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L&E Newsletter

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

A Message from the Chair

The position of Section Chair has been both energizing and enlightening. This is due largely to the attorneys in our Section and to the efforts of our new president, **Steven C. Krane**. It is most encouraging that his goals for the Association knit cleanly with those of our Section.

In June, Steve Krane called a two-day meeting of Section leaders. Along with meeting the Association's officers and colleagues, sharing ideas and promising on-going communication between the Sections, we saw and participated in the enormous changes which, at Steve Krane's direction, have already begun.

Among the items on Steve Krane's agenda is the identification of "the factors that will shape the practice of law in the next five years. . . . We must prepare now to be in a position to address the needs of our clients. . . ."[1] The Industrial Relations Research Association (IRRA) has similarly seen the need for a pro-active anticipation of future needs and, in June, held a program in Washington addressed to the key issues of identifying policy agendas to address the changing global economy, workplaces, and work forces in the new century. Our Section has begun its efforts in answering these questions.

At our last Executive Committee meeting, **John Canoni, Joel Glanstein, Margery Gootnick,** and **Janet McEneaney** volunteered to serve on an *ad hoc* committee to identify and report on issues that may arise in the future and the proactive steps we can take to address our clients' evolving needs. **Jackie Drucker** and **Dick Chapman**, both of whom have been working hard on the program for the Fall Meeting of our Section planned for this September at The Sagamore, have invited the renowned futurist, **William C. Cobb**, as our keynote speaker. He will share with us his expertise in both the future of the workplace and the future of our law offices. We are looking forward to his presentation with great interest. Should you wish to join us in the committee's work, you need only call one of us.

Another area of interest is the enlargement of the membership of our Section. We need to determine how we can make membership more relevant and desirable to the New York legal community, thereby encouraging participation. The elements of achieving this goal necessarily include developing programs and materials directly relevant to our practices, carrying forward the word of the achievements of the Association and our Section and, finally, letting the community know the advantages that derive from participation in our personal, professional and business growth. In order to do this, an overall view of the current demographics may prove helpful.

Of the members of our Section, 26% of the attorneys have less than ten years experience and 63% have ten years or more experience. One percent of our membership are students, 33% are women, 25% of our members work in law firms with less than 5 attorneys, 29% in

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firms with 6 to 99 attorneys and 7% in firms with 100 or more attorneys. Twenty-three percent of Section membership are under the age of 35, 55% are between the ages of 36 and 55, while 18.5% are over the age of 55. Statistics on ethnicity are as follows: 1% of our members are Black/African American, 0.5% are Asian/Pacific Islanders, 0.8% are Hispanic, 0.13% are Native Americans, other minorities comprise 0.5%, and White/Caucasians, 40%.[2] Clearly, there are large segments of the New York attorney population we are not reaching, the young, those new to the practice of law, women and minorities. Changes in our efforts to recruit new members must be made.

Among the membership in the various Sections, including ours, there are attorneys who practice in more than one field of law. Obviously, cross-pollination could be of great benefit to both the Sections and the membership. At my request, the Association has prepared a list illustrating the areas of practice of members of each of the Sections. More than 10% of the membership of the Corporate Counsel, Commercial and Federal Litigation and Municipal Law Sections practice labor and employment law. Similarly, more than 4% of the membership of the Health Law; Torts, Insurance and Compensation Law; Trial Lawyers and Young Lawyers Sections do so. Our own Section membership of 2,325 members, while primarily engaged in the practice of labor and employment law, practice in other areas as well.

While serving our own membership, it is obvious that we can extend our programs and other activities to other Sections' members. The obvious way to do this is to provide wider notice of our work and the benefits of our Section and to develop joint programs with other Sections. However, other avenues may be available to extend our reach and the Chair of our Membership & Finance Committee, **Robert Kingsley Hull**, will be available to speak with you should you wish to join in this effort.

Now, to address current matters, at our next Executive Committee meeting, we will address the recent application of the Federal Consumer Reporting Act to outside investigators of employee misconduct (including law firms). Because many of our firms participate in this process it is important to know, should the current interpretation by the Federal Trade Commission be upheld, the impact on our ability to conduct these investigations, on our obligation to respect attorney-client confidences, and on our clients' ability to accurately obtain information necessary, both for the management of their businesses and their own protection from liability.

Join us and experience the energy and excitement many of us feel through our participation in shaping the dialogue for, and subsequent development of, labor and employment policy for local, state and, perhaps, an even broader influence in the legal, business and economic structure of our society. We are lawyers involved in an influential Association of an influential state with influential courts in a leading nation of the world.

We can and should affect the future.

Endnotes

1. *State Bar News*, NYSBA, at 1, (May/June 2001).
2. All of these statistics are based upon the known facts available to the Association. In each compilation there are members for whom the facts are unavailable.

Linda Bartlett

Request for Articles

If you have written an article, or have an idea for one, please contact

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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.

From the Editor

Thanks so much to all of you who commented on the last edition of this *Newsletter*. Some of you noticed that the publication guidelines were not up to date, and you'll find revised guidelines on the last page.

In this edition are terrific articles about unionization of university graduate students, the Supreme Court's recent *Circuit City* decision, the ethics of using undercover investigators, New York's state and local disability discrimination laws and the long-awaited return of the legislative update. There's also a notice about our Section's outreach program to high school students.

Linda Bartlett has suggested that Section members give some thought to trends in labor law, so that we can proactively shape its future. I would welcome articles about the way you see the future of the areas in which you practice. What do you think will change in the next five or ten years and how will we be affected? What are the problems you see and how can they be solved?

I'd also like to share your favorite Internet sites for legal research. The first three "Top Ten" lists I receive by October 1st will be published in the next issue. Unfortunately, there's no prize for this competition except the admiration of your colleagues.

As you have gathered by now, I'm sure, articles for publication are always warmly received. My thanks to all who have volunteered, and those who will. Finally, I again express my gratitude to Lyn Curtis and Wendy Pike at NYSBA, without whom nothing is ever possible in this endeavor.

Janet McEneaney

Mandatory Arbitration Agreements and Implications of *Circuit City* for Employers

By Andrea Fitz and Evan J. Spelfogel

While many employers have favorably viewed arbitration programs as a means to resolve workplace disputes, including those involving issues of statutory discrimination, they have often delayed adopting or implementing those programs because legal uncertainty clouded whether even a fair program that afforded due process and all available remedies would be upheld by the courts.

In March 2001, in a much anticipated decision, the U.S. Supreme Court ruled 5-4 that, under federal law, employers may enforce agreements to arbitrate employment disputes with their employees, including statutory discrimination claims. The Court, in *Circuit City Stores, Inc. v. Adams*,[1] held that the Federal Arbitration Act (FAA) applied to the enforcement of arbitration clauses in employment agreements in industries involving commerce. This decision makes clear that employers that have agreed to arbitrate employment-related disputes with their employees may move in federal court to dismiss or stay lawsuits brought by those employees, and require that these disputes be pursued in arbitration. The Court also made clear that the FAA preempts contrary state laws.

Background of the Enforceability of Pre-Dispute Arbitration Agreements

The Federal Arbitration Act

Before 1925, the courts routinely refused to enforce pre-dispute arbitration agreements. On February 12, 1925, Congress enacted the FAA. One objective was to aid the commercial interests of the business community that found its efforts to enforce prospective agreements to arbitrate routinely rejected by the courts. The FAA covers all written arbitration agreements involving maritime transactions and interstate commerce. Although "commerce" is given an expansive definition in § 1 of the FAA, the statute excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Section 3 of the FAA allows a party to an arbitration agreement to stay court proceedings of a dispute that is subject to the arbitration agreement. Under § 4, federal district courts have the power to compel arbitration when a party has failed, neglected or refused to comply with an arbitration agreement.

The Supreme Court first upheld the constitutionality of the FAA in 1932.[2] Nearly 20 years later, however, the Court, in *Wilko v. Swan*,[3] held that investors were better protected if they were not bound to arbitration agreements in the sales of securities and voided the arbitration clause at issue. In so ruling, the Court relied on § 14 of the Securities Act. That section stated that any condition, stipulation or provision binding any person acquiring any security to waive compliance with the Act was void. The Court reasoned that an agreement to arbitrate constituted a waiver of substantive law and could not be waived under § 14. Subsequently, various lower courts interpreted *Wilko* as creating a "public policy defense" to the enforcement of arbitration agreements under the FAA when statutory claims were at issue.

The Steelworkers Trilogy

In a series of 1960 cases involving arbitration under union collective bargaining agreements, the U.S. Supreme Court held that suits could be brought under § 301 of the Labor Management Relations Act (or Taft Hartley Act) to compel arbitration and to enforce arbitration awards of employment disputes under union-management contracts.

