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L&E Newsletter

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of the New York State Bar Association

A Message from the Incoming Chair

Robert Kingsley (Kayo) Hull

Thanks are in order to Don Oliver, who steered our Section with such skill and good humor—see his accompanying message—for the last year. In the best tradition of Section governance, he generously included me whenever issues arose and was a delight to work with. I will try to follow Don's good example as I work with Alan Koral, our Chair-Elect. Alan has already distinguished himself for several years as our CLE Chair, a heavy oar he will gradually be handing over to Stephanie Roebuck during the months ahead.

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A Message from the Outgoing Chair

Donald D. Oliver

On May 11, 2007—after a one-year hiatus—the Section, together with co-sponsors Cornell University and Region 3 of the National Labor Relations Board, presented a program entitled "NLRB and the NLRA" in Buffalo. The full-day program contained a wide range of topics, including: (1) "Recent and Pending Developments at the NLRB"; (2) "The Ramifications of the Board's Decision in Oakwood"; (3) "Ethical Considerations in Practice Before the NLRB"; (4) "Wright Line: A Legal Doctrine and Its Practical Implications for Employees and Employers"; and (5) "After the Dust Has Settled: Compliance Procedures, Expectations and Requirements." There were also several guest appearances from the Board's Washington,

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Inside

NYSBA

A Message from the Incoming Chair

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The Editor of the New York State Bar Association's *State Bar News* recently asked me why lawyers should join the Labor and Employment Law Section. I've concluded that the lawyer who does *not* need to join our Section is really the exception to the rule.

Think about it: Almost all lawyers are themselves either employees or employers. Some of them are both. Regardless of how specialized their legal practice may be, labor and employment law is likely to affect their professional and personal lives. Almost every lawyer has good reason to be conversant in labor and employment law. A look at some of our Section's substantive committees—Employee Benefits; Equal Employment Opportunity; Individual Rights and Responsibilities—drives that point home.

The issues that grow out of the employment relationship are resolved in many forums. Other Section substantive committees—Alternative Dispute Resolution; Labor Arbitration and Collective Bargaining; Government Employee Labor Relations Law; International Labor and Employment Law; Labor Relations Law and Procedure—follow the activities of the various decision-makers: federal, state, and foreign government agencies; federal, state, and foreign courts; and local, multi-state, and transnational party-selected arbitrators and mediators.

Building on our members' expertise in these different fields, our Section committees plan and present Continuing Legal Education programs throughout the year at locations all over the State. The Section also offers a broad selection of CLE at our two yearly meetings: a full-day program at our Fall Meeting and a half-day program on the Friday morning of the Association's Annual late-January meeting week in New York City.

Studies commissioned by the Association over the years consistently show that the two principal reasons most of us join the country's largest voluntary bar are (1) its CLE programs and (2) networking with colleagues. Most of those opportunities arise in the context of the Association's subject-matter sections.

As you know, our Section does not look at labor and employment law from a single perspective, since our members represent a wide range of views. Lawyers with practices representing employers, unions, individual employees, and government agencies are all found in large numbers among our 2,300 members, as are the arbitrators and mediators who work with them. Our CLE program topics and speakers reflect that diversity of interests.

In fact, the Section's charter members will recall that when the Labor Law Committee sought Section status in the mid-1970s, some in the Association wondered whether a group made up of so many opposing interests could function as a Section. But by agreeing to disagree while encouraging free discussion, the Section not only survived but thrived, in part because when all points of view are represented, the quality of the debate is greatly enhanced. In addition, the Section provided neutral ground for collegial interaction, which benefited our professional relationships with each other.

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In light of all the foregoing, it is something of a mystery why half of the Association's members are not members of any of its Sections. The Association's President, Kathryn Grant Madigan, has launched a multi-year membership challenge. While the drive is primarily directed at recruiting new members to the Association, we in the Sections have been asked to expand our ranks as well. That takes me back to my opening point—almost every member of the bar would benefit by joining us. I'll be making that point to our non-member colleagues in response to President Madigan's challenge.

The Section's Executive Committee pledges its support of President Madigan's other goals for 2007–2008: "bringing [us] back to the basics of service to its members and the law-advocate-needy public" and "requiring greater accountability from every Association Section." We have high expectations for the Section and ourselves as we pursue its mission.

If you have an idea or concern you would like to share with me regarding the Section and its work, please let me know. My address and telephone number appear on the back cover of this *L&E Newsletter*. My e-mail address is kayo@arbit.com.

Robert Kingsley (Kayo) Hull

A Message from the Outgoing Chair

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D.C., offices. Lafe Solomon, Esq., Director of the Office of Representation Appeals, gave a summary of "Representation Case Issues Before the Board." The luncheon speaker was NLRB Member Wilma B. Liebman, Esq., who presented a thoughtful and well-received talk on "Reflections of an Aging Agency." Following the regular program, the Section sponsored a meeting among Region 3 Director Helen E. Marsh, Esq., members of the Region 3 staff, and attorneys who regularly practice before Region 3. Hopefully the Section's co-sponsorship of this annual event with Cornell and Region 3 will continue for many years to come.

The original plan was for this Message to be published while my status was still that of "lame duck" rather than "dead duck." It really makes no difference, however, because the Message remains the same. Kayo Hull assumed the duties of Chair on June 1 and is already hard at work on preparations for the Fall Meeting at Cornell. Accordingly, I will leave it to Kayo to address substantive issues and future events while limiting myself to fond remembrances and thank-you's.

I found my tenure as Chair to be both interesting and rewarding. I made some new friends and gained greater appreciation of many old ones. Special thanks are in order for five people. First, thanks to Janet McEneaney for all of her hard work and dedication in putting this *Newsletter* together and gathering and editing the labor and employment law articles covering such a wide variety of subjects. As she noted in her last column, there truly is "something of interest for everyone." Thanks also to Bob Simmelkjaer for his loyal service as Secretary during the last year. Bob will be putting down his pen and sharpening his pencil as he assumes his new role as Treasurer and Chair of the Finance Committee. Special thanks to CLE Chair Alan Koral for his incredible attention to detail, immediate response time, organizational skills, and the myriad hours of hard work spent putting an exceptional set of CLE programs together over the past year. Alan will continue to perform his duties as CLE Chair for the next year while also assuming new responsibilities as the Section's Chair-Elect. Thanks to Kayo Hull for his friendship and wise counsel as Chair-Elect. Kayo's transition from Chair-Elect to Chair was seamless, efficient and painless. Finally, special thanks to NYSBA Liaison Linda Castilla for making everything work. From arranging meeting rooms and accommodations at the Gideon Putnam for the Fall Meeting to facilitating communications with the NYSBA leadership and everything in between. Linda not only made the job as Chair easier, she made it enjoyable.

I am now prepared to embark on my next great Section adventure—acting as Co-Chair with Kayo Hull for a wine-tasting tour of the Finger Lakes Region during the Fall Meeting at Cornell. Hope to see you there.

Donald D. Oliver

PERB

The Public Employment Relations Board (PERB) has commenced the process of reviewing its Rules of Procedure (Rules) aimed at developing proposed changes. The last time the Rules were amended was in 1999.

The purpose of the proposed changes is to make PERB's procedures more practical, efficient and effective for agency staff and constituency groups. As part of the development of the proposed rule changes, members of the NYSBA Labor and Employment Section are encouraged to submit written ideas for such changes—both from an advocate's perspective as well as from your clients' perspectives. Please email your ideas and suggestions by September 10, 2007 to PERB Deputy Chair and Counsel Bill Herbert at wherbert@perb.state.ny.us.

From the Editor

Janet McEneaney

Mendelsohn v. Sprint

During its last week before the summer break, the Supreme Court granted *certiorari* in *Mendelsohn v. Sprint*, a case involving the Age Discrimination in Employment Act.[1] Ellen Mendelsohn, who had been employed at Sprint for about three years, was terminated pursuant to a company-wide reduction in force. After she was terminated, she sued the employer, claiming she had been chosen for the RIF because of her age.

Mendelsohn proposed to show testimony from other former Sprint employees who claimed to have been discriminated against in a similar manner. Mendelsohn's proposed witnesses all had different supervisors. The court ruled for the employer on a pre-trial motion to allow testimony only from employees who had the same supervisor as the plaintiff. Mendelsohn lost the case.

On appeal, the plaintiff argued that testimony from other individuals fired at the same time was relevant to her case because she had alleged a company-wide policy of age discrimination. Sprint argued that the evidence was not relevant and unfairly prejudicial.

The Court of Appeals held that excluding this evidence constituted a reversible error and remanded the case to the district court for a new trial. Sprint appealed to the U.S. Supreme Court which granted a writ of *certiorari* on June 11, 2007.

Gorman v. Consolidated Edison Corp.

In a recent case, the Second Circuit Court of Appeals ruled on compensation for "doffing and donning" and time taken for security procedures.[2]

Employees of the Indian Point II nuclear power station sued their present and former employers under the Fair Labor Standards Act.[3] They challenged overtime computation by Consolidated Edison and Energy and sought payment of wages for the time spent in security-related procedures entering and leaving the plant, which takes between 10 and 30 minutes each day, and other similar activities. The district court granted the employer's motion to dismiss.

On appeal, the question was whether the disputed activities were "'integral and indispensable' to a 'principal activity' under *Steiner.*"[4] The complaint listed those activities as:

(i) Waiting in traffic outside the plant entrance;

(ii) Badge inspection at the entrance, including a visual check of the interior of the car, and occasional random vehicle inspection (engine, trunk, glove compartment, undercarriage);

(iii) Parking and walking to the command post;

(iv) At the command post, waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector;

(v) Waiting in line to swipe an ID badge and to palm a sensor;

(vi) Going to the locker room to obtain and don metal capped safety boots, safety glasses, and a helmet (if applicable);

(vii) Walking to the job-site;

(viii) And at the end of the shift, doing many of these things in reverse.

The court found that these activities, while indispensable, were not also "integral" to the principal work activities. Addressing the plaintiffs' argument that the Portal-to-Portal Act was enacted at a time when the issue of invasive, time-consuming security measures may not have been envisioned, the court analogized the security activities to travel time and found that the text of the statute "does not depend on the purpose of any preliminaries, or how much time such preliminaries may consume."[5] "[S]ecurity measures that are rigorous and that lengthen the trip to the job-site do not thereby become principal activities of the employment."[6]

In the same vein, the court found that donning and doffing generic safety equipment—in this case a helmet, safety glasses, and steel-toed boots—might be indispensable to the principal job activities without being integral. The court found no difference between those activities and the activities of changing clothes and showering, which were not found to be covered by the FLSA in the *Steiner* case.[7] Nor is donning and doffing generic protective gear rendered integral because it is required by regulations.[8] Even if donning and doffing the safety equipment were integral and indispensable to plaintiffs' principal activities, the court said, it would likely find the time spent to be *de minimis.*

Hunt v. Pritchard Industries, Inc.

Solomon Hunt, who is black, filed a complaint against his employer, Pritchard Industries, alleging race and disability discrimination. According to Mr. Hunt, who appeared *pro se*, he is moderately partially disabled as a result of an on-the-job injury that restricts his job performance. He claimed that the employer did not accommodate his disability, did not promote him and retaliated against him. Specifically, he said, less senior white and Latino workers were promoted, his supervisor used racial slurs, and he was sexually harassed on the job.

Mr. Hunt also filed a complaint against Local 32BJ, SEIU, alleging that it failed to promote him, failed to accommodate his disability, retaliated against him, and treated him unequally in the terms and conditions of his employment. He claimed that the Union did nothing about the alleged racial discrimination and refused to file his sexual harassment complaint. Hunt claimed that Local 32BJ does not help him, although it helps white and Latino employees.

The collective bargaining agreement between the parties contains the following provision:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. *All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.* [emphasis added]

The contract also provides that "[a]ll Union claims are brought by the Union alone, and no individual shall have the right to compromise or settle any claim without the written permission of the Union."

The company filed a motion to dismiss the complaints and compel arbitration, arguing that the contract provides for arbitration as the sole and exclusive forum for resolution of all employment disputes, including federal discrimination claims. Citing previous Second Circuit decisions, the court denied the company's motion, stating that a union member cannot be compelled to waive his or her individual statutory rights because of a contract provision negotiated between the employer and the union.[9] It cited *Beljakovic v. Melohn Props., Inc.*, in which the Second Circuit previously denied an employer's motion to dismiss an ADEA claim based on the same arbitration provision in the Local 32BJ contract.[10]

Local 32BJ filed a motion to dismiss the Title VII and ADA claims against it. The court granted the union's motion because the plaintiff had not filed a separate EEOC claim against 32BJ.

However, the court let stand what it termed Mr. Hunt's hybrid § 301/fair representation claim against the employer and the union.[11] "To establish a hybrid § 301/DFR [duty of fair representation] claim, a plaintiff must prove both (1) that the employer breached a collective bargaining agreement and (2) that the union breached its duty of fair representation vis-a-vis the union members."[12] Because the plaintiff successfully stated such an allegation, the court found, he should be given the opportunity to prove it.[13]

Porzig v. Dresdner, Kleinwort, Benson, North America LLC

The Second Circuit vacated an arbitration award rendered by an NASD panel in an ADEA case because the award violated the Federal Arbitration Act and was in manifest disregard of the law.

Bernhard Porzig claimed he had been terminated because of age. Pursuant to a pre-dispute agreement, his claim was heard in arbitration under the auspices of the National Association of Securities Dealers Dispute Resolution. The Panel found that age was a factor in the decision to terminate Porzig and awarded him compensatory damages with interest, as well as punitive damages. The Panel did not award Porzig attorney's fees or costs. Instead, it assessed $13,840.75 against him for administrative fees. The statutes provide that the court shall "in addition to any judgment awarded to the plaintiff, . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."[14]

Mr. Porzig appealed the arbitration award, seeking attorney's fees and costs and vacation of the assessment of administrative fees. The court found that the panel had acted in manifest disregard of the law as to the attorney's fees because the evidence showed that the panel had been made aware of the applicable law. The case was remanded to the arbitration panel to determine reasonable attorney's fees.

On reconsideration, the district court also granted the plaintiff's motion to vacate or modify the award as

to costs, also on the grounds of manifest disregard. Thus, the costs were assessed against the defendant.

On remand to the arbitration panel, the defendants contended that the plaintiff's contingency fee arrangement with his attorney should be the maximum limit on the recoverable amount under the fee-shifting statute. In addition, the defendants argued that an award of attorney's fees might be unnecessary to achieve the purposes of the statutory fee-shifting provision. They said the plaintiff's attorney fee application should be substantially reduced, if not denied in its entirety. Granting the defendants' motion, the panel ordered Mr. Porzig to reveal the details of his fee arrangements with his attorney. It denied the plaintiff's motion to have the defendants reveal their own fee arrangements for comparison.

Ultimately, the panel issued a modified award, as follows:

> [Defendants] are jointly and severally liable for and shall pay to [plaintiff's] counsel . . . the sum of $75,000.00 for reasonable attorneys' fees (which sum includes interest from the date of the award of damages to [the plaintiff] in the above matter, and an additional sum of $8,500.00, the reasonable amount of costs and disbursements, for a total amount of $83,500.00.
>
> [Plaintiff's] counsel . . . shall remit to Porzig the sum of $82,437.81, which [he] has represented as constituting all attorneys' fees, costs, disbursements, and expenses retained by him out of the Panel's award, or otherwise paid to him by [Porzig].

Mr. Porzig returned to the district court to appeal the modified award and asked that the panel be ordered to use the lodestar method to calculate reasonable attorney's fees, as well as to compel the defendants to reveal their attorney's billing and expense records and vacate the portion of the award that ordered reimbursement of the plaintiff's paid contingency fee. The district court denied the motion and Mr. Porzig appealed the decision.

Janet McEneaney

Endnotes

1. 466 F.3d 1223 (10th Cir. 2006).
2. 488 F.3d 586 (2d Cir. 2007).
3. 29 U.S.C. §§ 201 *et seq.*, as amended by the Portal-to-Portal Act, 61 Stat. 86-87, which provides that employees will be not be paid for "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254 (a) However, the United States Supreme Court has found that "activities performed either before or after the regular work shift . . . are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an *integral and indispensable part of the principal activities for which covered workmen are employed* and are not specifically excluded by [subsection 1 of the Portal-to-Portal Act]. *Steiner v. Mitchell*, 350 U.S. 247, 248 (1956). *See also IPB v. Alvarez*, 546 U.S. 21, 37 (2005) (awaiting the first principal activity of the workday is not in itself a principal activity).
4. *IPB v. Alvarez*, *id.*
5. 488 F.3d 586 at 593.
6. *Id.*
7. 350 U.S. at 249.
8. *See Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994); *but see Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir. 2003) ("donning, doffing, and cleaning of non-unique gear [is] 'integral and indispensable' as that term is defined in *Steiner"), aff'd on other grounds, IBP v. Alvarez*, 546 U.S. at 21.
9. *Rogers v. New York Univ.*, 220 F.3d 73, 75 (2d Cir.), *cert. denied*, 531 U.S. 1036, 121 S. Ct. 626 (2000); *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001); *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Granados v. Harvard Maint., Inc.*, 05 Civ. 5489, 2006 WL 435731 (S.D.N.Y. 2006); *see also Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).
10. 2005 WL 2709174 (S.D.N.Y. 2005); *see also* "From the Editor," *L&E Newsletter*, Fall 2002, Vol. 27, No. 3.
11. *See Pozo v. J & J Hotel Co.*, 2007 WL 1376403 (S.D.N.Y. May 10, 2007); *Jordan v. Viacom Outdoor Group*, 475 F. Supp. 2d 440 (S.D.N.Y. 2007); *Acosta v. Potter*, 410 F. Supp. 2d 298 (S.D.N.Y. 2006); *Carrion v. Enter. Ass'n, Metal Trades Branch Local Union 638*, 227 F.3d 29 (2d Cir. 2000).
12. *White v. White Rose Food*, 237 F.3d 174 (2d Cir. 2001) ("the plaintiff may sue the union or the employer, or both, but must allege violations on the part of both").
13. *Porzig v. Dresdner, Kleinwort, Benson, North America LLC*, 2007 WL 2241592 (2d Cir. 2007).
14. 29 U.S.C. § 216(b) of the Fair Labor Standards Act, incorporated by reference into the Age Discrimination in Employment Act, 29 U.S.C. § 626(b). *See DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 822 (2d Cir. 1997).

Should Pensions Be a Mandatory Subject of Collective Bargaining Under the Taylor Law?

By Linda M. Lemiesz

I. Introduction

Article 14 of the New York State Civil Service Law, familiarly known as the Taylor Law, defines labor practices in the area of public employment in New York State.[1] Section 200 states boldly: "[I]t is the public policy of this state and the purpose of this act to promote harmonious and cooperative relationships between the government and its employees and to protect the public, by assuring at all times, the orderly and uninterrupted operations and functions of government."[2] The law expressly promulgates a process in which a harmonious relationship between the public employers and their employees guarantees the public uninterrupted governmental services.

In December 2005, the orderly procedures set out in the Taylor Law broke down, perhaps a harbinger of union negotiations in New York in the future. Weeks of bargaining between Local 100 of the Transit Workers Union and the Metropolitan Transit Authority (MTA) ended abruptly when the MTA, late in the negotiations, attempted to put the union members' pension contributions on the table.[3] The MTA proposed that all new transit workers contribute six percent of their wages toward their pensions; the status quo was a two percent contribution.[4] The resulting three-day strike disrupted New York City's busiest shopping week[5] and cost the city an estimated $40 million a day. The holiday spirit did not manifest itself among the parties to the conflict. The union denounced the action by the MTA as a direct attack on the economic security of its future members.[6] Mayor Bloomberg reacted by demonizing the transit workers as "selfish thugs."[7]

With no resolution months later, serious questions remain. Both the TWU and the MTA asserted that their opponent broke the law. The MTA pointed to the prohibition against strikes in New York Civil Service Law § 210(1): "No public employee or employment organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike." The union claimed that the MTA, in raising the issue about pensions, attempted to put on the bargaining table a prohibited topic of negotiation under Section 201(4). Although bargaining over pensions was allowed in the original iteration of the Taylor Act, a legislative amendment in 1973 placed retirement benefits under the exclusive purview of the state legislature.[8] Before this dispute could be resolved, the union called for a strike, an act that directly contradicted the union's affirmation under § 207(b)(3) that "it does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike." The union was punished by losing its dues check-off and having its leadership jailed.

Pressures to reduce pension costs may continue to bedevil public sector negotiations for the foreseeable future. Contributions to New York City's pension funds have increased dramatically since 2001, from $1.1 billion to $4.7 billion. Mayor Bloomberg has been an outspoken advocate of controlling pension costs as a matter of fiscal prudence, and he has estimated that by 2009 ten percent of the city's budget will be consumed by these costs.[9] Nor is New York City unique in facing this problem. In a major study done by Robert Palacios and Edward Whitehouse, the World Bank has identified the cost of civil service pensions as a problem for the global economy.[10] After reiterating why governments instituted such funds in the first place—to secure the independence of public servants, to make careers in public service attractive, to shift the costs of remunerating public servants into the future, and to retire older civil servants in a politically and socially acceptable fashion, Palacios and Whitehouse predict that the erosion of government pensions will have serious consequences for the stability of governments.[11]

New York State attempted to rein in its pension costs in 1973 by amending the Taylor Law, which originally had mandated the negotiation of pensions as a term and condition of employment. In a law that was scheduled to become effective on July 1, 1975, the New York State Legislature removed pensions as a mandatory subject of collective bargaining. The Governor's memorandum to the legislation explains that the law was passed to bring the "steeply mounting cost of public employee pensions, now running significantly ahead of private pension costs," under control.[12] The enactment of this law was eventually delayed until July 1, 1983.[13]

The growing friction between public employers and public employee unions over pension costs strongly indicates that the time has come to repeal this amendment and, once again, to include pensions as a mandatory subject of negotiation during the collective bargaining process. During the period that pension negotiations have been the prerogative of the legislature, costs have spiraled, and accountability has been sacrificed. This article will lay out the argument why the original Taylor Law placed bargaining over pensions where it belongs–on the collective bargaining table—and why restoration of bargaining rights in this area is needed to fulfill the original vision of the Taylor Law of promoting harmonious labor

relations. Pension benefits will continue to be a major labor issue as the baby boomers reach retirement, and fairness demands that public sector employers and the unions of their employees must be allowed to negotiate over this issue. Otherwise, the effectiveness of the Taylor Law will be permanently undermined to the detriment of public sector employment in New York State.

II. The Evolution of Public Sector Pensions

Public sector pensions date back to the time of Rome.[14] Indeed, some historians have speculated that the Roman Republic fell in part because of its inability to provide consistent and adequate pensions to its returning legionnaires.[15] As the Roman Republic was transformed into the Roman Empire, the Emperor Augustus rapidly discerned the need to placate his returning warriors, and he provided the means for them to retire and take up more peaceful ventures, often in the distant provinces they had conquered.[16] The pension provided by the emperor both rewarded loyal service and ensured continuing loyalty to the emperor's reign. Augustus initially funded such pensions from his personal fortune, but soon created an excise tax to ensure a continuing stream of revenue to finance the program as the fiscal demands of the program outstripped even his legendary generosity.[17] The plan he created bears uncanny resemblance to the pensions of the modern world.[18] Legionnaires could retire after twenty years' service on roughly sixty percent of their previous income.[19] Granting the legionnaires a pension protected public welfare and safety by creating an incentive for these men to serve in dangerous, distant wars that enriched the coffers of the empire, but such a stipend also stabilized the political situation in Rome by giving the legionnaires an incentive to continue to support the emperor's political regime.[20] Thus, Roman military pensions were vexed by many of the same issues that plague contemporary public sector pensions: the costs of providing for retirees in their old age or infirmity necessitating increased taxation had to be balanced against the possibility of a catastrophic disruption in an essential service if workers could not be recruited to perform an onerous task. If the government failed to strike this balance accurately, it risked its very survival.

