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Labor and Employment Law Journal

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of the New York State Bar Association

Message from the Outgoing Chair

Donald L. Sapir

So much to do, so little time to do it. This past year, it's been my privilege to serve the almost 2,500 members of the Labor and Employment Law Section as Section Chair. It is a beautiful thing to behold lawyers who advocate for their often adversarial constituencies (employers, individual employees, unions, and government agencies) and other lawyers serving as law professors or on state and federal boards, in the courts, and as private mediators and arbitrators, as they work together, collegially, putting their differences aside, to improve the plight of the labor and employment bar and to promote their common objectives. We do not always agree, but we can maintain our sense of purpose, sense of humor and agree to disagree without rancor or need to vilify adversaries or their clients in the way that

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Message from the Incoming Chair

Mairead E. Connor

I have inherited the Labor and Employment Law Section from Don Sapir's leadership in great shape. This year marks the Section's 35th Anniversary. Many thanks go to Don and his predecessors for making this Section a productive and collegial space for adversaries and neutrals. One of the things that appeals to me most about the Section is the atmosphere of collegiality and oftentimes genuine friendship among the members from management, labor and employee, and neutrals. It truly is a special place.

This year promises to offer even more to our members, both in terms of meetings offerings and online services. Our committees are even more active than before in putting together CLE programs that offer timely and important updates and analyses for our members.

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A Message from the Outgoing Chair

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has become common among media commentators and elected officials. Has anything changed to improve the Section since one year ago?

1. We now have an official Section "Labor and Employment Law" blog, http://nysbar.com/blogs/LELblog, managed by a team of dedicated Section blog posters. Concise summaries of the very latest developments of interest to labor and employment lawyers in New York State, *e.g.*, court and agency decisions, agency regulations and initiatives, news items, are posted with links to the full decisions, regulations, etc.
2. Diversity Fellowships were established to enhance the diversity within our Section. Lawyers of diverse backgrounds were recruited to become involved in the Section. The cost of their attendance at our Fall and Annual CLE meetings was underwritten by sponsorship contributions.
3. Sponsorship opportunities were expanded to allow lawyers, law firms, and neutrals to obtain recognition for their contributions paid to underwrite the expense of our Fall and Annual CLE meetings, Diversity Fellowships, and other activities.
4. The Section's Annual Meeting activities were expanded to include under one roof a discussion of cutting-edge ADR topics among renowned neutrals and advocates together with members of the Section's ADR Comm. and Labor Arbitration Comm. followed by a joint networking reception with members of the Labor Relations and Procedure Comm. and the EEO Comm., after their respective simultaneously conducted meetings with New York's NLRB Regional Directors and top EEOC, NYSDHR and NYCHRC administrators concluded.
5. An advisory committee composed of former Chairs of the Section was established to provide a vehicle to channel their institutional knowledge, hands-on experience and collective energy toward projects that benefit the Section and its members.

Being involved in the work of the Section on a day-to-day basis allows one to observe the many ways that the Section's Executive Committee members work to improve the professional and personal lives of labor and employment lawyers throughout New York State. While brevity prevents thanking all for their efforts, a few illustrative "thank yous" follow. Thanks for: the high-quality, low-cost CLE programs offered under the guidance of CLE Committee Co-Chairs Stephanie Roebuck and Ron Dunn; the law review quality of the Section's *LEL Journal* under the editorship of Philip Maier; the informative, greatly upgraded Section website, www.nysba.org/labor, and the continuously updated Section blog under the stewardship of Communications Committee Co-Chairs Jim McCauley, Mark Risk and Mike Curley and blogmaster extraordinaire Seth Greenberg. Thanks for: the successful efforts to increase diversity of our membership, leadership and profession by Diversity Committee Co-Chairs Mairead Connor, Jill Rosenberg and Natalie Holder-Winfield; outreach to increase membership by Membership Committee Chair Ted Rogers, outreach to existing members by our Coordinator of District Representatives Peter Nelson and our 13 District Representatives in their respective judicial districts; and for keeping the Section's finances in impeccable order by Finance Committee Chair Bob Simmelkjaer. My heartfelt thanks to all of the other Committee Chairs and Committee members for their work creating CLE program content, proposing legislation, commenting on proposed legislation, writing articles, and so much more.

If you are in the least bit interested in learning more about the Section, or how your participation in the Section's activities can help you in your practice, I urge you to attend one of the Section's committee meetings immediately following the Annual Meeting (1/28/11) in New York City or during this year's Fall Meeting (10/31-11/2/10) in Longboat Key, Fla., write an article for publication in the *Labor and Employment Law Journal*, offer to assist in revisions to the Section's treatise, *Public Sector Labor and Employment Law*, contact a CLE Committee Co-Chair or your District Representative with an idea you have for a CLE program or networking with other labor and employment lawyers in your area, contact a Section Law School Liaison to volunteer to speak at a local law school or college about a career in labor and employment law, or contact the Section Chair to discuss your thoughts on ways to improve the Section or the labor and employment laws in New York State.

It has been a great ride and one I will never forget. I would be remiss if I did not thank a few others that made my tenure as Chair enjoyable and possible. Thanks to: Mairead Connor, my Chair-Elect and right-hand person, who was quick to volunteer her services in any way she could help; Alan Koral, my predecessor and mentor, and his predecessor, Kayo Hull, who were quick to respond when their experienced perspective was solicited; Linda Castilla, our NYSBA staff liaison, whose patience and support were invaluable; Sharon Stiller, Secretary of the Section, who prepared Executive Committee Meeting minutes in record speed; and my law partner, Bill Frumkin, and Rachel Horton, my paralegal and administrative assistant, and our firm's entire staff for their attentiveness to our firm's clients and cases, which afforded me the ability to attend to the Section's business whenever my attention was needed. Lastly, but certainly not least, I thank my wife, Janet, who has been supportive of years of nighttime and weekend activities in furtherance of Bar Association business.

As Bob Hope sang, "Thanks for the memories."

Don Sapir

A Message from the Incoming Chair

(Continued from page 1)

- The Fall program at the Longboat Key Club, October 31-November 3, 2010, will be packed with interesting CLE topics and social events all in the beautiful setting of Longboat Key, Florida. Please consider joining your fellow Section members for this important meeting in Longboat Key. The Longboat Key Club is very family friendly and the area offers some of the most beautiful scenery on the Gulf Coast. Multiple thank yous to Stephanie Roebuck and Ron Dunn, our CLE co-chairs, for their countless hours of hard work in putting this, and other, programs together.

- The International Committee of the Section is putting on the Third Annual Conference of International Labor Law with Cornell in New York City on September 25, 2010. This conference will be a terrific chance to learn about this exciting and growing area of labor and employment law with presentations by extremely knowledgeable attorneys. Many thanks go to Donald C. Dowling, Jr., and Janet McEneaney for their hard work in coordinating this conference.

- The Annual Meeting will be held again this year at the Hilton New York with the rest of the NYSBA sections at the end of January, 2011. This meeting always gives an opportunity for great CLEs. This year, we are hoping to expand the very successful programs we had at previous Annual Meetings with presentations from the Regional Directors of the NLRB, EEO agency presentations, and ADR meetings. These programs were so successful last year that we hope to expand them with greater attendance at a larger setting.

- The Section webpage promises to become a greater resource this year than ever before. We are in the process of expanding the materials available on the webpage to the members. One of the best additions to the online offerings is the Section blog. While the blog is up and running now, we are in the process of obtaining rights to use the name we prefer. More information will be available about the blog name shortly. Many thanks to Seth Greenberg for his enthusiastic work in getting the blog started.

Last year, our Section began a diversity fellowship with the leadership of the Diversity and Leadership Development Committee and its co-chair, Natalie Holder-Winfield. The Diversity Fellows were Ross D. Levi, Executive Director of the Empire Pride Agenda; Stacey M. Gray, Stacey M. Gray, PC; and the Honorable Katherine Levine, who became our new District 13 Representative. These fellows participated in programs and attended our Fall meeting at the Sagamore in Lake George. We are in the process of selecting a new "class" of fellows for the coming year and adding a mentoring program to the fellowship. Making our Section a more diverse organization is something close to my heart. In the coming year, we will be increasing our attention to diversity and ensuring that our events are accessible and welcoming to everyone.

We have made several changes to chairs of several committees in an effort to bring in new ideas and keep our committees running smoothly. For example, the Legislation Committee now has four co-chairs: Sharon Stiller, Timothy Taylor, Jonathan Weinberger, and Vivian Berger. We will be reinstituting a legislative report that sets forth the new legislation in New York, which has been missed of late.

The Section has been very fortunate that many of the current hard-working committee chairs have agreed to continue to work in their capacities. Their expertise is irreplaceable, and I will rely on their experience throughout the year. I am keenly aware that we are a volunteer organization. The committee chairs' countless hours of work in their already busy schedules are truly a gift to our profession and are deeply appreciated. Please consider volunteering for a committee, if you have not done so already. I can promise you that you will meet interesting colleagues, add to your professional knowledge, and develop professional relationships like no others.

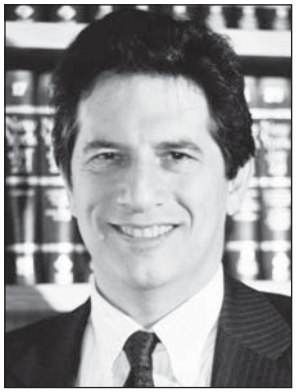
I also am deeply grateful to Bob Simmelkjaer, who has consented to continue his stint at Financial Officer. Bob does much of the nitty-gritty budget work that is so necessary and underappreciated by many. In the coming year, we plan on using some of our budget surplus for membership and diversity development, committee expansion, and law school initiatives.

Finally, sincerely thanks to Don Sapir, who got many of these ideas in motion. His vision for the Section was truly inspiring. He worked tirelessly for us all and managed the day-to-day "headache" work of the Section with coolness and aplomb. Don was truly one of our great Chairs. He will still be with us, however, on the Past Chairs Advisory Committee headed by Frank Nemia, which was in Don's brilliant foresight to create. I am confident his advice and expertise will be called upon frequently.

Anyone should feel free to contact me with ideas or complaints. I want them all! E-mail me at mec@connorlaborlaw.com.

Mairead E. Connor

From the Editor



Philip L. Maier

As usual, I would like to express my thanks to the authors for sharing their expertise with the labor and employment law community. Articles addressing recent developments of note include Douglas Cox's and Adisada Dudic's discussion concerning commuting as a reasonable accommodation under the Americans with Disabilities Act, Paul Murphy's update on the NLRB, and the Honorable Katherine Levine's discussion concerning recent developments under the Supreme Court's decision in *Garcetti*. I would also direct attention to William Frumkin's article concerning psychological considerations in employment mediation. John Gaal and Donald Dowling have again contributed to our knowledge of ethics and international employment issues by their regular columns.

I would also like to offer my congratulations to Barbara Durkin for capturing second prize in the Dr. Emanuel Stein Memorial Writing Competition. Her article addresses the implementation of United Nations documents for U.S.-based companies who are government contractors.

Philip L. Maier

Employment Law Toolkit for Cross-Border M&A Deals

By Donald C. Dowling, Jr.

Ten years ago, a leading London corporate lawyer declared to the *New York Times* (Mar. 26, 2000), in "merging two regular companies...you just do it and sort out the people issues afterwards."[1] If that was true then, it no longer is. These days, in any merger or acquisition between two employers—especially in the cross-border context—human resources and employment law compliance have become increasingly vital. "People issues" will never lie at the heart of the international M&A process, but they can be persistent and bedeviling over the course of a cross-border transaction, from due diligence and acquisition-agreement drafting through closing and post-merger integration.[2]

This is a toolkit for U.S. human resources professionals and legal counsel responsible for "people issues" in international M&A transactions. We address a multinational buyer or seller as it accounts for the seller's outside-U.S. employees who, at closing, will transfer over to the buyer. We divide these issues into three stages: (1) M&A employee transfers outside the U.S. (vested rights, acquired rights, *de facto* firings);[3] (2) international M&A employment due diligence checklist;[4] and (3) checklist of HR issues in international M&A transactions.[5]

Part 1: M&A Employee Transfers Outside the U.S.: Vested Rights, Acquired Rights and *de Facto* Firings

In most multi-jurisdictional deals, a single threshold employment-law question permeates all others: *What happens, after closing, to the seller's employees?* In cross-border transactions where the seller employs staff in more than one country, the answer to this question may differ for each jurisdiction, particularly when the transaction is an asset purchase.

Parties to a deal sometimes negotiate for the seller to lay off ("make redundant") some or all employees before closing, although in the European Union the fact of a transaction "shall not in itself constitute grounds for dismissal."[6] Any such pre-closing layoff ("collective redundancy") needs to comply with each affected jurisdiction's reduction-in-force and notice/redundancy/termination/severance laws, including local labor laws that require information/consultation/bargaining with employee representatives. But layoff laws are not unique to the M&A context. A pre-closing reduction-in-force is largely the same as any other layoff, although some unsatisfied severance liabilities can reach a buyer after closing.

The biggest employment-law problem that looms over M&A deals is the fate of those employees who remain on the seller's payroll at the moment of closing. This problem gets complex outside the U.S. because other jurisdictions tend to protect transferring staff more paternalistically than does the U.S. under employment-at-will. To draw this contrast we begin by looking at how U.S. law does—and does not—protect American employees affected by a deal. Then we look at workforces based abroad.

U.S. context. In addressing the fate of a seller's U.S. employees at the closing of an M&A transaction, the key distinction is whether the deal structure is a purchase of stock (shares) or assets.

- **Stock (shares) deal and U.S. employee transfers.** A stock sale (such as a merger) does not change employee status at closing. Peering through the lens of employment law, a stock transaction is invisible: The buyer, at closing, *becomes* the employer entity; that entity itself stays the same. The employer/employee relationships, liabilities, and collective bargaining arrangements stay the same, at least where employees do not have change-in-control clauses written into employment/compensation agreements. In the words of the old rock song, "*Meet the new boss, same as the old boss.*"[7]

  Yet a stock (shares) buyer enjoys an unusual flexibility as to its newly acquired *American* employees because of the unique U.S. doctrine of employment-at-will. A buyer that has recently acquired the stock of some other business remains free to lay off all its newly acquired U.S. employees without paying any

severance charges (assuming that: none of the U.S. staff enjoys contractual, quasi-contractual or union contract rights not to be fired; the layoffs are not for an illegal discriminatory/retaliatory reason; neither a severance plan nor the stock purchase agreement restricts layoffs; and any mass reduction complies with applicable notice mandates).

Going beyond layoffs, U.S. employment-at-will leaves non-unionized employers—and hence stock buyers—unshackled by *vested rights* obligations to maintain work conditions after closing.[8] A stock buyer is generally free to reduce existing terms/conditions of newly acquired non-union U.S. employees, to demote them, to discontinue their benefits, to reduce their pay, to change their job titles, and otherwise to restructure (subject to any contractual or quasi-contractual restrictions and subject to pension continuity rules under U.S. ERISA law).[9]

- **Asset-purchase deal and U.S. employee transfers**. The analysis differs markedly as to American employees in an *asset purchase* transaction. While U.S. labor union law can impose doctrines of "alter ego" and "successorship" on the 7% of the U.S. non-government workforce represented by labor unions, in the asset-purchase context the other 93% of the American workforce gets no statutory job protections. This means an asset buyer need not offer the seller's U.S. employees any jobs at all, and therefore remains free to offer tougher jobs with lower pay at a new and distant workplace. Indeed, the asset buyer that decides to offer jobs to U.S. staff is free to offer whatever terms/conditions it wants—even if materially lower than what the seller had provided—unless it contractually commits otherwise. And an asset buyer is free to start American employment fresh, with no years-of-service credit (service credit tends to be legally insignificant under U.S. employment statutes, anyway). In short, U.S. employment law outside the union context imposes no concept of "acquired rights."[10]

Outside-U.S. context. Outside the U.S., though, the legal analysis as to M&A-context employee transfers differs radically. Even so, in analyzing these transfers outside the U.S. we start with the very same structural distinction: stock (shares) versus asset-purchase transactions:

- **Stock (shares) deal and outside-U.S. employee transfers**. In a stock transaction the buyer becomes the employer entity, and so existing employer/employee relationships, contracts, and liabilities stay the same—although jurisdictions such as France and Romania impose obligations of "information/consultation" with worker representatives before a seller can commit to or close a stock sale. Outside of U.S. employment-at-will, from the moment of closing a stock buyer runs into the legal hurdle called *vested rights*. Outside-U.S. jurisdictions impose a regime of "indefinite employment" or (as it is known in the Philippines) "security of tenure." Indefinite employment regulates, restricts or prohibits no-cause employment terminations by granting fired employees some cause of action for a dismissal without notice, without good cause, or without following mandated procedures. This "vested rights" principle follows a stock deal through closing; stock buyers outside the U.S. cannot lay off employees after closing unless they comply with legal restrictions, pay legally imposed costs, and heed local notice/termination/severance and lay off laws.

  The tentacles of this vested rights rule reach far beyond restrictions on layoffs. An implicit corollary of any functional doctrine limiting no-cause *terminations* is that the restrictions on firing also act as restrictions on *constructive discharge*.[11] Otherwise, an indefinite employment regime's prohibition against unfair dismissals would become meaningless—an employer could freely "fire" workers, without cause, by demoting them, cutting their pay, and assigning intolerable tasks until they walked out in protest. Therefore, vested rights rules outside the U.S. severely restrict the power of an employer stock buyer unilaterally to reduce material employment terms/conditions of *surviving* employees. This means that outside the U.S. a stock buyer, after closing, faces obstacles restructuring, transferring workers to new office locations, realigning job titles, and discontinuing bonuses, benefits, and equity plans (absent employee consent, which often requires substantial concessions).[12]

- **Asset-purchase deal and outside-U.S. employee transfers.** The vested rights doctrine does not reach a buyer of *assets* because an asset buyer is a distinct legal entity—a new and separate employer. This fact alone sometimes tempts buyers to structure acquisitions as asset purchases, so as to maximize flexibility in human resources operations by sidestepping vested rights. This strategy is particularly common stateside, where many business sales get structured as asset purchases. But this strategy is much less viable abroad. Outside the U.S., jurisdictions tend to close the implicit loophole here in one of two ways, by imposing either an acquired rights rule or a *de facto* firing doctrine:

  – **Acquired rights jurisdictions.** Any buyer of a business that could skirt vested rights obligations simply by structuring an acquisition as an asset purchase would threaten the public policy that underlies the vested rights doctrine: safeguarding employee security in existing jobs as currently structured.[13] Because the asset purchase scenario threatens employees' vested rights, many countries' laws close this loophole by legislating in a concept called *acquired rights*.

Acquired rights laws are statutory mandates that force an acquirer of the assets of a business (in Europe called an "undertaking") to assume the transferor's existing workplace vested rights obligations. Indeed, acquired rights laws reach not only asset sales but also outsourcings and other business transfers short of a stock sale.

In an acquired rights jurisdiction, the vested and acquired rights concepts add up to a strict but fairly simple rule: Regardless of whether parties structure their deal as a stock (shares) or asset purchase, the buyer steps into the seller's shoes as employer and assumes a legal obligation to perpetuate existing employment terms/conditions/seniority (unless employees consent otherwise, which they have little incentive to do unless granted concessions).

There is another side to this coin. The *quid pro quo* of any coherent acquired rights mandate is that where affected employees transfer with terms/conditions/seniority intact, the transferor gets to walk away from its workforce without being deemed to have laid anyone off, and therefore free of severance pay/notice/"collective redundancy" obligations. This helps both parties, because no severance pay means the seller cannot pass termination costs onto the buyer in the form of a higher sale price.

How acquired rights laws work, as to their particulars, differs from jurisdiction to jurisdiction. Some examples:

* **EU.** Each EU member state imposes an acquired rights law under which an asset seller's employees automatically transfer to an acquirer with terms/conditions/seniority intact, and these laws require information/consultation with employee representatives over the asset sale.[14] (Colloquially if inaccurately, these local European laws are sometimes referred to by the British acronym "TUPE.") These laws adopt ("transpose") the amended European Union "acquired rights" or "transfer of undertakings" directive.[15] The EU directive lets European states except pension plans, and so in some EU jurisdictions pension rights are not acquired rights.[16] Member state laws implementing the directive are particularly robust and well-enforced; Germany, for example, allows employees to refuse the transfer.

  Singapore. Under the Singapore Employment Act section 18A, only low-level employees (staff *other than* managers, executives, and those in confidential positions) transfer by operation of law to an asset buyer with terms/conditions/seniority intact. A Singapore seller must notify these non-exempt employees and any union of the transfer before closing. Employment contracts automatically transfer, unless employees agree to new terms.[17]

  South Africa. South Africa's Labour Relations Act section 197 is an acquired rights law that works more or less like laws under the EU directive.

  South Korea. South Korea imposes acquired rights restrictions on many asset transfers. Transferring employees must get reasonable notice and must consent. Parties may execute an "employment transfer agreement" (ETA) confirming the consent; ETAs are necessary if the buyer will change terms or conditions of employment.[18]

– ***De facto* firing jurisdictions.** Vested rights jurisdictions generally protect employee vested rights, even in the event of an asset sale. But not every vested rights jurisdiction imposes *acquired rights* laws. Many countries use a different way to protect employee rights in an asset sale, a model we might call the "*de facto* firing doctrine." *De facto* firing jurisdictions presume that a seller's employees continue on as seller employees even after an asset sale, until they have been lawfully terminated and paid out notice and severance pay. That is, employees whose jobs are linked to transferring assets either keep working for the seller notwithstanding the sale or else get fired and paid out accordingly—even, in many cases, where the asset buyer agrees to hire them at closing. An asset seller with no appetite for retaining affected employees after an asset sale must do a layoff, funding severance pay, notice, and all other obligations of a mass firing. These costs fall on the seller in the first instance, but because an asset sale is what triggers them, a smart seller factors severance expenses into the sales price, and so the asset buyer ultimately, if indirectly, pays.

