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L&E Newsletter

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A Message from the Outgoing Chair

As my year as Chair winds to a close, I am happy to report on a number of important developments within the Section. First, I note that the Section will be moving into excellent hands. On June 1, 2004, Chair-Elect Pearl Zuchlewski begins her term as Chair. Pearl will be succeeded by Richard Zuckerman, who on June 1 will officially assume the post of Chair-Elect, having been elected at the Section's Annual Meeting last January. The process of naming a Chair-Elect a full year in advance has been a great benefit to the Section. The system has enabled each of us, before becoming Chair, to be directly involved in the Section's operations and to make a smooth transition. Dick Chapman, my predecessor, was wonderfully generous in this regard, and I have endeavored to carry on the tradition. Pearl was very active as Chair-Elect and, before that, as a Co-Chair of the EEO and the ADR Committees. Rich has served for several years as CLE Chair, which is the most demanding of all committee

(Continued on page 24)

A Message from the Incoming Chair

This is my first Newsletter Message from the Chair. I am very grateful for this opportunity to serve as Chair of our Section and to work with past Chairs, the Executive Board and our members. This column looks back at our Section's past accomplishments and forward to its new challenges.

A Tradition of Collegiality

Our Section has demonstrated a remarkable ability to grow and to adapt to a changing legal environment. When our Chair Emeritus Frank Nemia and others founded this Section in 1975, its focus was labor management relations in the public and private sectors. Skeptics wondered whether attorneys representing the divergent interests of employers and unions possibly could work together. With the help of the neutrals and academics who historically have played an important role in our Section, our members quickly demonstrated their commitment to professionalism and consensus. The Section soon became a presence in the New York State Bar Association.

(Continued on page 26)

Inside

From the Editor

I am happy to welcome Pearl Zuchlewski as Chair of our Section and look forward to working with her.

Thank you, also, to the authors of this issue's articles: John Gaal for his Ethics Matters column; Robert Lewis for an updated look at mandatory pre-dispute arbitration; Phil Maier for the PERB Update; Rick Stewart on the Clean Indoor Air Act and workplace smoking policies; and Rob Stulberg and Amy Shulman with their article on representing Americans employed abroad.

I was happy that many of you responded to my question in the last issue about the format and contents of the Newsletter. All the members who replied said they were pleased to have more articles to read. However, I have also been told that some people miss the photos of section meetings. We will try to remedy that beginning with the section meeting in October. Please let me know if you feel the lack of any other features.

Because of some unforeseen constraints, the editor's message is shorter than usual in this edition. It will be back to normal in the next.

Janet McEneaney

Representing Americans Employed Abroad: The Extraterritorial Application of Federal and State Anti-Discrimination Laws

By Robert B. Stulberg and Amy F. Shulman

Introduction

More than two million American citizens work in civilian jobs outside the United States.[1] Those expatriate workers are employed in a variety of industries, including banking, technology, education and construction.[2] Many of them work in foreign offices of American-based corporations; others are employed by foreign corporations. While federal and New York State laws prohibiting employment discrimination generally apply to workers employed in the United States or New York State, respectively, those laws may or may not protect American citizens employed abroad. Whether those laws apply outside of the United States can turn on a number of factors, including the type of discrimination alleged; the structure of the corporate employer, the residence of the affected employee, the nature of the foreign assignment, and/or the locus of the discriminatory acts.

In this article, we will examine the principal federal and New York State laws prohibiting employment discrimination[3] and their application to American citizens working outside of the United States. This examination is more than academic. Americans who suffer discrimination while employed abroad may find remedies under American law that are unavailable under the laws of their host country.[4] Moreover, such victims of discrimination may be able to assert concurrent claims under American and foreign statutes, and thereby gain strategic and substantive advantages. Assertion of such concurrent claims, in our experience, can broaden an expatriate claimant's discovery rights, potential damages, and leverage in settlement negotiations. As a general matter, federal courts faced with such concurrent claims will exercise their jurisdiction concurrently with the foreign courts handling the related litigation.[5]

Because the extraterritorial application of anti-discrimination laws depends in large measure on statutory language and legislative history, we will address each law separately (except for Title VII and the ADA, which will be addressed together because they are applied in the same manner outside the United States).

The Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA)[6] was the first of the federal employment discrimination statutes to apply beyond United States borders. Enacted in 1967, the ADEA prohibits employment discrimination on the basis of age, providing:

> It shall be unlawful for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.[7]

The ADEA allows recovery of consequential damages (amounts owing as a result of the ADEA violation),[8] liquidated damages for willful violations of the ADEA by a private-sector employer,[9] and attorneys' fees and costs.[10]

The ADEA defines "employer" as a "person in an industry affecting commerce" and having a certain minimum number of "employees," now set at 20.[11] The ADEA originally defined "employee" as "an individual employed by any employer," with certain exceptions.[12] As originally enacted, the ADEA did not explicitly permit or preclude extraterritorial application.[13]

Prior to 1984, several federal courts of appeal held that the ADEA, as originally enacted, did not apply to Americans employed abroad by American employers.[14] Those courts based their rulings on Section 7 of the ADEA,[15] which incorporates certain remedial provisions of the Fair Labor Standards Act (FLSA), including Section 216(d), 29 U.S.C. § 216(d), which exempts from FLSA coverage work performed in a foreign country.[16] The courts rejecting extraterritorial application of the ADEA reasoned that the ADEA's reference to 29 U.S.C. § 216(d) evidenced congressional intent to exempt foreign workplaces from ADEA coverage.[17]

In response to those decisions, Congress, in 1984, amended the ADEA "'to assure that the provisions of the ADEA would be applicable to any citizen of the United States who is employed by an American employer in a workplace outside the United States.'"[18] The 1984 amendments accomplished this objective by expanding the definition of "employee" in Section 11(f) of the ADEA[19] to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.'"[20]

The 1984 amendments, however, restricted the extraterritorial reach of the ADEA to employees working in a foreign country for an employer controlled by an American corporation.[21] Specifically, the 1984 amendments added a new subsection (h) to Section 4 of the ADEA,[22] which provides:

> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.
>
> (2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.
>
> (3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the
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> (A) interrelation of operations,
>
> (B) common management,
>
> (C) centralized control of labor relations, and
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> (D) common ownership or financial control, of the employer and the corporation.

Thus, the ADEA covers employment in a foreign country when the employee is an American citizen working or applying for work with an employer that is, or is controlled by, an American corporation.[23] The ADEA will not protect an American (or foreign) citizen working abroad for a foreign employer, including a foreign parent of an American subsidiary.[24] Nor will the ADEA protect a non-American citizen working abroad for an American corporation.[25]

The extraterritorial application of the ADEA will not be affected by the locus of the claimed discriminatory conduct. In *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, for example, a Chinese citizen legally residing in the United States applied and interviewed in New York City for a position as an attorney with the defendant in Beijing and Hong Kong.[26] The plaintiff brought an ADEA claim for the defendant's refusal to hire the plaintiff for those positions. The Southern District of New York held that the plaintiff, as a non-citizen, could not bring an ADEA claim for employment to be performed outside of the United States, even if the defendant made its allegedly discriminatory hiring decision in New York.[27]

In sum, an American citizen who is subject to age discrimination in his or her employment abroad for an American company or an American-controlled company can, assuming he or she meets the other jurisdictional requirements of the statute, bring an action in the United States under the ADEA to redress that discrimination.

Title VII of the Civil Rights Act and the Americans with Disabilities Act

Title VII of the Civil Rights Act[28] and the Americans with Disabilities Act (ADA)[29] also apply, in certain circumstances, to American citizens working abroad. Title VII makes it an "unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."[30]

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[31]

Title VII and the ADA authorize the recovery of compensatory damages, including front pay and emotional pain and suffering, punitive damages, consequential damages, and attorneys' fees and costs.[32] The amount of compensatory and punitive damages, however, are capped according to the size of the employer. For an employer with more than 500 employees, the sum of compensatory and punitive damages cannot exceed $300,000 per plaintiff.[33]

Like the ADEA, Title VII and the ADA, as originally enacted, did not expressly authorize or preclude extraterritorial application of those statutes. Both Title VII and the ADA prohibit discrimination by an "employer," which is defined as a "person engaged in an industry affecting commerce who has fifteen or more employees . . . ."[34] The original language of Title VII and the ADA defined an employee as "an individual employed by an employer," with certain exceptions.[35]

In 1991, in *Equal Employment Opportunity Commission v. Arabian Am. Oil Co.*, the Supreme Court held that Title VII did not protect United States citizens working abroad.[36] The Court held that federal laws may be applied extraterritorially only if they expressly authorize such application, and that the language of Title VII contained no such authorization.[37]

Shortly after the *Arabian Am. Oil Co.* decision, Congress enacted the Civil Rights Act of 1991, in part to

"strengthen and improve Federal civil rights laws."[38] Section 109 of the Civil Rights Act of 1991, entitled "Protection of Extraterritorial Employment," expressly extended the reach of Title VII and the ADA to American citizens working in foreign countries.[39]

The Civil Rights Act of 1991 expanded the definition of "employee" in Title VII[40] and the ADA[41] by adding the phrase, "[W]ith respect to employment in a foreign country, such term [employee] includes an individual who is a citizen of the United States."[42] The Civil Rights Act of 1991 also authorized extraterritorial application of Title VII and the ADA by adding the following language to those statutes: "If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by [this statute] engaged in by such corporation shall be presumed to be engaged in by such employer."[43] Whether an employer controls a corporation within the meaning of the foregoing provision depends upon the interrelation of operations, common management, centralized control of labor relations, and the common ownership or financial control of the employer and the corporation.[44] The Civil Rights Act of 1991 also added language to Title VII and the ADA stating that they "shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer."[45]

Title VII and the ADA, therefore, apply extraterritorially when "the employee is a United States citizen . . . and the employee's company is controlled by an American employer."[46] Title VII and the ADA do not apply to an American (or foreign) citizen working abroad for a foreign employer, including a foreign parent of an American subsidiary.[47] Further, although non-citizens working in the United States are covered by Title VII and the ADA,[48] non-citizens working abroad for an American company are not protected by those statutes.[49]

In *Torrico v. International Bus. Machines Corp.*,[50] the Southern District of New York considered whether a temporary assignment abroad constituted foreign employment for the purpose of applying the ADA extraterritorially. The plaintiff, a non-United States citizen who was employed in the United States by an American corporation, had been temporarily assigned to work in Chile. The issue presented was whether the foreign assignment rendered the plaintiff a non-citizen employed abroad, who would not be covered by the statute, or a non-citizen employed in the United States, who would be covered by the statute. Applying traditional contract law principles, the Court examined the totality of the circumstances to determine the "center of gravity" of the employment relationship.

Although *Torrico* involved a non-United States citizen, the "center of gravity" test employed in that case could be used to ascertain the place of employment of a United States citizen employed in the United States by a foreign corporation, but temporarily assigned to work abroad. If the center of gravity of such an employment relationship was found to be the United States, then the United States citizen could assert claims under Title VII and the ADA. If the center of gravity was found to be the foreign workplace, then Title VII and the ADA would not apply to the foreign corporation's discriminatory acts.

In sum, an American citizen who is subject to discrimination on the basis of sex or disability while employed abroad by an American company or a company controlled by an American employer can, assuming he or she meets the other jurisdictional requirements of those statutes, bring an action in the United States under Title VII or the ADA, respectively, to redress that discrimination.

Section 1981

Section 1981[51] is a general civil rights statute which prohibits race discrimination in, among other contexts, employment.[52] Section 1981, which was enacted by the Civil Rights Act of 1866 and amended by the Voting Rights Act of 1870, grants "[a]ll 'persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts . . .'" Section 1981 allows a prevailing plaintiff to recover consequential damages, uncapped compensatory and punitive damages, and attorneys' fees. [53]

The Supreme Court, in *Patterson v. McLean Credit Union*,[54] held that Section 1981 did not prohibit racial harassment or other forms of racial discrimination in the employment context. Congress enacted the Civil Rights Act of 1991, in part, to overrule *Patterson* and amend Section 1981 to expressly prohibit all forms of racial discrimination in employment. Specifically, the Civil Rights Act of 1991 expressly defined the phrase "make and enforce contracts" in Section 1981, to include the "making, performance, modification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[55] The Civil Rights Act of 1991 strengthened Section 1981 by amending it to cover, in the employment context, "the claims of harassment, discharge, demotion, [lack of] promotion, transfer, retaliation, and hiring" based on race.[56] The Civil Rights Act of 1991, however, did not address extraterritorial application of Section 1981, as it did for Title VII and the ADA.