In the United States, the first public sector pensions were likewise provided to veterans.[21] Early pensions were regarded by the courts as gratuities and thus unenforceable until the gift was received.[22] Even today, state legislatures occasionally evoke the gratuity theory of pensions when they seek to revoke pensions during times of economic distress. In 1857, police officers in New York City injured in the line of duty became eligible for benefits provided by the first municipal retirement system.[23] By the early twentieth century public and private employers had begun to adopt pension plans for their retirees. Massachusetts was the first state to adopt a public pension plan in 1911, and other states slowly followed.[24] Today, ninety percent of public sector workers have pensions.[25] The U.S. Census Bureau reported that 1,141,448 New Yorkers were in either a state or local retirement system in fiscal year 2003–2004.[26]

Public pension plans rapidly expanded during the nineteen sixties in a prosperous economy where public employee managers faced little incentive to control costs and the number of public employees rapidly expanded, creating greater political clout for their unions.[27] In addition, no federal legislative authority was imposed on the pension funds of local governments even when the Employment Retirement Income Security Act (ERISA) went into effect to protect qualified private defined benefit plans.[28] In 1998, state and local governments controlled $2.7 trillion in assets.[29]

Public pension plans differ in their design from private plans. The specific political culture that gave rise to the plan—traditions, statutes, and governance—is generally a factor in the plan's design.[30] States often set limits on how public employee pension funds can be invested.[31] Furthermore, at a time when private employers are turning to defined contribution or hybrid plans, public sector pension plans generally are still defined benefit plans, and employees are usually required to contribute to their plan.[32] In a public system, it is much harder than in the private sector to modify or terminate future benefit accruals.[33] Multiple tiers for successive generations of employees are the sometime result of this difficulty; for example, the New York City Employees' Retirement System (NYCERS) currently has four tiers and different plans within tiers as well.[34] Public employee pension plans usually have adjustments for cost of living, whereas such features are rare in private plans.[35] Also, public sector employers have been in the vanguard in creating pensions that are portable, allowing employees to carry their accrued benefits within the same pension system when they go to work for a different public sector employer within the plan.[36]

Beginning in the early 1980s, as the total amount of pension expenditures began to increase, other factors began to change dramatically as well. As the federal government tightened its grasp over private pension plans, many states adopted the "prudent person" standard of conduct mandated by ERISA for their own fund managers.[37] Meanwhile, state constitutional limits on where funds could be invested were relaxed, and states began to manage their portfolios very aggressively.[38] In some states, such as California, the funds have become extremely active in using their voting power to influence the policies of companies in which they have invested.[39]

Furthermore, the design of public employee pension plans began to evolve to include options beyond defined benefit plans. Social Security became available to public employees in states that chose to participate, and soon public plans were being rewritten to integrate Social Security.[40] Other states took the lead from private

employers and began to offer defined contribution plans, either as a replacement for defined benefit plans for new employees (Michigan) or in addition to defined benefit plans, to encourage greater employee savings for retirement and to attract younger workers who desired more flexibility about changing jobs.[41] Faced with the loss of workers with specialized skills, some states developed Deferred Retirement Option Plans (DROP) to reward employees who defer retirement by providing a partial lump sum distribution to such employees when they retire.[42] David Rajnes has summarized the recent state legislative changes in pension plan design as falling into the following categories: 11 states changed service credit/purchase of service requirements to enhance portability; ten states changed contribution rates; five states changed the manner in which funding was achieved or defined; four states changed formula annuity factors and vesting requirements; three states changed the way funds were governed or taxed; and two states altered deferred compensation matches, early retirement incentives, and contribution withdrawals.[43]

Cathie Eitelberg has argued that public pensions will continue to change as public sector employers adapt to trying to attract the new American worker.[44] She theorizes that such job seekers, in choosing where to work, view their pensions as part of their overall compensation. Such young workers prefer overall compensation packages that include bonus plans, gainsharing, portability, flexibility about working at home, superior training opportunities, and other mechanisms that allow the employee greater control over the conditions of work.[45] In such a context, she argues, public employers will have to assume the role of "benefits facilitators" rather than "benefits providers" in order to continue to attract the best workers.[46]

If Eitelberg is correct in her assumptions, this desire for greater employee control over benefits is better served by allowing public sector unions to negotiate over every benefit that constitutes the compensation packages of their members, rather than removing one topic from the collective bargaining process and attempting to negotiate the rest. Taking a major topic off the bargaining table creates an imbalance of priorities that impairs the ability of the union and the public sector employer to come to a binding and fair agreement. As public pensions evolve into more complicated schemes that involve a myriad of small decisions in their design, engaging the impacted parties more overtly in the process of design results in a more honest assessment of what can be achieved within the necessary fiscal constraints. As the World Bank found in its study, pensions attract workers to governmental sector jobs that need a steady supply of reliable employees;[47] dangerous jobs such as those performed by police, fire fighters or emergency medical technicians; unpleasant jobs such as those performed by sanitation, transit or environmental workers; jobs that are essential to the orderly process and future of society such as court officers and judges; and jobs that ensure the future of the society such as teaching. Negotiation allows for a better fit with the workforce that the public employer desires to attract and retain, a match that will become more critical as the baby boom generation retires and is replaced with a smaller number of potential laborers.

III. The Taylor Law

If the most recent transit strike reveals the strains on the negotiating process under the Taylor Act, an earlier transit strike was the impetus for the law being written in the first place. On January 1, 1966, Local 100 walked off the job on Mayor John Lindsay's first day in office.[48] The strike hobbled the city for the next twelve days. The following year, the New York State Legislature passed the Public Employees Fair Employment Act. Governor Nelson Rockefeller gave the new law the sobriquet "the Taylor Law" as a tip of the hat to George W. Taylor, Professor of Industrial Research at the Wharton School of the University of Pennsylvania and the chairman of the commission the governor had appointed to reform the existing Condon-Wadlin Law.[49] Taylor quipped that the new law was so unpopular with unions that no politician dared to associate himself with it.[50] Indeed, immediately after the governor signed the law, the three largest municipal unions collected a strike fund and then organized a rally in Madison Square Garden to protest what they considered its anti-union bias, in particular, the law's anti-strike provision.[51] The law, nonetheless, went into effect as planned on September 1, 1967. At the time of its passage, the Taylor Law was hailed as the first comprehensive public employment law passed by any state, a model of progressive labor relations at a time when the public sector was only beginning to unionize.[52] The legislative mandate was to end the unpopular strikes that disrupted public services by "eliminating the necessity" for such actions.[53] Academic critics praised the legislature for its foresightedness in relinquishing state sovereignty to allow public employee unions to form.[54] Section 200 concludes by summarizing the law's five main prongs:

> These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers and (e) continuing the prohibition against strikes by public employees and

providing remedies for violations of such prohibitions.[55]

Taylor's intellectual legacy as a leading proponent of alternate dispute resolution is revealed by the mechanisms written into the law for maintaining industrial harmony. The law empowers the umpire of such disputes, the New York State Public Employment Relations Board (PERB), to use five separate processes to resolve disputes: mediation, fact-finding, binding arbitration, legislative hearing, and conciliation.[56] The Taylor Law covers most public employees in New York State, including those employed by cities, villages, school districts, and public authorities, as well as by the state itself. By a year after the law's implementation, unionization of public employees had dramatically expanded, with 260,000 additional workers joining the 340,000 already unionized before the law became effective.[57]

Academic critics hailed the innovative features in the law that were designed to protect the negotiating process from breaking down and, therefore, to prevent the type of strikes that had crippled New York City in the recent past. The new law protected from reprisal employees and employee organizations engaged in concerted action, prevented employers from favoring one employee organization over another, and meted out punishment for a refusal to negotiate in good faith.[58] However, critics anticipated the possibility of employees forming multiple organizations that would have competing interests and predicted dire consequences for efficiency, especially in budgetary matters.[59] One commentator pointed out that negotiating directly with many unions representing various occupational interests was bound to be less efficient than a system where the Civil Service Employees Association negotiated informally with high officials.[60] Another complication was that the official negotiating on behalf of the public employer might have operational or supervisory authority but no budgetary powers or expertise.[61]

Retirement benefits under the Taylor Law quickly became a subject of judicial interpretation. The courts also had to consider the impact of the ongoing revisions of the law in this area. In a case involving the Town of Huntington, the Court of Appeals found that a collective bargaining agreement entered into between the school board and the teachers' association that provided for a salary increment for teachers during their last year of service before retirement was valid under the Taylor Law,[62] although the dissenting judge argued that this decision could have a "critical impact" on public retirement systems.[63] This case signaled the Court of Appeal's determination to give as wide latitude as possible to the collective bargaining process effectuated by the new law.

In *Albany v. Helsby*, the Court denied the City of Albany's Article 78 motion to annul PERB's finding on behalf of the Albany Police Officers Union and Albany Permanent Professional Fire Fighters Association that paid time off for union activities, work rules, and retirement benefits—which do not require legislative approval—were mandatory subjects of negotiation.[64] In reversing the Special Term on the issue of retirement benefits, the Court of Appeals found a "reasonable basis" for PERB to have construed the statutory scheme as "permitting employee organizations to negotiate for improvements in retirement benefits between July 1, 1964 and June 20, 1975, provided the improved benefits are among those already available under state law."[65] Admitting the wording of the statute was unclear, the Court of Appeals stated that "we should not blindly apply the literal words of the statute to arrive at an absurd result, in this case giving a right to negotiate to the employer but not the employee organizations.[66] The Court indicated its willingness to give deference to the newly formed agency (PERB) in interpreting the Taylor Law.

While the emerging Taylor Law jurisprudence upheld the public policy of mandating negotiations over "terms and conditions of employment" as part of collective bargaining between public employees and public sector employers, the legislature began to reconsider its earlier actions in passing the Taylor Law. The 1973 Legislature removed pensions from the scope of "terms and conditions of employment," ostensibly to save costs in a time of fiscal crisis.[67] The legislative record in this area, nonetheless, proves the ineffectiveness of the amendment as a cost control measure. In a series of articles published during the summer of 2006, the *New York Times* charted out a decade of dramatic improvements to the pensions of public employees. In 1995, the legislature approved a cost of living increase at an estimated cost of $99 million per year.[68] In 1998, the legislature followed the congressional amendment of ERISA and allowed shorter vesting of pensions, allowing employees to become vested in five years rather than ten.[69] The same year, another cost of living adjustment was approved. In 2000, before anyone could reasonably have guessed how the massive overtime earned by police and fire fighters in the aftermath of the terrorist attacks of September 11, 2001, would temporarily inflate salaries, the legislature allowed police and fire fighters to use their one year final salary as the basis for calculating their pensions and reduced the penalty for early retirement for all workers.[70] Despite this evidence that the legislature does not have a very effective method of controlling costs, recent legislation continues to enforce the ban on negotiating pensions during the collective bargaining process in New York state public employment.[71]

IV. Pensions as the Prerogative of the Legislature

The New York State Legislature is not unique in retaining control over state pensions. Fourteen states give public employees no bargaining rights in this area, and thirteen other states sharply limit the number of employees who have bargaining rights.[72] As public sector pen-

sions began to become common, public sector employment law was just beginning to evolve, hindered by the exclusion of public sector employers under the National Labor Relations Act.[73] Some of the concepts and terminology developed by the National Labor Relations Board were, nonetheless, adopted in public sector case law. An early issue facing courts would be to decide whether fringe benefits such as retirement were proper subjects of bargaining between public employers and their employees or their duly authorized employee representatives. Immediately, a limitation was recognized in public sector collective bargaining, the doctrine of "managerial prerogative" under which issues that are of particular importance to the public interest are reserved from mandatory bargaining and placed instead under the purview of the legislature.[74] Unlike in private sector bargaining where only the employer and the employee's duly appointed representative sat at the negotiations table, public sector bargaining recognizes the presence, and possibly the dominance, of the public interest. Under this doctrine, many states found it in the public interest to keep negotiations over retirement benefits out of the bargaining process and allow the legislature to set pension levels. Not only did such a policy allow for greater budgetary control to be imposed, but the resulting unified pension systems were easier to administer, generally covering sufficient numbers of employees to render efficiencies of scale.

In the 1970s, the first signs of potential problems with allowing the legislature to assert control over public employee benefits without regard to a collective bargaining process arose. Facing fiscal crises, several local governments, including New York City, attempted to breach multi-year contracts for wages, arguing that the police powers of government to protect the public interest extended to financial emergencies. The decision of the New York Court of Appeals in *Subway-Surface Supervisors Association v. New York City Transit Authority* allowed the city to use the 1975 Financial Emergency Act to renege on a scheduled five percent wage increase, even though the raise had been properly negotiated under a collective bargaining agreement under the Taylor Act. The Court upheld the constitutionality of the Financial Emergency Act under both Article 1, Section 10 of the U.S. Constitution and Article 5, Section 7 of the New York State Constitution.[75] This decision demonstrated to unions that wage increases under multi-year public sector bargaining agreements could be eliminated. The Court of Appeals found it was in the public interest to protect the rights of bondholders, even if that meant impairing the rights of public employees.[76]

Nonetheless, the same case demonstrated that pension rights could not be so easily set aside. The Appellate Division found that pension rights are constitutionally protected by Section 7 of Article 5 of the New York State Constitution: "[M}embership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."[77] After the Appellate Division found an impairment of constitutionally protected pension rights,[78] the parties entered into a wage deferment agreement under which pension calculations were made as though the wages had been paid on schedule.[79]

In a similar case in 1991–1992, the New York Court of Appeals demonstrated a greater respect for the rights of public employees under the Contracts Clause of the United States Constitution.[80] Faced with another budget deficit, New York attempted to defer the wages of certain unionized and non-unionized employees of the Surrogate's and Supreme Courts; the deferred wages would not be paid until the employee's service ended. The Court of Appeals upheld summary judgment; although the labor contract had lapsed, the Court of Appeals found that a continuation of substantive provisions of the contract existed until a new contract was reached under the quid pro quo of the Taylor Act's not allowing public employees to strike.[81] Therefore, the Court of Appeals found that a contract existed, and the state had unconstitutionally impaired it.[82] The Court distinguished *Subway-Surface Supervisors* as involving a temporary measure and not requiring a de facto long-term loan from employee to public employer against the rights of the affected employees and found that while the goal of reducing the state's deficit was a "significant and legitimate public purpose," the impairment of rights was not reasonable.[83]

V. Pensions Under Collective Bargaining Agreements

In a few states, public sector pensions are a subject of mandatory bargaining. In a thoughtful opinion by the Supreme Court of Michigan, the Court considered the question of whether the City of Detroit had a duty to bargain in good faith with the Detroit Police Officers Association on the subject of police retirement plan changes, where retirement provisions were part of the City Charter and under those rules able to be amended only after a popular vote by the electorate[84] The Court traced the legislative history behind the Public Employees Relation Act, noting that when Michigan passed the act in 1965 and gave public employees the right to select a collective bargaining representative and to enter into collective bargaining negotiations with their public employer, it patterned its definition of the duty to bargain after Section 8(d) of the National Labor Relations Act.[85] The Court found this parallel wording to be indicative of a legislative intent to rely on legal precedent developed under the NLRA. Thus, the Court found an obligation to bargain "in good faith" about subjects within the scope of the phrase "wages, hours, and other terms and conditions of employment" was the essence of labor law under the Michigan Public Employees Relation Act.; retirement fell within the scope of that phrase.[86]

It is appealing to consider the simplicity of reconciling state employment law with standards developed under the National Labor Relations Act and allow bargaining over pensions to be a mandatory subject of negotiation, as it was in the early days of the Taylor Act. Nonetheless, as Charles Craver has demonstrated, in times of fiscal crisis, unions are placed under enormous pressure to negotiate away pension benefits that they have earned in earlier contracts. At such times, private sector unions have often succumbed to pressure by their members to preserve the benefits of current employees at the expense of those of future employees and allowed the imposition of a dual compensation scheme.[87] Concession bargaining has become the norm in certain industries such as trucking, meat packing, steel, and air travel.[88] Craver details the pernicious impact negotiating such agreements had on union-member and member-member relationships, with an ensuing erosion of union solidarity.[89] It is this same specter of demoralized new employees with lower benefits that Roger Toussaint, the President of TWU, Local 100, raises on the TWU website.[90] Under such a bargaining regime, pension negotiations could become the wedge to divide a union's membership, destroying the power of the union and thus undermining the entire principle of collective bargaining.

In such cases there is a major problem with how far a union's duty of fair representation extends. The Supreme Court first defined the union's duty of fair representation in the case of *Vaca v. Sipes*, when it held that the duty of fair representation is breached when the union's conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory or in bad faith."[91] In 1990 the New York State Legislature amended the Taylor Law to incorporate the union's duty of fair representation, as developed by the Supreme Court under the National Labor Relations Act.[92] Section 209-a(2)c states: "Improper employee organization practices. It shall be an improper practice for an employee organization or its agents deliberately . . . to breach its duty of fair representation to public employees under this article."

The Public Employees Relation Board first applied the standard from *Vaca* in 1971[93] and expressly adopted it in the 1974 case of *In re Plainview–Old Bethpage Central School District* (7 P.E.R.B. 3096 (1974))[94] The New York Court of Appeals adopted the *Vaca* standard in 1984 in *Civil Service Bar Association v. City of New York*, in which the court upheld a union in agreeing to a negotiated settlement that favored the interests of some employees over others.[95] Thus, although a new hire who is unhappy about a dual compensation system may mount a fair representation challenge, he or she is unlikely to be successful unless the union has engaged in conduct that is "arbitrary, discriminatory or in bad faith." A greater risk to the union would be that the new hires are sufficiently unhappy with how collective bargaining has proceeded that, as they come to dominate the ranks of union membership, they vote the union out.[96]

Moreover, the duty of fair representation does not extend to retirees. This doctrine was first spelled out by the Supreme Court in *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass*; in that case, the employer sought to reduce a benefit for retirees that reduplicated provisions of the newly effective Medicare act.[97] The union filed an unfair labor practice charge when the employer refused to negotiate this change, and the National Labor Relations Board found a violation of Sections 8(a)(5) and (1). The Court of Appeals for the Sixth Circuit refused to enforce the cease-and-desist order. The Supreme Court affirmed. In an opinion written by Justice Brennan, the Court found that the legislative history of the National Labor Relations Act did not support extending the definition of "employee" to include people who were no longer members of the active workforce.[98] In footnote 12, the Court found a strong argument against allowing the union to negotiate for retirees: "In any event, in representing retirees in the negotiation of retirement benefits, the union would be bound to balance the interests of all its constituents, with the result that the interests of active employees might at times be preferred to those of retirees."[99] Furthermore, not only were retirees not included under "employees," but their benefits are not negotiable as "terms and conditions of employment" despite the impact of these benefits on the benefits of current employees.[100] The protection for retirement rights lies in contract principles under which vested retirement rights may not be altered without the pensioners' consent.[101]

The New York Court of Appeals adopted the rule from *Pittsburgh Plate Glass* in 1998. The Aeneas MacDonald Police Benevolent Association commenced an Article 78 proceeding against the City of Geneva, claiming that the City had reduced the level of health benefits it provided to retirees by substituting an inferior plan for the one to which it had long subscribed. The Court held that the public employer's duty to bargain does not extend to retirees. Since no collective bargaining agreement had addressed the benefits in question, there was neither a contractual nor a legal impediment to the City's unilateral action.[102]

Although PERB has generally followed *Pittsburgh Plate Glass*,[103] it has demonstrated certain reservations about the wholesale exclusion of retirees under the duty of fair representation. In the case of *Baker v. Thompson*, the teachers' union negotiated a contract that retroactively gave raises to employees in the period from 1999 to 2001, but employees covered under the previous contract who retired during the period between when the old contract expired and the new one was signed were excluded from receiving these raises.[104] The plaintiffs argued that they were owed a duty of fair representation for the time period when they were employed as members of the bargaining unit and the contract was being negotiated. PERB found for the plaintiffs. The State Supreme Court upheld PERB's decision to set aside the general rule that no duty

was owed to retirees, noting that "the application of the general rule to these plaintiffs relegates them to the same kind of irrational limbo as prompted recognition of those earlier exceptions."[105] Still, the decision was limited to the period when no contract was in effect but before each employee retired.

In addition to the lack of protection provided to new employees and retirees under the duty of fair representation, the union's role in negotiating pension benefits in New York State under the Taylor Law is also undermined by its inability to strike. Not every session at the bargaining table results in good-faith negotiations by public sector employers. Without the ultimate economic weapon of striking, the union has little ability at the bargaining table to demand results. Therefore, during the 2005 Transit Workers' Strike, punishment was imposed on the union, but, as yet, there has been no rebuke to the MTA's gambit of putting the union members' pensions contributions on the bargaining table. In a proposal put forward in 2002 by the AFL-CIO, the labor organization recommended that the State of New York would get better results in its collective bargaining negotiations if the legislature put some teeth in the Taylor Law and created penalties for sham bargaining.[106] Because the terms of a prior agreement remain in effect under the "Triborough Amendment," a public employer may have little incentive to bargain in earnest. The New York State Legislature ultimately passed the AFL-CIO's proposal that PERB be allowed to assess a fine imposing a salary increase against employers who were found to have refused to bargain.[107] Governor Pataki vetoed the legislation, saying "any effort to undermine the Taylor Law is unconscionable."[108]

VI. Conclusion

Despite the problems inherent in the collective bargaining process, the original iteration of the Taylor Law, which made pensions a mandatory subject of negotiations, better serves both the need of public sector employers to keep costs under control and the desire of workers to participate in the design of their benefits through their unions' participation in the bargaining process. Removing such an important subject of negotiation from the collective bargaining process undermines the effectiveness of the whole process by creating an issue that, in effect, has its own resolution process, subject to political whim. Furthermore, the current process too often removes the governmental entity that will ultimately be responsible for paying the bill from an effective position of bargaining, as New York City officials have frequently decried.

Nonetheless, the current processes under the Taylor Law should be strengthened to create a more efficient manner of collective bargaining. The alternate dispute resolution processes of the Taylor Law should be effectuated when bargaining reaches an impasse, and effective penalties against bad-faith negotiation should be available to both parties; if the union continues to foreswear the right to strike, the public employer must be subjected to fines or to the removal of the process to independent arbitrators. Finally, the weakness in the law whereby retirees have no union protection must be addressed by either creating an effective union of retired members, by prohibiting the union from making concessions that involve the benefits of those who have retired, or by subjecting agreements that involve the rights of the already retired to an independent process of review. Tweaking the law to suit the Twenty-First century requires an acknowledgment that longer life expectancies have extended the responsibility to care for former employees for a greater period of years, and procedures must be developed to consider this new reality. Otherwise, the Taylor Law's general principle of public responsibility toward those who have faithfully served the public will fade into oblivion.

Endnotes

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2. N.Y. Civ. Serv. L., Art. 14, § 200.
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4. *Id.* at B1.
5. Ray Sanchez, *STRIKE: Union's Defiance,* Newsday, Dec. 21, 2005, at 8.
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7. *Ballistic Bloomy Blasts the "Selfish Thugs Who Don't Care About People and Have No Respect for the Law,"* N.Y. Post, Dec. 21, 2005, at 4.
8. N.Y. Civ. Serv. L. § 201 (4) states: "The term 'terms and conditions of employment' means salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void."
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11. *Id.* at 7.
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20. *Id.* at 27.
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25. *Id.* at 5.
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34. NYCERS Web site, *at* http://www.nycers.org, last visited on 9/29/06.
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44. Eitelberg, *supra,* note 36, at 364.
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63. *Id.* at 133.
64. 370 N.Y.S.2d 215, 217 (N.Y. 1975).
65. *Id.* at 217.
66. *Id.* at 218.
67. *See supra* note 12.
68. Michael Cooper, *Retirees Get Albany Attention, and New York City Gets the Bill,* N.Y. TIMES, Aug. 22, 2006, at A1, B6.
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103. *See, for example*, *City of Cohoes*, 27 NYPER (LRP) P4529 (March 18, 1994).
104. 2002 NYPER (LPR) LEXIS 393 (November 8, 2002).
105. 750 N.Y.S2d 486, 490.
106. Denis M. Hughes, *Taylor Law Reform for the Twenty-First Century: Final Report and Recommendations of the New York State AFL-CIO*, 9 (June 2002), *available at* http://www.nysaflcio.org/documents/Taylor%20law%20reform%20final.pdf, last viewed on November 20, 2006.
107. *Id.* at 10.
108. Danny Hakim, *Pataki Rejects Taylor Law Change*, N.Y. TIMES, Aug. 17, 2006, at B6.

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The New York State Workplace Violence Prevention Act

By Sharon N. Berlin

I. Introduction

The New York State Legislature has amended Labor Law § 27-b to require New York public employers to develop and implement a program to prevent workplace violence. The new law, the New York State Workplace Violence Prevention Act ("the Act"), took effect on March 4, 2007 and requires public employers to evaluate their workplaces to assess the risk of violence, to develop a written workplace violence prevention program and to implement an annual training program concerning issues related to workplace violence.

The Act applies to all state employers and political subdivisions of the state, including public authorities, public benefit corporations, and all other governmental agencies or instrumentalities. School districts, already required to establish and maintain "school safety plans" pursuant to § 2801-a of the Education Law, are specifically excluded.

Although employers are required to comply with the Act's requirements commencing on March 4, 2007, the New York State Department of Labor ("DOL") has until July 2007 to promulgate rules and regulations regarding the Act.

II. Risk Evaluation and Determination

The Act requires all public employers to evaluate their workplace or workplaces to determine the existence of factors or situations that might place employees at risk of workplace violence. A "workplace" means any location away from an employee's domicile, permanent or temporary, where an employee performs any work-related duty in the course of his or her employment by an employer.

Employers should evaluate and consider existing working conditions for circumstances that often precede workplace violence, including, but not limited to:

- Employees working in public settings (e.g., social services or other governmental workers, police officers, firefighters, teachers, public transportation drivers, health care workers, and service workers);
- Employees working in high crime areas;
- Employees working late night or early morning hours;
- Employees exchanging money with the public;
- Employees working alone or in small numbers;
- Employee access to means of obtaining assistance such as communication devices and alarm systems;
- Uncontrolled access to the workplace;
- Areas of previous security problems.

The DOL recommends that public employers also review any past incidents of workplace violence to identify patterns or trends occurring in the workplace. In addition, employers should review their occupational injury and illness logs and incident reports to identify injuries that may have resulted from workplace violence. Employers should survey employees at all levels regarding violent incidents both reported and unreported. Finally, employers should evaluate physical workplace building security.

III. Written Workplace Violence Prevention Program

The Act requires that a public employer with 20 or more full-time permanent employees develop and implement a *written* workplace violence prevention program for their workplace or workplaces. The written program must include a list of the risk factors identified by the employer in its risk evaluation. The program must also describe the methods the employer will use to prevent incidents of workplace assaults and homicides. Examples of applicable methods include, but are not limited to:

- Making high-risk areas more visible to more people;
- Installing more or better external lighting;
- Installing video surveillance;
- Installing door buzzers, and other alarms;
- Using drop safes or other methods to minimize cash on hand;
- Posting signs stating that limited cash is on hand;
- Providing training in conflict resolution and non-violent self-defense responses;
- Establishing and implementing reporting systems for incidents of aggressive behavior.

The DOL suggests a variety of administrative and work practice controls to address workplace violence, such as establishing a liaison with local police and state prosecutors, adopting safety procedures for off-site work and creating a system of communication during emergencies. The DOL also stresses the importance of management commitment and employee involvement in the creation of a written workplace violence prevention program because employee knowledge and understanding of workplace violence is important for its prevention. Post-incident responses, such as trauma-crisis counseling and other employee assistance programs to assist victims and other employees, may also be considered.