  Not surprisingly, there is another side to this coin. The *quid pro quo* of the *de facto* firing doctrine is the opposite of the *quid pro quo* of the acquired rights doctrine: In a *de facto* firing jurisdiction, an asset buyer need not recognize acquired rights. An ex-employee of the seller, having been fully "cashed out," enjoys no right to a job with the buyer. Any buyer that *does* hire a seller's ex-employee is free to offer reduced terms/conditions and zero retroactive seniority.

But in many deals the asset buyer wants a "turn-key" operation complete *with* an experienced workforce. In other deals the asset seller insists that the buyer take responsibility for its existing staff, to minimize human resources problems and costs. Even where the buyer in a *de facto* firing jurisdiction agrees to hire seller employees at closing under identical terms/conditions/seniority, that commitment does not necessarily relieve the seller of its severance pay obligations. In the eyes of the law in a *de facto* firing jurisdiction, an asset buyer willing to hire a seller's workforce looks little different from some unconnected business hiring these same fired employees off the street. Indeed, a seller that chooses to sell only its assets, not its employment agreements, cannot expect the law to credit a buyer's post-closing job offers against seller pre-closing severance obligations.

That said, in an asset deal where the buyer is willing to hire, both parties have a keen financial incentive: saving severance money. Any transferring employee who receives both a full severance package from the seller and a new job from the buyer on retroactive terms/conditions/seniority would be "double dipping."

Often parties can avoid this "double dipping" if the employees cooperate. A buyer can warrant that it will offer jobs on same terms/conditions/seniority in exchange for each employee's agreement to *resign* from the seller or otherwise to waive severance pay. In essence the parties offer each employee a choice between either a full severance package *or* a comparable job with the buyer—not both. Local law in some jurisdictions facilitates these voluntary employment transfers through "employer substitutions" or other mechanisms.

Examples of *de facto* firing jurisdictions include:

Latin America. In Argentina, Mexico and most of Latin America, employees whom an asset seller fires enjoy a right to full notice and severance pay unless they consent to some other arrangement or unless in a jurisdiction like Mexico the parties structure an "employer substitution." In some Latin American jurisdictions a buyer and seller can be held jointly liable for severance payments. However, in Brazil a sale of the assets of an entire line of business can in effect trigger a sort of acquired rights rule.[19]

China. An asset seller in China that fires staff associated with transferring assets is subject to notice and severance pay obligations. China's layoff ("massive workforce reduction") law kicks in where a seller fires at least 20 employees or 10% of its workforce. Employees who agree to a transfer can resign or execute a mutual termination agreement plus a new employment agreement with the buyer, which can be structured as a three-party contract. Chinese employees will not likely agree to such a transfer unless the buyer perpetuates terms/conditions/seniority.[20]

India. Indian law distinguishes unskilled manual-laborer "workmen" earning up to U.S. $34 per month from non-workmen (usually managers, administrators, and supervisors). Where an asset seller does not intend to retain workman associated with transferring assets, the buyer can decide whether to hire them on same terms/conditions/seniority. Where the buyer refuses to hire workmen on replicated terms, the seller owes notice and severance pay. Indian law is similar as to *non-workmen*, except that a non-workman can transfer without severance pay even if the buyer will not replicate terms/conditions/seniority, unless the employment agreement requires otherwise.[21]

Japan. An employer (and hence a seller) in Japan cannot unilaterally lay off staff without cause, even where the employer is willing to give notice and tender severance pay. Japanese employees affected by an asset sale (a *jigyoujouto*) enjoy a right to keep working for the seller after closing, even if the buyer and seller contractually provide for an employment transfer and even if continued employment proves impossible because no seller business remains. If buyer, seller and employees all agree, the buyer can assume the seller's employment contracts, or the seller and employees can agree on separation terms or negotiated retirement agreements. Where employees have consented to a cash-out, the buyer is free to hire on new terms/conditions without respecting seniority.[22]

Part 2: International M&A Employment Due Diligence Checklist

After understanding what will happen to a seller's employees upon closing, the first "people issue" to tackle in any international M&A transaction is *human resources due diligence*.[23] Every prudent buyer of a business undergoes a due diligence process to learn what it is, and is not, buying—and whether the purchase is worth the price. Thorough due diligence requires researching a range of business and legal issues including, for example, seller's

compliance with antitrust laws, accounting principles, environmental regulations, and tax requirements. One part of thorough due diligence is the "people issues" of labor/employment and employee benefits. Due diligence into employment and benefits outside the U.S. is vital, because as we have seen, a buyer operating away from employment-at-will can in effect inherit the seller's human resources status quo, whether by vested rights in a stock purchase, acquired rights in an asset purchase, or some contractual commitment. Therefore, a prospective buyer should study the seller's employment operations and get familiar with the to-be-acquired worldwide workforce.[24]

A due diligence checklist helps a prospective buyer figure out what data to scrutinize and helps a prospective seller anticipate what data prospective buyers will expect to see. Doing due diligence into employment/human resources is tricky because employment is inherently local, with local issues indigenous to each affected country. (For example: Hong Kong imposes special social security/pension compliance requirements; Mexico imposes strict profit-sharing mandates; Brazil imposes an employer-financed unemployment regime; Saudi Arabia imposes unique workforce gender-segregation rules; and South Africa imposes special diversity obligations.) Here, though, our global due diligence checklist focuses on those human resources issues that arise across various jurisdictions. And so this checklist is merely an outline that needs fleshing out for each local jurisdiction where a seller in a particular deal employs staff.

- **Data laws in due diligence.** Many jurisdictions, including all those of the European Union, impose broad data privacy/protection laws that can have unexpected consequences in the due diligence context.[25] "Electronic data rooms" exacerbate exposure when they offer up to bidders personal information about identifiable seller employees. Liability for breach can transfer to a buyer at closing. Compliance may require "anonymizing," entering into "onward transfer agreements," entering into cross-border "model contractual clauses" agreements, or other such steps. Jurisdictions including Argentina, Hong Kong, Japan, Korea and United Kingdom offer guidance specific to the M&A due diligence context.

- **Materiality threshold.** Few prospective buyers will care about *immaterial* aspects of the seller's human resources operations. Check whether international HR due diligence in the particular deal is subject to some "materiality threshold," and then focus due diligence on what exceeds that threshold.

- **Claims, liabilities and exposure.** Are there any pending, threatened, or potential employment-related claims, lawsuits, disciplinary proceedings, workplace audits/investigations, criminal proceedings, or unpaid employee judgments? What is the exposure for non-compliance with labor/employment, payroll, safety, and HR data privacy laws (including data agency filing requirements)? What are the seller's cash reserves?

- **Corporate/employer issues.** Identify the seller's local affiliated corporate entities in each country that employ staff. Learn the relationships among seller's business/operating entities and any "services companies" that employ people.

- **Census and organization chart.** Get a census of seller employees (and directors) worldwide, including part-time and contracted-out employees. Include both employees who service the target entity and target-entity employees "seconded" to service other organizations. Ideally this census should include dates of hire, compensation, and job category. Separately, get an organization chart and verify that only the employees who actually work for the target unit, regardless of title or designation, will transfer as part of the deal. Identify any "shared services" employees who work for both the target unit and non-acquired units. Identify seller's contingent staff, such as independent contractors, consultants, agents, secondees, sales representatives, and employees who work from home or remotely.

- **Expatriates and immigrants.** Collect information on the seller's expatriate and immigrant populations and programs. Who are the overseas secondees and other posted expatriates? Which corporate entity employs each expatriate? Identify "stealth expatriates" not in the expatriate program but working outside their home countries. Check the visa status of non-local-citizen employees worldwide. How might the deal affect these visas? In a stock (shares) deal, be sure to check expatriate-triggered "permanent establishment" issues: Which expatriates are doing business in countries where the seller is unregistered and not paying taxes?

- **Code of conduct.** Check compliance with the seller's internal ethics code of conduct including any commitment to an industry code, any workforce corporate social responsibility program, and any so-called "framework" (union neutrality) agreement.[26] Do the seller's HR practices comply? Will they align with the buyer's practices? Check seller practices regarding government procurement, payment procedures to government officials, compliance with anti-bribery laws and audit/accounting rules.

- **Supply chain and human rights.** Get any *supplier* code of conduct, and get compliance information like social/human rights audits. Collect data on labor practices in the supply chain, particularly as to components/product sourced from the third world. Consider exposure to workplace-context human rights claims under the U.S. Alien Tort Claims Act.

- **HR policies and terms/conditions.** Identify and check compliance with seller's employment policies, written and unwritten. Look at employee handbooks, written work rules, and health/safety guidelines. Does the seller comply with legally mandated terms/conditions of employment? What special terms/conditions (beyond legal minimums) does the seller extend to employees? The buyer may have to replicate terms after closing.
- **Compensation and benefits.** Using a separate compensation/benefits checklist, check the seller's compensation philosophy, compensation/benefits "schemes" or plans, severance plans, retirement plans, bonus plans, and perquisites (like meals, housing, country clubs, and company cars). Check individual pension promises, special agreements, grandfather clauses, death/disability benefits, cafeteria plans, service awards, profit-sharing, savings plans, employee loans, and unusual expense reimbursements. Check compliance with local laws that mandate extra payments and benefits. Get an accounting of any transferring plans and study funding: Unfunded, underfunded, and "book reserve" plans can raise huge problems.
- **Equity and loans.** Look at seller stock options, employee ownership programs, officer/director stock ownership, and employee ownership in affiliates and entities doing business with the seller. Also check into loans and guarantees to employees.
- **Employee insurance coverage.** Look at the employment-related insurance the seller provides, like employee life/health/accident insurance, hazardous duty/kidnap insurance, payments to state-mandated insurance funds (such as workers' compensation insurance), expatriate coverage, and "key man" policies naming the employer as beneficiary.
- **Performance management.** Study the seller's performance management system. Focusing on key employees, collect data on job evaluations, performance appraisals, and problem employees.
- **Labor organization relationships**. What labor organizations represent workers? Collect organizational data regarding in-house or company-sponsored labor organizations such as works councils, any "European Works Council,"[27] company unions, health/safety committees, staff consultation committees, and ombudsmen. Collect meeting minutes and records memorializing labor disturbances and days lost to strikes.
- **Collective agreements.** Look at applicable collective agreements and "social plans" with employee groups. Get expired agreements with terms that still apply. Do any industry ("sectoral") collective agreements bind the seller as a non-signatory? Does the seller participate in any multi-employer bargaining associations? Go beyond trade unions and check agreements with works councils, worker committees, and ombudsmen.
- **Individual employment agreements**. Look at individual employment contracts with employees including agreements designated as statement of particulars, non-compete, confidentiality agreement, indemnification agreement, inventions agreement, and expatriate arrangement—or at least check these for key executives and look at form/template agreements for rank-and-file employees. Be sure to look at contracts with contingent workers (service providers like independent contractors, consultants, agents).
- **Employee consents.** Check individual employee consent forms. (In jurisdictions like the UK and Korea, employees may have consented in writing to work overtime. European employees may have consented to processing sensitive personnel data. Employees may have acknowledged a code of conduct or work rules in writing.)
- **Change in control.** Check change-in-control, golden parachute, and other transfer-related clauses in employment-related and agency agreements, including M&A-ratification provisions in any labor union contracts.
- **External agreements.** Do any external agreements (with third parties) limit HR flexibility? (For example, are there acquisition agreements from earlier deals that limit reductions in force? Has the seller signed on to any customer codes of conduct imposed on customers' suppliers? Is the seller a government contractor that has taken on public-procurement obligations affecting HR?) Separately, look at outsourcing agreements with HR service providers like payroll providers, "temp" agencies, benefits providers, and whistleblower hotline providers.
- **Payroll.** Check the seller's payroll processing compliance as to deductions, withholdings, reporting, compliance with mandatory payments to unions, and remittances to agencies including tax, social, unemployment, and housing funds. How is payroll issued? Are there any extra deductions (such as for charitable contributions or employee loan repayments)? Does the seller properly pay mandated benefits like premium-pay vacation, profit sharing, and thirteenth-month pay?
- **Wage/hour compliance.** Verify compliance with wage/hour laws, cap-on-hours laws, overtime payments, payments during business travel, and exempt-status designations.
- **Duty of care**. Get information on duty of care/safety/evacuation and other protocols such as for

hazardous-duty work and occupational health/safety law compliance, including for expatriates.

- **Discrimination/harassment.** Verify compliance with local discrimination/diversity/harassment laws including laws on pay equity, affirmative action, mandatory training, and "bullying." Verify compliance with the seller's own discrimination/harassment policies: Many international discrimination/harassment policies go well beyond local laws.
- **HRIS.** Look into the seller's employee data-processing and human resources information systems [HRIS]. Investigate transferability of HRIS and how HRIS complies with data protection laws.[28] Has the seller made all required notices/communications to employees about HR data processing?
- **Powers of attorney**. Find out what powers of attorney employees, officers, and directors hold. (These are particularly critical in Latin America, where there can be different levels of powers, some of which include the power to dispose of company assets.)
- **Management oversight.** What controls does the seller's headquarters use to monitor local management's compliance with laws and corporate policies?

Part 3: Checklist of HR Issues in International M&A Transactions

Having addressed both what happens to a multinational seller's employees upon the closing an international M&A deal[29] and what topics to check in conducting employment due diligence in the international M&A context,[30] there remains a list of other "people issues" to address in any international deal.[31] Among the most vital are:

- **Post-merger integration strategy.** Many threshold issues vital to deal structure inevitably turn on the buyer's anticipated level of post-closing workforce integration. Before structuring an international merger or acquisition, the buyer should articulate the extent to which it intends to integrate acquired employment operations after closing. Where will the buyer fall on the spectrum between managing the new operation as a stand-alone versus fully integrating acquired workforces into existing operations? Will there be an integration transition period after closing?
- **Purchase agreement drafting**. Employment issues factor into a number of the provisions in any thorough international M&A agreement, because employment liabilities often transfer at closing. Even where a buyer does not intend to employ the seller's workforce, a purchase agreement's representations, warranties, covenants and schedules should address employment issues across the seller's worldwide operations. Of course, the details (what the purchase agreement says about employment) differ from deal to deal. Parties to an M&A transaction usually agree in principle that pre-closing employee-related liabilities lie with the seller while post-closing liabilities lie with the buyer. But local laws in many jurisdictions can hold both parties liable for employment claims that accrue in the months before, or after, a deal. In practice there are further complications: What if the buyer, after signing the agreement but before closing, grants pay raises or takes other steps that raise the buyer's post-closing employment costs? What if the buyer fails to match employment terms/conditions and triggers imputed firings by the *seller*? Clarify these issues in the deal documents. Consider using indemnities or setting aside a basket of funds to cover post-closing claims between the parties.
- **Employer entity.** The buyer in an asset deal may need to set up new corporate entities in certain countries to employ people locally after closing. Forming a new local corporate entity implicates issues of corporate and tax law—and also employment law.[32] Factor employment issues into entity structuring.
- **Buyer rules**. Before committing to an international M&A deal, a buyer should factor in *its own* global code of conduct, its own human resources policies, and its own prior commitments to any industry or customer codes and any "framework" (union neutrality) agreements. Do any *seller* practices run afoul of these? Will the buyer be able to impose these commitments on new workforces after closing?
- **Restructurings/layoffs.** In some jurisdictions a transaction itself is not legal grounds for dismissal.[33] Even so, some buyers may insist that the seller do a pre-closing layoff. In other deals a buyer will plan layoffs or a "restructuring" for *after* closing. If there will be layoffs or a restructuring after closing, account for complexities that arise during the deal itself, such as regarding content of employee disclosures, compliance with severance provisions in existing employment contracts, and information/consultation with employee representatives.
- **Retention.** The flip side of the layoff coin is *retention*, which is often a challenge after a merger or acquisition. Where workforce or leadership continuity will be important, well before closing the buyer should consider strategies (like proactive communications, incentives, and "stay bonuses") for retaining desired employees.
- **Information/consultation.** Trade unions, works councils, committees, ombudsmen, and other employee representatives are far more common outside

the U.S. than stateside. Before committing to sell a business, in many countries a seller bears a mandatory-subject-of-bargaining duty of "information/consultation" and sometimes "participation," involving worker representatives in the ultimate decision. Liability for violating these consultation duties can pass, at closing, to the buyer—and injunctions holding up the deal are a threat—so neither seller nor buyer should take this issue lightly. Compliance is especially tough while a deal still needs to stay under wraps and where this bargaining obligation arises at overseas affiliates far from headquarters. In Germany a works council that has not been properly informed/consulted can win an interim injunction holding up a deal. In some jurisdictions, particularly in Europe, a *buyer* might have separate information/consultation obligations to its own existing workforce.

- **Representative bodies.** Under U.S. law, employer-dominated labor organizations are flatly illegal. But outside the U.S. many employee representative bodies (for example, works councils in Europe, labor-management councils in Korea, company unions in Latin America, health/safety committees, staff consultation committees, ombudsmen) owe their very existence to the sponsor employer. A buyer of either stock or assets may need to arrange to transfer, and then host, these bodies upon closing.[34] Where a seller spins off less than all of its workforce, employees may transfer without free-standing representative bodies, and the buyer may then have to launch new ones upon closing. In some deals a buyer may have a strategic reason to invite in a union at closing.

- **Individual employment contracts.** When employees transfer over to a buyer by contract or by operation of law, the buyer often assumes an obligation to maintain existing terms/conditions/seniority. And the buyer often inherits the existing individual employment contracts, as written. As a housekeeping matter, though, buyers may prefer to substitute their own individual form employment contracts naming the buyer as employer, sometimes making permissible (non-material) tweaks to employment terms/conditions to align HR offerings with the buyer's existing programs. Employees who sign new employment contracts should unambiguously revoke their prior agreements with the seller.

- **Offerings, benefits, payroll, HRIS.** A buyer must be ready to issue payroll upon closing in each country, making government withholdings and contributions and providing payroll-linked benefits that replicate seller benefits. This requires filings and taxpayer identification numbers. Some benefit plans automatically transfer to a buyer (such as in a stock transaction), but others do not. Any buyer that must maintain seller's terms/conditions in various countries may have to scramble to implement programs and structures that replicate seller offerings. Replicating equity plans can be a particular problem where the buyer is not publicly traded. Separately, how will acquired employees "migrate" onto the buyer's Human Resources Information System [HRIS]?

- **Transition services.** Some asset purchase deals establish a post-closing transition period during which the seller agrees to provide certain HR services or to employ certain employees who do not transfer by operation of law. Where applicable, work out a thorough HR transition services agreement.

- **Expatriates and visas.** Seller's expatriates pose a challenge in a deal where the buyer must employ them, must reconcile (or replicate) their packages, and must ensure that the transfer does not nullify visas/work permits. Separately, a buyer that will send its own expatriates into new overseas operations after closing should apply early for visas/work permits.

- **Employee communications.** A buyer and seller should coordinate their employee communications about the deal. Comply with language laws. Heed employment laws that require notice to employees and information/consultation/bargaining with employee representatives. A seller may have to tell employees, before closing, about the *buyer's* post-closing plans. Employees will be hungry for information.

- **Press releases.** Buyer and seller press releases and public communications about a deal implicate labor laws. Labor representatives in certain countries may have a right to information about a deal before any press release can issue. Never announce as a *fait acompli* any transaction that remains subject to labor consultations in some country.

HR integration. Work out a coherent post-merger HR integration strategy. Following through on HR issues after a merger or acquisition is vital to business success.

