuel Stein Writing Competition, published in this issue, is about the disability statutes under which claimants have sued in New York for obesity discrimination and the judicial treatment of those claims. Jeanne Zelnick said her interest in the subject was sparked after reading a newspaper account of a lawsuit brought by an obese man who claimed a restaurant refused to hire him because they could not supply a uniform in his size.

Finally, for those who have missed the photos of section meetings: they have returned! I am indebted to Margery Gootnick and Deborah Skanadore Reisdorph for some of the photos in this issue, which were taken at the Fall Meeting in Cooperstown in October, 2004. One of the highlights of the weekend was watching Margery as the umpire of the ballgame at Doubleday Field.

There are several interesting recent cases and decisions from New York and other jurisdictions, which I will write about in no particular order.

New York State Court of Appeals: *Madison-Oneida BOCES*

In a decision on December 21, 2004, the New York State Court of Appeals decided that teaching assistants fall within the purview of Education Law § 3013(2) for the purpose of determining layoffs.[1]

In 2001, the Madison-Oneida BOCES laid off teaching assistants without regard to seniority in the tenure track.[2] The TAs filed an Article 78 petition, which was dismissed by Supreme Court, which retained jurisdiction while allowing the Commissioner of Education to decide the issue.

The TAs appealed to the Commissioner for a determination that the TAs were teachers pursuant to Education Law § 3013(2). In March, 2002, the Commissioner rejected BOCES' arguments that the TAs were similar to vocational teachers because there were no specific educational, certification, or licensure requirements to be a TA. The Commissioner annulled BOCES' determination that the teaching assistants were not teachers, and did not have to be fired according to seniority, and reinstated TAs to full-time teaching positions with back pay and benefits, effective July 1, 2001. The Commissioner found that "teaching assistants are protected by Education Law § 3013(2)." Further, the Commissioner determined that the plain meaning of 8 N.Y.C.R.R. § 30.8 placed "all teaching assistants in the same special subject tenure area of teaching assistant which directly contradicts the argument that teaching assistants hold tenure" within a specific subject area of teaching assistant.

Second Circuit Court of Appeals: *Konits v. Mills (Valley Stream CSD)*

In a case of first impression, the Second Circuit found on January 7, 2005, that any use of state authority to retaliate against those who speak out against discrimination suffered by others, including witnesses or potential witnesses in proceedings addressing discrimination claims, can give rise to a cause of action under § 1983 and the First Amendment.[3]

Carol Konits, a music teacher, sued the school district in Valley Stream, alleging retaliation in violation of the First Amendment for filing a prior suit against her employer in 1996. The 1996 action, which settled during trial, alleged retaliation against Konits for assisting another employee of the school district in her suit for gender discrimination.[4]

The District Court granted summary judgment in favor of the school district, on the grounds that the 1996 lawsuit did not involve speech on a matter of public concern and, thus, Konits could not establish a retaliation claim. On March 2, 2004, the district court granted summary judgment to the defendants. It found that Konits's "1996 lawsuit was not speech on a matter of public concern" and, therefore, Konits could not establish her retaliation claim. It also found that Konits offered no evidence beyond her own statements to support her Equal Protection claim, and that she had no protected interests sufficient to make out a claim under the Due Process Clause. Therefore, the court found, there was no municipal liability and no need to reach the question of qualified immunity. It also declined to exercise supplemental jurisdiction over Konits's state law claims.

The Court of Appeals found that any use of state authority to retaliate against those who speak out against discrimination suffered by others, including witnesses or potential witnesses in proceedings addressing discrimination claims, can give rise to a cause of action under § 1983 and the First Amendment. In addition, it said that the teacher's prior lawsuit was speech on a matter of public concern that could support a cause of action for First Amendment retaliation. The Circuit Court also held that issues of municipal liability, qualified immunity, and her state law claims were related to the retaliation claims and should be considered by the district court.

Konits made a First Amendment claim of retaliation as a public employee. Overruling the district court, the Second Circuit found that both the 1996 lawsuit and the present claim were speech on a matter of public concern; that is, that gender discrimination in public employment is certainly a matter of public concern. It is even more so, the Court found, when the claim involves testimony in courts or administrative proceeding. The public is entitled to protection of the courts' interest in candid and truthful testimony, as well as the rights of discrimination victims to seek legal action. Thus, Konits should be able to have the opportunity to prove that her actions on behalf of Kenny were the cause of retaliatory actions against her.

The court noted that it was specifically overruling prior cases that denied a First Amendment cause of action where the plaintiff claimed retaliation based on identification as a witness in a fellow employee's discrimination suit.[5] It held that any use of state authority to retaliate against those who speak out about discrimination, including witnesses or potential witnesses, may give rise to a cause of action under 42 U.S.C. § 1983 and the First Amendment.

The Portal-to-Portal Cases

In February, the U.S. Supreme Court agreed to review two cases concerning compensable work day rules under the Fair Labor Standards Act. In one, the Ninth Circuit held that the employer was required to pay employees from the time they put on protective clothing at the beginning of the workday until the clothing was removed at the end of the workday. The court also requires the employer to pay its employees for time spent walking to and from their work stations.[6] In the second case, with similar facts, the First Circuit Court of Appeals decided the employer was not required to compensate employees for putting on or taking off protective clothing or for associated walking time.[7] The Supreme Court consolidated these two cases to address the conflict between the Circuits. The Court will also consider the question of whether time that employees spend waiting in line to obtain protective clothing is compensable under the FLSA.

These cases are significant because the outcome will affect companies in many different industries. They have the potential to create significant new liabilities for those companies whose workers wear protective clothing.

Jespersen v. Harrah's

A December, 2004 decision in the Ninth Circuit Court of Appeals is the latest in a series of newsworthy dress and grooming policy cases. In *Jespersen v. Harrah's Operating Company, Inc.*,[8] a three-member panel of male judges found by a 2-1 majority that the employer's "Personal Best" policy did not constitute gender discrimination by requiring female bartenders to wear cosmetic makeup.

Darlene Jespersen worked as a bartender at Harrah's Casino in Reno, Nevada for 16 years and was an outstanding employee. In 2000, Harrah's introduced a dress and grooming policy called the "Beverage Department Image Transformation" program. The company required each beverage service employee to attend "Personal Best Image Training" prior to his or her final uniform fitting, where "Personal Image Facilitators" taught employees how to dress and groom themselves.[9]

At the conclusion of the training, portrait and full body photos were taken of each employee and the photographs were placed in the personnel files. Supervisors were instructed to use the photos as "appearance measurement" tools; each employee had to look like the photos each day at work.

The original "Personal Best" policy did not require women to wear makeup and prohibited men from wearing makeup. However, the policy was soon

amended to require women, although not men, to wear makeup each day. Jespersen, who had never worn makeup to work, refused to comply and was discharged. She filed suit for gender discrimination.

The District Court granted summary judgment for Harrah's on the grounds that the new policies did not discriminate on the basis of immutable characteristics associated with her gender and because it imposed equal burdens on male and female employees. In reviewing the district court's decision, the Ninth Circuit summarized the issue on appeal as whether the grooming standards are based on a policy which on its face applies less favorably to one gender than the other.

Following precedent, the appellate court used its "unequal burdens test" to weigh the cost and time necessary for employees to comply with the policy.[10] The court held that the evidence did not support Jespersen's argument that the makeup requirement imposed burdens on women but not on men. Thus, it did not agree with her contention that the cost in time and money of applying makeup each day was a burden on female employees that was not imposed on male employees.

The dissent, however, focused on gender stereotyping and the Supreme Court's decision in *Price Waterhouse*.[11] By requiring its female employees to conform to outdated and impermissible gender stereotypes, the dissent concluded, the employer had violated Title VII of the Civil Rights Act. In addition, it found that Jespersen had presented a disputed fact as to whether the policy was more burdensome to women than men not only because of the impermissible stereotyping but also because of the time and expense required to comply with it.

Jespersen has requested a rehearing *en banc.* As of this writing, the Court of Appeals has not decided the motion.

Janet McEneaney

Endnotes

1. 2004 WL 2941306 (N.Y.), 2004 N.Y. Slip Op. 09409.
2. Education Law § 3013(2) provides, "[w]henever a trustee, board of trustee, board of education or board of cooperative educational services abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued."
3. *Konits v. Valley Stream Cent. High School Dist*., 394 F.3d 121 (2d Cir. 2005).
4. Konits assisted Marie Kenny, a custodial worker for the District, in bringing an action for gender discrimination against their employer by helping her file complaints with the District, referring her to an attorney and volunteering to testify on Kenny's behalf. Konits alleged that the District retaliated against her by removing her as an orchestra teacher and conductor, assigning her as a general music teacher in special education and depriving her of seniority rights.
5. The court specifically overruled *Nonnenmann v. City of New York*, 174 F. Supp.2d 121.
6. *Alvarez v. IBP, Inc*., 339 F.3d 894 (9th Cir. 2003); *cert granted, IBP, Inc. v. Alvarez*, No. 03-1238, 2005 WL 405752, 72 USLW 3568, 73 USLW 3059 (U.S. 2/22/05).
7. *Tum v. Barber Foods, Inc*, 360 F.3d 274 (1st Cir. 2004); *cert granted*, 2005 WL 405753, 73 USLW 3076 (U.S. 2/2/05).
8. 392 F.3d 1076 (9th Cir.2004).
9. The policy contained the following requirements:

   > All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.
   >
   > Appearance: Must maintain Personal Best Image portrayed at time; jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets; no faddish hairstyles or unnatural colors are permitted.
   >
   > Males: Hair must not extend below top of shirt collar. Ponytails are prohibited. • Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted. • Eye and facial makeup is not permitted. • Shoes will be solid black leather or leather type with rubber (non skid) soles.
   >
   > Females: Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions. • Stockings are to be of nude or natural color consistent with employee's skin tone. No runs. • Nail polish can be clear, white, pink or red color only. No exotic nail art or length. • Shoes will be solid black leather or leather type with rubber (non skid) soles. • Make up (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.

10. Under the equal burdens test, employers are permitted to apply different appearance standards to each sex so long as those standards are equal. This means the court must weigh the relative burdens imposed by the differing requirements.
11. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

The Bush National Labor Relations Board and the Attack on Employee Rights

By Jonathan P. Hiatt and Craig Becker

The reelection of President George W. Bush last November will have a profound impact on the nation's federal courts and thus the construction of those labor and employment laws over which federal judges have primary jurisdiction. Even more significant for employee rights, however, may be the President's reshaping of the National Labor Relations Board, the agency charged with protecting the rights of private sector workers to seek union representation and engage in collective bargaining. Without a change of course, the members of the Board appointed by President Bush appear to be headed toward the most radical non-legislative contraction of employee rights in the agency's history.

It took the Bush board much of the Administration's first term to gain its sea-legs. A majority appointed by President Clinton remained in place for much of the first year. After that, short-term recess appointments kept the Board from issuing decisions of precedential significance. Then, the first Bush board with a confirmed majority had little time to make an impact due to the early departure of one of the Bush appointees (Alex Acosta). Finally, a Republican majority was not regained until yet another recess appointment was made in late 2003.

"Without a change of course, the members of the Board appointed by President Bush appear to be headed toward the most radical non-legislative contraction of employee rights in the agency's history."

Once firmly established, however, the Bush majority has shown itself to be among the most anti-worker Board in the agency's history. In stark contrast to the two Clinton Administration boards, one of which was chaired by a career academic (William Gould) and the other by a career NLRB official (John Truesdale), the Bush board is chaired by a long-time management lawyer (Robert Battista), who has been joined in the Republican majority by another long-time management lawyer (Ronald Meisburg) and by the former chair of a National Lawyers for Bush presidential campaign committee (Peter Schaumber).

The actions of the current Board must be assessed in light of two facts. First, the law which the Board is charged with enforcing declares it to be national policy to *encourage* collective bargaining, through workers' self-organization and union representation.[1] Second, despite this national policy, over 90% of private sector employees today find themselves without representation and thus the capacity to bargain over their terms of employment even though survey and other data strongly suggest that workers would opt for union representation in their workplace, given a meaningful opportunity.[2]

Unfortunately, however, judging from the steady stream of decisions issued by the NLRB over the past six months, it would appear that this Board majority is intent solely on restricting employee protections under the Act in virtually every category, while expanding employers' arsenal for resisting unionization.

I. The Record of the Bush Board: Restricting Employees' Rights and Expanding Employers' Rights

Consider simply as one example the current Board's drastic limitation of the coverage of the Act itself. In just over four months, the Board has issued decisions either expressly reversing or stretching existing law to deny employee status and thus all protections under the Act to four distinct categories of employees: graduate assistants being paid to teach classes or perform research;[3] handicapped individuals working as janitors;[4] artists' models who provide their own robes or slippers;[5] and, effectively, temporary employees working jointly for a supplier employer and a user client absent consent from both employers.[6] Moreover, this contraction of the Act's coverage is unfortunately likely to be multiplied manyfold when the Board decides three much-awaited cases applying the supervisory exclusion to a broad array of employees with minor authority over others such as nurses.[7]

Note also just a few of this Board's other anti-worker decisions issued over roughly the same time period, limiting employees' Section 7 rights, weakening penalties for employers who commit unfair labor practices, and otherwise expanding employer rights. In *Holling Press, Inc.*,[8] this Board held that the actions of an employee who solicited a co-worker to testify before a state agency in support of her sexual harassment complaint were not "for mutual aid or protection" and were

thus unprotected against retaliation. In *Alexandria Clinic*,[9] this Board held that 29 nurses were lawfully discharged for starting a strike less than four hours after the time specified in their union's required 10-day notice to the employer. In *First Legal Support Services*,[10] this Board held that special remedies were unwarranted despite egregious employer retaliation during an organizing campaign where workers who tried to form a union were fired; threatened with discharge; threatened that the facility would close, made to sign independent contractor agreements; offered bribes if they would give up their support of the union; and told that their efforts were futile because "if the 'NLRB issues an order, for compliance . . . , they bring that order to us and we say 'f*** your order' and then go to federal court for years.'"[11] In *Hialeah Hospital*,[12] this Board rejected an ALJ's recommendation of a *Gissel* bargaining order in a case where high-level officers of the employer embarked on a course of discharge, threats to discharge the entire unit, surveillance, and other illegal conduct within hours of learning of a union's organizing effort. In *Crown Bolt, Inc.*,[13] this Board held that employer's threats to close a facility if employees voted for a union cannot be presumed to have been disseminated throughout a bargaining unit. Finally, in *Bunting Bearings Corp.*,[14] and *Mid-West Generation*,[15] this Board found no violation of the Act when employers selectively locked-out only the portions of their workforces that the employers perceived to contain the strongest supporters of the union. This onslaught on workers' rights occurred over just a 15-month period, with all but one of the decisions being issued in the four months ending in November 2004.

Looking ahead, however, one might reasonably fear that the most radical attack on workers and their unions is just about to begin. This is because the Board and its General Counsel have seemingly embraced a litigation strategy initiated by the National Right to Work Legal Defense Foundation, an organization that purports to represent employees, but was founded by employers in the wake of the Taft-Hartley Act and is funded by the most anti-union fringe of the employer community;[16] an organization so ideologically driven that even Judge Richard Posner held that its lawyers are "not an adequate litigation representative" of a class of employees represented by a union.[17] In two sets of pending cases, many of them instigated by Right to Work, we can anticipate an effort to place union representation effectively beyond the reach of most American workers.

II. Narrowing the Paths to Employee Representation: The Attack on Voluntary Recognition

The first set involves the two accepted paths to workplace representation—NLRB elections and voluntary card-check recognition—and their relationship to the democratic values embodied in the NLRA. Senator Wagner drew on those values by inserting the mechanism of the election into the Act, but only as a means of forcing recalcitrant employers to recognize their employees' choice of representative. The election was never meant to be and has never been the exclusive means of obtaining workplace representation. Turning the law's entire structure on its head, however, the current Board is threatening to use the rhetoric of employee free choice and symbolism of elections to effectively prevent workplace representation.

"In two sets of pending cases, many of them instigated by Right to Work, we can anticipate an effort to place union representation effectively beyond the reach of most American workers."

Employer agreements to recognize unions and engage in collective bargaining based on evidence of majority support other than by an election have been enforced since before the Wagner Act. From its inception, the Board has held that, "employers and unions do not require Board certifications as a prerequisite to collective bargaining if recognition of a majority representative suffices for their purposes."[18] Indeed, in a 1949 dissent, two Board members noted, "There are thousands of employers who have voluntarily recognized and bargained with representatives of their employees."[19] In 1970, another Republican Administration's Board recognized that "[t]o hold otherwise would be to make a mockery of the Board's orderly election processes—whose essential function is to resolve *legitimate* disputes concerning the desires of a majority of the employer's employees to be represented by a union. . . . [T]he Board should not permit its election processes to be used as a loophole in the law through which an employer may lawfully delay his bargaining obligation."[20]

Yet this is exactly what the current Board is threatening to do. In two cases now pending before the Board, it has suggested that it may lower the status and value of voluntary recognition by eliminating the insulated period running for "a reasonable period of time" after voluntary recognition during which the parties are given an opportunity to bargain pursuant to the express wishes of a majority of employees free of the pressure of a threat of withdrawal of recognition or a decertification petition.[21] The Board has even questioned the very legality of voluntary recognition agreements in its recent decision in *Shaw's Supermarkets*,[22] stating, "we have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a Board election."[23] This off-hand comment in an inter-

im decision simply granting review of the dismissal of an employer's RM petition and remanding for a hearing, prior to full briefing by the parties, and without the traditional notice and opportunity for comment the Board has provided the broader labor-management community when it is considering a major shift in policy, signals that the Board is prepared to issue what would be the most radical and legally unfounded decision in its history—a signal that has already sent shock waves through the labor-management community.

The promise of representation is already largely a dead letter for the vast majority of workers covered by the Act. They enter unorganized workplaces and never experience any organizing effort. They never vote in an election. They are never confronted by a choice and never make a choice. This is because all workplaces are created without representation and remain so until workers or unions change the status quo. The current Board appears to be intent on narrowing even further the means through which workers can enter the increasingly distant land of representation. To do so based on an expressed concern for employee free choice would be a dishonest distortion of that statutory policy.

III. Enforcing Ignorance: The Revival of *Majestic Weaving*

A second set of cases pending before the Board involves the issue of when a union and employer may begin the process of seeking agreements on terms and conditions of employment. These cases touch on the values of non-conflictual dispute resolution promoted by the Act. Again spurred by the National Right to Work Foundation, the Board's General Counsel has placed these cases before the Board, raising questions whose answers will also be critical to the nature of the free choice granted to employees by the Act.

In these cases the Board is threatening to revive and expand the moribund doctrine of the 1964 decision in *Majestic Weaving*.[24] In that case the Board overruled its prior decision in *Julius Resnick, Inc.*,[25] and held that it violates section 8(a)(2) of the Act for an employer and union to agree to terms and conditions of employment that will apply after a majority of employees evidence their support of the union, *even if* the agreement is conditional on a showing of such support.

The decision rested solely on the Supreme Court's decision in *International Ladies' Garment Workers' Union, AFL-CIO v. National Labor Relations Board (Bernard Altman)*,[26] yet the decision in *Bernard Altman* is clearly not controlling as the Board acknowledged before the Second Circuit.[27] In *Bernard Altman*, the employer granted the union the status of exclusive representative before it obtained majority support. The illegality of the action rested on the fact that it presented the employees with "a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative."[28] This action had the effect of "impressing that agent upon the nonconsenting majority."[29] In a *Majestic Weaving* situation, there is no such *fait accompli* because the negotiated contract is conditional on a showing of majority support. The Board's statement in *Majestic Weaving* that "the fact that [the employer] conditioned the actual signing of a contract with Local 815 on the latter achieving a majority at the 'conclusion' of negotiations is immaterial" makes no sense.[30]

Moreover, the employer in *Bernard Altman* did not simply negotiate a contract with the union but recognized it as the exclusive representative. The Court found that "the violation which the Board found was the grant by the employer of exclusive representation status to a minority union."[31] Indeed, the Court itself held "the exclusive representation provision is the vice in the agreement."[32] Again, in a *Majestic Weaving* situation, there is no grant of exclusive status. If another union requests that the employer agree to the same terms also conditional on a showing of majority support, the employer is free to enter into such a parallel agreement. The Board's conclusion in *Majestic Weaving* that it could "see no difference between the two [cases] in the effect upon employee rights" is simply baseless.[33] In one case, employees have no choice. In the other, they make a clear and informed choice knowing precisely what representation will bring them.