The federal courts have refused to apply Section 1981 to persons working outside of the United States.[57] Courts have held that the plain language of Section 1981, granting rights to all "persons within the jurisdic-

tion of the United States" and "in every State and Territory," expressly confines the reach of Section 1981 to the United States.[58]

Courts have also examined the legislative history behind Section 1981 and found that it evidenced no congressional intent to apply Section 1981 outside of the United States. In *Theus v. Pioneer Hi-Bred Int'l, Inc.*, the Southern District of Iowa examined Section 1981's enabling statute, the Civil Rights Act of 1866, which granted "citizens," defined as persons born in the United States, certain rights within the United States.[59] The Court observed that, although the Voting Rights Act of 1870 amended Section 1981 to change "citizens" to "persons" and thereby extend the protections of the statute to aliens, the 1870 amendment did not change the statute's reference to "every State and Territory."[60] Therefore, the Court concluded, the legislative history of Section 1981 does not show a congressional intent to expand the statute's scope beyond United States boundaries.[61]

In sum, Section 1981 cannot be applied to American citizens employed outside of the United States, and an employment discrimination claim under that statute must arise out of occurrences within the United States.[62]

New York State Human Rights Law, N.Y. Executive Law § 296 (NYSHRL)

The NYSHRL is the central anti-discrimination statute under New York State law. That statute provides, at N.Y. Exec. L. § 296(1)(a), that it shall be "an unlawful discriminatory practice":

> [f]or an employer or licensing agency because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The NYSHRL authorizes the recovery of uncapped compensatory and consequential damages, but no punitive damages or attorneys' fees.[63] Thus, the NYSHRL, which may be enforced through a plenary action in state court, a pendent state claim in federal court or a state administrative proceeding, offers claims and damages unavailable under federal anti-discrimination laws, i.e., unlimited compensatory damages and protection from discrimination on the basis of sexual orientation and genetic predisposition.

The NYSHRL can be applied extraterritorially, i.e., outside of New York State, in circumstances quite different than those that permit extraterritorial application of the ADEA, Title VII and the ADA. Section 298-a of the NYSHRL states that the law applies to acts of discrimination: (1) committed in New York State; or (2) committed extraterritorially by a state resident or a non-state resident against a New York State resident.[64] Discrimination committed extraterritorially by a non-resident gives a state resident the right to an administrative proceeding before the New York State Division of Human Rights,[65] while discrimination committed extraterritorially by a state resident against a state resident gives the state resident the right to a private civil action.[66]

To show that discrimination was "committed" in New York State for the purposes of Section 298-a of the NYSHRL , a plaintiff employed outside of New York must show that the decision to act in a discriminatory manner originated in New York.[67] This is a difficult standard to meet. In *Iwankow v. Mobil Corp.*, the plaintiff claimed that he was discriminated against on the basis of age after he was employed by the defendant in England for three and one-half years and then terminated as part of a worldwide reduction in force.[68] The Appellate Division, First Department held that the plaintiff could not state a claim under the NYSHRL—even though the termination occurred as "part of a worldwide reduction in force . . . decided upon at corporate headquarters in New York"—without an allegation that "the decision to implement the reduction in force in an age-discriminatory manner originated at corporate headquarters."[69]

If an employee employed outside of New York State cannot show that the discrimination at issue was "committed" in New York State, he or she can assert an NYSHRL claim only by showing that he or she is a New York State resident.[70] The NYSHRL, however, does not define the term "resident" for the purposes of Section 298-a. In *Torrico*, the Southern District of New York observed that, where, as in the NYSHRL, "a statute prescribes 'residence' as a qualification for a privilege or the enjoyment of a benefit, New York courts have interpreted the statutory term 'residence' to mean 'domicile.'"[71]

Domicile, in turn, is defined as residence or physical presence in New York State plus an intent to remain in the state indefinitely,[72] or an intent to return to the state from some other location.[73] A trip to or a stay in a foreign country, "'no matter how long continued, without any intention of remaining there permanently,' does not result in a change of domicile."[74] Courts generally ascertain domicile by considering the "'the entire course of a person's conduct,'" including, but not limited to, "the place of his family times, voter registration, tax lia-

bility, driver's license and vehicle registration, business activities, bank accounts, social activities and religious affiliations."[75]

In the context of foreign employment of American citizens, courts have adopted a "strong presumption in favor of a domestic [U.S.] domicile rather than a foreign domicile.[76] That presumption appears to only hold, however, if the plaintiff exhibits an intention to return to the United States. In *Kavowras v. Pinkerton, Inc., U.S.A.*, the plaintiff, a native New Yorker, sued for defamation after his employment was terminated in China. The plaintiff paid taxes in New York State, listed his family's Brooklyn, New York, house as his permanent residence on his visa, had a New York State driver's license, registered his car in New York State, maintained a bank account in New York State, and was certified as an emergency medical technician in New York State. The Southern District of New York found, however, that the plaintiff lacked domicile in New York State for the purposes of diversity jurisdiction, because the plaintiff had no articulable plan to return to the state permanently, as evidenced by the fact that he obtained employment with two other companies in China after the defendant had terminated his employment there.[77]

Significantly, although non-United States citizens working for an American employer abroad cannot bring an action under federal anti-discrimination laws, they may be able to bring an action under the NYSHRL, if they can show domicile in New York State.[78] In *Torrico*, a Chilean citizen resided in New York State before commencing a four-year temporary assignment to Chile for a New York employer. During that temporary assignment, the plaintiff's employment was terminated. The Southern District of New York held that the plaintiff could claim domicile in New York State because the plaintiff had, prior to the temporary assignment, resided and worked in New York and because the assignment to Chile was temporary. Accordingly, the Court held, even if the alleged discrimination was committed outside of New York State, the plaintiff could pursue a claim under the NYSHRL as a New York resident.[79]

Conclusion

The ADEA, Title VII, the ADA and the NYSHRL can, under certain circumstances, offer significant protection to American citizens and/or New York State residents who suffer discrimination while working abroad. If those statutes can be applied extraterritorially, they can provide expatriate workers with claims, remedies, discovery and litigation advantages that may be otherwise unavailable. Applying these anti-discrimination statutes to expatriate workers, however, requires careful legal and factual analysis, given the many variables that bear upon the issue.

Endnotes

1. Lay & Leerburger, Jobs Worldwide, Impact Publications (1995) at 1; University of Cincinnati E-Briefs, http://www.uc.edu/news/ebriefs/new.htm. More precise data on America's foreign-based civilian workforce are unavailable, as, surprisingly, the United States Census Bureau, Labor Department, Commerce Department and State Department do not maintain such data.
2. *Id.*
3. Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (ADEA) prohibits age discrimination; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.* ("Title VII") prohibits race, color, religion, sex, national origin, and sex discrimination; Americans with Disabilities Act of 1991, 42 U.S.C. § 12101, *et seq.* (ADA) prohibits disability discrimination; 42 U.S.C. § 1981 ("Section 1981") prohibits race and color discrimination; and New York State Human Rights Law, N.Y. Exec. L. § 296(1) ("NYSHRL") prohibits race, color, religion, sex, national origin, sexual orientation, disability, and age discrimination.
4. The United Kingdom, for example, has no law prohibiting age discrimination. In October 2000, however, the U.K. government supported the European Union Directive on Equal Treatment, and committed to implementing such legislation by 2006. The E.U. Directive required all member states to introduce legislation prohibiting direct and indirect age discrimination in employment and training. It remains to be seen how the U.K.'s legislation will compare to federal and New York State age discrimination laws. *See* British Council website, at http://www.britishcouncil.org/diversity/age_legislation.htm
5. *See Sapient Corp. v. Singh*, 149 F. Supp. 2d 55 (S.D.N.Y. 2001) and the cases cited therein. In *Sapient*, the American defendant (Singh) had worked in the English operations (Sapient Ltd.) of the American plaintiff (Sapient Corp.). Singh commenced an action in the United Kingdom against Sapient Ltd. for wrongful termination and wrongful cancellation of his stock options. Sapient Corp. then commenced an action in the United States against Singh for injunctive relief for breach of a non-disclosure, non-compete agreement. The Court refused to stay the U.S. action pending resolution of the U.K. action, because the U.S. action presented broader issues than those presented in the U.K. Specifically, while Singh's pre-termination conduct was at issue in both actions, his post-termination conduct was at issue only in the U.S. The Court also noted that injunctive relief was not available in the U.K. and that American witnesses could only be compelled to appear in the U.S. action. *Id.*
6. 29 U.S.C. § 621. *et seq.*
7. 29 U.S.C. § 623(a).
8. 29 U.S.C. § 626(b).
9. 29 U.S.C. § 626(b); *see Grandison v. U.S. Postal Serv.*, 696 F. Supp. 891 (S.D.N.Y. 1988).
10. 29 U.S.C. § 626(b), incorporating remedies available under 29 U.S.C. § 216 (the Fair Labor Standards Act), which allows for recovery of reasonable attorneys' fees; *see also Detje v. James River Paper Corp.*, 167 F. Supp. 2d 248 (D. Conn. 2001).
11. 29 U.S.C. § 630(b). Under the original language of the ADEA, an entity was deemed an employer if it employed at least 25 employees. *See Morelli v. Cedel*, 141 F.3d 39, 44 (2d Cir. 1998). In 1974, that threshold was lowered to 20 employees. *Id.* For a brief period of time prior to 1974, the threshold was set at 50 employees. *Id.*
12. *Morelli*, 141 F.3d at 44.

13. *Denty v. Smithkline Beecham Corp.*, 109 F.3d 147 (3d Cir. 1997).

14. *Cleary v. United States Lines, Inc.*, 728 F.2d 607, 610 (3d Cir. 1984), *superseded by statute*; *Zahourek v. Arthur Young & Co.*, 750 F.2d 827, 828–829 (10th Cir. 1984), *superseded by statute*; *Thomas v. Brown and Root, Inc.*, 745 F.2d 279 (4th Cir. 1984), *superseded by statute*; *see also Pfeiffer v. W.M. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985), *affirmed by* 573 F. Supp. 458 (N.D. Ill. 1983); *Osborne v. United Technologies Corp.*, 16 F.E.P. 586 (D. Conn. 1977); *see also Lopez v. Pan Am World Servs., Inc.*, 813 F.2d 1118 (11th Cir. 1987) (ADEA did not have extraterritorial effect prior to its amendment), *superseded by statute*; *S.F. De Yoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986), *superseded by statute; Ralis v. FRE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985), *superseded by statute; Wolf v. J.I. Case Co.*, 617 F. Supp. 858 (E.D. Wis. 1985).

15. 29 U.S.C. § 626.

16. *See* 29 U.S.C. § 216(d) (incorporating the foreign country exemption of 29 U.S.C. § 213(f)).

17. *Cleary*, 728 F.2d at 610; *Zahourek*, 750 F.2d at 828–829.

18. *Denty*, 109 F.3d at 149; *Morelli*, 141 F.3d at 42–43.

19. 29 U.S.C. § 630(f).

20. Pub. L. 98-459, § 802(a) (1984); *see Denty*, 109 F.3d at 150.

21. S. Rep. No. 98-467, *reprinted in* 1984 U.S.C.C.A.N. 2974, 3000; *see also Morelli*, 141 F.3d at 43.

22. S. Rep. No. 98-467, *reprinted in* 1984 U.S.C.C.A.N. 2974, 3000.

23. *Denty*, 109 F.3d at 151.

24. *Id.*, holding that the ADEA did not cover an American citizen who worked abroad for a foreign parent of an American subsidiary. The ADEA also protects citizens and non-citizens working for the U.S. operations of foreign corporations. *Morelli*, 141 F.3d 39; *Hansen v. Danish Tourist Board*, 147 F. Supp. 2d 142 (E.D.N.Y. 2001).