The first of these cases, *United Steelworkers of America v. American Manufacturing Co.*,[4] involved a motion to compel arbitration of a grievance. The collective bargaining agreement contained a broad, or "standard," arbitration provision that provided that "[a]ny disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement" would be submitted to arbitration. The Supreme Court reversed the lower court, stating that the merits of the grievance should not have been considered. The Supreme Court noted that court interpretation of contracts with arbitration clauses could jeopardize the "stabilizing influence" of arbitration and deprive the parties of an arbitrator's special expertise. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[5] the Supreme Court held that arbitration would be required unless a particular matter was specifically excluded. The Supreme Court described the arbitration of a grievance as part of the "continuous collective bargaining process" in which it was more appropriate to involve a labor arbitrator than a court. Importantly, "[d]oubts should be resolved in favor of coverage."

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,[6] the Court of Appeals had reviewed the arbitrator's award and decided that it was not enforceable on the merits. The collective bargaining agreement at issue contained an arbitration clause that provided that any disputes "as to the meaning and application" of the contract must be submitted to final and binding arbitration.

The Supreme Court held that without evidence of abuse by the arbitrator, it was improper for a court to review the merits of an arbitration award because it would undermine the "federal policy of settling labor disputes by arbitration."

In sum, for 14 years after the Court's holdings in the Steelworkers Trilogy, the integrity of binding arbitration clauses within collective bargaining agreements was no longer questionable.

Alexander and Its Progeny

In 1974, however, the Supreme Court unanimously held that union-represented individual employees could litigate statutory employment discrimination claims in federal court after unsuccessfully pursuing binding arbitration of their claims under their respective union contract. The Court held that, as a matter of public policy, employees pursuing grievances to final arbitration under the non-discrimination and grievance/arbitration clauses of a collective bargaining agreement do not forfeit their right subsequently to bring statutory employment discrimination claims in federal court.[7]

Alexander alleged he was improperly discharged from his employment because of his race. His union filed a grievance on his behalf. Alexander also commenced an action in federal court under Title VII of the Civil Rights Act. The grievance was processed through binding arbitration. The arbitrator concluded that plaintiff's discharge was for just cause, but did not discuss the claim of racial discrimination. The Supreme Court reversed the Tenth Circuit and held that an employee does not forfeit his private right of action under Title VII by first pursuing binding arbitration of his grievance under the union contract. The Court determined that contractual rights granted to a union under a collective bargaining agreement and the individual rights granted to employees under federal statutes are distinctly separate.

In *Barrentine v. Arkansas-Best Freight System, Inc.*,[8] the Supreme Court extended the *Alexander* rationale to encompass wage and overtime claims brought both under a collective bargaining agreement/grievance procedure and under the Fair Labor Standards Act (FLSA). The Supreme Court further extended the rationale to include claims under 42 U.S.C. § 1983.[9]

The *Mitsubishi* Trilogy

In 1985, a trilogy of non-labor, non-employment cases decided under the FAA marked the Supreme Court's departure from the public policy defense. In these cases, the Supreme Court held that the FAA may be used to compel the arbitration of statutory claims under a mandatory binding arbitration agreement unless the language of the statute, its legislative history, or the statute's underlying purpose indicates a disfavoring of arbitration.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[10] the Supreme Court held an arbitration agreement in an automobile distributorship contract enforceable. The Court added that, under the FAA, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be "resolved in favor of arbitration." The Court went on to hold that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute [but] submits to their resolution in an arbitral, rather than judicial, forum."[11] This premise appeared to contradict the Court's finding in *Wilko* that an agreement to arbitrate is necessarily a waiver of substantive rights.

The Court expressly dismissed the argument that statutory claims designed to advance important public policies should not be subject to compulsory arbitration under the FAA. The Court went on to state that

> so long as the prospective litigant effectively may vindicate [his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. [W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.[12]

In *Shearson/American Express Inc. v. McMahon*,[13] the Supreme Court extended *Mitsubishi* to compel enforcement of an arbitration clause encompassing claims arising under RICO and § 10(b) of the Securities and Exchange Act of 1934. The Court stated that the duty established by the FAA to enforce arbitration agreements was not diminished when a party bound by an agreement raised a claim founded on statutory rights.

Finally, in *Rodriguez de Quijas v. Shearson/American Express Inc.*,[14] the Supreme Court expressly overruled *Wilko* and stated that attacks on the competence of arbitration "as a method of weakening the protections afforded in the substantive law . . . [are] far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[15]

Gilmer and Its Progeny

In *Gilmer v. Interstate/Johnson Lane Corp.*,[16] the Supreme Court was faced with reconciling the holdings of *Alexander*, that arbitration is inferior to the judicial process for resolving statutory employment discrimination claims, and *Mitsubishi*, that binding arbitration agreements encompassing statutory claims are enforceable under the FAA's presumption of arbitrability. *Gilmer* concerned a securities industry employee who had signed an agreement providing for mandatory binding arbitration of any dispute, claim or controversy arising out of his employment or termination of employment. At

issue was whether this promise to arbitrate precluded Gilmer from litigating an Age Discrimination in Employment Act (ADEA) claim against his employer. The Supreme Court held that Gilmer's ADEA claim was arbitrable under the mandatory, binding arbitration agreement and that Gilmer was precluded from litigating the claim. Thus, the Supreme Court extended the presumption of arbitrability stated in the *Mitsubishi* trilogy to cover statutory employment discrimination claims arising under the ADEA, and appeared to reject much of the rationale underlying *Alexander.*[17]

Over the following eight years, the U.S. Courts of Appeals and various other federal and state courts extended the holding in *Gilmer* to cover race, sex and all other forms of statutory discrimination, whether the promise to arbitrate was contained in employment agreements, employment applications, personnel manuals or employee handbooks.

The *Gilmer* Backlash

In the mid 1990s, however, a "backlash" began to develop. Although the overwhelming majority of the courts that considered the issue since *Gilmer* upheld and enforced pre-dispute agreements to submit statutory employment discrimination claims to mandatory arbitration, a number of lower courts across the country began to reject some arbitration agreements and allow court litigation. Their rulings usually were based on one or more of the following grounds: (1) the agreements were not knowingly and voluntarily entered into by the employee; (2) the design and internal procedures of the arbitration mechanisms failed to provide to the employee the substantive equivalent to a lawsuit (for example, some courts did not enforce arbitration agreements where there were no formal written opinions or where there were limitations on the remedies available); or (3) the employees were being denied necessary fundamental due process.[18]

The *Circuit City v. Adams* Decision

When the plaintiff, Saint Clair Adams, began work at Circuit City in 1995, he signed an employment application including a two-page document entitled "Circuit City Dispute Resolution Agreement." This required that employees submit to binding arbitration all disputes arising out of their employment, including claims under federal, state and local laws prohibiting discrimination. Two years later, Adams filed an employment discrimination lawsuit against Circuit City in California state court, asserting claims under California's Fair Employment and Housing Act, and California tort law.

Circuit City moved in federal court to enjoin the state court action and to compel arbitration under the FAA. The district court granted the motion and compelled arbitration. On appeal, the Ninth Circuit Court of Appeals reversed, holding that the FAA did not apply to arbitration agreements contained in employment contracts. The Ninth Circuit reversed on the procedural ground that arbitration agreements in contracts of employment were excluded from enforcement under § 1 of the FAA. Its decision was contrary to the holdings of nine of the Circuit Courts of Appeals. Circuit City petitioned the U.S. Supreme Court for review.

At issue in the case was the scope of the exclusion in § 1 of the FAA that generally compels judicial enforcement of a wide range of written arbitration agreements. The exclusion covers contracts of employment of seamen, railroad employees, and any other class of workers engaged in foreign or interstate commerce. In reversing the Ninth Circuit, the Supreme Court held that the exemption was narrowly limited to transportation workers similar to seamen and railroad employees.

In the majority opinion, written by Justice Kennedy, the Court noted the value of nationwide certainty of enforcement of arbitration agreements and of avoiding litigation. The Court pointed out the well-known advantages to arbitrating employment claims, such as avoiding court litigation costs, a benefit of particular importance in employment litigation, which often involves smaller sums of money than commercial disputes. The Court also noted that permitting state law to prohibit arbitration of certain employment claims would breed litigation, call into doubt the efficacy of the dispute resolution procedures already adopted by many employers, and undermine the FAA's pro-arbitration purpose.

The Supreme Court decision reinforced its endorsement of arbitration of discrimination claims and strengthened the ability of employers to enforce arbitration agreements with their employees. This result is consistent with previous judicial acknowledgment of the strong federal policy favoring arbitration, and with the corresponding presumption in favor of the validity of agreements requiring the arbitration of employment claims. Thus, courts have enforced arbitration clauses found in a variety of documents, such as employment applications and employee handbooks, especially if the employee has signed an acknowledgment of receipt of the handbook. Notably, some courts have gone further, holding that, even in the absence of a signed receipt, accepting or continuing employment with knowledge of the arbitration provisions in a handbook is sufficient to create a binding agreement to arbitrate statutory claims.

The *Circuit City* decision is a significant development in the area of arbitration agreements. Employers who adopt pre-dispute mandatory arbitration provisions as a condition of employment will not have to be concerned about whether their agreements can be enforced under the FAA, or whether their enforcement will be left to the vagaries of multiple and often inhospitable state-law determinations. There are still, however, open issues of which employers must be aware.