While virtually no cases have followed *Majestic Weaving* during the past 40 years, an extensive line of cases has arisen based on the 1975 decision in *Houston Division of the Kroger Co.*,[34] that is in direct tension with *Majestic Weaving*. Under the *Kroger* line, the Board has enforced agreements arising out of an existing bargaining unit providing that the employer will recognize the union and apply the terms of the existing agreement in additional units upon a showing of majority support in those units. While the Board has never expressly explained why the two lines of cases result in different outcomes or precisely what the critical factual distinctions are between the two types of cases, it appears that the distinction rests on prior recognition of the union in at least one unit in the *Kroger* line of cases. But this distinction does not justify the different holdings—it has no bearing on the freedom of the choice made by employees in the additional units. In *Kroger*, the Board not only enforced the "additional store clause," it held that "national labor policy favors enforcing their validity."[35] The same is true whether or not the union is already recognized in one unit.

It is in all parties' interest to allow bargaining and binding agreements prior to recognition so long as any agreement is conditional on majority support. Such pre-recognition bargaining allows an informed choice by *both* employers and employees and allows for non-con-

flictual dispute resolution not to be deferred until after a bitter campaign over representation has already made it impossible.

For employees, knowledge about what representation would mean is increasingly important as unionized workplaces are increasingly isolated and as fewer and fewer workers have personal knowledge about unions either through their own or a family members' experiences in a unionized workplace. Today, workers not only face the well-known difficulties of accessing the Act's system of representation through the electoral mechanism, but find it increasingly difficult to even envision what representation would be like. The law allows employers to make dire predictions of what will happen if employees choose unionization,[36] but prevents the parties from reaching an agreement so that employees will actually know what it would be like. As Professor Samuel Estreicher has observed

> Nor does the present regime invariably promote employee free-choice. Workers . . . must decide on union representation against a backdrop of uncertainty. All too often they are voting without an understanding of the union's bargaining objectives and acumen, its effectiveness in contract administration, and its fit with the particular culture of the firm.[37]

Because "the law conditions bargaining authority on a prior showing of majority support," Estreicher points out, it leads to "workers casting lots with limited information."[38]

Indeed, it is precisely the foreignness of representation, the incumbent and dominant status of a lack of representation, that the General Counsel and current Board are attempting to preserve and extend. In explaining why he authorized issuance of a complaint in one case placing *Majestic Weaving* issues before the Board, the General Counsel made clear what interest will be served by the extension of this misguided rule. Because of the conditional agreements concerning terms and conditions of employment, the General Counsel explained, "the union is no longer 'merely an outsider seeking entrance.'"[39] According to the General Counsel, the law may *require* that unionization be a stranger to employees.

Employers, too, are forced to make decisions about what position to take on the union question from behind a legally imposed veil of ignorance. Two respected management lawyers asked in 1987:

> But where does this leave an employer who learns that a union is trying to organize its employees? Typically, the employer's response will be to launch an aggressive anti-union campaign. Most often, the employer will respond in this manner without any knowledge of the union's goals and without any attempt to ascertain the union's position. Such a response is understandable, particularly in view of the legal quagmire that an employer may find itself in if it is not aware of the somewhat hazy boundaries of the law. . . . [40]

But this is bad business. As these management lawyers explain:

> [A] relationship with the union is one of the most significant business transactions in which an employer can engage. If that relationship is not successful, the results can [be] disastrous. As in any other potential business relationship, the employer should be able to talk to the other side and perhaps even reach some preliminary understandings before it determines whether it wants to avoid such a relationship or not. . . .
>
> [B]efore embarking on a course of action—whether pro-union, anti-union or neutrality, employers should have enough information to allow for an intelligent decision. . . .
>
> * * *
>
> [T]he value of engaging in preliminary discussions with unions should not be overlooked. Meeting with a union early on to ascertain its goals and representation philosophy enables the employer to more realistically assess (1) the potential impact of the union on the employer's operations; and (2) the wisdom of expending company resources to campaign against the union.[41]

Thus, these representatives of employers recommend the following sensible steps whose legality the current Board has cast into question.

> First, employers should establish at the outset that they only intend to engage in exploratory discussions, not in collective bargaining. Second, they should make clear that they will not extend recognition to the union unless and until it demonstrates majority support. Third, any understandings reached with the union during preliminary discussions should expressly be contingent on the union's demonstration of majori-

ty support. Fourth, all such agreements should unequivocally reaffirm the employees' right freely to select the representative of their choice.[42]

One can envision such pre-recognition meetings and agreements between employers and unions serving a wide variety of mutually beneficial purposes. Parties might wish to explore whether, in the event of recognition, agreement might be possible on cooperative efforts to increase sales or government or other outside funding, on an equitable sharing of the resulting increased revenue among owners and workers, or on innovative solutions to increase retention and reduce understaffing. As part of their efforts to insure a cooperative relationship in the event of recognition, parties might attempt to establish procedures for assessing employee support for the union that avoid the waste of scarce resources on often bitter and protracted election campaigns by permitting employees to decide whether to be represented by a union through a card check, knowing exactly what it will mean if they do, and without employer opposition. One can imagine a no-strike guarantee that goes into effect immediately upon the majority choosing to be represented when the terms of the prenegotiated, but conditional contract become effective. One can envision this rational approach to labor management relations that truly advances the non-conflictual adjustment of disputes that Senator Wagner envisioned, but only if the current Board does not revive and extend *Majestic Weaving*.[43]

"Under the guise of preserving the purity of employees' choice, the Board is threatening to drastically restrict the manner by which employees can make the choice to be represented."

Congress had no intention of placing employees and employers behind a veil of ignorance when they make critical decisions about representation. The current Board has the opportunity to eliminate the impediment created by *Majestic Weaving* to relationships that are beneficial to employees, employers, and unions. However, spurred by the ideologically driven Right to Work Foundation, the Board appears poised to expand *Majestic Weaving* and even to overrule *Kroger* despite the fact that there is no coherent explanation of how *Majestic Weaving* serves the policies underlying the Act.

Conclusion

Under the guise of preserving the purity of employees' choice, the Board is threatening to drastically restrict the manner by which employees can make the choice to be represented. And under the guise of preventing employers from influencing employees' choice, the Board is threatening to prevent both employees and employers from knowing what the choice will actually mean. Based on its record to date, it appears that the only "free" choice the Bush Board will protect is employees' "free" choice to remain unrepresented in their dealings with employers.

Endnotes

1. *National Labor Relations Act*, 1935, as amended, Section 1.
2. There is a high level of satisfaction within the shrinking sector represented by unions. Professor Richard Freeman and Joel Rogers found that among those currently represented by unions, nearly 90% say they would opt for union representation given the opportunity while only 8% said they would be against. Richard B. Freeman & Joel Rogers, *What Workers Want* (Cornell University Press 1999) at 69. Moreover, among unrepresented workers, despite the well-documented flaws in the election system and the tremendous advantages enjoyed by employers opposing unionization, unions consistently win around 50% of elections—57.8% in 2003. "Trends: Number of Elections Decreased in 2003; Union Win Rate Increases for Seventh Year," *Daily Lab. Rep.* (BNA), at C-1 (June 8, 2004). Furthermore, recent polling data continues to indicate that unorganized employees want representation. A February 2003 survey by Hart Research Associates found that 53% of workers stated that they would definitely or probably vote for a union if an election were held tomorrow in their workplace, compared to only 41% who said they would vote no.
3. *Brown University*, 342 NLRB No. 42 (July 13, 2004).
4. *Brevard Achievement Center*, 342 NLRB No. 101 (Sept. 10, 2004).
5. *Pennsylvania Academy of Fine Arts*, 343 NLRB No. 93 (Dec. 6, 2004).
6. *Oakwood Care Center*, 373 NLRB No. 76 (Nov. 19, 2004).
7. *Oakwood Healthcare, Inc.*, Case 7-RC-22141; *Golden Crest Healthcare Center*, 18-RC-16415, 18-RC-16416; *Croft Metals, Inc.*, Case 15-RC-8393.
8. 343 NLRB No. 45 (Oct. 15, 2004).
9. 339 NLRB No. 162 (2003).
10. 342 NLRB No. 29 (June 30, 2004).
11. *Id*. at 3 (Member Liebman, dissenting).
12. 343 NLRB No. 52 (Oct. 29, 2004).
13. 343 NLRB No. 86 (Nov. 29, 2004).
14. 343 NLRB No. 64 (Oct. 29, 2004).
15. 343 NLRB No. 12 (Sept. 30, 2004).
16. Fine, Chanin, Gold, *Setting The Record Straight: A Report on the National Right to Work Committee and the National Right to Work Legal Defense and Education Foundation, Inc.* (1991).
17. *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989).
18. *General Box Co.*, 82 NLRB 678, 683 (1949).

19. *Monroe Co-operative Oil Co.*, 86 NLRB 95, 99 (1949) (Members Murdock and Gray dissenting).
20. *Redmond Plastics, Inc.*, 187 NLRB 487, 488-89 (1970) (*emphasis added*).
21. *Dana Corp.* and *Metaldyne Corp.*, 341 NLRB No. 150 (June 7, 2004).
22. 343 NLRB No. 105 (2004).
23. *Id*. at 2.
24. 147 NLRB 859 (1964).
25. 86 NLRB 38 (1949).
26. 366 U.S. 731 (1961).
27. 355 F.2d 854, 859 (2d Cir. 1966).
28. *Bernard Altman*, 366 U.S. at 736.
29. *Id*. at 737.
30. 147 NLRB at 860.
31. 366 U.S. at 736.
32. *Id*. at 737.
33. 147 NLRB at 860.
34. 219 NLRB 388 (1975).
35. 219 NLRB at 389.
36. We could cite many examples, but one recent one is *Savers*, 337 NLRB No. 163 (Aug. 1, 2002), in which the Board held that a supervisor's statement that "if the union ever did come in, the store wasn't making enough money to . . . pay off higher wages, and it would be a possibility that everybody would lose their job" was held to be a permissible prediction of future events.
37. *Freedom of Contract and Labor Law Reform: Opening Up the Possibility for Value-Added Unionism*, 71 *NYU Law Rev*. 827, 835 (1996).
38. *Id*. at 838.
39. Report on Recent Case Developments 11 (Nov. 17, 2004).
40. Stanley J. Brown and Henry Morris, Jr., "Pre-recognition Discussions with Unions," in *U.S. Labor Law and the Future of Labor-Management Cooperation, Second Interim Report*, U.S. Department of Labor, Bureau of Labor-Management and Cooperative Programs 98, 99 (Oct. 1987).
41. *Id*.
42. *Id*. at 103.
43. *Majestic Weaving* involved three critical facts: (1) agreement on a complete contract at a time when (2) the union did not represent any employees of the employer and (3) a rival union had substantial support in the unit. Not only do some of the cases in which complaints have issued raise the question of whether the *Majestic Weaving* doctrine should be resurrected, others could result in an expansion of the doctrine to apply despite the absence of each of the facts present in the original case; questioning, for example, whether a union and employer may ever lawfully agree (still on a conditional basis, of course) that a no-strike commitment will apply during the post-recognition negotiation process, or that interest arbitration procedures will be used in the event the parties are not able to amicably reach a first collective bargaining agreement.

Jonathan P. Hiatt is General Counsel to the AFL-CIO and Craig Becker is Associate General Counsel.

ERRATA

In the last issue of the *L&E Newsletter*, biographical information was omitted for Deborah Volberg Pagnotta, author of the article titled "Sometimes Sorry Just Ain't Good Enough." Ms. Pagnotta is President of Interfacet, Inc., which trains employers and employees on sexual harassment, cultural diversity and other employment issues; conducts neutral fact-findings; and mediates disputes. She is also of counsel to Silverberg Zalantis LLP in White Plains, New York. Ms. Pagnotta may be reached at info@interfacet.com.

J.M.

An article titled, "The New York State Human Rights Law: Election of Remedies," by Andrew J. Schatkin, was published in the last edition of the *L&E Newsletter*.

Mr. Schatkin has since informed us that, by oversight and inadvertence, he failed to acknowledge the work of Elana Ben-Dov, Esq., Senior Litigation Associate at the firm of Peckar and Abramson PC, which first suggested the article to him. He asks that Ms. Ben-Dov be credited as co-author.

J.M.

The following is an adaption of a presentation at International Law Weekend in October 2004. The panel was entitled, "Worlds in Collision: Issues in Cross-Border Employment Law."

Discrimination and UK Employment Law: The Impact of Global Conflict on Domestic Legislation

By James Libson and Alexandra Fawcett

The collision of worlds in the sphere of employment law is perhaps not as severe or obvious as many of the collisions being spoken about elsewhere at the International Law Week Conference. Many of the collisions are private and domestic rather than large scale and international. In the field of discrimination law, however, the effects of larger collisions are felt everywhere.

This point is illustrated by the case of an American software company whose business it is to put people into its clients' offices to manage and upgrade their software systems. One of their employees was a Muslim who was becoming more observant. He wanted to wear traditional clothing, including head covering, for religious purposes. The company's customer objected on the grounds that they had a business suit dress code.

What could the company do? Could it accede to its customer's requirements and insist that the employee wore a business suit? Was it or the customer responsible? Was it obliged to move the employee to another, more tolerant customer? These questions are examples of the smaller domestic collisions that arise out of our ever more fractured world.

The answers to these questions lie in the UK's discrimination legislation. Last year, legislation which prohibits discrimination on the grounds of religious belief finally came into force. While the UK has had discrimination laws in relation to race since 1976, an anomaly existed caused by the fact that the UK's Race Relations Act 1976 was limited to prohibiting discrimination on grounds of race. The result was that Jews and Sikhs were protected, as they are races as well as religions; Muslims and Christians were not.

While the adoption of the new law arose from the UK's obligations as an EU Member State and not as a reaction to world events, the anomaly clearly required correction. This need became particularly acute as it became clear that collisions at an international level were increasing Islamophobia.

This is an example of a timely coincidence between worldwide collisions and domestic legislation since the EU directive obliging the change in UK law was in fact in place some time before 9/11 and the war in Iraq.

This said, the foundations of UK and European discrimination law are not related to international collisions in a purely coincidental way. Quite the opposite, they were born out of the last great collision of the last century—the Second World War. It is in the United Nations Charter which came into force in October 1945 that we find expression of the ambition on which most future legislation is based, namely: "universal respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," art 55(c).

The enthusiasm with which this call for human rights has been received has been varied around the world, not least in the UK. In a society with no written constitution, rights have always been preserved by a fine balancing of competing freedoms, for example, the right to protest and the right of individuals (and their employees) to conduct their lawful business without fear of intimidation. The fluidity of the UK system has many advantages, however; it has led to a great resistance to any type of codification of rights being introduced. Even after finally ratifying the European Convention of Human Rights in the Human Rights Act 1998, the UK has resisted the implementation of a broad guarantee of equality. Instead, protection to vulnerable groups has been granted by Parliament at various times and to varying degrees as discrimination has been gradually outlawed in specific areas outside of which, one is still free to discriminate. This "bitty" approach is characterised by the following statistic: "[I]n 2000 it was calculated that to get a comprehensive picture of our discrimination law you would have to consult 30 Acts, 38 Statutory Instruments, 11 Codes of Practice and 12 EC Directives and Recommendations."[1]

Four years on and the position is much worse.

This debate is still a potent one. Politicians to the right of centre continue to rail against the rights-led and dependent society they claim Britain has become. They lament the adoption of European rights that impose obligations on the state and limit the freedom of the citizen resulting in too many spurious rights. What, they ask, has become of the concept of a British democracy based on individual freedoms balanced against each other, that do not, according to them, require the inter-

vention of rights granted by government and, even worse, Europe? They refer to an ever-growing basket of rights that goes beyond the employment sphere, but it is in the employment sphere that these rights have been established most aggressively.

In some ways these politicians may be correct. Rights are conferred to balance unequal conflicts—the conflicts between men and women, the able-bodied and the disabled, racial and ethnic minorities and the majority population, the old and the young. However, 30 years since the introduction of the first piece of equality legislation for women in the UK, the position of women in the workplace is still not equal and, on some statistics, is actually getting worse. The worsening position is illustrated by the following statistics:

- The pay differential between men and women in 2001 was still 19%[2]
- Women who work part-time are paid 41% less than a man working full-time for the same hours of work.[3]
- 187 directors of FTSE companies were paid more than £1 million last year; none were women.[4]
- The unemployment rate for people whose ethnic group was described as white was 5% and the rate amongst all ethnic groups taken as a whole was 11%.[5]

So we are left with an enigma. How do anti-discrimination laws ease the conflicts in our society? The same public institutions that bemoan the lack of progress advocate not less protection but further protection by way of legislation. It is a slow process they say and it takes time for rights to be recognised by individuals and for institutional behavioural patterns to change and adapt. They lobby against what is perceived as the odds stacked against individuals being able to successfully prosecute claims. This lobbying has been done with some success.

The history of statutory employment legislation in the UK is one of limited and capped awards for damages. This is still the position for laws protecting workers from procedural and substantive unfair dismissals, however the cap on damages in sex discrimination cases was successfully challenged in the European Court of Justice and there is now no cap under any of the UK's discrimination laws.

The European Union has also intervened more directly to accelerate the slow progress. A directive was issued, now incorporated into domestic law, that saw a reversal in the burden of proof in discrimination cases.[6] Now, once the employee has established a set of facts that show a possible case of discrimination, the burden reverses and it is for the employer to prove that its conduct was not discriminatory.

These are good and powerful steps and it is likely that we will see more cases and a rise in the proportion of cases that are won by employees. Already the level of media interest in several extremely high-profile cases brought in the UK courts has led to a rise in awareness of both employees' rights and employers' obligations.

This accords with the vision the EU has for its purpose. From its infancy, the EU saw as one of its ambitions not just economic union but union in the social sphere too. In one of its very early judgments the ECJ ruled that: "respect for fundamental personal human rights is one of the general principles of community law. . . there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights."[7]

The current position of the EU is simply but eloquently reflected in Article 13 of the EC Treaty (formerly the Treaty of Rome) inserted following the Treaty of Amsterdam and in force since 1 May 1999. It states: "the council . . . may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

While we may be some way away from the elimination of discrimination, the tools have been provided, at least in the employment context, to have a go at starting. In the UK there is equal pay legislation and laws outlawing discrimination on grounds of sex, race, disability, sexual orientation and religious belief with age to come in 2006. The UK's sexual orientation and religious belief laws came into effect only this year, but, relying on the framework and jurisprudence of the laws against sex and race discrimination which have been around for nearly 30 years and disability discrimination which has been in force for nearly a decade, they should have a more immediate effect.

So back to the original example; what were the company's obligations? At the time the situation arose, the legislation against discrimination on grounds of religious belief had not yet been introduced. The employee, as a Muslim, had no protection under the Race Relations Act 1976 and the company was able, without liability, to insist that its customer's demands were acceded to and that the employee wore a business suit. Today the answer would be different. The employee would be protected on grounds of religious belief and, without being able to establish what is called a genuine occupational requirement (which, in this case, the company would not have been able to) it would have had to accommodate its employee's request as would the company's customer. Perhaps this illustration is a small indication of the way progress can be made.

Having established the nature of UK discrimination laws, it is important to touch upon their reach. Can UK citizens working in America call upon the protection of these UK laws even whilst employed outside the jurisdiction?