25. *Denty*, 109 F.3d at 147, 150–151 (affirming district court's ruling that the "relevant work site is the location of [the position for which the plaintiff applied], not the location of [the plaintiff's] employment at the time of the alleged discrimination.").

26. *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476 (S.D.N.Y. 1999).

27. *Id.* at 477.

28. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.

29. Americans with Disabilities Act of 1991, 42 U.S.C. § 12111.

30. 42 U.S.C. § 2000e-2(a)(1).

31. 42 U.S.C. § 12112.

32. 42 U.S.C. §§ 1981a(a)(1), 1988, 2000e-5(g),(k); 42 U.S.C. 12117(a), incorporating remedies available under Title VII, 42 U.S.C. 2000e-5, § 1981a(a)(2), 1988.

33. 42 U.S.C. § 1981a(b)(3); *see also, Oliver v. Cole Gift Centers, Inc.*, 85 F. Supp. 2d 109 (D. Conn. 2000).

34. 42 U.S.C. 2000e(b); 42 U.S.C. 1211(5).

35. *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59 (D.D.C. 2002); Civil Rights Act of 1991, Pub. L. No. 102-166, § 109 (1991), codified as amended at 42 U.S.C. 2000e(f) and 42 U.S.C. 12111(4).

36. *Equal Employment Opportunity Commission v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 256–57 (1991).

37. *Id.* at 256–57.

38. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109 (1991).

39. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109 (1991), codified as amended at 42 U.S.C. 2000e(f) and 42 U.S.C. 12111(4). Other than the title of Section 109 of the Civil Rights Act of 1991, "Protection of Exterritorial Employment," the legislative history of the Civil Rights Act of 1991 does not explain Congress' intent in enacting the amendments. *See Shekoyan,* 217 F. Supp. 2d at 64–65.

40. 42 U.S.C. § 2000e(f).

41. 42 U.S.C. § 12111(4).

42. *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 65 (D.D.C. 2002); *Torrico v. International Bus. Machines Corp.*, 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002).

43. Pub. L. No. 102-166, § 109(c) (1991), codified as amended at 42 U.S.C. 2000e-1 and at 42 U.S.C. 12112.

44. 42 U.S.C. 2000e-1(c)(3); 42 U.S.C. 12112(c)(2)(C).

45. 42 U.S.C. 2000e-1 and 42 U.S.C. 12112, respectively; Pub. L. No. 102-166, § 109(c) (1991), codified as amended at 42 U.S.C. 2000e-1(c)(2) and at 42 U.S.C. 42 U.S.C. § 12112(c)(2)(B); *see also* 42 U.S.C. 2000e-1(a) (exempting aliens working outside of the United States for a foreign or American employer from coverage under Title VII).

46. *Shekoyan*, 217 F. Supp. 2d at 65; *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600 (N.D. Tex. 1999) (Title VII applies abroad only to American citizens working for American companies or their foreign subsidiaries).

47. *Shekoyan*, 217 F. Supp. 2d at 68.

48. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (Title VII protects United States citizens and aliens from unlawful discrimination in the United States, citing 29 C.F.R. § 1606.1(c)(1972), "Title VII . . . protects all individuals, both citizens or non-citizens, domiciled or residing in the United States."

49. 42 U.S.C. § 2000e-1; *Torrico*, 213 F. Supp. 2d at 400–402; *Torrico*, 01 Civ. 841 (GEL), 2004 WL 439493 (S.D.N.Y. Mar. 9, 2004); *Mithani v. Lehman Bros. Inc.*, 01 Civ. 5927 (JSM), 2002 WL 14359 (S.D.N.Y. 2002).

50. *Torrico*, 213 F. Supp. 2d at 399.

51. 42 U.S.C. § 1981.

52. H.R. Rep. No. 102-40(II), reprinted in 1991 U.S.C.C.A.N. 549, *69.

53. 42 U.S.C. 1981a(b)(4), 1988; *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684 (2d Cir. 1998).

54. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

55. Civil Rights Act of 1991, P.L. 102-166 § 101 (1991).

56. H.R. Rep. No. 102-40(II), reprinted in 1991 U.S.C.C.A.N. 549, *37. The word "contract" in Section 1981 has been held to cover an employment relationship, whether pursuant to a written contract or at-will. *Lauture v. International Business Machines Corp.*, 216 F.3d 258 (2d Cir. 2000).

57. *De Lazzari Barbosa v. Merck & Co., Inc.*, 2002 WL 32348281 (E.D. Pa. 2002); *Mithani v. J.P. Morgan Chase & Co.*, 2001 WL 1488213 (S.D.N.Y. 2001); *Gantchar v. United Airlines, Inc.,* 1995 WL 798600 (N.D. Ill. April 21, 1995); *Theus v. Pioneer Hi-Bred Int'l, Inc.*, 738 F. Supp. 1252, 1254 (S.D. Iowa 1990).

58. *Theus*, 738 F. Supp. at 1254.

59. *Id.*

60. *Id.*

61. *Id.* The Court also analogized Section 1981 to its "legislative cousin," the Fourteenth Amendment to the U.S. Constitution, which contains language similar to Section 1981 ("no state shall deny to any person within its jurisdiction the equal protection of the laws") and relied on the fact that the Fourteenth Amendment does not apply extraterritorially. *Id.*

62. *Gantchar*, 1995 WL 798600; *Theus*, 738 F. Supp. at 1254.

63. N.Y. Exec. L. § 297(9); *Abdallah v. City of New York*, 2001 WL 262709 (S.D.N.Y. March 16, 2001).

64. *Torrico*, 213 F. Supp. 2d at 406–407; *Duffy v. Drake Beam Morin, Harcourt General, Inc*., 1998 WL 252063 (S.D.N.Y. May 19, 1998); *Iwankow v. Mobil Corp*., 541 N.Y.S.2d 428 (1st Dep't App. Div. 1989).

65. N.Y. Exec. L. § 298-a(3); *Torrico*, 213 F. Supp. 2d at 406 & n.10. If the New York State Division of Human Rights (NYSDHR) believes that discrimination has occurred, it can issue an order directing the non-resident to cease and desist from the acts of discrimination alleged. *Sherwood v. Olin Corp*., 772 F. Supp. 1418, 1422 (S.D.N.Y. 1991). If the non-resident fails to obey the NYSDHR's cease-and-desist order, the agency must prohibit the non-resident from transacting business in New York State. *Id.* at 1422–23. Violation of that prohibition on transacting business in New York State constitutes a criminal misdemeanor. *Id.*

66. N.Y. Exec. L. § 298-a(2); *Sherwood v. Olin Corp*., 772 F. Supp. 1418, 1422 (S.D.N.Y. 1991).

67. *Iwankow v. Mobil Corp*., 541 N.Y.S.2d 428 (1st Dep't App. Div. 1989).

68. *Iwankow*, 541 N.Y.S.2d at 428.

69. *Id*.; *see also, Duffy v. Drake Beam Morin, Harcourt Gen'l, Inc*., 1998 WL 252063 (S.D.N.Y. May 19, 1998) (non-New York resident employed in New Jersey could not claim discrimination occurred in New York even though defendant made decision to fire plaintiff in New York); *Miller v. Citicorp*., 1997 WL 96569 (S.D.N.Y. Mar. 4, 1997) (non-New York resident employed in Florida could not state NYSHRL claim even though defendant made decision to terminate plaintiff in New York).

70. N.Y. Exec. L. § 298-a.

71. *Torrico*, 213 F. Supp. 2d at 407–408.

72. *Id*., 213 F. Supp. 2d at 407–408.

73. *Morrison v. Blitz*, 1996 WL 403034 (S.D.N.Y. July 18, 1996).

74. *Torrico*, 213 F. Supp. 2d at 409.

75. *Morrison v. Blitz*, 1996 WL 403034; *Bevilaqua*, 642 F. Supp. 1072 (S.D.N.Y. 1986) (plaintiff remained domiciled in New York after he returned to his parents' home in Virginia, where plaintiff had an apartment in New York, attended classes in New York, had had a full-time job in New York, paid New York State income taxes, and was registered to vote in New York).

76. *Davis v. Davis*, 525 N.Y.S.2d 777 (Sup. Ct., Nassau Co. 1988).

77. *Kavowras v. Pinkerton, Inc*., *U.S.A*., 1998 WL 209617 (S.D.N.Y. April 29, 1998).

78. *Torrico*, 213 F. Supp. 2d at 408–409.

79. *Id*. at 410.

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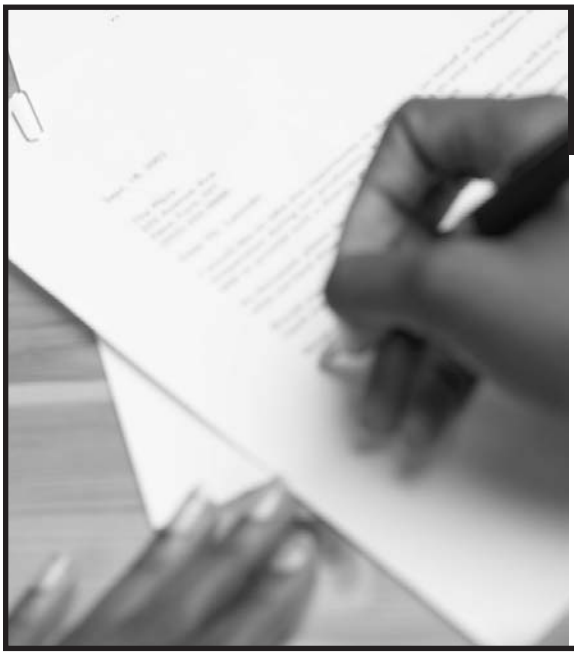

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Mandatory Pre-Dispute Arbitration: 2003 Update

By Robert Lewis

On March 21, 2001, in *Circuit City Stores Inc v. Adams*,[1] the United States Supreme Court upheld the enforceability of mandatory pre-dispute arbitration agreements in employment contracts and employee handbooks that require the arbitration of statutory claims under the Federal Arbitration Act (FAA).[2] Although the Court did not address the contents of such agreements, numerous lower court decisions, both state and federal, require that the arbitration procedures be fair and afford employees due process. What is "fair"[3] and "due process"[4] in the arbitration context will have to await further judicial clarification.

Circuit City was a predictable follow-up to the Court's decision in *Gilmer v. Interstate/Johnson Lane Corp*.[5] a decade earlier. There, the Court held that a claim of discrimination under the Age Discrimination in Employment Act (ADEA) was subject to binding arbitration, pursuant to an arbitration agreement contained in a securities registration application between Gilmer and the New York Stock Exchange (NYSE).

At the age of 56, Roger D. Gilmer was hired as a manager of financial services by Interstate/Johnson Lane Corporation (Interstate), a securities firm registered with the NYSE. Along with other Interstate employees and thousands of other employees in the securities industry, Gilmer was required to sign a NYSE registration form, in which he "agreed to arbitrate any dispute, claim or controversy" between himself and Interstate. The NYSE rules also provided for arbitration of "any controversy . . . arising out of the employment or termination of employment" of a registered individual.

Six years after being hired, Gilmer was terminated and his duties allegedly assigned to a 28-year-old. In response, Gilmer filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC). Soon thereafter, Gilmer brought suit in a North Carolina federal court. There, the employer moved to compel arbitration under the FAA and to stay Gilmer's court action permanently. The district court refused to compel arbitration. The U.S. Court of Appeals for the Fourth Circuit reversed, and the Supreme Court granted *certiorari* on the question of the arbitrability of Gilmer's ADEA claim.