A model written Workplace Violence Prevention Plan is available on the Department of Labor's website at http://www.labor.state.ny.us/workerprotection/safety-health/workplaceviolence.shtm.

IV. Employee Information and Training Program

The Act requires that public employers with 20 or more full-time employees make the workplace violence prevention program available, upon request, to its employees and their designated representatives (i.e., union officials). Public employees must be informed of the Act's requirements, including its reporting and enforcement provisions, the risk factors in their workplace or workplaces, and the location and availability of the written workplace violence prevention program. In addition, all public employers must conduct employee training on the risk of occupational assaults and homicides at their workplace or workplaces, both at the time of their initial job assignment and annually thereafter. Employee training must include, at least: (1) the measures employees can take to protect themselves from such risks, including specific procedures the employer has implemented to protect employees, such as appropriate work practices, emergency procedures, use of security alarms and other devices; and (2) the details of the written workplace violence prevention program established and implemented by the employer. The Department of Labor suggests that employers instruct employees to limit physical interventions in workplace altercations unless a designated emergency response team or security personnel are available.

The training programs should involve all employees, including supervisors and managers. Finally, employers should regularly re-evaluate their workplace violence prevention program and employee training to determine overall effectiveness and to identify deficiencies or changes that should be made.

V. Reporting Systems and Enforcement

The Act requires employers to implement a reporting system for employees to use if they believe that either a serious violation of a workplace violence prevention program or an imminent danger of workplace violence exists. The Act requires the employee to report the matter to a supervisor in the form of a written notice. The employer must be given a reasonable opportunity to correct the activity, policy or practice in question. This written reporting requirement, however, does not apply where an imminent danger or threat exists to the safety of a specific employee or, where applicable, to the general health of a specific patient, and where the employee has a reasonable, good faith belief that reporting to a supervisor would not lead to corrective action.

If written notice is provided by an employee and the employer fails to correct the reported matter after a reasonable period of time, the employee may request an inspection by the DOL. A request for inspection must be in writing, must set forth the specific grounds for the request and must be signed by the employee or employee representative. The DOL must provide the employer in question with a copy of the request for inspection prior to or at the time of the inspection and no prior notice of the inspection is required. Furthermore, at the request of the employee, the DOL may withhold that employee's identity and the names of other individual employees or their representatives.

A representative of the employer and an authorized employee representative must be given the opportunity to accompany and aid DOL representatives during an inspection, should the individuals so desire. The DOL's authority to inspect an employer's premises is not limited to the alleged violations stated in the complaint, and DOL officials may inspect any other area in which there is reason to believe a serious violation of the law exists. The inspection may also include interviews with a reasonable number of employees concerning matters of safety in their workplace. The law grants DOL officials the authority to conduct inspections on their own initiative, without a prior request, if there is reason to believe that an inspection is necessary or within a general administrative plan for enforcement.

VI. Retaliation is Prohibited

The Act specifically prohibits public employers from retaliating against employees who: (1) report an alleged serious violation to a supervisor; (2) request an inspection by the DOL; or (3) accompany DOL officials during an inspection.

VII. Conclusion

For all employers, the first step in complying with the Act's requirements is to engage in a thorough review of their workplaces to determine the existence of factors that might place employees at risk of workplace violence. Employers with 20 or more permanent full-time employees must develop and implement a written workplace violence prevention program. All employers must make this information available and provide relevant training for their employees.

Ms. Berlin is a partner in the Melville, New York law firm of Lamb & Barnosky, LLP, where she represents public and private sector employers in labor and employment law matters. Ms. Berlin is a member of the of the New York State Bar Association's Municipal Law Section's Executive Committee and Chair of the Section's Employment Relations Committee.

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2006 and 2007 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(N.Y. Orders 1-31 of 2006; N.Y. Orders 1-13 of 2007)

22 N.Y.C.R.R. §	Court	Subject (Change)
202.7(f)	Sup./County	Requires that movant seeking TRO show either that he or she made good faith effort to notify respondent of application or that giving notice would result in significant prejudice
202.8(h)	Sup./County	Repeals requirement that counsel for movant alert court by letter when a motion is not decided within 60 days from later of final submission or oral argument and requires Deputy Chief Administrators to notify judges by e-mail when 60 days have elapsed (120 days in motions designated as complex)
202.26(e)	Sup./County	Authorizes court to order parties, insurance carriers, or other persons having an interest in any settlement to attend a settlement conference
202.48(c)(2)	Sup./County	Requires that proposed counter-orders and counter-judgments be submitted with a copy marked to delineate proposed changes to the order or judgment to which objection is made
202.70	Sup.	Adopts statewide rules for the Commercial Division
Part 221	All Trial Cts.	Adopts uniform rules for the conduct of depositions, including objections, refusals to answer, and communications with deponent
730.2	A.T., 2d Dep't	Establishes a Civil Appeals Management Program for the appellate terms in the Second Department
1000.4(f)(2)	A.D., 4th Dep't	Adds requirement for one-inch margin for briefs
1000.14(a)(4)	A.D., 4th Dep't	Adds provision for certification in lieu of motion for permission to proceed on appeal as poor person and assignment of counsel
Part 1010	A.D., 4th Dep't	Established and then later repealed a Civil Appeals Settlement Program

The amendments to the trial court rules are included in the court rules published on the Office of Court Administration's website: www.nycourts.gov/rules/trialcourts/index.shtml.

This chart originally appeared in the Spring 2007 and Summer/Fall 2007 issues of the Commercial and Federal Litigation Section Newsletter*, Vol. 13, No. 1 and Vol. 13, No. 2, published by the Commercial and Federal Litigation Section of the New York State Bar Association.*

Independent Contractor vs. *de Facto* Employee: Drawing the Distinction Internationally

By Donald C. Dowling, Jr.

New York employers often take their first steps in a new overseas market by engaging an independent contractor, rather than a foreign employee, to sidestep the hurdles of foreign local employment laws and payroll contributions. Even many large multinationals maintain broad networks of overseas independent contractors whom they do not consider employees—but whose relationships with the company look a lot like employment. Overseas, the lure of the independent contractor relationship as a substitute for a traditional employment relationship can be attractive, but dangerous.

One human resources professional recently posted a query on an internet HR bulletin board: *"Our company is looking to have independent contractors rather than employees work for us throughout Latin America. I wanted to know if the laws in those countries are just as strict as those in the U.S."*[1] The short answer to this is simple: "No. They are even stricter." The laws outside the U.S. that distinguish independent contractors from employees are indeed much stricter than in the U.S.—or, at least, compliance with them can be much more expensive.

Independent contractors (abroad called "consultants," "freelancers," "entrepreneurs" or the "self-employed") seem especially attractive in countries where a company has little or no other presence, and maybe no locally incorporated subsidiary, and also in countries where employment obligations and payroll costs are high. Signing up someone abroad as an "independent contractor" instead of as an "employee" seems an easy shortcut around complications like local payroll, withholdings, mandatory benefits, employment law compliance and tax obligations.

The problem is that legal systems abroad (just as in the U.S.) tend not to defer to parties' self-characterizations as "independent contractor" and "principal." Whether a would-be contractor really is a genuinely independent business, as opposed to a *de facto* employee, rarely turns purely on the text of the parties' contract. Elevating substance over form, local foreign laws look to whether the parties have an employment relationship in fact. For example, in *Ministry of Defence (M.O.D. Dental Services) v. Kettle*,[2] a U.K. employment tribunal recently reaffirmed that English law requires looking beyond the four corners of an independent contractor agreement and accounting for the realities of the actual job.

What Happens If an Overseas Contractor Gets Held as a *de Facto* Employee?

If a U.S. court or the I.R.S. holds that a purported independent contractor was a *de facto* employee, the liabilities are mostly contained in six categories:

1. back tax withholdings
2. back Social Security contributions
3. back unemployment/workers' compensation insurance
4. back overtime (for non-exempt positions)
5. back benefits due under the terms of certain employer plans
6. interest and penalties

Abroad, though, when an independent contractor gets mischaracterized, liabilities can run much higher, because outside the U.S. there is no employment-at-will. Engaging an overseas independent contractor whom local law deems an employee subjects a multinational to liabilities on these same six grounds as in the U.S.—plus on four potentially more expensive grounds:

7. back vacation and back holidays
8. back mandatory benefits like profit sharing, thirteenth month pay, mandatory bonuses, and payments to state housing funds and state-mandated personal unemployment funds

9. severance pay, notice pay, and liabilities for unfair dismissal

10. fines[3]

These four extra grounds add up. In one admittedly exceptional case, a U.S. multinational's former independent contractor suing in a Latin American labor court claimed to have been a *de facto* employee—and made out a plausible case for U.S.$40 million.

How Likely Is a Claim?

When engaging a single contractor in some foreign city, it is tempting to hope the contractor arrangement will fly under the radar. And it may, for a while. Unfortunately, though, when a long-term relationship with a foreign independent contractor finally ends, the contractual termination provisions typically look meager in comparison to local employment severance law and back benefits: A contractual provision for 30 or 60 days' notice motivates a "contractor" to run to local labor court and request employment severance, claiming to have been a *de facto* employee—notwithstanding the signature on the independent contractor agreement. And while foreign labor courts can be surprisingly sympathetic here, it does not even take a disgruntled ex-contractor to raise the claim. Overseas tax and Social Security agencies specifically target "fraudulent independent contractors" in their audits.

When Is a Contractor Not a Contractor?

The potential exposure and the likelihood of a challenge raise the threshold question: *When can an overseas service provider legitimately be engaged as an independent contractor, and when should a foreign service provider be hired as an employee?* Because local law almost invariably looks beyond the text of the contractor agreement and uses a "totality of the circumstances" test, the realities of the business relationship predominate, so the question becomes: *What is the difference, under foreign law, between an independent contractor and an employee?*

This question turns on local law in the place where the service provider works. (Choice-of-foreign-law clauses in contractor agreements rarely control, because the public policy of fundamental employee protection is at stake.) Every country's local law offers up some list of factors distinguishing contractors from employees. Even within one country, these contractor-vs.-employee factor lists can differ; for example the U.S. I.R.S. test has 20 factors[4] while American common law is usually said to include 13 factors.[5] But speaking broadly, countries' lists of contractor-vs.-employee factors are surprisingly similar, from nation to nation. This is one of very few areas in international employment law where broad generalizations across jurisdictions can actually be useful. Most all countries uphold independent contractor status if the service provider can truthfully answer "yes" to five questions:

1. Do you have "authoritative control" to do your work the way you want to—free from instruction on process, free from discipline, free from work rules, free from your principal's "supervision and control"?

2. Are you free to set your own schedule and hours?

3. Do you provide your own office and supplies, pay your own business expenses, and hire your own assistants?

4. Do you get paid only for work you do, such as hourly pay or task pay (no paid vacations/holidays)?

5. Can you, and do you, have other paying clients—and do you market your services to the public?

While these five questions predominate, ten others can also factor into a finding that a service provider is a genuine independent contractor:

6. Is the service provider free to determine the order and sequence of tasks?

7. Does the service provider bear the possibility of casualty loss (property/personal injury) and take business risk?

8. Does the service provider buy insurance?

9. Is the service provider's pay free from employee-benefit/executive-compensation offerings like health/life/disability insurance, bonuses, and equity awards?

10. Is the service provider unshackled by non-compete, non-solicitation, and other post-termination restrictions?

11. Does the service provider make tax/social security payments and withholdings like a business?

12. Is the service provider nowhere named on the principal's organization chart and internal structural documents?

13. Do the service provider's business cards and letterhead make clear the independent relationship, and does the contractor use a title unrelated to the company?

14. Does the service provider refrain from attending the principal's training sessions as a student?

15. Is the service-providing relationship explicitly temporary and short-term?[6]

It is easy to engage a "one-off" overseas independent contractor for a discrete task like fixing a computer or a

plumbing problem. The problems arise in the grey area between "contractor" and "employee"—such as where a multinational needs a long-term foreign contractor who can act as an agent, who will follow detailed instructions and who must refrain from competing. Avoid this grey area by taking three (albeit-difficult) action steps:

1. **Revisit the threshold decision to make a foreign services provider an independent contractor.** Consider hiring as an employee. Yes, hiring as an employee can cause administrative headaches, including payroll and "permanent establishment" tax problems in countries where your company has no other presence. But the strategic question is whether those headaches will hurt more than the pain when the foreign contractor later claims to have been a *de facto* employee.
2. **Draft an independent contractor agreement that makes the case for real independence**. Loosen the reins. Resist the temptation to tie a contractor down with non-compete restrictions, to motivate with bonus pay, and to negotiate on vacation, work hours, and other provisions that look like employment terms. And be sure the contract recites the clauses necessary under local law.[7]
3. **Structure the day-to-day working relationship to buttress the contractor's independence**. Keep the contractor off organization charts. Let him compete. Do not provide an office or company business cards. Do not schedule hours.

Checklist

After taking these three steps, use a checklist to account for additional issues:

- **Entering a new country**: A widely held misperception is that a multinational entering a new country where it has no corporate presence (no local branch, subsidiary or license to transact business) cannot employ locals—and must engage any service provider as a contractor. In fact, though, few countries prohibit foreigners from employing locals; a multinational in a country where it has no presence usually can, in theory, engage either a contractor or an employee. But consider the ramifications:
  - **Permanent establishment**: A principal doing business in some new foreign country can be said to have a "permanent establishment" there, which raises a host of legal and tax implications: obligation to register to do business; liability for local corporate taxes (possibly on worldwide income); duty to appoint a local representative; jurisdiction in local courts. But contrary to popular belief, "permanent establishment" is not inextricably linked to employment status a principal can be held to have a "permanent establishment" for having engaged a local independent contractor, especially one who dedicates full-time efforts and who has agency authority to bind the principal.
  - **Contractor pay reporting**: In the U.S., principals must notify the I.R.S. of payments to American independent contractors using the 1099 form. Few other countries require reporting contractor pay, but be sure to check.
  - **Foreign payroll**: Consider using a third-party payroll administrator to pay compensation and benefits and to make withholdings and payroll taxes.
  - **Visa**: A foreign local employee paid through a U.S. entity payroll will not likely be able to enter the U.S. without a U.S. work visa.
- **Local independent contractor protection laws**: A small but growing number of countries has begun enacting special laws designed to protect independent contractors. Check for, and comply with, these. A new law effective in Spain on October 11, 2007 categorizes independent contractors that devote 75% of full-time efforts to a single client as "economically dependant autonomous workers," a new designation, and requires that the principal of any such contractor offer 18 days of annual time off—and pay severance pay upon any pre-term, no-cause termination.[8] Also, a new labor code in Peru, expected to come into force by the end of 2007, will introduce a rebuttable presumption that any independent contractor working for just one client is a *de facto* employee.
- **Contractual backstops**: In engaging foreign contractors, consider negotiating in indemnities, set-asides, hold-harmless provisions and other contractual remedies in case contractors (or their employees) are ever held the principal's employees. These provisions might be enough of a disincentive to keep a disgruntled ex-contractor from suing in labor court, although they are subject to local-law enforceability issues (even putting aside the issue of collectability).
- **Third party staffing agency**: A popular strategy for engaging overseas contractors is to enlist a local independent manpower or staffing agency to hire a service provider, and then to contract for the person's services *through the agency*. The agency will charge for its services, but this fortifies the case for the contractor's independence (it is tough to argue an "employment" relation-

ship between two corporations).[9] However, in some countries a principal could be held a "dual employer" with the staffing company. And local restrictions against outsourcing (such as in Brazil) become more problematic when engaging a freestanding company.

- **Sole proprietorship**: One step short of the "third party staffing agency" strategy is to have the contractor incorporate a closely held company and then to contract with it, instead of the contractor personally. The veil here can be pierced, of course, but this strategy can offer advantages.[10]
- **Embedded subcontractors**: Foreign contractors sometimes engage their own employees or subcontractors who may in effect be invisible to the overseas principal: The multinational has privity of contract with his foreign contractor, but no formal relationship with the contractor's subordinates. The very fact that a contractor has employees or subcontractors of his own can serve to buttress the argument that the contractor is not an employee, but unfortunately the "embedded" employees can always argue that the multinational principal is their "dual employer." So inventory-embedded employees and subcontractors: Develop a proactive strategy to contain exposure.
- **Mid-term conversions**: Nipping the independent-contractor-vs.-*de-facto*-employee problem in the bud at the time of initial engagement is a best practice. But multinationals that already have existing relationships with foreign "contractors" can nevertheless take compliance steps. Indeed, liability here soars after a mischaracterization has lingered for years. Consider a global conversion project, changing mischaracterized contractors over to employees. Pay consideration for releases of accrued liabilities. Do this now, while relationships are friendly. To defer the problem until termination or an audit will increase exposure.
- **Salespeople**: Where an independent contractor will sell product, a principal who sidesteps employment laws can walk right into regulations on *sales agents*. Independent contracts with salespeople need to account for local laws that impose protections (especially regarding compensation and termination) on sales agencies (and, less commonly, on distributorships).[11]

Strategy

The *"independent-contractor-or-employee?"* conundrum is a perennial problem even for major multinationals. Engaging an independent contractor overseas rather than hiring a foreign employee may seem to offer efficiencies and advantages—but can open Pandora's Box. Know when a would-be independent contractor is too likely to be held an "employee" under local foreign law. When necessary, hire as an employee. Otherwise, take three action steps before engaging any overseas independent contractor, and use a checklist to spot other issues. Engage only independent contractors who really are independent. Convert over any mischaracterized employees.

Endnotes

1. SHRM Online Global HR Bulletin Board, 4/20/2007 *at* 5:12 P.M.
2. [2007] U.K. E.A.T. 0308/06 (1/31/2007).
3. For example, Spain's law on Violations and Sanctions in Social Matters can impose fines up to €3,006, plus 20–35% over the amount of unpaid taxes/withholdings, etc., and even more if a violation is held to be "very severe."
4. *See* I.R.S. Revenue Ruling 87-41.
5. *See, e.g.*, State of California, Employment Development Department, Employment Determination Guide, *available at* wwwedd.cahwnet.gov/taxrep/de38.pdf.
6. In Sweden, for example, a contract for over six to nine months risks being held an employment relationship.
7. For example, in Turkey, independent contractor agreements should invoke the Turkish Code of Obligations, whereas employment agreements refer to the Turkish Labor Code.
8. *Estatuto del Trabajador Autónomo* (Spain), July 11, 2007, creating a new category of "economically dependent independent contractor" (*trabajador autonomo economicamente dependiente*). Spanish labor courts have jurisdiction over claims by "economically dependent independent contractors" arising under this law.
9. *See, e.g.*, James v. Greenwich Council, [2006] U.K. E.A.T. 0006/06/2T (12/18/2006) (U.K. temp agency employee held not employee of principal).
10. For example in the Netherlands it may be possible to sever a contract with a *corporate entity* without having to seek permission—the Dutch Labor Relations Decree of 1945 requires permission from the Dutch Centre for Work and Income to terminate an individual, but not a corporate, contractor.
11. In the European Union these laws fall under the too-often-ignored Directive 86/653, which has been adapted ("transposed") into local laws like the U.K.'s Commercial Agents (Council Directive) Regulations 1993. *See* O. Brettle, "Commercial Agents," 189 *Personnel Management Newsletter* (U.K.) 2006, at 6; O. Brettle, "The Commercial Agent's Regulations—Ten Years On," *Employment Law Journal* (U.K.) 1/04, at 22.

Donald C. Dowling, Jr. is International Employment Counsel at the New York City office of White & Case, the international law firm with 35 offices in 23 countries. Working daily with his firm's employment lawyers worldwide, Don project-manages for multinational employer clients international HR initiatives such as: global HR policies, codes-of-conduct, hotlines, compensation/equity plans, reductions-in-force and restructurings. He advises on "offshoring," "sweatshop" allegations, expatriate administration, data privacy in global Human Resources Information Systems and HR in international M&A deals.

The Parameters of Municipal "Provisional" Employment: *City of Long Beach v. CSEA*

By Robert Agostisi

The Court of Appeals recently issued an important decision clarifying the parameters of so-called "provisional" employment within municipalities. In *City of Long Beach v. Civil Service Employees Assn., Inc.—Long Beach Unit* ("CSEA"), the Court confronted the question of whether employees appointed on a provisional basis pursuant to N.Y. Civil Service Law § 65 could be granted tenure under a collective bargaining agreement ("CBA").[1]

In March 2004, the New York State Civil Service Commission issued a report that admonished the City of Long Beach for poor control over its provisional appointments—appointments not designed to exceed nine (9) months in duration.[2] The report also noted that some competitive class provisions within the civil service (i.e., those involving a qualifying exam and placement on an eligibility list) had been improperly filled with and retained by provisional employees in contravention of the Civil Service Law.[3]

After this report was issued, the City appointed a new Civil Service Commission, and ultimately discharged the provisional employees at issue.[4] The CSEA filed grievances on behalf of these employees, claiming that they had been granted tenure under the CBA, and were entitled to transfer to any open positions. In their demand for arbitration, the CSEA relied on several sections of the CBA, one of which provided that "employees with one (1) year of service in the annual employment of the City, *regardless of classification*, will be deemed tenured employees."[5]

The City moved to stay arbitration on public policy grounds, arguing that the foregoing provision of the CBA—which the City itself was a party to—was void on public policy grounds. The City prevailed in its petition before the New York State Supreme Court for the County of Nassau. This decision was subsequently upheld by the Appellate Division, Second Department.[6]

In affirming the Appellate Division's ruling, the Court of Appeals held that the "subject dispute was not arbitrable because granting the relief sought on behalf of the provisional employees under the so-called 'tenure' provisions of the [CBA] would violate the Civil Service Law and public policy."[7] In its ruling, the Court of Appeals also reaffirmed the principle that provisional appointments "carry no expectation nor right of tenure." Relying on this principle in conjunction with the strict time limitations set forth in Section 65(2) of the Civil Service Law, the Court held that the City could not provide "superior rights" extending the tenures of provisional appointments beyond nine (9) months. The Court also observed that the limitations set forth in the statute are "necessary to ensure adherence to the constitutional preference for merit selection."[8]

In a lengthy dissent, Chief Judge Kaye agreed with the majority's conclusion that provisional employees cannot be granted tenure by virtue of a provision in a CBA. However, Chief Judge Kaye opined that an arbitrable question remained as to whether the provisional employees should have been transferred to open positions under a separate section of the CBA. This argument was premised on a section of the CBA which purported to allow tenured provisional employees to transfer to open positions for which they were qualified.

The Chief Judge reasoned that because the Civil Service Law "does not prohibit the City and CSEA from negotiating limited protections for provisional employees based on length [of service]," the question remained arbitrable.[9] The Chief Judge also added that the majority's concerns regarding such transfers were unfounded, explaining that the transfers were not "tantamount to permitting a provisional appointment to ripen into permanency. . . ."[10]

Endnotes

1. 8 N.Y.3d 465, __ N.E.2d __ [May 1, 2007].
2. N.Y. Civ. Serv. § 65(2).
3. *City of Long Beach*, 8 N.Y.3d at 465.
4. *Id*.
5. *Id*. (emphasis added)
6. *Id*.
7. *Id*. (citations omitted).
8. *Id*.
9. *Id*.
10. *Id*.

Robert Agostisi is an Assistant Corporation Counsel with the City of Long Beach. He received his J.D. from Hofstra University, and his B.S. from SUNY Albany.

Adverse Action: An Analysis

By Andrew J. Schatkin

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §. 2000(e-2), entitled "Unlawful Employment Practice," states in pertinent part that:

> *It shall be 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; or*
>
> *(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.*

The basic thrust of the statute is to prohibit discriminatory practice in the workplace based on sex, religion, national origin, and race. It is beyond the scope of this article to provide a full analysis of this most complex and important statute. This article will attempt to analyze one element of proof of what may constitute a prima facie case of national origin, race, color, or religious discrimination, under this statute.

In order to prove national origin, race, color, gender, disability discrimination and age discrimination under Title VII; the Americans with Disabilities Act; and the Age Discrimination Act, a complainant must satisfy the burdens of proof initially established in *McDonnell Douglas v. Green*[1] and *Texas Department of Community Affairs v. Burdine*,[2] as recently affirmed in *St. Mary's Honor Center v. Hicks*.[3] A complainant's initial burden is to establish a prima facie case of discrimination by presenting admissible evidence of "actions taken by the employer," from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." *Furnco Constr. Corp. v. Waters*[4] (citing *International Bd. of Teamsters v. United States*[5]); *see also Hicks*;[6] *Burdine*;[7] and *McDonnell Douglas*.[8]

More specifically, in order to establish a prima facie case of national origin, race, color, or religious discrimination, disability, or age discrimination, the complainant must demonstrate that (1) he belonged to a protected class, (2) his job performance was satisfactory, and (3) he was discharged under circumstances which give rise to an inference of discrimination. See *McDonnell Douglas Corp. v. Green*;[9] *Vaughn v. Mobil Oil Corp*;[10] *Scott v. Federal Reserve Bank*;[11] *Fahie v. Thornburgh*;[12] and *Fisher v. Vassar College*.[13]

This article proposes to analyze and consider one separate and discrete element of what may be said to constitute a prima facie case of employment discrimination. That element is that the terminated employee, allegedly subjected to some form of discrimination, was the subject or object of an adverse employment decision.