The answer is complicated and requires an appreciation of the way in which the EU works. The issue is again best illustrated by an example; the Posted Workers Directive (No. 96/71), adopted in 1996 (and required to be implemented by Member States by 1999), provides that employees who are temporarily posted in another Member State must benefit from the minimum level of protection afforded to employees in that Member State. This means that, irrespective of the contractual choice of law, posted workers will be protected by various aspects of the labour law of the country in which they are working. The employee may then have a choice as to which rights they choose to enforce.

Companies in the U.S. may therefore fall into the trap of ensuring that they comply with UK provisions but fall short of the (usually more generous) provisions of the Member State to which they are sending their employees. An American corporation, therefore, with its European headquarters in London, that posts just one of its employees to set up a small operation in Spain will, in respect of that employee, be subject to whichever of the two countries' employment laws is most generous. In relation to dismissal procedures, for example, which in Spain are much more generous, the unforeseen consequences of such a posting may be significant.

In the discrimination sphere, the jurisdiction of the UK courts varies as between pieces of legislation. The farthest reach is contained in our Race Relations Act 1976 (as amended by Reg. 11 of the Race Relations Act 1976 (Amendment) Regulations 2003 SI 2003/1673). This reach extends to the new laws against discrimination on grounds of sexual orientation and religious belief and will soon apply to disability discrimination as well. Under these provisions, the UK courts have jurisdiction if (a) the employer has a place of business at an establishment in Great Britain; (b) the work is for the purposes of the business carried out at that establishment; and (c) the employee is ordinarily resident in Great Britain (i) at the time when he applies for or is offered the employment, or (ii) at any time during the course of the employment.

The burden therefore is light and any employee from anywhere can prosecute his or her rights if they fulfill these criteria. This said, the UK laws do not seek to extend their reach beyond organisations established in the UK or to employees who have had absolutely no period of work or residence in the country. With sex discrimination the test is slightly different. The courts will have no jurisdiction if the employer can show that the employee conducted her work wholly outside the UK (s.6 Sex Discrimination Act 1975).

What is most difficult for non-European organisations to comprehend is not either the reach of the jurisdiction or the anti-discrimination laws, many of which are thematically familiar to American employers, but the laws protecting procedural and substantive unfair dismissals; the large costs associated with those; and the much more widespread use of contractual arrangements governing the employment relationship. It is in these areas that the one conflict not alluded to, the one epitomised by the epithet, two countries divided by the same language, really strikes home.

Endnotes

1. Tufyal Choudhury and Gay Moon, "Complying with its International Human Rights Obligations: the United Kingdom and Article 26 of the International Covenant on Civil and Political Rights," 2003 *European Human Rights Law Review* (no. 3) at 307 (Sweet & Maxwell).
2. 2001 UK census.
3. *Id*.
4. Julie Finch, "Women Still Failing to Reach the Top," *The Guardian*, 6 October 2004, quoting a report commissioned by Deloitte.
5. Labour Force Survey; see 112 *Equal Opportunities Review* 23 (2002).
6. Council Directive No. 2000/78/EC of 27 November 2000, *Establishing a General Framework for Equal Treatment in Employment and Occupation*.
7. *Deference v. Sabena (no3)* [1978] ECR 136.

James Libson is Head of Litigation and Employment Law at the London law firm of Mishcon de Reya; Alexandra Fawcett is a lawyer in the Employment Department.

Wrongful Termination, Damage Period Length and Mitigation

By Charles Diamond and Damon Montal

Introduction

In litigation involving wrongful termination, the plaintiff's primary economic damages consist in lost wages and benefits suffered while unemployed. However, our legal system requires the plaintiff to find another comparable job and mitigate damages as far as possible. For the plaintiff, plainly there is conflict between the potential increased damage award made possible by remaining unemployed and the legal duty to mitigate. This conflict has implications in litigation involving wrongful termination for the period of unemployment, the level of compensation following termination and, consequently, for the amount of total damages claimed and possibly awarded.

This is an issue that calls for an expert review of the best publicly available employment data as well as employee specific data. The expert must opine on whether a plaintiff has properly mitigated the damages relative to statistical expectations based on a relevant comparator. Rounding out the statistics, an expert assessment is made of whether the terminated employee has followed a reasonable process to find another job. The latter assessment becomes all the more important when the plaintiff claims inability to find any substitute employment, a replacement job pays appreciably less, or when the employment search period appears protracted or open-ended.

Brief Conceptualization

In the typical case, the plaintiff's claims can be summarized as in Figure 1 (below). The terminated employee has suffered a period of little or no income and then obtains a job with an earnings profile that will never catch up with the pay line possible with the lost job. The increasing-without-end damage period depicted in the graph is many times at odds with economic data.

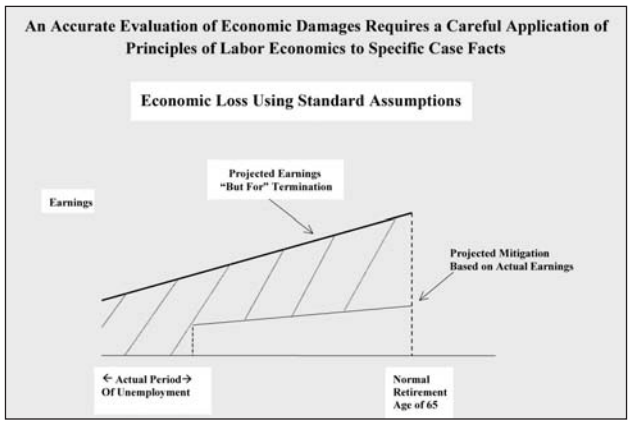


Figure 1

It is ironic that the plaintiff's claims of wrongful discharge deny that termination was due to any personal productivity inadequacies. However Figure 1 demonstrates and plaintiff's argument implicitly assumes that the plaintiff is unable to obtain a comparable job at any time in the future and that he would not be able to restore completely his previous earnings pattern based on his productive capabilities even at another (hopefully) unbiased employer. In Figure 2 (below) we show a much more reasonable damage model, more in accord with economic theory and empirical research.

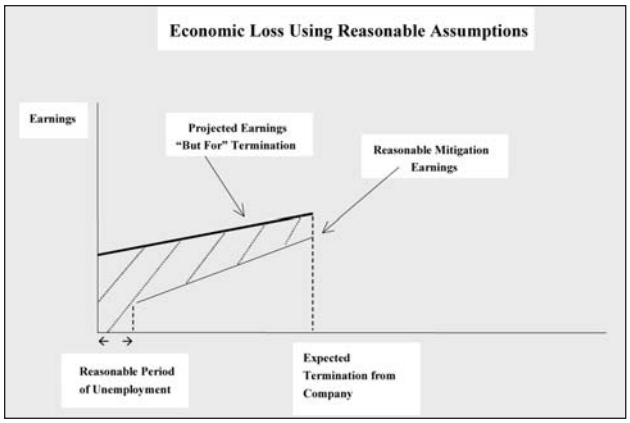


Figure 2

Figure 2 encapsulates several of the flash points of contention usually found in wrongful termination litigation. Notice that in Figure 1 the damage period does not end until retirement age while Figure 2 shows that the damage period would end at the point where the employee would have expected to have been terminated regardless of alleged illegal employer behavior. It is a fact of life in our modern economy that employees will change jobs voluntarily, and sometimes involuntarily, several times over a career. Using the accused employer's personnel records, average expected time on the job can be computed for most job categories thus setting a natural limit to the damage period in cases of this type. Of course, for terminated employees who have outstayed the expected time at a position this solution to cutting off the damage period is not available but there are other possible solutions.[1]

Notice also in Figure 2 compared to Figure 1 that the period of unemployment is much shorter and that the mitigation earnings line approaches (rather than departs from) the lost job's earnings line. In order to deal with these issues we turn to sources of information that are publicly available and we save until the last sections of this article questions concerning the process

that the terminated employee has followed in the job search.

Displaced Worker Survey

The first step in framing the damage period for a claim of wrongful termination is to examine various publicly available data sources. Regardless of the personal facts of a wrongful termination claim, a review of the Displaced Worker Survey published by the U.S. Department of Labor every two years as a supplement to the January Current Populations Survey (CPS) should be undertaken. Displaced workers are employees who held jobs of long duration, i.e., have held a position with their employer for longer than three years. Displaced workers are defined as persons 20 years of age or older who lost or left jobs because their plant or company closed or moved, there was insufficient work for them to do, or their position or shift was abolished.[2] For persons who *found jobs*, the median weeks without work for displaced workers, over 20 years of age was 5.3 weeks for people surveyed during 1998 and 1999.

Fine parsing of the Displaced Worker survey is possible. If we combine the 1998 and 2000 surveys, we find that the median length of unemployment for all displaced workers 50 years or older was 14 weeks. Because some people can take a long time to find another job, the average length of unemployment was 22.8 weeks.[3] The data show that by two years out, almost 98% or more of all displaced workers are reemployed. Based on these data, a claim of an open-ended damage period because a plaintiff cannot find another job would be difficult to maintain.

State Unemployment Insurance Claims

Another important data source is the level of Unemployment Insurance (UI) claims in a state or region. For example, the New Jersey Department of Labor produces the Income Security Card Fact Card that tracks unemployment and other key economic indicators. The Average UI Duration per Claim was 19 weeks in 2002 and decreased to 17.9 weeks in 2003. This statistic is correlated positively with the unemployment rate and thus offers another check on the difficulty and expected length of time for terminated employees to find another job.

Caveat Emptor

It will usually be impossible to encounter a case where the precise facts of the terminated employee fit the economic survey data. The displaced worker data are useful in describing the situation for terminated employees who are under the most difficult circumstances in terms of finding another job. Although the survey does an excellent job of describing the U.S. labor market in general, some may feel it could be stretching things when applied in a case involving a financial executive with stock options and other employer-provided benefits. However, the displaced worker survey, along with other federal and state data, may be brought together to set boundaries on what is reasonable mitigation and thus describe the probable limits of the damage period.

An Example

An example may help to demonstrate how to use the data described here. The case involved an executive whose employment contract was terminated. Based on the 1998 and 2000 Displaced Workers Survey, the median length of unemployment for management, executive, and related personnel was 13 weeks, while the average was 22.8 weeks. The written and signed employment contract called for a 90-day notification of termination on the part of both parties and was in force for a period of three years. The plaintiff in the case was suing for lost wages and income and claimed inability to find a replacement job for over four years. As is customary, the plaintiff's expert in the case assumed the damage period extended to the plaintiff's expected retirement date. In contrast, the defendant's expert presented several scenarios including a recommended estimate of damages based on the 1998 and 2000 survey data (13 weeks), the 90-day notification period, and a maximum damage period coinciding with the contract termination length of three years.

Job Search Process

We have seen expert reports claiming open-ended damage periods and/or protracted job search time. If the plaintiff claims that their employment circumstances are not typical of national or local experiences, then the process that the plaintiff has undertaken to search and locate a job becomes of greater interest in the case. Although the job search process is not rigidly defined, there is a general framework that professional career transition consultants follow that constitutes both a reasonable and effective job search. If a plaintiff is making unusual claims for their job search and thereby claiming an extended damage period, it would be helpful for counsel to learn from experts in the job placement business about the steps that executives and professionals would follow in order to effectively secure another position. It may be that a flawed search strategy is the reason that a plaintiff has not found another position.

A job search can be a daunting experience under the best conditions. Conducting a search after a termination can be an especially stressful and emotionally draining process requiring special considerations. With

or without professional assistance, a game plan needs to be formulated to assist the plaintiff through this transition. An effective job search is an organized and structured process with a beginning, middle, and end.

Of course, while the plaintiff is still gainfully employed is the best time to prepare for an exit and back up important files, information on projects that the plaintiff worked on, letters of praise, performance reviews, and statistics. The time to create an accomplishment file that documents the plaintiff's achievements, indicates results, and utilizes crucial quantifiable data is while he or she still has access to this information. Even though the information is essential to a job search, the plaintiff needs to be mindful and respectful of proprietary and confidential corporate information and property.

Another important exit strategy is to secure contact information regarding clients, prospective clients, associates, and colleagues. Typically, this database is maintained in the office and is difficult to access after termination. Yet securing contact information for networking purposes could be as valuable as one's skill sets or other credentials.

First Phase of Job Search: *Self-Assessment*

The *first phase* of the job search begins immediately after the termination. This is a critical time to stop, take a breath, and review the current business landscape. This period of strategy development and self-assessment creates the foundation on which to build the next chapter in a professional life.

In this self-assessment stage, the court should expect that the plaintiff is taking inventory of marketable and transferable skills, accomplishments, and expertise. This provides them with the proper ammunition to sell themselves effectively and to illustrate how they can bring value to prospective organizations. It is also a confirmation of their own self-worth that they have a documented history of achievement and success.

This is an ideal time to revisit career values, motivations, and interests and align them with one's current life situations and circumstances. People usually have more options than they realize. They can maintain the same career track, make a career change, or consider a different industry. They might change to a smaller company or investigate non-profit alternatives. This could be the perfect time to reevaluate future career plans, gain a renewed identity through a new direction, or decide to go independent. Before they start to re-climb that corporate ladder, separated employees need to ascertain which is the right ladder for them or even if they now want to own that ladder.

It is during this self-assessment stage that people gain an understanding of their emotional state. This is the time to put things into perspective by developing support systems within the family, through friends, community organizations, or with professional care. Nothing will derail a job search more quickly than unresolved anger or depression.

Second Phase of Job Search: *Campaign Preparation*

Once a career direction is decided upon, the next stage is for the plaintiff to prepare how to present themselves to that new marketplace. This *second phase* is called campaign preparation. In this phase, terminated employees begin to script out what they want to say, how they want to say it, and how to give themselves the greatest impact and separate themselves from the pack.

It is during this phase where resumes are developed, "personal info commercials" are perfected, and cover and marketing letters are drafted. Separated employees use this time to polish "accomplishment statements" that reflect their expertise, breadth of experience, and value to prospective organizations. It is important that special consideration is devoted to crafting "exit statements" that explain why the plaintiff is no longer associated with the former company. Answering that question could be an awkward and uncomfortable experience, even during social situations, if a carefully worded and prepared presentation is not in place.

Obtaining references is another matter that requires special preparation. Attorneys could play a vital role by negotiating an agreement on the language for termination, letters of recommendation, and even who could be appointed as the official point person within the company.

Phase Three of Job Search: *Marketing Plan*

The *third phase* of an effective job search is developing and implementing a well thought-out marketing plan. This plan should include targeted industries, geographic locations, and company size. The plaintiff should utilize multiple search strategies to penetrate the targeted companies. Responding to placed ads (either newspaper or Internet), using executive recruiters, utilizing a direct telemarketing campaign, and networking are all helpful and proven methods. The more proactive approaches, such as direct contact and networking, are statistically highly effective measures. Networking is considered the cornerstone of the marketing plan, providing the best chances for unearthing the "hidden job market."

A highly effective method to re-enter the job market is by directly contacting the former employer's competition. Active job seekers should bypass the human resource department and reach out directly to the hiring manager in the appropriate department. Eventually networking should lead to meetings with the right people, at the right level, at the right companies.

Phase Four of Job Search: *Interviews*

This segues into the *fourth phase* of the job-search process: the interview.

Skillful interviewing techniques are a combination of presenting prepared and well thought-out answers that reflect the separated employee's ability to bring value to prospective organizations and asking strategic questions that indicate depth of experience. It is crucial that job seekers determine the needs of the decision maker, while projecting an air of confidence that they can deliver.

For the terminated employee, the most dreaded question is, "Why are you no longer employed with your previous company?" It is best not to dwell on this issue, but present an "exit statement" that has been carefully prepared by the legal team and that could be substantiated by the former company, and then move on. It is important not to speak badly of the former company and its managers or make the issue appear personal.

Last Phase of Job Search: *Getting the Position*

The *fifth and last phase* of the job-search process is landing a position and rebuilding one's career. With proper outplacement support during the transition, the job seeker could gain self-promotional skills in presentation and effective networking techniques that could serve them well in a new career. The plaintiff's goal, aside from the immediate one of securing a position, is to develop insight into their professional setback that will allow them to make better employment choices in the future.

Conclusion

Most of the economic damages claimed in a lawsuit involving wrongful termination concern lost wages and benefits. Presumably, an employee who has lost his job would desire to inflict as large a damage award as possible against a former employer. However, employment law recognizes that the discharged (wrongful or otherwise) employee has a duty to mitigate these damages. The conflict deepens when it is realized that mitigation depends to a large degree on the psychological/emotional health of the discharged employee.

There are a number of factors that could impact a protracted job-search campaign. Some of the factors could be external to the plaintiff, such as economic conditions or general market conditions including the actual need companies have for that particular skill set. Other factors could be internal and complicated by the terminated employee's emotional state. These include such things as determination, motivation, discipline, or emotional disturbances (e.g., depression, anger or anxiety). There may also be factors such as the plaintiff's resume writing abilities, marketing strategies, interviewing techniques, and overall skill and knowledge of how to conduct an organized and efficient job-search campaign.

Utilizing an outplacement firm or a career coach could ameliorate all the mitigating situations. A professional career coach would advise a plaintiff on a career change or a career shift if market/economic conditions have lessened the need for his/her skills. A coach could help motivate or structure a plaintiff or give advice for the need to seek psychological counseling if there appears to be concerns about his or her mental health. And, finally, a career consultant could advise the plaintiff on proven job-search techniques to expedite the job search process.

As we have just described, there are helpful sources of publicly available data to assist attorneys and their experts. By design, the employment data describe the average experiences of job seekers and plaintiffs typically are claiming unusual circumstances. A closer look at the job-seeking process which we have just outlined may be helpful in assessing the genuineness of the plaintiff's efforts in mitigating damages.

Endnotes

1. Judges are reluctant to award damages based on a damage model with no terminus. Depending on specific case facts, it may be possible to estimate a reasonable cutoff to the damage period based on several of the same sources we discuss below.
2. BLS USDL 04-1381 July 30, 2004.
3. The median time is the value for the person in the middle of the distribution while the mean (the average) sums all the times of the people in the survey and divides by the number of people in the survey. If the distribution is bell shaped, then the mean and median are the same. In our case, the mean is more than 50% larger than the median because a few people take an unusual amount of time to find another job. The median is the preferred statistic in case of employment termination, being more representative of the common experience of displaced employees.

Damon Montal is a Senior Career Transition Consultant with The Ayers Group in New York City. Charles Diamond is a Managing Director at FTI Consulting providing litigation support to attorneys in Employment Law.

NYSBA Ethics Summary—2004 Opinions

By Ellen M. Mitchell

Opinion 773 (1/23/04)

Code: DR1-102(A)(2), (5); 2-102(A)(4); 5-101(A); 5-105(A), (B), (D); 5-108(A), (B); 8-101(A)(2); 9-101(B), (C); Canon 9; EC 8-8.

Question: Is a lawyer who serves on a municipal board prohibited from appearing before that board? If so, is a law firm with which that lawyer has an "of counsel" relationship also disqualified from appearing before that board? If so, does the lawyer's recusal from the board's deliberations on matters involving the firm avoid disqualification?

Opinion: A lawyer who serves on a municipal board is prohibited from appearing before that board on behalf of a private client. Lawyers who are "of counsel" to a law firm are "associated" with the law firm for purposes of DR 5-105(D), and so the firm is likewise disqualified from appearing before the board unless the client gives informed consent. Whether the firm is disqualified by other rules depends on the facts and circumstances, but if not and if the firm does appear, the lawyer-member must recuse him or herself.

Related Cases: N.Y. State 431 (1976), quoted in N.Y. State 435 (1956), 510 (1979), 692 (1997), 702 (1998); N.Y. State 702 (1998); N.Y. State 262 (1972); ABA 90-357; N.Y. City 1996-8; N.Y. City 1995-8; N.Y. City 81-3 (1982); *Nemet v. Nemet*, 112 A.D.2d 359, *app. dismissed*, 66 N.Y.2d 602 (1985); N.Y. City 2000-4; *Restatement (Third), of the Law Governing Lawyers*, § 123 cmt. c(ii) (1998); N.Y. State 632 (1992); N.Y. State 145 (1970); *In re Nicholas Quennell*, N.Y.C. Conflict of Interest Board Case No. 97-60; N.Y.C. Conflict of Interest Board Advisory Op. 96-04; N.Y.S. Ethics Comm'n. Advisory Op. 99-12; N.Y. State 424 (1975); N.Y. State 209 (1971); N.Y. State 364 (1974); N.Y. State 484 (1978); *Kings Point Gate, LLC v. Aroche*, 192 Misc. 2d 45 (Nassau Cty. Dist. Ct. 2002); Nassau County 93-20; N.Y. State 655 (1993); N.Y.S. Ethics Comm'n. Advisory Op. 90-14.