In a 7-2 decision, the Court held that Gilmer was bound by his pre-dispute agreement to arbitrate any dispute arising out of his employment, including a dispute involving an allegation of age discrimination under the ADEA.[6] Because the arbitration agreement was part of a registration process with the NYSE, rather than a contract of employment between Gilmer and his former employer, the Court was able to avoid construing the reach of the exclusion of FAA Section 1 for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[7]

The Supreme Court directly confronted this issue in *Circuit City*.[8] The Court narrowly construed FAA Section 1 to exempt *only* employees who actually transport people or goods in interstate commerce, such as seamen and railroad employees. All others, it concluded, are covered by the FAA.[9]

The reaction to *Circuit City* was that the Supreme Court had given a green light to employers to initiate arbitration systems.[10] However, notwithstanding the Court's unequivocal affirmation of mandatory arbitration, one circuit alone, the Ninth, refused to acquiesce,[11] until recently.[12]

Applicability to Current Employees

Circuit City may not, however, apply to employees already employed when the arbitration program is installed, where there was no employee assent to arbitration or consideration supporting the employer's promise to arbitrate. It is a basic principle of contract law that an agreement must be supported by adequate consideration to be valid. Where both parties agree to be bound by the arbitration agreement, there is sufficient consideration.[13] In the employment context, the employer must be willing to arbitrate its claims against the employee and the employee must be willing to arbitrate his or her claim against the employer. Mutuality is the key.[14] The California Supreme Court spelled out the concept of mutuality with an example:

> An arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction . . . The arbitration agreement in this case lacks mutuality in this sense because it requires the arbitration of employee but not employer claims arising out of a wrongful termination. *An employee terminated for stealing trade secrets, for example, must arbitrate his or her wrongful termination claim under the agreement while the employer has no corresponding obligation to arbitrate its trade secrets claim against the employee.*[15]

Continued Employment as Consideration

In many jurisdictions, the rule is that an employee's continued employment following implementation of a new arbitration program will constitute sufficient consideration.[16] Since the issue is likely to be decided on a state-by-state basis, however, the law of the jurisdiction in which the agreement will be enforced should be considered.[17]

The plaintiffs' bar, seeking to invalidate an arbitration agreement's enforceability against a current employee, may draw on cases involving the enforceability of covenants not to compete, arguing the absence of consideration.

For example, South Carolina held that when a covenant not to compete is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary for the covenant to be enforceable. The Court refused to enforce the covenant for lack of consideration, where the employee's duties, position, and salary were left unchanged.[18]

In jurisdictions where continued employment has been held to be insufficient consideration for a mandatory arbitration agreement, or the law is unsettled, current employees may be provided additional consideration for their participation in the program such as a pay raise, a one-time bonus, special training, or other benefits.

In addition to increase the likelihood of enforceability, it may be prudent to include an explicit provision concerning consideration, such as "the mutual promises herein provide consideration for each other."

Impact of *Circuit City* on the Use of Mediation

As more employers adopt mandatory arbitration programs, the use of mediation will also proliferate, since most programs include a mediation step preliminary to arbitration. In addition, attorneys representing employees covered by mandatory arbitration programs, realizing they will be ordered to arbitrate, will more likely approach the other side at an earlier stage with offers to mediate before initiating litigation.

Indeed, in line with the heightened focus on mediation by the plaintiffs' bar, in March 2002, the National Employment Lawyers Association (NELA), the country's only bar association consisting of lawyers who represent individuals in employment-related matters, sponsored a two-day conference entitled "ADR After *Circuit City*," which included sessions on preparation and advocacy in mediation.

Mediation of employment disputes has increased dramatically in recent years and has become almost commonplace in the workplace. A comprehensive survey among Fortune 1,000 companies in 1997 reported that 87% of the companies used mediation at least once in the three years prior to the survey.[19]

External mediation (the use of outside mediators) has become the most widely used form of alternative dispute resolution. For example, JAMS, a provider of dispute resolution services, reports that 70 percent of its caseload involves mediations. In addition, many state and federal agencies and court systems have adopted mediation as a means to reduce their caseloads.[20]

Class Actions

Most of the arbitration agreements that have been litigated to date do not expressly address the availability of class action relief. However, with certain exceptions, most courts have been willing to order cases styled as class actions to arbitration.[21]

As a result, arbitration clauses have increasingly become the favored way to avoid litigation since the potential for class action litigation is significantly reduced if the consumers or employees have agreed to arbitrate their disputes.[22] Indeed, commentators have urged companies in various industries to adopt mandatory binding arbitration to avoid class actions.[23]

What if the arbitration clause is silent on the issue? That is, the clause mandates arbitration generally, without referring to class actions. It was expected that the Supreme Court would address this issue in *Green Tree Financial Corp. v. Bazzle*,[24] but it did not. Justice Breyer, writing for the plurality, stated:

> We are faced at the outset with a problem concerning the contracts' silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends? Given the South Carolina Court's holding, it is important to resolve that question. But we cannot do so, not simply because it is a matter of state law, but also because it is a matter for the arbitrator to decide. Because the record suggests that the parties have not yet received an arbitrator's decision on that question of contract interpretation, we vacate the judgment of the South Carolina Supreme Court and remand the case so that this question may be resolved in arbitration.[25]

Consequently, until this issue is resolved, employers who wish to insure arbitration of potential class actions should specifically provide for arbitration in the agreement, whether the dispute involves an individual or a member of a class. For example, the clause may state:

ARBITRATION

The parties agree that any dispute between them arising out of the employment relationship or its termination, including workplace discrimination claims based on federal, state, or local statutes, whether individually or as a member of a class, or any claim the employer may have against the employee, shall be settled by a single arbitrator in accordance with the JAMS Employment Arbitration Rules and Procedures (including the Minimum Standards of Procedural Fairness), or the National Rules for the Resolution of Employment Disputes of the American Arbitration Association. The mutual promises herein provide consideration for each other. The arbitration will be held pursuant to the provisions of the Federal Arbitration Act.

This agreement does not cover claims for injunctive relief for prohibited competition or the unauthorized disclosure of trade secrets or confidential information, as to which the employer may seek and obtain equitable relief from a court of competent jurisdiction.

Title VII's Statutory Scheme

In 1972, Congress amended Title VII of the Civil Rights Act of 1964 to provide the EEOC with independent authority to bring suit in court. Before the EEOC does so, a charge must be filed with the EEOC by or on behalf of an aggrieved person, or by a member of the EEOC. If the EEOC finds reasonable cause to believe that prohibited discrimination has occurred, it must attempt to conciliate the charge; if that effort is unsuccessful, the EEOC may choose to bring an enforcement action in its own name. The employee may intervene in such a suit.

If the EEOC fails to act within certain time periods, or determines that the charge lacks merit or decides that it will not file a suit and so notifies the employee, the employee may bring a private suit. The EEOC may intervene in any such action. Whether the action is brought by the EEOC or by an employee, the remedies may include injunctive relief, back pay, reinstatement, and other equitable relief. In 1991, Congress expanded the relief available to include the right to a jury trial and compensatory and punitive damages.

Is the EEOC Bound by an Arbitration Agreement?

On March 26, 2001, the Supreme Court granted *certiorari* in *EEOC v. Waffle House, Inc.*,[26] to consider whether and to what extent the EEOC, in prosecuting a discrimination suit in its own name, is bound by a private arbitration agreement between the charging party and his or her employer. In *Waffle House*, the Fourth Circuit joined the Second Circuit in *EEOC v. Kidder, Peabody & Co., Inc.*,[27] in holding that the EEOC was barred from seeking monetary relief in federal court on behalf of a charging party who had entered into an arbitration agreement.

In the EEOC's petition for *certiorari*, it argued that it had filed 439 suits in fiscal 1999, most of which sought victim-specific relief, and that the issue in *Waffle House* could be expected to recur frequently, since pre-dispute arbitration agreements were becoming increasingly common.[28]

In opposing *certiorari,* Waffle House observed that 439 suits constituted a small percentage of the 77,444 charges filed with the EEOC in 1999. In addition, Waffle House argued that to disregard the existence of a charging party's private agreement to arbitrate his or her employment-related claims in an EEOC enforcement action would enable the employee to intervene in a lawsuit brought by the EEOC, when the employee could not have brought such a lawsuit in his or her own right. Such a result, argued Waffle House, would completely circumvent the individual's agreement to arbitrate and subvert the federal policy favoring arbitration.[29]

Waffle House, Inc., is a restaurant chain headquartered in Norcross, Georgia, a suburb of Atlanta. On June 23, 1994, Eric Baker sought employment at its restaurant in Columbia, South Carolina. He filled out an employment application that contained a clause that he would submit to binding arbitration "any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment."

Baker did not accept employment at that particular Waffle House location, but he did accept it at a location across town. He began work on August 10, 1994 and, approximately two weeks later, suffered a seizure while on the job. The seizure was apparently the result of a change in his medication that controlled a seizure disorder he had developed from a car accident years earlier.

Baker was discharged from his employment on September 5, 1994. A few days later, he filed a charge with the EEOC, which in turn filed an enforcement action against Waffle House, claiming a violation of the Americans with Disabilities Act. The complaint filed by the EEOC sought a permanent injunction barring Waffle House from discriminatory practices on the basis of disability, and requiring it to change its policies to halt the effects of discrimination. On behalf of Baker, the EEOC

sought back pay, compensation for pecuniary losses suffered by him, punitive damages, and reinstatement.

Waffle House sought to stay the litigation, dismiss the action, and compel arbitration of Baker's claim. The District Court denied Waffle House's motions. Before the Fourth Circuit, the EEOC argued that it had never agreed to arbitrate the statutory claim and that, under its mandate, it had the power to bring an action in federal court when venue was proper for equitable relief. The Court agreed. It quoted the Supreme Court's statement in *Gilmer* that "it should be remembered that arbitration agreements will not preclude the EEOC from bringing action seeking class-wide and equitable relief."[30]

The EEOC's application to seek "make whole" relief was another matter. The Fourth Circuit held that to permit the EEOC to prosecute Baker's individual claim in court, the resolution of which he had earlier committed by contract to the arbitration forum, would allow the EEOC to do for Baker what Baker could not do himself.[31]

The Issue Decided

On January 15, 2002, the Supreme Court decided the issue, siding with the EEOC.[32]

Reversing the Fourth Circuit, the Court held that the language of Title VII was clear, and not trumped by the federal policy favoring arbitration. Accordingly, the Court held that "[T]he EEOC has the authority to pursue victim-specific relief regardless of the forum that the employer and employee have chosen to resolve their disputes."[33]

In responding to Justice Thomas' dissent predicting that the majority's holding would discourage the use of arbitration agreements by employers in the future, Justice Stevens, writing for the Court, opined that it would have a negligible effect on federal policy favoring arbitration, noting that the EEOC files suit in less than one percent of the charges filed with it each year.[34]

Decision Critiqued

The reaction to *Waffle House* has been varied. Particularly insightful is the comment by Barry A. Naum in the *Ohio State Journal on Dispute Resolution*:

> The only clear result of the Court's decision in *Waffle House* is that the EEOC is now able to pursue in court victim-specific relief for an employee that has signed an arbitration agreement in conjunction with his employment. The result, however, is limited. *Waffle House* does nothing to change the insipient notion that arbitration agreements are favored in the employment context. Therefore, what appears to be a clear-cut victory for employ[ee]s may in fact simply be a clear-cut victory for arbitration agreements in general—creating greater scrutiny over their creation and thereby potentially creating better arbitration agreements.
>
> Although this *Waffle House* wrinkle is an important wrinkle, at the end of the day we may still confidently declare that employers have little cause to worry that their employment arbitration agreements will be subject to attack. Through the murk created by *Waffle House*, we may in fact see that the *Circuit City* trend is little changed.[35]

The EEOC's Policy Challenging Mandatory Arbitration

In July 1997, the EEOC issued its Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, setting forth its position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the principles of the civil rights laws.[36] Accordingly, the EEOC has challenged by litigation, *amicus curiae* participation, and Commissioner charge, most agreements including provisions requiring mandatory arbitration. When it sought to apply its policy to Borg-Warner, a company based in the state of Washington, it was met with a legal gauntlet.[37]

A Case in Point

From 1991, Borg-Warner required all employees to execute an arbitration agreement known as a "Pre-Dispute Resolution Agreement."[38] The agreement provided that if an employee were to bring suit against the company, Borg-Warner could insist on arbitration pursuant to the FAA.[39]

In December 1998, Rudy Lee, a Borg-Warner employee, filed a charge with the EEOC's Seattle office alleging race discrimination but not mentioning the arbitration agreement he had signed as a condition of employment.[40] The EEOC found insufficient evidence to support the charge; however, it issued a "determination" that there was reasonable cause to believe that the company had violated Title VII when it had required the employee to sign the agreement. The EEOC sought to have the company rescind its mandatory arbitration policy.[41]

The company refused and brought an action in the U.S. District Court for the District of Columbia seeking a declaratory judgment that its arbitration agreements

were enforceable and that it had not violated Title VII by insisting that its employees sign such agreements as a condition of their employment.[42] Additionally, the company sought an injunction enjoining the EEOC from attacking the validity of arbitration agreements though litigation.[43]

The District Court dismissed the suit, and the company appealed. In affirming, the U.S. Court of Appeals for the District of Columbia Circuit reviewed the state of the law regarding arbitration agreements and Title VII.

