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Labor and Employment Law Journal

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

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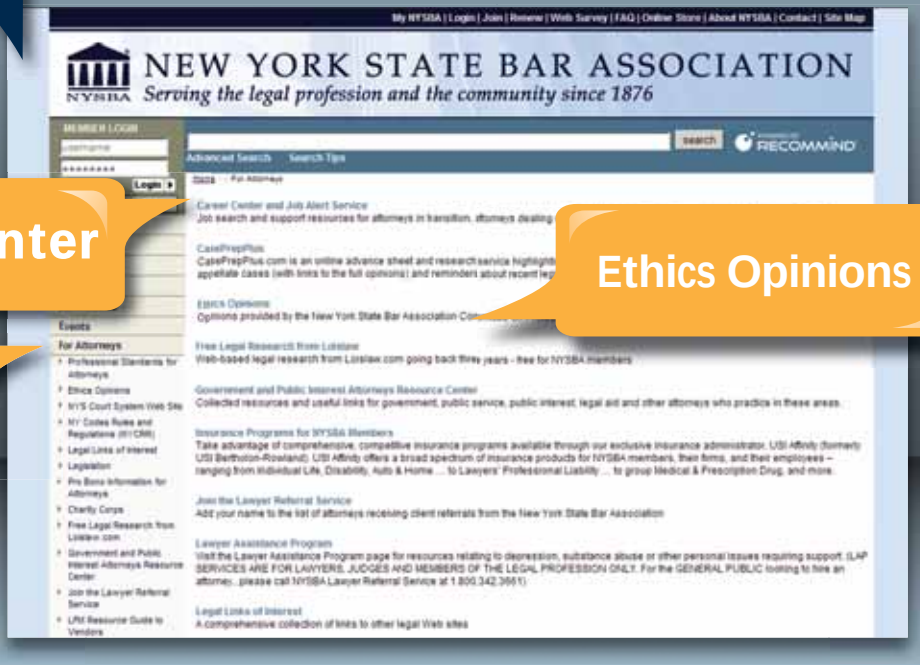

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Message from the Outgoing Chair

The law, for many of us, has been a jealous mistress (or companion if you prefer), requiring a disproportionate amount of our time, commitment, and energies. This is particularly the case in the labor and employment law field where the law is constantly changing and evolving, placing an even greater burden on our ability to satisfy our professional obligations and maintain our self-imposed standards of professionalism.

NYSBA's Labor and Employment Law Section has always taken pride in working to enhance the professionalism of the labor and employment law bar and our members. This has taken the form over the years of quality CLE programs, representing the interests of the bar in general and of our practice area in particular wherever possible, and of providing a refuge from the adversarial garb we are often required to wear when representing our clients' interests. In this way, temporary adversaries are allowed to break bread in a comfortable setting and to develop personal relationships, thereby enhancing the collegiality of the bar.

Our Section took determined steps this past year to enhance those efforts as more fully described in John Gaal's accompanying article. One important step was our efforts to reinvigorate the Section's committee structure and leadership. I urge you all now, as I have in the past, to join committees, to participate in their activities, to challenge the committee chairs to do more, and to work with the Section in enhancing the professionalism of our members.

I also want to thank those involved in launching perhaps our most important programs in years, our Mentoring Program. Our New Lawyers Committee Co-Chairs, Genevieve Peeples and Rachel Santoro, deserve special thanks along with our new Section Chair John Gaal and Mike Bernstein, both partners at Bond Schoeneck & King, for their efforts and enthusiastic support of the Program. I also want to thank Second Circuit Judge Denny Chin who graciously met with the mentees at the reception in April launching the Program and for hosting our mentees during Second Circuit oral arguments in June. Judge Chin met with the mentees both before and after the appellate arguments to share his insights on appellate practice. In the Fall, the mentees are also scheduled to meet with Elizabeth Grossman, the EEOC Regional Attorney, and Karen Fernbach, Regional Director for the NLRB's Region 2, with more events planned thereafter.