Remaining Issues After *Circuit City*

First, employers still must ensure that the arbitration agreement meets general requirements for enforceability. Arbitration agreements will not be enforced if they are overreaching, are unfair to the employee, are procedurally defective or lack mutuality. As stated in *Gilmer,* the agreement must be knowing and voluntary, and it must merely substitute an arbitral forum for the judicial forum, preserving to the employee all substantive statutory rights.[19]

Second, the Supreme Court has not yet addressed a split in the circuits concerning the validity of agreements that require a plaintiff to pay all or part of an arbitrator's fee. A number of courts have held that an employee should not be required to pay more than he/she would have to pay to file a case in court. Clearly, the argument goes, a plaintiff does not have to pay the salaries of the judge or jurors. Most courts have merely invalidated expensive fee provisions of the arbitration agreement but enforced the rest of the agreement. Several courts, however, have refused to enforce the agreement altogether. In a somewhat analogous recent ruling by the Supreme Court in *Green Tree Financial Corp.—Alabama v. Randolph*,[20] the Supreme Court stated that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal rights in the arbitral forum."

Third, also remaining unresolved is the continuing validity of *Alexander,* holding that arbitration under a union collective bargaining agreement does not foreclose an individual from bringing a claim under federal discrimination statutes. The Supreme Court had an opportunity to revisit *Alexander* in light of *Gilmer* but declined to do so in *Wright v. Universal Maritime Service Corp.*[21] There, the Court stated that it might reconsider *Alexander* if, unlike *Wright,* the language in the union collective bargaining agreement arbitration clause expressly covered statutory discrimination claims.

Fourth, employers must be aware that an arbitration clause in an employee handbook that disclaims that it is a contract may be open to challenge on the issue of whether there is any enforceable agreement at all. Ambiguously worded arbitration clauses may be vulnerable to challenge on the grounds that the employee did not agree to arbitrate the specific statutory right asserted. Federal courts deciding these issues under the FAA have applied state contract law to determine whether a binding agreement to arbitrate was made. Since such laws may vary from state to state, employers implementing mandatory arbitration should follow applicable state law to ensure that they are creating an enforceable obligation to arbitrate.

Fifth, employers must remember that under *Gilmer,* an employee covered by a mandatory arbitration agreement still may file a discrimination charge with the Equal Employment Opportunity Commission (EEOC), and the EEOC may institute its own judicial action based on that charge.

The EEOC moreover, has held administratively that an employer commits a *per se* violation of Title VII of the Civil Rights Act by conditioning employment on the employee's signing of a pre-dispute arbitration agreement encompassing Title VII rights. There appears to be no court decision upholding the EEOC's position.

The U.S. Court of Appeals for the Fourth Circuit, in *EEOC v. Waffle House, Inc.*,[22] and the Second Circuit, in *EEOC v. Kidder, Peabody & Co.*,[23] have held that the EEOC may not pursue individual relief (as contrasted with class or group), such as reinstatement, back pay, compensatory or punitive damages, on behalf of employees who have entered into binding arbitration agreements with their employers. The U.S. Supreme Court has granted review in *Waffle House* to resolve the conflict with the Sixth Circuit's decision on the same issue in *EEOC v. Frank's Nursery & Crafts, Inc*.[24] The case is scheduled to be argued during the Court's October 2001 term.

Finally, employers must be aware that, contrary to decisions by all other circuits to have considered the issue, the Ninth Circuit has held that *Gilmer* does not apply to Title VII claims and, therefore, employees cannot be required to arbitrate such claims in that circuit. In *Duffield v. Robertson Stephens & Co.*,[25] the Ninth Circuit stated that Congress intended to preclude compulsory arbitration of Title VII claims when it enacted the 1991 Act shortly after the *Gilmer* decision. The Supreme Court did not grant review in *Duffield* and the decision in *Circuit City v. Adams* did not address this issue. Notwithstanding, the U.S. District Court for the Central District of California ruled on April 26, 2001 that *Duffield* has been voided by *Circuit City*.[26]

Pros and Cons of Arbitration

Many employers who do not currently require mandatory arbitration for the resolution of employment claims may now be rethinking that position in light of the *Circuit City* decision. However, before implementing mandatory arbitration, a practical decision must be made: Is the arbitration of employment claims a good idea for your company?

There are numerous advantages to implementing a mandatory arbitration program:

1. Arbitration may be less expensive than litigation.
2. Usually arbitration is concluded in far less time than the average trial.
3. Arbitration may avoid excessive or run-away jury awards for emotional distress and punitive damages.
4. A court may overturn arbitration awards only in limited circumstances.

5. The arbitration proceedings are of a more private and confidential nature.

Employers should also be aware of the disadvantages of implementing a mandatory arbitration program:

1. Employee morale may diminish.
2. An employer may be unable to take full discovery or make pre-hearing motions and this may hinder its ability to present an aggressive defense.
3. Arbitrators may be unsophisticated in employment law and are not bound by legal precedents that may favor employers.
4. Unless specifically provided by the arbitration agreement, arbitrators are not bound by a court's plenary scheme, including evidentiary rules.
5. Unless carefully screened, arbitrators can harbor bias that can substantially affect the outcome of an arbitration.
6. Arbitration is usually final and binding with limited right of appeal.
7. Arbitration is not always less costly than litigation.

Conclusion

Employers should be aware that the Court's decision in *Circuit City* did not resolve all the issues concerning pre-dispute agreements to arbitrate statutory discrimination claims. The decision does not change the kinds of basic contractual issues that may arise, such as whether the parties have made a voluntary, knowing and binding agreement to arbitrate, or the scope of the issues covered by the arbitration clause. Thus, challenges to arbitration clauses on contractual grounds still may be raised. In addition, the Court did not have before it the issues of whether an arbitration agreement that requires an employee to pay a share of the arbitrator's fee is enforceable under the FAA, whether a contractual limitation on statutory rights or remedies removes a particular statutory claim from the scope of the arbitration clause, or whether provisions of the arbitration agreement that impair the remedial purposes of the statute on which an employee's claim is based invalidate the agreement, all issues that already have been the bases of successful challenges to arbitration of statutory claims in the "backlash" cases.

The *Circuit City* decision may cause more employers to consider whether they should require their employees to enter into pre-dispute mandatory arbitration agreements. In this respect, employers should weigh carefully, in the specific context of their particular culture and labor-relations environment, the potential benefits and drawbacks of arbitration. Employers also should recognize, of course, that mandatory arbitration will apply only to claims asserted by employees *after* the arbitration agreement is implemented, and may not affect claims already raised by their employees in any other forum. If an employer decides that mandatory arbitration is in its interest, it must ensure that such agreements are properly drafted and adopted, to avoid the legal pitfalls that still exist.

Endnotes

1. No. 99-1379, 2001 WL 273205 (Mar. 21, 2001).
2. *See Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932).
3. 346 U.S. 427 (1953, *overruled by Rodriguez v. Shearson/American Express*, 490 U.S. 477 (1989)).
4. 363 U.S. 564, 565 n.1 (1960).
5. 363 U.S. 574, 583 (1960).
6. 363 U.S. 593 (1960).
7. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).
8. 450 U.S. 728 (1981).
9. *McDonald v. City of West Branch*, 466 U.S. 284 (1984).
10. 473 U.S. 614, 628 (1985).
11. 473 U.S. at 637.
12. *Id*. at 627.
13. 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987).
14. 490 U.S. 477 (1989).
15. For a comprehensive discussion of the background of pre-dispute mandatory arbitration agreements, *see* Fitz, *The Debate Over Mandatory Arbitration in Employment Disputes*, 514 Disp. Resol. J. 35 (1999).
16. 500 U.S. 20 (1991).
17. For a complete discussion of arbitration in employment disputes, *see* Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 Hofstra Lab. L.J. 247 (1993).
18. *See, e.g.*, *Halligan v. Piper Jaffrey*, 148 F.3d 197 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999); *Montes v. Shearson Lehman Bros. Inc.*, 128 F.3d 1456 (11th Cir. 1997); *Heurtebise v. Reliable Business Computers, Inc.*, 452 Mich. 405, 550 N.W.2d 243 (1996), *cert. denied*, 117 S. Ct. 1311 (1997); *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1997); *Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1994). *See also* Spelfogel, *Pre-dispute ADR Agreements Can Protect Rights of Parties and Reduce Burden on Judicial System*, N.Y. St. B.J., vol. 71, no. 7, at 16 (September/October 1999).
19. *See Gilmer*, 500 U.S. at 26 ("we [recognize] that '[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum'").
20. 121 S. Ct. 513, 522 (2000).
21. 525 U.S. 70 (1998).
22. 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (March 26, 2001).
23. 156 F.3d 298 (2d Cir. 1998).
24. 177 F.3d 448 (6th Cir. 1999), *cert. denied*, 525 U.S. 982 (1998).
25. 144 F.3d 1182 (9th Cir. 1998).
26. *Olivares v. Hispanic Broadcasting Corp.*, No. CV- 00-00354-ER, 2001 WL 477171, at *1 (C.D. Cal. April 26, 2001).