* * *

Contrary to an assertion of a London corporate lawyer, parties to an international deal can never afford to "just do it and sort out the people issues afterwards." A stock (shares) transaction, merger, or asset purchase that affects employees across a number of countries confers significant rights on employees outside the U.S. Precisely what these rights are, though, differs by country and can depend on transaction structure. Address the fate of overseas employee populations.[35] Handle employee due diligence proactively.[36] And account for all the other employment issues, in every affected country.[37]

Endnotes

1. Andrew Ross Sorkin, "A Lawyer's Lawyer: Bridging Borders," N.Y. Times, Mar. 26, 2000 at Business p. 2.
2. *See* Donald C. Dowling, Jr., "How to Ensure Employment Problems Don't Torpedo Global Mergers and Acquisitions," 13 DePaul Business Law Journal 159 (2001), *reprinted in* 2002 Employment Law Update (H.H. Perritt, ed.).
3. *Infra* Part 1.
4. *Infra* Part 2.
5. *Infra* Part 3.
6. EU Transfer of Undertaking Directive 2001/23/EC at art. 4(1).
7. "Won't Get Fooled Again," lyrics by Peter Townshend (1971).
8. U.S. employers are free to make sweeping reductions in work terms, a freedom they exercise regularly. An article in the New York Times called "A Hidden Toll on Employment: Cut to Part Time" (July 31, 2008) reports on U.S. employers unilaterally cutting hours, benefits and take-home pay. Another New York Times piece addresses the trend of U.S. workers "being told to move abroad—or else." According to the article, U.S. employers will transfer a worker saying, "I don't care if your wife has to stay here, this is what you have to do." "Leaving Wall St. for a Job Overseas" (August 12, 2008). U.S. employers also regularly rewrite employee handbooks, discontinue HR programs, restructure and integrate workforces, and downgrade employees' jobs and job titles. These unilateral reductions in U.S. work terms are possible because the U.S. has no doctrine of *vested and acquired rights*. U.S. employment-at-will, unique in the world, remains good law in the states: "Despite dire predictions of the demise of [U.S.] at-will employment in the early years of the 21st century, it appears… that 'funeral arrangements' may still be a bit premature." Peter Strelitz, *et al.*, "Employment-at-Will: Has the Death Knell Officially Sounded?" International HR Journal, Summer 2008, at 16, 21. Americans usually think of employment-at-will as related to employment *terminations*, because employment-at-will is defined as an employer's right to fire an employee for any reason or no reason except a discriminatory or retaliatory reason—even on a "whim." *Supra* at 16. But employment-at-will also is what grants U.S. employers their freedom to reduce employment terms in day-to-day human resources operations: After all, an employee who can be fired at will has no standing to complain about a reduction in conditions *less* than a termination.
9. Employment Retirement Security Act (1974), *codified inter alia at* 29 U.S.C. 1001 *et seq.*
10. For discussions by this author of the sharp contrast between U.S. employment law and employment laws in the rest of the world, see Donald C. Dowling, Jr., "U.S.-Based Multinational Employers and the 'Social Contract' Outside the United States," 43 the Int'l L. 1237 (2009); Donald C. Dowling, Jr., "The Multinational's Manifesto on Sweatshops, Trade/Labor Linkage, and Codes of Conduct," 8 Tulsa J. of Com. & Int'l L. 27 (2000).
11. *See supra* note 8.
12. *Id*.
13. *Id*.
14. Examples include: France labor code article L. 122-12; Italy law 428/1990 as amended; and the U.K. Transfer of Undertakings (Protection of Employment) Regulations [TUPE].
15. EC Directive 2001/23/EC.
16. EC Directive 2001/23/EC, *supra*, note 15, at art. 3(4).
17. *See* M. Martinez-Herrera, *et al.*, "The Transfer of Undertakings in Asia: An EU or a U.S. Approach?," 20 IBA Employment & Ind. Rel. Law, no. 1, p. 7, 9 (Feb. 2010).
18. *See* M. Martinez-Herrera *et al., supra* note 17, at 10.
19. *See* Brazil Labor Code art. 448.
20. *See* M. Martinez-Herrera, *et al., supra* note 17, at 7-8.
21. *See* M. Martinez-Herrera, *et al., supra* note 17, at 8-9.
22. *See* M. Martinez-Herrera, *et al., supra* note 17, at 9.
23. *See* Dowling, *supra* note 2, at 167-71.
24. *Id*.
25. *See* Donald C. Dowling, Jr. & Jeremy M. Mittman, "International Privacy Law," chapter 14 in Proskauer on Privacy (PLI 2009 & supp.).
26. *See* Donald C. Dowling, Jr., "Global Codes Of Conduct," chapter 4 in Corporate Compliance Practice Guide: The Next Generation of Compliance (C. Basri, ed., Lexis/Nexis, 2009).
27. Directive 2009/38/EC, *replacing* Directive 94/45/EC.
28. *See* Dowling, *supra* note 25.
29. *Supra* Part 1.
30. *Supra* Part 2.
31. *See* Dowling, *supra* note 2.
32. Three examples: German "AG" corporations have stricter employee-involvement burdens than do "GmbH" entities; in some parts of Latin America multinationals set up a "services company" to employ staff separate from their "operating" entity, to control liabilities under local profit-sharing mandates; and as of January 2010 a "Representative Office" in China should employ only four non-Chinese-citizens—meaning that a buyer with a larger expatriate workforce will need a different corporate structure.
33. *See* EU Transfer of Undertakings Directive, *supra* note 6, 2001/23/EC at art. 4(1).
34. *See* EU Transfer of Undertakings Directive, *supra* note 6, 2001/23/EC at art. 6(1).
35. *Supra* Part 1.
36. *Supra* Part 2.
37. *Supra* Part 3.

Donald C. Dowling, Jr. is International Employment Counsel at White & Case LLP in New York City. He leads a team of lawyers who practice outbound international employment law exclusively, and who advise multinationals on the employment issues in cross-border mergers and acquisitions. He is ranked by Chambers as one of the top employment lawyers in New York and by *PLC Which Lawyer?* as one of the top international employment lawyers in the U.S.

A Look Back at the Board's 2007 Decisions and a Glimpse Forward to What Might Change

By Paul Murphy

Between June and December, 2007, the National Labor Relations Board (the Board) issued a number of decisions in which it revisited and reversed Board precedent. Many of these decisions attracted considerable attention from everyone who closely follows the Board and prompted significant criticism from some quarters and praise from others.[1] In addition, the Board was deeply divided during this period. In Fiscal Year 2007, then-Members Wilma Liebman and/or Dennis Walsh dissented in 34% of the cases issued by the Board.[2]

On December 16, 2007, Chairman Robert Battista's term expired and at the end of December, 2007, the recess appointments of Members Walsh and Peter Kirsanow concluded. As a result, from January, 2008, until April, 2010, the Board operated with just two members, and although it issued hundreds of decisions during the period, very few, if any, involved the type of significant issues that were addressed in the 2007 decisions. As a result, we can only speculate on how enduring the 2007 decisions will be and what if any long-term impact they may have. It is not surprising that since the 2008 presidential election, labor law soothsayers have been predicting that a Board appointed by a new president would revisit and reverse or modify many of the holdings in not only the 2007 decisions, but the decisions from the prior two or three years as well.

This article will examine the Board's holdings in some of the notable 2007 decisions and hopefully shed light on how they might impact the parties and practitioners who appear before the NLRB. In addition, the article will address the likelihood that the Board, as it is presently constituted, will revisit the issues raised in these cases.

This article is not intended to advance a particular position on any of the issues raised by these cases, or advocate for changes in Board law. Similarly, it is not intended to predict what the current Board might do if it revisits any of the cases discussed herein.

(1). *The Guard Publishing Company d/b/a The Register-Guard*, 351 NLRB 1110 (2007)

If observers were asked to identify the four or five most significant decisions issued by the Board in 2007, *Register-Guard* would likely be on most lists. On December 16, 2007, the very last day of Chairman Battista's term, the Board issued this long-awaited decision addressing issues related to employee use of employer e-mail systems for Section 7 activities. In recognition of e-mail's impact on workplace communication, the General Counsel had been seeking since the late 1990s to place a case before the Board that would allow it to address what, if any, right employees had to utilize their employer's e-mail system to communicate about union matters. *Register-Guard* was the first case that presented the Board with this opportunity.[3]

The General Counsel argued in *Register-Guard* that given e-mail's unique features and its widespread use by employees everywhere for work and non-work related communications, customary rules governing employee use of employer property for Section 7 purposes were inapplicable. Therefore, the General Counsel argued that case law governing employees' right to utilize more traditional forms of employer property such as bulletin boards, telephones and copying machines had no application to e-mail systems.[4]

The General Counsel argued that the common usage and interactive nature of e-mail made it the 21st century equivalent of the water cooler as a gathering spot and that rules forbidding its use for non-business purposes should be presumptively unlawful, absent special circumstances. Under the General Counsel's argument, employees would presumably have a right to use employer e-mail systems for Section 7-related reasons on non-work time.

A Board majority of Chairman Battista, and Members Peter Schaumber and Peter Kirsanow disagreed with the General Counsel's position. The majority acknowledged e-mail's impact on workplace communication, but concluded that those features did not warrant carving out an exception for e-mail usage from the Board's established position that employees have no statutory right to use employer property for Section 7 activity. Accordingly, the Board held that an employer may, if it chooses, forbid its employees from using its e-mail system for non-work related purposes, including Section 7 activities, unless employers act in a fashion that discriminates against Section 7 activity.

Although the majority rejected the General Counsel's argument about e-mail usage, and its position drew a sharp dissent from Members Liebman and Walsh,[5] its holding in this regard probably was not regarded as unusually controversial. In fact, the administrative law judge who heard the case reached the same conclusion.

Although the ALJ had concluded that *Register-Guard*'s policy restricting the use of the e-mail system for non-work related solicitations was not facially unlawful, he determined that the employer's application of the policy to the three union-related e-mails at issue was unlawful because its facially lawful policy was enforced in a

discriminatory manner given the record evidence that the employer tolerated employee utilization of the e-mail system for other non-work related communications.

The Board majority, however, reversed the ALJ's conclusion with respect to two of the three e-mails in question, and in doing so, admittedly revised the Board's established definition of what constitutes discrimination in the context of work rule enforcement against Section 7-type activity. Previously, the Board had long held that an employer violates Section 8(a)(1) of the Act by allowing employees to use its equipment for any non-work related reasons while prohibiting its use for Section 7-related activities.[6] The Board, prior to its decision in *Register-Guard*, had never differentiated between non-work related uses of employer property when determining whether an employer was guilty of discriminatory enforcement.

The Board majority, however, revised the definition of discrimination such that an employer could lawfully allow its employees to use its property for personal non-work related reasons like wedding and birth announcements, the sale of personal items and party invitations, but prohibit its use by employees on behalf of outside organizations. Thus, according to the majority, an employer "may draw a line between charitable and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, …" *Register-Guard*, supra, at 1118.

Applying the new definition of discrimination to the facts in the case, the Board determined that two of the three e-mails for which the employee had been disciplined constituted solicitations on behalf of the union, an outside organization. It noted that although the record contained evidence that the employer had permitted employees to use the e-mail system to solicit on behalf of personal causes there was no evidence that it had ever tolerated the use of its e-mail system for non-work related solicitations on behalf of outside organizations. Thus, it ruled that the employer did not violate the Act by disciplining the employee for sending the two e-mails in question. The Board reached a different conclusion with respect to the third e-mail at issue. It noted that this e-mail could not be characterized as a solicitation, but was an attempt to clarify some facts related to a union activity. It noted that the employer's policy did not prohibit all non-work related communications on its e-mail system, only non-work related solicitations, and that the employer had permitted a variety of non-work related electronic communications other than solicitations. Therefore, it concluded that the employer had violated the Act by disciplining the employee for using the e-mail system to send a union-related, non-solicitation communication.[7]

Regardless of whether parties appearing before the Board agree with the majority's position on an employer's right to restrict use of the e-mail system for non-work-related purposes, presumably they will have little difficulty understanding and adhering to the standard. In fact, given that it is identical to the standard that has been used for all other types of employer property for over 60 years, it would be surprising if all parties could not quickly grasp and adapt to this portion of the ruling.

It is not apparent, however, that the Board's new definition of discrimination can be as easily comprehended and followed. In this regard, although *Register-Guard* involved only the use of the employer's e-mail system, as the majority acknowledged, the new definition of discriminatory enforcement could affect virtually all forms of Section 7 activity on an employer's premises. The majority's recitation of the distinctions an employer could make in enacting and enforcing workplace rules on page 1118 of the decision highlights the type of judgments employers, unions and their representatives would have to make before deciding on how to proceed. Likewise, the distinction that the Board drew between the e-mails at issue in this case reinforce how difficult it might be for everyone, but particularly employees seeking to engage in Section 7 activity, to determine exactly what is permitted. It is apparent that all parties, including unions, employers, and their advocates will have to carefully analyze workplace rules, examine exactly how the rules have been enforced in the past, and then determine exactly what employees should be permitted to do.

It is not unreasonable to expect that the Board, as it is presently constituted, might revisit and modify portions or all of the *Register-Guard* holdings. In fact, some pundits predicted shortly after the 2008 elections, that a re-examination of *Register-Guard*, especially the new definition of discrimination, might be one of the first priorities for a new Board.[8] If the Board is inclined to revisit at least this aspect of *Register-Guard*, presumably any case in which it is alleged that the employer discriminatorily enforced rules prohibiting solicitation, distribution, or posting would provide it with an opportunity to do so.

(2). *Madison Square Garden Ct.*, 350 NLRB 117 (2007)

The Board's decision in this case, which came on the heels of an earlier decision in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), has the potential to significantly impact how parties conduct themselves during an organizing drive. In this case, the Board came close to, without saying as such, adopting a per se rule that a low level supervisor's involvement in the collection of union authorization cards warrants setting aside any election in which a union wins.

This case arose from a 2000 organizing drive. Following an election won by the union, the employer filed objections, seeking to have the election overturned because of the pro-union activity of some relatively low-level supervisors. In this regard, the alleged supervisors' pro-

union activities included the distribution of authorization cards for other employees to sign. The Regional Director originally recommended dismissal of the objections on the basis that the individuals in question were not supervisors and the Board denied the employer's Request for Review on this finding. In turn, the employer engaged in a technical refusal to bargain. The Board, in response, remanded the original representation case back to the Regional Director for a re-examination of the employees' supervisory status in light of the Supreme Court's intervening decision in *NLRB v. Kentucky River*, 532 U.S. 706 (2001). On remand, the Regional Director concluded that the employees were supervisors because of their authority to issue discipline short of discharge, but concluded that the supervisor's alleged pro-union conduct did not constitute objectionable conduct. Over seven years after the original election, the Board reversed the Regional Director and set aside the election based on these supervisors' involvement in the collection of authorization cards.

At the heart of this case was the Board's application of the new standard set forth in *Harborside Healthcare, Inc.*, supra, for determining whether an election should be set aside because of a low-level supervisor's participation in the collection of authorization cards. Prior to *Harborside*, the Board would not set aside an election based on pro-union conduct by supervisors where the employer had communicated its opposition to union representation to its employees, unless the pro-union conduct by the supervisors in question could have reasonably tended to coerce employees into voting for the union based on the fear of retaliation or the hope of reward. *Lil-Base Co.*, 290 NLRB 1179 (1988). In evaluating the likelihood of coercion, the Board examined the nature and degree of authority possessed by the supervisors alleged to have engaged in pro-union activity, and "their concomitant ability to reward or punish unit employees." *Luther-Roseville Medical Center*, 324 NLRB 218 (1997). Although not totally dispositive, the absence of evidence that the supervisors actually threatened retaliation or promised benefits was significant in the Board's analysis of whether the employees could have reasonably been coerced by the pro-union supervisor. *Luther–Roseville Medical Center*, supra; *Millsboro Nursing* 327 NLRB 879 (1999). Indeed, prior to *Harborside*, the Board was considerably more likely to overrule objections addressing pro-union supervisory conduct than it was to sustain them.

Harborside, however, represented a change in the Board's position on this issue. The Board stated that "absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with employee freedom to sign a card or not." The Board indicated in *Harborside* that there was a presumption that a supervisor's pro-union conduct and solicitation of cards interferes with employee choice, even in the absence of express threats, and that it would set aside an election where, in its judgment, the conduct could have materially affected the election. The Board stated that to determine whether the conduct materially impacted the vote it would examine: (1) the margin of the election; (2) whether the conduct was widespread or isolated; (3) the timing of the conduct in relation to the election; (4) the extent to which the conduct became known; and (5) the lingering effect of the conduct.

Madison Square Garden represented a retroactive application of *Harborside* and arguably presented a strong demonstration of the Board's inclination to apply *Harborside* as a per se rule. In this regard, the evidence in *Madison Square Garden* that the conduct in question could have affected the outcome of the election was not as compelling as the evidence in *Harborside*. First, the supervisors' authority was limited to the issuance of minor discipline and over eight weeks elapsed between the card solicitations and the election. In addition, the supervisors only passed out cards and did not collect them or ask for their return.

The *Harborside* and *Madison Square Garden* decisions, coupled with the Board's newer and more liberal definition of a supervisor in *Oakwood Health Care*, 348 NLRB 686 (2006), have the potential to significantly impact the parties' actions and the manner in which they conduct organizing drives. This is particularly true for unions, which could jeopardize their chances to ultimately organize a group by enlisting a close call or borderline supervisor in their cause. In this regard, if it unwittingly uses an employee to solicit authorization cards whose possible supervisory status has never been resolved and that person is later deemed to be a supervisor, then under these cases, there is a high probability that the election would be set aside if the union happened to prevail. This potential dilemma is exemplified by *Madison Square Garden*, where both the Regional Director and Board originally concluded that the employees in question were not supervisors and then had to reconsider once the law changed. As a result, the union had an election set aside because employees who were deemed not to be supervisors when they first engaged in pro-union conduct were ultimately found to be so after a change in the legal standard.

Likewise, an employer may find itself having to make difficult choices when confronted with a close call supervisor's involvement in the solicitation of authorization cards. In such a situation, it may decide to take measures to force the possible supervisors to cease and desist from the pro-union activity, and run the risk that the person will be deemed not to be a supervisor and its actions therefore unlawful. An employer could decide, however, to overlook the supervisors' pro-union conduct and essentially reserve a possible objection if the union wins the election. Regardless of what choice it makes, each comes with its own consequences and risks.

Once again pundits have predicted that a Board whose members have been appointed by the new president will reverse *Harborside Healthcare* and *Madison Square*

Garden at the first opportunity, and return to the previous standard.[9]

(3). *TruServ Corporation*, 349 NLRB 227 (2007)

In this case, another 2007 decision, the Board by a 3 to 2 vote, with Members Liebman and Walsh dissenting, overruled extant precedent. *TruServ* involved the question of whether the settlement of a Section 8(a)(5) unfair labor practice charge precludes the processing, and requires the dismissal, of a decertification petition filed after the alleged unfair labor practice, but before the execution of a settlement agreement. The Board held that in these circumstances, dismissal of the petition is unwarranted and that it can be processed and an election held upon the conclusion of the remedial period required by the settlement agreement. The Board indicated that this principle would apply even if the parties' post-petition settlement included reaching an agreement on a new contract that would otherwise serve as a bar. The Board noted that notwithstanding its decision in this case, it would still adhere to long-established precedent requiring the dismissal of a decertification petition that was filed after the settlement of a Section 8(a)(5) charge. *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951).

Unlike the other cases discussed in this article, the Board's decision in *TruServ* did not overturn years of established precedent, but instead is more reflective of the change in the law that normally occurs when the composition of the Board changes due to election outcomes.

In this regard, in 1984, the Board decided that the resolution of an unfair labor practice charge did not preclude the processing of petitions filed prior to the resolution. *City Markets*, 273 NLRB 469 (1984). In that case, decertification petitions for two separate units were dismissed, subject to reinstatement because of a pending 8(a)(5) charge that precluded a question concerning representation. Subsequently, the parties reached agreement on new contracts, and the union, as part of the agreement, withdrew the charges that had precluded the processing of the petition. Upon the petitioners' requests, the Board ruled that the petitions should be reinstated, noting that the unfair labor practice charges had been withdrawn without a formal finding that the law had been violated.

City Markets involved a non-Board resolution of a case in which the Regional Director decided to issue complaint. In *Passavant Health Center*, 278 NLRB 483 (1986), the Board extended the *City Markets* holding to cases involving informal settlement agreements approved by the Regional Director. In that case, the Board affirmed that, absent a finding or an admission of unfair labor practices, there was no basis to conclude that petitions filed before the execution of the settlement were tainted by unlawful conduct.[10]

In 1995, however, the Board reversed *Passavant* and held that the settlement of an unfair labor practice charge that would preclude the existence of a question concerning representation bars the processing of any petition that was filed after the alleged violation, but before the settlement. *Douglas-Randall*, 320 NLRB 431 (1995). *Douglas-Randall* involved an informal settlement agreement approved by the Regional Director after a decision to issue complaint, but the Board subsequently applied its holding in that case to circumstances where a case was resolved by non-Board settlement after the Regional Director issued complaint. *Liberty Fabrics*, 327 NLRB 38 (1998). Finally, the Board applied the *Douglas-Randall* holding when the unfair labor practice charge was still under investigation and the parties reached a new collective-bargaining agreement even before the Regional Director made a merit determination. *Supershuttle of Orange County*, 330 NLRB 1016 (2000).

The Board in *TruServ* overruled *Douglas-Randall* and its progeny, and indicated that it was returning to the doctrine enunciated in *Passavant Health Center*, supra. It is evident that at the core of the Board majority's holding in *TruServ* is a belief that dismissing a petition without a finding or an admission that unfair labor practices that would have tainted the petition had been committed is an unwarranted infringement on employees' right to free choice under the Act.

The dissent maintained that the Board's *TruServ* holding undermines the Board's policies of promoting the peaceful settlement of unfair labor practice cases and the fostering of stable collective bargaining relationships. In particular, the dissent observed that the majority's holding created a disincentive for a union to settle, noting that a union would be reluctant to resolve a case by any means if it knew that it still must contend with a decertification petition. The majority responded to this criticism by recognizing that a union might feel a diminished incentive to settle under its ruling, but stated that possibility did not overcome what it saw as the intrusion *Douglas-Randall* and its progeny imposed on Section 7 rights and employee exercise of free choice. The majority stated that in cases where Regional Directors are convinced that the alleged unfair labor practices tainted the petition, they can include the petitioner in the settlement discussions and attempt to secure an agreement to withdraw the petition. Likewise, according to the majority, if a Region is convinced that an employer is guilty of unfair labor practices that would taint a petition, it can insist that any settlement contain an admission of liability. If a withdrawal of the petition cannot be secured, or an admission of liability obtained, the Region could ultimately litigate the matter if it truly believes that the alleged unfair labor practices tainted the petition.

The contrary holdings of *TruServ* and *Douglas-Randall* illustrate the tensions that sometimes arise between employees' exercise of free choice and the promotion of stable collective bargaining and the peaceful resolution of unfair labor practice disputes. There is also no question

that the *TruServ* decision has the potential to substantially impact the likelihood of settling an unfair labor practice case. If a union is truly concerned about the pendency of a decertification petition, there is very little incentive for it to agree to any resolution of a pending charge, but especially a non-Board resolution. In addition, even though the Board's majority indicated that a Regional Director can refuse to approve an informal settlement if it does not provide for a withdrawal of the petition by the petitioner or an admission of liability by the employer, it seems apparent that a case will still be more difficult to settle and more likely to be litigated under these circumstances. Thus, Regions may be faced with having to choose between accepting settlements that leave the fate of a decertification petitions unresolved, or litigating a case that otherwise could be settled.