Asserting that the EEOC "has been waging a losing battle" against mandatory arbitration, the Court cited decisions of the First, Second, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits, noting that "each of those courts of appeals agrees with us that Title VII claims may be subject to mandatory arbitration" and that *Circuit City* "adds to the weight of these precedent . . ."[44] The Court concluded, however, that in light of these decisions, the company did not suffer any legally cognizable injury from the EEOC's policy statement.[45] The Court stated that to issue a declaratory judgment against the EEOC would be redundant and an injunction "entirely unnecessary . . ."[46]

Time for a Change

In light of the unanimity of circuit court opposition to the EEOC's policy, the newly appointed commissioners should review and rescind its policy of opposing mandatory pre-dispute arbitration agreements *per se*, while it continues to examine the validity of arbitration agreements for issues involving fairness, remedies, and denial of due process.[47] Moreover, a more neutral position might encourage greater participation by employers in the EEOC's voluntary mediation program, in which only 31% of employers agreed to engage in the process during the past two years.[48]

Conclusion

In the decade following the Supreme Court's *Gilmer*[49] decision, many employers have adopted mandatory arbitration programs. In the wake of *Circuit City*, these numbers have increased. It has been estimated that as many workers are now covered by nonunion arbitration systems as are covered by collective bargaining agreements.[50]

Interestingly, employers that have had significant experience with mandatory arbitration programs have reported relatively few arbitrations, with most disputes resolved in the early stages. It is expected that this trend will continue. Thus, mediation and, if necessary, arbitration should prove beneficial to most workers and offer businesses a less expensive means of dispute resolution.

Endnotes

1. 121 S. Ct. 1302 (2001).
2. *See* 9 U.S.C. §§ 1–16 (1994).
3. "[An] arbitrator is free to set his own rules of procedure so long as he stays within the bounds of fundamental fairness." *Keebler Co. v. Truck Drivers, Local l70*, 247 F.3d 8, 11 (1st Cir. 2001).
4. *See A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 1995 A.B.A. Sec. Lab. & Employment L. 1, 1.
5. 500 U.S. 20 (1991).
6. *See id.* For a critical analysis of the *Gilmer* decision, see Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum,* 13 Hof. Lab. L.J. 381, 383 (1996) (arguing that "the *Gilmer* decision carries alternative dispute resolution to excess").
7. 9 U.S.C. § 1 (1994).
8. *See* 121 S. Ct. at 1308 ("So the issue reserved in *Gilmer* is presented here.").
9. *See id.* at 1311–13. For a discussion of the exemption issue prior to the Court's decision in *Circuit City*, see Robert Lewis, *Staying Out of the Courtroom by Implementing ADR Procedures,* J. Alternative Disp. Resol. Employment, Winter 2000, at 32, 36.
10. *See Court Says Employers Can Require Arbitration of Disputes*, N.Y. Times, Mar. 22, 2001, § C, at 1.
11. *See Duffield v. Robertson Stephens Co.*, 144 F.3d 1182 (9th Cir. 1998), *cert. denied,* 525 U.S. 996 (1998).
12. *Duffield* was overruled in *EEOC v. Luce, Forward, Hamilton & Scripps*, __ F.3d __ (9th Cir. 2003), 92 Fair Empl. Prac. Cas. (BNA) 1121, 1123 (9th Cir. September 30, 2003) (en banc).
13. *See O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997).
14. *See Wright v. Circuit City Stores*, 83 Fair Empl. Prac. Cas. (BNA) 877, 881 (N.D. Ala. 2000) ("Circuit City's promise to be bound by the arbitration process itself serves as mutual consideration in this case."); *see also Howard v. Oakwood Homes Corp.*, 516 S.E.2d 879, 882 (N.C. Ct. App. 1999) ("We hold that the mutual promise to abide by the provisions of the [Dispute Resolution Program] and to relinquish the right to pursue certain disputes in Court is sufficient consideration to support the [Dispute Resolution Program] agreement."); *cf. J.M. Davidson v. Webster*, 110 Daily Lab. Rep. (BNA) A-8 (Tex. App. 2001) (finding insufficient consideration where arbitration agreement bound only the employee and not the employer).
15. *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 694 (Cal. 2000) (emphasis added).
16. For a review of the majority rule, *see Tinder v. Pinkerton Security*, 89 Fair Empl. Prac. Cas. (BNA) 1537, 1542–43 (7th Cir. 2002) (finding agreement to arbitrate enforceable); *Circuit City Stores Inc. v. Najd*, 89 Fair Empl. Prac. Cas. (BNA) 1149, 1152 (9th Cir. 2002) (finding parties agreed to arbitration of disputes); *Johnson v. Circuit City Stores*, 148 F.3d 373, 374 (4th Cir. 1998) (finding arbitration agreement was supported by adequate consideration); *DeLuca v. Bear Stearns*, 87 Fair Empl. Prac. Cas. (BNA) 782, 793 (D. Mass. 2001) (allowing motion to compel arbitration); *Chanchani v. Salomon/Smith Barney*, 85 Fair Empl. Prac. Cas. (BNA) 840, 842 (S.D.N.Y. 2001) (finding that continuation of work constituted acceptance of arbitration agreement); *Ahing v. Lehman Bros., Inc.*, 94 Civ. 9027 (CSH) 2000 U.S. Dist. LEXIS 5175 (S.D.N.Y. 2000) (indicating that continuation of employment is sufficient consideration for arbitration agreement); *Affiliated Paper Cos. v. Hughes*, 667 F. Supp. 1436 (N.D. Ala. 1987) (discussing noncompete agreement); *Mattison v. Johnston*, 730 P.2d 286 (Ariz. Ct. App. 1986) (discussing length of employment and consideration for agreement); *Roessler v. Burwell*, 176 A. 126

(Conn. 1934) (upholding injunction preventing solicitation of customers); *Research & Trading Corp. v. Powell*, 468 A.2d 1301 (Del. Ch. 1983) (finding that continuation of employment was valid consideration for restrictive covenant); *Thomas v. Coastal Indus. Servs., Inc.*, 108 S.E.2d 328 (Ga. 1959) (discussing restrictive covenant); *Corroon & Black of Ill., Inc. v. Magner*, 494 N.E.2d 785 (Ill. App. Ct. 1986) (discussing restrictive covenant); *Zellner v. Conrad*, 183 A.D.2d 250, 256, 589 N.Y.S.2d 903 (App. Div. 2d Dep't 1992) (holding that continued employment is sufficient consideration for post-employment agreement); *Camco, Inc. v. Baker*, 936 P.2d 829 (Nev. 1997) (discussing noncompete agreement); *Hogan v. Bergen Brunswig Corp.*, 378 A.2d 1164 (N.J. Super. Ct. App. Div. 1977) (finding that continuation of employment supported restrictive covenant); *Howard v. Oakwood Homes Corp.*, 516 S.E.2d 879, 882 (N.C. Ct. App. 1999) (*citing O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997)); *In re Tenet Healthcare Ltd*, 18 Individual Empl. Rts. (BNA) 1808, 1813 (Tex. App. 2002) (granting writ of mandamus challenging trial court's denial of motion to compel arbitration).

For a review of the minority rule, see *Snow v. BE&K Constr. Co.*, 126 F. Supp. 2d 5, 15 (D. Me. 2001) ("[B]ecause [the employer] provided only an illusory promise, there was no exchange of promise for performance, and therefore no manifestation of mutual assent.") (citations omitted); *Phillips v. Cigna Invs.*, Inc., 27 F. Supp. 2d 345 (D. Conn. 1998) (holding mere continued employment alone did not constitute acceptance of unilateral arbitration policy); *Freeman v. Duluth Clinic Ltd.*, 334 N.W.2d 626 (Minn. 1983) (holding that noncompete clause is not enforceable because of lack of consideration); *Kadis v. Britt*, 29 S.E.2d 543 (N.C. 1944) (discussing noncompete agreement); *Morgan Lumber Sales Co. v. Toth*, 41 Ohio Misc. 17, 321 N.E.2d 907 (Ohio Ct. Common Pleas 1974) (discussing restrictive covenant as not being supported by consideration); *Mail-Well Envelope Co. v. Saley*, 497 P.2d 364 (Or. 1972) (indicating that nominal consideration is not valid for noncompete agreement); *Kistler v. O'Brien*, 347 A.2d 311 (Pa. 1975) (finding noncompete agreement not supported by consideration); *Schneller v. Hayer*, 28 P.2d 273 (Wash. 1934) (finding insufficient consideration where promise could be terminated at any time).

17. *See First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Zumpano v. Omnipoint Communications*, 84 Fair Empl. Prac. Cas. (BNA) 1592 (D.N.J. 2001) (applying Pennsylvania law); *Wright v. Circuit City Stores*, 83 Fair Empl. Prac. Cas. (BNA) 877, 881–82 (N.D. Ala. 2000) (applying Alabama law).
18. *See Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207 (S.C. Sup. Ct.) (2001).
19. *See* David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes. A Report on the Growing Use of ADR by U.S. Corporations,* at 9, Cornell/Perc Institute on Conflict Resolution (1998).
20. Notwithstanding this trend, some employers and/or their defense counsel resist the mediation process, because of assumptions about mediation that are outdated and in large part unfounded. *See* Penny Nathan Kahan & Lori L. Deem, *Mediation as a Model for Resolving Employment Disputes in the New Millennium,* 1 Employee Rts. Q. 28, 31 (2000) (challenging misconceptions).
21. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive*?, 42 Wm. & Mary L. Rev. 1, 63–65 (2000).
22. *See* Andrea Lockridge, Note, *The Silent Treatment: Removing the Class Action From the Plaintiff's Toolbox Without Ever Saying a Word*, 2003 J. Disp. Resol. 255, 268.
23. *See* Sternlight, *supra* note 21 at n.2.
24. 539 U. S. __ (2003).
25. *Green Tree*, at 1, 2.
26. 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001).
27. 156 F.3d 298 (2d Cir. 1998).
28. *See* Brief for Petitioner at 18, *EEOC v. Waffle House, Inc.*, 121 S. Ct. 1401 (2001).
29. *See* Brief for Respondent at 15, 22, *EEOC v. Waffle House, Inc.* 121 S. Ct. 1401 (2001).
30. *Waffle House*, 193 F.3d at 811 (*quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).
31. *See id.* at 812.
32. *See EEOC v. Waffle House, Inc.* 122 S. Ct. 754 (2002).
33. *Id.* at 765.
34. *See id.* at 763, n.7.
35. 18 Ohio St. J. on Disp. Resol. 225, 235 (2002).
36. *See* 3 EEOC Compl. Man. (BNA) N: 3101 (July 10, 1997) <http://www.eeoc.gov/docs/mandarb.html>.
37. *Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831 (D.C. Cir. 2001).
38. *Id.* at 832.
39. *See id.*
40. *See id.*
41. *Id.*
42. *See id.*
43. *Id.*
44. *Id.* at 833.
45. *Id.*
46. *Id.*
47. *See Hooters of America v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) ("Hooters . . . promulgat[ed] rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.").
48. *See* Kirstin Downey, *The Trend is to Mediate, Not Litigate, Bias Cases*, WASH. POST, Dec. 3, 2003, at E02. *See also* 173 Lab. Rel. Rep. (BNA) 345 (Dec. 8 , 2003).
49. *See Gilmer*, 500 U.S. 20 (1991).
50. *See* Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace,* 16 Ohio St. J. on Disp. Resol. 489 (2001).