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ADA: Not the Only Game in Town—Nor Even the Best

By Mark H. Leeds

The Americans with Disabilities Act of 1990 (ADA)[1] often is hailed as the principal civil rights measure for America's largest, most diverse, and fastest-growing minority group, a group anyone can join at any moment.[2] However, the ADA—both as written and as interpreted by the U.S. Supreme Court—generally covers fewer people, entities, and rights, and provides weaker remedies, than do some comparable state and local laws. Such laws have been receiving heightened attention as the Supreme Court pursues "neo-federalism." In *University of Alabama Board of Trustees v. Garrett*,[3] upholding states' Eleventh Amendment immunity from private employment discrimination suits for monetary damages under Title I of the ADA, the Court noted:

> Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U. S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.[4]

Indeed, in many instances, laws recognizing rights of people with disabilities are significantly stronger in New York State[5] and New York City[6] than is the ADA. While the acts prohibited by the respective federal, state, and city laws are comparably extensive—covering everything from discriminatory hiring practices, to refusing to make reasonable accommodations, to failing to hold employer-sponsored social functions for employees in accessible locations[7]—the relative strength of the city and state laws extend beyond the definition of the term "disability" to encompass substantive and procedural requirements, as well as availability of remedies. Though an exhaustive comparison cannot be assayed here, this article is designed to assist in recognizing and exploring crucial aspects of disability discrimination law in labor and employment contexts in New York State and New York City.

Who Has a Disability?

To be covered under the ADA, a person's disability must "substantially" limit a "major life activity."[8] New York City and New York State laws contain no such limitation. The New York City Human Rights Law (CHRL) has perhaps the broadest definition of the term "disability":

> 16. (a) The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment.
>
> (b) The term "physical, medical, mental, or psychological impairment" means:
>
> (1) an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or
>
> (2) a mental or psychological impairment.
>
> (c) In the case of alcoholism, drug addiction or other substance abuse, the term "disability" shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse, and shall not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.[9]

The section-by-section analysis accompanying the City Council report on the extensive 1991 CHRL amendments that included this definition, discussed the change from the term "handicap" to a new term: "disability." It stated:

> The definition [of disability] is amended to clarify that any person with a physical, medical, mental or psychological impairment or a history or record of such an impairment is protected by the

> law. Those impairments are defined broadly so as to carry out the intent that persons with disabilities of any type be protected from discrimination.[10]

This was a direct response to more restrictive language in the ADA and in federal regulations then being developed under the ADA.[11]

The ADA limits those whose rights it recognizes,[12] and these limitations become more pronounced in federal regulations implementing the ADA.[13] In addition, the Equal Employment Opportunity Commission (EEOC) has defined the term "substantially limits."[14]

Rejecting an EEOC interpretation that ADA coverage should be determined without respect to mitigating factors, such as an individual's use of eyeglasses, the U.S. Supreme Court, in *Sutton v. United Air Lines*, said, "[t]o be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity."[15] Under the CHRL, anyone with an impairment—substantial or not, corrected or not—is covered. As with the ADA, people also are protected by the CHRL from discrimination on the basis of their relationship with someone who has or had an actual or perceived disability.[16]

The New York State Human Rights Law (SHRL) defines "disability" more broadly than does the ADA, but more narrowly than does the CHRL:

> 21. The term "disability" means: (a) a physical, mental 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 accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.[17]

The SHRL's exclusive list of types of impairments, use of the phrase "prevents the exercise of a normal bodily function," and alternate requirements for clinical diagnosis make that law less inclusive than the CHRL. In recent years, a spate of SHRL amendments have highlighted specific types of disabilities or potentially disability-related conditions,[18] perhaps calling into question the coverage of the basic definition.

The right to "reasonable accommodation" in employment[19] under the SHRL[20] is similar to that under the ADA[21] and under the CHRL[22], although the CHRL explicitly places the burden of proving "undue hardship" on the covered entity[23] and makes it "an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question."[24]

What Is a Covered Entity?

In an employment context, a "covered entity" prohibited from discriminating on the basis of disability under the ADA is "an employer, employment agency, labor organization, or joint labor-management committee,"[25] with an employer defined as one employing 15 or more people.[26] The SHRL prohibits employment discrimination in varying contexts by employers, labor organizations, employment agencies, and, in some circumstances, licensing agencies or joint labor-management committees,[27] with the term "employer" covering those employing four or more.[28] The CHRL prohibits employment discrimination in varying contexts by an employer, labor organization, employment agency, or joint labor-management committee—or by an employee or agent of those entities.[29] While employers of four or more are covered, independent contractors may be counted.[30]

A review of how employers might violate these laws is beyond the scope of this article, but coverage of employment agencies and labor organizations deserves some discussion. Employment agencies, as screeners of prospective employees for an employer, may stray into prohibited disability-based action, either at the suggestion of an employer/client or by their own concept of who might be "right" to recommend. Unions, although active proponents of the ADA and similar laws, tend to favor seniority over reasonable accommodation (notwithstanding a duty of fair representation) and cumbersome, time-consuming grievance and arbitration procedures over more streamlined methods of reaching a reasonable accommodation. Unions also may insist on provisions in collective bargaining agreements that may result in discrimination charges against the employer, which then must decide whether to jeopardize general labor relations by bringing the union into the case. An employer and the union(s) with which it collectively bargains also must navigate between Scylla and Charibdys (or, more precisely, the EEOC and the NLRB) in sharing confidential information about the disability of an employee[31] who has requested a reasonable accommodation that may conflict with collectively bargained seniority rights. The EEOC has advised the NLRB that

such sharing with pertinent union representatives may be permissible under the ADA to a limited extent in the context of determining whether an accommodation poses an undue hardship to the union or to its senior member who has been bypassed to accommodate a person with a disability.[32] This opinion is based in part on the right of pertinent inquiry to verify the need for an accommodation requested, where both the employer and the union have obligations to make reasonable accommodations. Not addressed squarely, *inter alia*, is a situation in which the member with a disability has not directly invoked the union's obligation, making the request to the employer alone; the employer may want to suggest the employee involve the union or clearly authorize the employer to do so. The weight to be given a seniority provision in a collective bargaining agreement in the context of a reasonable accommodation request is before the Supreme Court in its 2001 term.[33]

What Remedies Are Available?

Relief under the ADA is limited not only by Supreme Court neo-federalism, but also by the terms of the statute itself. With respect to employment discrimination, an individual may file a complaint with the EEOC within prescribed time limits not exceeding 300 days after the alleged discrimination, or file suit in federal or state court within three years of the allegedly discriminatory act, seeking reinstatement of employment, back pay, attorneys' fees and other relief, including compensatory and punitive damages in cases of intentional (not disparate impact) discrimination.[34] The Civil Rights Act of 1991 added compensatory and punitive damages (though not for governmental entities) on a capped sliding scale, depending on the size of the employer,[35] as well as provisions for attorneys' fees.[36]

The CHRL and, to some extent, the SHRL, provide remedies superior to those of the ADA. Administrative complaints may be filed within one year after the alleged discriminatory act with the City Commission on Human Rights[37] or with the State Division of Human Rights.[38] The CHRL also contains a substantial private right of action, with a three-year statute of limitations, in which a full range of remedies, including compensatory and punitive damages, injunctive relief, costs, and attorneys' fees may be awarded.[39] The SHRL has a similar statute of limitations, although punitive damages and attorneys' fees are not available.[40] Unlike the ADA, the CHRL and the SHRL have no limitation on the amount of damages that may be sought. While the City Commission and the City's Corporation Counsel must be served with a copy of the complaint before suit is filed, government agencies are not exempt from suit. The city itself may bring a "pattern or practice" suit, seeking a wide range of relief, including civil penalties.[41]

Conclusion

Considering the many millions of people who work and seek employment in New York City and New York State each day, it is essential for practitioners to look not only to the ADA, but also to the City Human Rights Law, the State Human Rights Law, and the State Civil Rights Law, all of which recognize and enforce significant rights of people with disabilities.