The leading case on that element of an employment discrimination prima facie case is *Galabya v. New York City Board of Education*.[14] The facts in *Galabya* were that a teacher brought an action against the Board of Education alleging his transfer from one school to another violated the Age Discrimination in Employment Act. The United States District Court for the Eastern District of New York entered Summary Judgment in favor of the Board. The teacher appealed. In *Galabya*, the specific facts were that the appellant was "excessed," meaning that that appellant was not fired, but reassigned to another position in the school system. Specifically, the appellant was reassigned to teach keyboarding at Van Ardsdale High School. To that point, in the appellant's 14-year teaching career, his work had been in Special Education. The transfer did not affect the appellant's salary, and there was no evidence that the ultimate reassignment resulted in a loss of benefits, prestige, or opportunities for advancement. However, it was undisputed, that the facilities at Van Ardsdale were inferior to the facilities at P.S. 4, where the appellant had taught, to the extent that the teachers at Van Ardsdale did not have their own classrooms, desks, or closets. After a series of disputes at Van Ardsdale, the appellant took a leave of absence. The Second Circuit considered the issue of what was to be considered an adverse employment action here. They apprehended the appellant's argument to be that he was denied assignment to the P.S. 4 computer lab, not assigned for the start of the 1994 school year, mis-assigned to Sara Hale, and then ultimately assigned to Van Ardsdale, where he was forced to teach outside his area of expertise, Special Education, and at a school with inferior facilities to P.S. 4. The Court then proceeded to analyze what constituted an adverse employment action as a matter of law. The Court stated that a plaintiff sustains an adverse employment action if he or she endures a "material adverse change" in the terms and conditions of employment. The Court went on to state that to be "materially adverse" a change

in working conditions must be "more disruptive than a mere inconvenience or alteration of job responsibilities." The Court then stated that "a materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation."

The United States Court of Appeals concluded that there was no evidence that the delay in reassignment, followed by the mis-assignment to Sara Hale, was an adverse employment action. The Court noted the appellant did not allege that the appellee denied him an available transfer, that the appellee failed to pay his salary during the interim period, or that the delay in any way harmed his career. The Court went on to state that the inconvenience that the appellant endured, because of the relatively minor administrative miscues that occurred during the reassignment process, was not cognizable as an adverse employment action. The Court further noted that the allegedly inferior facilities the appellant faced at Van Ardsdale did not render the assignment an adverse employment action. The Court went on to state further that the disparity in working conditions—which was reduced to the fact that teachers in Van Ardsdale rotated through classrooms, whereas the teachers at P.S. 4 had their own classrooms—could be characterized as minor. The Court also concluded that the transfer of the appellant out of Special Education classes also did not constitute an adverse employment action, noting that the plaintiff offered no evidence the transfer was some sort of demotion that would constitute a serious professional setback and stigma to his career. The Court opined that a transfer is an adverse employment action if it results in a change in responsibilities so significant as to constitute a setback to the plaintiff's career. Weighing all these factors, the Second Circuit concluded that what occurred here was not an adverse employment action.

A second authoritative decision on what may be said to constitute an adverse employment action is in *Wanamaker v. Columbian Rope Co*.[15] In *Wanamaker*, the plaintiff brought an age discrimination claim with respect to his termination. Again, the United States Court of Appeals for the Second Circuit initially set forth in *Wanamaker* what may be said to be a prima facie case of retaliation. The Court held that a prima facie case of retaliation under the ADEA requires proof that: (1) the plaintiff was engaged in an activity protected under the ADEA; (2) the employer was aware of the plaintiff's participation in the protected activity; (3) the plaintiff was subject to an adverse employment action; and (4) there is a nexus between the protected activity and the adverse action taken.

The *Wanamaker* Court stated that in retaliation cases brought under Title VII the ADEA does not define an adverse employment action solely in terms of job termination or reduced wages and benefits, and that less flagrant reprisals by employers may be adverse. The Court took note of the decision of the Seventh Circuit in *Collins v. State of Illinois*,[16] where that court stated that in a Title VII case, an employer can make a job undesirable not affecting money or benefits. On the other hand, the Second Circuit, citing *Welsh v. Derwinski*,[17] noted that not every unpleasant incident creates a claim for retaliatory discharge. The Court noted that because there are no bright-line rules the Courts must pore over each case to determine whether the challenged employment action reaches the level of "adverse."

Finally there is a further consideration, in *Richardson v. New York State Department of Correctional Services*,[18] of what may be said to constitute an adverse employment action. The *Richardson* Court noted the two performance reviews that stated that the plaintiff's job performance was "average" rather than "excellent" did not constitute an adverse employment action, and that the transfer and reassignment, which involved different job responsibilities, and a move to a position involving contact with the prisoner population, constituted an adverse employment decision.

In short, the law appears to be in stated, as set forth in *Galabya*, *Wanamaker*; and *Richardson.* For the action of an employer to constitute a adverse action, the change in employment must be substantive and not a mere annoyance, inconvenience, or alteration. This could be evidenced by a termination of employment, a demotion evidenced by a decrease in wage or salary, or something similarly substantial. On the other hand, in *Wanamaker*, that Court noted that less flagrant actions can be an adverse employment action, even when the action does not affect money or benefits. Similarly in *Richardson*, the Court noted that a move to a position in the correctional system involving contact with the prisoner population constituted an adverse employment action.

There are other cases that analyze this issue more specifically. For example, in *Grube v. Lau Industries, Inc*.[19] the United States Court of Appeals for the Seventh Circuit stated that the employer's decision to change a female employee's working hours by transferring her from a first-shift manager position to a second-shift manager position did not rise to the level of an adverse employment action as required for the employee's prima facie case of gender discrimination. The Court of Appeals held that the employee's paying job title remained the same and she suffered no significantly diminished job responsibilities.

Similarly, *Stockette v. Muncie Indiana Transit System*,[20] the United States Court of Appeals for the Seventh Circuit held that requiring an employee to submit to a drug test is not an "adverse employment action," and thus is not actionable under Title VII, where the employer requested that the employee take the test only after it had

received the report that he was using drugs and after a trained observer determined that he exhibited signs of being under the influence of a controlled substance.[21]

Lumhoo v. Home Depot USA, Inc.[22] is an interesting case. In that case, the United States District Court for the Eastern District of New York held that the termination of an African-American employee from his position in a home improvement retail chain store followed by a subsequent reinstatement to part-time position at a different location did not constitute adverse employment action required to establish a discriminatory discharge in violation of Title VII and Section 1981. The United States District Court for the Eastern District of New York held that the store investigated the incident leading to termination and reinstated the employee with full back pay, the same salary and benefits, and the same seniority status, and removed all record of his termination from store records.[23]

Conclusion

This analysis of what may be said to constitute an "adverse employment action" in the context of a prima facie case brought under Title VII, the ADA, or the ADEA, shows a basic pattern that the action much be substantive. There must be a significant effect on the employee's employment situation, whether loss of salary, loss of benefits, or some negative change in the employee's working situation. There is authority, however, as stated in *Wanamaker*, that something less than that can be said to constitute an "adverse employment action" and there is no set rule on the issue and that each case must be considered on its own facts.

Endnotes

1. 411 U.S. 792 (1973).
2. 450 48 (1981).
3. 509 U.S. 502 (1993).
4. 438 U.S. 567 (1987).
5. 431 U.S. 432, 358 (1977).
6. 509 U.S. *at* 506-07.
7. 450 U.S. *at* 1253-54.
8. 411 U.S. *at* 802.
9. *Id*.
10. 707 F. Supp. 595 (S.D.N.Y. 1989).
11. 704 F. Supp. 441 (S.D.N.Y. 1989).
12. 746 F. Supp. 310 (S.D.N.Y. 1990).
13. 114 F.3d 1332 (2d 1994). *See also Parika v. United Artist Theater Circuit, Inc*., 934 F. Supp. 760 (S.D. Miss. 1996); *Plair v. E.J. Brach & Sons, Inc*., 931 F. Supp. 555 (N.D. Ill. 1995); *Dean v. Pepsi-Cola Beverages Corp*., 894 F. Supp. 600 (N.D.N.Y. 1995); *Mulero Rodriguez v. Ponte, Inc*., 891 F. Supp. 680 (D. Puerto Rico 1995); *James v. Ranch Mart Hardware,* Inc., 881 F. Supp. 478 (D. Can. 1995); *Mills v. Gibson Greetings, Inc*., 872 F. Supp. 366 (E.D. Ky. 1994); *Thomsic v. State Farm Aut. Ins. Co*., 870 F. Supp. 318 (D. Utah 1994); *Lopez v. Schwan's Sales Enterprises, Inc*., 845 F. Supp. 1440 (D. Kan. 1994); *Edwards v. Interboro Institute*, 840 F. Supp. 222 (E.D.N.Y. 1994); *Alie v. NYNEX Corp*.,158 F.R.D. 239 (E.D.N.Y. 1994); *Evans v. Ford Motor Co*., 768 F. Supp. 618 (D. Minn. 1991).
14. 202 F.3d 636 (2d Cir. 2000).
15. 108 F.3d 462 (2d Cir. 1997).
16. 830 F.2d 692 (7th Cir. 1987).
17. 14 F.3d 85 (1st Cir. 1994).
18. 180 F.3d 426 (2d Cir. 1999).
19. 257 F.3d 723 (7th Cir. 2001).
20. 221 F.3d 997 (7th Cir. 2000).
21. *See also Primes v. Reno*, 190 F.3d 765 (6th Cir. 1999); *Bragg v. Navistar Intern. Trans. Corp*., 164 F.3d 373 (7th Cir. 1998) (No adverse employment action under Title VII when alleged performance demonstration, during which the employee was allegedly evaluated without her knowledge to determine whether she deserved a promotion, and after which she was not promoted was not an adverse employment action). *See also Leder Gerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997); *Zhou v. Pittsburg State University*, WL 1564249 (D. Kan. 2003) (Held: Oral and written reprimands that a State University employee received did not constitute adverse employment actions as would support a prima facie case of national origin discrimination under Title VII absent showing that the employee suffered negative consequences as a result of the reprimands).
22. 229 F. Supp.2d 121 (E.D.N.Y. 2002).
23. *See also Martin v. Bowing-Oak Ridge Co.,* WL 31994282 (E.D. Tenn. 2002). In that case the United States District Court for the Eastern District of Tennessee held that the employer's assignment of an African-American employee who had complained of racial harassment by co-workers from the first shift to the second shift was not an adverse employment action as required for employee's prima facie case of retaliation under Title VII and Section 1981 and the Tennessee Human Rights Act (THRA). That Court held that the assignment was a lateral transfer within the employee's same job classification with the same job title, seniority, and pay.

Andrew J. Schatkin practices law in Jericho, New York. He has published over 150 legal articles and contributed chapters to five books. He is listed in *Who's Who in America*; *Who's Who in the World*; and *Who's Who in American Law*.

Amendment to New York City Administrative Code Prohibits Discrimination on the Basis of Domestic Partnership Status

By Joan M. Gilbride and Yael J. Wepman

Over the past decade, recognition of domestic partnership status and the advancement of rights for domestic partners have gradually developed in the United States. On October 3, 2005, New York City's Mayor Michael Bloomberg signed into law the Local Civil Rights Restoration Act of 2005 amending the New York City Administrative Code to add "partnership status" to the list of protected classes under New York City's Human Rights Law.

The amendment defines "partnership status" to mean the status of being in a domestic partnership under the New York City Administrative Code. The Administrative Code defines a domestic partnership to exist when two people share "a close and committed personal relationship" and "live together and have been living together on a continuous basis." While domestic partners must generally register their partnerships with the New York City Clerk, the Administrative Code makes it clear that the City will recognize a marriage, domestic partnership or civil union lawfully entered into under the laws of another state.

As a result of this amendment, employers in New York City who have four or more employees are required to provide their employees' domestic partners with the same privileges that they provide to their employees' spouses.

Based upon the language of the amendment, it would appear that a New York City employer is legally obligated to amend its benefit plans to include "domestic partners." Although the amendment does affect employers' obligations under New York City Law, the amendment does not affect an employer's obligations under the federal Employee Retirement Income Security Act of 1974 ("ERISA"), which regulates private sector employee welfare and pension benefit plans, because ERISA preempts state laws related to most employee benefit plans.

ERISA protects married employees and their children; it does not protect the rights of employees with domestic partners. For instance, employers who choose to limit ERISA benefits to traditional opposite-sex spouses may do so, even in jurisdictions such as Massachusetts and Vermont, which recognize same-sex marriages or civil unions. To date, there have been no reported cases in which a private-sector employer was found to have a legal obligation to offer ERISA benefits to an employee's domestic partner.

Equality protections in the United States for sexual minorities range from the right of individual gays and lesbians to equal employment opportunities to same-sex couples' equal right to have their partnerships recognized legally. Approximately 60 cities in the United States have same-sex partnership registries, including New York, Los Angeles, San Francisco, Chicago, and Atlanta. Additional examples of equality protections for sexual minorities can be seen at the state level in California, Connecticut, Massachusetts and Vermont, which have enacted laws that extend many of the same legal rights of marriage to same-sex couples.

As more states and municipalities enact laws regarding same-sex relationships, it is important for employers and employees to keep abreast of these developments.

KBR has offices in New York City, Westchester, Long Island, New Jersey and California. Joan is a partner and Yael is an associate practicing in employment law from the management side.

Protecting Employees' Constitutional Rights in Governmental Investigations: The *U.S. v. Stein* Decisions

On July 9, 2002, in response to various high-profile corporate scandals, President George W. Bush established a Corporate Fraud Task Force headed by then-Deputy Attorney General Larry Thompson. The Task Force created a memorandum entitled Principles of Federal Prosecution of Business Organizations (the "Thompson Memorandum"), which directed federal prosecutors to consider various factors when determining whether to indict a corporation. In particular, the Thompson Memorandum required prosecutors to consider a corporation's willingness to waive the attorney-client privilege and "a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys' fees, [or] through retaining the employees without sanction for their misconduct."

From the outset, the Thompson Memorandum provoked controversy within the national legal community. Practitioners and state bar associations criticized its perceived interference with the attorney-client privilege and with a corporation's implementation of policies governing employee indemnification. The New York State Bar Association House of Delegates passed a resolution in June 2006 critical of the Memorandum's reward for corporations that decline to pay defense costs for their employees.

In *U.S. v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) ("*Stein I*"), Judge Lewis Kaplan held that the Thompson Memorandum unconstitutionally coerced companies to deprive their employees of the means of defending themselves against criminal charges in violation of the Fifth and Sixth Amendments of the Constitution because it interfered with the rights of employees to receive a fair trial and to benefit from the effective assistance of counsel.

The *Stein* decision emerged amidst a backdrop of IRS and Senate Subcommittee investigations concerning the development and implementation of abusive tax shelters. KPMG found itself at the center of one such Senate Subcommittee investigation, and some of its partners were subpoenaed to testify in November of 2003. In response to that testimony, KPMG retained Skadden Arps to design a plan of cooperation with the government in an effort to avoid indictment.

Federal prosecutors investigating KPMG were keenly focused on whether KPMG planned to pay the legal fees of its employees under investigation. On more than one occasion during these discussions, the government referred to the Thompson Memorandum, and suggested that KPMG's payment of these fees would be viewed as rewarding misconduct. Judge Kaplan determined that the government's admonitions constituted a warning that "payment of legal fees by KPMG, beyond any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm."

Judge Kaplan found that KPMG had in the past advanced and paid legal fees, without respect to a cap or condition of cooperation with the government, for its employees who found themselves having to defend civil, criminal or regulatory proceedings arising out of activities within the scope of their employment. He also found that, as a direct result of the government's coercion, KPMG had reversed this practice. KPMG's employees under investigation were instructed that KPMG would pay their legal fees and expenses, only up to $400,000, and only on condition that the employee "cooperate with the government and . . . be prompt, complete, and truthful." Significantly, KPMG told these employees that "payment of . . . legal fees and expenses will cease immediately if . . . [the employee] is charged by the government with criminal wrongdoing."

Although each of the individual KPMG defendants in *Stein* subsequently made proffers to the government, the circumstances surrounding Defendant Smith were noteworthy. Acting upon the advice of counsel, Smith initially declined to make a statement about the tax shelters at issue. When the government reported Mr. Smith's lack of cooperation to KPMG, KPMG told Smith that unless he provided the government investigators with the information they requested, KPMG would cease payment of his legal fees and would possibly take further disciplinary action "including expulsion from the firm." Smith relented, rejected his attorney's advice, and agreed to make the proffer to save his job.

Judge Kaplan held that the government's implementation of the Thompson Memorandum coerced KPMG to eliminate payment of its employees' attorneys' fees, a benefit they would have otherwise received. This denial impinged upon the KPMG defendants' ability to defend themselves, and was thus constitutional only if it could survive strict scrutiny—if it were narrowly tailored to achieve a compelling objective. It did not, the Court held, because it "burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs." In so holding, the Court noted that if

the government wanted to prohibit a corporation from rewarding employees engaged in the obstruction of justice, it could have easily achieved this goal by taking the payment of legal fees into account in making charging decisions only if such payments were part of an obstruction scheme. Accordingly, the Court held that the government's implementation of the Thompson Memorandum violated the KPMG defendants' Sixth Amendment right to counsel because the government "acted with the purpose of minimizing [their] access to the resources necessary to mount their defenses."

Shortly after *Stein* I, Judge Kaplan decided *U.S. v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) ("*Stein II*"), in which he suppressed the statements made by Defendant Smith and another KPMG partner on the ground that they were coerced by the government's implementation of the Thompson Memorandum. And, in September, the court also held that it had ancillary jurisdiction to hear claims by the KPMG employees against KPMG.

Stein shows that at least one prominent professional organization was prepared to sacrifice the rights of its employees to curry favor with prosecutors in an effort to avoid indictment. While *Stein* seems to protect employees whose companies have had longstanding practices of reimbursement for legal expenses, the fate of employees at companies without such policies remains unclear. If, however, *Stein*'s underlying premise is to prevent the government from coercing corporations into sacrificing the constitutional protections of its employees, courts would be hard-pressed to distinguish between the two situations.

This article was prepared by the Corporate Litigation Counsel Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. The co-chairs of the Corporate Litigation Counsel Committee are Carla M. Miller and Richard B. Friedman. Special thanks for the preparation of this article are extended to Committee members Jamie B.W. Stecher, David J. Kanfer, Stanley Pierre-Louis, and Robert D. Shapiro.

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For Your Information

Levy Ratner P.C. announces that **Suzanne Hepner** has become a member of the firm and **Sara D. Newman** and **Susan J. Cameron** have become associated with the firm.

Canada: Employer Liability for Immigration Breaches Can Be Costly

By Sergio R. Karas

I. Introduction

The current labor shortages experienced by Canadian companies in many industries have heightened the need for qualified workers. Many Canadian companies are now hiring foreign workers to fill the gap left by retiring employees, an aging population, lack of qualified prospects in Canada, and opportunities for growth at home and abroad. Canadian employers who never before considered hiring foreign workers are now in the process of actively recruiting them. Stories of labor shortages in the construction, mining, petroleum and other industries are almost a daily feature in the national press. While Canadian employers are now feeling the need to look abroad for qualified skilled workers, a practice that has been commonplace for many years in the United States, caution is necessary.

II. The IRPA

A. Section 124 of the IRPA

The *Immigration and Refugee Protection Act* ("IRPA"), in force since 28 June 2002, contains a number of provisions dealing with misrepresentations made by foreign nationals or by other persons with respect to applications for immigration status. Employers should be particularly careful when hiring foreign workers to ensure that no misrepresentation is made to the authorities by any party to an application. The specter of potential liability is very real under the current immigration legislation.

Employers should pay special attention to the provisions of Section 124 of the IRPA, which states that:

> (1) Every person commits an offence who
>
> > (a) contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act;
> >
> > (b) escapes or attempts to escape from lawful custody or detention under this Act; or
> >
> > (c) employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed.
>
> (2) For the purposes of paragraph (1)(c), a person who fails to exercise due diligence to determine whether employment is authorized under this Act is deemed to know that it is not authorized.
>
> (3) A person referred to in subsection 148(1) shall not be found guilty of an offence under paragraph (1)(a) if it is established that they exercised all due diligence to prevent the commission of the offence.

Specifically, Section 124(1)(c) appears to be far reaching in its scope and may prove worrisome for employers. The words in the section that make it a contravention of the IRPA to *"employ a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed"* are very broad and could be interpreted to cover any situation where there is a change in the employee's duties or in the terms of employment. For example, if a foreign worker receives a promotion during the course of employment in Canada, the conditions of his or her Work Permit may be violated and the employer could find itself in contravention of Section 124(1)(c) of the IRPA. Similarly, if an employer merges or is acquired by another company and this results in a change in the foreign worker's duties or reassignment to another location, the provisions of the IRPA could also be contravened by the employer.

B. The Danger of a Change in Circumstances

Generally speaking, when a foreign worker enters Canada, he or she receives a Work Permit. Such a Work Permit could be issued by Citizenship and Immigration Canada (CIC) pursuant to an exemption from the IRPA Regulations (as in the case of intra-company transferees or other exempt categories), or could be granted after the issuance of a Labor Market Opinion by the Foreign Worker Unit of Service Canada, when the employer has demonstrated that there are no Canadians available for the position, or there could be a transfer of skills to Canada, or to fill a labor shortage, or where other benefits could ensue. In each case, the entry of the foreign worker into the Canadian labor force is governed by the terms and conditions set out in the Work Permit or in the Labor Market Opinion.

For example, a senior manager or a specialized knowledge worker could enter Canada as intra-company transferees based on their status in the corporate structure, seniority, special skills, knowledge, and salary commensurate with the position. However, if there is a change in the corporate structure which results in a

change in the assignment of the foreign worker, a contravention of the IRPA could occur. Also, where a foreign worker is admitted to Canada to perform duties for an employer at a specific location, but the workplace is changed to another province, a contravention could also take place.

In cases where a Labor Market Opinion has been issued by Service Canada, a contravention of the IRPA could have serious ramifications. Labor Market Opinions set out in great detail the terms and conditions of employment, including salary, vacation, benefits, place of employment, and other significant factors pertaining to the engagement of the foreign worker. Labor Market Opinions are issued after a careful review by Service Canada of all the circumstances surrounding the employer and its request to hire a foreign worker and, in many instances, after extensive national advertising and a thorough search for local candidates. If the foreign worker's duties change due to reassignment or restructuring, those conditions may trigger a contravention. For example, where a company hires a foreign worker to discharge his duties as a Sales Manager and he or she is then promoted to the position of Marketing Director, the employer may be in contravention of the IRPA, since it is engaging the foreign worker in a different capacity to that intended when the Labor Market Opinion and the Work Permit were granted. Conversely, if the same Sales Manager is demoted to a non-managerial position, a similar difficulty would arise.

The problem of employing a foreign national in a capacity in which he or she is not authorized specifically by the Work Permit is compounded by the attribution of "deemed knowledge" to the employer by Section 124(2) of the IRPA. Under that section, a person who fails to exercise due diligence to determine whether the employment is authorized is "deemed to know that it is not authorized." The provision imposes an active duty on the employer to satisfy itself that a foreign national is authorized to work in a specific position, and to determine that a Work Permit is valid at all times during the employment. It is therefore extremely important that an employer keep track of all foreign workers in a systematic fashion, including the positions for which they are authorized to perform services, the duration of the Work Permits, and expiry dates.

When charged with a contravention, employers could rely on the defense of "due diligence" set out in Section 124(3) of the IRPA, if they can establish that they have exercised all reasonable care to prevent the commission of an offense. Again, this section places an active duty on the employer to monitor foreign workers in a very detailed manner, and to document their files as extensively as possible.

C. Consequences of Contravention

Contraventions of the IRPA carry serious penalties. Pursuant to Section 125, a person who commits an offense may face heavy fines or even imprisonment. Section 125 states:

> **125.** A person who commits an offence under subsection 124(1) is liable
>
> (a) on conviction on indictment, to a fine of not more than $50,000 or to imprisonment for a term of not more than two years, or to both; or
>
> (b) on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both.

Although there have been, to date, no reported cases of employer prosecution, there is anecdotal evidence that some smaller subcontractors in the construction industry have been cited for contraventions of the IRPA. However, generally speaking, Citizenship and Immigration Canada (CIC) and Canada Border Services Agency (CBSA) have not actively pursued employers who employ unauthorized foreign workers. Contrast this with the U.S. situation, where large-scale employer prosecutions are common.

In one reported case, however, the authorities chose a different route to deal with the problem of unauthorized employment. In *Brar v. Canada (Minister of Citizenship and Immigration*), 2006 FC 1502, the applicants were citizens of India who applied for and received Work Permits to enable them to come to work in Canada. The Work Permits were for "Bombay Paradise Restaurant" in Calgary, owned by a numbered company. Their permits made it clear that the applicants were not authorized to work for any employer or in any location other than specifically stated in the permits. However, upon arrival in Canada, the applicants found out that the restaurant was under construction and far from being completed. The owner of the business placed them in another establishment known as "Bombay Sweethouse and Restaurant," which apparently was not under the same ownership, although paychecks issued to the workers were issued by the numbered company which was the owner of "Bombay Paradise Restaurant." The workers were cooks and candy makers at the second location, where they remained employed.

The authorities became aware that the applicants were working for an employer which was believed to be different from that stated in the Work Permit. As a result, an Exclusion Order was issued based on the determination that there was a violation of the IRPA. Specifically, the Exclusion Order relied upon Sections 41(a) and 29(2) of the IRPA, which state:

> 41(a) A person is inadmissible for failing to comply with this *Act* in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this *Act;*
> …
>
> 29(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this *Act,* must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.

Upon hearing the matter, the Immigration Division held that the above noted provisions had been contravened by the workers and issued Exclusion Orders against them. At the hearing, the workers took the position that they were unsophisticated and not familiar with the laws in Canada. They contended that they were told that the "Bombay Paradise Restaurant" was not yet ready, but the owner had another establishment where they could work. However, the Immigration Division rejected that contention, and held that the applicants had an obligation to know what the requirements of admission to Canada were and that "ignorance of the law is never an excuse."