Surely, as the majority asserts, however, there would be cases where adherence to *Douglas-Randall* would result in the dismissal of some petitions that were not tainted by unfair labor practices.[11] It is difficult to conceive of a standard that would perfectly balance what are sometimes the conflicting legitimate considerations of promoting the settlement of unfair labor practice charges and the exercise of employee free choice. In *TruServ*, the Board struck the balance in favor of the latter. If the current Board overrules *TruServ* and reverts to *Douglas-Randall*, it will have tilted the fulcrum in favor of the former. Given that the Board's position on the issue addressed in *TruServ* has changed every time the White House has changed hands over the last 25 years, it would appear that there is a strong likelihood that a new Board will overrule *TruServ* and return to *Douglas-Randall*.

(4). *Grosvenor Orlando Associates, LTD*, 350 NLRB 1197 (2007)

St. George Warehouse, 351 NLRB 961 (2007)

In these two September 2007 cases, the Board issued decisions that modified established precedent regarding a discharged employee's obligation to seek interim employment. In *Grosvenor*, the employer unlawfully fired a group of unfair labor practice strikers in 1996. The Employer contested the case throughout the administrative process and after a United States Court of Appeals enforced the Board's Order requiring the employer to reinstate the employees and make them whole, the employer litigated back pay issues in a compliance proceeding. In a decision in which it adopted many of the ALJ's determinations on back pay, the Board by a 2 to 1 vote redefined what constitutes an adequate search for work by imposing a deadline for commencing a search for interim employment after an unlawful discharge. It also concluded that many of the discriminatees had incurred willful loss at times during the initial stage of back pay period by applying to a limited number of places. Particularly noteworthy was the Board's announcement that, absent unusual circumstances, it would toll the back pay period for anyone who did not commence a search for work within two weeks of their discharge, until they actually began their search for work. Likewise, it found that an employee who otherwise began a timely search for work conducted an inadequate search by submitting only three applications in a two-month period.[12] The Board repeatedly concluded that other employees who submitted applications at the rate of once a month during the first quarter following their discharge conducted an inadequate search during the quarter in question and tolled their back pay for that period.

The Board issued *St. George Warehouse*, a second back pay decision, less than three weeks after its decision in *Grosvenor*. In this case, the Board, by a 3 to 2 vote, modified existing law on which party bears the burden of willful loss during a compliance proceeding. Prior to *St. George Warehouse*, for more than 45 years, the Board required the employer, or in CB cases, the union, to produce all of the facts to substantiate an affirmative defense that a discriminatee unreasonably failed to search for work. *St. George Warehouse*, supra, at 967. In that case, the majority reaffirmed that a respondent has a burden of persuasion when it asserts that a discriminatee has conducted an unreasonable search for work. It noted, however, that the contention that a discriminatee has failed to make a reasonable search for work has two elements: (1) there were substantially equivalent jobs within the relevant geographic area and (2) the discriminatee unreasonably failed to apply for those jobs. *Id.* at 961. The majority noted that established Board law placed the burden of proving both elements on a respondent, but it decided going forward that if a respondent satisfied its burden of establishing that there were substantially equivalent jobs available, the discriminatees and General Counsel would bear the burden of going forward with evidence that discriminatees sought those jobs. The Board reasoned that the discriminatees and the General Counsel, who advocates on their behalf, are in the best position to know the scope of the employment search and why it was conducted in the manner it was.

In *St. George*, a one-day back pay hearing was conducted at which the General Counsel called no witnesses. The employer asserted only one defense, that the two discriminatees did not conduct an adequate search for interim work. To support this contention, the employer presented as its only witness a labor market specialist, who testified that she had conducted a labor market survey by examining public sources and newspaper ads and determined that there was a sufficient number of comparable jobs to conclude that during the times of their unemployment the discriminatees had not conducted an adequate search for work. The ALJ concluded that this testimony was insufficient to satisfy the employer's burden, and awarded the entire amount of back pay sought. The Board's majority, contrary to the ALJ and based on its new burden allocation, concluded that the employer had satis-

fied its obligation to establish that there were substantially equivalent jobs available. As a result, it concluded that the burden had switched back to the General Counsel and the discriminatees to show that they had adequately searched for work. Recognizing that existing Board law did not impose such an obligation at the time of the hearing, the Board remanded the matter to allow the parties to produce such evidence.

The dissent criticized the majority for breaking from established precedent and shifting the burden away from the "wrongdoer." It also faulted the Board for abandoning a legal standard that had enjoyed considerable judicial approval. Finally, Member Liebman wrote separately to express her view that the majority's decision weakened what was already an insufficient remedy.

The effect of these two decisions is going to require discriminatees and the unions or representatives who are assisting them to be mindful about not only the need to initiate a meaningful search for work quickly, but to also thoroughly document the steps they take to find interim employment. Along the same lines, Regional Offices have been instructed to advise anyone who files a charge alleging that they were unlawfully discharged of the requirements imposed by these two decisions and the need to keep adequate records of their search for work.[13]

(5). *Dana Corp./Metaldyne Corp.*, 351 NLRB 434 (2007)

Shaw's Supermarkets, Inc., 350 NLRB 585 (2007)

Wurtland Nursing and Rehabilitation, 351 NLRB 817 (2007)

This article addresses these three seemingly disparate decisions simultaneously because, as a group, they further demonstrate the debate within the Board that was carried on in a number of 2007 decisions about exactly where the balance should be struck between the statutory objectives of protecting employees' exercise of free choice and promoting stable collective bargaining. In addition, the three cases seemingly reflect incongruities within both factions in an ongoing debate about the role of the NLRB election process as a tool for capturing employees' preference for union representation.

Other than *Register-Guard*, supra, perhaps no 2007 decision drew more attention and provoked more debate than the Board's decision in *Dana Corp./Metaldyne Corp.* (*Dana*) to modify the recognition bar. For over forty years prior to the Board's decision in *Dana*, after an employer granted voluntary recognition, the union enjoyed an irrebuttable presumption of majority status for a "reasonable" period of time to negotiate a contract. *Keller Plastic Eastern, Inc.*, 157 NLRB 583 (1966). In addition, if a contract was negotiated during this reasonable period it would serve as a bar to an election for as much as almost three years. This principle became known as the recognition bar doctrine, and it applied equally to decertification and rival union petitions.

In *Dana*, the Board's majority, comprised again of Chairman Battista and Members Schaumber and Kirsanow, stated that the statute reflected a preference for NLRB-conducted elections. It observed that statutory preference for Board conducted elections is predicated on the greater reliability of elections to serve as a barometer of employee choice and noted that the Supreme Court had observed that authorization cards are "admittedly inferior to the election process" (quoting *NLRB v. Gissel Packing, Co.*, 395 U.S. 575, 603 (1969)). Given that the majority construed the statute to favor elections and noting that it was widely recognized that the election process was superior to authorization cards for capturing employees' preference for union representation, they believed that revisions to the recognition bar doctrine were warranted.

Therefore, it modified the doctrine to require a 45-day notice period before the recognition bar took effect. If no decertification or rival petitions are filed within the 45-day notice period, the union will enjoy an irrebuttable presumption of majority status for a reasonable period of time and any contract that is negotiated, including one that is reached during the 45-day notice period, would be a bar for a period of up to three years. If on the other hand the 45-day notice period, which only commences upon the posting of a notice, does not elapse, there will be no election bar regardless of how long it has been since recognition was granted and a collective bargaining agreement reached.

The Board, after revising the recognition bar doctrine, described the details of the notice-posting requirement. Under the new requirement, if the parties enter into a voluntary recognition agreement, they are expected to notify the appropriate Regional Office in writing of this development. In turn, the Regional Office will send official NLRB notices to be posted in the workplace. The notices will advise employees: (1) of the grant of recognition and the date on which it occurs; (2) their right, whether they signed a card or not, to be represented by a union of their choice, or no union at all; (3) within 45 days from the posting, if a decertification or rival union petition supported by or 30 percent showing of intent is filed, it will be processed in accordance with traditional Board processes; and (4) if no petition is filed within the 45-day notice period then there can be no challenge to the union's status for a reasonable period of time. The Board indicated that the new requirements would only be applied prospectively.[14]

The dissent criticized the majority for overruling established precedent. It maintained that the majority's decision destabilized collective bargaining and relegated voluntary recognition to disfavored status by allowing a minority of employees to highjack the collective bargain-

ing process just as it is getting started. *Dana Corp.*, supra, at 450.[15]

On their face, *Shaw's Supermarkets* and *Wurtland Nursing* do not appear to have any similarity with *Dana*. Neither case involves a voluntary grant of recognition, but both instead arise from the withdrawal of recognition while a decertification petition was pending. In *Shaw's*, the employees filed a petition after the third year of a five year contract. The petition was supported by a showing of interest signed by a majority of employees in which they expressed their desire not to be represented by the union. A copy of the showing of interest petition was furnished to the employer, who withdrew recognition. After the third year of the agreement, the contract did not bar the processing of a petition, and although the law had long allowed employees and rival unions to file petitions after the third year of an agreement of a long-term agreement, employers had never been able to file petitions during the term of a contract, regardless of its length. *Montgomery Ward & Co.*, 137 NLRB 346 (1962). In addition, in other circumstances, the law indicated that an employer which had agreed to a contract was foreclosed from withdrawing recognition even in those circumstances where the contract could not serve as a bar. *Young Women's Christian Association of Western Massachusetts*, 349 NLRB 762 (2007). In *Shaw's*, however, a Board majority indicated that a contract which was still in effect, but could no longer operate as a bar, did not preclude an employer from withdrawing recognition if it possessed evidence that a majority of employees no longer supported a union.

Wurtland, supra, presented a different issue. In that case, the employees filed a decertification petition supported by a showing of interest petition containing a caption that read, "We the employee's (sic) of Wurtland Nursing and Rehab wish for a vote to remove the Union, SEIU 1199." When the employer received a copy of the showing of interest petition and ascertained that it had been signed by a majority of the employees, it withdrew recognition. A two-member majority of Chairman Battista and Member Kirsanow reversed the ALJ and held that the wording of the petition was more than a request for an election and was a clear unequivocal expression of the employees' desire to remove the union and that therefore the withdrawal of recognition was lawful. Member Walsh, in dissent, noted that the petition could be interpreted just as reasonably as a request for an election, and that any ambiguity should be weighed against permitting a unilateral withdrawal of recognition. Member Walsh indicated that under these circumstances the employees' true sentiment about union representation would have been best captured by a secret ballot election.

In her previously mentioned testimony before the Joint House and Senate Subcommittees, Member Liebman noted that the employers' withdrawals of recognition in *Shaw's* and *Wurtland* deprived the employees of the elections they sought when they filed their decertification petitions. She accused the majority of favoring the election process in *Dana* but giving it short shrift in *Shaw's* and *Wurtland*. She asserted that the contrast in approaches raised questions about the Board's fairness.[16] Although the members of the *Dana*, *Shaw's* and *Wurtland* majorities never specifically addressed Member Liebman's assertion, it seems likely that they might assert that Members Liebman and Walsh also hold inconsistent views on when elections are best suited to resolve questions concerning representation by minimizing the suitability of elections in *Dana*, but emphasizing it in *Shaw's* and *Wurtland*.

Any new Board, regardless of how it is constituted, is going to have to wrestle with striking a proper balance between protecting the exercise of free choice and encouraging and promoting stable collective bargaining relationships. It is also going to have to define exactly what roles elections should play in this process. Those of us who observe and follow the Board and work in the field will be keenly interested in the choices that are made.

Endnotes

1. As evidence of the attention given to the decisions in 2007, the Subcommittee on Employment and Workplace Safety, United States Senate and the Subcommittee on Health, Employment, Labor and Pensions, House of Representatives, held joint proceedings to which they invited then-Chairman Robert Battista and then-Member, and current Chairman, Wilma Liebman to present their perspectives on the Board's recent decisions.
2. Statement of Wilma Liebman, Member, National Labor Relations Board before the Subcommittee on Employment and Workplace Safety, United States Senate, Subcommittee on Health, Employment, Labor and Pensions and House of Representatives (December 13, 2007). In her statement, Member Liebman characterized the level of dissents as unprecedented and contrasted the 34% dissent rate in 2007 with the dissent rate of 17% from the mid-1980s, in what had been previously regarded as an unusually contentious period for the Board.
3. The first alleged violation in *Register-Guard* occurred in May, 2000.
4. For over 60 years prior to *Register-Guard*, the Board held that employees had no Section 7 right to use their employers' property to engage in pro- or anti-union activity. Thus, employees have no statutory right to utilize their employers' bulletin boards, *Eastern Technologies*, 322 NLRB, 848, (1997); video equipment, *Mid-Mountain Foods*, 332 NLRB 229 (2000); and telephones, *Churchill Supermarkets*, 285 NLRB 138 (1987).
5. The opening of the dissenting opinion reflects the depth of disagreement on this question. Members Liebman and Walsh wrote, "Today's decision confirms that the NLRB has become the 'Rip Van Winkle of administrative agencies.'" *NLRB v. Thrill, Inc.*, 980 F. 2d 1137, 1142 (7th Cir. 1992). "Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace. In 2007, one cannot reasonably contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper." *Register-Guard*, *supra* at 1121.
6. *Vons Grocery Co.*, 320 NLRB 53 (1995) and *Honeywell, Inc.*, 262 NLRB 1402 (1982) (bulletin boards). *Richmond Times-Dispatch*, 346 NLRB 74, (2006) and *E.I. DuPont de Nemours & Co.*, 311 NLRB 893 (1993) (e-mail systems).
7. Members Liebman's and Walsh's disagreement with the majority's decision to overturn what it characterized as "bedrock Board

precedent about the meaning of discrimination as applied to Section 7" was at least as strong as its dissent from the majority's conclusions about the employer's right to limit e-mail usage. *See Register-Guard*, *supra*, at 1130, fn. 26. In addition, the United States Court of Appeals, (D.C. Circuit) also disagreed with the Board's holding on this issue. On appeal, it reversed the Board on relatively narrow grounds. *Guard Publishing Co. v. NLRB*, 971 F. 3d 53 (D.C. Circuit 2009). The Union only sought review of the Board's conclusion that the employer's enforcement of the rule with regard to the two solicitation e-mails was not discriminatory. Therefore, the court did not address the Board's ruling that an employer could adopt a policy limiting the use of its e-mail systems. It also did not pass on the Board's effort to redefine discrimination. Instead, it noted that the employer's published rule banned all non-work related solicitation via e-mail, and that the Board's distinction between solicitations on behalf of outside organizations and other non-work related activities was a distinction that was not reflected in the rule itself. Thus, it concluded that discipline given for sending all of the union-related e-mail was unlawful.

8. *See e.g.*, "Top NLRB Precedents in Jeopardy Under an Obama Labor Board," by Paul Galligan, New York Law Journal (Jan. 15, 2009).

9. "Top NLRB Precedents in Jeopardy Under an Obama Labor Board," Galligan, *supra*; "Obama Administration: What Changes to Expect," prepared by Harold Coxson and Christopher Coxson of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. on behalf of the U.S. Chamber of Commerce (September, 2009).

10. In subsequent years, the Board further extended the *Passavant/City Markets* holdings by ruling that processing of petitions could be resumed even if the settlement agreement was approved unilaterally over the union's objections. *Nu-Aimco*, 306 NLRB 978 (1992).

11. An argument could be made that the majority's concern that the Board's position in *Douglas-Randall* unduly tramples on employees' right to exercise free choice, because it may result in dismissal of petitions in which no unfair labor practices were actually committed, applies equally to petitions that are filed after the settlement is reached. Therefore, the majority is arguably acting inconsistently by overruling *Douglas-Randall*, but reaffirming its continued adherence to *Poole Foundry*.

12. This particular employee applied for a job on October 1, 1996, three days after he was fired. He submitted an application for another job in November, and an application for a third job in early December. He was actually hired for the job for which he applied in December, but did not start until January, 1997. The Board, notwithstanding that he secured a job in early December to start in January, determined that his search for work in December was inadequate and tolled back pay for the entire fourth quarter of 1996. In dissent, Member Walsh accused the majority of imposing a new requirement that a discriminatee seek "interim interim" employment. The dissent also criticized the majority for requiring the employees to begin a job search while they were still picketing as part of a concerted effort to get their jobs back, and for failing to examine the entire back pay period, during which all discriminatees were gainfully employed after the first quarter.

13. Memorandum OM 08-54 (May 15, 2008), Memorandum OC 09-01 (October 3, 2009). Both of these memorandums can be found at www.nlrb.gov.

14. *Dana* is also high on many lists of cases that are likely to be reversed by a new Board. "Top NLRB Precedents in Jeopardy Under an Obama Labor Board," Galligan, *supra*, "Obama Administration: What Changes to Expect," prepared by Harold Coxson and Christopher Coxson of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. on behalf of the U.S. Chamber of Commerce (September, 2009).

15. As a note, Region 3's experience does not suggest that *Dana's* impact has been as great as expected. Since the decision issued in September, 2007, the Region has been advised of grants of recognition in 14 instances. In all instances, the 45-day notice period elapsed and no petitions of any kind were filed. Furthermore, the Region has had no case where it has processed a petition because voluntary recognition had been granted, but no 45 day notice had been posted.

16. Member Liebman's statement before the Subcommittee on Employment and Workplace Safety, U.S. Senate and Subcommittee of Health, Employment, Labor and Pensions, U.S. House of Representatives (12/13/07).

Paul Murphy is Assistant to the Regional Director, Region 3, Buffalo, NY.

Commuting as a Reasonable Accommodation Under the ADA: How Many Federal Circuits Will Be Along for the Ride?

By Douglas B. Cox and Adisada Dudic

I. Introduction

The Third Circuit Court of Appeals recently expanded the scope of the Americans with Disabilities Act of 1990 (ADA)[1] in *Colwell v. Rite Aid Corp.* by ruling that there is "nothing inherently unreasonable" in requiring employers to provide otherwise qualified employees with disabilities with assistance related to commuting to work.[2] In making this ruling, the Third Circuit held that the ADA is not strictly limited to issues in the workplace. The *Colwell* decision is a departure from the other federal circuits' previous rulings generally holding that employers are not responsible for making reasonable accommodations related to employees' commutes to and from work as commuting was regarded as an activity that falls outside of the scope of the job, and therefore not within employers' ADA responsibilities. Will the other federal circuits follow the lead of the Third Circuit in *Colwell*? How should employers in the Third Circuit and in the other federal judicial circuits react to this ruling?

II. Americans with Disabilities Act and Reasonable Accommodations

The ADA prohibits employers from discriminating against qualified individuals with disabilities in relation to their employment because of such employees' disabilities. With this prohibition comes the obligation that the employers make reasonable accommodations to known physical or mental limitations of otherwise qualified employees with disabilities unless such employers can demonstrate the accommodation would impose undue hardships on the operation of employers' businesses or would be a direct threat to the health and safety of the disabled employees themselves or others.

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities.[3] There are three types of reasonable accommodations under the ADA: (1) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (3) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

If an employee claiming a disability requests a reasonable accommodation, the employer is advised not to waste resources in trying to establish that the employee does not really have a disability. Instead, once an employee indicates a disability and requests a reasonable accommodation, the employee and the employer are to engage in an informal interactive process to ascertain a reasonable accommodation for the employee's disability which would not unduly burden the employer's business operations. It is generally accepted that employers may choose among reasonable accommodations as long as the chosen accommodation is effective.[4] However, the term "accommodation" inherently implies that an employer must be willing to, at the very least, consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable an employee with a disability to work.[5]

Both parties are to engage in the interactive process in good faith. The employee could demonstrate that the employer breached its duty to provide a reasonable accommodation by failing to engage in good faith in the interactive process by showing that: (1) the employer knew about employee's disability; (2) the employee requested accommodation or assistance for disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.[6] The employer, on the other hand, could show its compliance with the duty to make a good faith effort to provide a reasonable accommodation by taking steps such as the following: (1) meeting with the employee who requests an accommodation; (2) requesting information about the condition of employee's disability and the limitations on the employee due to the disability; (3) asking the employee what he or she specifically wants; (4) showing some sign of having considered the employee's request; and (5) offering and discussing available alternatives when the request is too burdensome.[7]

As indicated, the employer's obligation to provide a reasonable accommodation is limited to the extent that such modification or adjustment, if required, would cause undue hardship to the employer.[8] This undue hardship limitation refers to any significant difficulty or expense that would be imposed on the employer as a result

of providing a specific accommodation. Such a determination is made by focusing on the resources or circumstances of the particular employer in relation to the cost or difficulty of providing a specific accommodation. In practice, it is very difficult for employers to establish this affirmative defense. Unless there is a showing of unreasonable expense that will adversely impact employer's finances, the employer raising this defense will almost always lose.

III. Traditional Approach to Commuting Under the ADA

The judicial decisions following the enactment of the ADA established the principle that the ADA protections apply only once the disabled employee gets to work and that the employer has no duty to provide assistance to the employee with regard to getting to work. For example, in *Bull v. Coyner*,[9] a city government employee suffered from a condition which rendered him nearly blind, preventing him from driving at night. The supervisor forbade the employee's coworkers from giving him rides to and from work on the city's time and, eventually, even changed the employee's schedule so that he was forced to commute to work at night. Although the district court stated that the supervisor's actions "may have been insensitive or even malicious,"[10] it held that commuting to and from work is not part of the work environment that the employer is required to accommodate. Those activities that fall outside the scope of the job, like commuting to and from the workplace, would, therefore, not be within the scope of the employer's obligations under the ADA.