Endnotes

1. 42 U.S.C. §§ 12101 *et seq.*
2. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and related statutory and regulatory provisions prohibiting disability discrimination by recipients of federal funds, should not be forgotten, although they will not be discussed further here.
3. (Docket No. 99-1240) 148 L.Ed.2d 866, 69 U.S.L.W. 4105 (February 21, 2001).
4. Slip op. 16-17, n. 9. Under the reasoning of *Garrett*, Title II suits for monetary damages against state governments also may be subject to challenge. However, "the Eleventh Amendment does not extend its immunity to units of local government." Slip op. 11.
5. New York State Executive Law §§ 290 *et seq*. State Human Rights Law (SHRL); New York State Civil Rights Law Art. 4-B, particularly §§ 47-a and 47-b; N.Y.S. Division of Human Rights Recommendations on Employment Inquiries (March 2001), http://www.nysdhr.com/employmentup.html.
6. New York City Administrative Code §§ 8-101–8-703. While that law may not readily be available, Local Law 39 of 1991, showing the City Human Rights Law as substantially amended then, may be viewed at http://leah.council.nyc.ny.us/law91/int0465a.htm; subsequent (relatively minor) amendments may be found through http://leah.council.nyc.ny.us/laws.htm.
7. 42 U.S.C. § 12112; N.Y.S. Exec. Law § 296; N.Y.C. Admin. Code § 8-107.
8. 42 U.S.C. § 12102(2).
9. N.Y.C. Admin. Code § 8-102.16.
10. 1991 CHRL amendments, p. 6.
11. The Report of the Legal Division of the New York City Council on the eventual Local Law 39 of 1991 stated, at 12-13:

    > It is clear that Proposed Int. No. 465-A will put the city's law at the forefront of human rights laws. Faced with restrictive interpretations of human rights laws on the state and federal levels, it is especially significant that the city has seen fit to strengthen the local human rights law at this time. Particular attention should be given to section 9-130 of Proposed Int. No. 465-A which provides that, "the provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." It is imperative that restrictive interpretations of state or federal liberal construction provisions not be imposed upon city law.

12. 42 U.S.C. § 12102(2) defines "disability" in the following terms:

    > (2) Disability—The term "disability" means, with respect to an individual
    >
    > (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 an impairment; or
    >
    > (C) being regarded as having such an impairment

13. For example, Justice Department regulations clarifying the term "disability" state: "The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104.

14. The EEOC defines "substantially limits" in the following terms:

    (j) Substantially limits—

    (1) The term substantially limits means:

    (i) Unable to perform a 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 to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

    (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

    (i) The nature and severity of the impairment;

    (ii) The duration or expected duration of the impairment; and

    (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

    (3) With respect to the major life activity of working—

    (i) 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 as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

    (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

    (A) The geographical area to which the individual has reasonable access;

    (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

    (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

    29 C.F.R. § 1630.2.

15. 527 U.S. 471 (1999).

16. 42 U.S.C. § 12112(b)(4); N.Y.C. Admin. Code § 8-107.20.

17. N.Y.S. Exec. Law § 292.21.

18. N.Y.S. Exec. Law §§ 292.21a-d.

19. These and related statutes also require reasonable accommodation in various other contexts not pertinent here.

20. N.Y.S. Exec. Law §§ 292.21, 292.21-e, 296.3; 9 N.Y.C.R.R. § 466.11.

21. 42 U.S.C. § 12111(9); the individual must be "otherwise qualified," meaning that, with or without reasonable accommodation, the person must be able to perform the essential functions of the job in question, 42 U.S.C. § 12111(8). *See* 29 C.F.R. § 1630.9; EEOC Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, http://www.eeoc.gov/docs/accommodation.html.

22. N.Y.C. Admin. Code §§ 8-102.18, 8-107.15.

23. N.Y.C. Admin. Code § 8-102.18 (whether the entity is an employer, place of public accommodation, or other).

24. N.Y.C. Admin. Code § 8-107.15.

25. 42 U.S.C. § 12111(2).

26. 42 U.S.C. § 12111(5).

27. N.Y.S. Exec. Law § 296.

28. N.Y.S. Exec. Law § 292.5; employers of even one person are covered under N.Y.S. Civil Rights Law Art. 4-B, which prohibits discrimination against people with disabilities who use guide, hearing or service dogs, or who are blind and use a cane as a mobility aid; *see* particularly §§ 47-a, 47-b.

29. N.Y.C. Admin. Code § 8-107.

30. N.Y.C. Admin. Code § 8-102.5.

31. 42 U.S.C. § 12112(d). New York State also imposes a confidentiality requirement on an employer, 9 N.Y.C.R.R. § 466.11.

32. Letter of November 1, 1996, from Ellen J. Vargyas to Barry Kearney, http://www.eeoc.gov/docs.html.

33. *US Airways, Inc. v. Barnett* (00-1250), *cert. granted,* April 16, 2001; EEOC Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, n. 115, http://www.eeoc.gov/docs/accommodation.html.

34. 42 U.S.C. § 12117, adopting remedies available under 29 U.S.C. § 794a to those claiming discrimination under § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); as to those remedies, *see Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Doe v. New York University*, 666 F.2d 761, 774 (2d Cir. 1981); *Martin v. New York State Department of Labor,* 512 F. Supp. 353 (S.D.N.Y. 1981) (applying CPLR 214(2) to establish a three-year statute of limitations).

35. 42 U.S.C. § 1981a. The Supreme Court recently found front pay not limited by the cap, *Pollard v. E.I. duPont de Nemours & Co.* (00-763) (June 4, 2001).

36. 42 U.S.C. § 1988. The Supreme Court recently significantly limited opportunities for recovering attorneys' fees, *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (99-1848) (May 29, 2001).

37. N.Y.C. Admin. Code § 8-109.

38. N.Y.S. Exec. Law § 297.5.

39. N.Y.C. Admin. Code § 8-502. Common law sovereign immunity recently has been held to bar punitive damages against the city itself under the CHRL, *Katt v. City of New York,* N.Y.L.J, June 29, 2001, p. 27, col. 6 (S.D.N.Y. 95 Civ. 8283).

40. N.Y.S. Exec. Law § 297.9; punitive damages and attorneys' fees are only available in cases of housing discrimination, *id.* and § 297.10.

41. N.Y.C. Admin. Code §§ 8-402, 8-403.

Organizing in the Ivory Tower: Graduate Student Assistants at Private Universities Are Employees Entitled to All of the Protections of the National Labor Relations Act

By Carl Levine

Introduction

On October 31, 2000, the National Labor Relations Board (NLRB or "Board"), in a 3-0 decision, found that Teaching Assistants,[1] Research Assistants[2] and Graduate Assistants[3] (collectively "Graduate Assistants"), enrolled as graduate students at New York University (NYU), are employees within the meaning of the National Labor Relations Act (NLRA or "Act") entitled to all of the Act's protections.[4] This is the first time that Graduate Assistants at a private university have been found to be employees under the Act.[5] *NYU* came on the heels of another NLRB decision, issued on November 26, 1999, in which the Board, overturning over 20 years of precedent, found that medical interns and residents working at private hospitals are employees within the meaning of the Act, notwithstanding that they, like the Graduate Assistants at NYU, are also students. [6]

Following a ruling in favor of the United Auto Workers (UAW) by the Regional Director of Region 2 of the NLRB, in April 2000, the NYU Graduate Assistants were allowed to vote on whether they wanted to be represented by the UAW for purposes of collective bargaining. The ballots were sealed after the election, however, pending the outcome of NYU's appeal to the NLRB in Washington, D.C. After the Board upheld the Regional Director's decision, the ballots were counted and, following a settlement agreement addressing challenged ballots, the UAW was certified as the representative of the Graduate Assistants. NYU initially refused to bargain with the Union but, on March 1, 2001, on the eve of a strike authorization vote, NYU recognized the Union. The parties are currently involved in negotiating a first contract.

As the number of tenured and tenure-track positions has declined at American universities, they have become increasingly dependent on the labor of both adjunct faculty and graduate student Assistants. At many universities, including NYU, Teaching Assistants are responsible for one-half, or more, of all undergraduate instruction. In return, Graduate Assistants, in addition to tuition waivers, often receive meager salaries insufficient to cover basic living expenses. In the past, the overwhelming majority of graduate students could at least look forward, after years of hardship while they completed their studies, to secure positions in academia after graduation, but this is no longer the case. Rather, many graduate students serving as Assistants will never obtain secure jobs in their chosen professions. Therefore, it is not surprising that in the wake of *NYU* organizing drives have commenced at private universities throughout the country.

Prior NLRB Case Law

Prior to the issuance of *NYU*, the NLRB had never spoken definitively as to whether Graduate Assistants at private universities were employees within the meaning of the Act. There *had* been a number of decisions, however, mostly from the 1970s, in which the Board had shown a reluctance to afford employee rights to students who worked for the academic institutions at which they were students. This reluctance was based on the Board's perception that the work performed by these students was incidental to their status as students.