Upon judicial review, the Federal Court quashed the Exclusion Orders and held that, in this case, "Bombay Paradise Restaurant" was the employer which paid the applicants, and declined to accept the government's position that a person must interpret the terms of the Work Permit in light of the application upon which it was granted. The court held that the Work Permit should be readily understood on its own, without reference to other material, and should be understandable to all interested persons, not just to the worker or the government, on its face. The court held that the government has a responsibility to ensure that Work Permits are sufficiently clear and specific. The court likened the issuance of the Work Permit to the interpretation of the contract, and if there is ambiguity it should be construed against the party which prepared it. The court exhorted the government to make Work Permits clear to all parties, and found that the applicants had not breached the terms of their Work Permits.

While in the above-noted case the applicants escaped sanction, it should be considered in light of its specific circumstances. It remains debatable whether the stringent interpretation given by the court to the requirement for clarity necessary in a Work Permit could have the effect of relieving applicants from responsibility for making reasonable inquires concerning the nature of their employment. In the above case, it must be noted that the employer continued to pay the applicants, that the location of work was within the same geographical area, and there appears to have been some sort of arrangement between the two restaurants. However, matters could be very different if there is a slight variation in the factual context. Further, it remains to be seen whether a higher court would agree with this restrictive interpretation of the seemingly clear provisions of the legislation.

III. Conclusion

Employers must exercise the utmost care when hiring foreign workers. In particular, employers must adhere to the terms and conditions set out in the Work Permits and in Labor Market Opinions. Failure to do so may result in serious penalties. It is prudent for employers to seek appropriate legal advice before reassigning foreign workers to new positions, to avoid the potential for a contravention of the IRPA which can carry substantial penalties.

It is crucial that employers who intend to reassign foreign workers to different duties or positions within the organization obtain legal advice prior to doing so, and take active steps to file the appropriate documentation to obtain changes to the terms and conditions attached to the Work Permit or Labor Market Opinion, if one was obtained.

Sergio R. Karas is current Vice Chair of the Ontario Bar Association Citizenship and Immigration Section, and co-Chair of the International Bar Association Immigration and Nationality Committee. His comments and opinions are personal and do not necessarily reflect the position of any organization.

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The following article was presented as part of a program at a meeting of the New York City Chapter of the Labor and Employment Relations Association in March 2007.

The New York State Employment Relations Board

By James A. Conlon

The New York State Employment Relations Board was created in 1991. It was born by legislative act consolidating the New York State Labor Relations Board and the New York State Mediation Board. The merging of these two agencies brought together the adjudicative, mediation and arbitration duties of each under one board. The purpose of the merger was to more efficiently perform the goals of promoting industrial peace and settling employment disputes within New York State. The history of the Board is a long one.

History of the Agency

In 1937, after the Supreme Court decision in *Jones & Laughlin Steel Corp.*,[1] which upheld the constitutionality of the Wagner Act, the New York State Legislature passed what was known as the Doyle-Newstein bill. The bill was to afford protection of collective bargaining at the state level similar to that afforded by the National Labor Relations Act. The bill was signed by Governor Lehman on May 20, 1937 and the New York State Labor Relations Act went into effect on that day.

The New York State Labor Relations Act declared that it was the public policy of the State of New York

> to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purposes of collective bargaining or other mutual aid and protection, free from the interference, restraint or coercion of their employers.[2]

Comparisons with the National Act

If you compare Section 700 of the New York State Act and Section 1 of the National Labor Relations Act, you will note that the "Little Wagner Act" of New York was modeled closely after the original National Act. Closer examination shows that the substantive and procedural provisions of the two statutes were substantially similar in basic content. The similarity has been recognized by the New York State Court of Appeals.[3] There also were and are significant differences, and these differences have become more marked following the 1947 (Taft-Hartley) amendments and the 1959 (Landrum-Griffin) amendments of the National Labor Relations Act.

Unfair Labor Practices: Both the New York Act and the National Labor Relations Act list certain types of employer conduct that are considered to be unfair labor practices. The National Labor Relations Act contains five unfair labor practices, whereas the New York Act contains ten. The unfair labor practices listed in the New York Act are considerably more explicit and clearly defined than those listed in the National Act. A really significant difference between the New York Act and the National Labor Relations Act is that the 1947 and 1959 amendments of the latter added, in Section 8(b), a list of labor union activities which are prohibited, such as coercion of employees, the closed shop, certain secondary boycotts, recognition picketing, and so forth. The New York State Act contains no such list of prohibited union activities. The activities prohibited by the New York Act are limited to employer conduct. It should be noted that even though the New York Act contains no parallel to Section 8(b) of the National Act, many of the activities prohibited by Section 8(b) are controlled in New York State by the courts.

Runoff Elections: Another difference between the National Act and the New York State Act is the conduct of runoff elections. In election cases where there are two unions and "neither" on the ballot and there is no majority for either, the New York Board has consistently followed a policy of conducting a runoff election between the two unions. This policy is followed even if the vote for neither is greater than the vote for either Union A or Union B. The Board reasons that so long as the employees do not cast a majority of votes for either, this is at least an indication that the employees desire to be represented by some union.

The National agency and the New York agency rely very heavily on the settlement of disputes through informal procedures. They both encourage the settlement of disputes in unfair labor practice cases and representation cases prior to the formal hearing stage.

The New York agency recognizes separate bargaining units for supervisors, where the National agency has been precluded from dealing with supervisors since 1947.

The New York agency also recognizes a single employee bargaining unit, unlike the National agency.

The Board

The New York State Labor Relations Act is administered and enforced by an administrative agency, created pursuant to Section 702 of the statute. The administrative agency was the New York State Labor Relations Board.

In July of 1991 the New York State Labor Relations Board and the New York State Mediation Board were merged to form the New York State Employment Relations Board, or what is commonly referred to as SERB.

The Mediation Board had been in existence since 1968,[4] and was primarily responsible for settling labor disputes through the means of mediation and arbitration. The Mediation Board had always worked together with the Labor Relations Board in the years prior to the merger. The two Boards frequently referred cases to one another. For example, an investigation by the Labor Relations Board of a charge or petition may indicate that the dispute centers in a disagreement about contract interpretation rather than on an unfair labor practice or a representation conflict. In such a case the Labor Relations Board would refer the matter to the State Board of Mediation.[5]

The Current Board and Public Policy

The New York State Employment Relations Act establishes as public policy the encouragement of the practice and procedure of collective bargaining and provides: for the protection of employees in expressing their full freedom of association and organization; that the best interests of the people are served by the prevention or prompt settlement of labor disputes; that voluntary mediation of such disputes will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people; that representatives of employers and unions engaged in disputes which threaten to curtail the production or distribution of goods or the provision of services are encouraged to voluntarily submit such disputes to the agency created by this article prior to engaging in a strike, lockout or other cessation of employment.

It is the objective of the New York State Employment Relations Board to take all possible steps which will effectively and expeditiously carry out the policy of the New York State Legislature and maintain industrial peace to the greatest extent possible to the benefit of the people of the state.

The Board provides two types of arbitration services upon request of the parties—grievance arbitration (staff or panel): arbitration of grievances and disputes arising under terms of an existing collective bargaining agreement; and interest arbitration: arbitration to establish the terms of a collective bargaining agreement, either initial or successor.

The Board provides mediation services based on the following principles: Strikes and lockouts, no matter what the merits of controversy, produce economic waste; the best interests of the people of the state are served by the prevention or prompt settlement of labor-management disputes; voluntary mediation of labor-management disputes contributes to promoting permanent industrial harmony. Mediation should be viewed as a tool to help prevent or to reduce work stoppages. It substitutes reason for unnecessary conflict through facilitation by a disinterested third party. It enhances communication between the parties and permits them to find their way out of what may appear to be an impossible problem.

Pursuant to Section 705 of the Labor Law, it is the Board's responsibility to determine appropriate bargaining units and to implement, through card check or secret ballot election, the free democratic choice by employees as to whether they wish to be represented by a union and, if so, by which one.

The Board also acts to prevent and remedy unlawful conduct in violation of Section 704 of the Labor Law. These prohibited acts include discouraging membership in unions by discrimination against employees because of such membership, refusing to bargain collectively with a union which represents a majority of the employees in an appropriate bargaining unit, or engaging in any other acts which interfere with, restrain or coerce employees in the exercise of rights guaranteed them by the Act.

The Board currently has offices in Albany, Buffalo, New York City, Long Island and Syracuse.

§ 702. Employment Relations Board

1. There is hereby created in the department a board to be known as the "New York state employment relations board" which shall be composed of five members who shall be appointed by the governor with the advice and consent of the senate, one of whom shall be so appointed on recommendation of the temporary president of the senate, one of whom shall be so appointed on recommendation of the speaker of the assembly, and one of whom shall be so appointed on recommendation of the temporary president of the senate or the speaker of the assembly to alternate beginning with the first appointment subsequent to the effective date of the chapter of the laws of nineteen hundred ninety-two amending this subdivision being made by the temporary president of the senate. All subsequent alternate appointments shall be made only upon expiration of a three

year term. No member appointed to a three year term shall hold over. No member of the board during his or her period of service as such shall hold any other public office. Members of the state employment relations board serving on the effective date of the chapter of the laws of nineteen hundred ninety-two amending this subdivision shall be continued as members of the board and shall be deemed appointed to the board as of the effective date of the chapter of the laws of nineteen hundred ninety-two amending this subdivision, and the member of the board who formerly served on the state mediation board shall be deemed to be the member appointed on recommendation of the speaker of the assembly. Four members shall be appointed for a term of six years, and one member appointed on recommendation of either the temporary president of the senate or the speaker of the assembly shall be appointed for a term of three years, commencing on January first, nineteen hundred ninety-three, except that the members serving on the effective date of the chapter of the laws of nineteen hundred ninety-two amending this subdivision shall be deemed to occupy terms which shall expire on December thirty-first, nineteen hundred ninety-eight. The governor shall designate one member to serve as chairperson of the board. A member chosen to fill a vacancy shall be appointed for the unexpired term of the member whom he or she is to succeed. Any member of the board may be removed by the governor for inefficiency, neglect of duty, misconduct or malfeasance in office, and for no other cause, after being given a copy of the charges and an opportunity to be publicly heard in person or by counsel.

Jurisdictional Issues

NLRB and SERB Jurisdiction

There was no distinguishable controversy authorizing a federal injunction in an action by the NLRB to restrain the State Labor Relations Board from proceeding further in respect of an unfair labor practice charge where it was not certain that the NLRB would take jurisdiction. Summary judgment in such a case would be denied since a question of fact was presented in respect of the interstate activities involved, a question which ought to be determined first by the NLRB for the purpose of establishing exclusive jurisdiction in the NLRB.[6]

Where the National Labor Relations Board has asserted general jurisdiction over a union of foremen employed by industries subject to the National Labor Relations Act, but has refused to certify such unions as collective bargaining representatives on the ground that to do so would obstruct, rather than further the purposes of the act. Certification of such unions by the New York State Labor Relations Board under the State Act is invalid as in conflict with the National Act.[7]

Where the State Labor Relations Board, after hearing, ordered reinstatement of an employee, the issue that the Board lacked jurisdiction because of the employer's alleged interstate operations should have been raised at the hearing and could not be asserted at an application for enforcement of the order.[8]

SERB Has Jurisdiction When the National Labor Relations Board Does Not Assert Jurisdiction Over the Enterprise

The NLRB gets its authority from Congress through the National Labor Relations Act. The NLRB has been given jurisdiction over enterprises that affect interstate commerce. It does not assert jurisdiction in all cases affecting commerce. The NLRB uses its discretion by limiting the exercise of its authority to cases involving enterprises whose effect on commerce is substantial. The NLRB has developed "jurisdictional standards" based on the yearly amount of business done by the enterprise, or on the yearly amount of sales or purchases.

In a 1968 case before SERB, the Employer challenged the jurisdiction of the Board stating that the NLRB had exclusive jurisdiction over the enterprise. The SERB stated the "record here demonstrates that the National Board, by its Regional Director, after finding the appropriateness of a unit limited to the Employer's school bus operation, expressly refused to assert jurisdiction over such an operation. . . . Accordingly, and in cognizance of our own unit finding herein, we find and conclude that this State Board has jurisdiction of this proceeding."[9]

Jurisdiction of SERB Unsuccessfully Challenged Under Federal Constitutional Basis

In 1990, SERB jurisdiction was challenged over a religious high school on the basis that the New York State Labor Relations Act should be pre-empted by the National Labor Relations Act. The rationale was that the State Act should not exercise jurisdiction over church-operated schools because application of the State Act violated the Free Exercise and Establishment Clauses of the First Amendment.

SERB cited the religious high school for violating the New York State Labor Relations Act. The School was charged with refusing to bargain in good faith, and improperly discharging and failing to reinstate striking employees. The School challenged the SERB jurisdiction on constitutional issues.

The School's argument suggests that the application of the State Labor Relations Act would interfere with fundamental rights of parents of students to direct the religious education of their children. The Court of Appeals, analyzing the matter under the Supreme Court decision in *Employment Div., Ore. Dept. of Human Resources v. Smith*,[10] noted that the "rights of parents in the education of their children . . . are altogether different than the rights of a religiously affiliated employer with respect to the control of and authority over their lay employees." The Court of Appeals held that "[a]pplication of the New York State Labor Relations Act to lay teachers in parochial schools does not violate the Free Exercise nor Establishment Clauses of the First Amendment, and the New York State Labor Relations Act is not pre-empted by the National Labor Relations Act from exercising jurisdiction over church-operated schools."[11]

Regarding the Free Exercise Clause, the Court held that the "Labor Relations Act is valid law of general applicability enacted for purposes of encouraging collective bargaining, not to regulate religious conduct or beliefs, and thus incidental burden on free exercise of religion that results from its application to religious school does not violate the free exercise clause of the First Amendment."[12]

The Schools Establishment Clause argument also fails under Court analysis. The Court of Appeals noted that the Supreme Court made it clear when discussing the Establishment Clause that "total separation is not possible in an absolute sense, [for s]ome relationship between government and religious organizations is inevitable." The Court further explained, "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular relationship." In applying the test for ascertaining Establishment Clause violations, it concluded that the only excessive entanglement prong was potentially implicated by the application of the State Labor Relations Act to the subject School (citing to *Lynch v. Donnelly*, 465 U.S. 668). The Court concluded that the Board's relationship with the religious schools over mandatory subjects of bargaining does not involve the degree of surveillance necessary to find excessive administrative entanglement.

The Court of Appeals held that "[a]pplication of Labor Relations Act (CLS Labor §§ 700 et seq.) to religious schools does not result in excessive entanglement of government with religion, and thus does not violate the establishment clause of the First Amendment; state's intrusion into a school's labor practices is minimal in that participation in collective bargaining will not impinge on religious character of the school and, if the school contends that it has a religious reason for an alleged unfair labor practice, the state is prohibited from challenging whether the motive is pre-textual."[13]

Jurisdiction of the SERB Over the New York Racing Association

In a 1983 case, jurisdiction of the SERB was challenged by the New York Racing Association. The Intermediate Report of the Administrative Law Judge, which is incorporated into the SERB's decision notes as follows:

> Section 103.3 of the National Labor Relations Board's Rules and Regulations, promulgated in 1973, states that the National Board shall not exercise jurisdiction over the racing industry. . . . That rule has not been withdrawn or modified by the National Labor Relations Board and thus I find that the State Board continues to have jurisdiction over this Respondent.[14]

Constitutionality—Federal Law

The National Labor Relations Act (U.S.C. tit. 29, ch. 7) and the State Labor Relations Act (L. 1937 ch. 443) are alike in their provisions and almost identical in their language. Enforcement of the state act, therefore, in no manner impairs the supremacy of the federal statute in contravention of the U. S. Constitution, Article VI, § 11, which provides that the laws of the United States, enacted pursuant to the Constitution, are part of the supreme law of the land.[15]

The enactment of this act could not override the constitutional authority of the Federal Government with respect to the protection of interstate and foreign commerce.[16]

A particular activity in the area of labor relations may be "protected" by federal law not only where it falls within § 7 of the National Labor Relations Act (29 U.S.C.S. § 157; declaring certain concerted activities to be protected), but also where it is an activity which Congress intended to be unrestricted by any governmental power (state or federal). In short, the legislative purpose underlying the Wagner and Taft-Hartley Acts may dictate that certain activity neither protected nor prohibited be privileged against state regulations.[17]

Single Unit Bargaining Units

While superintendents of apartment houses represent management on premises, with respect to their subordinates, they are employers rather than employees.

However, in relation to their own employers, they remain employees within definition of section 701, subdivision 3.[18]

The Board held that a single employee may designate a representative to act for him. The Board found there was no reason to believe that the legislature intended to deny the Board the power to find an appropriate unit composed of a single employee where the circumstances warrant.[19]

Unfair Labor Practice Only Chargeable to Employers

Neither employees nor labor organizations may be found guilty of unfair labor practices; only employers may be prevented from engaging in them. Only employers may not interfere, restrain or coerce.[20]

Three Board Members Required for Decision

Where two of the three members of the board were present throughout the proceedings, constitutional rights were not violated by reason of the fact that before a final decision, one member of the board was replaced and the new member joined in and signed the decision after full consideration of the record. [21]

Endnotes

1. 301 U.S. 1 (1937).
2. Labor Law § 700.
3. *Davega-City Radio, Inc. v. S.L.R.B.*, 281 N.Y. 13, 22, 22 N.E.2d 145, 147 (1939); *S.L.R.B. v. Holland Laundry, Inc.*, 294 N.Y. 480, 63 N.E.2d 68 (1945).
4. The Mediation Board was actually established in 1886 under the title of the New York State Board of Arbitration.
5. Kurt L. Hanslowe, "Procedures and Policies of the New York State Labor Relations Board," Cornell University, Humphrey Press 1964, p. 21.
6. *NLRB v. New York State Labor Relations Board* (1952 DC NY), 106 F. Supp. 749, 30 BNA LRRM 2417, 22 CCH LC P 67062.
7. *Bethlehem Steel Co. v. New York State Labor Relations Board* (1947), 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026, 19 BNA LRRM 2499, 12 CCH LC P 51245.
8. *New York State Labor Relations Board v. Marlene Transp. Co.* (1955), 207 Misc. 677, 139 N.Y.S2d 621.
9. *Long Island Bus Co., Inc. and Local 1, School Bus Drivers Union, Ind. and Local 252, Transport Workers Union, AFL-CIO,* 31 SLRB No. 7 (1968).
10. 494 U.S. 872 (1990).
11. *Christ the King Regional High School v. Culvert*, 644 F. Supp. 1490 (S.D.N.Y. 1986), *aff"d*, 815 F.2d 219 (2d Cir. 1986).
12. *Id.*
13. *Id.*
14. *In re The New York Racing Association, Inc. and John Sferlazza*, 46 SLRB No. 21.
15. *Davega-City Radio, Inc. v. S.L.R.B.* (1939), 281 N.Y. 13, 22 N.E.2d 145.
16. *Consolidated Edison Co. v NLRB* (1938), 305 U.S. 197, 83 L. Ed. 126, 59 S. Ct. 206, 3 BNA LRRM 645, 1 CCH LC P 17038. *See also Bethlehem Steel Co. v. New York State Labor Relations Board* (1947), 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026, 19 BNA LRRM 2499, 12 CCH LC P 51245.
17. *International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Com.* (1976), 427 U.S. 132, 49 L. Ed. 2d 396, 96 S. Ct. 2548, 92 BNA LRRM 2881, 78 CCH LC P 11476.
18. *New York State Labor Relations Board v. Metropolitan Life Ins. Co.* (1944), 183 Misc. 1064, 52 N.Y.S.2d 590, 15 BNA LRRM 650.
19. *In re 117-14 Union Turnpike, Inc.*, 2 SLRB 866, 872 (1939).
20. *Triboro Coach Corp. v. New York State Labor Relations Board* (1940, Sup.), 22 N.Y.S.2d 1013, 7 BNA LRRM 741.
21. *New York State Labor Relations Board v. Paragon Oil Co.* (1943, Sup.), 45 N.Y.S.2d 152.

Request for Articles

If you have written an article and would like to have it considered for publication in the *L&E Newsletter*, please send it in electronic format (pdfs are NOT acceptable), along with biographical information, to its Editor:

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

Second Circuit Upholds Municipal Wage Freeze

By A. Vincent Buzard

On September 21, 2006, the Second Circuit Court of Appeals held for the first time that increases in wages provided for in contracts can be constitutionally frozen as a part of an effort to alleviate a municipal fiscal crisis.[1] Previously, the Second Circuit had held that legislation by the State of New York to freeze or defer wages as a part of a claimed state fiscal crisis was unconstitutional.[2] Because a number of municipal governments in New York are in or near a fiscal crisis, the validity of a wage freeze is naturally of interest to municipalities and the lawyers who advise them. I was privileged to defend the validity of the wage freeze and was pleased to be asked to write this article by the editor.

The wage freeze was imposed upon the employees of the City of Buffalo by the Buffalo Fiscal Stability Authority, which is a public authority created by legislation enacted on July 3, 2003 by the New York State Legislature. In Buffalo, the authority is referred to as the "Control Board" and I will do so here.

The creation of the Control Board was a response by the legislature to a deepening fiscal crisis in Buffalo which had been studied by the New York State Comptroller at the request of the legislature. The Comptroller found that Buffalo had been operating with a structural deficit for several years and was only able to fund its operations with the use of reserves and increasing State aid. The Comptroller found that Buffalo was confronted with ever increasing budget deficits in part due to the City's population decline and poor economy. He further found that Buffalo's fiscal crisis was not likely to be remedied by the City alone and recommended the creation of an authority with the power to freeze wages.

In enacting the legislation, the legislature made specific findings, including finding that the City was in a fiscal crisis and that Buffalo could not remedy its dire financial condition alone; that the welfare of the inhabitants of the City was seriously threatened; and that the crisis could not be resolved absent further assistance from the State.

The Control Board was given oversight of the City's finances, including the power to approve all contracts and monitor four-year financial plans. The Control Board was also given the power to freeze hiring, and to freeze the wages granted under collective bargaining agreements.

Under The Control Board, various belt-tightening measures were instituted, including freezing hiring and layoffs. Even after these measures, the Control Board found that for the 2004/2005 fiscal year, Buffalo projected a budget gap of $20 to 30 million dollars higher than previously estimated and that the budget gap for the next four years would exceed $250 million. As a result, the Control Board invoked the power to freeze wages and determined that a wage freeze was "essential to the maintenance of a financial plan." The statutory standard was that the Board could freeze wages if it found that such a freeze was necessary to the maintenance of a four-year economic plan. The Board so found and froze the wages as of April 21, 2004.

The Buffalo Federation of Teachers brought a lawsuit in Federal Court alleging that the freeze was unconstitutional under the impairment clause of the Constitution and that the freeze also violated equal protection and due process. However, the principle argument was on the question of impairment. The District Court granted our motion for summary judgment finding that the State had acted properly within its police power to address the City of Buffalo's dire financial situation.

While the Constitution prohibits states from passing any "law impairing the obligations of contracts" (U.S. Constitution Article 1, Section 10, Clause 1), the prohibition is not absolute. The Courts have held that the contract clause preserves "the inherent police power of the state to safeguard the vital interest of its people"[3] and that the contract clause must be accommodated to the police power to protect the lives, health, morals and general welfare of the people. The three prong test is (1) whether the impairment is substantial; (2) whether it serves a significant public purpose; and (3) whether the means chosen are reasonable and appropriate.

In the *Teachers* case, all of the contracts had actually expired, but the expired contracts had provided for annual step increases. Because the Taylor Law provides that existing contracts will remain in effect until a new contract has expired, the Courts have held that that statute itself is a part of the contract and therefore even though the increases are provided for by expired contracts, they are a contract right.

The District Court held that the impairment was substantial and we did not argue otherwise on appeal. On the second prong of the test, the plaintiff teachers' union essentially conceded that Buffalo was in a fiscal crisis.

The argument centered on the third test, which was whether the means chosen to accomplish the purpose were reasonable and appropriate. The teachers' union relied on the cases in which the Second Circuit had found that the State had unconstitutionally impaired the wages of court reporters by "lagging" their pay, that is, by delaying their pay.[4] In both of those cases the Court had held

that the State had other alternatives to impairing wages, and that one of the alternatives included the raising of taxes.

In this case, the teachers' union argued that the freeze was really a State-imposed freeze, and because the State had other alternatives, *i.e.*, to raise state taxes, the freeze was self-serving and therefore unconstitutional.

While the union did not contest the nature and extent of Buffalo's crisis, it argued because the State did not have a similar fiscal crisis the legislature could not constitutionally authorize the freezing of wages. Our papers set forth in detail all of the previous steps taken by the Control Board, including the hiring freeze, raising taxes and school closings. We thus demonstrated that the State and the Control Board had not considered freezing wages to be simply another policy alternative.

We also argued that unless the wage freeze was upheld there would be more school closings, more layoffs and more drastic remedies, which the Court relied on in finding that a moderate course would not have served the public purpose equally as well. In finding that that the freeze was reasonable, the Court also relied on the fact that it was temporary.

The Court did not directly deal with plaintiff's primary argument that the State could have raised taxes to solve Buffalo's fiscal crisis. The Court held that to meet a fiscal emergency, taxes conceivably could always be raised, but that is not a legislature's only appropriate response. Further, the Court held that we had shown that Buffalo had already increased taxes to meet its fiscal needs and that raising taxes further would have exacerbated Buffalo's fiscal problem. The teachers union had not argued that the City should further raise taxes, so the Court on this whole finding was not really directly confronting the teachers' union's argument. The Court also held that the teachers union had not shown how any money raised by the State raising taxes would flow to Buffalo. That finding was a variation on the argument we had made, which was that even if the wage freeze were found unconstitutional, there was no guaranty that the State would make up the difference through further aid. Finally, the Court held that it would not second guess the wisdom of picking a wage freeze over other policy alternatives such as layoffs or elimination of essential services.[5]

The Court distinguished *Condell* and *Surrogates,* the teachers' union's primary basis for their arguments, by holding that in those cases the emergency was in doubt and that the payroll lag had been instituted because of "political expediency." The Court contrasted the situation in Buffalo where there was a very real fiscal crisis and no evidence of political expediency or "unjustified welching."