Finally, I want to thank the Section's Executive Committee for all its support throughout this challenging and rewarding year. I especially want to thank the Section's immediate past Chair, Mairead Connor, and my successor, John Gaal, both of whom made themselves freely available whenever called upon for help. Having worked closely with John for most of the last year, I can say unequivocally that the Section is in great hands and the prospects for bringing to fruition the Section's ambitious plans are bright with John at the helm.

Alfred G. Feliu

Message from the Incoming Chair

In the beginning of June, I started my term as the 37th Chair of our Section. I did so with a great sense of both humility and pride. I am humbled to hold a position that has been held by so many notable labor and employment law leaders in New York—Frank Nemia, Bill Bergan and Bernie King, to name just a few. I am filled with pride at the thought of chairing an organization with the rich history of our Section, with a strong and dedicated Executive Committee that provides such great support and counsel, and with a future for which "the sky is the limit."

I have the unenviable task of following immediately on the heels of Al Feliu. Al was a tireless leader this past year, guiding the Section to a number of significant accomplishments:

- with the incredible assistance of Rachael Santoro and Genevieve Peeples, the Section instituted a mentoring program, with a kickoff reception held at the offices of Paul, Hastings in New York City on May 10. In its inaugural year, we are thrilled that we have close to 30 mentees who have been paired with 30 mentors from our Section's ranks who have enthusiastically stepped up to get the program off to a very successful start. (One of the things that has always made our Section special is the willingness of our members to help one another, and especially those new to the field.);
- at last month's NYSBA Section Leader's Conference, our Section was honored with a first place award in the Association's Diversity Challenge. This award reflects the work of Al along with our Diversity and Leadership Development Co-Chairs, Jill Rosenberg and Wendi Lazar, to whom we owe a tremendous thanks for their work;
- we are in the process of filling yet another class of Diversity Fellows;
- one of the principal achievements of Al's tenure has been a significant reorganization of our Section's Committee structure. With our new structure in place comes the promise of an even more invigorating Section.

As I look ahead to this next year, one of my primary goals will be to continue the terrific strides we have made in the past year. While our Mentoring Program kickoff was a wonderful start for a program that is vital to the future of the Section, it was just that—a start. Our focus this year will be on closely monitoring that Program to make sure it fulfills its promise, and then find ways to enhance it. Similarly, while being declared a "Section Diversity Champion" is a great way to end the first year of the Bar Association's Diversity Challenge, it too is just a beginning. We need to do even more in this arena in the coming years, and we are all committed to doing so.

As important will be continuing down the path started with our recent reorganization. As every Section leader knows, committees are the lifeblood of the organization. Active committees, engaged in "real" projects to promote our shared interests, are what keep any Section, and especially our Section, vital and meaningful to members. So with a new structure in place, this year committees will be pushed to work on publications, reports and various other activities which will show the value of Section membership. Along with this, we will also work hard to continue our emphasis on bringing new faces, with new ideas, into the leadership of the Section.

We are well under way with our planning for the Fall Meeting. This year's meeting will be held at the Kaatskill Mountain Club at Hunter Mountain, September 21 to 23. Our Continuing Legal Education Committee, chaired by Ron Dunn and Sharon Stiller, are in the process of finalizing details now. After a number of years of providing wonderful leadership in connection with our Continuing Legal Education Committee, Ron has asked for a "break" and his successor will be Seth Greenberg. We look forward to putting Seth's limitless energy to good use on this Committee, which provides so much benefit to all of our members. A special thanks to Ron for all that he has done.

A number of other changes in Section leadership have taken place recently. Also after several years of yeomen's service as head of our Finance Committee, Bob Simmelkjaer has asked for some well deserved time off from this task. We have been fortunate to have had Bob keeping an eye on our finances these past few years. Bob will not, however, be going far and he will chair the Labor Arbitration Committee. We are very fortunate to have convinced Stephanie Roebuck to succeed Bob. I look forward to working with Stephanie this year in this very important position. I am very happy to announce that succeeding Stephanie in her former role as chair of our Sponsorship subcommittee will be Sheryl Galler.