Further, the district court in *Salmon v. Dade County School Bd.*[11] found that commuting to and from work is an activity unrelated to and outside the work environment. There, the employee was a guidance counselor who suffered from a back condition requiring her to rest after completing the drive from home to work. The employee was the sole counselor at an elementary school with more than 1,000 low-income students with social and emotional problems. Her work report time was 8:15 a.m., but after her commute to work, the employee stated that she needed to rest and stretch in her car. She requested, as a reasonable accommodation, the ability to report between five to twenty-five minutes late to work in order to stretch and rest her back after commuting. The school's principal, in turn, "suggested that the employee leave home a little earlier to avoid heavy traffic and to give herself time to stretch and rest her back."[12] Since the employee persisted in reporting late to the workplace, the school district placed her in a non-promotable status claiming that prompt arrival is an essential element of the job for all employees. The employee was removed from the non-promotable status once she started reporting to work on time. The school did provide certain reasonable accommodations to the employee, including moving her office from the second to the first floor because she was unable to walk up the stairs and having students escorted to her office for counseling sessions so that the employee would not have to walk long distances to meet students. The employee sued the school district under the ADA alleging that the school district discriminated against her on the basis of her disability by refusing to allow her to report to work late or transfer her to another school closer to her home as a reasonable accommodation. The court found that the ADA does not require the school district to allow the employee to report late to work or to transfer the employee to a school closer to her home due to the disability because "[w]hile an employer is required to provide reasonable accommodations that eliminate barriers *in* the work environment, an employer is not required to eliminate those barriers which exist *outside* the work environment."[13]

The court in *Schneider v. Continental Cas. Co*.[14] also followed this line of reasoning. In that case, the employee had a back injury that was made worse by her commute into downtown Chicago. The employee requested that she be allowed to work out of another company office that would require a shorter commute. This request was rejected by the employer because the employee's job duties required that the employee be present in the downtown Chicago office. The court ruled that the employer was not required to eliminate the employee's "barrier outside of the work environment, i.e., her commute" as a reasonable accommodation.[15] The court noted that the employee was hired to work at the downtown Chicago office and that her hour-long commute was "self-imposed" because she could have made the choice to live closer to Chicago.[16]

Similarly, in *Pagonakis v. Express, LLC*, a co-manager, who had disabilities that were the direct result of an automobile accident, requested a number of accommodations. Those requested accommodations included the ability to arrive late to work without penalty in the case of inclement weather such as fog, snow, or rain and an early leave time to avoid driving home in the dark. The court found that employers are not required to grant accommodations relating to an employee's commute to and from work because the ADA "solely addresses discrimination with respect to 'terms, condition or privilege of employment.'"[17] These cases reiterate the principle that the ADA protections apply only once employees with disabilities arrive at work and that employers are not obligated to provide assistance to such employees with regard to getting to or from work.

The *Schneider* court cited an opinion letter by the Equal Employment Opportunity Commission's (EEOC) Deputy General Counsel which stated that "employers need not remove barriers away from the work environment" and that "[a]n employer is required to provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate barriers outside the work environment."[18] This line of cases

established a clear principle excluding commuting from employers' responsibilities under the ADA. This principle was, however, challenged in the Third Circuit with *Colwell v. Rite Aid Corp.* The *Colwell* decision represents an expansion of employers' ADA responsibilities when employees with disabilities request reasonable accommodations for disability-related commuting issues.

IV. *Colwell v. Rite Aid Corp.*

Jeanette Colwell worked as a cashier at a Rite Aid store, mostly weekday evenings from 5:00 to 9:00 p.m. After Colwell was diagnosed with retinal vein occlusion and glaucoma in her left eye, which eventually led to her becoming blind in that eye, Colwell informed her supervisor at Rite Aid that it was dangerous and difficult for her to drive to work at night due to the partial blindness.[19] Colwell could not use public transportation because the bus service stopped at 6:00 p.m. and there were no taxis available. Also, Colwell insisted that having to work night shifts created a hardship for her and her family members who had to drive her to work on those days when she was scheduled for night shifts.[20] Nonetheless, the Rite Aid supervisor told Colwell that assigning her to day shifts only "wouldn't be fair" to other workers and continued to schedule Colwell for evening shifts.[21] Colwell ultimately resigned due to the alleged mental distress caused by her former supervisor's treatment and indifference to her vision problems.[22]

Following her resignation, Colwell filed a lawsuit in the United States District Court for the Middle District of Pennsylvania against the Rite Aid Corporation and the supervisor claiming, *inter alia*, causes of action under the ADA. The district court, following the then-prevailing position on the matter, found that the ADA is designed to address such barriers to an employee's ability to work which exist inside the workplace, but that the ADA does not extend to those difficulties which the employee may experience in relation to the employment, but over which the employer has no control.[23] Further, recognizing that the accommodation that Colwell sought "had nothing to do with the work environment or the manner and circumstances under which she performed her work," the district court held that Rite Aid had "no duty to accommodate [Colwell] in her commute to work."[24]

On appeal, the main issue for the Third Circuit was whether a request for a shift change by a disabled employee unable to drive at night due to partial blindness can be considered a reasonable accommodation under the ADA. Contrary to previous decisions, the Third Circuit held that the ADA is not strictly limited to issues in the workplace. The court concluded that, as a matter of law, changing Colwell's working schedule to day shifts only in order to alleviate her disability-related difficulties is the type of accommodation that the ADA statute contemplates.[25] Referencing the Congressional intent to include workplace accessibility for disabled employees in the ADA, the Third Circuit observed that there is "nothing inherently unreasonable" in requiring that employers provide otherwise qualified disabled employees with assistance related to commuting to work.[26]

In sum, according to the Third Circuit, the ADA can compel the employer, under certain circumstances, to accommodate an employee's disability-related difficulties in getting to work, if such accommodation is reasonable.[27] Although careful not to say that employers are responsible for how employees get to work, the Third Circuit rendered the requested accommodation in *Colwell*, a shift change, as being reasonable and within the contemplation of the ADA.

V. Implications of *Colwell v. Rite Aid Corp.*

The *Colwell* decision thus holds that the ADA protections may extend beyond the scope of the disabled employee's work environment while the employee is within the four corners of the workplace to also encompass the disability-related accommodations relating to traveling to and from the workplace. The EEOC supported Colwell in her appeal under the ADA and submitted an amicus brief to the Third Circuit outlining its position. Relevant to the *Colwell* decision, § 12111(9)(B) of the ADA provides that the term "reasonable accommodation" may include job restructuring, part-time or modified work schedules, and other similar accommodations for individuals with disabilities.[28] Contrary to the EEOC's opinion letter referenced in *Schneider*, the EEOC here urged that the reasonable accommodations as set out in § 12111(9)(B) are not strictly limited to address only those issues that disabled employees face in performing their jobs once they are at the workplace.[29] Also, the EEOC insisted that the district court's conclusion that the accommodation obligations under the ADA are limited to the workplace or the work environment has "no basis in law or logic, and… subverts the purpose of the reasonable accommodation provision."[30]

According to the EEOC, the plain language of the ADA does not limit an employer's obligation to accommodating an employee's disabilities that affect performance of the essential work functions. Instead, the EEOC suggests that an employee with a disability who can perform all essential work functions without an accommodation is nonetheless entitled to an accommodation to her "known physical or mental limitations."[31] Highlighting that Congress intended to extend the employer's duties beyond the boundaries of the workplace, the EEOC demanded a conclusion that in situations where an employee is able to perform the essential work functions without accommodations, but is seeking a schedule adjustment to be able to get to and from the workplace, such an employee is seeking an accommodation contemplated by the ADA.[32] The EEOC urged that a shift change is reasonable accommodation under the ADA because, even though employers have no control over how their employees get to work, employers nonetheless do control when the work is being done.[33]

The *Colwell* ruling supplements a prior decision by the Second Circuit in *Lyons v. Legal Aid Society*,[34] which was considered an anomaly in the ADA jurisprudence until *Colwell*. In that case, the employee suffered severe physical impairments that prevented her from walking long distances. She sued her employer, the Legal Aid Society, for refusing to provide her with financial assistance to pay for a parking space closer to work. The Second Circuit held that the employee stated a claim under the ADA and, depending on the circumstances in question, such an accommodation in the form of financial assistance might be reasonable. The Court purported that there was "nothing inherently unreasonable" in requiring the Legal Aid Society to provide a disabled employee with assistance related to her ability to get to work.[35] The Second Circuit considered an employer's ADA responsibilities to include reasonable accommodations associated with commuting and other issues related to an employee actually arriving at the workplace. Therefore, if an employee with a disability requests a part-time or modified work schedule based upon a difficulty with commuting to and from work related to that employee's disability, then considering such a reasonable accommodation and engaging in the interactive process with that employee is contemplated by the ADA.

The EEOC is very likely to continue to push for similar decisions in other circuits as well. The recently appointed EEOC Commissioner Chai Feldblum played a leading role in the drafting of the ADA.[36] Her appointment will likely contribute to the EEOC's attempt to change the previous restrictive judicial treatment of commuting under the ADA into a broader, more-encompassing interpretation of reasonable accommodations. As for the long line of cases which held that commuting is outside the purview of the ADA's reasonable accommodations provision, the EEOC purports that none of these rulings are binding and that their rationale should be rejected as it conflicts with the "ADA's goals of assuring 'equality of opportunity, full participation, independent living, and economic self-sufficiency' for individuals with disabilities."[37]

The era of employers being able to simply deny employees' requests for ADA reasonable accommodations related to commuting is over. Employers must now carefully consider any such requests. Work from home arrangements, telecommuting, modified work schedules, and other reasonable accommodations should be taken into consideration and discussed with the employee making the request for a reasonable accommodation. Some potential reasonable accommodations may be readily available, such as public transportation or perhaps even public transportation which certain communities provide specifically for the disabled. If this type of public transportation is less than fully reliable, an employer could, as an additional reasonable accommodation, further consider excusing late arrivals by an employee using such public transportation when the late arrival is the result of a delay in public transportation.

VI. Conclusion

The *Colwell* decision has, for all intents and purposes, changed the way employers must deal with requests by disabled employees for reasonable accommodations related to commuting. Requests for an ADA reasonable accommodation related to commuting are relatively common and we can assume that the EEOC will be looking out for *Colwell*-type cases in other circuits as well. Employers should ensure they are complying with all ADA provisions, particularly the obligation to engage in the interactive process in good faith, so as to avoid being the next test case for the EEOC. Engaging in the interactive process seems to be the simplest way to both protect employers from potential liability and to meet the needs of employees with disabilities seeking assistance with issues relating to their commute to and from work.

Endnotes

1. Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101 (1990) [hereinafter ADA].
2. *Colwell v. Rite Aid Corp.*, No. 08-4675 at 7 (3d Cir. April 8, 2010) (citing *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1517 (2d Cir. 1995)).
3. EEOC Enforcement Guidelines: Reasonable Accommodation and Undue Hardship under the ADA (Oct. 17, 2002).
4. *See Gratzl v. Office of the Chief Judges of the Twelfth, Eighteenth, Nineteenth, and Twenty-Second Judicial Circuits*, No. 08-3134 (7th Cir. April 7, 2010) (Here, the Seventh Circuit recently highlighted that the ADA does not obligate the employers to allow the disabled workers to dictate the terms of the reasonable accommodation. Employers are not required to make the exact accommodation that the disabled employees request and may reject the proposed accommodations if such accommodations would unduly burden the business operations so long as the employers offer a reasonable alternative.).
5. *Vande Zande v. Wisconsin Dept. Of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995).
6. *Taylor v. Phoenixville School District*, 184 F.3d 296, 317 (3d Cir. 1999).
7. *Id.*
8. *Id.* Another affirmative defense is the "direct threat" defense. *See Chevron U.S.A. Inc. v. Echazabal*, 122 S. Ct. 2045 (2002) (holding that the direct threat defense may be applied not only when the employee with a disability is causing harm to others, but also where the only threat of harm is to the disabled employee).
9. No. 98 C 7583 (N.D.Ill. Feb. 23, 2000).
10. *Id.* at 9.
11. 4 F. Supp. 2d 1157 (S.D.Fla. 1998).
12. *Id.* at 1159.
13. *Id* .at 1163.
14. No. 944721 (N.D.Ill. 1996) (stating that "[t]he court recognizes that the ADA is important legislation that seeks to integrate disabled individuals into the economic and social mainstream, and to ensure that the truly disabled will not face discrimination because of stereotypes or their insurmountable impairments. However, there is a clear line of demarcation between extending the ADA to a truly disabled individual so that individual can lead a normal life and allowing an individual with marginal impairment to

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use disability laws as bargaining chips to gain a competitive advantage." (internal citations omitted)).

15. *Id.* at 9.
16. *Id.* ("CNA is not required to transfer Schneider to the Downer's Grove facility as a reasonable accommodation because CNA does not provide such job transfers for employees without disabilities. Nor does CNA provide transportation to work for employees without disabilities who have difficultly using public or private transportation. Rather, CNA hires workers for particular offices with the reasonable expectation that the hired workers will remain at those offices, come to work and perform the tasks they were hired to perform. The ADA does not require CNA to reassign Schneider to an occupied position or create a new position at the Downer's Grove office in order to accommodate Schneider. It is undisputed that when Schneider was hired it was to work out of the Chicago office not the Downer's Grove office. Schneider then made the choice to live in Aurora rather than Chicago or closer to Chicago. Thus, the limitation of the hour commute was self-imposed by Schneider and at no time did she try to change this self-imposed limitation.").
17. *Pagonakis v. Express*, LLC. 543 F. Supp. 2d 453 (D.Del. 2008) (quoting *Bull v. Coyner*, No. 98 C 7583 (N.D.Ill. Feb. 23, 2000)).
18. *Schneider v. Continental Cas. Co.*, No. 944721, at 9 (N.D.Ill. 1996).
19. *Colwell v. Rite Aid Corporation*, No. 3:07cv502 at 1 (M.D.Pa. 2008).
20. *Id.* at 2.
21. *Id.* at 1.
22. *Id.* at 2.
23. *Id.* at 8.
24. *Colwell v. Rite Aid Corporation*, No. 3:07cv502, at 9 (M.D.Pa. 2008).
25. *Id.* at 6.
26. *Id.* at 7 (citing *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1517 (2d Cir. 1995).
27. *Colwell v. Rite Aid Corporation*, No. 08-4675 at 7 (3d Cir. April 8, 2010).
28. ADA, 42 U.S.C.A. § 12111(9)(B) (1990).
29. *Colwell v. Rite Aid Corporation,* No. 08-4675 at 7 (3d Cir. April 8, 2010).
30. Brief of Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant, at 8 [hereinafter EEOC Brief].
31. *Id.*
32. *Id.*
33. *Id.*
34. 68 F.3d 1512 (2d Cir. 1995).
35. *Id.* at 1517.
36. "President Obama Announces Recess Appointments to Key Administration Positions," The White House, Office of the Press Secretary, March 27, 2010.
37. EEOC Brief (citing ADA § 12101(a)(7)).

Douglas B. Cox is Senior Corporate Counsel at XO Communications. Adisada Dudic is Candidate for J.D./LL.M. in International and Comparative Law at Cornell Law School, Class of 2011.

Ethics Matters

By John Gaal

Q My corporate client has recently been sued and some of its employees are likely to be contacted directly by the plaintiff's attorney (and may even be deposed by her) as she prepares her case. My client has asked me to represent these potential witnesses individually as well (at its cost). Can I do that?

A Assuming there otherwise is no conflict of interest between these individuals and your existing corporate client, you probably can represent them under the Rules of Professional Conduct, but you should be cognizant of how a court might view that representation.

Under *Niesig v. Team I*, 76 NY 2d 363 (1990), certain corporate employees are considered "represented" by virtue of the fact that the corporate employer is represented. This is a relatively limited group of employees, however, and most employees are not considered represented simply because their employer is represented. The significance of representation is that a lawyer may not directly communicate with an individual who is represented by another lawyer without that other lawyer's consent. New York Rules of Professional Conduct, Rule 4.2. Consequently, if an employee is deemed represented because his or her employer is represented, opposing counsel may not unilaterally communicate with that individual and must instead go through the employer's counsel. The Court of Appeals in *Niesig* limited the scope of this "off limits" group in part to permit more wide-ranging "informal" discovery, which it viewed as a more effective and cost efficient alternative to costly formal discovery proceedings.

Assuming the individuals in question do not otherwise fall within the scope of your representation of their corporate employer under *Niesig*, by you undertaking their representation on an individual basis it will have the same effect on opposing counsel's right to unilaterally speak with them. Once represented by you, pursuant to Rule 4.2, opposing counsel must go through you to communicate with these individuals. (Of course, the result would be the same if these individuals chose to be represented by yet another lawyer—then neither you nor plaintiff's counsel would be able to communicate with these individuals on the subject of the representation without that other lawyer's consent.)

On occasion, courts have struggled with what they perceive as lawyers trying to circumvent *Niesig* and, through this kind of individual representation, place barriers to opposing counsel's attempts to engage in the very informal discovery promoted by *Niesig*.

In *Rivera v. Lutheran Medical Center*, 22 Misc 3d 178 (Sup. Ct. Kings County 2008) the court disqualified defense counsel after it (at its client's urging) offered to represent several individuals who were going to be witnesses in the case. The court clearly was annoyed at defense counsel's representation, finding that it was intended to "prevent plaintiff from exercising his right to informally interview these witnesses in accordance with *Niesig*…." The court went on to note that these individuals "were clearly solicited…to gain a tactical advantage in this litigation insulating them from any informal contact with plaintiff's counsel.…" Although the court disqualified defense counsel as a result of this representation (and other issues the court had with defense counsel), the court had to stretch to find a basis to support that disqualification decision.

Ultimately, the court relied on the ethics rules against solicitation to justify disqualification. Specifically, it found that by initiating contact with these individuals and offering representation at no charge (the fees were to be paid by the employer), the lawyers had improperly solicited these clients in violation of DR 2-103(A)(1) (at the time of this decision, the former Code of Professional Responsibility was in effect). That Disciplinary Rule provided:

> A. A lawyer shall not engage in solicitation:
>
> (1) by in-person or telephone contact or by real time or interactive computer-accessed communication unless the recipient is a close friend relative, former client or existing client.

(Under the new Rules of Professional Conduct, Rule 7.3 continues this same language.) Although it is not clear from the facts of the case, presumably the employer's attorneys initiated communication with these individuals by in-person or telephone contact. Had they made the same offer via letter, for example, there could be no violation of this rule, because written solicitations are not prohibited under either the former Code or the new Rules.

Interestingly, the court reached this decision based in large part on *U.S. v. Occidental Chemical Corp.*, 606 F. Supp. 1470 (W.D.N.Y. 1985). However, in that case, while the court did not look kindly on defense counsel undertaking representation of individual witnesses, it did not disqualify counsel. In addition, the ethics rules on client solicitation in 1985 were dramatically different than they

were under either the last version of the Code or the current Rules and thus there was more of a basis to question the validity of the solicitation.

Today, even if the *Rivera* court's approach is used, so long as the solicitation of the individuals is not by in-person, telephone or interactive computer-accessed communication, it should be permissible and presumably would provide no basis for disqualification. In addition, there should be no prohibition on the corporate employer reaching out to an individual and offering to pay legal fees if that individual wished to be represented by the employer's counsel (assuming no other conflicts exist). If the individual then initiates contact with the employer's lawyer there has been no improper solicitation. And of course, if the individual raises the issue of representation from the beginning, there should be no issue.

Thus, it is likely that you can represent these individuals (again, assuming no other conflicts) provided you are careful in terms of how you initially communicate with them. Nonetheless, if you or your client initiates that communication, you should be prepared for a possible adverse reaction by the court.

If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John Gaal at (315) 218-8288.

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

Update on *Garcetti*—Is Speech by Public Employees Still Protected?

By Hon. Katherine A. Levine

Traditionally, a public employee making a First Amendment retaliation claim pursuant to 42 U.S.C. § 1983 must first show that: (1) his speech was constitutionally protected, i.e., on a matter of public concern; (2) he suffered an adverse employment action; and (3) that the speech at issue was a substantial, causal or motivating factor in the government's decision to discipline him; i.e., that the action would not have been taken absent the employee's protected speech. *Mt Healthy C.S.D. v. Doyle*, 429 U.S. 274, 287, 283-87; 50 L. Ed. 2d 471 (1977); *Morrison v. Johnson*, 429 F.3d 48, 51 (2d Cir. 2005); *Decoma Love-Lane v. Martin*, 355 F.3d 766, 776 (5th Cir. 2003); *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). The first two elements involve questions of law whereas the third element is a question of fact. *Decoma Love-Lane*, 355 F.3d at 776.

Even assuming the employee meets this threshold requirement, the employer can still escape liability on either of two grounds by showing by a preponderance of the evidence that: (a) it would have taken the same adverse employment decision in the absence of the speech, *Mt. Healthy,* 429 U.S. at 286, see, *Locurto v. Safir*, 264 F.3d 154 (2d Cir. 2001); *Gardetto v. Mason*, 100 F.3d 803 (10th Cir. 1996) or, (b) the employee's speech interfered with the "effective and efficient fulfillment of the employer's responsibilities to the public" and that such disruption outweighed the First Amendment value of the employee's speech. *Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir. 1993) citing *Connick*, 461 U.S.138, 50, 75 L. Ed. 2d 708 (1983), 150.

A. Analysis of *Garcetti*

In *Garcetti v. Ceballos*, 547 U.S. 410, 164 L. Ed. 2d 689 (2006) the Supreme Court added a new element to this threshold determination by requiring that a public employee not only show that his speech was on a matter of public concern, but that he made this speech as a citizen as opposed to pursuant to his official duties. If an employee cannot make these two showings, his speech is not insulated from employer discipline. The Court thus "'narrowed the Court's jurisprudence in the area of employee speech' by further restricting the activity that is protected." *Weintraub v. Bd. of Educ., CSD, CNY*, 593 F.3d 196, 201 (2d Cir. 2010) quoting *Reilly v. City of Atlantic City*, 532 F.3d 216, 228 (3d Cir. 2008).