Opinion 774 (3/23/04)

Code: DR 1-104(A)-(D); DR 4-101(B), (C), (D); DR 5-105(E); EC 4-2; EC 7-10.

Question: Law firms often hire secretaries, paralegals, or other non-lawyers who have worked at other law firms. What are a law firm's supervisory responsibilities upon hiring a non-lawyer who has worked at other law firms? In particular, must the law firm check for conflicts of interest?

Opinion: When a law firm hires a secretary, paralegal, or other non-lawyer who has previously worked at another law firm, the law firm must adequately supervise the conduct of the non-lawyer. Supervisory measures may include i) instructing the non-lawyer not to disclose protected information acquired at the former law firm and ii) instructing lawyers not to exploit such information if proffered. In some circumstances, it is advisable that the law firm inquire whether the non-lawyer acquired confidential information from the former law firm about a current representation of the new firm or conduct a more comprehensive conflict check based on the non-lawyers's prior work. The results of such an inquiry will help determine whether the new law firm should take further steps, such as seeking the opposing party's consent and/or screening the non-lawyer.

Related Cases: N.Y. State 422 (1975); N.Y. State 700 (1998); N.Y. State 720 (1999); *Dubois v. Gradco Sys., Inc.*, 136 F.R.D. 341, 347 (D. Conn. 1991); ABA 91-359; *Riddell Sports, Inc. v. Brooks*, 1994 U.S. Dist. Lexis 2290 (S.D.N.Y 1994); *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 129 A.D.2d 678 (1987); *Mulhern v. Calder*, 196 Misc. 2d 818 (Sup. Ct., Alb. Co. 2003).

Opinion 775 (5/4/04)

Code: DR 2-103; DR 7-104(A)(1); DR 9-102(C)(4); EC 7-11; EC 7-12.

Question: When a possibly incapacitated former client requests the return of the client's original will, may the lawyer who has been holding the will for safekeeping communicate with the former client and others to ascertain whether the client is in fact incapacitated or under undue influence, insofar as necessary to determine how to respond to the client's direction?

Opinion: In this instance, the lawyer who drafted and maintained an original will received a letter from the former client drafted by someone else requesting the return of the original will. The lawyer has reason to believe that the former client is not competent and may be acting under the influence of a family member who would benefit if the will is destroyed and the former client's estate passes through intestacy.

No disciplinary provision would bar the lawyer from contacting the former client directly in order to ascertain his or her genuine wishes regarding the disposition of the original will or to make a judgment about competence. If after conducting whatever inquiry the lawyer deems appropriate, the lawyer still believes the

former client is or may be incompetent, the lawyer may seek judicial guidance on how to proceed.

Related Cases: N.Y. State 724 (1999); N.Y. State 746 (2001); N.Y. State 746 (2001); N.Y. State 717 (1999); N.Y. State 710 (1998).

Opinion 776 (5/13/04)

Code: DR 4-101; DR 5-101; DR 5-105; DR 9-101(B)(1); Canon 7.

Question: May a former prosecutor ethically serve as defense counsel for an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor?

Opinion: It is a per se prohibited conflict of interest for a former prosecutor to defend an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor.

Related Cases: Disciplinary Rule 9-101(B)(1); N.Y. State 748 (2001); *People v. Abar*, 99 N.Y.2d 406, 408 (2003); *People v. Smart*, 96 N.Y.2d 793, 794 (2001); *People v. Longtin*, 92 N.Y.2d, 640, 642 (1998); *GD Searle & Co., Inc. v. Pennie & Edmonds LLP*, N.Y.L.J., Jan 26, 2004, at 18 (N.Y. Sup. Ct.); *Gidatex, S.r.L. v. Campaniello Imports, Ltd*., 82 F. Supp. 2d 119 (S.D.N.Y. 1999); N.Y. State 714 (1999); N.Y. State 572 (1985); Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—a Response to Mr. Fox*, 29 Hofstra L. Rev. 971, 984 (2001); N.Y. Jud. Law § 493 (Consol 2004); S.D.N.Y. and E.D.N.Y. Local Civ. R. 1.5(b)(5).

Opinion 777 (8/30/04)

Code: DR 5-101; DR 5-102(A), (B); DR 5-103(A); EC 5-3; EC 5-7.

Question: May a lawyer who owns an interest in land that is subject of an annexation dispute between two neighboring towns represent one of the towns in the dispute?

Opinion: DR 5-103(A) does not prevent the inquirer from representing the town because the Code only prohibits the *acquisition* of an interest in the subject matter of the litigation, not the pre-existing possession of such an interest. If the interest of the lawyer and the town are fully aligned, then it is likely that a disinterested lawyer would conclude that the inquirer's representation of the client would not be adversely affected by the inquirer's interest in the land, so the town may validly consent to the representation after full disclosure. Thus, a lawyer may represent a client in litigation notwithstanding that the lawyer owns a pre-existing interest in the subject matter of the litigation, if the lawyer's interests and the client's interest in the outcome of the litigation are not in conflict and the lawyer will not be called as a witness.

Related Cases: N.Y. State 629 (1992); DR 2-106(C)(2) or (3); ABA Model Rule 1.8(i); Maine Op. 92 (1988); Alabama Op. 85-23; Alabama Op. 84-159; *In re Capobianco v. Halebass Realty, Inc.*, 72 A.D.2d 804 (2d Dep't 1979); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 105 (5th Cir. 1978); ABA 00-416; ABA Inf. Op. 899 (1965); *Walz*, 1996 WL 88556 (S.D.N.Y. 1996); *Bachman v. Pertschuk*, 437 F. Supp. 973, 976-77 (D.D.C. 1977).

Opinion 778 (8/30/04)

Code: DR 5-105(A), (B), (C); DR 5-108(A); EC 5-15, 5-16, 5-17.

Question: May a lawyer engaged by an insurance carrier represent two co-defendants who are named insureds when the amount of the plaintiff's claim exceeds the policy limits and one co-defendant has an indemnification claim against the other?

Opinion: Under the Code, a lawyer must decline to represent multiple clients if the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer's representation of the other client, or if it would be likely to involve the lawyer in representing differing interests. The Code does permit a lawyer to represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interests of each and if each consents to the representation after full disclosure and the advantages and risks involved.

In sum, a lawyer engaged by an insurance company may not represent two defendants, one of whom has a potential indemnification claim against the other, unless a disinterested lawyer would believe the lawyer can competently represent the interests of each, the one defendant waives the right to assert indemnification as cross-claim, and both defendants otherwise consent after full disclosure.

Related Cases: DR 5-105(C); N.Y. State 761 (2003); N.Y. State 674 (1995); N.Y. State 560 (1984); N.Y. State 191 (1971); N.Y. State 349 (1974); *Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65 (1969); *Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981); *Bryan v. State-Wide Ins. Co*., 144 A.D.2d 325 (1988); *cf. Nat. City Bank v. N.Y. Cent. Mut. Fire Ins. Co*., 6 A.D.3d 1116 (2004); *Goldberg v. American Home Assurance Co*., 80 A.D.2d 409 (1981); N.Y. State 73 (1967); N.Y. State 555 (1984).

Opinion 779 11/5/04

Code: DR 2-103(B).

Question: May an attorney pay a marketing organization a fee in return for being furnished with a bundle of pre-screened client "leads," consisting of potential clients who may need representation in connection with their federal income taxes?

Opinion: The payment by an attorney for a bundle of "leads" to prospective clients would violate DR 2-103(B) because neither of the exceptions in subparagraphs (1) or (2) applies. The payments would be compensation paid to marketer "to recommend or obtain employment by a client" so it would be improper for an attorney to participate in the proposed transaction.

Related Cases: N.Y. State 557 (1984); N.Y. State 663 (1992); N.Y. State 721 (1999); N.Y. State 662 (1994) (quoting N.Y. State 557 (1984)); N.Y. State 636 (1992); ABA 297 (1961); N.Y. State 741 (2001); N.Y. State 705 (1998).

Opinion 780 (12/8/04)

Code: DR 2-110(A)(2); 4-101(C)(4), 6-102(A), 9-102(C)(4); EC 4-6.

Questions

1. May a lawyer retain copies of the client's file over the objection of the client?
2. May the lawyer demand a release from liability as a condition of not retaining copies?

Opinion: When a lawyer's employment by a client ends, the lawyer is required to deliver the client property, including files, which the client is entitled to receive as a matter of law. Although the Code does not explicitly address the issue of whether the *lawyer* has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest. Implicit in DR 4-101(C)(4) is the lawyer's right to retain copies of the file in order to collect a fee or defend against an accusation of wrongful conduct. The lawyer's right to retain copies of the file may be reflected in a retainer agreement or an engagement letter.

Although the Committee has previously held that a lawyer may not insist on a general release as a condition of returning a client's file, it has not addressed the question of whether a lawyer's agreement to give up the right to retain copies of the file may be conditional on such a release. Because the Committee believes that a lawyer has a right to retain copies of the file, if the client objects to the lawyer's retention of copies, the Committee holds that the lawyer may insist on a general release as a condition of acquiescence.

Related Cases: N.Y. State 766 (1993); N.Y. State 623 (1991); *Restatement (Third), of the Law Governing Lawyers* § 46(2); N.Y. State 339 (1974); N.Y. State 591 (1988). *In re Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997); *Bronx Jewish Boys v. Uniglobe, Inc.*, 166 Misc. 2d 347, 350, 633 N.Y.S. 2d 711, 713 (Sup. Ct. 1995). *In re Grand Jury Proceedings (Vargas)*, 727 F.2D 941, 944-45 (10th Cir.); *In re Calestini*, 321 F. Supp. 1313, 1316 (N.D. Ca. 1971); Michigan Ethics Committee Op. R019 (2000). Neb. Op. 2001-03 (2001); Mass. Op. 92-4 (1992); S.F. Bar Op. 1990-1 (1990); Ala. Op. 88-102 (1988); Ohio Op. 92-8 (1992); Colo. Op. 104 (1999); Ky. Op. E-235 (1980); N.Y. State 591 (1988); N.Y. State 275 (1972); N.Y. State 567 (1984); N.Y. State 591 (1988); Wis. Op. E-85-12 (1986).

Opinion 781 (12/8/04)

Code: DR 1-102, 2-110, 4-101, 7-102; EC 7-6.

Question: A matrimonial lawyer, in order to submit a financial statement on behalf of a client, certified the accuracy of the statement to family court. After filing the statement, the lawyer learns that it contains a material error relating to the omission of substantial client assets. Is the lawyer required to withdraw the financial statement?

Opinion: A matrimonial lawyer who learns that a financial statement submitted by the lawyer to the family court contains a material omission, and that the client perpetrated a fraud on the tribunal, must call upon the client to rectify the material omission. If the client refuses, the lawyer must withdraw the financial statement. If the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule, the lawyer must withdraw from the representation, with the court's permission if required under its rules.

Related Cases: N.Y. State 674 (1995); 22 N.Y.C.R.R. § 202.16(e); 22 N.Y.C.R.R. § 130-1.1A(b); 22 N.Y.C.R.R. § 130-1.1(c); *Attorney Grievance Commission v. Rohrback*, 323 Md. 79, 93-100 (Ct. of Ap. Md. 1991); Nassau County 2003-1; N.Y. City 2002-1; N.Y. City 1994-8.

Opinion 782 (12/8/04)

Code: DR 1-102(A)(5), 4-101(B), (C), (D); EC 4-5

Question: DR 4-101(B) states that a lawyer shall not "knowingly" reveal a confidence or secret of a client. Does a lawyer who transmits documents that contain "metadata" reflecting client confidences or secrets violate DR 4-101(B)?

Opinion: "Metadata" may be loosely defined as data hidden in documents that is generated during the

course of creating and editing such documents. It may include fragments of data from files that were previously deleted, overwritten or worked on simultaneously. The hidden text may reflect editorial comments, strategy considerations, legal issues raised by the client or the lawyer, legal advice provided by the lawyer, and other information.

The Code prohibits lawyers from "knowingly" revealing a client confidence or secret, except when permitted under one of five exceptions. DR 4-101(D) states that a lawyer "shall exercise reasonable care to prevent his or her employees, associates and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client." Similarly, a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances.

Lawyer recipients also have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets.

Related Cases: N.Y. State 709 (1998); N.Y. City 94-11; N.Y. State 709 (1998); N.Y. State 749; N.Y. State 700 (1997); David Hricik and Robert R. Jueneman, "The Tranmission and Receipt of Invisible Confidential Information," 15 The Professional Lawyer No. 1, p. 18 (Spring 2004); Mark Ward, "The hidden dangers of documents," BBC News World Edition, August 18, 2003, at http://news.bbc.co.uk/2/hi/technology/3154479.stm; "Barry MacDonnell's Toolbox for WordPerfect for Windows—Macros, Tips and Templates"; Feruary 5, 2004, at http://home.earthlink.net/wptoolbox?Tips/UndoRedo.html; "How To: Minimize Metadata in Microsoft Word 2002 Documents," at http://support.microsoft.com/?kbid=237361; "How To: Minimize Metadata in Microsoft Word 2000 Documents," at http://support.microsoft.com/?kbid=237361. Richard M. Smith, "Microsoft Word bytes Tony Blair in the butt," June 30, 2003, at http://www.computerbytesman.com/privacy/blair.htm; Barry MacDonnell's Toolbox for WordPerfect for Windows—Macros, Tips, and Templates," February 5, 2004, at http://home.earthlink.net/wptoolbox?Tips/UndoRedo/html.

Ellen Mitchell is Associate Counsel in the CSEA Legal Department. She is a member of the Labor and Employment Law Section's Committee on Ethics.

New Tax Law Ends "Double Taxation" of Attorneys' Fees

By Parag Patel

In the fall of 2004, President Bush signed legislation that could make it easier or cheaper to settle employment discrimination claims.[1] The new law ends the "double taxation" of attorneys' fees previously applied to individuals who win or settle employment discrimination and related cases. The new law applies only to awards issued and settlements executed for employees beginning November 22, 2004.

Under the old law, plaintiffs who won or settled discrimination lawsuits were taxed on the total amount of the award or settlement, including attorney fees paid directly to the plaintiffs' attorney by the defendant. For example, the IRS required a civil rights plaintiff who won or settled a case, for $100,000, to pay taxes on the entire amount, even though a contingency fee of $33,000 went to the plaintiff's attorney, and the attorney would already be paying taxes on that same $33,000. This "double taxation" was often an obstacle to settlement, causing plaintiffs and their attorneys to insist on a higher settlement amount to cover the double tax hit.

The new law permits plaintiffs to deduct the amount of attorney fees and court costs from their income (an "above the line" deduction), which means these payments are not subject to other deduction limits (i.e., the alternative minimum tax or the two-percent floor on miscellaneous deductions).

Specifically, the new law allows a full deduction for attorneys' fees and costs for (1) claims of "unlawful discrimination," (2) certain claims against the federal government, and (3) certain claims against an employer based on group health plan payments subject to the Medicare secondary payor rules. The new law defines unlawful discrimination as any act that is unlawful under the following statutes:

- Section 302 of the Civil Rights Act of 1991 (2 U.S.C. § 1202);
- Sections 201-207 of the Congressional Accountability Act of 1995 (2 U.S.C. §§ 1311-1317);
- The National Labor Relations Act (29 U.S.C. §§ 151 *et seq*.);
- The Fair Labor Standards Act of 1938 (28 U.S.C. §§ 201 *et seq*.);
- Section 4 or 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 623 or 633a);
- Section 501 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 791 or 794);
- Section 510 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1140);
- Title IX of the Education Amendments Act of 1972 (29 U.S.C. §§ 1681 *et seq*.);
- The Employee Polygraph Protection Act of 1988 (29 U.S.C. §§ 201 *et seq*.);
- The Worker Adjustment and Retraining Notification Act (29 U.S.C. §§ 2102 *et seq*.);
- Section 105 of the Family and Medical Leave Act of 1993 (29 U.S.C. § 2615);
- 38 U.S.C. Chapter 43 (Employment and Reemployment Rights of Members of the Uniformed Services);
- Section 1977, 1979, or 1980 of the Revised Statutes (42 U.S.C. § 1981, 1983, or 1985);
- Section 703, 704, or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2, 2000e-3, or 2000e-16);
- Section 804-806, 808, or 818 of the Fair Housing Act (42 U.S.C. § 3604-3606, 3608, or 3617);
- Section 102, 202, 302, or 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12112, 12132, 12182, or 12203);
- Any federal law prohibiting discharge, discrimination, or other forms of retaliation or reprisal against an employee for asserting rights or taking actions permitted under federal law (i.e., whistleblower protection laws); and
- Any provision of federal, state, or local law or common law claims permitted under federal, state, local or common law (1) providing for the enforcement of civil rights, or (2) regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or (3) prohibiting discharge of an employee or discrimination or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law.

It is important to point out, however, that while the new law provides tax relief for the aforementioned claims, plaintiff recoveries based on other claims get no tax relief. The new law applies regardless of whether the attorney fees and court costs were paid by the plaintiff or by the defendant. The law does not change any

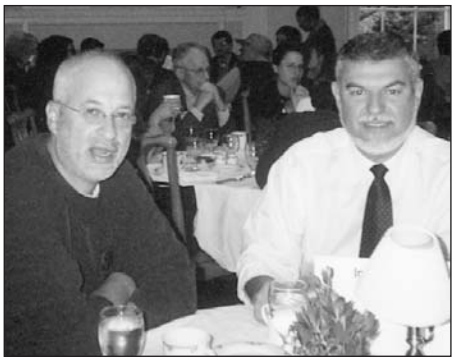
(Continued on page 26)

(l to r) Secretary-Elect Elena Cacavas, Chair-Elect Richard Zuckerman, Former Chair Rosemary Townley

Laura Schnell and Janice Goodman

Elena Cacava

Jim McCauley and Sharon Stiller



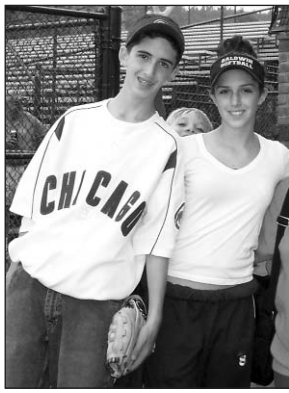
Ira Cure and Wayne Outten

Scott Phillipson and Mairead Connor

Margery Gootnick

In the Doubleday Field Dugout

Peter Conrad and Bruce Levine



(l to r) Steven Zuckerm
Margery Gootnick a

s and Family

The Real Umpire and Margery Gootnick

(l to r) David Fish, Iyana Titus, David Sapp

Former Section Chair Linda Bartlett and Current Chair Pearl Zuchlewski

(l to r) Peter Spinelli, W. James Schwan and John J. Faso

Mike Harren and Jim Hancock

Janice and Mike Bernstein

han, Alyssa Zuckerman, and Rich Zuckerman

David Sapp and James Conlon

NYSBA President Ken Standard and Section Chair Pearl Zuchlewski

(Continued from page 23)

requirement that defendants report to the IRS any payments made to the plaintiff or plaintiffs' attorneys.

So what does this all mean for employers? Hopefully, easier and faster settlements since plaintiffs will no longer seek to "gross up" the total settlement amount to make up for the old double tax impact. Employers should use the new provision as a bargaining point in settlement negotiations.

So what does this all mean for attorneys? While the law will not affect the taxes currently paid by attorneys, settlement agreements and other litigation documents (specifically the complaint, jury instructions, etc.) will have to be carefully tailored to achieve a favorable tax result for clients. A tax attorney should be consulted to ensure the favorable tax treatment of attorneys' fees and costs from judgments and settlements of discrimination and other employment-related claims.