The Court also found the *Subway Surface Supervisors Association v. New York City Transit Authority*[6] decision by the New York State Court of Appeals to be persuasive and relevant because there, as in Buffalo, there was a clear fiscal crisis.

There are a number of lessons for municipalities considering the need for a control board with the power to freeze wages.

First, the fact that the State Comptroller had issued a detailed report confirming the existence of the crisis was critical. Any attempt to freeze wages without such an analysis or demonstration of the reality of the fiscal crisis would be difficult. The fact that the legislature made findings that there was a fiscal crisis also provided an articulated basis for arguing that there was an important public purpose being served. Secondly, the fact that the Control Board adopted other measures first, such as layoffs and tax increases, enabled us to show that there really were no other alternatives except further layoffs that would cut deeply into public safety and educational services. Third, the fact that the City of Buffalo did not try to freeze its own contracts meant that the freeze was not self-serving. The fact that the Control Board was not abrogating its own contract gave it some level of independence. The fact that the freeze was to be regularly reviewed also aided in demonstrating the reasonableness of the freeze. Further, the fact that one union was not singled out for a wage freeze, was also important.

In short, the decision by the Second Circuit was clear that a wage freeze can be imposed on municipal employees in this State where the fiscal crisis is clear and the wage freeze is treated as a last resort.

Endnotes

1. *Buffalo Teachers' Federation v. Tobe,* 464 F.3d 262 (2d Cir. 2006).
2. *Association of Surrogate and Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991); *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993).
3. *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 434, 54 S. Ct. 231, 78 L.Ed. 413 (1934).
4. *Supreme Court Reporters*, 940 F.2d 766; *Condell*, 983 F.2d 415.
5. *Supreme Court Reporters,* 940 F.2d at 772; *Condell,* 983 F.2d at 418.
6. 44 N.Y.2d 101, 404 N.Y.S.2d 323 (1978).

Mr. Buzard is a past president of the New York State Bar Association. A former corporation counsel for the City of Rochester, he presently is the Chair of the Appellate Practice Group at Harris Beach PLLC.

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Legislative Update

NYSBA Labor and Employment Section Legislation Committee

Howard Edelman, Co-Chair • Timothy S. Taylor, Co-Chair

The following represents an edited list of pending legislation. For a complete list of all pending legislation see www.public.leginfo.state.ny.us and www.assembly.state.ny.us

Bill No.	
A69	**Pheffer (MS)**—Prohibits the use of inmate labor to access, collect or process personal information
A241	**Morelle (MS)**—Establishes an economic and entrepreneurial education program in the department of education; appropriates $200,000 therefor
A403	**Cahill (MS)**—Provides for cost-of-living adjustments of disability benefits for an employee with a permanent total disability
A408	**Dinowitz (MS)**—Creates additional remedies for unlawful discharge, penalty, or discrimination due to the exercise of an employee's right to be absent from employment for jury duty
A572	**Zebrowski**—Allows certain employers access to conviction records
A781	**Wright**—Provides civil penalties for violations of article 5 of the labor law concerning meal period and day of rest provisions
A1263	**Eddington (MS)**—Authorizes the commissioner of labor to establish procedures providing information on the child health insurance plan to a person filing for unemployment insurance
A2324	**John**—Requires certain employers to develop and implement programs to prevent workplace violence
A2348	**Ortiz (MS)**—Provides for the labeling of apparel manufactured without the use of abusive and exploitative labor
A2547	**McDonough (MS)**—Authorizes the imposition of a sentence of hard labor for violent felony offenders
A2718	**John (MS)**—Provides that every procurement contract entered into by a state agency shall contain a statement from the contractor that no forced labor was used
A2722	**John (MS)**—Establishes the responsibility of bidder on public works contracts and provides for establishment of construction contract lowest responsible bidder registry
A2771	**Dinowitz (MS)**—Enacts the "anti-human trafficking act of 2007"; creates several crimes addressing trafficking a person for labor or sexual servitude
A2825	**Kolb (MS)**—Authorizes employers of manual workers to apply to commissioner of labor for exemption from requirement of paying manual workers weekly
A3383	**DelMonte**—Requires employers of farm laborers to allow one day of rest each week and mandates the use of farm labor work agreements
A3686	**John (MS)**—Prohibits state agencies from purchasing goods provided by a sweatshop
A4539	**Espaillat (MS)**—Requires any printing of legislative stationery printed or produced by union labor to display the union label or "union bug"
A4689	**Morelle**—Establishes an exemption from the tax on sales and the compensating use tax for labor used to maintain, service, repair or improve historic real property
A5667	**Walker (MS)**—Fines municipalities that fail to enforce prevailing wage paid by contractors on public works projects 10% of the project costs
A5853	**John (MS)**—Designates as unfair labor practice and prohibits use of public funds for activity intended to influence outcome of union election and other activity
A6113	**Gabryszak (MS)**—Requires elementary and secondary schools to teach courses on the role of labor unions in American society
A6138	**Scarborough (MS)**—Establishes the summer employment program
A6412	**Pretlow**—Extends unfair labor practice protection to state grant recipients
S718	**BRESLIN**—Enacts the farmworkers fair labor practices act, granting collective bargaining rights, workers' compensation and unemployment benefits, etc. to farmworkers
S1933	**SCHNEIDERMAN** - Enacts the "language barrier elimination act" to provide translations to the limited English proficient in connection with certain services
S3674	**MAZIARZ**—Relates to the payment of wages and penalties for violations of certain sections of the labor law
S3712	**MAZIARZ**—Establishes sanctions against asbestos violators and successors
S3884	**FLANAGAN**—Enacts the farmworkers fair labor practices act, granting collective bargaining rights, workers' compensation and unemployment benefits to farmworkers

Touchdown, Brent Jones! 49ers' Tight End Scores in a Big Victory over CBS

By Joseph M. Hanna

After a spectacular NFL career as a tight end for the San Francisco 49ers in which he collected 33 touchdown catches, three Super Bowl rings and four Pro Bowl selections, Brent Jones decided to take his football experience to the broadcasting booth. In 1998, Jones joined CBS Broadcasting, Inc.'s ("CBS") broadcast team. CBS and Jones entered into a written contract (the "Agreement") in which Jones would provide on-air analysis for NFL games. The original Agreement ran until February 15, 2003. In January of 2003, CBS extended the Agreement through 2006.

Stating that he wanted to spend more time with family and focus on other business ventures, Jones resigned from CBS on September 29, 2005, refusing to honor the remainder of his contract. At the time of his resignation, CBS had paid Jones approximately $123,000 of his $200,000 salary for 2005; however, Jones had provided on-air services for only three games of the 2005 NFL season.

CBS refused to pay the remainder of Jones' salary for that season. In fact, the network felt that Jones was only entitled to 3/17ths of his $200,000 salary (approximately $35,294), and demanded that it be reimbursed for any amounts paid above that for the 2005 contract year. Jones refused to reimburse CBS.

On October 27, 2005, CBS filed a complaint in the Supreme Court of New York, County of New York, alleging breach of contract and unjust enrichment. On December 19, 2005, Jones removed the case to the United States District Court for the Southern District of New York based on diversity of the parties.[1] Jones then filed a motion for judgment on the pleadings seeking dismissal of the claim against him.

Jones made two arguments in support of his motion for judgment on the pleadings: (1) CBS's breach of contract claim must be dismissed because CBS has already exercised its sole remedy of terminating payment to Jones for the breach; and (2) CBS's unjust enrichment claim must be dismissed as a matter of law because a valid enforceable contract existed between the parties.

After analyzing the facts of the case and applying basic contract law, the district court rejected CBS's breach of contract and unjust enrichment claims and granted Jones' motion to dismiss.

The Breach of Contract Claim

By the time Jones breached his contract, CBS had paid him for approximately eight months of the calendar year. However, as of the date of his resignation from the network, Jones had worked only three games of the NFL season. Thus, CBS argued that Jones only should have been paid 3/17ths of his $200,000 salary and that it should be reimbursed for all amounts paid above that for the 2005 contract year. Jones did not dispute that he breached his contract with CBS; however, he argued that CBS had already exercised its sole remedy for a breach of contract by ceasing further payment to him, and that reimbursement was not a remedy available to CBS. The court agreed.

In dismissing CBS's breach of contract claim, the court focused on the contract itself. Paragraph 1(a) of the Agreement stated that Jones was to provide services as "an On-Air Analyst and in related capacities in connection with the National Football League game and studio coverage and any related NFL program and/or coverage." Paragraph 1(b) provided that CBS and Jones "will negotiate in good faith regarding appropriate additional compensation to be paid" if any services other than those detailed in paragraph 1(a) were requested. The contract between the parties also detailed a list of services that Jones had to provide at CBS's request, including "attendance at rehearsals, program conferences, publicity photographic sessions, sales promotion meetings, affiliate meetings and conventions, trade shows and other events and functions."

CBS began compensating Jones for the 2005 contract year on February 13, 2005. The Agreement stated that payment was to be made "in accordance with CBS's payroll practices." He specifically stated that Jones was to be compensated at the rate of "1/52nd of Two Hundred Thousand Dollars ($200,000.00) per week." Therefore, the Agreement called for Jones getting paid on a weekly basis. The Agreement did not reference the number of football games Jones was expected to call each year, nor did it contain a provision for the return of any payment to CBS in the event Jones terminated the Agreement prematurely. Rather, Paragraph 19 of the Agreement between CBS and Jones provided that:

> If Contractor or Artist at any time materially breaches any provision of this Agreement . . . CBS may . . . reduce Contrac-

> tor's Compensation pro rata, and/or CBS may, by so notifying Contractor during or within a reasonable time after such period, terminate this Agreement.

"Pro rata" was not defined in the Agreement.

The district court held that the Agreement between CBS and Jones "is not wholly without ambiguity." However, in rendering its decision, the court referred to well-known contract principles involving the language of a contract and whether that language is considered ambiguous,[2] acknowledging the well-known rule that contractual language is unambiguous if it has a "definite and precise meaning" and "there is no reasonable basis for a difference of opinion" as to its interpretation.[3] Conversely, "contract terms are ambiguous if they are capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[4]

The court further relied on the well-established principle that "[l]anguage whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations. . . . The court is not required to find the language ambiguous where the interpretation urged by one party would 'strain the contract language beyond its reasonable and ordinary meaning.'"[5]

The court analyzed the section of the Agreement which allowed CBS to "reduce Contractor's compensation pro rata." However, the term pro rata was never defined. The court held that a "reasonably intelligent and objective person could give the Agreement only one interpretation—that 'pro rata' means a proportion based not on the number of games called out of seventeen; but, rather on the number of weeks out of the year the Agreement was in effect." It reached this conclusion by looking at the express language of the Agreement, which it found undermined CBS's argument. In the Agreement, CBS agreed to pay Jones according to its "regular payroll practices." Furthermore, CBS agreed to pay Jones at the rate of 1/52nd of $200,000 per week for the 2005 contract year. The court concluded that the plain language of the Agreement suggested that "pro rata" was to be based on the number of weeks worked out of the year.

The court also noted that there was no language in the Agreement to support CBS's contention that Jones was obligated to call a certain number of games per year. Therefore, it found CBS's contention that Jones was obligated to call 17 games, the number of games in the NFL regular season, to be completely misplaced. There was also no provision in the Agreement that called for Jones to reimburse CBS in the event of a breach. The specific remedies set out in the contract were a reduction of Jones' salary, and/or termination. CBS had exercised one of its available remedies by terminating the contract at the time of the breach.

The court concluded its analysis of the breach of contract issue by stating that CBS's interpretation of the Agreement "does not make sense." The number of games was not specified in the contract—i.e., there could have been more than 17 games. Jones may have been asked to call exhibition games, playoff games, and the Pro Bowl. Also, Jones had other obligations to CBS that were not limited to calling games, such as trade shows, publicity photographic sessions, and press conferences.

The court concluded by saying that "the parties could not have intended that [Jones] would be paid on a weekly basis throughout the year, subject to a refund if Jones did not call all the games. If that had been the parties' intention, they surely would have spelled that out in the Agreement."[6]

Unjust Enrichment

The court also dismissed CBS's claim that Jones was unjustly enriched because he was paid for work that he did not perform. "To state a claim for unjust enrichment in New York, a plaintiff must allege that: (1) defendant was enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances were such that equity and good conscience require defendants to make restitution."[7]

Under New York law, however, "[t]he existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract or unjust enrichment for occurrences or transactions arising out of the same matter."[8] On the other hand, where "there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, [a party] may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies."[9]

The court held that there was a valid and enforceable contract between CBS and Jones and that the subject matter of the unjust enrichment claim was covered by the contract. Therefore, CBS could not recover under any theories of quasi-contract, and Jones' motion to dismiss the unjust enrichment claim was granted.

CBS also argued that the unjust enrichment claim was permissible under Rule 8(e)(2) of the Federal Rules of Civil Procedure. However, in dismissing the claim, the court determined that the cases that CBS cited to support its argument were inapplicable because in each of the cases the validity of the contract was at issue.[10] The court explained that the alternative pleading rules may allow for an unjust enrichment claim where there was a question as to the validity or enforceability of a contract. In the present case, however, there was no dispute that a valid, enforceable contract existed.

Conclusion

Based upon fundamental contract law and a practical interpretation of the Agreement, the district court held that CBS's Agreement was ambiguous and did not properly set out safeguards to protect itself in case a party to the contract was to breach it. Like the paydays that he had waiting for him in the end zone from the golden arms of Joe Montana and Steve Young, Jones cashed in one more time, when the district court ruled in his favor by dismissing CBS's case.

Endnotes

1. *CBS Broadcasting Inc. v. Brent Jones and Brent Jones, Inc.*, 2006 WL 3095916 (S.D.N.Y. 2006).
2. *See Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F3d 435, 443 (2d Cir. 1995).
3. *Sayers v. Rochester Tel. Corp. Supplemental Mgt. Pension Plan*, 7 F.3d 1091, 1094-95 (2d Cir. 1993) (*quoting Breed v. Ins. Co. of North America*, 413 N.Y.S.2d 352, 355 (1978)); *see Lucente v. IBM Corp.*, 310 F.3d 243, 257 (2d Cir. 2002).
4. *Nowack v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996); *Space Imaging Europe, Ltd. v. Space Imaging L.P.*, 38 F. Supp. 2d 326, 334 (S.D.N.Y. 1999); *Sayers v. Rochester Tel. Corp.*, 7 F.3d 1091, 1095 (2d Cir. 1993).
5. *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) (*quoting Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459, 161 N.Y.S.2d 90, 141 N.E.2d 590 (1957)).
6. *CBS Broadcasting Inc. v. Brent Jones and Brent Jones, Inc.*, 2006 WL 3095916 (S.D.N.Y. 2006).
7. *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 320 F. Supp. 2d 164, 177 (S.D.N.Y. 2004) (citing *Astor Holdings, Inc. v. Roski*, No. 01 Civ. 1905 (GEL), 2002 WL 72936, *17 (S.D.N.Y. Jan. 17, 2002) (citing *Louros v. Cyr*, 175 F. Supp. 2d 497 (S.D.N.Y. 2001)).
8. *Eagle Comtronics, Inc. v. Pico Products, Inc.*, 682 N.Y.S.2d 505, 506 (4th Dep't 1998) (citing *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 521 N.Y.S.2d 653, 656 (Ct. App. 1987)).
9. *Leroy Callendar, P.C. v. Fieldman*, 676 N.Y.S.2d 152, 153 (1st Dep't 1998) (quoting *Joseph Sternberg, Inc. v. Walber 36th St. Assocs.*, 594 N.Y.S.2d 144, 146 (1st Dep't 1993)).
10. *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F.Supp.2d 609, 621 (S.D.N.Y. 2003) (noting that whether or not a contract existed was yet to be decided); *Cosmocom, Inc. v. Marconi Communs, Int'l, Ltd.*, 261 F.Supp.2d 179, 187 (E.D.N.Y. 2003) (refusing to dismiss the claim because of the possibility the contract was terminated before the plaintiff claimed the defendant was unjustly enriched).

Joseph M. Hanna is an Associate with the firm Goldberg Segalla LLP in its Buffalo, New York office. Mr. Hanna concentrates his practice on the areas of commercial litigation, construction litigation, and intellectual property law.

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What Constitutes Wages?

By Martin Minkowitz

The primary benefits an injured worker is entitled to under the State Workers' Compensation Law are payment for medical care[1] and treatment and wage replacement.[2] Medical care and treatment, for obvious reasons, commence immediately and there is a right to payment for medical expenses from the first day of disability. Wage replacement, on the other hand, does not commence until seven days after the injury. This avoids minor injuries or disabilities being included in the system. However, wage replacement for the first seven days will be picked up if the disability continues for more than fourteen calendar days.[3]

How much a claimant will be awarded depends in part on his or her average weekly wage. There is a formula to compute the weekly wage basis for the payment of compensation.[4] It is the average weekly wage of the injured employee at the time of the injury, which is used as the basis to compute compensation for an injury, or for death benefits if it is a result of a compensable injury; one, which arose out of, or in the course of, the employment.

In any event, and what has been law for more than a decade, no injured employee, or one entitled to receive benefits if there is a death, is entitled to a wage replacement award in excess of $400 a week. In the past several years, the Governor and the state Legislature have considered increasing the maximum cap of $400 per week to an amount ranging from 20% to 60% higher. No such legislation has been successful, however, and the Governor again this year has proposed raising the wage replacement rate to a maximum of $500 per week. That legislation is still pending.

In order to determine what constitutes the weekly wage to establish the wage benefit, the Board will consider not just the cash payment (salary) to the insured employee, but other forms of compensation as well.

The definition in the statute[5] states that, "wages means the money rate at which the service rendered is recompensed . . . including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer." Therefore, in computing what constitutes wages the Board can include any benefits or other consideration which is given to an employee by the employer for the services rendered.[6] It has included such items the employer has given as commissions and bonuses paid to the employee in the year preceding the injury.

Recently, the Board has considered whether the value of tuition provided by the employer should be included in the calculation of the injured worker's average weekly wage. Normally, the value of tuition is compensation to the employee for services provided and it should be considered wages under the definition of wages in the statute.[7] However, if the Board determines that the claimant's payment of wages is unaffected by whether his children attended a school, it may conclude that the tuition is not a part of a wage and therefore should not be considered as a part of the average weekly wage or computation of the award of lost wages.[8] In that case, the court, in affirming the Board's exclusion of the tuition remission, concluded that the employer considered the tuition remission, to be an additional benefit akin to health benefits, and indicated that the Internal Revenue Service has ruled that tuition remission is not a taxable benefit. It therefore affirmed the Board's exclusion of the tuition remission as part of wages within the meaning of Workers' Compensation Law § 2(9).[9]

What constitutes wages is generally a question of fact for the Board to determine. As such, if their decision is supported by substantial evidence, an appellate court will not change it on an appeal.

Endnotes

1. *See* § 13 WCL.
2. *See* §§ 15–16 WCL.
3. *See* § 12 WCL.
4. *See* § 14 WCL.
5. § 2, Sub. Div. 9 WCL.
6. *See O'Neil v. Randolph Dairy Farms*, 65 A.D.2d 907 (1978).
7. *See Deer Kill Day Camp*, 95 NYW CLR 1089 (1995).
8. *See Blackwelder v. Faith Heritage School et al.*, __ A.D.3d __ (2006).
9. *See Blackwelder, supra*.

Martin Minkowitz is a partner at the Law Firm of Stroock & Stroock & Lavan, LLP.

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The Current State of Anti-Discrimination Laws Covering Sexual Orientation and Why the Employment Non-Discrimination Act Should Be Enacted

By Laura A. Miskell

(1) Introduction

Employment discrimination strikes at a fundamental American value—the right of each individual to do his or her job and contribute to society without facing unfair discrimination. Currently, under United States federal law, employees are provided with basic legal protection against employment discrimination on the basis of race, gender, religion, national origin, disability and age.[1] Many state and local governments have enacted laws that protect individuals from discrimination based on sexual orientation,[2] and many employers have their own anti-discrimination laws.[3] Unfortunately, employees' sexual orientation, gender identity and gender expression have no equivalent federal protection against employment discrimination.

One bill that has been continuously offered to the federal government to counteract this inequitable and unmerited exclusion of employment protection is the Employment Non-Discrimination Act (ENDA). ENDA would prohibit discrimination on the basis of sexual orientation, providing basic protection to ensure fairness in the workplace for Americans who are currently denied equal protection under the law.

Although there is widespread bipartisan support for ENDA, it has continuously been denied passage through Congress, each time by a very small margin. Furthermore, although Federal Courts recognize the morally reprehensible nature of targeting individuals for harassment based on actual or perceived sexual orientation, this has not altered the interpretation of federal legislation.[4] In one sexual orientation discrimination case, the Ninth Circuit court held that it could not "bootstrap Title VII protection for homosexuals under the guise of protecting men generally. [A]doption of this bootstrap devise would frustrate Congressional objectives [and] would achieve by judicial 'construction' what Congress did not do and has consistently refused to do on many occasions."[5] We are therefore left with a situation where the courts, in wanting to find for plaintiffs victimized by harassment and/or discrimination based on their sexual orientation, must either expand the interpretations of already-existing anti-discrimination statutes or wait for Congress to pass a new law protecting individuals' freedom in their sexual orientation. ENDA would fill this necessary void and provide employees with a federal statute that would protect against discrimination based on sexual orientation.

(2) Current State of the Law

Although there is currently no federal law that protects against discrimination based on sexual orientation, there are many state, county and city governments that have enacted anti-discrimination laws that include sexual orientation, as well as many private and government employers.

(a) State/County/City Governments

In the 1970s, municipalities were the first governments to pass laws prohibiting sexual orientation discrimination.[6] The village of Alfred, NY and Minneapolis, MN, became two of the first municipalities to include sexual orientation in their anti-discrimination laws.[7] Also noteworthy about the village of Alfred and the city of Minneapolis is that both have laws that cover discrimination in public *and* private employment.[8] Many other cities, including Buffalo, NY, have just recently passed such laws protecting sexual orientation; some just passed at the end of 2003.[9]

In 1983, Wisconsin became the first state to prohibit discrimination based on sexual orientation.[10] As noted above, many states have since followed: Fourteen states and the District of Columbia ban employment discrimination based on sexual orientation in both public and private employment, and ten states ban employment discrimination based on sexual orientation covering only public sector employers.[11]

For a good example of the reasoning behind enacting an anti-discrimination statute, one may look at New York State's recently enacted "Human Rights Law."[12] The legislative history indicates that the state

> has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace,

> order, health, safety and general welfare of the state and its inhabitants.[13]

The City of San Francisco's code is also a good example of an anti-discrimination municipality code, which includes sexual orientation in its coverage.[14] The legislative history surrounding this law delineates the various reasons that the city enacted the code:

> In this City and County the practice of discrimination on the actual or perceived grounds of . . . sexual orientation, gender identity, . . . and the exploitation of prejudice related thereto adversely affects members of minority groups. Such discriminatory practices are inimical to the public welfare and good order in that they: (a) impede social and economic progress for the entire citizenry by preventing members of minority groups from achieving full development of their individual potentialities and from contributing fully to the cultural and business life of the community; (b) constantly frustrate, degrade and embitter members of minority groups, thereby diminishing their initiative and interests in the community; and (c) tend to create intergroup hostilities and antisocial behavior.[15]

One other interesting anti-discrimination municipal law which includes sexual orientation and gender is the city of Ithaca's.[16] In its definition's section, the Code defines "gender" (which is protected under the law) as " . . . actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior, or expression, whether or not [it] is different from that traditionally associated with the legal sex assigned to that person at birth."[17] This is clearly one of the more liberal definitions of "gender" and demonstrates that the city recognizes that importance of protecting not only gay men and lesbians, but also those who are classified as "transgendered," "questioning," "transsexual," etc.

It is clear that these states and municipalities find it compelling to protect individuals who, because of their sexual orientation, have been or could be discriminated against due to an immutable characteristic such as sexual orientation, and would serve as good examples for a federal law.

(b) Employer Non-Discrimination Policies

In addition to state and local governments prohibiting sexual orientation, many employers have taken the initiative to include sexual orientation in their non-discrimination policies. As of the beginning of 2004, thirty-eight (38) federal government departments and agencies; one thousand, two hundred and eighty-four (1,284) private sector employers; three hundred forty-eight (348) Fortune 500 companies; and four hundred two (402) colleges and universities have non-discrimination policies that include sexual orientation.[18] It is noteworthy that when I started my research in early November 2003, eleven new private sector employers, fourteen Fortune 500 companies, and four colleges/universities were added to the list of employers with non-discrimination policies that included sexual orientation by the end of December 2003.[19]

The Human Rights Campaign Foundation Internet site goes into depth regarding individual employer's non-discrimination policies, and it breaks them down into categories.[20] To illustrate an example of a company's anti-discrimination policy, I chose to examine Wal-Mart Corporation's policy, as it is the largest employer in the United States and is ranked number one in the Fortune 500.[21]

Wal-Mart has a written non-discrimination policy covering sexual orientation in its employee manual (although the manual does not cover gender identity and/or expression). Wal-Mart's policy does not offer health insurance coverage to employees' same-sex domestic partners.[22] Although Wal-Mart offers diversity training (that includes sexual orientation) in the workplace, it does not engage in respectful and appropriate marketing to the lesbian, gay, bisexual and transgender (LGBT)[23] community, nor does it provide support through its corporate foundation to LGBT or AIDS-related organizations or events. So although it is commendable that Wal-Mart at least acknowledges sexual orientation in its non-discrimination policies and training, the number one employer in the country still has quite a way to go before the LGBT community is truly treated equally with other workers.