In *Garcetti,* Justice Kennedy, writing for the majority, first cited to the Court's prior reasoning in the seminal case of *Pickering v. Board of Education*, 391 U.S. 563, 568, 20 L. Ed. 2d 811 (1968), that it must first determine whether the employee spoke as a citizen, on a matter of public concern. 164 L. Ed. 2d at 699 citing 391 U.S. at 568. If the answer is no, the employee has no First Amendment cause of action based on his employer's reaction to the speech. 164 L. Ed. 2d at 699 citing *Connick, supra*, at 147, 75 L. Ed. 2d 708. If the answer is yes, then the question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. *Id.*, citing *Pickering*, 391 U.S. at 568.

Justice Kennedy then stated that the "controlling factor" which made that case different from the other precedents was that employee Ceballos prepared his memo "pursuant to his duties as a prosecutor" and thus fulfilled his responsibility to advise his supervisor as to how to best to proceed with a pending case. 547 U.S. at 421, 164 L. Ed. 2d at 701. Ceballos was thus doing what he was employed to do and the employer had the right to evaluate what he wrote as part of its function as an employer managing the workplace. 547 U.S. at 421-22, 164 L. Ed. 2d at 701-02. The Court then held that "when public employees make statements pursuant to their official duties,… [they] are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421, 164 L. Ed. 2d at 701. Therefore, if a public employee is charged with speaking or writing on a given topic, the Court reasoned, the fact that the topic is of public import does not shield the employee from "managerial discipline" based on that employee's work product. *Id*.

Garcetti thus works an innovation upon the law by adding a third element into the traditional *Pickering* analysis. *Weintraub v. Board of Education, CN,* 489 F. Supp. 2d 209, 214. (E.D.N.Y. 2007) *(Weintraub II).* Rather than ascertaining whether the speech was motivated by an employee's private interests, which was simply a corollary to the proposition that a state employee's speech must concern a matter of public interest in order to enjoy First Amendment protection, courts must now independently ascertain whether the speech was made in the employee's capacity as a private citizen rather than as an employee, a criterion that is never satisfied when the employee speech at issue was made pursuant to the employee's official duties." *Weintraub II*, *supra,* 489 F. Supp. 2d at 214. *See also*, *Anderson v. State of N.Y. Office of Court Administration*, 614 F. Supp. 2d 404, 428 (S.D.N.Y. 2009) (*Garcetti* and its progeny dictate that speech made by a public employee pursuant to her professional duties does not fall under First Amendment protection because it is not made as a citizen).

The caveats made by Justice Kennedy to his ruling are crucial. The Court first noted the fact that Ceballos

expressed his views inside his office rather than publicly was not dispositive since employees may receive First Amendment protection for expressions made at work. *Id.* at 700 citing *Givhan v. Western Line Consol. Sch. Dist*., 439 U.S. 410, 414, 58 L. Ed. 2d 619 (1979). Nor was the fact that the memo concerned the subject matter of Ceballos' employment controlling since the First Amendment protects "some expression related to the speaker's job." *Id.* at 701 citing *Pickering v. Bd. of Educ*., 391 U.S. 563, 20 L. Ed. 2d 811 (1968). Justice Kennedy paid homage to the Court's previous finding that "were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues." *Id.* at 700 citing *San Diego v. Roe,* 543 U.S. 77, 82, 160 L. Ed. 2d 410 (2004). As an example, Justice Kennedy noted that teachers are the members of a community most likely to have informed and definite opinions as to how funds allotted to the schools should be spent and must therefore be able to speak out freely on such questions without fear of retaliation. *Id.* at 701. Rather, "[t]he controlling factor in Ceballos' case was that his expressions were made pursuant to his duties as a calendar deputy." *Id.* at 701.

The Court refused to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there was room for debate and noted that employers could not restrict employees' rights by creating "excessively broad job descriptions." Nor would formal job descriptions govern since they often bore little resemblance to an employee's actual duties. *Id* at 701. Likewise, the listing of a specific task in an employee's written job description did not demonstrate one way or the other whether the task was within the scope of the employee's professional duties for First Amendment purposes. 547 U.S. at 424-25.

B. The Aftermath of *Garcetti*

Despite Judge Kennedy's caveats, it is clear that *Garcetti* has limited the scope of protection afforded to public employees when their speech does not squarely fall within the domain of public concern, but rather pertains to their scope of employment, and where they express their speech internally within the workplace.

Garcetti's imposition of an additional requirement onto a court's initial analysis—that the speech be made by an employee in his capacity as a citizen—in many instances is theoretical only. Where the employee's speech pertains to strictly personnel matters or management policies which affect him personally (speech which typically has never been protected, see, *Connick,* 461 U.S. at 114, *Branton v. City of Dallas,* 272 F.3d 730, 740 (5th Cir. 2001)), the courts will usually find that the speech was made pursuant to the employee's job duties.

Conversely, courts will find that an employee spoke as a citizen, regardless of whether he gained knowledge about his "speech" from his job or the speech was "pursuant to" his job duties, where the speech is at the core of what citizens are obligated to speak about, such as testifying at trial or speaking to the press or government about core matters of public concern, i.e., systemic corruption, or official malfeasance. In sum, the courts place great weight upon whether the speech is made to the outside world, as opposed to being made within internal channels at the workplace.

Illustrative of this trend is the courts' treatment of speech which can be characterized as whistleblowing, i.e. speech which discloses any evidence of corruption, impropriety, waste, misuse of public funds or other malfeasance on the part of government officials. Prior to *Garcetti*, the courts uniformly found that speech which can be of "substantial" public concern is entitled to be accorded significant weight in the *Pickering* balance. See, *Branton v. City of Dallas*, 272 F.3d 730, 739-41 (5th Cir. 2001) ("There is perhaps no subset of 'matters of public concern' more important {for purposes of First Amendment protection…than bringing official misconduct to light," *Baldassare v. State of New Jersey,* 250 F.3d 188, 197 (3d Cir. 2001).

However, this speech is often uttered by employees who, but for their job duties, would have no knowledge of these improprieties. *Garcetti* has caused the balance to shift away from protecting higher up employees whose core job duties involve detecting such waste and improprieties, unless such speech discloses systemic governmental breach of the public trust and is made to the outside world as opposed to through the internal channels of command.

C. Two Circuit Court Cases Which Illustrate These Principles

In *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008),[1] the Third Circuit cogently analyzed the additional requirements that the *Garcetti* decision grafted onto the court's analysis of First Amendment claims. Following *Garcetti,* "(a) public employee's statement is protected when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public "as a result of the statement he made (i.e., the Pickering balancing test)," 532 F.3d at 228.

The lower court had rendered its decision prior to *Garcetti* and found the speech at issue—the trial testimony of a police officer who had participated in an investigation conducted jointly by state and local police concerning corruption in the Atlantic City Police Department—to involve a matter of public concern. See, *Reilly v. City of Atlantic City*, 427 F. Supp. 2d 507 at 515-16 citing *Baldassare v. New Jersey,* 250 F.3d 188, 195-97 (3d Cir. 2001) (plaintiff's conduct and expression in an internal investigation of other officers at prosecutor's office matter of public concern); *Pro v. Donatucci*, 81 F.3d 1283, 1291 n.4

(3d Cir. 1996) ("context of [courtroom testimony] raises the speech to a level of public concern regardless of its content…").

The Third Circuit noted that the *Garcetti* Court had distinguished between Ceballos' preparation of a memo, which was akin to the other "daily activities" which he performed as a government employee such as supervising attorneys, investigating charges and preparing filings, with activities that contributed to the "civil discourse" which "retain the prospect of constitutional protection for the speaker. " 532 F.3d at 226, citing *Garcetti*, 547 U.S. at 422.

The Court then found *Garcetti* had not specifically addressed whether the First Amendment protections applied to the trial testimony of a public employee. 532 F.3d at 230. However, it noted that as a police officer, Reilly had assisted a state investigation of a fellow officer and testified for the prosecution at the subsequent trial and that said speech thus appeared "to have stemmed from his official duties in the investigation." *Id.*

However, the Court did not find it necessary to parse through Reilly's job duties in order to make a ruling since the "duty to testify has long been recognized as a basic obligation that every citizen owes his Government" and that such duty was so overarching as to mandate First Amendment protection. 532 F.3d at 231. Thus, "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee." *Id* at 231, citing to *Branzburg v. Hayes*, 408 U.S. 665, 690-91. 33 L. Ed. 3d 626 (1972) (duty to testify not vitiated by one's role as newsman) and *United States v. Nixon*, 418 U.S. 683, 709, 41 L. Ed. 2d 1039 (1974) (duty of President to testify). "That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully."[2] 532 F.3d at 231.

The trajectory in the case of *Weintraub v. Board of Education*, 593 F.3d 196 (2d Cir. 2010) also is helpful in comparing First Amendment jurisprudence pre- and post-*Garcetti*. Plaintiff Weintraub, a New York City teacher, alleged that he suffered a series of adverse employment actions, including termination, due to his complaints to supervisors and his filing a union grievance over the assistant principal's refusal to suspend a student who had been throwing books at him.

In its initial pre-*Garcetti* decision, the district court refused to dismiss Weintraub's First Amendment claim, reasoning that "the content of speech questioning and administrative response, or lack thereof, to discipline problems in the classroom relates to a matter of public concern, regardless of whether that speech comes from a[n] elected official, citizen or teacher." *Weintraub v. Bd. of Educ of the City of N.Y.*, 423 F. Supp. 2d 38, 52 (E.D.N.Y. 2006) ("*Weintraub I*"). The court also found Weintraub's motive for making the statements was a general concern for the safety of the "classroom and school" rather than for his personal gain.

Subsequent to *Garcetti,* the Board of Education moved for reconsideration of its motion for summary judgment. The District Court granted summary judgment on so much of Weintraub's speech involving private conversations with the A.P. wherein he expressed his dissatisfaction with the A.P.'s handling of the book throwing incidents, and his filing of a formal grievance itself since Weintraub was "speaking as an employee, proceeding through official channels to complain about unsatisfactory working conditions." *Weintraub v Board of Education, CNY,* 489 F. Supp. 2d 209, 214, 219 (E.D.N.Y. 2007) *(Weintraub II)*. The court denied summary judgment with respect to Weintraub's discussions with other teachers about the incidents and the A.P.s failure to impose adequate discipline, since these discussions were "clearly not within the scope of his employment duties." *Id.* at 220.

At the suggestion of the district court, Weintraub filed an interlocutory appeal on the following issue: "whether a public employee acts as an 'employee' or a 'citizen' when he notifies his supervisors, either formally or informally, of an issue regarding workplace safety that touches both upon a matter of public concern and the employee's own private interests." 593 F.3d at 200.

The Second Circuit stated that under *Garcetti*, if Weintraub "either did not speak as a citizen or did not speak on a matter of public concern 'he has no First Amendment cause of action based on his...employer's reaction to the speech.'" *Id.* at 201, citing *Sousa v. Roque*, 578 F.3d 164, 170 (2d Cir. 2009). The Court then held that by filing a grievance with his union to complain about his supervisor's failure to discipline a child in his classroom, Weintraub was "speaking pursuant to his official duties and thus not as a citizen." 593 F.3d at 201.

The *Garcetti* Court defined speech made "pursuant to" an employee's job duties as "speech that owes its existence to a public employee's professional responsibilities," 547 U.S. at 421, 164 L. Ed. 2d. The Second Circuit first noted that this inquiry was simple in *Garcetti* since the plaintiff admitted that his speech was part of his official duties, whereas Weintraub claimed that his filing of a grievance was not.

The Second Circuit then rejected Weintraub's contention that "pursuant to" meant that he was "required" as part of his employment duties to initiate grievance procedures. Rather, taking into consideration that the inquiry was a "practical one" (*Garcetti*, 547 U.S. at 424), the Second Circuit joined other circuits' conclusion that speech not necessarily required by or included in the job description could still be pursuant to official duties "so long as the speech is in furtherance of such duties." 593 F.3d at 202, 203 citing *William v. Dallas Ind. Sch. Dist*. 480 F.3d 689.

694 (5th Cir. 2007). Weintraub's grievance was "pursuant to his official duties because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties'" as a teacher—namely to maintain classroom discipline. 593 F.3d at 203 citing *Williams*, *supra*, 480 F.3d at 694. Weintraub's speech challenging the administration's failure to discipline a student in his class was a "means to fulfill" and "undertaken in the course of performing" his primary responsibility of teaching. *Id.*

Of crucial importance was the court's distinction between its decision and *Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410, 58 L. Ed. 2d 619 (1979).[3] In *Givhan*, the English teacher internally aired her grievances over the "respective roles of blacks and whites" in the schools and the impression the placement of blacks in non-teaching positions would leave on black students. The Second Circuit found that Givhan's grievances were not "in furtherance of" her core duties as teacher, in contrast to Weintraub's grievance over the administration's treatment of a student who threw a book at him. 593 F.3d at 204.

Finally, the Second Circuit stressed the importance of whether there was a "relevant citizen analogue" to the mode or forum in which the speech was made. The court first cited to *Garcetti's* distinction between an "employee grievance" for which there is no relevant citizen analogue, and "public statements outside the course of performing [an employee's] official duties," 593 F.3d at 203, citing *Garcetti*, 547 U.S. at 423. The *Garcetti* Court gave two examples of speech with a citizen analogue: (1) a school teacher's letter to a local newspaper and (2) discussions of politics with a co-worker. *Id.* citing *Garcetti* at 422-23. See also *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) (prison guard's complaint to state senator and Inspector General's Office about supervisor's failure to respond to inmates' sexually explicit behavior toward female guards protected since there was a relevant citizen analogue to the employee speech—the right to complain to elected public official and independent state agency about official malfeasance).

In contrast, the lodging of a union grievance was not a channel of discourse available to non-employee citizens. Rather Weintraub made this *internal communication* through channels established by his employer, the Board of Education.

In his dissent, Judge Calabresi stated that *Garcetti* required a "less expansive definition of speech made pursuant to...official duties," 593 F.3d at 205. Judge Calabresi framed the majority's holding as follows: a public employee's speech is "pursuant to official duties" when it both is "in furtherance of the employee's core duties" and has no relevant citizen analogue. 593 F.3d at 205. Judge Calabresi found that this test would allow retaliation against much speech that should be protected, especially in light of the Supreme Court's continued assertion that "the members of the community most likely to have informed and definite opinions" about an issue must be able to speak out freely about these issues. 593 F.3d at 207 citing to *Pickering*, *supra*, 391 U.S. at 572; accord *Garcetti*, 547 U.S. at 421.

The first prong of the majority's decision—whether the speech was "in furtherance of" an employee's "core duties" was overly broad, as it could be read to preclude classroom teachers from receiving First Amendment protection anytime they spoke on a matter that implicated anything that was indispensable to effective teaching and learning. 593 F.3d at 206. Since the prerequisites for effective learning are "broad and contentious," speech on a wide variety of topics, ranging from healthy diets to two-parent families, might be unprotected. *Id*.

Furthermore, Judge Calabresi found the majority's test to contradict the "pragmatic concerns" motivating *Garcetti*—i.e., the need for employers to ensure that their employees' official communications are accurate, of sound judgment and promote the employer's mission. *Id.* at 207 citing *Garcetti*, 547 at 422-34. This concern would be satisfied by defining speech as being "pursuant to official duties" when the employee "**is required to make such speech in the course of fulfilling his job duties,**" which is a practical inquiry done on a case-by-case basis. *Id.* at 208. When an employee is engaged in speech that the "employer itself has commissioned or created" 547 U.S. at 422, the employee is acting as a "mouthpiece of the employer" and the employer must have a substantial degree of control over the speech. 593 F.3d at 207.

As to the "citizen analogue" prong of the test, Judge Calabresi found that this inquiry would replicate the public/private disclosure distinction that the Supreme Court previously had disavowed in *Givhan*, *supra*. He also noted that Weintraub clearly did not file his grievance *pursuant to* his official duties. While Judge Calabresi took it as a given that Weintraub's duties entailed informing the school administration of violent incidents, as a means of facilitating the school's disciplinary apparatus, and that such speech was hence unprotected, the grieving of the administration's response through his union was "quite another matter."

Endnotes

1. The import of the *Reilly* decision is confirmed by the Second Circuit's reliance on this decision to declare the post-Garcetti standard that should be followed in this circuit. See, *Weintraub, supra.*
2. Compare *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007) (police officer's subpoenaed civil deposition testimony unquestionably not part of what he was employed to do and hence was protected although he testified about speech that was made pursuant to his official duties) with *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008) (testimony at a legislative hearing not protected because it was given as an employee and not a citizen).
3. In his dissent, Judge Calabresi questioned whether the majority decision conflicted with *Givhan*.

Psychological Consideration in the Mediation of Employment Disputes

By William D. Frumkin

Mediation of employment disputes is commonplace, and its ultimate success is often dependent upon not just the merits of the case, but the psychological perspectives the parties bring to it. To reach resolution it is imperative that each party consider the psychological considerations confronting the other side. This article is an attempt to illuminate the perspectives of the parties leading up to the mediation and during its course.

Setting the Scene[1]

Consider the following hypothetical situation: the lawyers about to be involved in an age discrimination case know each other well from bar activities and have mutual respect for each other (an advantage of active membership in this Section). Plaintiff's counsel has written a detailed demand letter (not knowing that the employer is represented by his/her colleague). Upon receipt, the employer's counsel calls the plaintiff's counsel to discuss the case in some depth. After a frank discussion, they convince each other that if the case does not settle at this point it will probably be a long and arduous road ahead. The plaintiff believes that the case has significant merit, is worth a fair amount of money and will most certainly overcome a motion for summary judgment. The employer's counsel believes that the case is not frivolous, but hardly sees the same merit that the plaintiff's counsel does, and does not agree that the case is worth anything near plaintiff's counsel's assessment. In addition, the lawyers disagree on how recent case law will be applied to the case. Ultimately, defense counsel believes that the case will not pass muster at summary judgment. No shock there! Regardless, based on the fact that each believes their clients are in for a long battle, they agree to bring the case to mediation. They collectively come to the conclusion that an employment neutral they both respect would be perfect to mediate the case and arrangements are made relatively quickly for this to occur (another advantage of active membership in this Section).

Behind the Scenes Leading Up to the Mediation Session (Plaintiff's Camp)

Thankfully for plaintiff's counsel, the plaintiff, who is a fifty-nine-year-old mid-level executive at a large corporation, has agreed to accept his recommendation to go to mediation. Plaintiff's counsel has met several times with his client to prepare for the mediation which has included a full discussion of the facts, claims, defenses, as well as potential economic and emotional distress damages. Plaintiff's counsel has worked hard to communicate realistic expectations about the value of the case. As usual, the plaintiff values the case greater than does plaintiff's counsel. Just as typically, they both value the case greater than the defendant's counsel, who values the case greater than his client. As the weeks leading up to the mediation pass it has become the focal point of the plaintiff's life (as he remains unemployed and his job search goes poorly). The plaintiff's wife will be attending the mediation session as well and she has also been involved in some of discussions with plaintiff's counsel. Moreover, the plaintiff's brother in California has been consulted, as well as the plaintiff's adult children and other members of his extended family. The day of the mediation will indeed be a "watershed" day for the plaintiff. Not surprisingly he is angry that he was let go from the company after a ten plus year tenure. The plaintiff has also discussed the situation thoroughly with his mental health therapist and has spent considerable time on the web learning about lawyers, litigation, mediation, arbitration, the EEOC, and any other relevant topic. He has been on every conceivably relevant Internet site and then some. As the mediation date comes closer, he has not been sleeping well, has not been eating particularly well, and has had little desire to socialize with friends. His relationship with his wife has become strained because they are not in agreement concerning how the plaintiff should be compensated to settle the case. The plaintiff and his wife realize that reinstatement is out of the question, but they disagree with respect to the amount of money that he should receive. They both want to know what can be done about getting assistance from his former employer to help him get his career on track, something which he believes is owed to him.

Behind the Scenes Leading Up to the Mediation Session (Employer's Camp)

The defendant's attorney who has been interacting with plaintiff's counsel is outside counsel that is working with his "client" who is the in-house counsel. The in-house attorney has finally prevailed upon his business people to focus on the mediation. They have decided that in addition to the outside counsel, the inside counsel will be present at the mediation, as well as the business person who supervised the plaintiff and who was also responsible for the decision to terminate him. In the days just before the mediation, outside counsel has set up a conference call with everyone involved to discuss the case, and the parameters for settlement. This has been a

very busy time at the corporation due to restructuring of its manufacturing plant in the Midwest. Therefore, it has not been easy for the in-house counsel to get the central business person to focus on the mediation. In fact, the business person learns two days before the mediation that he must participate in a conference call scheduled that day from 2:00-3:00 p.m., which cannot be rescheduled. He will also have to read and respond to a multitude of e-mails leading up to the conference call. There will also be some post-conference call e-mails that he will have to attend to if the mediation has not been completed by then. Regardless, the in-house counsel and the business person want to settle the case because they have been informed by their outside counsel that plaintiff's counsel is competent and if the case proceeds, it will be both a financial drain and a distraction for the business person to deal with. This is especially so at a time when the needs of the business require his full attention. During the conference call the day before the mediation, the parameters for settlement are set and the business person has been briefed concerning what he should and should not say at the mediation. While the outside counsel is extremely well-prepared for the mediation, he would have liked to have had more time with not only the in-house counsel, but with the business person prior to the mediation.[2]

The Pre-Mediation Call with the Mediator

During the pre-mediation conference call, which was subsequent to the parties submitting confidential position statements to the mediator, a discussion was held regarding what the lawyers think is the best way to proceed, i.e., should there be a joint session. There is also some discussion about their respective positions and how recent case law could impact the case. The call is quite cordial and informative. Being an experienced mediator, she explains that she needs to speak to each of the attorneys in separate calls and the attorneys have no problem with proceeding in this manner.