Endnote

1. The Civil Rights Tax Relief Act was passed as section 703 of H.R. 4520, the American Jobs Creation Act of 2004, S. 557/H.R. 1155 (2004). The bill was signed by the President in October, 2004, and went into effect on November 22, 2004.

Parag Patel, Esq. is a tax attorney who may be reached at patellaw@mail.com.

For Your Information

Peter R. Jerdee has become a partner of **The Gregory P. Joseph Law Offices, LLC**.

Outten and Golden, LLP, announces that **Kathleen Peratis** has become a partner of the firm. **Lewis M. Steel** and **Wendy S. Lazar** have become of counsel to the firm, and **Mark R. Humowiecki**, **Renika C. Moore**, **Anjana Samant** and **Steven C. Sheinberg** have become associates.

Rachael A. Akohonae, Nancy L. Merwin and **Benjamin J. Shin** have become associated with the firm of **Sabin, Bermant & Gould, LLP**.

Robert D. Kraus and **Pearl Zuchlewski** announce the formation of **Kraus & Zuchlewski, LLP**, concentrating in employment law on behalf of individuals. **Geoffrey A. Mort** is of counsel.

Paul Schachter and **Denise Reinhardt** have become senior counsel to the firm of **Levy Ratner, PC**. **Adam Rhymard, Jennifer J. Middleton, Clarissa Y. Jones** and **Ezekiel D. Carder** have become associates of the firm.

Ethics Matters

By John Gaal

Q A client recently terminated its relationship with me. The client has now asked me to return all its files to it, and has further demanded that I keep no copies of these files. While I am confident my representation of this client in the past has been excellent, there is always a possibility of an unforeseen malpractice claim rearing its head in the future. As a result, I would certainly like to keep copies of these files so, if necessary, I could defend myself. Am I ethically obligated to return the client's files and to refrain from keeping copies?

A Client files in New York are generally considered to belong to the client. Consequently, upon request (and assuming all fees are paid so that there is no basis for the lawyer to claim a retaining lien interest in the file), the client is entitled to their return.

The New York State Bar Association's Committee on Professional Ethics recently addressed the issue of retaining copies of those files in Formal Opinion 780 (*See* page 21). Although recognizing that a lawyer does not have a property interest in client files, the Committee did recognize that a lawyer does have some interest in client files. Relying in part on DR 4-101's exception to the duty to maintain client confidences for instances in which a lawyer must defend herself against an accusation of wrongful conduct, the Committee concluded that a lawyer does have a right to retain copies of client files, at her own expense, even over a client's objections. The Committee referenced decisions reaching a similar conclusion from Nebraska, Massachusetts, San Francisco, Alabama, Ohio, Colorado and Kentucky in further support of its conclusion.

The Opinion further holds that a lawyer may properly demand a general release from the client in exchange for agreeing not to make copies of the files. Although the Committee had previously held that a lawyer may not insist on a general release as a condition to returning the file itself, NYSBA Formal Opinion 339 (1974), because a lawyer has a right to retain copies it concluded that the lawyer could insist on a general release in exchange for giving up that right. In addition, because such a release would not arise "prospectively," it concluded that seeking one would not violate DR 6-102(A)'s prohibition against seeking to limit liability to a client for malpractice.

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC in Syracuse, New York and an active Section member. If there is 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.

Request for Articles

If you have written an article, or have an idea for one, please contact *L&E Newsletter* Editor

Janet McEneaney, Esq.
205-02 33rd Avenue
Bayside, NY 11361
(718) 428-8369
E-mail:mceneaneyj@aol.com

Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

EEO Committee Report

Recently, the EEO Committee of the Labor and Employment Law Section coordinated with Cornell Law School and the New York State School of Industrial and Labor Relations to present a useful MCLE program called "Employment Law for the General Practitioner" for upstate attorneys on November 13, 2004. The session awarded 5 credit hours (1.0 in Skills and 4.0 in Professional Practice and/or Practice Management for all Attorneys) to the approximately 50 attendees, which included students from the ILR School and the Law School.

Exceptional speakers included Laura Harshbarger of Bond Schoeneck & King; David Fish of Rosen Leff; and associate professors of ILR, Risa Lieberwitz, Lee Adler, and Rocco Scanza. Local attorney Jim McCauley and Rochester attorney Michael T. Harren also provided valuable presentations, along with EEOC Mediator David Ging from Buffalo. Labor and Employment Section Secretary Michael Gold coordinated with Program Co-Chair Deborah S. Skanadore Reisdorph to make the upstate program a success.

This article won second prize in the Section's annual Dr. Emanuel Stein Writing Competition for law school students.

A Weighty Dilemma: The New York Court's Erratic Stance on Weight-Based Employment Discrimination Claims

By Jeanne Zelnick

Introduction

American society is undoubtedly weight-obsessed. However, this does not mean that we are getting thinner.[1] In fact, American society is currently in the midst of an obesity[2] epidemic[3] where 64% of American adults age 20 years and over are overweight or obese.[4] These startling numbers have not escaped New York City, where more than half (53%) of adults in the five boroughs[5] are overweight or obese.[6] However, these rising numbers have done little to increase sympathy for the obese and the stigma surrounding this group remains consistent and severe.[7] For example, formerly obese gastric bypass surgery patients almost unanimously agree that they would rather lose a leg than return to their former state.[8] Even more shocking, a "20/20" television interview of several five-year old children revealed that the children unanimously preferred to lose an arm, than be obese.[9]

Reports such as these vividly demonstrate that American society does not view excess body fat as just another physical trait, such as eye or hair color. In fact, obesity is associated with a range of negative stereotypes, such as a lack of competency, productivity, conscientiousness, aggressiveness, and ambition.[10] These stereotypes are the result of the commonly held belief that obesity is a mutable or voluntary condition,[11] despite a growing number of studies, suggesting that obesity is largely untreatable.[12] The direct consequence of these stereotypes is a prevalence of weight-based employment discrimination[13] and a corresponding increase in weight-based employment discrimination lawsuits. In New York City, six such suits were adjudicated at the state and federal levels during a three-year period (1996–1999).[14]

Part I of this article examines the federal and state disability statutes, which New York's weight-based employment discrimination claimants are currently using to support their claims. Part II outlines the judicial treatment of weight-based employment discrimination suits in New York from 1967–1999 and concludes that plaintiffs have generally been unsuccessful in characterizing obesity as a disability under existing state and federal disability statutes. Part III discusses the policy reasons for protecting the obese, reviews the inadequacies of the currently available statutory framework, and proposes that the resolution of this issue can be achieved through a modification of New York State statutory law. Specifically, Part III suggests that a provision, which specifically bars weight-based employment discrimination, should be added to the New York Human Rights Law.[15]

I. Current Remedies: Federal and State Legislation

If a New York employee suspects that he has experienced weight-based employment discrimination, he may file a claim, alleging a statutory violation by his employer. New York's weight-based employment discrimination suits have been at the state and the federal levels, pursuant to one or more of three statutes: the Americans with Disabilities Act of 1990[16] (the "ADA"), the Federal Rehabilitation Act of 1973[17] (the "RHA"), and the New York State Human Rights Law[18] (the "HRL"), which was implemented in 1968.[19] The disability framework in each of these three statutes will be examined in turn.

A. Disability Protection Under Federal Law: The ADA and the RHA

The ADA provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employer compensation, job training, and other terms, conditions, and privileges of employment.[20]

Under the ADA, the term "disability"[21] specifically means:

(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) a record of such impairment; or

(c) being regarded as having such an impairment

An individual who meets at least one of these three prongs is covered as a disabled person under the ADA (unless specifically excluded elsewhere in the statute).[22] The first prong of the disability definition consists of three key phrases: "physical impairment," "substantially limits," and "major life activity."[23] Together, these phrases present a formidable hurdle for New York plaintiffs bringing weight-based employment discrimination claims under the ADA.[24]

A "physical impairment" is defined under Equal Employment Opportunity Commission Regulations to Implement the Equal Employment Provisions of the American Disabilities Act ("EEOC Regulations")[25] as follows:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.[26]

Furthermore, the EEOC Regulations ascertain that: "the term 'impairment' does not include physical characteristics such as eye color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of the physiological disorder."[27]

Next, the EEOC Regulations define "substantially limits" as:

(i) Unable to perform major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared with the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[28]

With regards to prong one of the "substantially limits" definition, the term "major life activity" is defined in the EEOC Regulations as:

> Functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[29]

With regards to the "major life activity" of working, the EEOC has noted that:

> The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. . . . The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[30]

The RHA, a 1973 statute, preceded the AHA.[31] It is similar to the ADA in form and content.[32] The major significant difference between the two statutes is that the RHA is much narrower in scope than the ADA, since the RHA applies solely to employment discrimination in federally funded programs.[33] The RHA provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[34]

To obtain status as a "qualified individual with a disability" under the RHA, an individual must satisfy one or more elements of a three-pronged test, which is identical to that of the ADA.[35] One difference is that "major life activities" are defined more broadly in the RHA than in the ADA and include sitting, standing, lifting, and reaching.[36]

B. Disability Protection under New York State Law: the HRL

Under New York State law, an employer is prohibited from discharging an individual, based on disability.[37] A disability is defined as[38]:

a. A physical or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically acceptable clinical or laboratory diagnostic techniques

b. A record of such an impairment

c. A condition regarded by others as such an impairment

As under the ADA and the RHA, an individual who demonstrates that he or she falls under at least one of the statute's three prongs is considered disabled under the HRL.

The HRL's definition of disability is "substantially broader"[39] than that of the federal statutory framework. Under the HRL, an individual claiming wrongful discharge, based on a disability, need not demonstrate that his impairment "substantially limits a major life activity," as under the ADA or the RHA.[40] Rather, an individ-

ual may be disabled under the HRL if his impairment is determined by "medically acceptable" techniques.[41] Thus, a clinical diagnosis by a medical professional may be sufficient evidence of a disability for HRL purposes.[42]

By and large, New York's state and federal courts have held that "weight, in and of itself does not constitute a disability [under state or federal statutes] for discrimination qualification purposes" under the ADA, the RHA, and the HRL.[43] Thus, these statutes have proven themselves as ineffective statutory remedies for weight-based employment discrimination claims at the state and the federal levels.[44] Because these disability statutes provide inadequate relief for weight-based employment discrimination claimants, it is imperative that the New York State legislature develops a state statutory remedy to address this very issue.[45]

II. Tracing the Judicial Management of Weight-Based Employment Discrimination Claims in New York's State and Federal Courts

New York's state and federal courts have inconsistently adjudicated weight-based employment discrimination suits. Part A examines New York's first weight-based employment discrimination claim, which was adjudicated prior to any federal or state disability statute. Part B examines New York's first weight-based employment discrimination claim, which was adjudicated, pursuant to a disability statute (the HRL). The cases in Part C demonstrate that federal and state disability laws have formed an increasingly rigid barrier to the successful adjudication of weight-based employment discrimination claims in New York's federal courts.

A. New York's First Weight-Based Employment Discrimination Challenge

The 1967 case of *Parolisi v. Board of Examiners of the City of New York*[46] was an early attempt by New York's courts to fashion a proper remedy for a weight-based employment discrimination claimant. The case sets out many of the issues still present in recent weight-based employment discrimination lawsuits.[47] The Plaintiff ("Parolisi") was denied her substitute teacher's license by the New York City Board of Education (the "Board"), "solely" due to her weight.[48] The Board had adopted specific standards for the "health and physical fitness" of teaching applicants, using a standard weight table to make its evaluation.[49] Because Parolisi deviated 76 percent from the Board's maximum permissible weight, it concluded that her weight would interfere with teacher and student safety, denying her a license.[50] Consequently, Parolisi sued the Board in New York State Supreme Court.[51]

Parolisi did not use the disability statutes as a vehicle for her claim, since these were not yet enacted. However, Parolisi was successful in her suit because the court refused to accept the idea that an individual's employment status should turn on weight, as opposed to merit.[52] However, the court struggled to structure its opinion, resulting in an unwieldy, yet clever application of the New York State Constitution[53] to find that the Board's standards were not "reasonably and rationally related to the ability to teach or maintain discipline."[54] Although the court successfully applied the New York State Constitution to preserve the plaintiff's integrity, *Parolisi* initiated a dilemma that would plague New York's courts in the upcoming years: the application of a non-specific statutory remedy for weight-based employment discrimination suits made their successful adjudication virtually impossible.

B. The Advent of Disability Statutes as a Vehicle for Weight-Based Employment Discrimination Claims

McDermott v. Xerox Corp.,[55] New York's first weight-based employment discrimination case, filed pursuant to a disability statute, resulted from the HRL's 1968 enactment. The Plaintiff ("McDermott") applied for a job with Xerox Corp. ("Xerox"), whose company policy included a pre-employment medical examination.[56] Upon accepting Xerox's offer of employment, McDermott was examined by a physician who noted that she was "obese."[57] Xerox then informed McDermott that she would not be hired, since she failed the medical examination.[58]

In 1975, McDermott filed a claim with the State Division of Human Rights, alleging disability discrimination, in violation of the HRL.[59] The Human Rights Commissioner found for McDermott, the Human Rights Appeal Board reversed, and the Appellate Division reversed the Appeal Board's decision.[60] The 1985 case was an appeal by Xerox, urging that its rejection of McDermott was not weight-based, but based upon the "statistical likelihood that her obese condition would produce impairments in the future."[61]

The court rejected the Xerox defense and held that HRL's disability definition is a broad one,[62] emphasizing that a disability under the HRL may be "demonstra[ted] by medically accepted clinical or laboratory diagnostic techniques."[63] In sum, though the court asserted that obesity might be considered a disability under the HRL, the holding is a narrow one, since the "demonstrable by medical techniques" factor was the decisive feature of the court's opinion.

Notwithstanding the narrowness of the holding, *McDermott* was a seminal case, as it was the first weight-based employment discrimination case to reveal New York's courts are amenable to the concept of obesi-

ty as a disability under the HRL. However, *McDermott* was hardly an indicator of the difficult times that lay ahead for weight-based employment discrimination claimants, especially in New York's federal courts.

C. Is Obesity a Disability? Into the 1990s: A Losing Battle

After *McDermott*, New York's courts did not adjudicate any weight-based employment discrimination suits until 1989. The re-emergence of such suits was directly related to the enactment of the ADA in 1990. As a result, all of New York's weight-based employment discrimination suits were brought at the federal level during the 1990s. Yet, no plaintiff prevailed under the ADA or the RHA. In addition, a successful HRL claim was narrowly restricted by whether or not the plaintiff had presented "medically acceptable"[64] evidence of obesity.

The first case in this series, *Underwood v. Trans World Airlines*,[65] demonstrates that the HRL is a limited tool for addressing weight-based employment discrimination "when the Plaintiff does not explicitly allege that his condition amounts to obesity."[66] Here, the Plaintiff ("Underwood") was a flight attendant who was suspended without pay when she failed to lose a prescribed amount of weight, pursuant to her employer's ("TWA") appearance standards.[67] In 1988, Underwood filed an unsuccessful grievance with TWA's In-Flight Services who found, after an appeal hearing, that "the disciplinary measures taken were warranted."[68] Underwood then sued TWA in New York State Supreme Court, alleging an HRL violation.[69] TWA successfully removed the case to federal court and moved to dismiss Underwood's claims.[70]

Because the court was unwilling to accommodate Underwood's weight-based employment discrimination claim, the result was an extremely conservative application of the HRL. The court compared the *Underwood* facts to *McDermott*, highlighting that unlike McDermott, Underwood was merely deemed "overweight" by her employer.[71] According to the court, "the difference between overweight and obese is not merely one of semantics."[72] In sum, the *Underwood* court suggested that under the HRL, a weight-based employment discrimination claimant must not only prove obesity,[73] but must also attest to his or her condition using "medically accepted clinical or laboratory diagnostic techniques."[74]

The next case, *Hazeldine v. Beverage Media*,[75] reveals the schism between federal and state disability law. Unlike the HRL, the ADA considers medical evidence of obesity as inconsequential in establishing whether obesity amounts to a statutorily protected disability. Here, the Plaintiff ("Hazeldine") began working as a proofreader at Beverage Media ("employer") in 1980, at 150 pounds.[76] When she was terminated in 1992, Hazeldine weighed around 300 pounds.[77] However, as is often the case with weight-based employment discrimination, Hazeldine was not terminated specifically due to her weight.[78]

Shortly thereafter, Hazeldine filed a federal complaint with the EEOC and was informed of her right to sue.[79] Hazeldine then sued her employer, alleging termination in violation of the ADA and the HRL.[80] After discovery, the employer moved for summary judgment on two grounds.[81] First, the employer argued that Hazeldine's obesity did not render her disabled under the ADA.[82] Second, the employer argued that "there [was] no evidence that [Hazeldine] was terminated because of her obesity."[83] As with *McDermott*, *Hazeldine* was characterized by a lack of efficacy at the pre-trial level, resulting in a five-year gap between Hazeldine's termination and the adjudication of her claims.[84]

The court first examined Hazeldine's ADA claims. In addressing the first prong of the ADA's disability definition, it found that "Hazeldine submitted sufficient evidence for a jury to find that her obesity is a physical impairment."[85] The major issue in the case was whether Hazeldine's obesity "substantially limit[ed] one or more major life activities"[86] and the court found that it did not. Hazeldine countered this judicial interpretation with a letter from her physician, diagnosing her as "morbidly obese" and attesting to the physical difficulties that she encountered, as a result of her weight.[87] However, the court adopted an exceptionally literal reading of the ADA's "substantially limits" prong, which does not allow medical evidence to prove disability.[88] Lastly, the court examined whether Hazeldine was "regarded as" disabled and found that "Hazeldine [did] not present any evidence that [her employer] regarded her as disabled as a result of her obesity."[89] Thus, the court granted the employer's first summary judgment motion."[90]

In addressing Hazeldine's HRL claims, the court immediately emphasized the statute's "broad reach,"[91] citing *McDermott*.[92] Here, as with *McDermott*,[93] the court believed that Hazeldine's medically diagnosed "morbid obesity" legitimately supported her HRL claim.[94] Thus, the *Hazeldine* court established that a weight-based employment discrimination claimant stands a better chance of success under state disability law than under federal law. Although *Hazeldine* shed light on the boundaries of the HRL, it promulgated additional uncertainties for federal weight-based employment discrimination claimants, as illustrated by *Francis v. City of Meriden*.[95]

Francis v. City of Meriden, the sole Second Circuit case on this issue, demonstrates that a plaintiff who relies soley on federal disability law as a vehicle for his weight-based employment discrimination claim must

overcome formidable hurdles. Here, Francis was a firefighter who failed to meet his employer's ("Meriden") weight standards and was suspended without pay.[96] Francis filed his initial complaint in Connecticut's District Court and relied on the ADA and the RHA, relying on the "regarded as" prong of the statutes.[97] When the District Court dismissed the complaint, Francis appealed to the Second Circuit.[98]

The court asserted that a valid "regarded as" claim must allege that the claimant's employer "regarded him as having an 'impairment' within the meaning of the statutes."[99] Because Francis did not demonstrate that his employer perceived that his obesity was linked to "impairment,"[100] the court definitively curtailed the federal disability framework as an avenue for relief.[101] In essence, the *Francis* court found that being "regarded as" obese by an employer is not the same as being "regarded as" disabled, under the ADA and the RHA.[102]

The *Francis* court's overwhelming policy consideration was a fear of creating a slippery slope.[103] The court did not wish to open the federal disability statutes to a slew of ambiguous disability claims, thus undercutting the true Congressional purpose behind the implementation of these statutes.[104] Thus, although the Second Circuit's definitive mandate was shaped by a reasonable apprehension of overextending the protective scope of federal disability statutes, it did not eliminate a more practical consideration: New York's weight-based employment discrimination claimants still lacked a clear-cut statutory remedy for their grievances.