Pauline Kinsella will be co-chairing the Public Sector Labor Relations Committee with John Corcoran. Willis Goldsmith has been named Secretary-Elect of the Section. Danitra Spencer has been named chair of the Diversity and Leadership Development Committee's Diversity Fellows subcommittee.

Chris D'Angelo, who had co-chaired our Membership Committee, will be taking over as co-chair of the Equal Employment Opportunity Committee, succeeding Pat Cody. The press of other responsibilities had led Pat to seek a change as well. She too will be sorely missed. Chris will be joining current co-chair David Fish. Carmelyn Malalis has been named Chair of the EEO's LGBT subcommittee, and Rachel Minter will be chairing its Disability Law subcommittee. We welcome Molly Thomas-Jensen who will be replacing Chris D'Angelo (and joining Alyson Mathews) as co-chair of the Membership Committee.

Lastly, after several years, Phil Maier has asked to step down as Editor of the *Journal*. We sincerely thank Phil for all of his work in that role. Allan Bloom and Delyanne Barros will be succeeding Phil.

An early reminder as well that our Annual Meeting will be held in New York City, in conjunction with the Bar's Annual Meeting. This year we will again be at the Hilton New York at the end of January. As that program progresses, more details will be provided.

Our blog continues to grow. I was recently advised that we were in the "top 5" of all NYSBA Bar Association blogs. But there is still a lot of work to go. The blog provides a great opportunity for members to get something "published" and anyone interested in submitting a piece should reach out directly to Seth Greenberg, at sgreenberg@gbglawoffice.com, who will continue his oversight of our blog, or Mark Risk, at mdr@mrisklaw.com.

I strongly encourage all members to get involved. Sign up for a Committee (or two or three) that match your interests and then actively participate. It is a great way to meet colleagues, to sharpen your skills in a particular area, and to move into the leadership ranks of this truly amazing organization.

So while I start this year with a great deal of enthusiasm (and trepidation), I also start it with a great deal of thanks. Thanks not only to those Past Chairs mentioned earlier, who led our Section in its earlier years, but an equal thanks to those most recent Chairs who have shaped our current contours—Al Feliu, Mairead Connor, Don Sapir—and all the Chairs who "reigned" in the years in between and who all contributed so much towards making us what we are today.

In closing, I commend to you Al Feliu's eulogy delivered on behalf of the Section at the recent memorial service for Margery Gootnick and Sharon Stiller's piece on Margery, both of which appear in this issue of the *Journal*. Margery was beloved by all of us and will be sorely missed, but never forgotten.

John Gaal

Margery Gootnick

A Memorial to Our Friend and Mentor

She was the ultimate neutral, except when it came to umpiring at Cooperstown, for the Labor and Employment Law Section meetings. Then, every child was safe.

As many of you know, we lost Margery way too early, on April 16, 2012. But she was too special to ever lose, so the purpose of this article is to share some Margery memories that we were all so lucky to have.

Years ago, Margery took me under her wing. She had large wings and a large soul for such a diminutive lady. She said I reminded her of herself; I regarded that as the best compliment I had ever received. She used to say that there weren't many people that she loved, but that I was one of them. That could not possibly be true, since she loved so many people and they all loved her. I believe that she had no idea how many people loved her.

I remember one of the first Labor and Employment Law Section meetings I attended. Margery and I drove to Cornell, and of course, I got lost with her giving directions. We stopped at every small store on the way, and bought lottery tickets. After that, whenever we drove anywhere, we always stopped for lottery tickets. No matter how many times we did this, I always had to explain how to scratch them off, and what was needed to win.

She was excited to introduce me to the Section; she told me that her favorite people belonged to the Section. She particularly could not wait to introduce me to Richard Zuckerman, and she had brought along photos to show how much he looked like her son, David. After that, she and her late husband, Lester, delighted in seeing the Zuckerman family, and hearing of Alyssa, David, Eric and Stephen's brilliance. Margery felt like they were her own children. She also delighted in reminding us of the controversy when the Section considered adding neutrals, and always pointed out that the various components of our Section work better together than any other group she had ever seen.