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The New Clean Indoor Air Act and Workplace Smoking Policies

By Richard V. Stewart, Jr.

The 2003 Amendments to the New York State Clean Indoor Air Act[1] have been well-publicized and the subject of debate since they were signed into law on March 26, 2003.[2] Remarkably, the amendments took only five days to transform themselves from a bill into a law.[3]

The Basics of the Amendments

The Clean Indoor Air Act of 2003 places a far more restrictive ban on smoking in places of employment. In fact, the new amendments *completely* ban smoking in places of employment.[4] The Act defines "places of employment" as any "indoor area or portion thereof under the control of an employer in which employees of the employer perform services."[5] Places of employment include offices, school grounds, retail stores, banquet facilities, theaters, food stores, banks, financial institutions, factories, warehouses, employee cafeterias, lounges, auditoriums, gymnasiums, restrooms, elevators, hallways, libraries, bowling establishments, employee medical facilities, rooms or areas containing photocopying equipment or other office equipment used in common, and company vehicles.[6]

Generally, the ban on indoor smoking also includes bars; restaurants; indoor areas containing a swimming pool; mass transportation; youth centers; day care centers; group homes for children; public institutions for children; residential treatment facilities for children; all public and private colleges, universities and other educational or vocational institutions; hospitals and residential health care facilities; commercial establishments for carrying on trade; and indoor arenas, zoos and bingo facilities.[7]

Under the amended Act, an employer cannot allow smoking indoors, even if the public does not have access to the area, unless the employer obtains a waiver from the enforcement officer employed by the county board of health or county health department.[8] To obtain a waiver the employer must apply for a waiver and establish that (1) compliance with the law would cause undue financial hardship, or (2) that other factors exist which would render compliance unreasonable.[9]

Prior to obtaining the waiver, the employer must comply with the law.[10] The decision to grant a waiver is at the discretion of the county enforcement officer. If the waiver is granted, the waiver is subject to conditions or restrictions "necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure that the waiver is consistent with the general purpose of [the law]."[11]

An employer who has a smoking lounge indoors, or who allows employees to smoke indoors, will be subject to fines of up to $2,000 per violation.[12] Finally, local laws, ordinances, or regulations that are more restrictive than the new law will not be superceded by the amendments.

The law will affect smoking policies of many employers. Prior to the amendments, the Air Act allowed employers to create a separate, closed room for smoking.[13] Now, smoking lounges are prohibited.

"[T]he new amendments completely *ban smoking in places of employment."*

Educational Institutions

For purposes of the smoking ban, the Act separates educational institutions into two categories. The Act separates colleges, universities, and vocational institutions from elementary schools, secondary schools, nursery schools and pre-schools.

The Act completely bans smoking in all *indoor and outdoor areas* on school grounds. School grounds are defined as "any building, structure and surrounding outdoor grounds contained within a public or private pre-school, nursery school, elementary or secondary school's legally defined property boundaries as registered in a county clerk's office and any vehicles used to transport children or school personnel."[14]

As "school grounds" are a sub-definition of "places of employment," smoking is now completely prohibited on school grounds. The Act only bans smoking in *indoor areas* at "all public private colleges, universities and other educational and vocational institutions."[15]

While the smoking ban at colleges and universities and like institutions is limited to indoor areas on campus, the ban is absolute at all elementary schools, secondary schools, nursery schools and pre-schools, covering indoor and outdoor areas.

Smoking at Residential Health Care Facilities

While the indoor smoking prohibition is practically absolute in "places of employment," there are exceptions. Residents at residential health care facilities, adult care facilities, community mental health residences and day treatment program facilities, may smoke in designated separate enclosed rooms.[16] While the employees at residential health care facilities, adult care facilities, community mental health residences and day treatment program facilities cannot smoke indoors, as it is their place of employment, the residents can smoke indoors in areas designated by the residential facility.

As of July 24, 2003, the Act no longer provides statutory protection from second-hand smoke for employees who may have to supervise residents while the residents are smoking in a designated smoking area. Prior to the amendments, an employer was required "to provide nonsmoking employees with a smoke-free work area."[17] Strangely, this statutory protection was repealed.

Duty to Negotiate Smoking Policies

Prior to the 2003 amendments, an employer had a duty under the Act to negotiate with an employee organization before adopting or implementing a workplace smoking policy that was more restrictive than the statute.[18] This has remained unchanged in the private sector. Under the National Labor Relations Act (NLRA), private-sector employers are required to bargain over aspects of the smoking policy that are beyond the statutory language.[19]

The question of whether or not a public-sector employer has to negotiate a smoking policy that is more restrictive than the Act has not always been easy to answer. The New York State Public Employment Relations Board (PERB) held in *Oneonta City Sch. Dist.* that public employers must negotiate any smoking policy more restrictive than required by statute.[20] This decision was partially based on a provision of the Clean Indoor Air Act that subjected smoking policies more restrictive than the Act to collective bargaining.[21] This provision was repealed in the 2003 revision to the Act.

The other basis of the *Oneonta City Sch. Dist.* decision relied on the Board's decision in *County of Niagara (Mount View Health Facility)*, which pre-dated the enactment of the Clean Indoor Air Act.[22] In *County of Niagara*, PERB held that:

> (s)ince there is no public policy, *as yet*, which requires or permits a public employer to ban smoking in the work place or in its facilities, we continue to believe that employee smoking regulations are work rules subject to the balancing test which we have previously employed to determine whether unilaterally promulgated work rules violate the [Taylor Law]. Smoking regulations affect terms and conditions of employment.[23] [emphasis added]

The enactment of the Clean Indoor Air Act in 1990 did not create a strong enough "public policy" for PERB to hold that the creation and implementation of smoking policies were no longer subjected to collective bargaining. In fact, PERB found that the Act provided further support for use of the balancing test. PERB held that the provisions of the Act, which subjected smoking policies to the applicable law governing collective bargaining, did not supercede the balancing test but included "the use of a balancing test to determine the negotiability."[24] In that case, PERB went on to uphold *County of Niagara,* thereby continuing the duty to negotiate the creation and implementation of smoking policies.

"Smoking is now completely prohibited on school grounds."

Given the new amendments to the Clean Indoor Air Act, the "public policy" has changed. Any smoking policy that prohibits indoor smoking will not be subjected to collective bargaining as law now prohibits indoor smoking in the workplace.

However, the Act does not mention smoking in outdoor areas except in relation to outdoor dining areas of restaurants, which is not relevant to this discussion, and school grounds. Smoking is now completely prohibited on school grounds.[25] The Act offers no other guidance in regards to *outdoor* smoking areas at "places of employment."[26]

This leads to a question that has been asked frequently since the new amendments went into effect: Where are employees going to smoke when the weather gets cold and it is snowing? An outdoor smoking area may be covered so long as that area is not being used by employees to perform services for the employer.[27]

Yet the fact that covered outdoor smoking areas are not prohibited by the amendments to the Act, does not of course place a duty on employers to provide a covered, outdoor smoking area. Nothing in the Clean Indoor Air Act imposes a duty on an employer to build a covered smoking shelter for its employees. As before the 2003 amendments to the Act, the employer can build an outdoor smoking shelter, or not. However, as outdoor smoking areas are not considered a "place of employment," there is no prohibition on collective bargaining on the subject.[28]

Conclusion

While the amendments to the Clean Indoor Air Act have placed more restrictions to smoking in the workplace, employee organizations and employers still have aspects of smoking policies to discuss at the negotiation table.

Endnotes

1. Public Health Law §§ 1399-n through 1399-x.
2. McKinney's Session Laws, Chapter 13, Laws of 2003.
3. Senate bill 3292, which was introduced in the Senate on March 21, 2003, passed the Senate on March 26, 2003 by a vote of 57 to 4. On March 26, 2003 the Senate's bill was substituted for Assembly bill 7136 and passed by the Assembly later that same day by a vote of 97 to 44. Governor Pataki signed the bill into law that same day.
4. Public Health Law § 1399-(1).
5. Public Health Law § 1399-n(5).
6. *Id.*
7. Public Health Law §§ 1399-o(2)–(18).
8. Public Health Law § 1399-u.
9. Public Health Law § 1399-u(1)(a) & (b).
10. Public Health Law § 1399-u(1).
11. *Id.*
12. Public Health Law §§ 12(1) & 1399-v.
13. Public Health Law § 1399-o(6)(f) (McKinney's 2002). This subsection was repealed by the 2003 Amendments.
14. Public Health Law § 1399-n(6).
15. Public Health Law § 1399-o(13)
16. Public Health Law § 1399-o(14).
17. Public Health Law § 1399-o(6)(a).
18. Public Health Law § 1399-o(6)(i) (McKinney's 2002). The subsection read as follows: "(A)ny provisions in a smoking policy that are more restrictive that the minimum requirements set forth in this subdivision shall, if a collective bargaining unit exists, be subject to applicable law governing collective bargaining."
19. *Gallencamp Stores v. NLRB*, 402 F.2d 525 (9th Cir. 1968).
20. 24 PERB ¶ 3025 (1991).
21. Public Health Law § 1399-o(6)(i) (McKinney's 2002).
22. 21 PERB ¶ 3014 (1988).
23. *Id.* at 3029, citing *County of Rensselaer,* 13 PERB ¶ 3080 (1980); *Steuben-Allegany BOCES*, 13 PERB ¶ 3096 (1980*), State of New York*, 18 PERB ¶ 3064 (1985).
24. *Massena Memorial Hospital*, 25 PERB ¶ 3023 at 3050 (1992).
25. Public Health Law § 1399-n(6) defines school grounds as "any building, structure and surrounding outdoor grounds contained within a public or private pre-school, nursery school, elementary or secondary school's legally defined property boundaries as registered in a county clerk's office and any vehicles used to transport children or school personnel."
26. Public Health Law § 1399-n(5).
27. Even if a covered outdoor area were to be considered an "indoor area" merely because it was covered (which is most likely not the case), as long as no employees perform services for the employer in that area it would not meet the definition of a "place of employment" under Public Health Law § 1399-n(5).
28. *See County of Niagara*, *supra*; *Gallencamp Stores v. NLRB, supra*.

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PERB Update

By Philip Maier

The following is a summary of decisions issued by the Public Employment Relations Board from October, 2003 until March 15, 2004.

Good-Faith Bargaining

State of New York (Division of State Police), 36 PERB ¶ 3048 (2003)—The Board affirmed an ALJ decision dismissing a charge which alleged a violation of §§ 209-a.1(a) and (d) of the Act when the State denied annual leave in one-day increments to a troop commander. The charge had been deferred to arbitration and the arbitrator had determined that there was not a past practice of allowing employees holding the title of major to use leave in one-day increments as alleged in this case. The Board held that collateral estoppel applied to the past practice issue as raised in the charge. Parties are precluded from relitigating in a subsequent action an issue actually litigated and necessarily determined in a prior proceeding. There was an identity of issue in both the charge and the grievance arbitration. Since a past practice was not altered, the State did not violate the Act.

Representation

Town of Southampton, 37 PERB ¶ 3001 (2004)—The Board affirmed the dismissal of a decertification/certification petition seeking to fragment a group of 18 public safety dispatchers from a long-standing unit of approximately 230 employees in various titles throughout the Town. The basis of the petition was that the incumbent union had inadequately represented the dispatchers by excluding them from the negotiating process, agreeing to concessions which they had won in an arbitration proceeding that only had affected the dispatchers, and by ineffectively processing membership applications from dispatchers. The Town insisted on certain concessions which affected the dispatchers, maintaining that position until an impasse was declared. The Town intended to go to legislative imposition if an agreement was not reached and the concessions sought were not achieved.

Ultimately, the parties reached a compromise, and the union won other benefits for the remainder of the unit. Additionally, the dispatchers were the only group that received retroactive payments as a result of the negotiations. A member of the team was a dispatcher, and dispatchers also held union positions and were able to engage in union affairs. The problem relating to membership applications did not concern only the dispatchers. The Board did not find any evidence of inadequate representation, and stated that not all interests could be satisfied in this difficult round of negotiations. Consistent with the Board's precedent to find, as the appropriate unit, the largest unit permitting for effective negotiations, and to fragment units only when a compelling reason is present, the Board affirmed the dismissal of the petition.