I also thought it would be interesting to break down the anti-discrimination policies of the two universities I have attended. My undergraduate degree was obtained at Cornell University, which is situated in the middle of a very progressive town, Ithaca, NY. The area surrounding Ithaca has always been the forerunner in progressive issues: Seneca Falls, NY was the site of the first women's conference held to gain the right to vote, Cornell was among the first Ivy League Universities to admit both women and African Americans, and Ithaca, NY has always been a very "gay-friendly" community. With all this in mind, I was not surprised to learn that Cornell University not only has a written non-discrimination policy covering sexual orientation in its employee manual, but the university also offers health insurance coverage to employees' same-sex domestic partners.[24] Cornell's Web site hosts various links for job information and has a link to its available jobs that boasts its equal opportunity for, among others, race, sex, religion, ethnicity and sexual orientation in the University's application process.[25] The University at Buffalo also has a written non-discrimina-

tion policy covering sexual orientation in its employee manual, but it does not offer health insurance to employees' same-sex domestic partners.[26]

The number of employers that voluntarily offer non-discrimination policies that include sexual orientation is a great start. And as stated above, the numbers are growing every day (albeit somewhat slowly). Furthermore, the cities and counties that have enacted anti-discrimination laws based on sexual orientation demonstrate that legislators and their community members see a recognized need for these laws to protect the LGBT community. However, many of these city and county laws protect employees only in public jobs, and, unfortunately, there are still a staggering number of employees who have absolutely no protection. A federal law is needed to protect all of those employees who are arbitrarily and illogically left out of federal protections, one that would be similar to and outlined after Title VII of the 1964 Civil Rights Act, which has protected women, African Americans, and other minorities for forty years.

(3) Title VII of the 1964 Civil Rights Act

One great achievement of the civil rights movement of the early 1960s was the enactment of the Civil Rights Act of 1964. Title VII of the Act prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.[27] In enacting Title VII, the first major piece of federal legislation banning employment discrimination, Congress chose not to prohibit all forms of irrational, invidious employment discrimination. Instead, it prohibited discrimination only the basis of the aforementioned five proscribed classifications, leaving out categories such as age, disability and sexual orientation. Although many of the categories left out of Title VII have since been the subject of federal law enactments,[28] sexual orientation has yet to be covered in a federal statute.

(a) History and Principles of Title VII

Since the drafters of ENDA used Title VII as a boilerplate example when designing the statute, it is worthwhile to outline the basic history and the principles of Title VII. The Act applies to all private employers with fifteen or more employees, and all federal, state and local government employers, and it also applies to employment agencies and labor organizations.[29] The Act exempts certain employers from its grasp, including religious corporations, associations and educational institutions.[30]

Title VII has two different theories to prove discrimination: disparate treatment and disparate impact.[31] For a disparate treatment claim, the plaintiff must prove that she was a member of a protected class, that she was qualified for the job (or promotion, etc.), that she was rejected for the job, and that the job remained open.[32] After the prima facie case is made, the employer must offer a legitimate, non-discriminatory reason for the employment decision. If the employer reaches this burden, the plaintiff then has an opportunity to show that the reason proffered by the employer was a pretext and the real reason for the employment decision was in fact discrimination.[33]

Title VII also authorizes plaintiffs to bring a disparate impact cause of action against his or her employer.[34] Under this theory, if a particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin and the employer fails to demonstrate that the challenged practice is job related for the position and is consistent with business necessity, the employer violates Title VII.[35] Title VII also prohibits an employer from retaliating against any of her employees because the employee has opposed any practice made unlawful by Title VII.[36]

Title VII actually permits employers to discriminate (only with per se violations, not with disparate impact claims[37]) in certain situations if they can demonstrate they have a bona fide occupational defense.[38] If the employer can prove that the basis for discrimination is "reasonably necessary to the normal operation of that particular business," he or she can discriminate without violating Title VII.[39]

Finally, the substantive rights found within Title VII are enforced by the Equal Employment Opportunity Commission (EEOC).[40] Almost all of the components, protections and remedies of ENDA mirror Title VII, as will be discussed below.

(b) Expanding the Interpretation of Title VII to Include Sexual Orientation

Some proponents of enacting an anti-discrimination law which would cover sexual orientation argue that enacting a new bill to protect the LGBT community is unnecessary. Instead, they propose simply allowing the courts to expand (or continue expanding, as many argue) Title VII to include sexual orientation under "because of sex."

The term "sex" was actually added at the last minute, just two days before the House sent the bill to the Senate.[41] The opponents of Title VII, specifically Representative Howard W. Smith, hoped that by adding "such a ridiculous provision" it would defeat the bill.[42] "Congress did not fully realize or consider the implications of Title VII's sex discrimination provisions at the time it was passed."[43] Many proponents who argue construing "sex" to include sexual orientation point to the fact that the ambiguity surrounding the word should leave wide discretion open to the courts in interpreting the meaning of sex under Title VII.[44]

In two landmark cases, *Oncale v. Sundowner* and *Price Waterhouse v. Hopkins*, the Supreme Court expanded Title

VII beyond the plain meaning of "sex."[45] In *Price Waterhouse*, the Court held that the prohibition on discrimination "because of sex" included discrimination against a woman for her failure to comply with societal views of femininity.[46] Writing for the majority, Justice Brennan held that employment decisions based on sex-stereotypes are actionable under Title VII because Congress, with Title VII, intended to strike at the "entire spectrum of disparate treatment of men and women resulting from sex-stereotypes."[47]

As the court in *Price Waterhouse* expanded Title VII to cover discrimination based on gender non-conformity, it appears that that could "technically" be met very easily every time one discriminates against a lesbian or gay man. It seems that a man's desire to sleep with and be life-partners with another man, and a woman's desire to be with another woman, is a definitive example of nonconformity to sex-stereotyping, thus satisfying the requirements of *Price Waterhouse.* Nevertheless, the Supreme Court and Congress have denied expanding the *Price Waterhouse* rationale to lesbians and gay men.

Another landmark case that expanded "because of sex" in Title VII was *Oncale v. Sundowner.*[48] In that case, a male oil rigger complained of same-sex harassment by his supervisors and other male co-workers because he was sexually and physically assaulted and threatened with rape. The plaintiff's complaints to his supervisors were ignored and he eventually was forced to quit.[49] Justice Scalia, writing for a unanimous court, that held that Title VII reaches same-sex harassment and declared that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[50] As *Oncale* and *Price Waterhouse* demonstrate, the Supreme Court has been willing to expand the plain meaning of "sex" to include same-sex harassment and discrimination based on sexual stereotyping. However, as neither case mentions sexual orientation, both cases have left it up to the lower courts to interpret whether or not "because of sex" also means "because of sexual orientation." In most cases, the answer is always "no."[51]

Some commentators argue that expanding Title VII to interpret "sex" as also meaning "sexual orientation" is consonant with Congressional intent.[52] Some proponents of expanding the interpretation of sex under Title VII argue that since Title VII is a remedial statute, it should not be so narrowly construed. The courts should promote the overall purpose of the legislation, guaranteeing the right to employment opportunities free from arbitrary discrimination, especially in consideration of current societal circumstances.[53] Generally, courts construe ambiguous language in remedial statutes liberally to effectuate the legislature's overall curative goals.[54] The legislative history demonstrates that the purposes of Title VII were to eliminate illogical discrimination in the workplace: "A nation need not and should not be converted into a welfare state. . . . [A]ll that is needed is the institution of proper training programs and *the elimination of discrimination in employment practices.*"[55]

Furthermore, it is not inconsistent with what the Supreme Court has already done in expanding the interpretation of "sex" in Title VII. The Congressional notes from the 88th Congress demonstrate that the members never investigated the issues of sexual harassment, sex-stereotyping, or same-sex harassment when it debated the parameters of Title VII.[56] Nevertheless, the Supreme Court has expanded the interpretation of sex to include sexual harassment.[57] The reasoning behind these cases is that Title VII's overall purpose was to eliminate arbitrary discrimination and barriers in the workplace. It should seem logical therefore, that expanding the interpretation of "sex" to include sexual orientation would simply be furthering the purpose of the statute: *the elimination of discrimination in employment practices.*

Public policy and fundamental fairness have also been another argument for expanding the interpretation of "sex" to include sexual orientation in Title VII discrimination claims.[58] Members of the LGBT community have suffered from invidious discrimination and unequal treatment, not only in the workplace, but in all aspects of their lives. In fact, until 1973, just thirty years ago, the American Psychiatric Association listed homosexuality in its registry of mental illnesses.[59] No individual should be penalized because of an arbitrary trait (such as race, ethnicity, or sexual orientation), and those that are should have protections afforded to them to combat the punishment or discrimination suffered.

Finally, some proponents of expanding the interpretation of Title VII point to the fact that if the Act is not interpreted to include sexual orientation, it leaves a negative incentive for employers to defend themselves against Title VII claims. If, for example, a female employee brings a sexual harassment claim, and happens to also be a lesbian, the employer can simply claim that he fired the employee because he is homophobic and just hates lesbians. If a prima facie case of sexual discrimination is met when the plaintiff proves that she was discriminated against "because of her sex,"[60] then the employer can simply answer with the reason that the employment decision was made is because he is homophobic; it had nothing to do with the employee's sex. Even if the employee is not gay or a lesbian, if the employer can prove he "thought" or "perceived" the employee to be gay or lesbian, he will also have an easy defense to Title VII claim.[61] This will not only encourage courts to turn a blind eye to harassment, but it also provides employers with a malicious incentive to use homophobia as a defense to Title VII claims.

Although a bill was first proposed in 1975 to amend Title VII by adding "affectional or sexual preference" as a protected category, there have also been other proposed legislations to Congress to amend either Title VII or other federal civil rights legislation to include prohibitions on sexual orientation discrimination.[62] Unfortunately, none of these bills ever achieved significant support.

As good as many of the arguments are to expand Title VII to include sexual orientation, many commentators argue that the best route to get sexual orientation as a federally protected category in anti-discrimination laws is to enact a new law altogether: the Employment Non-Discrimination Act (ENDA). Although there have been trends to expand Title VII by the courts, most of the ENDA proponents find it extremely unlikely that this Supreme Court will ever expand Title VII to also include sexual orientation in its protections. Therefore, many see enacting a new law as the only plausible alternative to ensure protection from discrimination based on sexual orientation. With that in mind, Senators Edward Kennedy and Lincoln Chafee and Representatives Gary E. Studds and Barney Frank proposed the Employment Non-Discrimination Act to Congress in 1996.[63]

(4) The Employment-Non Discrimination Act

In the 1990s, proponents of anti-discrimination laws based on sexual orientation began to change their strategy. Many states, municipalities and employers were far ahead of the federal government in that they already had their own anti-discrimination laws that covered sexual orientation as one of the protected groups. As it became clear to most gay-rights proponents that the only possible federal law that *could* cover sexual orientation, Title VII, would probably never be expanded far enough to protect the LGBT community, gay-right proponents came up with a new approach. Instead of continuously proposing bills that would only amend already-existing federal laws, Senators Kennedy and Chafee and Representatives Studds and Frank proposed a new law that would prohibit employment discrimination on the basis of sexual orientation: the Employment Non-Discrimination Act (ENDA).[64]

(a) History of the Employment Non-Discrimination Act

Although many observers and opponents of ENDA thought that the act would be easily defeated when it was first proposed in the Senate in 1996, it only failed to pass by a small margin; the vote was 49-50.[65] Ironically, the one senator (Senator Pryor) who was unable to attend the session (his son was recovering from cancer and he wanted to be by his side), was a Democrat who had supported many other pro-gay initiatives in the past.[66] He reported to the *Arkansas Democratic Gazette* that he probably would have voted for ENDA, therefore leaving the tie-breaking vote to Vice President Al Gore.[67] As President Clinton showed his unwavering support for the plight of the LGBT community and of ENDA specifically, Gore would most likely also have voted for ENDA to pass.[68]

Senator Kennedy, feeling that although the bill was defeated, it was at such a small margin that it needed little changing, reintroduced the bill in essentially the same form in 1997.[69] However, the bill never made it to a vote that time. One year later, President Clinton became the first President in United States history to speak on gay issues in his State of the Union Address.[70] President Clinton called on Congress to pass ENDA, as he saw it imperative that our country work together to stop hate crimes and discrimination against homosexuals.[71]

In April 2002, ENDA was once again back in the Senate and approved by the Senate Committee. The Committee urged the full Senate to pass the legislation.[72] Furthermore, this time, unlike the times before when no significant action was taken on the bill, Senate Majority Leader Tom Daschle pledged to allow a vote before the end of the 107th Congress. Unfortunately, contrary to Mr. Daschle's word, he ultimately failed to keep his pledge, which allowed for the bill to die when the Senate adjourned in November 2002.[73] Due to the Republicans taking control of the Senate in the 108th Congress, leadership of the Senate Committee was seized from Senator Kennedy, the co-sponsor of the bill, and given to Senator Judd Gregg, a conservative who opposes gay rights.[74]

Although the future of ENDA seems cloudy, at best, right now, supporters of the bill have not lost all hope. ENDA has wide bi-partisan support (45 Senators and 193 House Representatives co-sponsored the bill),[75] public support,[76] and support from labor unions, religious groups and women's groups.[77]

(b) The Principles and Elements of ENDA

In preparing ENDA, the drafters based the bill on Title VII of the 1964 Civil Rights Act. They had the ability to learn from the pros and cons that Title VII had presented the courts and those it covers for over forty years. Perhaps in knowing how controversial the bill would be, the drafters actually limited both the remedies and the claims individuals could bring as compared to Title VII.[78]

(i) What ENDA does do

ENDA extends federal employment discrimination protections currently provided based on race, religion, national origin, age and disability to also include sexual orientation. ENDA extends fair employment practices, not special rights, to lesbians, gay men, bisexuals *and* heterosexuals.[79]

ENDA provides that it shall be an unlawful employment practice for an employer, employment agency or labor organization to "fail or refuse to hire or to discharge

any individual, or otherwise to discriminate against any individual with respect to the compensation terms, conditions or privileges of employment of the individual, because of the individual's sexual orientation."[80] Sexual orientation is defined as " . . . homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived."[81] The Act also provides that a covered entity shall not retaliate against nor coerce any individual who opposes any act or practice prohibited by the Act.[82]

With respect to the administration and enforcement of the Act in the case of a claim of a violation of the Act, the EEOC shall have the same powers as it does to administer and enforce Title VII of the Civil Rights Act of 1964.[83]

As far as remedies go, ENDA is much more restrictive than Title VII. For instance, in Title VII, if the court finds that the respondent has intentionally engaged in unlawful employment practices, the court may enjoin the respondent, order such affirmative action as may be appropriate, order reinstatement or hiring of employees (with or without back pay) or any other equitable relief as the court deems appropriate.[84]

In "mixed-motive" cases, where the employee demonstrates that a violation of the Act as well as other factors were considered in the employment practice,[85] the court may grant declaratory relief, injunctive relief, and attorneys' fees and costs.[86] In ENDA claims, although the petitioner may receive similar remedies to those provided for in Title VII,[87] there are some significant differences. The court may never impose affirmative action on a violator of the Act as is provided for in Title VII.[88] Furthermore, ENDA does not allow for back pay awards as a component of compensatory damages as Title VII does.[89]

The Act does apply to Congress, with the same procedures as provided for in the Congressional Accountability Act of 1995, and it also applies to presidential employees, with the same procedures as provided for under the Presidential and Executive Office Accountability Act of 1996.[90] Furthermore, the Act does not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination that is prohibited under any other federal law or any law of a state or political subdivision of a state.[91]

(ii) What ENDA Does NOT Do

ENDA covers employers who have fifteen or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.[92] It does not cover therefore any small employers or any private membership clubs.[93] ENDA also explicitly exempts religious organizations, as defined as any religious corporation, association, or society; or an educational institution if the institution is in whole *or substantial part* controlled or owned by a religious group; or if the curriculum of the institution is directed toward the propagation of a religion.[94] These two limitations reflect a respect for free association and free exercise values embodied in the First Amendment when those values might be most threatened by a non-discrimination rule.

ENDA also does not apply to members of the armed forces and does not interfere with any laws creating a special right or preference concerning employment for veterans.[95]

A very important component of ENDA that, by its inclusion, has even gained support of those who initially opposed the bill, is section 8 of the Act, Quotas and Preferential Treatment.[96] Section 8 explicitly does not allow for quotas or preferential treatment based on sexual orientation of the individual. A covered entity under the Act shall not adopt or implement a quota on the basis of sexual orientation nor shall a covered entity give preferential treatment to an individual on the basis of sexual orientation.[97] ENDA also does not allow the imposition of affirmative action for a violation of the Act.[98]

ENDA also does not allow for a "disparate impact" claim such as is available under Title VII, only disparate treatment claims.[99] Therefore, an employer is not required to justify a neutral practice that may have a statistically disparate impact on gay men, lesbians or bisexuals. This creates a higher bar for plaintiffs to prove their discrimination claim; they must prove that the employer intentionally discriminated against them.

ENDA does not require employers to give benefits to same-sex partners. This is important as it does not change any financial responsibility an employer has to the significant others of homosexual employees.

Finally, ENDA does not allow the EEOC to collect statistics on sexual orientation or to compel employers to collect such statistics.[100] This would ensure that employees' privacy rights were not violated.

Taken together, ENDA's limitations narrow the class of prohibited conduct to that which is most arguably unconstitutional. The disallowance of disparate impact claims focuses the statute on conduct that is purposely directed at gays and lesbians and thus most likely to be motivated by unconstitutional animus. The other limitations excluded from ENDA's reach (such as excluding religious entities) demonstrate that the drafters recognized the need to balance constitutional interests (such as free religious exercise or a right to associate).

(c) Arguments Offered Against Enacting ENDA

Opponents of the bill rely mainly on two contradictory numbers-based arguments to support their position: the "floodgates" argument and the "droughters" argument.[101] What's interesting is some opponents actually claimed *both* that there is no reason for protecting homo-

sexuals because they are not discriminated against (the drought argument) *and* that if ENDA were to be enacted, there would be a floodgate of litigation.[102] If there is no reason to enact the law (gays and lesbians are not discriminated against), then how could there be a floodgate of claims (if there is nothing to claim)?

Opponents also claim that ENDA would provide "special rights" for lesbians, gay men and bisexuals; ENDA would promote immoral lifestyles contrary to wholesome American values; and that homosexuality is a chosen behavior, a lifestyle choice, and so should not be protected.

(i) The "Floodgates" Argument

Opponents who fall under the "floodgates" argument maintain that should Congress pass ENDA, there will be an unbelievable flow of litigation. One opponent, Roger Clegg, wrote: "Every homosexual with a straight supervisor . . . who isn't promoted will have a ready-made lawsuit. This, of course, will create an incentive for homosexual employees to make their status widely known."[103] During the floor debates on ENDA, Senator Orrin Hatch argued that ENDA would cause a "litigation bonanza" and would "lead to scores of thousands of new lawsuits" and Senator Trent Lott stated that ENDA is "just a guarantee of multiple lawsuits."[104]

There are several places to look to when countering this argument. First, in response to Mr. Clegg's argument, ENDA claims would be no different, in fact would be more restrictive, than Title VII. An employee would be able to bring only a disparate treatment claim, not a disparate impact claim. So contrary to that argument, the employer would have to be deliberately discriminating against his or her employee before the employee would be able to bring a claim of discrimination. Secondly, just as every black employee who has a white supervisor and every female employee who has a male supervisor does not have a discrimination claim under Title VII, every homosexual employee who has a heterosexual employer would not have a claim under ENDA.

To Senators Hatch's and Lott's argument, empirical data demonstrate that the floodgates argument actually never came to fruition after thousands of anti-discrimination laws were enacted in states, cities, counties and employers' businesses all over the country. These states and cities did not suffer from a profusion of lawsuits congesting their courtrooms. In 1997, Congress requested the General Accounting Office (GAO) research the contention that there would be a floodgate of sexual orientation claims if ENDA was enacted.[105] The GAO gathered data from states that have anti-discrimination laws that prohibit sexual orientation discrimination. The GAO's report resulted in three sets of numbers: the number of annual employment discrimination complaints filed in each state; the number of these complaints that alleged sexual orientation discrimination; and the number of sexual orientation complaints as a percentage of the total number of employment discrimination cases filed within that state that year.[106] The GAO found that never more than 3% of state employment discrimination complaints were claims based on sexual orientation. From these results, the GAO concluded that there was "no indication that these laws have generated a significant amount of litigation."[107] To the contrary, the GAO concluded that "relatively few formal complaints of employment discrimination on the basis of sexual orientation have been filed, either in absolute numbers or as a percentage of all employment discrimination complaints in the states."[108]

Another study was done in our nation's capital, Washington, DC, to determine the affects that a law covering sexual orientation in its protections would have on the courts. The study was based on Washington DC's Human Rights Act of 1977.[109] Of the 2,535 discrimination complaints filed between 1990 and 1995, only 100 (approximately 4%) concerned sexual orientation discrimination.[110] As Senator Kennedy explained, "This bill will not open the flood gates of litigation. What it will do is open the doors to long overdue equal protection under the law."[111]

(ii) The "Drought" Argument

Some opponents of ENDA have argued that there is just no need to enact such legislation as ENDA because homosexuals do not need protection from discrimination. At the congressional hearing on ENDA, Representative Glenn Poshard questioned the need for ENDA because there "is really nothing going on in the workplace to the extent that the gay community is articulating to the American public."[112] Furthermore, some opponents go so far as to argue that even if there are some examples of sexual orientation discrimination, homosexuals "do far better financially than most Americans" so the "evidence indicates they do not suffer [from job discrimination]."[113] One anti-gay author noted, "Corporate America has been quite accommodating to gays already, without any intervention by the federal government; states and municipalities have shown themselves willing to intervene, too; and for better or worse gay activists have succeeded in making antigay discrimination decidedly uncool."[114]

Contrary to these statements, however, a recent poll reports that nearly half of all homosexual employees have been discriminated against at work, suggesting that the need for protection is, in fact, very real.[115] Furthermore, these are only reports from those who are comfortable enough to be "out" in the workplace or to be brave enough to report incidents of discrimination. Through my research, I found countless cases[116] and stories of individuals who were discriminated against because of

their sexual orientation: (1) A Georgia woman was fired from her job as an award-winning cook when her company adopted a written policy against employing gay people; (2) a married, heterosexual Kansas man was refused a teaching job because a school employee suggested that he *might* be gay; (3) a Detroit postal worker was harassed and beaten at work because of his perceived sexual orientation.[117] Clearly, there is a very real and immediate need for protecting individuals who are discriminated against, on a daily basis, for an immutable characteristic such as sexual orientation.

(iii) ENDA Would Provide "Special Rights" for Homosexuals

Opponents of ENDA have argued that if Congress passed an Act protecting the LGBT community, it would be providing "special rights" to those individuals. A video that was created by a conservative group entitled "Gay Rights/Special Rights" shows the heading: "Ever been denied the right to vote?" and the answers were, Homosexuals: NO; African Americans: Yes.[118] The special rights argument has been offered by many opponents of ENDA. Former Congressman LaFalce stated, "ENDA masquerades as a non-discrimination bill, . . . but the truth is that it would grant homosexuals special rights and protections in the workplace."[119] The problem with this argument is that not one claim that has been offered in support of the "special rights" argument really provides the reasoning behind alleging that ENDA would provide "special rights." Clearly, as demonstrated above, the LGBT community has faced countless incidents of arbitrary and unwarranted discrimination and harassment, and those examples were only incidents of employment discrimination. Members of the LGBT community have also not been able to rent housing; have not been able to receive medical benefits or life insurance policies of their life partners; have not been able to say goodbye in hospital rooms when their life partner is dying because they are not "family"; have had their children taken away from them; have been accused of horrific crimes such as child molestation and being sexual predators simply because they are gay or lesbian;[120] and most appallingly, have actually been killed for being something they cannot change (whether or not they want to): being a homosexual.[121]

(iv) ENDA Would Promote Immoral Lifestyles (Which Are a Choice)

Many other opponents of ENDA argue that the government should not pass legislation that would "promote an immoral lifestyle." ENDA would give the federal government "too much power over what we think and what we believe by using 'hate' to describe people who are advocating traditional moral values."[122] Intertwined in the immorality argument is that since homosexuality, in the minds of ENDA opponents, is considered a "choice," gay men and lesbians are choosing to behave immorally and therefore should not be afforded any protections for those choices. "America needs a government that is willing to stand against the promotion of the homosexual lifestyle."[123] Senator Kennedy responded to this most eloquently: "ENDA does reflect traditional American values [as] bigotry is not an American value." Still, many other anti-gay commentators believe that homosexuality is the epitome of anti-American values. One such commentator stated:

> if the group seeking . . . protection is defined by voluntary behavior that flouts majoritarian notions of morality, then it seems reasonable to ask that group to stop engaging in that behavior. Society singles out all sorts of behavior-based groups for negative treatment—adulterers, bigamists, and people who use prostitutes, among many other groups. Yet no one would argue that such groups are suspect class.[124]

Conservatives have also claimed that race is not a fair comparison to homosexuality: "Behaviors are changeable, but race is immutable. All you have to do is look at me to know I'm black."[125] Homosexuality is not viewed as innate by those who oppose legislation protecting gay men and lesbians, even though scientists and psychologists have worked for decades, to no avail, to discover the reasons behind why one individual is a heterosexual and why another is a homosexual. Same-sex attractions generally emerge by early or mid-adolescence without any prior sexual experience and some homosexuals have said they tried for years to "un-do" what nature had done to them, all with no success. Nevertheless, many people just cannot accept something they do not understand and find it much easier to dismiss an immutable characteristic as "sinful" or a "chosen lifestyle" or "chosen behavior."