After *Francis*, New York's weight-based employment discrimination climate appeared slightly more promising for litigants. In *Butterfield v. New York State*,[105] the Plaintiff defeated his employer's summary judgment motion, concerning his ADA/RHA claim and his HRL claim, albeit by a narrow margin.[106] In 1989, the New York State Department of Correctional Services ("employer") hired the Plaintiff ("Butterfield") as a corrections officer[107] and Butterfield underwent gastric bypass surgery to reduce his weight in 1993.[108] In 1994, Butterfield filed a charge with the New York State Division of Human Rights under the ADA and the HRL, alleging "continual [post-surgery] harassment by coworkers."[109] When the Division of Human Rights found that the employer's conduct did not violate the statutes, Butterfield sued his employer, pursuant to the ADA, the RHA, and the HRL and his employer moved for summary judgment.[110]

The court first determined whether Butterfield's alleged "morbid obesity"[111] corresponded to prong one of the ADA and the RHA's disability definition.[112] Although the court asserted that a triable issue existed as to whether Butterfield's obesity constituted a "physical impairment" under the ADA and the RHA,[113] the debatable issue was whether Butterfield's morbid obesity "substantially limited a major life activity,"[114] which Butterfield asserted it did.[115] However, the court concluded that Butterfield's "periodic" physical discomfort resulting from his weight was insufficient for a juror to find the substantial limitation of a major life activity.[116]

Although it appeared that Butterfield's federal claims were not viable, the court then considered the applicability of the "regarded as" prong.[117] Though it was initially reluctant to assert that Butterfield was "treated by [his employer] as having an impairment," the court observed that the "regarded as" prong is multi-faceted. Thus an employee might be a "regarded as" disabled based simply on disparaging treatment by his co-workers.[118] Here, the court found that Butterfield may have been "regarded as" disabled, due to "an abusive pattern of behavior" by his co-workers[119] and validated Butterfield's federal disability claims, denying the employer's summary judgment motion. Moreover, the court denied the employer's summary judgment motion for Butterfield's HRL claim, since Butterfield supplied "medically acceptable"[120] evidence of his morbid obesity from the surgeon who performed his weight-reduction procedure.[121]

Notwithstanding these dual victories, *Butterfield* is a tenuous model for New York plaintiffs bringing weight-based employment discrimination suits under federal or state disability statutes. First, the *Butterfield* court was clearly uncomfortable with broadening the federal disability framework, even when presented with explicit evidence of weight-based employment discrimination. Second, *Butterfield* was not adjudicated on the merits, as neither the state nor the federal claims were pursued after the court's summary judgment ruling.

New York's most recent weight-based employment discrimination case, *Furst v. Unified Court System*,[122] reaffirms that New York's federal courts are indisposed to these claims, as a general matter. Here, the Plaintiff ("Furst") applied for the position of court officer in the New York State Court System ("Court System").[123] As part of the application process, Furst was required to pass a medical examination to ensure that employees "performed the physical aspects of the job in a safe and effective manner."[124] When Furst failed the medical examination in 1993 and again in 1996, the Court System informed him that he could no longer pursue employment as a court officer.[125] Accordingly, Furst filed a complaint with the EEOC, received a "Notice of Right to Sue," and sued the Court System in 1997, alleging ADA and HRL violations.[126] Three years later, when the suit was adjudicated, the Court System moved for summary judgment.[127]

Furst's claim was twofold. First, he alleged that his obesity was a disability because it was a "medical

impairment, affecting his musculoskeletal and cardiovascular systems."[128] However, Furst did not allege that he suffered from morbid obesity, he was not clinically diagnosed as such, and he did not allege that his obesity substantially limited a major life activity.[129] The court reiterated that an ADA obesity-as-disability claim stands a chance for success only if the plaintiff is "morbidly obese," or "suffers from a weight condition that is the symptom of a physiological disorder."[130] Thus, it found that Furst's obesity did not satisfy prong one of the ADA's disability definition.[131] Next, Furst alleged that he was "regarded as" disabled by the Court System.[132] However, the court refused to equate a failure to meet prescribed weight standards with disability under the "regarded as" prong, of the ADA[133] emphasizing that, by its very nature, the "court officer job required certain physical skills."[134] In sum, because the Court System's weight-based employment decision was not arbitrary, the *Furst* court granted its ADA summary judgment motion.[135]

Furst's HRL claim was not decided on the merits[136] because the federal court declined to exercise supplemental jurisdiction over the pendant state claim.[137] Although a lack of supplemental jurisdiction was the court's procedural justification for its dismissal of Furst's HRL claim, it is equally probable that that court viewed the claim as untenable, since Furst failed to substantiate his condition with "medically acceptable" evidence of obesity.[138]

Furst represents the current status of weight-based employment discrimination litigation in New York. In general, weight-based employment discrimination claimants have made little progress under federal or state disability laws and no plaintiff has ever prevailed on an obesity-as-disability claim under the ADA in New York's federal courts.[139] Although the HRL appears to offer greater respite than the ADA at both the state and the federal levels, a claimant's use of the statute is restricted by whether medical evidence of obesity is actually supplied[140] and by whether the court chooses to validate this evidence.[141] In sum, *Parolisi*, *McDermott*, and *Hazeldine* represent a limited set of early victories for plaintiffs alleging obesity as a disability under state or federal law.[142] More recently, *Underwood*, *Francis*, *Butterfield*, and *Furst* demonstrate that the New York's federal courts remain exceedingly wary of characterizing obesity as a disability under either federal or state disability law.[143]

III. Securing Statutory Protection for New York's Weight-Based Employment Discrimination Claimants

A. Protecting the Obese as Matter of Policy

The hesitation of New York's courts in extending the statutory coverage of federal and state disability protection to weight-based employment discrimination claimants has done little to ease the predicament of the obese as a class. Many employers continue to act prejudicially towards the obese, believing that weight is intimately tied to job-related qualifications.[144] Due to the general policy principle that individuals should be assessed based upon abilities and not based upon immutable[145] or external physical characteristics, it follows that the obese must be given the same workplace opportunities as the non-obese.[146]

A preliminary consideration is the "substantial and growing size of the affected class."[147] Between 1991 and 2001, the number of Americans with a BMI of 30 or greater nearly doubled, increasing from 12% to 21%.[148] As previously noted, more than half of New York City adults—some 2.8 million individuals—have a BMI of 25 or greater.[149] In some New York City neighborhoods, one in every four adults has a BMI of 30 or greater.[150] As one commentator has noted, the percentage of obese individuals in New York actually exceeds the percentage of certain protected classes, such as racial minorities.[151] For instance, 26.6% of the adult population in New York City's five boroughs[152] is African American, 27% is Hispanic, and 10% is Asian.[153] In contrast, 53% of New York City's population has a BMI of 25 or greater.[154] Based on a comparison of these numbers, it follows that New York City's obese are statistically more likely to suffer from discrimination than its racial minorities.

Next, obesity is closely linked to socioeconomic status, race, and sex. For example, New York City's poorest neighborhoods, including Harlem and the South Bronx, are the regions where one in four adults have a BMI of 30 or greater.[155] In addition, 22% of adult New Yorkers with a household income of $25,000 or lower are obese, while only 14% of New Yorkers with a household income of $50,000 or higher are obese.[156] Furthermore, racial minorities are twice as affected by obesity; 26% of African American and 23% of Hispanic New Yorkers have a BMI of 30 or greater, as compared with 14% of white New Yorkers.[157] In terms of sex, a greater proportion of obese individuals in New York City are women, with 20% of females having a BMI of 30 or greater, as opposed to 16% of males.[158] Even more worrisome, a majority of these women are African American or Hispanic.[159] These statistics reveal a striking correlation between obesity and underrepresented minority status.[160] In essence, weight-based employment discrimination is more likely to affect groups who historically have fought for workplace equality.[161]

Furthermore, there is increasing consensus within the medical community that weight is genetically predetermined and thus, immutable.[162] Yet, much of the stigma surrounding obesity stems from the assumption that excess weight is a mutable condition that can be

quickly altered with diet, exercise, and a little willpower.[163] As discussed by the cases in Part II, many New York employers have adopted such preconceived notions in assessing their job-related qualifications of the obese.[164] It is unjust that an employer's preconceived notions of obesity, in general, should tarnish the employment history of an obese individual, based on a trait for which they are not wholly responsible.[165]

A final consideration is judicial efficacy and finality. The rising number of weight-based employment discrimination suits in New York City during the 1990s[166] has done little to improve the efficacy in their adjudication. On average, four years have passed between the filing of a weight-based employment discrimination complaint and the adjudication of the claim.[167] Furthermore, even after unnecessarily lengthy proceedings, some suits have not been adjudicated on the merits.[168] In sum, the uncertain legal climate surrounding weight-based employment discrimination claims and the numerous policy considerations for protecting this group[169] has resulted in a vital need for the timely and efficient adjudication of these claims.

B. Identifying the Problem: The Inadequacies of Disability Law in Fighting Weight-Based Employment Discrimination

As outlined above, numerous policy incentives exist for protecting the obese from weight-based employment discrimination. The challenge is the implementation of these incentives, in light of a serious obstacle: the fact that existing federal and state disability statutes do not adequately support these claims.[170] The cases in Part II reveal that New York's courts are not in accord as to whether obesity constitutes a physical disability for statutory purposes.[171] At the same time, there is a clear tension between the judicial reluctance in accommodating these claims and the fact that disability law is the only available statutory recourse for obese plaintiffs in New York.

Despite this apparent tension, currently existing law is not the appropriate framework for weight-based employment discrimination claims. The ADA, RHA, and HRL were implemented to provide "clear, strong, consistent, and enforceable standards addressing discrimination against people with disabilities."[172] By using disability law as a vehicle for weight-based employment discrimination claims, the obese are inadvertently upsetting these legislative goals.[173]

Moreover, members of the disabled community are generally opposed to the concept of obesity as a disability, especially in light of the group's long struggle for recognition in American society.[174] Conversely, some obese individuals may be wary of disability law as a vehicle for weight-based employment discrimination claims.[175] Like the physically disabled, the obese have long struggled for social acceptance and many feel that associating obesity with disability further stigmatizes the class, thus destroying any progress that has been made in this realm.[176]

Commentators have noted that a major policy consideration surrounding disability discrimination is how broad to make the protected class.[177] Because the disability statutes were not enacted to protect "untraditional"[178] disabilities, such as obesity, they are underinclusive with regards to obesity as a disability. First, they do not recognize weight as a condition that should be afforded protection against employment discrimination.[179] Second, the first prong of the statutory disability definition[180] has been made underinclusive, due to a restrictive construction by New York's state and federal courts.[181]

Although the underinclusiveness of federal and state disability statutes has certainly hurt the chances for success of a weight-based employment discrimination suit in New York,[182] this underinclusiveness may actually be advantageous to the legal system, as a whole.[183] One commentator has noted: "including obesity as a covered [disability] would make every case fact-specific, and virtually every disputed case would have to be litigated."[184] If New York's courts regularly adopted particularized investigations on obesity as a disability, obese individuals might be more apt to file weight-based employment discrimination claims under existing disability law, resulting in a larger docket of weight-based employment discrimination claims, the prolonged adjudication of the ensuing lawsuits, and an erosion of precious judicial resources. Although this argument is a reasonable one, it only highlights the glaring inadequacies of current disability law as a means of protecting the obese from weight-based employment discrimination.[185]

C. The Statutory Remedy: A Specific Prohibition Against Weight-Based Employment Discrimination

From both a policy and a legal perspective, the most viable solution for fighting weight-based employment discrimination in New York is through a specific state statutory provision, altogether barring the practice. A tailored statutory solution will be considered in light of Michigan's Elliot-Larsen Civil Rights Act[186] and the Santa Cruz Municipal Code,[187] both of which explicitly ban weight-based employment discrimination, relying primarily on alternative dispute resolution mechanisms to do so.

Michigan is at the forefront of statutory protection for weight-based employment discrimination claimants and weight was included as a protected class under the Michigan Elliot-Larsen Civil Right Act ("the Act") in 1975[188]:

> An employer shall not fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . weight. [An employer shall not] limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of . . . weight.[189]

A notable feature of the Act is its efficiency in addressing weight-based employment discrimination complaints. Although not specifically outlined in the statute, "adversarial proceedings" are strongly discouraged[190] and mediation is encouraged as a preliminary step.[191] Formal adjudication may also be avoided with a "conciliation conference," during which the employer is encouraged to eliminate its weight-based employment restrictions.[192] In sum, a crucial function of the statute is to preclude the formal adjudication of weight-based employment discrimination claims.

The results of these non-adversarial steps are impressive. In 1999, it was estimated that "in the twenty-four years since the statutory ban on weight-based employment discrimination, about ten weight-based employment discrimination cases have come before Michigan's Department of Civil Rights Commission."[193] Moreover, when weight-based employment discrimination claims are actually adjudicated in Michigan's courts, the Act is not used as a broad, blanket prohibition on weight-based employment discrimination.[194] Rather, the courts have applied the statute prudently, carefully examining the claim in light of the surrounding facts and whether the plaintiff was able to provide specific evidence of termination based on weight.[195]

The Santa Cruz Municipal Code (the "Code") was implemented in 1992.[196] Its objectives and structure are comparable to the Michigan Act. The preamble of the Code outlines the statute's three-fold purpose:

> [First], it is the intent of the city council . . . to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on . . . weight. [Second, because] the ethnic minority population within [Santa Cruz] is growing, it is important for the city to take action to assure that all persons within the city have equal access to . . . employment. [Third], it is the intent of the council to provide an inexpensive, expedient, and informal method of resolving discrimination disputes and ease the burden on [the county's] courts.[197]

Like the Act, the Code attempts to preclude the formal adjudication process. The Code specifically outlines a non-adversarial process, featuring mediation, as a means of resolving weight-based employment discrimination claims.[198] Only after the mediation remedy is exhausted, can a weight-based employment discrimination claimant file a cause of action in "any court of competent jurisdiction within one year of the alleged discriminatory act or within six months of the termination of mediation."[199] In 1999, seven years after the Code's realization, the Santa Cruz City Attorney offered insight as to the statute's effectiveness:

> The [Code] has been well received by the City's residents and businesses. . . . [T]here have been no private enforcement actions taken pursuant to the ordinance.[200]

It must be realized that such uniformly positive results might be less readily achieved in New York State, since the Santa Cruz Code's coverage extends to a "small and relatively insular jurisdiction, which provides greater opportunities for consensus building."[201] Yet, the overarching necessity for a New York statute that is similar in form and function to the Act or the Code outweighs this potential drawback. The next issue, then, is the effective procedural implementation of an Act or Code-like statute in New York.

One option is the local-level ordinance. A local-level New York City ordinance might consist of five separate municipal ordinances for each of New York's City's five boroughs, with the chief advantage being speedy implementation. However, the local model would not treat all members of the class equally. Although residents of the five boroughs would be explicitly protected against weight-based employment discrimination, all other residents of New York State would still be forced to resort to federal or state disability statutes as currently written. In sum, a local approach is neither the fairest nor the most sensible means of resolving the issue.

A second option is a mandate by the New York State Legislature, resulting in a statewide ban on weight-based employment discrimination. However, this scattered approach might make uniform statutory implementation extremely difficult, as each county could conceivably have its own version of the statute. Furthermore, it would surely result in timing problems, since it is likely that some counties would implement

weight-based employment discrimination provisions before others.

Consequently, the complexities of local-level statutory implementation dictate that a state statute is the preeminent device for a total ban on weight-based employment discrimination in New York.[202] The most expedient solution is to modify the HRL with an additional provision, specifically banning weight-based employment discrimination. This provision should be separate and distinct from the HRL's current disability provisions.[203]

The new HRL provision should explicitly outline a set of preliminary non-adversarial measures to be used in the face of a weight-based employment discrimination claim. By providing for a timely assessment of a claim's merits, these non-adversarial measures would benefit courts and plaintiffs alike, thus shielding both parties from lengthy and expensive litigation. Under the non-adversarial portion of the new HRL provision, a weight-based employment discrimination claimant might choose between mediation, arbitration, or ADR after being informed of the pros and cons of each option. Thus, claims would reach New York's courts, only if these preliminary non-adversarial measures were unsuccessful.

The proposed HRL provision should not be construed as providing an unlimited right to sue for weight-based employment discrimination. First, the courts should follow Michigan's lead so that cases would reach New York's courts only after careful scrutiny of the factual bases for these claims. Furthermore, the HRL provision should be tempered by a "bona fide occupational qualification" ("BFOQ") exception.[204] That is, the provision should explicitly give an employer discretion to refuse to hire an overweight person if the employer can establish that that ideal weight is a BFOQ.[205] The Santa Cruz Code contains a BFOQ exception:

> Nothing in this chapter shall be deemed to prohibit selection or rejection based solely on a bona fide occupational qualification [or] a bona fide physical requirement.[206]

New York's basic BFOQ exception should be adapted from the Code and should be further customized, so as to clearly establish what constitutes a BFOQ. Under the exception, a job description that includes a weight limitation might be a valid BFOQ under the statute if excess weight places the employee "in great danger"[207] or if the employee is involved in "maintenance of public confidence in governmental services."[208] Thus, New York's statutory BFOQ exception might not be advantageous to all weight-based employment discrimination claimants. For example, plaintiffs who work in government law enforcement jobs, such as Butterfield[209] and Furst,[210] might not be afforded protection under the proposed clause. Yet, a pre-adjudication scrutiny of the factual bases for weight-based employment discrimination claims and a tailored BFOQ provision hardly destroys the ultimate rationale behind a specific prohibition on weight-based employment discrimination in New York: an unambiguous description of the law in combination with a concise set of remedies for aggrieved plaintiffs.

Conclusion

The adjudication of New York's weight-based employment discrimination suits from 1967 to 1999 has resulted in little more than a cluster of contradictory holdings. Despite these inconsistencies, one thing remains clear: the currently existing state and federal disability statutes offer minimal relief for New York's weight-based employment discrimination claimants. In view of the numerous policy considerations for protecting the class, the importance of upholding the original legislative purpose behind currently existing disability statutes, and the advantages of timely resolution of the merits of a claim through non-adversarial proceedings, New York's weight-based employment discrimination suits can no longer be adjudicated as they have been for the past thirty-six years. Thus, it is imperative that the New York State Legislature develops and implements a particularized statutory ban on weight-based employment discrimination. The time to do so is now.

Endnotes

1. Dr. Thomas R. Frieden, the New York City Health Commissioner observes: "I think what is surprising all of us in public health across the nation is that obesity is not only getting worse, it's getting worse faster than any of us thought it could." *See* Richard Perez-Pena, *In Spite of All Those Sidewalks, the City Finds Itself Flabby,* New York Times, Aug. 13, 2003 at B1.
2. Obesity is defined as being extremely fat or corpulent. Stedman's Medical Dictionary 1076 (25th ed. 1990). The term "fat" is preferred by the National Association to Advance Fat Acceptance ("NAAFA") to describe both the condition and the individual. *See e.g.* NAAFA, *Why Do We Use the Word Fat so Freely*?, *at* http://wwww.naafa.org/documents/brochures/naafa-info.html#word.