She received many honors, which she would never have shared with anyone. In fact, I asked to nominate her for various awards many times, and she would not let me. Margery would downplay her accomplishments. She always said that she went to Harvard and Cornell University Law School, in order to find a husband. She found a great one—Lester, an orthopedic surgeon, was a Renaissance man. He took up playing the flute when he retired and once graced me with a flute duet at my house. He died, also way too young, from complications from an illness he contracted when he served in Doctors Without Borders.

I was not the only person she mentored. Margery had many legal assistants over the years, but her relationship with them was different than the relationships most of us have with ours. Her most recent assistant, Gayle, was almost a member of her family. In fact, Margery split her house in half, and Gayle and her family lived in the other half. Gayle took care of all of Margery's business, and much of her personal errands, and Margery took her in as though Gayle was her daughter. When Margery divided her house, she needed to procure zoning approval, and the locals opposing it pulled out an old law banning the "keeping of slaves" in one's home. Margery won, of course, but delighted in pulling out the article accusing her of "keeping of slaves." Gayle is only the last of a number of young women that Margery befriended, and who became supporters of her as she supported them.

As many of us also know, Margery did the same with so many fledgling arbitrators, and others who joined the Section. The unifying comment from many upon her death was that she made each of us feel like we were her best friend; she not only remembered each person, but also their children and special events. She made everyone feel welcome to the Section.

In 2005, she was elected president of the National Academy of Arbitrators. She was so proud of this honor. Many will remember her Presidential address, set to verse. And on December 4, 2006, she was honored at an awards dinner in New York City as one of three women of distinction awarded by the NYC Chapter of the Labor & Employment Relations Association. In her acceptance speech, Margery noted that, "Arbitration has a special place in this world. It offers a way to serve people in crisis whose only salvation just may be a professionally binding decision."

She received appointments to three Presidential Emergency boards under the Railway Labor Act, and was appointed by Secretaries of State Madeleine Albright, Colin Powell and Condoleezza Rice as a member of the United States Foreign Service Grievance Board. She served on the Board of Advisors of the Scheinman Institute on Conflict Resolution, at the Cornell School of Industrial Labor Relations and the International Court of Arbitration for Sports (ICAS), Lausanne, Switzerland.

Margery would agonize about her decisions, but she always knew what was right. One of us told the tale of an arbitration where the labor representative and management representative both agreed on what should happen, but Margery, the true neutral, dissented. She could not refrain from doing what she believed was right, and her beliefs were strong. While she was always willing to listen to what others said, she trusted her own views.

Margery was an adventurer, traveler and philanthropist. She and Lester took a charter plane around the world, and traveled on the Orient Express. She was smug about being one of the nine Section members who attended the Longboat Key Florida Section meeting during a Hurricane scare, even as she clung to the walls to prevent being blown away as she traveled from her room to the Conference Center.

Her refuge was Chautauqua, particularly after her great love and soul mate, Lester, died. Each summer, she would rent an apartment near the amphitheatre and for one of those weeks, invite her arbitrator and lawyer female friends. We called ourselves the "Porch Potatoes," because we would sit out on the porch, drink wine, and listen to the lectures or music. Margery loved to attend the lectures, and then to discuss what was said. But she would rarely stay for the questions, because she felt many of them were inane. She also took classes there, most famously one on comedy given by Mark Russell. We Porch Potatoes had to endure endless hours of Margery's agonizing over which political joke to tell in class.

She took the young dance students at Chautauqua under her wing, and funded a scholarship in Lester's memory for up and coming young dance students taking classes at Chautauqua. The Porch Potatoes would always wander over to the dance studio to see "Margery's dancers."