Many religious entities claim that homosexuality is a sin and therefore it should not be tolerated. "ENDA would result in suppression of the religious expression of employers and employees. . . . Religious people are being told to sit in the back of the bus."[126] Contrary to this belief, however, is (1) the religious exemption that ENDA provides for, discussed above, and (2) many religious entities do, in fact, support ENDA.

The Interfaith Alliance has been urging Congress to pass ENDA since its introduction. Interfaith Alliance's Executive Director Reverend Dr. C. Welton Gaddy stated, "Our various religious traditions call on us to promote the shared values of compassion and human dignity. ENDA will ensure that no one is discriminated against in the workplace, and that all employees are treated with the same respect which every human being deserves."[127]

Many other religious entities have also spoken out in support of ENDA and pro-gay federal legislative protection. The American Jewish Committee, the Evangelical Lutheran Church in America, the Presbyterian Church (USA), Jewish Women International and the Unitarian Church are all examples of "people of faith and goodwill [that] support the Senate's efforts to protect all employees from workplace discrimination. . . ."[128] Therefore, ENDA undoubtedly enjoys support from both religious entities and religious leaders who believe in ensuring that all Americans enjoy the fundamental rights of freedom to work, freedom from discrimination, and freedom to enjoy their constitutional protections and rights, specifically equal protection under the law.

(d) Arguments Offered for Enacting ENDA

Although I have already outlined countless reasons that support passing ENDA,[129] I would like to delineate just a few that have not been explicitly mentioned. Many proponents argue some key points: ending employment discrimination is good economics; the bill enjoys the majority of the American people's support; and eradicating years of arbitrary and unjustifiable discrimination, whether real or perceived, of gay men, lesbians and bisexuals is the right and just thing to do.

(i) Enacting ENDA Would Be Good Economic Policy

Many proponents of ENDA rationalize the bill on solely economic grounds (both for the individual employee and for the economy as a whole). Senator Kennedy declared, "our nation has prospered because it rewards hard work and merit, not bigotry and intolerance."[130] It would be hard to imagine where our country would be without the thousands of minorities and women who have contributed immeasurably and incredibly to the workforce of the United States of America. And it's not just the employers that would lose out on hardworking, intelligent, productive employees. The whole nation would suffer if the homosexual man who was to find the cure for AIDS was denied the job in the lab simply because he was gay. Moreover, many homosexual employees have actually admitted to taking jobs that are lower paying in exchange for a more tolerant workplace (often called the "compensating differential").[131] Proponents of ENDA see this as depressing returns to human capital investments.[132] One study, conducted by the National Commission on Employment Policies, found that discrimination against gay and lesbian employees "translates into a $47 million loss attributable to training expenditures and unemployment benefits alone."[133]

Many "economic" proponents of ENDA also argue the individual side of the economic theory. As stated above, many homosexual individuals have to chose between taking a higher-paying job where they must either hide their homosexuality or actually pretend they are heterosexual or taking a lower-paying job where tolerance is higher. Should some individuals chose to take the higher paying jobs, where they must hide their true identity, there is a chance that they will be among the group of employees who have been shown to expend significant energy maintaining their sexual orientation on the job, attempting to control whether, when, and to whom it is disclosed.[134] This obviously would take a toll on any individual trying to hide a huge part of their life, and the expenditure of energy may adversely affect productivity and thus depress earnings of both themselves and the company.[135]

Some individuals have chosen to actually make it clear on their resumes, cover letters and/or interviews that they are gay or lesbian. One friend from Cornell would list, under the "Activities" section of his resume, "President, Men Supporting Men." Another friend, when asked the standard "What was the hardest thing you ever had to overcome?" question in interviews, would always respond with the difficulties surrounding "coming out" to his family and friends. Both of these individuals have decided to take the route of knowing their sexual orientation will not be a factor while they are working in lieu of hiding it in the interviewing process to worry about it later down the road (and, incidentally, these two individuals are doing *extremely* well both financially and psychologically). However, many individuals are still forced to make the decision between having the security of a tolerant workforce and perhaps a lower paying job, or a higher paying job where they may have to hide their true identity, taking a huge psychological toll on their well-being.

(ii) ENDA Enjoys Support from the Majority of the American People

Many proponents of ENDA point to the fact that the federal government should be listening to its people: the majority of the American public support ENDA. In a 2001 Gallup Study, 85% of Americans support equal opportunities for gay employees in the workplace.[136] In a more comprehensive study, in September 2002, 77% of Americans polled said sexual orientation should not be a factor in evaluating job performance and 50% favor the inclusion of sexual orientation in written non-discrimination policies.[137] Furthermore, as stated above, corporate America is also supportive of anti-discrimination laws that cover sexual orientation. As of January 3, 2004, three hundred forty-eight (348) Fortune 500 companies; thirty-eight (38) federal government department and agency employers; one thousand two hundred eighty-four (1,284) private sector employers; and four hundred two (402) colleges and universities have non-discrimination policies that include sexual orientation.[138] Obviously, these thousands of employers understand the impor-

tance, both socially and economically, of including sexual orientation in their anti-discrimination policies.

(iii) Eradicating Years of Arbitrary Discrimination Is the Right Thing to Do

Finally, eradicating years of arbitrary and unjustifiable discrimination, whether real or perceived of gay men, lesbians and bisexuals, is the right and just thing to do. If ENDA were to be passed, no longer would plaintiffs who are victimized by repeated offensive harassment be denied a judicial remedy because of their sexual orientation. The consequences for employment law will be far reaching—ultimately, more protection under the law and less discrimination in the workplace would occur. "The time is long overdue to pass legislation that prohibits this kind of fear, intimidation and bigotry in the workplace."[139]

(5) Conclusion

Employment discrimination strikes at the heart of every American worker. Traditional American values and equal opportunity under the constitution mandate that bigotry and ignorance be taken out of the equation in the employment realm.

The Employment Non-Discrimination Act is based on fairness, justice and equal opportunity for all who are qualified. It is neither overly broad nor is it intrusive upon the rights of others. It simply is extending the rights and privileges that Title VII has bestowed upon minorities and women for forty years. Just as race, color, religion, sex, or national origin are preposterous and unreliable reasons to base employment decisions on, so too is sexual orientation. As Lyndon B. Johnson stated, when signing the most significant civil rights, anti-discrimination law ever enacted, "We have talked long enough in this country about civil rights. It is time to write the next chapter and to write it in the books."[140] It is time, after countless years of discrimination, harassment, and bigotry, to include sexual orientation in our federal government's protections.

Endnotes

1. *See* Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2; Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*; Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634.
2. As of January 3, 2004, twenty-four state governments and the District of Columbia, and two hundred fifty-five city/county governments have laws that ban employment discrimination based on sexual orientation. *See* http://www.hrc.org for a complete listing.
3. As of January 3, 2004, thirty-eight federal government departments/agencies and 1,284 private sector employers have non-discrimination policies that include sexual orientation. *See* http://www.hrc.org for a complete listing.
4. Heinzelmann, Mary Beth, *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues*, 12 Law & Sex. 337, 338 (2003); *see, e.g., Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (holding the plaintiff had no cause of action under Title VII after allegedly enduring conduct from co-workers which included frequent anti-gay slurs, the court held: "There can be no doubt that the conduct allegedly engaged in by [the plaintiff's] co-workers is morally reprehensible . . . nevertheless . . . the law is well-settled . . . to have reached the question that [the plaintiff] has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation). *Id.*
5. *Desantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 330 (9th Cir. 1979).
6. Barber, Jeremy S., *Comment: Re-Orienting Sexual Harassment: Why Federal Legislation Is Needed to Cure Same-Sex Sexual Harassment Law*, 52 Am. U. L. Rev. 493, 523 n.185 (2002).
7. *See* http://www.hrc.org. These two municipalities enacted anti-discrimination laws based on sexual orientation in 1974.
8. *Id.* Many of the municipalities just protect discrimination based on sexual orientation in the public employment arena (almost half—approximately 102 out of 255—do not prohibit discrimination in private employment).
9. *See* http://www.hrc.org, for a complete listing. Rehoboth Beach, DE; Peoria and Springfield, IL; Covington, KY; Moorhead, MN; and El Paso, TX are among the municipalities that have just in the past year passed laws prohibiting discrimination based on sexual orientation in employment.
10. *See* Wisc. Stat. Ann. 66.1101 (West 2000). Washington, D.C. had a similar law passed five years prior to that, in 1978 (D.C. Code Ann. 2.1401.01 (2001)).
11. *See, e.g.*, Cal. Lab. Code § 1102.1 (West Supp. 1996); Conn. Gen. Stat. Ann. § 46a-81c (West 1994); Mass. Gen. Laws Ann. ch. 151B, § 4 (West 1996). *See also* http://www.hrc.org.
12. NY Executive Law § 290 (1996); the law was amended on January 16, 2003 to include discrimination based on sexual preference or orientation.
13. *Id.* § 290(3).
14. San Francisco, CA, Administrative Code § 12A.1.
15. *Id.*
16. Ithaca, NY, Code § 215.
17. *Id.* at § 215-2.
18. *See* http://www.hrc.org for a complete listing.
19. *Id.*
20. *Id.*
21. Wal-Mart's Anti-Discrimination Policy, as broken down on the http://www.hrc.org Web site.
22. As I will discuss below, ENDA also does *not* mandate same-sex benefits for partners.
23. I will use LGBT throughout this paper, a common term used by the gay population. However, it should be noted here that ENDA would provide explicit protections to only gay men, lesbians, bisexuals and heterosexuals. Transgendered individuals would not be covered.
24. *See* http://www.hrc.org; *see also* http://www.cornell.edu.
25. *See* http://www.ohr.cornell.edu/jobs/index.html, click on link for equal opportunity and the Web site brings you to, http://www.ohr.cornell.edu/jobs/rec/Applicant_Notice.doc.
26. *See* http://www.hrc.org; *also*, University at Buffalo's policy breakdown.
27. 42 U.S.C. § 2000e-2.
28. *See* The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634; The Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*
29. 42 U.S.C. § 2000e(b)-(d).

30. *Id.* at § 2000e-1(a).
31. *Id.* at § 2000e-2(a), (k).
32. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).
33. *Id.*
34. 42 U.S.C. § 2000e-2(k).
35. *Id.,* (k)(1)(A). Note that the complaining party may also make the demonstration of disparate impact with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice, *see* § 2000e-2(k)(1)(A)(ii).
36. 42 U.S.C. § 2000e-3.
37. 42 U.S.C. § 2000e-2(k)(2).
38. 42 U.S.C. § 2000e-2(e).
39. *Id.*; *see also Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex.1981); *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex.1983).
40. 42 U.S.C. § 2000e-4.
41. 52 Am. U. L. Rev. 493, 498, n.28.
42. *Id.* at 498.
43. *Id.* at 499.
44. *Id.* at 500-04.
45. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 241 (1989); *Oncale v. Sundowner Offshore Services, Inc.*, 532 U.S. 75 (1998).
46. 490 U.S. 228, 241 (1989).
47. 52 Am. U. L. Rev. 493, 503 (*citing* 490 U.S. 228, 241 at 251).
48. 532 U.S. 75 (1998).
49. *See generally id*.
50. *Id.* at 79.
51. *See* 52 Am. U. L. Rev. 493, 510 (outlining various cases where the judges dismiss Title VII claims if they are based on the plaintiff's sexual orientation); *see, e.g., Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (2001); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *see also Desantis v. Pacific Telephone Co.*, 608 F.2d 327 (9th Cir. 1979); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Smith v. Liberty Mut. Ins.*, 569 F.2d 325 (5th Cir. 1978).
52. King, Tiffany L., *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation,* 35 U.C. Davis L. Rev. 1005, 1035 (2002).
53. *Id.* at 1036.
54. *Id.* at 1038.
55. *See* 88th Cong., 2d Sess. (1964), at 2513-2517 (emphasis added).
56. *Id*.
57. *See, e.g., Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986) (the first Supreme Court case to recognize sexual harassment is actionable as sex discrimination under Title VII); *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) (outlining hostile work environment cases for sex discrimination claims under Title VII); *Nichols v. Frank,* 42 F.3d 503 (9th Cir. 1994) (holding that an employee's acquiescence in the sexual demands of a supervisor is not inconsistent with a finding that the employee's participation was "unwilling") .
58. 35 U.C. Davis L. Rev. 1005, 1041.
59. *Id.* at 1001, n.33.
60. 42 U.S.C. § 2000e-2(a)(1).
61. 52 Am. U. L. Rev. 493, 512, n.121.
62. *Id.* at 524, n.191.
63. *Id.* at 524, n.193.
64. Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong; H.R. 1863, 104th Cong. (1995). The newest proposed version is S. 1284, 107th Cong. (2001).
65. 52 Am. U. L. Rev. 493, 529, n.222.
66. *Id.*
67. *Id.*
68. *See* http://www.hrc.org/issues/federal_leg/enda/background/index.asp.
69. The Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997). The only minor difference in the second version of ENDA is that it would prohibit the EEOC from collecting statistics about the sexual orientation of employees and further prevents the EEOC from compelling employers from doing so (*see,* 52 Am. U. L. Rev. 493, 529, n.224).
70. 52 Am. U. L. Rev. 493, 529.
71. *Id.*; *see also* http://www.hrc.org/newsreleases. President Clinton said, "I support ENDA because I believe in fundamental fairness and equality—values that are at the very heart and soul of the creed that unites us as a nation" (*see* http://www.prideatwork.org/enda.html).
72. 52 Am. U. L. Rev. 493, 529.
73. *Id.* at 530.
74. *Id.*
75. *Id.*
76. *See* § (4)(d)(ii) of this article; *see also* statement made by Coretta Scott King: "I support ENDA because I believe that freedom and justice cannot be parceled out in pieces to suit political convenience. As my husband, Dr. Martin Luther King, Jr. said, 'Injustice anywhere is a threat to justice everywhere.' I don't believe you can stand for freedom for one group of people and deny it to others" (*see* http://www.prideatwork.org/enda.html).
77. The AFL-CIO, the ACLU, SEIU, UNITE, United Farm Workers of America, American Nurses Association, the American Jewish Committee, the Evangelical Lutheran Church in America, the Presbyterian Church (USA), Jewish Women International and the Unitarian Church are just a short list of examples of unions and religious groups that have all voiced their support for ENDA. *See, e.g.,* http://interfaithalliance.org; www.prideatwork.org; http://hrc.org/issues/federal_leg/enda; http://www.aclu.org.
78. For example, and to be discussed in detail more below, ENDA does not provide for a disparate impact claim as Title VII does, only a disparate treatment claim.
79. The Employment Non-Discrimination Act of 2001, S. 1284, H.R. 2692 (107th Cong.) (hereinafter referred to as "ENDA").
80. *Id.* at § 4(a)-(c).
81. *Id.* at § 3(9).
82. *Id.* at § 5(a), (b).
83. *Id.* at § 12(a)(1)(A).
84. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15, § 2000e-5(g).
85. *Id.* at § 2000e-2(m).
86. *Id.* at § 2000e-5(g)(2)(B)(i).
87. ENDA § 12(b).
88. *Id.* at § 12(d).
89. *Id.* at § 13(c).
90. *Id.* at § 12(c).
91. This is an important note because ENDA solely provides protection against discrimination on the basis of sexual

orientation in the workplace. It does not provide for protection in any other arena of a homosexual's life (i.e., housing), as many state and municipality laws do. *See, e.g.,* Wisc. Stat. Ann. 66.1101 (West 2000); D.C. Code Ann. 2.1401.01 (2001); NY Executive Law § 290; Ithaca, NY, Code § 215; San Francisco, CA, Administrative Code § 12A.1.

92. *Id.* at § 3(4)(A).
93. *Id.*
94. *Id.* at § 3(8)(A),(B), § 9.
95. *Id.* at § 10.
96. *Id.* at § 8.
97. *Id.*
98. *Id.* at § 12(d).
99. *Id.* at § 4(f).
100. *Id.* at § 7.
101. Rubenstein, William B., "Do Gay Rights Laws Matter?: An Empirical Assessment," 75 S. Cal. L. Rev. 65, 66 (2001).
102. *See* Clegg, Roger, "Bad ENDA, More Bad Legislation," *available at* http://www.nationalreview.com (hereinafter "Bad ENDA").
103. *Id.*
104. 52 Am. U. L. Rev. 493, 528, n.217, *citing* Hearing on S. 2238 Before the Comm. on Labor & Human Res., 103d Cong (1994).
105. 75 S. Cal. L. Rev. 65, 66.
106. *Id.*
107. *Id.* nn.5-7, *citing* Letter from Barry R. Bedrick, Associate General Counsel to the Honorable James M. Jeffords, Chairman in U.S. Gen. Accounting Office, Sexual-Orientation Based Employment Discrimination: States' Experience With Statutory Prohibitions (GAO/OGC-98-7R) (1997).
108. *Id.*
109. 35 U.C. Davis L. Rev. 1005, 1043.
110. *Id.*
111. Statement of Senator Edward Kennedy on ENDA (October 23, 1997), *available at* http://www.senate.gov/member/ma/kennedy/general/statements/971023enda.html.
112. 52 Am. U. L. Rev. 493, 528, n.218.
113. Statement of Congressman John LaFalce (December 5, 1996), *available at* www.lafalce.com/library/family/1996-12-05_homo-enda.shtml.
114. "Bad ENDA," *supra* note 102.
115. 52 Am. U. L. Rev. 493, 528, n.219.
116. *See, e.g., Desantis v. Pacific Telephone & Telegraph Co.,* 608 F.2d 327, 330 (9th Cir. 1979); *Martin v. N.Y. State Dep't of Corr. Servs.,* 224 F. Supp. 2d 434 (N.D.N.Y. 2002); *Rene v. MGM Grand Hotel, Inc.,* 243 F.3d 1206 (2001); *Simonton v. Runyon,* 232 F.3d 33 (2d Cir. 2000); *Ulane v. E. Airlines, Inc.,* 742 F.2d 1081 (7th Cir. 1984); *Smith v. Liberty Mut. Ins.,* 569 F.2d 325 (5th Cir. 1978).
117. *See* http://www.hrc.org/issues/federal_leg/enda/enda_quickfacts.asp.
118. 12 Law & Sex. 337, 345, n.64.
119. Congressman LaFalce's Statement, supra note 113.
120. These are incidents that have been reported to me by friends in the LGBT community.
121. One young man who lost his life solely because of fear and hatred toward homosexuals was Matthew Shepard.
122. Keeport, Lauren, "Conservatives Urge Congress to Vote Down Gay Rights Bill," *available at* www.soulforce.org.
123. *Id.*
124. Drew, Josiah N., "Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-Discrimination Rights and Religious Free Exercise Rights in the Public Workplace," 16 BYU J. Pub. L. 287, 304 (2002).
125. *Id.*
126. Statement by Reverend Louis Sheldon of the Washington, D.C. based Traditional Values Coalition, *available at* www.soulforce.org.
127. *See* http://www.interfaithalliance.org/news/NewsPrint.cfm?ID=4428&c=37.
128. *Id.*
129. In light of the obvious need for a federal anti-discrimination law for the LGBT community (see the "Drought Argument" in (4)(c)(ii) above), ENDA would be restrictive: it would not provide for a disparate impact theory; it would exempt religious entities and the military; it would not allow for Affirmative Action policies or quotas or preferential treatment, etc.
130. Statement of Senator Kennedy, *supra* note 111.
131. Blandford, John M., *The Nexus of Sexual Orientation and Gender in the Determination of Earnings,* 56 Ind. & Lab. Rel. Rev. 622, 624 (2003).
132. *Id.*
133. 52 Am. U. L. Rev. 493, 531, n.238.
134. 56 Ind. & Lav. Rel. Rev. 622, 624.
135. *Id.*
136. *See* http://www.hrc.org/issues/federal_leg/enda/enda_quickfacts.asp; *see also* http://www.interfaithalliance.org/news/Newprint.cfm?ID=4428&c=37.
137. 52 Am. U. L. Rev. 493, 531, n.236.
138. As of January 3, 2004, *supra* note 3.
139. Senator Kennedy's Statement, *supra* note 111.
140. *See* www.civilrights.org.

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Alternative Dispute Resolution
Abigail J. Pessen
Mediation Services
80 Broad Street, 30th Floor
New York, NY 10004
abigail@pessenadr.com

Jill Rosenberg
Orrick Herrington et al
666 5th Avenue
New York, NY 10103
jrose@orrick.com

Jonathan Ben-Asher
Beranbaum Menken Ben-Asher & Bierman LLP
80 Pine Street, 32nd Floor
New York, NY 10005
jb-a@bmbblaw.com

Arbitrator Mentoring (Ad Hoc)
John E. Sands
Arbitrator and Mediator
200 Executive Dr., Suite 100
West Orange, NJ 07052-3303
JESands@aol.com

Communications
James N. McCauley
701 West State St.
Ithaca, NY 14850
jmccauley@clarityconnect.com

Sharon P. Stiller
Boylan Brown Code Vigdor & Wilson LLP
2400 Chase Square
Rochester, NY 14604
sstiller@boylanbrown.com

Continuing Legal Education
Alan M. Koral
Vedder, Price, Kaufman & Kammholz, P.C.
1633 Broadway, 47th Floor
New York, NY 10019-6771
akoral@vedderprice.com

Stephanie M. Roebuck
Keane & Beane, P.C.
445 Hamilton Avenue, Suite 1500
White Plains, NY 10601
sroebuck@kblaw.com

Diversity and Leadership Development
Louis P. DiLorenzo
Bond Schoeneck & King
330 Madison Avenue, 39th Floor
New York, NY 10017-5001
dilorel@bsk.com

Mairead E. Connor
Chamberlain, D'Amanda, Oppenheimer & Greenfield
PO Box 939
Syracuse, NY 13201-0939
mec@cdlawyers.com

Employee Benefits
Mark E. Brossman
Schulte Roth & Zabel LLP
919 Third Avenue, 23rd Floor
New York, NY 10022
mark.brossman@srz.com

Equal Employment Opportunity Law
Deborah S. Skanadore Reisdorph
Skanadore Reisdorph Law Offices
PO Box 536
Whitesboro, NY 13492
ladylaw@nysbar.com

Patricia Ann Cody
Heller Ehrman LLP
Times Square Tower
7 Times Square
New York, NY 10036
patricia.cody@hellerehrman.com

Ethics and Professional Responsibility
John Gaal
Bond Schoeneck & King
One Lincoln Ctr.
Syracuse, NY 13202-1355
jgaal@bsk.com

Nancy E. Hoffman
CSEA
Local 1000, AFSCME
143 Washington Avenue
Albany NY 12224-0125
hoffman@cseainc.org

Finance
Robert T. Simmelkjaer
160 West 97th Street, Suite 8A
New York, NY 10025
simmelkjaer@worldnet.att.net

Future Sites (Ad Hoc)
Theodore O. Rogers, Jr.
Sullivan & Cromwell LLP
125 Broad Street, 35th Floor
New York, NY 10004
rogerst@sullcrom.com

Government Employee Labor Relations Law
Seth Greenberg
Greenberg Burzichelli Greenberg P.C.
3000 Marcus Avenue, Suite 1w7
Lake Success, NY 11042
sgreenberg@gbglawoffice.com

Individual Rights and Responsibilities
Dennis A. Lalli
Kauff McClain & McGuire LLP
950 3rd Avenue, 14th Floor
New York, NY 10022-2705
lalli@kmm.com

Stefan D. Berg
309 Arnold Avenue
Syracuse, NY 13210-3715
stefanberg@igc.org

International Labor and Employment Law
Robert Paul Lewis
Baker & McKenzie
1114 Avenue of the Americas, 4th Floor
New York, NY 10036-7703
robert.p.lewis@bakernet.com

Wayne N. Outten
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016-5902
wno@outtengolden.com

Journal and Newsletter (Ad Hoc)
Janet McEneaney
205-02 33rd Ave.
Bayside, NY 11361
mceneaneyj@aol.com

Labor Arbitration and Collective Bargaining
Rachel J. Minter
Law Offices of Rachel J. Minter
350 Fifth Avenue, Suite 4710
New York, NY 10118
rachmint@aol.com

Labor Relations Law and Procedure
Bruce S. Levine
Cohen, Weiss and Simon LLP
330 West 42nd Street
New York, NY 10036
blevine@cwsny.com

Peter D. Conrad
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8200
pconrad@proskauer.com

Law School Liaison
Norma G. Meacham
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
ngm@woh.com

Legislation
Timothy S. Taylor
NYS United Teachers
800 Troy Schenectady Road
Latham, NY 12110
ttaylor@nysutmail.org

Howard C. Edelman
119 Andover Rd.
Rockville Centre, NY 11570-1533
hcearb@aol.com

Membership
William D. Frumkin
Sapir & Frumkin, LLP
399 Knollwood Road, Suite 310
White Plains, NY 10603
wfrumkin@sapirfrumkin.com

Public Sector Book (Ad Hoc)
Jean Doerr
Public Employment Relations Board
The Electric Tower
535 Washington Street, Suite 302
Buffalo, NY 14203-1415
jdoerr@perb.state.ny.us

Jerome Lefkowitz
Public Employment Relations Board
80 Wolf Road, 5th Floor
Albany, NY 12205
jlefkowitz@perb.state.ny.us

Scholarships and Other Financial Support (Ad Hoc)
William D. Frumkin
Sapir & Frumkin, LLP
399 Knollwood Road, Suite 310
White Plains, NY 10603
wfrumkin@sapirfrumkin.com

Union Administration and Procedure
Robert L. Boreanaz
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, NY 14202-3901
(716) 849-1333

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NEW YORK STATE BAR ASSOCIATION
LABOR AND EMPLOYMENT LAW SECTION
One Elk Street, Albany, NY 12207

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