   I will use the term "obesity" in this article, as I feel that it better encompasses the range of conditions faced by this group.
3. *See* F. Xavier Pi-Sunyer, *The Fattening of America,* 272 JAMA, 238, 238 (1994); *see also* Robert Kuczmarkski et al., *Increasing Prevalence of Overweight Among US Adults*, 272 JAMA, 205, 205 (1994).
4. *See* National Center for Health Statistics, *Prevalence of Overweight and Obesity Among Adults: United States,* 1999-2000, *available at* http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obses/obse99.htm. Obesity is defined in one of two ways: using body-mass index (BMI) or using weight. BMI is one's weight in pounds multiplied by 703, then divided by the square of height in inches; or, in metric measures, weight in kilograms, divided by the square of height in meters. *See* Richard Perez-Pena et al., *As Obesity Rises, Health Care Indignities Multiply*, N.Y. Times,

November 29, 2003, *available at* http://www.nytimes.com/2003/11/29/nyregion/29OBES.html. Some studies define obesity in terms of BMI. *See, e.g.*, Lorna Thorpe et al., *One in Six New York City Adults is Obese*, N.Y.C. Vital Signs, Jul. 2003, at 1 (using the BMI framework, an adult with a BMI of between 25 and 30 is classified as "overweight" and an adult with a BMI of 30 or greater is classified as "obese"). In addition, an adult with a BMI of 40 or more is "morbidly obese" and the term "super-obese" is sometimes used for an adult with a BMI of 50 or more. *See* Richard Perez-Pena et al., *As Obesity Rises, Health Care Indignities Multiply*, N.Y. Times, November 29, 2003, *available at* http://www.nytimes.com/2003/11/29/nyregion/29OBES.html. Other studies define obesity using three levels, which correspond to ideal weight as defined by the Metropolitan Life Insurance Company Tables. *See* David F. Williamson, *Descriptive Epidemiology of Body Weight and Weight Change in U.S. Adults*, 119 Annals of Internal Med. 646, 646 (1993). Level one is "overweight" and includes "any weight exceeding the ideal weight as defined by insurance company tables." *See* Donald Bierman, Jr., Comment, *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification*, 30 Santa Clara L. Rev. 951, 956 (1990). Level two is "medically significant obesity," and includes those who are at least 20% above their "ideal" weight. *See* David F. Williamson, *Descriptive Epidemiology of Body Weight and Weight Change in U.S. Adults*, 119 Annals of Internal Med. 646, 646 (1993). Level three is "morbid obesity" and is defined as weighing 100 pounds above one's "ideal" weight or weighing over twice one's "ideal" weight. *See* The Merck Manual of Diagnosis And Therapy 918 (16th ed. 1992).

In this article, the BMI framework will be adopted. Additionally, "obese" will be used as a generalized term to describe both "overweight" individuals with a BMI between 25 and 30 and "obese" individuals with a BMI of 30 or greater.

5. The 5 boroughs are Bronx borough, Brooklyn borough, Manhattan borough, Queens borough, and Staten Island borough. *See* Census 2000 Data for the State of New York, Table 5. "Population by Race and Hispanic or Latino Origin, for the 15 Largest Counties and Incorporated Places in New York: 2000, *at* http://www.census.gov/Press-Release/www/2001/tables/ny_tab_1.PDF.

6. In 2002, the New York City Department of Health and Mental Hygiene conducted a borough-wide survey of 10,000 individuals. The survey found that 35% of New York adults were "overweight" (with a BMI between 25 and 30) and 18% (1 out of 6 New York adults) were "obese" with a BMI of 30 or higher. *See* Lorna Thorpe et al., *One in Six New York City Adults is Obese*, N.Y.C. Vital Signs, Jul. 2003, at 1.

7. Sondra Solovay, Tipping the Scales of Justice: Fighting Weight-Based Discrimination 25 (Prometheus Books ed. 2000).

8. *See* Gina Kolata, *The Burdens of Being Overweight: Mistreatment and Misconceptions*, New York Times, Nov. 22, 1992 at A1.

9. *See* Nicole Campbell, *Weighed Down,* Daily Californian, May 16, 1995 at 9.

10. *See* Esther Rothblum et al., *The Relationship Between Obesity, Employment Discrimination, and Employment-Related Victimization*, 37 Journal of Vocational Behavior 251, 253 (1990) (citing research by J.C. Larkin et al., *No Fat Persons Need Apply*, 6 Sociology of Work and Occupations 312-17 (1979)).

11. *See infra* notes 162-165 and accompanying text.

12. *See* Solovay, *supra* note 7, at 156-57 (remarking that, statistically, the ability to maintain weight loss on a permanent basis is extremely low). For example, Yale researchers reported an 80% failure rate in weight-loss maintenance, even in the midst of the 1944 wartime food rationing. *Id*. at 157. Recent figures reveal diet failure rates of up to 98%, with the National Institutes of Health reporting a 90% failure rate. *Id*.; *see also* Donald Bierman, Jr., Comment, *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification*, 30 Santa Clara L. Rev. 951, 957 (1990).

13. *See* Esther Rothblum et al., *The Relationship Between Obesity, Employment Discrimination, and Employment-Related Victimization*, 37 Journal of Vocational Behavior 251, 251 (1990). This is the leading study that documents employment discrimination against the obese. *See* Solovay, *supra* note 7, at 103. The subjects of the study were 453 men and women recruited through the National Association to Aid Fat Acceptance ("NAAFA"). *Id.* at 103. Respondents were assigned to one of three categories: non fat (weighing no more than 19% above 1983 Metropolitan Life insurance tables), moderately fat (weighing 20-49% above Metropolitan Life tables), and fat (weighing 50% or more above the Metropolitan Life tables). *Id*. The survey revealed that 62% of fat women, 42% of fat men, and 31% of moderately fat women were not hired, due to their weight. *Id.* None of the non-fat respondents reported having been denied a job because of their weight. *Id.* The most common comment made by survey respondents was that "[T]hese results, regarding the frequency of job discrimination may actually be underestimating [its] true incidence." *See* NAAFA Workbook Committee of the National Association to Advance Fat Acceptance, NAAFA Workbook 6-13 (1993).

14. The New York cases from 1996-1999 are: *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997) (held: for employer); *Furst v. State of New York Unified Court System*, No. 97-CV-1502, 1999 U.S. Dist. LEXIS 22588 (S.D.N.Y. May 12, 1999) (held: for employer upon motion for summary judgment regarding federal law claim and court declined to exercise supplemental jurisdiction over pendant state law claim); *Butterfield v. New York State et al*., No. 96 Civ. 5144, 1998 U.S. Dist. LEXIS 18676 (S.D.N.Y. Jul. 15, 1998) (held: employer's summary judgment motion regarding obese plaintiff's state and federal law claims denied but the merits of claim not decided); *Marks v. National Communications Association*, No. 96 Civ. 5144, 1998 U.S. Dist. LEXIS 18676 (S.D.N.Y. Jul. 15, 1998) (held: merits of claim not decided but obese plaintiff permitted to amend claim to include relevant state statutes); *Hazeldine v. Beverage Media*, 954 F. Supp. 697 (S.D.N.Y. 1997) (held: for employer upon motion for summary judgment regarding federal law claim and held for obese plaintiff on state law claim); *Delta Airlines v. New York State Division of Human Rights*, 91 N.Y.2d 65 (N.Y. 1997) (held: for employer); *Delta Airlines v. New York State Division of Human Rights*, 652 A.2d 132 (Sup. Ct. App. Div. 1996) (held: for employer).

15. N.Y. Exec. Law § 296 (2003); N.Y. Exec. Law § 292 (2003).

16. 42 U.S.C. §§ 12101-12213 (2003).

17. 29 U.S.C §§ 701-797(b) (2003); s*ee also* Equal Employment Opportunity Commission Regulations to Implement the Equal Employment Provisions of the ADA, 20 C.F.R. § 1630.2 (2003).

18. N.Y. Exec. Law § 296 (2003); N.Y. Exec. Law § 292 (2003).

19. *See* New York State Division of Human Rights Mission Statement and History, *at* http://www.nysdhr.com/hist.html.

20. 42 U.S.C. § 12112(a) (2003).

21. 42 U.S.C. § 12012(2) (2003).

22. *See* Solovay, *supra* note 7, at 135.

23. 42 U.S.C. § 12012(2) (2003).

24. *See infra* Part II.

25. 29 C.F.R. § 1630.2 (2003).

26. 29 C.F.R. § 1630.2(h)(1) (2003).

27. 29 C.F.R. § 1630 App. (2003).

28. 29 C.F.R. § 1630.2(j)(1) (2003).

29. 29 C.F.R. § 1630.2(i) (2003).

30. 29 C.F.R. § 1630.2(j)(3)(i) (2003).

31. *See Francis v. City of Meriden*, 120 F.3d 281, 283 (2d. Cir. 1997).

32. *See Francis*, 120 F.3d at 283.
33. *Id*. at 283.
34. 29 U.S.C. § 794(a) (2003).
35. An "individual with a disability" is: any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. *See* 42 U.S.C. § 12012(2) (2003).
36. 45 C.F.R. § 83.3(j)(2)(ii) (2003).
37. N.Y. Exec. Law § 296 (2003).
38. N.Y. Exec. Law § 292(21) (2003). Furthermore, under the New York City Administrative Code, "disability" means: any physical, medical, mental, psychological impairment or a history or record of such impairment. *See* 8 N.Y. ADC § 102 (16) (2001).
39. *See Hazeldine v. Beverage Media Ltd.*, 954 F. Supp. 697, 706 (S.D.N.Y. 1997); s*ee also McDermott v. Xerox Corp.*, 491 N.Y.S.2d 106, 109 (1985) (observing that "in New York, the term "disability" is more broadly defined").
40. *See Hazeldine,* 954 F. Supp. at 706.
41. "Fairly read the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future." *See McDermott*, 491 N.Y.S. 2d at 109.
42. Under the New York Administrative Code, the term "disability" means "any physical, medical, mental, psychological impairment or a history or record of such impairment." *See* 8 N.Y. ADC 102(16) (2003); *see also Hazeldine*, 954 F. Supp. at 706 (concluding that a reasonable jury could find that plaintiff was disabled within the meaning of the HRL, based on a medical diagnosis of "morbid obesity").
43. *See Delta Airlines v. New York State Division of Human Rights*, 91 N.Y.2d 65, 73 (N.Y. 1997).
44. *See* Solovay, *supra* note 7, at 129.
45. *See* discussion *infra* Part III (C).
46. *Parolisi v. Board of Examiners of the City of New York*, 285 N.Y.S.2d 936 (N.Y. Sup. Ct. 1967).
47. *See* Solovay, *supra* note 7, at 115.
48. *See Parolisi*, 285 N.Y.S.2d at 937.
49. *Id*. at 938.
50. *Id.* at 939; s*ee also* Solovay, *supra* note 7, at 116.
51. *Id.*
52. "An objective standard of obesity [should not be favored over] a subjective test of the ability to perform." *See Parolisi*, 285 N.Y.S.2d at 940.
53. *See* N.Y. Const., Art. V, § 6 (stating: "Appointments in the civil service of the State and municipalities shall be made according to merit and fitness.").
54. *See Parolisi*, 285 N.Y.S.2d at 940.
55. *State Division of Human Rights on the Complaint of Catherine McDermott v. Xerox Corp*, 65 N.Y.2d 213 (N.Y. 1985).
56. *Id*. at 215.
57. McDermott was 5'6" and weighed 249 pounds. *Id.* at 215.
58. "She was later informed that she had failed the exam solely because of her obesity." *Id*.
59. *Id*.
60. *Id.* at 215-20.
61. *Id.* at 217.
62. *Id.* at 218.
63. *Id.*; s*ee also* N.Y. Exec. Law § 292(21) (2003).
64. N.Y. Exec. Law § 292(21) (2003).
65. *Underwood v. Trans World Airlines*, 710 F. Supp. 78 (S.D.N.Y. 1989).
66. *See* Underwood, 710 F. Supp. at 84.
67. *Id.* at 81. At 5'4" and 154 pounds, Underwood was informed that she had to reduce her weight to at least 142 pounds to match TWA's weight and appearance standards.
68. *Id.*
69. *Id.*
70. *Id.* at 80, 82.
71. *Id.*
72. *Id.*
73. An "obese" individual has a BMI of 30 or greater. *See* Thorpe et al., *supra* note 4 at 1.
74. *See McDermott*, 65 N.Y.2d at 218; N.Y. Exec. Law § 292(21) (2003).
75. *Hazeldine v. Beverage Media, Ltd.*, 954 F. Supp. 687 (S.D.N.Y. 1997).
76. *See Hazeldine*, 954 F. Supp. at 698.
77. *Id.* at 701.
78. "In the employment discrimination context, . . . direct evidence supporting a plaintiff's claim of discrimination is rarely found among an employer's papers." *Id.* at 702; s*ee also Gallo v. Prudential Residential Services Ltd. Partnership*, 22 F.3d 1219, 1224 (2d Cir. 1994); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).
79. *Id.*
80. *Id.* at 698; *see* 42 U.S.C. § § 2000e-2000e17 (2003) (Title VII); 8 N.Y. ADC § § 101.1-101.7 (2003). Hazeldine also sued, pursuant to Title VII of the Civil Rights Act of 1964, alleging discrimination, due to her sex. *Id*.
81. *Id*. at 698, 702.
82. *Id*. at 702.
83. *Id.*
84. Hazeldine was fired in 1992 and her complaint was adjudicated in 1997. *Id*. at 698, 701.
85. *Id*. at 703.
86. *Id*. *See* 42 U.S.C. § 12012(2)(a) (2003) (ADA).
87. *Id*. at 703.
88. 29 C.F.R. § 1630.2(j)(1) (2003).
89. *Id.*
90. *Id.* at 702, 706.
91. *Id*. at 706.
92. *Id.*; *see* 8 N.Y. ADC 102(16) (2003) (an individual's impairment need not substantially limit a major life activity or prevent a normal bodily function).
93. "Pursuant to [*McDermott*] Hazeldine's clinically diagnosed morbid obesity renders her disabled under the [HRL]." *Id*. at 706.
94. "[We] conclude that a reasonable jury could find that Hazeldine is disabled within the meaning of the [HRL] and the New York City Administrative Code." *Id.*
95. *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997).
96. *Id*. at 282-83.
97. *See* 42 U.S.C. § 12012(2)(c) (2003). The RHA's "regarded as" prong is identical to that of the ADA. *See supra* notes 32-39 and accompanying text.

98. In accepting Francis' appeal, the Second Circuit noted:

> The district court adopted the Report and Recommendation of a magistrate judge recommending that the case be dismissed, in part because Francis did not allege that he suffered from a disability. We agree with Francis that the district court misconstrued the nature of his claim by requiring that he allege that he suffers from a disability. . . . We nonetheless affirm, albeit on different grounds.

Id. at 282-83.

99. *Id.* at 285.

100. Under the ADA and the RHA, the first prong of the disability definition requires a claimant to provide evidence of "a physical impairment." *See supra*, notes 22-28, 36-67 and accompanying text.

101. "[A] mere physical characteristic [such as moderate obesity] does not, without more, equal a physiological disorder [under the ADA or the RHA]." *Id.* at 285 (citing *Andrews*, *infra* note 130, at 810).

102. *Id.* at 285-86.

103. "[The ADA and RHA were created to] . . . deter discrimination against those who actually suffer from the types of . . . disorders [that] the statutes were intended to cover." *Id*. at 287.

104. "It would be inconsistent with [Congressional] purposes to construe the acts to reach alleged discrimination by an employer on the basis of a simple physical characteristic, such as weight." *Id.* (citing *Andrews, infra* note 130 at 809-10).

105. *See Butterfield v. New York State et al*., No. 96 Civ. 5144, 1998 U.S. Dist. LEXIS 18676, at *25 (S.D.N.Y. Jul. 15, 1998).

106. *See Butterfield*, 1998 U.S. Dist. LEXIS 18676 at *66.

107. *Id*. at *10.

108. *Id*.

109. *Id*. at *14; *see* The Merck Manual of Diagnosis and Therapy 918 (16th ed. 1992), *supra* note 4 (defining morbid obesity).

110. *Id.* at *2-*3. Butterfield also sued pursuant to 42 U.S.C. §§ 2000e-2000e17 (2003) (Title VII), New York State Civil Rights Law, the Fifth, Eighth, Fourteenth Amendments to the United States Constitution (pursuant to 42 U.S.C. § 1983 (2003)). *Id*. at *2.

111. "Butterfield argues that he is morbidly obese and that such obesity is an impairment under [the ADA and the RHA]." *Id.* at *26.

112. *Id*. at *27.

113. *Id*. at *26-*31.

114. *Id*. at *31-*33.

115. *Id*. at *31.

116. *Id*. at *33. *Compare with Hazeldine v. Beverage Media, Ltd*., 954 F. Supp. 687, 703-05 (S.D.N.Y. 1997) (finding that morbidly obese plaintiff's limited ability to lift and carry objects weighing over ten pounds, inability to kneel and bend, and breathlessness after climbing stairs or walking more than five city blocks did not support the conclusion that her weight substantially limited a major life activity).

117. *Id*. at *35-*37.

118. *Id*. at *38; s*ee also School Board v. Arline*, 480 U.S. 273, 282-83 (1987) (observing that an individual may be covered under the "regarded as" prong if he or she has "a visible impairment that does not substantially limit [a major life activity] but could nevertheless substantially limit [his or her] ability to work, as a result of the negative reactions of others to the impairment"); *see also* William J. McDevitt, Article, *Defining the Term "Disability" Under The Americans With Disabilities Act*, 10 St. Thomas L. Rev. 281, 296 (observing that under the "regarded as" prong, an employer's misperceptions of a disabled individual can be "as disabling as the most limiting impairment").

119. *Id*. at *43-*46.

120. N.Y. Exec. Law § 292(21) (2003).

121. *Id*. at *11, *27.

122. *Furst v. State of New York Unified Court System*, No. 97-CV-1502, 1999 U.S. Dist. LEXIS 22588 (S.D.N.Y. May 12, 1999).

123. *See Furst*, 1999 U.S. Dist. LEXIS 22588 at *3.

124. *Id.* at *3.

125. *Id.* at *6.

126. *Id*.

127. *Id.* at *1.

128. *Id.* at *6.

129. *Id*. at *14.

130. *Id*. at *13; *see Butterfield*, *supra* notes 105-19 and accompanying text; *see also Cook v. City of Rhode Island Dep't of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 25 (1st Cir. 1993) (holding that morbid obesity was a physical impairment and, thus, a disability under the ADA). *But see Andrews v. State of Ohio*, 104 F.3d 803, 808-09 (6th Cir. 1997) (finding no physical impairment from "simple" obesity); s*ee also* 29 C.F.R. § 1630.2(h) (2003) (requiring physiological disorder for obesity).

131. *Id.*

132. *Id*.

133. "Plaintiff must do more than simply allege that an employer refused to hire him because he [failed] to meet a weight requirement." *Id*. at *17.

134. *Id.* at *18. " The duties of the job included providing security in courtrooms, subduing dangerous or unruly individuals, and guarding jurors." *Id.* at *2.

135. *Id*. at *20.

136. *Id*.

137. *Id*. at *20-*21.

138. *See* N.Y. Exec. Law § 292(21) (2003). *Compare with Hazeldine v. Beverage Media, Ltd*., 954 F. Supp. 687, 707 (S.D.N.Y. 1997) (considering the plaintiff's pendant HRL claim, in light of "medically demonstrable evidence" of obesity).

139. *See supra* Part II (B).

140. *See* N.Y. Exec. Law § 292(21) (2003); *supra* Part II(A) (*Parolisi*), Part II(B) (*McDermott)* and Part II(c) (*Hazeldine*).

141. In general, New York's state courts have found for weight-based employment discrimination claimants if they present "medically acceptable" evidence of obesity. *See supra* Part II(A) (*Parolisi*), Part II(B) (*McDermott)* and Part II(c) (*Hazeldine*).

142. *See supra* Part II(A) (*Parolisi*), Part II(B) (*McDermott)* and Part II(c) (*Hazeldine*).

143. *See supra* Part II(C) (*Underwood*), Part II(C) (*Francis*, *Butterfield*, and *Furst*).

144. *See* Steven Greenhouse, *Overweight and Ready to Fight: Obese People Are Taking Their Bias Claims to Court*, N.Y. Times, Aug. 4, 2003 at B1 ("[M]aking a determination of people's capability and their health based on how they look [is] not fair." (quoting Jeanette DePatie, spokeswoman for the National Association to Advance Fat Acceptance)).

145. *See infra* notes 162-65 and accompanying text.

146. *See* Karol V. Mason, Note, *Employment Discrimination Against the Overweight*, 15 U. Mich. J.L. Ref. 337, 339 (1982) ("Adding weight to the list of impermissible classifications used as barriers to employment would promote hiring based on ability and complement existing employment legislation."). Two federal

statutes afford notable anti-discrimination protection to employees. The first is Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2 (2003). The second is the Age Discrimination in Employment Act of 1967, which extends employment protection to older workers. *See* 29 U.S.C § 621(a)(1) (2003). In addition, most states have developed legislation that mirrors the federal anti-discrimination statutes. *See* Mason, *supra* at 342.