Harrison Central School District, 36 PERB ¶ 3046 (2003)—The Board affirmed a decision of an ALJ finding that the newly-created title of teaching assistant was in the CSEA's unit since it was listed as a title in the collective bargaining agreement of that unit's recognition clause. In *Monroe-Woodbury*, 33 PERB ¶ 3007 (2000), the Board held that when a title is specifically included in a recognition clause, a unit clarification petition seeking a determination that the title is in that unit will be granted without further inquiry into the parties' practice. A reading of the contract leads to the conclusion that the title "teacher assistant" is the same as teaching assistant and is in the CSEA-represented unit. Even if ambiguous, the District has referred to the title interchangeably as both teacher assistant and teaching assistant.

New York City Transit Authority, 36 PERB ¶ 3038 (2003)—The Board affirmed the decision of an ALJ which placed the titles telecommunications specialist and computer specialist in a unit represented by DC 37, the intervenor in petitions filed by the TWU. The Board affirmed the finding that the titles share a greater community of interest with the DC 37-represented titles, since there is a greater similarity in the wages, benefits and other terms and conditions of employment, and reiterated that a unit placement petition is a mini-representation petition. The DC 37-represented employees, like the titles in issue, are paid on an annual basis, as opposed to the TWU employees, who are paid on an hourly basis. The work performed by the titles in question is more similar to that performed by the DC 37 employees, in that it does not require as much supervision, the employees are engaged in longer-term projects requiring greater skill levels, and work more independently than the TWU-represented employees. The Board also rejected the employer's contention that the titles be placed in a separate unit since there was no evidence to support such a placement. It thus rejected its administrative convenience argument.

Discrimination and Interference

City of Syracuse, 36 PERB ¶ 3047 (2003)—The Board reversed an ALJ decision finding that the City violated §§ 209-a.1(a) and (c) of the Act when it transferred an employee for grievance activity. While noting that the employee was engaged in protected activity and the employer representatives were aware of this activity, the Board stated that the union did not make a *prima facie* case since the record lacked evidence that the City would not have acted but for the protected activity. The Board held that the remarks relied upon by the ALJ did not provide sufficient evidence of animus or improper motivation. The Board also disagreed with the ALJ that the proffered reason for the transfer was pretextual, and that in the absence of animus, timing alone is insufficient to support a finding of a violation. Since the union failed to prove that but for the grievance activity the transfer would not have occurred, the charge was dismissed.

New York City Transit Authority, 36 PERB ¶ 3049 (2003)—The Board reversed a decision of an ALJ finding a violation of § 209-a.1(a), and held that a medical examination which an employee was required to attend was not an investigatory interview entitling him to representation rights. The examination was to determine whether the employee required further education and/or treatment. No alcohol or drug test was scheduled, and could not be pursuant to the parties' CBA or the NYCTA's rules. Since no test was scheduled, the employee could not reasonably conclude that the examination would result in discipline. What was involved were continuing issues of treatment, not issues involving discipline. In testing whether there is a reasonable basis to conclude that discipline may result, the Board uses a reasonable person standard. The examination in this matter is not of the type which is of an investigatory nature triggering a right of representation under the Act.

New York City Transit Authority, 36 PERB ¶ 3043 (2003)—The Board affirmed the dismissal of a charge alleging that an employee was retaliated against by being required to enroll in a substance abuse program because the TWU filed an improper practice charge alleging that the NYCTA improperly refused his request for union representation during a physical examination. A doctor, in preparation to testify at the hearing related to the request for union representation, testified that she noticed that he was improperly advised that he was not required to report to a substance abuse program. He was then required to enroll in a program. The Board, in accordance with the ALJ, held that he was not retaliated against because of the filing of the earlier charge. The fact that an employer becomes aware of information in the course of investigating an improper practice charge, or preparation for a hearing related to that charge, does not preclude action based upon that information. The record indicated that the doctor's judgment was based upon her medical opinion, and there was no evidence to indicate that it was motivated by animus.

Duty of Fair Representation

Transport Workers Union, Local 100 (Brockington), 37 PERB ¶ 3002 (2004)—The Board reversed an ALJ decision finding that the TWU violated §§ 209-a.2(a) and (c) of the Act by not representing an employee properly in a grievance proceeding. The charging party, the only witness in the proceeding, alleged that the TWU did not allow him to bring witnesses to his arbitration, present photographs containing evidence, and to produce evidence of other employees having committed similar offenses who received lesser penalties. The Board held that the ALJ erroneously concluded that in the absence of the TWU showing any good faith for its actions, it violated the Act. The Board held that the ALJ improperly shifted the burden to the TWU, and that the evidence did not demonstrate that the charging party proved in his case that the TWU acted in an arbitrary, discriminatory of bad-faith manner. Though the representation may have been deficient, that does not rise to the requisite level necessary to find a violation of the Act. Accordingly, the charge was dismissed.

Local 375, District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (Malhotra), 36 PERB ¶ 3044 (2003)—The Board affirmed the dismissal of a charge alleging a violation of § 209-a.2(c). Claims were time-barred, and with respect to actions taken after his retirement, Malhotra had no standing to file an improper practice charge alleging a breach of the DFR.

United Federation of Teachers, NYSUT, AFT, AFL-CIO (Saidin), 36 PERB ¶ 3042 (2003)—The Board affirmed the dismissal of a charge alleging the breach of the duty of fair representation because the union failed to make certain arguments at an arbitration hearing, failed to follow the employee's wishes concerning the conduct of the arbitration proceeding because one of the union representatives did not like him, and that the UFT and employer conspired to breach the DFR at the arbitration hearing. The UFT made a motion to dismiss based upon an offer of proof, which was granted. The Board restated that in this procedural context the offer must be viewed in a light most favorable to the charging party, and must be given all reasonable inferences. The Board stated that dissatisfaction with tactics during a grievance hearing alone does not give rise to a viable

charge, nor does the fact that a union may be incorrect in its analysis. No facts were offered to show that he was disliked. Therefore, the offer of proof did not demonstrate that the UFT acted in an arbitrary, discriminatory, bad-faith manner and the charge was dismissed.

New York State Court Clerks Association (Janay), 36 PERB ¶ 3041 (2003)—The Board affirmed a decision by an ALJ dismissing a charge alleging that the union violated its duty of fair representation by failing to file an EEOC charge on his behalf, by refusing to allow him the opportunity to speak with the union's counsel, by failing to assist him in obtaining a work transfer, and by failing to respond to his inquiries. The Board affirmed the ALJ's findings that the union had adopted a policy pursuant to which EEOC charges were not filed on behalf of unit members, that the union did not allow other members to speak with counsel under the circumstances present in the employee's case, that it had assisted him in trying to obtain a transfer, and that it responded to his inquiries. In light of these findings, the Board concluded that the union did not act in an arbitrary, discriminatory or bad-faith manner, and affirmed the dismissal of the charge.

Jurisdiction

State of New York (Department of Correctional Services), 36 PERB ¶ 3040 (2003)—The Board reversed an ALJ decision finding that the Board had jurisdiction over a charge alleging a breach of a settlement agreement. The Board held that the ALJ erred in relying upon *Sherburne-Earlville Central School District*, 36 PERB ¶ 3011 (2003) to decide the jurisdictional issue. In interpreting that case, the Board stated that it involved the creation of a past practice by a supervisory employee that favored only certain members of a District-wide unit, and existed without the knowledge or consent of the unit's bargaining representative or the superintendent. Further, there was no mutuality in the creation of the alleged practice. In this matter, the Board stated that the settlement agreement was an agreement within the meaning of § 205.5(d) of the Act, and that such an agreement acts as a source of right divesting the Board of jurisdiction. The charge was therefore dismissed pursuant to the Board's deferral policy.

Practice and Procedure

State of New York (Office of Mental Health–South Beach Psychiatric Center), 36 PERB ¶ 3039 (2003)—The Board dismissed exceptions due to the failure to file timely exceptions on all parties to the proceeding. Exceptions were dismissed despite the fact that the party not served did not object. *See also Yonkers Federation of Teachers (Jackson)*—36 PERB ¶ 3050 (2003)- Failure to serve exceptions in accordance with Rules not excused because party is *pro se* litigant.

Philip L. Maier is the Regional Director for the New York City office of the New York State Public Employment Relations Board. He also serves as Administrative Judge and Chief Regional Mediator for the agency. He is a graduate of Vermont Law School.

For Your Information

The firm of Berenbaum, Menken & Ben-Asher, LLP and the Law Office of **Mark H. Bierman** have joined to become **Berenbaum Menken Ben-Asher & Bierman LLP. Stephen H. Palitz** joins the firm as of counsel.

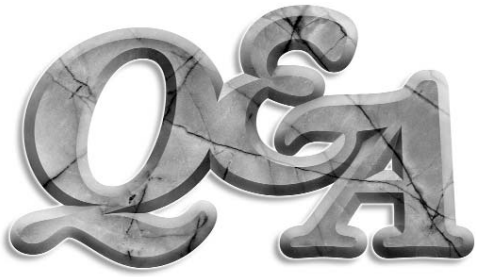
Laurence S. Moy has become a partner of the firm of **Outten & Golden LLP** and **Carmelyn P. Malalis** has become an associate of the firm.

The Partners of **Allen & Overy** announce that **Michael S. Feldberg** has become a partner and head of the firm's U.S. litigation practice, and **Pamela Rogers Chepiga** has become senior litigation counsel.

Joel C. Glanstein has been elected to the Board of Governors of the College of Labor and Employment Lawyers.

Janet McEneaney has earned an LL.M. degree in Commercial and Employment Law of the European Union from the University of Leicester in the U.K.

Ethics Matters



By John Gaal

Q About six months ago, I had a new client come to the firm. There was no conflict at that time between this new client and any of my other clients. Nonetheless, I could anticipate that a conflict might arise in the future with one of my long-time clients. As a result, I explained this possibility to the new client and told it that while I felt that I currently could undertake its representation, and indeed wanted to, if a conflict later did arise between it and my other client, I would not be able to continue my representation. I also explained that, in those circumstances, I would want to be able to continue with my representation of the other client, even if it were adverse to the new client. The new client agreed, signed off on this consent, and I began the representation. Now, the conflict I feared has materialized. My long time-client has a dispute with the new client and wants me to represent it. Will I be able to rely on the consent I secured, and actually sue my new client now?

A Because you secured the consent of your new client to withdraw and undertake an adverse representation, before the conflict actually arose, you have what is called an "advance" consent. While a number of authorities in other states generally have recognized the validity of advance consents, they are nonetheless risky.

In New York, the Committee on Professional Ethics of the New York County Lawyers' Association, in New York County Opinion 724 (1998), has approved of the use of an advance waiver of a future conflict provided certain conditions are met. Most significantly, the conflict which subsequently arises must have been reasonably anticipated by the consenting client based on the disclosures that were made at the time the consent was originally given. Thus while the specific facts giving rise to the later conflict need not be known or precisely described at the time the consent is given, the conflict which does arise must be reasonably foreseeable based on the information provided to the client, otherwise the consent cannot be considered "knowing." In addition, the sophistication of the client is a relevant factor in the ultimate determination as to whether the consent will be enforceable.

NYSBA Formal Opinion 674, on the other hand, suggests that a consent in these circumstances may only be effective if it is given *after* the conflict arises. Viewing this type of situation as triggering the rules on representation adverse to a former client under DR 5-108, Opinion 674 concluded that "[t]he consent required by DR 5-108 could only be obtained *after* the client becomes a 'former client.'" (Emphasis added.) A recent decision issued by the First Department, *St. Barnabas Hospital v. New York City Health and Hospitals Corporation*,[1] indicates that such advance consents may in fact be enforceable even though obtained prior to the time the actual conflict arose.