In the two most significant of these decisions, *Cedars-Sinai Medical Center*,[7] and *St. Clare's Hospital*,[8] the Board held that medical interns and residents working at private hospitals were not employees under the Act because they were primarily students. The Board held, despite the absence of any supporting language in the Act itself, that it would be contrary to public policy to allow interns and residents to form unions under the protection of the Act. In *St. Clare's Hospital*, the second of the interns and residents cases, the Board noted, *in dicta*, that it had previously adopted a policy against certifying units of student employees. In support of this proposition, however, it cited only a single case, *San Francisco Art Institute*.[9] In *San Francisco Art Institute*, the Board held not only that a group of student janitors, working for the institution which they attended as students, should not be included in a bargaining unit with full-time non-student janitors, but also that they should not be allowed to form their own unit of student employees.[10]

Prior to its decision in *NYU*, the Board had only considered the status of Graduate Assistants under the Act in *Leland Stanford Junior College*,[11] a case involving a proposed unit limited to Physics Department Research Assistants (RAs). In *Leland Stanford*, the students at issue, while classified as Research Assistants, had no service requirements beyond the research required of them for the completion of their own dissertations. Thus, while the decision in *Leland Stanford* included

some general language about the supposed inappropriateness of graduate students forming unions, the decision was grounded in the fact that, insofar as the students at issue did *not* perform services for their university, they could not properly be considered employees under the Act. As will be discussed below, in *NYU*, the UAW relied, in part, on *Leland Stanford* in successfully arguing that a limited number of science RAs should be excluded from the Union's proposed unit as non-employees.

Thus, while before *NYU* the Board had never ruled on the status of Graduate Assistants who perform services for the benefit of the universities which they also attended as students, it had shown a disinclination for recognizing that student employees, in general, were employees under the Act. However, this disinclination was abandoned in 1999 in *Boston Medical Center*, where the Board explicitly overturned *Cedars-Sinai* and *St. Clare's*, finding that there was nothing about an employee's status as a student which precluded them from coverage under the Act. Insofar as the Act has no specific exclusion for student employees, the Board determined that it should apply the traditional common law test for determining employee status. Under the common law test, individuals are employees if they perform services for their employer, under the employer's direction and control, for which they are compensated. Under this test, the Board found that medical interns and residents were indeed employees entitled to the protections of the Act.

The decision in *Boston Medical Center* was issued while the hearings were still underway in *NYU*. The decision sent a signal to the Union in *NYU* that, if it could establish the common law elements, the Board would likely recognize the employee status of the Graduate Assistants it sought to represent.

The University's Position

In challenging the right of Graduate Assistants to unionize, NYU argued that the Assistants are primarily students and their work assignments are educational in nature. Graduate students are afforded opportunities to work as Teaching and Research Assistants, according to NYU, not so much because the University needs their services, but because NYU, motivated by nothing more than the best interests of its students, considers such opportunities to be part of a well-rounded graduate education. Thus, it argued, any benefits which the University derived from the service of students as Graduate Assistants was incidental to the educational value to the students. Further, according to NYU, the money (and tuition remission) which students received during semesters in which they served as Graduate Assistants was actually "financial aid" rather than compensation for services.[12] Insofar as the Assistants are not primarily performing a service for the University, and are receiving financial aid rather than compensation, they fail, according to NYU, to meet the common law test for employee status and should not be treated as employees under the Act.[13]

In the alternative, NYU argued, even if Graduate Assistants met the common law test for employee status they should be precluded from the protections of the Act on public policy grounds. Specifically, NYU claimed that unionization of its Assistants would undermine the mentor/mentee relationships at the heart of the graduate educational experience, as well as threaten academic freedom. Unionized Assistants, it argued, would seek to negotiate issues such as tenure decisions and academic grades. Numerous universities, and associations representing universities, filed *amici* briefs with the NLRB in support of this position.

The main hurdle NYU faced in arguing for a public policy exclusion of Graduate Assistants is that the Act, which explicitly excludes numerous other groups of employees from its protections, contains no such exclusion for student employees. While exclusions not explicitly contained in the Act *have* been found to exist, such exclusions, such as the exclusion of managerial employees, have usually been clearly supported by the language of the Act and/or its legislative history. NYU attempted to overcome this hurdle by relying on the one line of cases in which an exclusion was found by the Board despite a lack of any supporting language in the Act or its legislative history: the line of cases excluding severely disabled adults working in non-profit rehabilitative sheltered workshops.[14] NYU argued that its relationship with its Graduate Assistants, like the relationship of charitable organizations with the employees of the sheltered workshops which they run, is primarily educational, and not guided by traditional business considerations. Thus, in light of the harms which would result if the Act's protections were extended to Graduate Assistants, the Board had the authority and duty to exclude the Assistants, notwithstanding the lack of any explicit exclusion in the Act.

The Union's Position

The Union, relying on *Boston Medical*, as well as a line of Supreme Court cases which found that the definition of employee under the Act is expansive,[15] argued that the Board need look no further than the plain language of the Act and the common law test which the Board has historically applied to determine employee status under the Act. Simply put, if Graduate Assistants perform a service for the University, under its direction and control, for which they receive compensation, they are employees unless explicitly excluded by the plain language of the Act itself.

In establishing that the Graduate Assistants perform services which are of benefit to NYU, the Union showed that Assistants at NYU do over half of all of the teaching

in the College of Arts and Sciences at NYU, and play a number of other pivotal roles throughout the University. Further, while the Union took the position that it was irrelevant to the issue of employee status whether some of the Graduate Assistants benefited educationally from their service, it pointed out that the evidence showed that in many cases there was no such benefit. For example, a number of witnesses testified that they had been required, in connection with their employment, to perform services with little or no educational value such as photocopying and putting books on reserve, organizing receptions and sorting mail. Although NYU argued that the wages received by Graduate Assistants was really "financial aid," it was established that these wages are subject to payroll taxes, and that Assistants only receive these monies if they perform the services which are assigned.

As to NYU's public policy arguments, the Union argued, in the first instance, that these arguments were simply irrelevant to the applicable common law test. The Board had taken this position in 1999 in *Boston Medical*, where the employer had raised concerns similar to those raised by NYU, when it found that the parties could "identify and confront any issues of academic freedom as they would any other issue in collective bargaining" concluding that "unionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands."[16]

In the alternative, in the event that the Board determined that the public policy concerns raised by NYU were cognizable, the Union argued that NYU had provided no evidence to support its public policy concerns and that there was no other foundation for the fears expressed by the University. In this regard the Union sought, unsuccessfully, to introduce evidence concerning the experience with Assistants' unions at public universities. Assistants' unions have been recognized, in some cases for decades, at numerous universities including, among others, the University of Michigan, the University of California, the University of Massachusetts at Amherst, Rutgers and SUNY. The Union hoped to show that unionization at these institutions had not had the calamitous effects which NYU predicted would ensue if its Assistants were allowed to unionize.[17] In its brief, the Union also cited a study conducted by a professor from Tufts University showing that the overwhelming majority of faculty members at public universities with Assistants' unions did not believe that collective bargaining interfered with academic freedom or with their educational relationships with their graduate students.[18] Finally, and perhaps of greatest significance, the American Association of University Professors (AAUP), the largest professional organization of professors teaching at American universities, filed an *amicus* brief on behalf of the Union. It supported the right of Graduate Assistants to unionize and expressed its view that unionization would neither threaten academic freedom nor negatively effect the educational relationships of professors with their graduate students.

The Science Research Assistants

In its original petition, the UAW excluded Graduate Assistants at the Sackler Institute of Biomedical Sciences ("Sackler") because it did not believe that these Assistants, located at the geographically distinct medical campus, shared a sufficient community of interest with the other Graduate Assistants to be included in the bargaining unit. By the end of the hearing, however, it became apparent to the Union that the students at Sackler should be excluded from the bargaining unit on an altogether different basis, namely that they, and a smaller number of Research Assistants in science departments on the main campus (collectively "Science Research Assistants"), were not employees under the common law test.

From the start, NYU made the argument that none of the Graduate Assistants were employees under the Act. In the end, the Union found NYU's evidence convincing as to the status of the Science RAs. This evidence established that the Science RAs, like the RAs in *Leland Stanford*, do no work beyond what they are otherwise required to do in connection with the lab rotations and dissertation research which are at the core of their academic programs. Thus, the Union concluded, unlike the other Graduate Assistants at NYU, these Assistants do not perform a service for the benefit of NYU and are not employees under the Act. NYU, on the other hand, while arguing that none of the Graduate Assistants are employees, took the position that if any of them were found to be employees then all should be considered to be employees and should be included in a single bargaining unit.

The NLRB Decision

The NLRB, relying on *Boston Medical*, and the Supreme Court cases which have held that the term "employee" must be construed broadly under the Act, applied the common law test and found that, under this test, the NYU Graduate Assistants are employees entitled to the protections of the NLRA. The questions of whether the Assistants are "predominately students," or whether they receive an educational benefit as a result of their employment, were found to be irrelevant to this determination. The Board also affirmed the Regional Director's finding that, unlike the other Graduate Assistants, the Science RAs are not employees under the applicable common law test.