147. *See* Mason, *supra* note 146, at 343.

148. *See* Thorpe et al., *supra* note 4, at 1.

149. *Id*. at 1.

150. In these neighborhoods, 24 to 31 percent of the population has a BMI of 30 or greater. *Id*. at 1.

151. *See* Mason, *supra* note 146, at 344.

152. *See supra* note 5.

153. *See* Census 2000 Data for the State of New York, Table 5. "Population by Race and Hispanic or Latino Origin, for the 15 Largest Counties and Incorporated Places in New York: 2000, *at* http://www.census.gov/Press-Release/www/2001/tables/ny_tab_1.PDF.

154. *See* Thorpe et al., *supra* note 4, at 1.

155. *Id*.

156. *Id*. at 2.

157. *Id*.

158. *Id*.

159. *See* Elizabeth Kristen, Comment, *Addressing the Problem of Weight Discrimination in Employment*, 90 Calif. L. Rev. 57, 98 (2002); Mason, *supra* note 146, at 344-45.

160. *See, e.g.,* Greenhouse, *supra* note 144, at B1 (describing *Connor v. McDonalds's Restaurant et al*., No. 3:02CV382, 2003 U.S. Dist. LEXIS 4108 (Dist. Conn. Mar. 17, 2003) where plaintiff, an African American welfare recipient, alleged that he was denied employment, due to obesity).

161. *See* Mason, *supra* note 146, at 345.

162. *See* Kristen, *supra* note 159, at 69; Albert J. Stunkard, *An Adoption Study of Human Obesity*, 314 New Engl. J. Med. 193, 193 (1986) (discussing a study where the weight of children adopted by different parents was compared and concluding that "genetic influences are important determinants of body fatness").

163. *See* Kristen, *supra* note 159, at 69.

164. *See supra* Part II.

165. *See* Mason, *supra* note 146, at 348.

166. *See supra* note 14 and accompanying text (observing that six weight-based employment discrimination suits were adjudicated in New York between 1996 and 1999).

167. *See supra* Part II.

168. *See, e.g., supra* Part II(C) (*Furst v. State of New York Unified Court System*, No. 97-CV-1502, 1999 U.S. Dist. LEXIS 22588 (S.D.N.Y. May 12, 1999)); *Butterfield v. New York State et al*., No. 96 Civ. 5144, 1998 U.S. Dist. LEXIS 18676 (S.D.N.Y. Jul. 15, 1998)).

169. *See* Mason, *supra* note 146, at 339.

170. *See* Patricia Hartnet, *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, 24 Rutgers L.J. 807, 837 (commenting that "legal recourse under the . . . disability anti-discrimination laws . . . falls short of adequately addressing employment discrimination against obese workers. These laws have little or no value as protective measures, but operate solely as post-termination remedies of little utility.").

171. *See supra* Part II.

172. 42 U.S.C. § 12101(b)(2) (2003).

173. Dennis M. Lynch, Comment, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 J. Air. L. & Com. 203, 240 (1996).

174. *See* Solovay, *supra* note 7, at 130.

175. *Id*. at 129.

176. "[Some obese individuals] simply want to distance themselves from yet another marginalized group and therefore flatly reject the term 'disabled.'" *Id*. at 130.

177. Bruce I. Shapiro, Article, *The Heavy Burden of Establishing Weight as a Handicap Under Anti-Discrimination Statutes*, 18 W. St. U.L. Rev. 565, 572 (1991).

178. *See* Lynch, *supra* note 173 at 240; *see also* 42 U.S.C. 12101(a)(2), (3), (4), (5), (9) (2003) (ADA Findings and Purposes).

179. *See* discussion *supra* Part I (A).

180. 42 U.S.C. § 12012(2)(a) (2003).

181. *See, e.g., Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997); *Furst v. State of New York Unified Court System*, No. 97-CV-1502, 1999 U.S. Dist. LEXIS 22588 (S.D.N.Y. May 12, 1999); *Butterfield v. New York State et al.*, No. 96 Civ. 5144, 1998 U.S. Dist. LEXIS 18676 (S.D.N.Y. Jul. 15, 1998); *Underwood v. Trans World Airlines*, 710 F. Supp. 78 (S.D.N.Y. 1989); *Delta Airlines v. New York State Division of Human Rights*, 91 N.Y.2d 65 (N.Y. 1997); *Delta Airlines v. New York State Division of Human Rights*, 652 A.2d 132 (Sup. Ct. App. Div. 1996).

182. *See supra* Part II.

183. *See* Shapiro, *supra* note 177, at 577 (observing: "The definition of handicaps should be narrowly construed and is not an appropriate area for judicial activism.").

184. *Id.* at 577.

185. *See* Mason, *supra* note 146, at 340 (concluding that "present laws are inadequate to protection overweight persons from discrimination.").

186. Mich. Comp. Laws § 37.2202(1)(a), (b) (2003).

187. Santa Cruz, Cal., Mun. Code 9.83.010 (2003).

188. *See* Kristen, *supra* note 159, at 101.

189. Mich. Comp. Laws § 37.2202(1)(a), (b) (2003). Weight was included in the Civil Rights Act in response to a situation where an employer did not allow on-leave employees to return to work, if their weight exceeded permissible limits. When the employees picketed against these restrictions, receiving substantial publicity, weight was subsequently allowed as a protected statutory classification. *See* Mason, *supra* note 146, at 354 (citing Act of March 22, 1976, Pub. Act No. 52, 1976 Mich. Acts 118).

190. *See* Mason, *supra* note 146, at 354.

191. *See* Michigan Department of Civil Rights: Problem Resolution Process, *at* http://www.michigan.gov/mdcr/0,1607,7-138-4953—,00.html.

192. *See* Mason, *supra* note 146, at 354 (giving examples of successful conciliation conferences). For instance, a 195-pound man alleged that he was denied employment by a security service, due to his weight. After a conciliation conference, the employer agreed to compensate the claimant with $900, and to revise its employment application to comply with state law. *See* Security Service Revises Application, No. 8001-180, 1980-01 Mich. Dep't Civil Rts. Enforcement Bureau Case Reps. A 180-pound woman alleged she was denied corporate employment due to her weight. Following a conciliation conference, the respondent agreed to compensate the claimant with $500, and to revise its pre-employment application to comply with state law. *See* 180-Pound Woman Receives $500, No. 8008-81, 1980-80 Mich. Dep't Civil Rts. Enforcement Bureau Case Reps.

193. *See* Solovay, *supra* note 7, at 245 (quoting Art Stine, Ombudsman for the Michigan Department of Civil Rights).

194. *See* Kristen, *supra* note 159, at 105 (observing: "Plaintiffs have not always prevailed under the [Civil Rights Act].").

195. *See, e.g.*, *Howard v. City of Southfield*, No. 95-1014, 1996 U.S. App. LEXIS 25290 at *23-*24 (6th Cir. Sept. 11, 1996) (holding that plaintiff failed to prove disparate impact, since he presented no evidence, regarding the weight of the other applicants for the job); *Byrnes v. Frito-Lay*, 811 F. Supp. 286, 291 (E.D. Mich. 1993) (finding for employer, since claimant did not establish a prima facie case of weight-based employment discrimination); *Ross v. Beaumont Hospital*, 687 F. Supp. 1115, 1124 (E.D. Mich. 1988) (finding for weight-based employment discrimination claimant, in light of demonstration that weight was determining fact in her termination); *Lamoria v. Health Care and Retirement Corp.*, 584 N.W.2d 589, 594 (Mich. Ct. App. 1998) (finding for weight-based employment discrimination claimant, in light of proof of weight as a "determinative factor" in her termination).

196. *See* Kristen, *supra* note 159, at 105.

197. Santa Cruz, Cal., Mun. Code 9.83.010 (2003) ("Purpose and Intent").

198. *See* Santa Cruz, Cal., Mun. Code 9.83.12 (2003) ("Resolution and Enforcement").

199. *See* Santa Cruz, Cal., Mun. Code 9.83.12(2)(b) (2003).

200. *See* Solovay, *supra* note 7, at 244.

201. *See* Kristen, *supra* note 159, at 107 (quoting Linda Krieger of the National Association to Advance Fat Acceptance, who suggests that local laws are good tools for establishing protection for stigmatized groups).

202. *See* Donald Bierman, Jr., Comment, *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification*, 30 Santa Clara L. Rev. 951, 976 (1990) (concluding "[T]he appropriate response to the weight-based employment discrimination problem is for state . . . legislative bodies to expand current civil rights laws to include . . . obesity as protected from discrimination.").

203. N.Y. Exec. Law § 296 (2003); N.Y. Exec Law § 292(21) (2003).

204. *See* Mason, *supra* note 146, at 360.

205. *Id*. at 360.

206. Santa Cruz, Cal., Mun. Code 9.83.080(6) (2003) ("General Exceptions").

207. *See* Mason, *supra* note 146, at 361.

208. *Id.*

209. Butterfield was employed as an officer with the New State Department of Correctional Services. *See supra* note 105 and accompanying text.

210. Furst was employed as a court officer in the New York State Court System. *See supra* notes 122-23 and accompanying text.

Jeanne Zelnick is a third-year student at Brooklyn Law School, where she is a Primary Articles Editor for the Brooklyn Law School *Journal of Law & Policy*. She has worked as a student intern for Judge William H. Walls in the District Court of New Jersey and for Chief Judge Jane A. Restani at the U.S. Court of International Trade. Most recently, she was a summer associate at White & Case LLP, where she will be working full-time in the fall.

NEW YORK STATE BAR ASSOCIATION

Section Chair
Richard K. Zuckerman, Esq.
Lamb & Barnosky, LLP, Melville

Program Co-Chairs
Michael A. Curley, Esq.
Morgan, Lewis & Bockius LLP, New York City

Arnold H. Pedowitz, Esq.
Law Offices of Arnold Pedowitz, New York City

Alan M. Koral, Esq.
Chair, Committee on Continuing Legal Education
Vedder, Price, Kaufman & Kammholz, P.C., New York City

Pearl Zuchlewski, Esq.
Immediate Past Section Chair
Kraus & Zuchlewski LLP, New York City

Litigating Non-Compete Cases In New York

NYSBA

Labor and Employment Law Section

Employment Law Litigation Institute

Fordham University School of Law,
New York City
June 17-18, 2005

YOUR ATTENDANCE AT THIS PROGRAM OFFERS 9.5 MCLE CREDIT HOURS

You will learn about:

- **Preparing the Company and the Employee for Litigation**
- **Discovery: Expedited Depositions, Computer Forensics and Preservation of Data**
- **Ethical Issues in Drafting Non-Compete Agreements**
- **Preliminary Injunction Hearing with Witnesses, Judge and Ruling**
- **Settlement Panel with a Mediator**

and more...

NYSBA

IMPORTANT INFORMATION

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. **Under New York's MCLE rule,** this program has been approved for a total of up to 9.5 credit hours, consisting of 8.5 credit hours in practice management and/or areas of professional practice and one credit hour in ethics. The 8.5 credit hours in practice management or areas of professional practice will not qualify for newly admitted attorneys because it is not a basic practical skills program. However, the one credit hour in ethics will qualify for newly admitted attorneys.

Discounts and Scholarships: New York State Bar Association members may apply for a discount or scholarship to attend this program based on financial hardship. Under that policy, any member of our Association who has a genuine financial hardship may apply in writing not later than two working days prior to the program, explaining the basis of his/her hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. For more details, please contact: Linda Castilla at: New York State Bar Association, One Elk Street, Albany, New York 12207.

Schedule of Events

Friday, June 17, 2005

8:30 am	**Continental Breakfast**	
8:30 am	**Registration**	
9:00 to 9:15 am	**Welcoming Remarks** **Richard K. Zuckerman, Esq.** Section Chair	
	Introductory Remarks **Michael A. Curley, Esq.** Morgan, Lewis & Bockius LLP New York City	**Arnold H. Pedowitz, Esq.** Law Offices of Arnold Pedowitz New York City
9:15 to 10:30 am	***Overview of the Law: Common Law Doctrines; Non-Compete Agreements; Trade Secrets; Employee Duty of Loyalty; Unfair Competition; Raiding and Tortious Interference***	
Speakers:	**James P. Philbin III, Esq.** Morgan, Lewis Bockius LLP New York City	**Ronald G. Dunn, Esq.** Gleason Dunn Walsh & O'Shea Albany
10:30 to 10:45 am	**Coffee break**	
10:45 to 12:00 pm	***Preparing the Company and the Employee for Litigation (Part I): Counseling Your Client Regarding the Wisdom of Litigation; Deciding Whom to Sue; Fact Gathering; Speaking with Witnesses; Obtaining Affidavits and Drafting Papers***	
Speakers:	**Theodore O. Rogers, Jr., Esq.** Sullivan & Cromwell LLP New York City	**Lonny H. Dolin, Esq.** Dolin, Thomas & Solomon, LLP Rochester
12:15 to 1:15 pm	**Lunch**	
1:30 to 2:20 pm	***Preparing the Company and the Employee for Litigation (Part II): Confidentiality Issues; Deciding what Relief to Request; TROs; Bonds; Deciding where to File; and other Nuts & Bolts Issues***	
Speakers:	**Laurence S. Moy, Esq.** Outten & Golden LLP New York City	**Jodyann Galvin, Esq.** Hodgson Russ LLP Buffalo
2:20 to 2:45 pm	**Break**	
2:45 to 3:35 pm	***Discovery: Expedited Depositions, Computer Forensics, and Preservation of Data***	
Speakers:	**Elliot Schnapp, Esq.** Gordon, Gordon & Schnapp, P.C. New York City	**John F. Fullerton III, Esq.** Proskauer Rose LLP New York City

3:35 to 4:50 pm ***Ethical Issues in Drafting Non-Compete Agreements, Advising Clients, and Protecting Trade Secrets in Non-Compete Cases***

Speakers:

Jonathan A. Wexler, Esq.
Vedder, Price, Kaufman & Kammholz, P.C.
New York City

Debra L. Raskin, Esq.
Vladeck, Waldman, Elias & Engelhard, P.C.
New York City

4:50 pm **Adjourn**

Saturday, June 18, 2005

8:30 am **Continental Breakfast**

8:30 am **Registration**

8:45 to 9:00 am **Welcoming Remarks**
Pearl Zuchlewski, Esq.
Immediate Past Section Chair

Introductory Remarks

Michael A. Curley, Esq.
Morgan, Lewis & Bockius LLP
New York City

Arnold H. Pedowitz, Esq.
Law Offices of Arnold Pedowitz
New York City

9:00 to 9:50 am ***TRO: Conference with Judge in Chambers Followed by Discussion of Notice to Adversary, How to Argue to the Court, Problems Arising from the Lack of Fully Developed Facts, Judge's Perspective, and Bond Requirements***

Speakers:

The Honorable Leonard B. Austin
Justice, Supreme Court of the State of New York
10th Judicial District
Mineola

Robert L. Levy, Esq.
Bantle & Levy LLP
New York City

Robert Whitman, Esq.
Orrick, Herrington & Sutcliffe LLP
New York City

9:50 to 10:40 am ***Settlement Panel with a Mediator: Discussion of How Mediation Can Be Helpful in Trade Secret and Covenant Not to Compete Cases***

Speakers:

Rosemary A. Townley, Esq.
Arbitrator and Mediator
Larchmont

David Liebowitz, Esq.
Bear Sterns & Co. Inc.
New York City

Miriam F. Clark, Esq.
Ritz & Clark LLP
New York City

10:40 to 11:00 am **Coffee break**

11:00 to 12:15 pm ***Preliminary Injunction Hearing with Witnesses, Judge and Ruling***

Speakers:

The Honorable Leonard B. Austin
Justice, Supreme Court of the State of New York
10th Judicial District
Mineola

Victoria A. Cundiff, Esq.
Paul, Hastings, Janofsky & Walker LLP
New York City

Robert L. Herbst, Esq.
Bedlock, Levine & Hoffman
New York City

12:15 pm **Adjourn**

Section Committees and Chairs

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

Alternative Dispute Resolution
Jonathan Ben-Asher
(212) 509-1616

Lowell Johnston
(212) 517-7880

Jill Rosenberg
(212) 506-5215

Communications
James N. McCauley
(607) 257-0121

Sharon P. Stiller
(585) 258-2851

Continuing Legal Education
Alan M. Koral
(212) 407-7750

Diversity and Leadership Development
Louis P. DiLorenzo
(646) 253-2315

Allegra L. Fishel
(212) 245-8909

Employee Benefits
Mark E. Brossman
(212) 756-2050

Equal Employment Opportunity Law
Deborah S. Skanadore Reisdorph
(315) 733-2074

Peter T. Shapiro
(212) 527-1394

Ethics and Professional Responsibility
John Gaal
(315) 218-8288

Nancy E. Hoffman
(518) 257-1443

Finance
Robert Kingsley Hull
(315) 536-9820

Government Employee Labor Relations Law
Douglas E. Gerhardt
(518) 449-1063

Individual Rights and Responsibilities
Dennis A. Lalli
(212) 644-1010

Mimi C. Satter
(315) 471-0405

International Labor and Employment Law
Philip M. Berkowitz
(212) 940-3128

Ira Cure
(212) 358-1500

Wayne N. Outten
(212) 245-1000

Labor Arbitration and Collective Bargaining
Rachel Minter
(212) 643-0966

Labor Relations Law and Procedure
Peter D. Conrad
(212) 969-3020

Bruce Levine
(212) 563-0230

Law School Liaison
Robert T. Simmelkjaer
(212) 749-3197

Legislation
Howard C. Edelman
(516) 764-4316

Timothy S. Taylor
(518) 213-6000

Membership
William D. Frumkin
(914) 328-0366

Public Sector Book
Jean Doerr
(716) 847-3449

Jerome Lefkowitz
(518) 257-1443

Melvin Osterman
(518) 487-7600

Scholarships and Other Financial Support
William D. Frumkin
(914) 328-0366

Union Administration and Procedure
Robert L. Boreanaz
(716) 849-1333

Publication—Editorial Policy—Non-Member Subscriptions

Persons interested in writing for the *L&E Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *L&E Newsletter* are appreciated.

Publication Policy: I would appreciate it if you would call or e-mail me to let me know your idea for an article. You can reach me at (718) 428-8369 or mceneaneyj@aol.com.

After we've discussed it, the article should be submitted by e-mail along with a letter granting permission for publication and a one-paragraph bio. The Association will assume your submission is for the exclusive use of this *Newsletter* unless you tell me otherwise in your letter.

Editorial Policy: The articles in the *L&E Newsletter* represent the author's viewpoint and research and not that of the *L&E Newsletter* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscriptions: The *L&E Newsletter* is available by subscription to non-attorneys, libraries and organizations. The subscription rate for 2005 is $75.00. For further information, contact the Newsletter Department at the Bar Center, (518) 463-3200.

Deadlines for submission are the 1st of January, April, July and October each year. If I receive your article after that date, it will be considered for the next edition.

Thank you for your cooperation.

Janet McEneaney
Editor

L&E Newsletter

Editor
Janet McEneaney
205-02 33rd Avenue
Bayside, NY 11361
(718) 428-8369
E-mail:mceneaneyj@aol.com

Section Officers

Chair
Pearl Zuchlewski
500 5th Avenue, Suite 5100
New York, NY 10110
(212) 869-4646

Chair-Elect
Richard K. Zuckerman
534 Broadhollow Road, Suite 210
Melville, NY 11747
(631) 694-2300

Secretary
Michael Evan Gold
293 Ives Hall, Cornell University
Ithaca, NY 14853
(607) 255-7646

Secretary-Elect
Elena Cacavas
55 Hanson Place, Room 700
Brooklyn, NY 11217
(718) 722-4546

ISSN 1530-3950

NYSBA
Labor and Employment Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155