During the call with plaintiff's counsel, he expresses to the mediator how important a day this is to his client, and discusses the difficulties his client has had leading up to the mediation. These include the strained relationship with his wife, his problems with eating and sleeping, his discussions with extended family, (particularly the brother in California), and anything else the plaintiff's counsel feels could be an impediment toward settlement. Plaintiff's counsel also makes it clear that the plaintiff expects that a resolution include some assistance to help his client jump-start his career.

In his call with the mediator defense counsel does not expressly indicate that he wished his client had been more involved and more ready for the mediation, but does let the mediator know that the business person will not be available from 2:00-3:00 p.m. to take his conference call. He also mentions that his client may be distracted by the call but doesn't believe this will have a serious impact upon the mediation. He expresses the desire to settle, but emphasizes his view that the case will not get past summary judgment and that his client is not going to write a "big check." The mediator appreciates the candor.

The day before the mediation plaintiff's counsel and outside defense counsel exchange e-mails with the mediator confirming that "all systems are go" and expressing their collective desires to amicably resolve the case.

The Day/Evening Before the Mediation

During the day before the mediation, the plaintiff's counsel has taken care of many issues in other cases and can now focus on the final preparation for the mediation. He brings home the mediation statement, has a lengthy conversation with the plaintiff and his wife that evening, and encourages the plaintiff to get a good night's sleep. Unfortunately, this does not occur. The plaintiff is up half the night pacing, worrying, keeping his wife awake (she is a poor sleeper anyway), and ultimately gets very little sleep.

Defense counsel, similar to plaintiff's counsel, finally clears the deck with respect to issues related to other cases sometime in the late afternoon, and stays in the office late reading over his submission. He calls the in-house attorney before leaving the office, but does not reach him. He also e-mails but gets no response. At 10:00 p.m. he gets a return call on his cell phone and they chat for approximately half an hour about the case.

The Morning of the Mediation

Plaintiff's counsel meets the plaintiff and his wife for coffee at approximately 8:30 a.m., with the mediation set to begin at 10:00 a.m. It becomes apparent to plaintiff's counsel that his client is sleep deprived and nervous. It takes all of the plaintiff's counsel's skills to calm him down. He encourages his client to be optimistic, realistic and most of all attentive and open to the advice that the plaintiff's counsel and the mediator will provide to him during the course of the mediation. They get to the offices of the mediator about a half an hour prior to the start of the scheduled mediation. Defense counsel is scheduled to meet the in-house counsel and the business person at approximately 9:30 in the lobby of the mediator's office building and he is there about ten minutes early. Just about the appointed time, the in-house counsel arrives. The two of them then spend approximately 20 minutes waiting for the business person to arrive and he does so about ten minutes before the start of the mediation. He apologizes for his lateness, but issues related to the 2:00 p.m. scheduled conference call came up very early that morning, which caused his lateness.

How the Differing Psychological Perspectives Could Affect the Potential Outcome

What should now be clear from the hypothetical is that the plaintiff's and defendant's perspectives from a psychological standpoint are at opposite ends of the spectrum. The plaintiff believes the success or failure of his professional life is on the line. While the mediation is of significant importance to the defendant, the same is hardly true. In fact, the mediation may not even be the most important issue the business representative has to deal with that day! The totally divergent perspectives loom over the process and cannot be ignored if the mediation is to be successful. Any attempt to "throw around numbers" without taking these perspectives into account will be counter-productive. The usual factors that are considered by the parties, i.e., the strengths and weaknesses of the case, the defense costs, the distraction to business, the length of time the case may proceed, the potential success of a dispositive motion, and trial will be filtered by the aforementioned psychological perspectives.

By way of example, take the parties opening settlement positions. The plaintiff always faces the danger of the "non-starter," meaning conveying a number that is much more than the plaintiff's counsel believes the plaintiff could ever expect to settle for at that particular phase of the process. The attitude of, "I will start at a high number and work down from there because there is nothing to lose," will most likely also lead to a very short, unsuccessful day. If plaintiff's counsel starts with a demand that is going to cause him or her to have to drop more than $100,000.00 in the next round to keep the mediation going, then he or she should consider how this will affect his client's credibility as the mediation proceeds. Of course, getting the plaintiff to agree to a reasonable starting point is a major mountain that the plaintiff's counsel must climb. There is no magic answer as to how to get the plaintiff to be realistic, but the best advice is to start counseling the plaintiff to be realistic in the initial case consultation, not just before or on the day of the mediation. Plaintiff's counsel needs to be aware of their client's psychological "gestalt" from the first minute that they meet. This has to be addressed through every additional interaction, i.e., via telephone, e-mail, in-person conference, etc.

On the other hand, the defendant's response to the initial demand will most likely have an even greater effect on the potential success of the mediation than the plaintiff's opening demand. For example, if the defendant comes to the mediation knowing that it has authority up to $75,000.00, it has to carefully consider what the opening response to the plaintiff's settlement demand should be. Of course, communicating the position that the initial demand is too high and must be lowered in order to respond at all a "non-starter" as far as the plaintiff is concerned. If the case is to settle, the totally unreasonable nature of the initial demand should be communicated, but something has to be offered in return. If the philosophy is that we will start very low, so as not to encourage the plaintiff, consider how this may affect the plaintiff psychologically, and if that is actually what the defendant wants to happen. Remember the plaintiff has been waiting for this offer for weeks, months or years. This isn't just a business deal. It's often viewed as a make-it-or-break-it life-altering event. If the defendant's counsel counters with $5,000.00, it will likely have the impact of "a shot" to the plaintiff's "solar plexus." This may destroy any confidence the plaintiff has in the process and may very well prevent him or her from focusing on anything that happens after that opening "shot across the bow" is communicated. This may cause feelings of helplessness, hopelessness and dread, not a good thing for the defendant if the goal is to settle. On the other hand, if the opening response is something greater, i.e., $20,000.00 to $25,000.00, although it is much lower than what the plaintiff hoped to receive (possibly $200,000.00), it is at least something that the plaintiff's counsel can work with by telling his client that in his experience, this is a good faith starting point. The plaintiff's counsel can support this by expressing that in his experience sometimes the opening counteroffer is usually something less than $5,000.00, so this is actually not too bad a start. An opening counter of $5,000.00 versus $20,000.00 can have a monumental effect on the plaintiff's ability to thoughtfully participate in the mediation as the day proceeds. Therefore the defendant should think carefully about this before low-balling, if in fact it is their true desire to settle. If both the parties were businesses the amount of the initial counter-offer would not have this all-encompassing effect, but the plaintiff is not a business. The defendant should not lose sight of who is on the other side. Likewise, the plaintiff's attitude that a multi-million dollar business can afford to pay him a lot of money will not advance the process. It is often helpful to explain to the plaintiff that a departmental budget may be the source of the settlement funds and that the individual responsible for it cares as much about that as the plaintiff cares about his own personal finances. This will hopefully ameliorate this unproductive way of thinking.

As far as addressing the non-monetary concern that the plaintiff has with respect to assisting him to jumpstart his career, this may or may not be possible. However, if the defendant makes it known at the outset that it would consider playing some role, whatever that might be (preferably early on in the mediation), this will go a long way toward resolution rather than taking the position that there is no way the defendant has any interest in doing so. Even if the defendant cannot ultimately agree to something along these lines, just the expression of the defendant's recognition of the plaintiff's plight will be helpful.

To a great extent, the mediator's knowledge and appreciation of the psychological factors impacting both parties will be critical. For example, it may be helpful (with respect to the aforementioned hypothetical) if the mediator explains to the plaintiff's counsel in front of the plaintiff that the two o'clock conference call is unavoidable. In the event the call causes some delay in the process, this will hopefully prevent the plaintiff from feeling that his case is not important enough to the defendant to focus on. While the plaintiff's concern may seem like a picayune, unimportant issue to the defendant, it isn't to the plaintiff and could become a sticking point affecting the outcome if it's not addressed early on.

There is no question that the plaintiff, in most cases, will end up being the harder party to please. It is quite evident that the plaintiff usually has a lot more "psychological capital" riding on the case than the defendant. This being the case, the mediator can and should be the difference maker. This task is secondary to only one other and it is related, that is, establishing credibility with the plaintiff and his or her counsel. If that is not established early on in the process, the mediation will be an exercise in futility.

Conclusion

The psychological perspectives of the parties cannot be ignored in the mediation of an employment dispute. While the strengths and weaknesses of the case, costs involved, distraction, etc. are all critical factors, none of these can be examined without a critical eye toward the psychological perspective of not only the plaintiff, but the defendant as well. The mediator is the conduit or lighting rod for dealing with these issues and, if great attention is paid to them, the likelihood of success will increase dramatically.

Endnotes

1. The hypothetical presented may be viewed as somewhat stilted or stereotypical. This is done purposefully to illuminate the issues that may arise in the context of mediation.
2. This is not to say that in many instances the individual(s) who made the decision to terminate the plaintiff are not personally affected by it. They may be just as emotionally charged as the plaintiff, i.e., angry and/or insulted by the allegations brought against them. However, the fact remains that they have a job and an income, they don't perceive their professional life to be hanging in the balance, and it is not a "24/7," all-encompassing event consuming their waking and often sleepless hours.

Mark Gaston Pearce

I am proud to announce that our Section's Executive Board member, Mark Gaston Pearce, the District Representative for the Eighth District, received a recess appointment by President Obama to the NLRB.

The appointment remains in effect until the end of the next term of the U.S. Senate, approx. Dec. 2011. Mark remains under consideration for confirmation by the Senate to a full term as an NLRB member.

Mark left his Buffalo, N.Y. firm, Creighton Pearce Johnsen & Giroux, and has reported for duty at the Board. Sadly for us, Mark is required by governing ethics rules to resign his position as a District Rep. and as an Executive Committee member of the LEL Section; however, we hope that he will continue to participate in our meetings as a valued active member of the Section. I am sure that all members of the Section and its Executive Committee join me in wishing Mark the very best in his new position.

Don Sapir

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Correction

Stacey Barrick, Esq., and Cynthia Stallard, of Whiteman Osterman & Hanna LLP, were contributors to the Legal Terms Glossary on Networking article which appeared in the *Labor and Employment Law Journal*'s Spring 2010 edition. My apologies for the oversight of not listing them as contributors.

Philip L. Maier

Providing a Framework for Social and Economic Rights of Workers Employed by Multinational Enterprises Utilizing Compliance Procedures for U.S. Contractors

By Barbara J. Durkin

Introduction

This article will address the implementation of United Nations documents for U.S.-based companies who are government contractors and the potential impact on their value supply chain as well as their own subsidiaries. Using the model already employed by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance, the reach of the U.N. guidelines can be extended to improve the rights of workers employed by multinational enterprises while encouraging international sustainable development.

Part I will address the role of multinational enterprises in preserving labor rights. The challenge of defining appropriate standards as identified by the various agencies of the United Nations will be discussed. Part II will review the challenge of enforcement of the labor standards on both the international and domestic level. Part III will address possible solutions to this dilemma. Intrafirm trade amounts to about 40% of the United States total trade and does not reflect the related-party transactions of branded marketers and retailers who do not actually manufacture anything themselves.[1] Part III will propose a model of enforcement utilizing government procurement contracts to encourage multinational enterprises and their resultant value supply chain, including the organizations' subsidiaries, to establish goals and timetables for compliance with the labor standards.

Labor rights have been emphasized throughout the history of the United Nations as a fundamental concern. The primary challenge has been the implementation and enforcement of the various conventions and declarations made by its multiple agencies. The recommendations in this article focus on integrating concepts that have been proven to accomplish social policy in the area of affirmative action in the United States into a model that can be applied to U.S. government contractors who are multinational enterprises.

I. The Role of Multinational Enterprises

In March 2007, the International Labour Organization (ILO) issued the results of its 2006 International Colloquium, *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*. In those sessions, four issues were reviewed: (i) the existing institutional framework for monitoring state compliance with social and economic rights, (ii) rethinking methods of supervision and evaluating their impact, (iii) international supervision at the time of institutional reform, and (iv) future approaches to international regulation and supervision.[2] During the proceedings, it was acknowledged that "Multinational Enterprises (MNEs) are immensely powerful entities who have been the main beneficiaries of globalization and have significantly influenced the working conditions of millions of workers, not only in their own subsidiaries but also in their supply chains of developing countries."[3]

A. Historical Review of Initiatives

The United Nations has recognized as a primary objective the promotion of economically and socially sustainable enterprises, particularly in developing countries. In its conclusions, the Conference Committee on Sustainable Enterprises stated that "sustainable enterprises are a principal source of growth, wealth creation, employment and decent work. At the level of the enterprise a number of practices are important, including social protection, social dialogue and good industrial relations, sound human resource development practices, conditions of work, productivity, wages and shared benefits, corporate social responsibility, and corporate governance."[4] Enterprises cannot be sustainable unless workers enjoy full implementation of labor legislation and respect for universal human rights, in particular freedom of association, the right to collective bargaining, non-discrimination and the abolition of child labor and forced labor.[5]

Several documents developed by the United Nations and the ILO are considered critical instruments in promoting economically and socially sustainable enterprises, particularly in developing countries. In 1977, the United Nations issued the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, commonly known as the MNE Declaration.[6]

Traditionally, the ILO created labor standards using a system of conventions that required each member state to ratify the entire document in order to be bound by its terms and conditions.[7] Ratification meant that the Conventions would take on the importance of an international treaty.[8] If the member state ratified a Convention, it was obligated to bring its national policies into compliance with the Convention.[9] If a member state did not ratify a Convention, it still was obligated to report on the degree to which its national policy conformed to the Convention.[10] In 1998, however, this process was changed. The ILO established "core labor standards" in the Declaration on the Fundamental Principles and Rights at Work,[11] call-

ing upon its member countries to comply with its principles, regardless of whether they have ratified the relevant conventions.[12]

This Declaration parallels, in many respects, references to core international labor standards in the United Nations (UN) Universal Declaration of Human Rights (1948), the UN Covenant on Civil and Political Rights, and the UN Covenant on Economic, Social and Cultural Rights that came into force in 1976.[13] The core labor standards are a set of four internationally recognized basic rights and principles at work: (i) freedom of association and the effective recognition of the right to collective bargaining, (ii) elimination of all forms of forced or compulsory labor, (iii) effective abolition of child labor, and (iv) elimination of discrimination in respect to employment and occupation.[14] The Declaration was unanimously ratified by the ILO's member states (including the United States).[15]

In 2000, the MNE Declaration was revised to take into account the ILO Declaration.[16] The Organisation for Economic Co-operation and Development (OECD) Guidelines,[17] issued in 1976 and revised in 2000, are recommendations for responsible business conduct in areas including employment and industrial relations and human rights. The United States has endorsed these codes. In addition, the United Nations has adopted a Global Compact[18] to be endorsed by businesses and has proposed the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("the Norms").[19] From the date of its inception through the end of June 2007, the ILO has adopted 188 Conventions and 199 Recommendations covering a broad range of subjects related to labor rights.[20]

II. Challenges to Implementation and Enforcement

A. Domestic Jurisdictional/Procedural Issues

To both economists and the general public, the multinational group is perceived as a single enterprise, a single firm acting as one unit. The common control, common business purpose, economic integration, even administrative independence, and often common public persona that characterize the group's operations serve to reinforce that perception.[21] However, in the United States, each of the constituent corporations of the group is regarded as a separate legal entity, a person, with its own legal rights and duties, separate and distinct from those of its shareholders.[22] This traditional conceptual framework of entity law creates problems of major proportions for efforts to litigate in the United States against American multinationals involving human rights.[23]

It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (i.e., an entity with control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.[24] In the case of *United States v. Bestfoods*,[25] the Court noted that "[i]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts. This recognition that the corporate personalities remain distinct has its corollary in the well established principle of corporate law that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." Further, "a parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is consistent with the parent's investor status. Appropriate parental involvement includes: monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures."[26]

The case of *Doe v. Unocal Corp.*[27] reinforced the concept of conventional entity law. The Court followed the conventional doctrine that only where the requirements of traditional "piercing the veil" or "alter ego" jurisprudence or an agency relationship may be established can the barriers of entity law be surmounted. It was only then that the local subsidiary's contacts with the forum may be attributed to the foreign parent for purposes of establishing jurisdiction.[28]

The international labor rights cases generally involve foreign affiliates of the multinational enterprise. Because it is difficult to assert American jurisdiction over these foreign entities, actions are often initiated against their American parent corporation. The ability to "pierce the corporate veil" is hindered by Federal Rule 12 (b)(6) requiring the specific allegations of the involvement of the parent corporation in any tortious acts committed by the foreign subsidiary.[29]

The doctrine of *forum non conveniens* is an additional barrier to attributing liability to foreign subsidiaries of U.S.-based multinational enterprises. Foreign plaintiffs have attempted to litigate actions against domestic parent corporations and sometimes their foreign subsidiaries as well for alleged wrongful actions injuring persons abroad.[30] Using traditional standards for applying the doctrine, American courts have always referred plaintiffs to the foreign jurisdictions in which the alleged injuries were incurred and whose law governs the case.[31]

B. International Concerns

Although the United Nations through its agencies has developed a variety of guidelines for MNEs, none are consistent in their approach toward a labor standard. Countries, including the United States, have ratified only some provisions of the documents, making it difficult to define precisely what is meant by the term "labor standards." Instead, the issue of "fair labor standards" appears to be one of those concepts that is widely endorsed as an ideal but difficult to support in its details.

It has been suggested that the ILO be given stronger enforcement and supervisory powers. Utilizing the ILO's structure involving consultation with governments, employees and unions, the ILO and its conventions may serve as reference point for all parties involved in the discussions on labor standards in trade agreements and voluntary codes of conduct.[32] Although the ILO's regulations may be perceived as having limited effectiveness, they have positive value, especially when combined with the domestic and transnational efforts of both private and public stakeholders.[33] However, the relationship between such entities as the World Trade Organization (WTO) and the ILO is confusing;[34] the WTO has declared labor standards to be the province of the ILO.[35]

Several theories have been proposed for providing greater enforcement mechanisms. One model, termed "integrative linkage" by Kolben,[36] suggests that social standards and labor rights should be incorporated into free trade agreements. The model suggests holding countries accountable for their inadequate labor laws or their enforcement by utilizing trade-related labor rights provisions.[37] Kolben proposes making the provision of minimum standards of labor regulation a condition for better terms of trade.[38] He cites the argument, made by Hyde, that while there may be overall economic benefits to international cooperation to implementing at least some labor standards, countries will not do so without an effective coordinating mechanism. Hyde recommends small groups of countries agree to implement a set of mutually agreed upon standards in bilateral or regional trade agreements.[39] Trubek has argued that a transnational "vision" for the regulation of industrial relations does not have to be a "binary choice between the national and the global" but rather a "weaving together of the norms across borders deploying private rules, local practices, national laws, supranational forums, and international law in the interest of effective protection of workers and their rights."[40]

Kolben proposes using a universal baseline of core labor rights as defined by the ILO's Fundamental Principles and Rights at Work to monitor compliance. He argues that legitimacy and accountability would be provided to the process because almost all countries are obliged to respect a baseline of generally accepted principles of international law by virtue of their membership in the ILO.[41] Further, he suggests the model of integrative linkage used to condition better terms of trade on the provision of minimum standards of labor regulation should strengthen, rather than supplant, other forms of domestic and international public regulation.[42] Kolben recommends the development of a Trade and Labor Governance Council (TLGC) to direct the integrative linkage initiative. The TLGC would be governed by a variety of stakeholders including the signatory governments, unions, non-governmental organizations, employers and multinational corporations that do business in the country. It would be responsible for the design and oversight of the integrative linkage scheme, ensuring that it complies with the basic terms outlined in the trade agreement.[43]

Trebilcock and Howse note that a persuasive argument can be made in favor of linkage of international trade policy, including trade or other economic sanctions, with core labor standards, to the extent that they are appropriately characterized as basic or universal human rights.[44] One of the options available procedurally for invoking trade or other economic sanctions against violations of universal human rights involves a requirement that all countries that are parties to either a regional or multilateral arrangement like the WTO commit themselves to effectively enforcing their own existing labor laws, with enforcement provided through supranational or international dispute settlement processes and penalties. Trebilcock and Howse acknowledge the limitations of this option citing the dilemma that only labor standards, and not other universal human rights, are addressed and note that the option assumes member countries have already enacted laws reflecting these standards but have failed to enforce them effectively, not necessarily the case.[45]

C. Carrot or Stick—Should Compliance Be Voluntary?

The United Nations in its enforcement of labor standards has primarily relied on the voluntary compliance of multinational enterprises and governments. The ILO tripartite structure, composed of representatives from governments, employers, and workers' groups, provides the means by which to monitor and report labor conditions in member countries. Employers and workers' groups can raise concerns related to government actions which violate previously ratified labor conventions.[46] Although the constitution of the ILO includes a provision related specifically to enforcement (i.e., Article 33),[47] the organization has instead relied on more informal methods to promote compliance, relying more frequently on public shaming through documentation in ILO reports, technical expertise and financial assistance.[48]

Many of the voluntary, market-driven mechanisms emerged as non-governmental organizations and other interest groups became frustrated with the ineffectiveness of the ILO.[49] Instruments were developed by these parties including certification, labeling and voluntary codes of conduct in an attempt to identify organizations or products that conform to core international labor standards.[50] The Global Compact,[51] launched in 1999, and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[52] adopted in 2003, represent attempts by the United Nations to provide a universal framework for voluntary corporate social responsibility.[53] The voluntary approaches suffer from several limitations, however. The mechanisms apparently apply to only a small percentage of the sectors where noncompliance with core labor standards is believed to be common and, more importantly,

vary in a variety of dimensions including which core labor standards are recognized, how they are defined, and how effectively these standards are monitored.[54]

D. Corporate Codes of Conduct: A Voluntary Approach

Corporate Codes of Conduct have been developed in response to a number of situations in the multinational environment. The passage of the United States Sentencing Guidelines[55] in 1991 provided an impetus for organizations to institute codes of conduct. Companies could gain lenient sentencing based on mitigating factors including the establishment of a program to prevent and detect violations of the law.[56]