St. Barnabas Hospital had retained a firm to handle some employment litigation for it. At the time, the firm also represented another hospital which was adverse to St. Barnabas in some transactional matters. Because the employment litigation was unrelated to the transactional work, the firm concluded that no actual conflict existed which precluded it from undertaking the employment litigation. The law firm agreed to undertake the representation provided St. Barnabas consented that in the event the firm later found itself in the midst of an actual conflict between St. Barnabas and its other hospital client, the firm would cease representing St. Barnabas and would be allowed to continue to represent the other hospital, even in connection with the adverse matter. St. Barnabas agreed, in writing, to those terms. When a subsequent conflict involving a new matter did arise and the firm withdrew from representation of St. Barnabas, St. Barnabas moved to disqualify the firm from the adverse matter. The trial court granted the motion, but the First Department reversed.

The Appellate Division applied the traditional "former client" analysis to determine whether in the first instance a conflict even existed. Under those rules, found in DR 5-108(A), a lawyer may not represent a client against a "former client" (which was St. Barnabas' status after the firm withdrew from its representation) in a matter substantially related to the lawyer's prior representation of that former client without the former client's consent. The Court easily found that the current matter was both substantially related to the firm's former representation of St. Barnabas and adverse to St. Barnabas.

The Court turned to the firm's position that St. Barnabas had consented, in advance, to the firm's continued representation of the other client in the event just these circumstances arose. The Court rejected St. Barnabas' argument that the representation of the other client in this adverse matter created such an "irreconcilable conflict" that St. Barnabas could not consent as a matter of law. The court also found that the consent provided by St. Barnabas was "knowing." Emphasizing that St. Barnabas is a "sophisticated, institutional client, and one obviously well-versed in dealing with attorneys," the Court applied the written consent consistent

with its obvious intent. In fact, the Court found that the consent extended to the adverse litigation at hand, even though "litigation" was not expressly mentioned within the terms of the consent.

Finally, the Court applied laches to find that St. Barnabas' 14-month delay between the firm's withdrawal from its representation and its motion to disqualify the firm constituted further evidence of the hospital's consent, and raised the suggestion that the motion it eventually made was for tactical purposes, and not aimed at legitimate concerns.

The First Department's decision should provide comfort for attorneys dealing with sophisticated, institutional clients that an advance consent will in fact be enforced when the anticipated conflict subsequently arises. However, care must still be taken to ensure that the client from whom the consent is secured is sufficiently apprised of the facts which may later lead to a conflict, because unless the conflict which actually materializes could be "reasonably anticipated" from the facts presented, the likelihood of the consent being enforced is slight. Moreover, despite the Court's willingness to apply the consent in *St. Barnabas* to "litigation," prudence demands that a consent which permits later adverse representation explicitly reference "adverse litigation." A number of courts and other authorities have not been as quick as the First Department to view litigation as necessarily included in a general consent to adverse representation.

Endnote

1. 2004 N.Y. App. Div. LEXIS 4011 (1st Dep't, April 8, 2004).

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC in Syracuse, New York, and an active Section member. If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John at (315) 218-8288.

chairmanships, and, prior to that, he chaired the Government Employee Relations Committee for five years. With Pearl stepping into office and Rich waiting in the wings, the future of the Section indeed is bright. Our members will enjoy continuation of enhanced services and expanded opportunities in the years ahead, as the initiatives that we have begun take root and flourish under Pearl and Rich's guidance.

"Our members will enjoy continuation of enhanced services and expanded opportunities in the years ahead, as the initiatives that we have begun take root and flourish under Pearl and Rich's guidance."

Also ensuring the bright future of the Section are the newly elected District Representatives. Merrick Rossein, to whom I am deeply grateful for his outstanding service as Section Secretary and parliamentarian *par excellence*, was elected to a three-year term as the Representative for the Eleventh Judicial District. Also, Terence O'Neil, incumbent District Representative for the Tenth Judicial District, was re-elected to a second three-year term, and Donald Sapir was re-elected to a third term in the Ninth. Mark Leeds, who last year graciously and enthusiastically stepped into an unexpired term in the Twelfth Judicial District, was elected to his first full three-year term. The District Representatives provide an important geographical link between the Executive Committee and the membership. To enhance their involvement in this capacity, the twelve District Representatives this year officially were added to the roster of the Membership Committee. In that capacity, they will be assisting Bill Frumkin, the Membership Committee Chair, in identifying ways in which the Section may better meet the needs of the membership.

The past year has been marked by a variety of structural and organizational improvements, of which the creation of a separate Membership Committee is just one. We began the year with the presentation of recommendations prepared by the *Ad Hoc* Committee on Section Structure, which had been put in place by Dick Chapman. The Executive Committee adopted the *Ad Hoc* Committee's recommendations and, as a result, formed several new Committees, as follows: Diversity and Leadership Development; Communications; and International Labor and Employment Law. We also created a separate Finance Committee and gave full standing-committee status to the Public Sector Book and the Ethics and Professional Responsibility Committees, both of which previously had existed only on an *ad hoc* basis.

After the changes in Committee structure had been implemented, we began our effort to make the members more aware of the Committee opportunities available to them. We received a resounding response to our request for expressions of interest in Committee membership, and we have made every effort to appoint members to the Committees they designated as being the most appealing to them. Through this process, we have infused the Section's Committees, old and new, with a wealth of fresh ideas and enthusiasm. The new Committees have been able to swing swiftly into action. For example, the Communications Committee, led by Co-Chairs Jim McCauley and Sharon Stiller, is overseeing the development of a new membership directory that will be accessible on line. The International Labor and Employment Law Committee, chaired by Wayne Outten, Ira Cure, and Phil Berkowitz, is preparing a session for presentation at the Section's Fall Meeting in Cooperstown (October 1-3, 2004).

In January of this year we enjoyed the hugely successful Annual Meeting, which drew the largest attendance in the Section's history. We were delighted to see the tremendous turnout and thank our attendees for their tolerance of the tight quarters that resulted. Thanks to Rich Zuckerman, the CLE Committee, and several of the Committees that prepared presentations, our sessions were rich in substance, policy debate, and practical pointers. Our luncheon speaker, The Honorable Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission, provided, in an entertaining and enlightening way, important insights and highlights regarding current and upcoming initiatives of the EEOC.

Throughout the years, the Section frequently has addressed important policy developments in the law as they relate to labor and employment practices. In the past year, we have been particularly active in this regard. The Section offered input on issues such as the Federal Mediation and Conciliation Service's Access to Neutrals Initiative, the proposals of the Commission on Public Access to Court Records, the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, and, most recently, the initial set of recommendations of the NYSBA Committee on Standards of Attorney Conduct (COSAC) regarding proposed revisions to the *New York Code of Professional Responsibility*. On each of these issues, the responsible Section Committee developed thoughtful and balanced recommendations that were then adopted by the Executive Committee and officially submitted as the viewpoint of the Section. Our latest endeavor, the comments on the proposed revi-

sions to the Code of Professional Responsibility, was developed by the Ethics and Professional Responsibility Commit-tee, chaired by John Gaal and Nancy Hoffman. The recommendations are comprehensive and ensure that the views of the labor and employment law bar are heard in the important work being conducted by COSAC. The review of the *Code of Professional Responsibility* will be an ongoing project and will call for our continued involvement as a Section. Anyone who would like to obtain a copy of the recommendations or to become involved in our future work on this important matter is encouraged to contact the Committee Co-Chairs.

"[T]he Labor and Employment Law Section is a remarkable gathering of the finest within our profession."

Through this Section, we, as labor and employment lawyers, have the opportunity and obligation to make our voices heard on important policy issues that affect our practices. I am confident the Section will continue its contributions in this way. The Section also provides us with an unparalleled source of professional education and interaction, and we can be assured that these services will remain a central focus of the Section. My certainty is based upon an understanding of and deep respect for this extraordinary organization. As I have noted before in these pages, the Labor and Employment Law Section is a remarkable gathering of the finest within our profession. It is a place where attorneys with divergent practice orientations and viewpoints come together in the spirit of collegiality and work productively to enhance our shared expertise in the dynamic field of labor and employment law. One of the greatest testaments to the collegiality, professionalism, and dedication found within our Section is that our former Chairs have remained active contributors, giving generously of their time, insights, and historical perspectives as the Section works for the good of the membership and the profession. I now look forward to joining their ranks, and I thank the Section for the honor of having served as its Chair.

Jacquelin F. Drucker

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A Message from the Incoming Chair
(Continued from page 1)

After this auspicious beginning, our Section never stagnated. In 1992, then-Chair Michael Bernstein created the Future Directions Committee to examine the Section's membership and structure. Among the changes that the Committee recommended and the Section implemented was the designation of a fourth category of Section participant—attorneys representing individuals who are not necessarily union members. I personally am indebted to Mike and others who supported this important change.

Our Section immediately reached out to attorneys representing individuals, welcomed them and integrated them into meaningful leadership positions. For example, attorneys representing individuals have become co-chairs of the Alternate Dispute Resolution, Equal Employment Opportunity Law and Individual Rights and Responsibilities Committees. Our annual meetings and fall meetings now include topics such as the Sarbanes-Oxley Act which are of particular interest to those attorneys. At the same time, our Section has remained committed to maintaining Committees and sponsoring programs on traditional labor management relations for the attorneys who practice in these areas.

The January Annual Meeting

Our Section's strength and vitality were on display at the January annual meeting which had an unprecedented attendance—336 of our 2,504 members. The plenary sessions addressed the Family Medical Leave Act and retaliation claims. We then broke into two concurrent workshops—one, on the Taylor Law, a second on the National Labor Relations Act.

Our Annual Meeting speakers reflected our Section's diversity, including members from the New York metropolitan area and upstate, attorneys from large and small law firms, corporate counsel and representatives from the public sector. Presentations were informative, lively and interactive; the written materials were invaluable.

Our luncheon speaker, the Honorable Cari M. Dominguez, Chair of the Equal Employment Opportunity Commission, discussed a range of issues of interest to our members, including the prevalence of retaliation claims, the success of the mediation program and the proposed rule change related to Medicare eligibility.

The success of our Annual Meeting, like the success of our fall 2003 meeting in Ottawa, was primarily attributable to two individuals—our past Chair Jacquelin F. Drucker and our former Continuing Legal Education Chair Richard K. Zuckerman.

I thank Jackie for including me in Section activities during my time as Chair-Elect, and I will rely upon her continuing support during my year as Chair. I also congratulate Rich on becoming Chair-Elect, and I look forward to working with Rich's successor as CLE Chair, Alan Koral.

The Fall Meeting

At this time, my primary focus is the Fall Meeting which will be held October 1–3 at the Otesega Hotel in Cooperstown, New York, site of the Baseball Hall of Fame. Alan and the CLE Committee are working diligently to develop a program which will be useful and informative to all our members.

Linda Castilla, our NYSBA staff liaison and meeting planner, has been hard at work, as usual, making our meeting memorable. We all owe Linda thanks for an impressive coup—she has secured time on Saturday afternoon, October 2, for a softball game on Doubleday Field. In addition, Linda has arranged cocktail parties at the Baseball Hall of Fame and at the Fenimore Art Museum.

Please mark your calendars now and be alert for the registration materials which will be sent to you. We anticipate a significant turnout, and we want to avoid disappointment.

The Year Ahead

During my year as Chair, I hope to build on the accomplishments of the past. After reorganizing our committee structure, and expanding the number of committees, the Section sent a letter to our members inquiring about their interest in serving on a committee. I am delighted to report that the response has been overwhelming, and I look forward to working with our past members and our new members on a variety of projects and initiatives.

On several occasions, our Section has sponsored two-or three-day litigation institutes where experienced Section practitioners present a concentrated program on specific areas. Topics have included Attorneys' Fees and Damages and Litigating Disability Discrimination Claims. The Executive Committee will be reviewing the possibility of sponsoring another institute, perhaps in May 2005, and I will make every effort to give priority to this project.

Finally, my personal objective during the next year will be to encourage newly admitted attorneys to join our Section. Section membership has been invaluable to me, both professionally and personally. I believe that attorneys beginning their careers will benefit immeasurably by becoming part of our collegial community, and our Section will benefit from new members' energy and ideas. I hope that you share this goal and that you will work with me to achieve this objective.

Pearl Zuchlewski

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

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

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

Thank you for your cooperation.

Janet McEneaney
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