Rejecting NYU's reliance on the sheltered-workshop cases, which the Board found "evoke a profoundly different environment from that in which the graduate assistants work," the Board found NYU's public policy arguments to be without merit. Noting that the NLRA does not contain an exclusion for students, the Board

concluded that "there is no basis for denying collective bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students." In rejecting NYU's professed concerns about academic freedom, the Board noted that these concerns were speculative and were, in any event, amenable to collective bargaining which, as noted in *Boston Medical* was a dynamic institution "capable of adjusting to new and changing work contexts."[19]

Conclusion

In the wake of *NYU*, organizing efforts involving Graduate Assistants at private universities have picked up momentum around the country. Assistants at Columbia University, Brown and elsewhere have filed petitions with the NLRB seeking representation elections. While the universities at which Assistants are organizing have indicated their willingness to oppose these efforts vigorously, and even to attempt to relitigate many of the issues already decided in *NYU* and *Boston Medical*, there is every reason to believe that the unionization of Graduate Assistants will continue its march through American academia. In fact, inspired by the recent organizing efforts of Graduate Assistants, there has recently been increased interest in unionization among adjunct faculty, another group victimized by the changing academic job market. Faced with the growing reliance of American universities on low-cost student labor, and the uncertainty of the academic job market which awaits new graduates, there is every reason to believe that Graduate Assistants will continue to band together in an effort to improve their conditions, and that organizing in this sector will meet with continued widespread success.

Endnotes

1. NYU Teaching Assistants were mostly assigned to teach discussion or laboratory sections connected with larger lecture courses. Many others, however, were assigned as the teacher of record for stand-alone courses, particularly in the Expository Writing Program (freshman English composition) and introductory language courses. A more limited number were assigned to assist professors in lecture courses that did not have separate discussion or laboratory sections.
2. The NYU Research Assistants included in the certified unit are mostly graduate students in the social sciences and humanities who are assigned to individual professors to provide general research assistance. This assistance often took the form of mundane tasks such as locating source materials, photocopying and proofreading. There is another group of students classified as Research Assistants, primarily in the sciences, who were excluded from the certified unit as non-employees. This group is discussed below in greater detail.
3. NYU employees classified as Graduate Assistants include graduate students performing a diverse set of tasks including, *inter alia*, providing office assistance, performing a wide range of tasks in support of student theatrical performances, editing magazines, counseling undergraduates, and helping with recruitment and alumni relations functions.
4. *New York University and the United Auto Workers (NYU)*, 332 NLRB No. 111.
5. While Graduate Assistants at many public universities are unionized, and have been in some cases for decades, as public employees these Graduate Assistants are covered by state labor laws rather than the NLRA.
6. *Boston Medical Center*, 330 NLRB No. 30.
7. 223 NLRB 251 (1976).
8. 229 NLRB 1000 (1977).
9. 226 NLRB 1251 (1976).
10. There have also been numerous decisions, *e.g., San Francisco Art Institute*, in which the Board has declined to allow student employees to be included in the same bargaining units with non-student employees on community of interest grounds. *See, e.g., Adelphi University*, 195 NLRB 639 (1972); *Clark County Mental Health Center*, 225 NLRB 780 (1976). *But see University of West Los Angeles*, 321 NLRB 61 (1996) (allowing a combined unit of student and non-student employees where employment of students was not contingent on their status as students).
11. 214 NLRB 621 (1974).
12. One way in which NYU attempted to support this position was by arguing that it would be cheaper for the University to use Adjunct Instructors than Teaching Assistants to teach the laboratory sections, discussion sections, and stand-alone courses, to which it assigned Teaching Assistants. The Union countered this argument by pointing out that, in order to remain competitive, elite academic institutions like NYU have to fully fund most of their doctoral students. Insofar as these students must be funded anyway, it is cheaper to require them to work as a condition of their funding than to fully fund them and hire adjuncts, which is the real choice facing NYU.
13. The third element of the common law test, direction and control, was never in dispute. Insofar as NYU argued that Assistantships were really guided educational experiences, it conceded that the tasks performed by Graduate Assistants were performed under the direction and control of University faculty.
14. *See e.g., Goodwill Industries of Tidewater*, 304 NLRB 767 (1991); *Goodwill Industries of Denver*, 304 NLRB 764 (1991); *Key Opportunities, Inc.*, 265 NLRB 1371 (1982); *Goodwill Industries of Southern California*, 231 NLRB 536 (1977).
15. *See N.L.R.B. v. Town and Country*, 516 U.S. 85 (1995) (applying the common law test to find that an employee who is also a paid union organizer is an employee under the Act); *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984); *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981).
16. *Boston Medical* at 13-14.
17. NYU argued that the experience at public universities was irrelevant because, where state courts had allowed Assistants to unionize, they relied on state labor laws which were dissimilar in a number of respects from the NLRA. Specifically, a number of the state labor laws at issue prohibited public employees from striking and/or proscribed acceptable areas for collective bargaining in ways which did not exactly parallel the NLRA.
18. Hewitt, *Graduate Student Unionization: A Description of Faculty Attitudes and Beliefs*, Annual Forum of the Association for Institutional Research (1999).
19. In a separate concurrence, Board Member Hurtgen, who had dissented in *Boston Medical*, stated that he supported the majority in *NYU*. Unlike the situation in *Boston Medical*, he said, where work with patients was a necessary part of the medical training, serving as an Assistant at NYU was not a degree requirement for the vast majority of individuals at issue.

Carl Levine is an associate at the firm of Levy, Ratner & Behroozi in New York City, where he represents unions in labor and employment disputes.

New York State Labor Law Legislative Update

By Geraldine A. Reilly

It is my pleasure to resume this regular update of recent state law changes relevant to the labor and employment law community. The new laws cover a wide range of state labor law and employment-related issues. This selection is intended to acquaint interested readers with the fundamental statutory changes of laws passed in the year 2000 legislative session.

Further information regarding legislative proposals, whether considered, signed into law or vetoed can be found in the sponsor's memorandum, or in signing or veto messages. Copies of the legislation can be obtained from members of the Legislative Section, the legislature's public information staff, or McKinney's Session Laws by chapter number for the year in question. Current proposals can now be found on the Assembly's Internet Web site at www.assembly.state.ny.us.

1. A.7464-B (Cahill)/S.4085-B (Bonacic)

This bill was crafted to assist and protect public safety workers who are exposed to blood or other bodily fluids in the course of their employment. The term "public safety worker" has an expansive meaning in this bill and is not limited to the named categories of firefighter, emergency medical technician, police officer, correction officer, driver and medical observer. The bill would afford these workers medical assistance upon exposure to a potential pathogen, rather than upon the onset of manifestations of an illness. The bill passed the Assembly on June 12, 2000 and the Senate on June 14, 2000. It was signed into law as Chapter 559 of the Laws of 2000 on Nov. 1, 2000.

2. A.7981 (Rules-Nolan)/S.8111 (Spano)

This bill was drafted in response to indications of serious problems in enforcing the Prevailing Wage portions of the Labor Law. Supporters of the bill said it would address the problems in the bidding procedure for construction and renovation of buildings, where contractors submitted unrealistically low bids for work, intentionally calculating the labor costs for construction at under the legal wage. The bill provided that, when there was more than a 10% differential in bid calculations between the two lowest bidders, the lowest bidder would have to provide proof of a commitment to pay the legal wage on the project prior to the award. The bill was vetoed on Nov. 15, 2001 by Veto Message #53.

3. A.8602 (Butler)/S.3315 (Spano)

This bill provided authority to the New York State Insurance Fund to diversify the Workers' Compensation payment premium options offered to Fund customers. It contemplates a more "customer-friendly" installment plan, to accommodate the payment needs of various employers. The Fund is considered the insurer of last resort for employers in New York State seeking to purchase Workers' Compensation insurance on behalf of their employees. The bill was passed by the Senate on March 27, 2000 and by the Assembly on June 15, 2000. It was signed into law as Chapter 149 of the Laws of 2000 on July 18, 2000.

4. A.8963-A (Rules-Schimminger)/S.4908-A (Farley)

This bill authorized the release of certain information, previously classified as confidential under the Workers' Compensation Law, to an insurer or health benefit plan under certain conditions. The records would be available for inspection by agents of the insurer or health benefit plan to determine entitlement to reimbursement for payments made on behalf of an employee for medical and/or hospital services. The bill was passed by the Senate and Assembly on June 14, 2000, and was signed into law on Oct. 4, 2000 as Chapter 536 of the Laws of 2000.

5. A.9529 (Nolan)/S.6539 (Spano)

This bill amended the Labor Law to recalculate the amount an employee must earn in a base period to be eligible for Unemployment Insurance benefits. The bill was drafted in response to an unexpectedly high disqualification rate among seasonal workers after the Unemployment Reform Act of 1998 was enacted. In addition, the bill establishes a new penalty structure for employers who fail to submit wage information needed to establish the wage reporting data exchange. The data is essential to accurately calculate benefits for the unemployed worker benefits. The bill passed the Senate and the Assembly on Feb. 14, 2000, to be signed into law as Chapter 5 of the Laws of 2000, on Feb. 15, 2000.

6. A.9787-C (Nolan)/S.6539-C (Skelos)

This bill amended the Workers' Compensation Law, and relates to the accounting standards used in calculating premium assessments on funds administered by the Workers' Compensation Board. It applies to the Fund for Concurrent Employment, the Reopened Case Fund, the Aggregate Trust Fund, the Non-Resident Compensation Fund, the Uninsured Rehabilitation Fund and the Special Disability Fund.