The external forces of consumer concerns and the potential for media exposure of substandard labor conditions in multinational supply chains have also motivated the creation of the corporate codes.[57] These global human rights codes of conduct and attendant policies applicable both for the organization and its contractors address such issues as forced labor, child labor, labor organizing and bargaining, non-discrimination, worker health and safety and in some cases minimum wage and maximum hour guidelines.[58] The use of human rights codes has yet to be adopted universally, however.[59]

Murray, in her review of corporate codes and labor standards, acknowledges the role of organized lobby groups, political parties and individuals in fostering accountability on the part of Multinational Enterprises. Highlighting the significance of the "WTO's push to achieve a global system of regulation of labor,"[60] she proposes that the organization's emphasis appears to have led to "heightened awareness of labour standards, and the need for firms operating transnationally to account for their labour practices if for no other reason than to assist in the campaign of international business to avoid this regulation."[61]

Hong and Liubinic have identified the most significant hurdles to overseeing corporate codes of conduct are based on the inherent conflict in interest that MNEs face when they monitor themselves.[62] The financial costs, especially those incurred as a result of external or third party monitoring, deter more than minimal compliance with the internal codes.[63] Liubinic, in his discussion of the use of corporate codes, emphasized the importance of the credibility of the audit results in effecting change and noted the two primary private models for ensuring compliance: corporate (internal) monitoring or agency monitoring.[64]

Corporate monitoring, using in-house quality control inspectors and auditors who visit overseas work sites, is a prevalent method used by many United States MNEs. It is considered efficient and cost-effective since "code monitoring duties can simply be integrated into these pre-existing monitoring positions."[65] A premier example of corporate monitoring, Levi Strauss established the first code of conduct for suppliers, its "Terms of Engagement." Employing 20 factory assessors to monitor compliance with their code at factories supplying directly to the company, they also select and train contract or third-party assessors in each region for use by licensees in factories producing product for their brands. Assessors audit factories at least annually and more often if remedial action has been taken for any violations of the supplier code.[66]

Other organizations, such as Wal-Mart[67] and Nike,[68] have opted for a system of agency monitoring, paying a third-party such as an accounting firm like Ernst & Young or Price Waterhouse to perform outside audits to monitor their code compliance.[69] Supporters of agency monitoring note that the use of these third parties provided them with a "comparative advantage" in auditing policies and procedures related especially to the codes of conduct, including those concerned with child labor. Detractors, however, question the professional capability of accounting or independent consulting firms to audit the codes.[70]

E. Precedent for U.S. Government-Influenced Compliance with International Trade Agreements

The United States has adopted the principle that access to its market must be conditioned on adherence to labor rights.[71] Recognizing the importance of core labor rights to fair trade, Congress mandated compliance with "internationally recognized labor rights" as a precondition to receiving special trade benefits under the Generalized System of Preferences (GSP).[72] The Omnibus Trade and Competitive Act of 1988[73] amended § 301 of the Trade Act of 1974[74] to allow the U.S. Trade Representative to take retaliatory action against U.S. trading partners who display a persistent pattern of conduct that violates standards similar to those enumerated by the ILO.[75] The remedies under § 301 authorize the President, utilizing the foreign affairs power, to take trade action to improve a partner's immediate labor rights and to take any action to change the rules of trade and finance that encourage the violation of those rights.[76] Since 1999, the United States has included labor rights provisions in all its negotiated bilateral and regional trade agreements.[77] Moran, chair of the Brookings Institution's Committee on Monitoring International Labor Standards, has identified the similarity between the ILO standards and the Generalized System of Preferences (GSP), the unilateral trade preference program often given by the United States to developing countries.[78]

The adoption of trade measures by the United States to protect labor standards in developing countries has been cited as evidence of the government's commitment to international workers' rights.[79] When a nation ratifies a convention, it is required to implement national policies to ensure compliance. Even if, as in the case of the United States, an ILO member fails to ratify a convention, it is obligated to submit an annual report to the ILO discussing

the extent to which its national policy is in compliance.[80] The United States has established that it "meets and exceeds the standards delineated in these conventions" and "has enacted domestic laws that guarantee the rights enumerated under the GSP program."[81] Nonetheless, the United States has been accused of imposing a double standard of requiring compliance from its trading parties while failing to ratify all of the ILO labor rights conventions. Baltazar notes the government has provided the counterargument that, while it agrees with the ILO standards, its failure to ratify all of the ILO conventions can be attributed to its adherence to the principle of federalism. Simply put, labor issues primarily are within the authority of the individual states, not the federal government.[82]

Trade agreements have been used to influence the behavior of domestic corporations concerning international labor standards. In 1977, the Sullivan Principles were initially adopted by twelve U.S. firms. "Sullivan firms" were designed to protect human rights in only one country, South Africa. Firms made commitments to racially nondiscriminatory employment, the payment of fair wages well above the minimum cost of living, management training programs for blacks and other non-whites, the provision of supportive services for employees including housing, health care, transportation and recreation and the use of corporate influence to help end apartheid in South Africa.[83] Each Sullivan Firm's performance was subject to outside audit and public reports by the management consulting firm, Arthur D. Little.[84] By 1986, approximately 200 of the 260 businesses in South Africa had adopted the Sullivan Principles.[85]

The MacBride Principles, passed by Congress as part of the Omnibus Appropriations Act for Fiscal Year 1999,[86] consist of nine employment and affirmative action principles for U.S. companies doing business in Northern Ireland. This Act mandates that "United States contributions [to the International Fund for Ireland] should be used in a manner that effectively increases employment opportunities in communities with rates of unemployment higher than the local or urban average of unemployment in Northern Ireland. In addition, such contributions should be used to benefit individuals residing in such communities."[87] In addition, the MacBride Principles have been formally adopted by numerous state and local governments in the United States.[88]

In 1994, the Executive Branch under President Bill Clinton published a set of Model Business Principles, emphasizing corporate human rights codes.[89] The Model Principles encouraged "all businesses to adopt and implement voluntary codes of conduct for doing business around the world."[90] They suggested that corporate codes cover at least workplace health and safety; fair employment practices, including bans on child labor, forced labor and discrimination and the rights to organize and bargain collectively; environmental protection; compliance with laws against bribery and corruption; and a corporate culture that respects free expression and does not condone political coercion in the workplace, that contributes to communities in which the company operates, and that values ethical conduct.[91] Some organizations responded by expressing a preference for the OCED and ILO guidelines issued in the 1970s, arguing they encompassed most of the areas in the Model Business Principles. The Administration found only eight large firms who were willing to support the Principles "as a useful reference point for framing the codes of conduct for individual businesses."[92] The U.S. Department of Commerce was assigned the responsibility for implementing the codes.[93]

F. Government Procurement Contracts Have Been Used to Influence Corporate Social Responsibility

The United States government is the single largest consumer in the nation, purchasing more than $250 billion in goods and services each year.[94] Aaronson, testifying before the Congressional Human Rights Caucus concerning global corporate social responsibility (CSR), acknowledged the market power of the United States government to influence public policy, particularly those areas related to the environment.[95] Government procurement preferences[96] are mandated by various laws, Presidential Executive Orders, and procurement regulations to purchase "green" (e.g., biobased, recycled content, and energy efficient) products.[97] As an example, the Energy Policy Act (EPACT) of 2005[98] and Executive Orders 13221[99] and 13423[100] require Federal agencies to purchase products that are designated as energy efficient.[101] Recognizing that Federal agencies spend at least $10 billion each year on purchases of products consuming energy,[102] the Federal Energy Management Program (FEMP) provides resource materials for both Federal purchasers[103] and suppliers.[104]

III. A Proposed Model for Compliance

A. Integrating the Value Supply Chain and the ILO Core Labor Standards

The Organisation for Economic Co-operation and Development (OECD), in its 2002 economic outlook report, reviewed recent evidence relating to the internationalization of production over the past decade. Its analysis revealed that cross-border trade between MNEs and their affiliates (i.e., "intra-firm" or "related party" trade) accounts for a substantial share of international trade in goods.[105]

Jensen, in discussing the growth of foreign investment and the activities of MNEs between the 1970s and 2001,[106] emphasized the dynamic, yet often statistically underestimated, impact of the growth of global supply chains.[107] He explained that in the buyer-driven value chain, the buyer controls many of the aspects of producers and ensures that the producers meet delivery dates, quality standards, design specifications, etc. It is, he proposed, "but a short step to argue that the buyer should also take responsibility for the conditions under which subcontrac-

tors operate, in terms of their relations with labour and their impact on the environment" and noted these types of industries saw explicit codes of conduct introduced in the 1990s.[108]

The seminal Kenan Consensus reviewed the appropriate roles of the United States government in promoting global corporation social responsibility and made eighteen recommendations toward achieving that goal.[109] The study group stressed that while policymakers have attempted a variety of methods, ranging from exhortation and meetings to even nurturing of organizations, to help companies monitor their corporate social responsibility strategies, the primary problem of the United States' approach is its lack of coherence. In her testimony before the Congressional Human Rights Caucus, Kenan Consensus study group member Aaronson noted that "no one agency or individual is in charge, despite the importance of Multinational Enterprises to global economic stability and growth."[110] Further, she identified the problem's origin primarily as a result of the failure of the United States government to authorize an agency to coordinate globalization policies.[111] There is no interagency working group to act to integrate the different mandates and constituencies of the executive agencies and different branches within the cabinet departments promote different corporate social responsibility initiatives.[112] The Kenan Consensus recommended that the President of the United States issue an Executive Order requiring federal government agencies to integrate labor and human rights performance and reporting guidelines into procurement preferences using the precedent established concerning environmental administrative law.[113]

The study group advised that the Department of State promote adherence to and implementation of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, including support for the role played by the National Contact Point in resolving issues affecting foreign operations.[114] It suggested all government agencies providing direct support for U.S. companies operating overseas should publicly endorse the guidelines and encourage corporations receiving their financial support to adhere to them.[115] Further, the Kenan Consensus proposed the United States Department of Labor actively promote adherence to the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the ILO Declaration on the Fundamental Principles and the Right to Work (i.e., the core labor standards).[116] It urged the United States, in the interest of credibility and promoting these standards around the world, to "show leadership by ratifying the ILO Core conventions that it has not yet ratified.[117]

A precedent has been established for assuring compliance throughout the value supply chain in the enforcement of domestic government labor standards. The Wage and Hour Division of the United States Department of Labor has established a program making the release of goods embargoed for violation of the Federal Labor Standards Act (FLSA) contingent on the apparel manufacturer's agreement to establish a monitoring system to be operated by the manufacturer and to complete a compliance program for all of its contractor and subcontractor shops. [118]Additional agreements are created between the manufacturer and it subcontractors, setting out terms and methods for assuring compliance and the implementation of administrative procedures. The agreements at both the manufacturer and contractor levels stipulate a method of formal monitoring undertaken by either the manufacturer or a third party.[119] Weil, in a study evaluating the effectiveness of this method, found a statistically high level of compliance with the agreements. Additional benefits result as manufacturers have sought out contractors more likely to comply with the law and, therefore, have increasingly their use of contractors who were in compliance.[120]

B. Developing a Model for Compliance with the ILO Core Labor Standards Similar to the Model Used to Ensure Compliance with Affirmative Action

This article proposes a model for monitoring compliance with international core labor standards utilizing a similar model currently in place for ensuring compliance with affirmative action social policy. By incorporating appropriate clauses into government contracts with MNEs and their resultant value supply chain including the organization's subsidiaries, these entities would be encouraged to establish goals and timetables to meet the standards. More importantly, since a substantial share of international trade in goods is the result of intra-firm trade,[121] a unique opportunity arises to incorporate compliance with the international core labor standards through the use of the contractor-subcontractor relationship, thus piercing the corporate veil of immunity and its attendant apparent immunity from liability for the actions of its subsidiaries.[122]

The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget, established by Congress, provides a key role in developing the government-wide policies, regulations and procedures used to acquire the goods and services needed by federal agencies.[123] One of its responsibilities is to identify desirable government-wide procurement system criteria, including evaluating the past performance of contractors providing goods and services to government agencies.

Executive Order 11246[124] provides for the promotion and insuring of equal opportunity for all persons, without regard to race, color, national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted contracts. The Office of Federal Contract Compliance Programs, part of the United States Department of Labor, is responsible for "ensuring that employers doing business with the Federal government comply with the laws and regula-

tions requiring nondiscrimination and affirmative action in employment."[125]

Under the terms of a government contract,[126] prime contractors and subcontractors[127] are subject to the terms of the Executive Order. The prime contractor agrees to include a clause[128] into the contract incorporating the organization's commitment to equal employment opportunity.[129] The contractor also agrees to include the portions of the clauses in every eligible subcontract or purchase order. The provisions of the contract related to equal employment opportunity are therefore also binding upon each of the contractor's subcontractor or vendor.[130] In the event the contractor does not comply with the nondiscrimination clauses of the contract, the contract "may be canceled, terminated, or suspended in whole or in part and the contractor may be declare ineligible for further Government contracts or Federally assisted contracts in accordance with procedures authorized by Executive Order 11246."[131]

Compliance reports are required on an annual basis from both contractors and subcontractors. A prime or first tier subcontractor with 50 or more employees and a contract amounting to $50,000 or more and any subcontract below the first tier who performs construction work at the site is required to file a report. Pre-award compliance evaluations are required where the award would total $10 million or more. A non-construction contractor who meets the above criteria must develop and maintain a written affirmative action program for each of its establishments.[132] Bidders, prospective prime contractors or subcontractors under the requirements must file a certificate of compliance and state in the bid or in writing at the outset of negotiations whether it has developed and has on file affirmative action programs,[133] has participated in any previous contract or subcontract subject to the equal opportunity clause, and whether it has filed with the appropriate agencies under the applicable filing requirements.[134]

A similar model can be utilized providing the inclusion of a clause in government contracts requiring compliance with the labor standards established by the United Nations. MNEs, as government contractors, would include the clause in contracts with their subcontractors in the same way equal opportunity clauses are currently incorporated.[135] Using the value supply chain, there would be an ever-widening net of subcontractors who would be required to comply with the standards. A format similar to an affirmative action plan would be required, relying on the OECD Guidelines or ILO standards, to ensure compliance. A key component of that labor standards plan, as currently with affirmative action plans, would be the identification of compliance factors, identifying areas needing improvement and the development of goals and timetables to meet those objectives. Of particular importance is the oversight of compliance procedures. It has been suggested that the ILO be used as the third party organization to monitor compliance. If an organization is found in compliance with no violations, it could be given preferential procurement status for government purchases. This would provide a financial incentive to organizations to exceed compliance standards.

It is therefore possible to provide both a carrot and a stick approach to the enforcement of the ILO standards in the United States. Although the United States has not ratified all of the standards, its labor laws incorporate most of them. The development of a preferred contractor status, predicated upon compliance with the ILO standards and similar to the status of international preferred trading partners, would generate increased sales to government agencies by contractors. Further research could be conducted to determine if establishing a recognizable performance standard, similar to the esteem afforded organizations complying with the ISO 9000 quality standards, would encourage organizations to more fully participate in efforts to provide basic labor rights to their employees and those of their subsidiaries and subcontractors. The increased revenue from transactions from preferential treatment with government procurement contracts would exceed any additional costs incurred by businesses to ensure compliance. It is also noteworthy that when the economy suffers from sluggish consumer or industrial sales, the institutional/governmental market usually is less volatile, thus preserving an income stream for the firms. These financial benefits, combined with the international markets' increased emphasis on corporate social responsibility, should provide an impetus for organizations to actively participate in these programs.

Conclusion

In conclusion, then, although the United Nations has promulgated conventions and declarations to develop sustainable enterprises and to foster the development of labor rights, more needs to be done to ensure the protection of basic labor rights of individuals employed both by MNEs as well as by their subsidiaries and subcontractors are protected. The opportunity for piercing the corporate veil has arrived.

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Barbara J. Durkin graduated from Pace University School of Law in 2010, received an M.B.A. in Organizational Behavior from Iona College and a B.A., *cum laude*, in Political Science and Business from St. John's University. **The author would like to thank Meaghan S.D. Foy, Lawrence B. Brennan, and Jolanda G. Jansen for their invaluable assistance. This article won second place in the Dr. Emanuel Stein Memorial Writing Competition, sponsored by the Labor and Employment Law Section of the New York State Bar Association.**

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

James R. Grasso
Phillips Lytle LLP
3400 HSBC Center
Buffalo, NY 14203-2887
jgrasso@phillipslytle.com

Deborah S. Skanadore Reisdorph
Skanadore Reisdorph Law Offices
18377 Beach Blvd., Suite 219
Huntington Beach, CA 92648
ladylaw@nysbar.com

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plmbox@aol.com

Janet McEneaney
205-02 33rd Avenue
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mceneaneyj@aol.com

Alternative Dispute Resolution
Glen P. Doherty
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, NY 12207
doherty@mltw.com

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

Jonathan Ben-Asher
Ritz Clark & Ben-Asher LLP
40 Exchange Place, 20th Floor
New York, NY 10005
jben-asher@rcbalaw.com

Communications
Mark Daniel Risk
Mark Risk, PC
60 East 42nd Street, 47th Floor
New York, NY 10165
mdr@mrisklaw.com

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

Michael A. Curley
Curley & Mullen LLP
5 Penn Center Plaza, 23rd Floor
New York, NY 10001
mcurley@curleymullen.com

Continuing Legal Education
Ronald G. Dunn
Gleason Dunn Walsh & O'Shea
40 Beaver Street
Albany, NY 12207
rdunn@gdwo.net

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

Diversity and Leadership Development
Mairead E. Connor
Law Offices of Mairead E. Connor, PLLC
440 South Warren Street
PO Box 939
Syracuse, NY 13201-0939
mec@connorlaborlaw.com

Natalie V. Holder-Winfield
Quest Diversity Initiatives
15 East Putnam Avenue, Suite 174
Greenwich, CT 06830
natalie@questdiversity.com

Jill L. Rosenberg
Orrick Herrington & Sutcliffe LLP
666 5th Ave.
New York, NY 10103
jrose@orrick.com

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

Equal Employment Opportunity Law
David Fish
David M. Fish Attorney at Law
3 Park Avenue, 28th Floor
New York, NY 10016-5902
fish@davidmfish.com

Patricia Ann Cody
Wormser Kiely Galef & Jacobs LLP
825 Third Avenue
New York, NY 10022
pcody@wkgj.com

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

Philip L. Maier
PERB
55 Hanson Place
Brooklyn, NY 11217-1579
plmbox@aol.com

Rachel J. Minter
Law Office of Rachel J. Minter
345 Seventh Avenue, 21st Floor
New York, NY 10001
rminter@rjminterlaw.com

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

Immigration Law
Patricia L. Gannon
Greenberg Traurig LLP
200 Park Avenue
New York, NY 10166
gannonp@gtlaw.com

Individual Rights and Responsibilities
Dennis A. Lalli
Bond, Schoeneck & King, PLLC
330 Madison Avenue, 39th Floor
New York, NY 10017-5006
Dlalli@BSK.com

Patrick J. Solomon
Thomas & Solomon LLP
693 East Avenue
Rochester, NY, 14607
psolomon@theemploymentattorneys.com

International Labor and Employment Law
Janet McEneaney
205-02 33rd Avenue
Bayside, NY 11361
mceneaneyj@aol.com

Donald C. Dowling, Jr.
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787
ddowling@whitecase.com

Labor Arbitration
Barbara C. Deinhardt
State Employment Relations Board
86 Chambers Street, Suite 201
New York, NY 10007-2634
bdeinhardt@aol.com

Willis J. Goldsmith
Jones Day
222 East 41st Street
New York, NY 10017-6739
wgoldsmith@jonesday.com

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

Bruce S. Levine
Cohen, Weiss and Simon LLP
330 West 42nd St.
New York, NY 10036
blevine@cwsny.com

Law School Liaison
Merrick T. Rossein
CUNY School of Law
65-21 Main St.
Flushing, NY 11637
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Norma G. Meacham
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
ngm@woh.com

Legislation
Sharon P. Stiller
Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP
45 Exchange Blvd, Suite 275
Rochester, NY 14614
sstiller@abramslaw.com

Jonathan Weinberger
880 Third Ave., 13th Floor
New York, NY 10022
jweinberger@verizon.net

Vivian O. Berger
Columbia Law School
435 West 116th Street
New York, NY 10027-7297
vberger@law.columbia.edu

Timothy S. Taylor
NYS United Teachers
800 Troy Schenectady Road
Latham, NY 12110
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Gwynne A. Wilcox
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New York, NY 10011
gwilcox@levyratner.com

Union Administration and Procedure
Steven A. Crain
CSEA
Legal Department
143 Washington Avenue
Albany, NY 12210
steven.crain@cseainc.org

Robert L. Boreanaz
Lipsitz Green Scime Cambria LLP
42 Delaware Ave., Suite 120
Buffalo, NY 14202-3901
rboreanaz@lglaw.com

NEW YORK STATE BAR ASSOCIATION
LABOR AND EMPLOYMENT LAW SECTION
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Editor
Philip L. Maier
PERB
55 Hanson Place
Brooklyn, NY 11217-1579
plmbox@aol.com

Section Officers

Chair
Mairead E. Connor
Law Offices of Mairead E. Connor, PLLC
440 South Warren Street, Suite 703
P.O. Box 939
Syracuse, NY 13201
mec@connorlaborlaw.com

Chair-Elect
Alfred G. Feliu
Vandenberg & Feliu LLP
60 E. 42nd Street, 51st Floor
New York, NY 10165
afeliu@vanfeliu.com

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Dennis A. Lalli
Bond, Schoeneck & King, PLLC
330 Madison Avenue, 39th Floor
New York, NY 10017
Dlalli@bsk.com

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