The bill also changed accounting terminology used in assessing the surcharge for administrative expenses of the Workers' Compensation Board. The changes were required to conform the state statute to accounting standards issued by the Financial Accounting Standards Board. The bill is similar to the accounting changes introduced into statue by Chapter 188 of the Laws of 1999.

It was passed on June 13, 2000 in the Senate and on June 22, 2000 in the Assembly. It was signed into law on Oct. 4, 2000 as Chapter 510 of the Laws of 2000.

7. A.10250-A (Rules-Nolan)/S.7198-C (Rules)

This bill established a statutory minimum cash wage for food service workers subject to the New York State Department of Labor Wage Orders. This includes workers who serve food or beverages to guests, patrons or customers in the hotel or restaurant industries, and also applies to wait staff, bartenders, captains, and bussing personnel. These employees must receive at least the state statutory minimum wage of $5.15 per hour. This category of worker would be subject to a minimum of $3.30 in cash, if in combination with tips, they received the state minimum wage or more than the minimum wage.

In addition, the bill calls for the creation of a Wage Board within six months of any subsequent minimum wage increase to examine issues relevant to the Wage Order for Food Service Workers. The bill passed the Senate and Assembly, to be signed into law on March 31, 2000 as Chapter 14 of the Laws of 2000.

8. A.11275 (Rules-Nolan)/S.6935 (Marcellino)

This bill, an effort to ensure payment of the legal rate on public works projects, called for a daily head count of workers performing services on a prevailing wage construction site. The engineer-in-charge, or the agent having direct supervision of the execution of the construction contract, would have been required to prepare and submit a daily summary of workers and their classifications.

The bill passed the Senate on June 14, 2000 and the Assembly on June 15, 2000. It was vetoed on Nov. 15, 2000 by Veto Message #50.

9. A.11279 (Mazzerelli)/S.7932 (Spano)

This bill extended the sunset, or expiration, date for Chapter 831 of the Laws of 1981 until Dec. 31, 2002. That section of the Labor Law, dealing with the representation of those applying for Unemployment Insurance benefits would have expired on Dec. 31, 2001. The bill allows the Department of Labor, in cities with a population of more than 1 million, to maintain lists of qualified individuals interested in representing workers in related administrative hearings. It passed the Senate on June 7, 2000 and the Assembly on June 14, 2000. It was signed into law as Chapter 339 of the Laws of 2000 on Aug. 23, 2000.

10. A.11306 (Rules-Nolan)/S.8112 (Rules)

This bill extended the sunset, or expiration, date for Chapter 635 of the Laws of 1996 for one year. That law established a pilot program to improve the quality of care and contain the costs of Workers' Compensation health care, through a carefully monitored Managed Care program.

Initially established by Chapter 729 of the Laws of 1993, the program would otherwise have expired on Dec. 31, 2000. The bill passed the Assembly on June 13, 2000 and the Senate on June 14, 2000. It was signed by the Governor on Sept. 20, 2000.

11. A.11358 (Rules-Nolan)/S.8192 (Spano)

This bill amended the Public Authorities Law to permit public authorities to incorporate a requirement that bidders and their subcontractors participate in apprenticeship programs approved by the New York State Department of Labor into their bidding guidelines for public work contracts. The bill passed the Assembly and Senate on June 22, 2000. It was delivered to the Governor on Nov. 27, 2000 and received Veto #72 on Dec. 8, 2000.

12. A.11435 (Rules-Nolan)/S.8133 (Spano)

This bill amended the Labor Law to establish a new type of whistleblower protection in the health care industry. It would protect health care workers from retaliatory personnel actions such as dismissal, discharge, suspension or demotion, if those actions were in reprisal for whistleblowing activity.

The bill passed the Senate on June 14, 2000 and the Assembly on June 15, 2000. It was delivered to the Governor on Dec. 29, 2000. Since the Governor did not act on the proposal within 30 days it was returned to the legislature as a pocket veto.

13. A.11473 (Rules-Nolan)/S.8176 (Rules)

This bill expanded the investment authority of the State Insurance Fund, a quasi-state entity which issues Workers' Compensation insurance in the state market. The Fund had previously been limited to the ability to invest in secure, low-yield instruments. This bill allowed the Fund a more liberal investment array, including corporate bonds. It also established a procedure to regulate the Independent Medical Examinations frequently required by employers or insurance carriers under the rules of the Workers' Compensation system. The bill passed the Senate and Assembly on June 14, 2000, and was signed by the Governor on Sept. 20, 2000 as Chapter 473 of the Laws of 2000.

14. A.4779 (D.Butler)/S.492 (Onorato)

This bill specified certain information to be included in workplace warning signs required by OSHA concerning toxic materials handled by workers. The bill directed the Department of Health to work with the Department of Labor in the development of sign content and display, which pertained to information workers should know about relevant toxic material. It specified the size of lettering for the signs and that each sign should include

the words, "YOU HAVE A RIGHT TO KNOW." Information to be available to each worker included the name of the toxic substances, the immediate and long-term effects of exposure at hazardous levels, the symptoms of exposure at hazardous levels, proper conditions for safe use and exposure to these substances, appropriate emergency treatment and procedures for cleanup of spills and leaks of such toxic substances.

The bill passed the Assembly on April 17, 2000 and the Senate on June 14, 2000. It was vetoed by Veto Message #56 on Nov. 21, 2000.

Geraldine A. Reilly is Associate Counsel for Labor at the New York State Assembly. The views expressed are her own and do not necessarily reflect those of the legislature or any member of the legislature.

ETHICS MATTERS:
Using Undercover Investigators/Discrimination Testers: Any Ethical Problems?

By John Gaal

Occasionally, lawyers turn to private investigators and/or discrimination testers to accomplish their objectives. These investigators and testers, in turn, often rely on deceit to carry out their tasks. Can this use of investigators/testers present any ethical issues for the lawyers employing them? DR 1-102(A) of the New York Code of Professional Responsibility provides that a "lawyer . . . shall not [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation," nor shall a lawyer "circumvent a Disciplinary Rule through actions of another." The little commentary which does exist on this subject typically argues that, especially given the societal purposes served by the use of testers to uncover discrimination, "the ends justify the means" and the ethical rules should be interpreted in such a manner as to permit some degree of deceit, even if it otherwise conflicts with the Code of Professional Responsibility.[1]

Although in a different context, at least one court in New York has rejected the "ends justify the means" defense to an ethics charge. *In re Malone*,[2] which arose in the context of using a private investigator, indicated that while it was permissible for a defense lawyer to employ a private investigator to "befriend" a prosecution witness post-trial, to determine whether perjured testimony was used at trial, it emphasized that a lawyer must not be a party to "conduct involving deceit or misrepresentation," and that if "inquiry is made by the witness as to whom the investigator represents, he should, of course, disclose the lawyer-principal." The Supreme Court of Oregon also recently refused to read into that state's analogue to DR 1-102(A) any exception to the proscription against deceit that would allow the use of deception in this investigatory context.[3]

Contrastingly, a recent opinion issued by the Committee on the Rules of Professional Conduct of the State Bar of Arizona, arising specifically in the tester context, condoned the use of such limited deceit to "protect society from discrimination based upon disability, race, age, national origin, and gender." And in a seemingly overbroad construction of the New Jersey rules, the court in *Apple Corps. Ltd. v. International Collectors Soc.*,[4] concluded that, under New Jersey RPC 8.4(c), "misrepresentations solely as to identity or purpose and solely for evidence gathering purposes" are not prohibited. In *Gidatex v. Campaniello Imports, Ltd.*,[5] the court also provided some condonation of deceit in the context of private investigators. It observed that "[t]he use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation," did not violate the Code of Professional Responsibility. The court held that the

> policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys. The presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made.

The differences of opinion on this subject strongly suggest that before embarking down a path of using investigators and/or testers to pose as someone they are not, the practitioner should undertake a thorough review of these authorities to ensure that he or she is not crossing over the line.

Endnotes

1. *See, e.g.*, Isbell and Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (1995).
2. 105 A.D.2d 455 (3d Dep't 1984). NYSBA Comm. on Professional Ethics, Formal Op. 402 (1975).
3. Opinion No. 99-11 (1999).
4. 15 F. Supp. 2d 456 (D.N.J. 1999).
5. 82 F. Supp. 2d 119 (S.D.N.Y. 1999).

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

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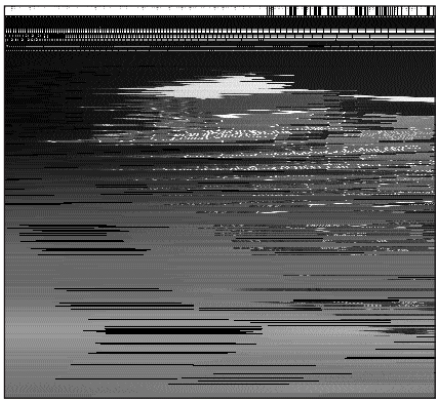

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Thank you for your cooperation.

Janet McEneaney
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