She would also host a special Porch Potato dinner during the week, and invite interesting Chautauquans. While others wanted to become Porch Potatoes, it was a special honor, by invitation only. Margery had shirts made up for us, and would not let us come if we forgot our shirts. Arbitrator Susan Grody Ruben forgot hers once, and had to make a white shirt into a Porch Potato shirt before she was permitted to stay. People in Chautauqua began to notice our shirts and would often ask us who the Porch Potatoes were. We delighted in making up answers, such as, "A famous singing group," or a "Cooking School." In truth, we were just Margery's "buds," some of the luckiest women on earth.

Sharon P. Stiller, Esq.

Remembrances of Margery

The following remarks were delivered by Al Feliu at a celebration of the life of Arbitrator Margery Gootnick held at Fordham Law School on June 11, 2012. Al presented on behalf of the New York State Bar Association's Labor and Employment Law Section. John Sands moderated the event and other speakers included Nancy Hoffman, Esq., former CSEA General Counsel, George Nicolau, former President of the National Academy of Arbitrators, Christine Newhall, Senior Vice-President for the American Arbitration Association, Marty Scheinman, President of Cornell's Scheinman Institute on Conflict Resolution, and Susan Grody Ruben, Esq.

The voice. Can't you hear it? A little brassy, a little gravely. That powerful, piercing, determined, and clear voice.

Ever since Margery passed, it keeps returning. Like a super-ego telling me what I should do. As you probably know, Margery, among her many other accomplishments, was a Chair of the Labor and Employment Law Section. I just completed my term as Chair. I must admit, as a Chair-Elect in 2010-11, I was a sycophant at her feet. Brimming with ideas, I regularly ran them by Margery. Some of those ideas she endorsed, others she mocked, and still others she helped me reframe.

The voice. Guiding me, cautioning me, threatening me. She could be scary.

The voice that demanded one thing from you—do the right thing!

I'm pleased to say that some of those ideas for the Section have come or are coming to fruition. In the Catholic tradition, I must confess the following. Few or none of these ideas were original—I am not that smart. I confess to having "borrowed" extensively from a 1994 report from a Future Directions Committee report authored by none other than Margery Gootnick.

It took us, it took me, eighteen years to catch up to her. We in the Section are not done implementing Margery's ideas, and much more needs to be done to give life to her vision. But at least we're on our way.

The voice. Self-deprecating, self-aware.

Anyone who knows me knows that sarcasm and irreverence are among my few strengths. When Margery would get too serious with me or begin waving her finger emphatically at me to make her point, as she often did, I would simply take her finger-waving hand in my one hand and her second hand in my second hand and start to dance with her. This disarmed her. She would respond that she was not in the mood or had just eaten dinner and then she moved on to her next recipient of her views on what needed improvement.

If anyone doubts that Margery had a great sense of humor, they did not see her umpire the game in Cooperstown at one of our Section meetings ten or more years ago. It was a sight that none who were there can easily forget. Having pulled a muscle trying to relive a life of athletic success which I in fact had never lived, I was relegated to serving as catcher in front of umpire Margery. Throughout that game, she regularly threatened me with bodily harm if she were hit by the ball due to any failing on my part.

She was also a woman of great compassion and small gestures. Indeed, I received, as I had for more than a decade, a birthday card from Margery, humorous as usual. It arrived the day before she passed away. She always found a way to get the last word in.

There are many measures of the success of a life—trophies and awards, fancy titles, financial success, and collections of material things. Will Rogers said, "If you want to be successful, it's just this simple. Know what you are doing. Love what you are doing. And believe in what you are doing."

Anyone who knew Margery walked away convinced that she absolutely knew what she was doing, loved it, and fully believed in it—whatever the "it" was at the time. Many have disagreed with her, applauded her, or been inspired by her. But they could never ignore her, and never forget her.

When I announced Margery's passing, there was a flood of remembrances, reactions, vignettes, and poignant recollections. The entire Section, it seems, felt the need to share their special remembrances of Margery.

I am pleased to report that Chair John Gaal has appointed a committee of the Executive Committee to propose to the Executive Committee a proper way for the Section to honor Margery's memory.

The voice. Dogged, determined, scary. A clarion call for honesty, integrity, justice, and compassion. A voice of clarity in a world of ambiguity.

A voice I and many others in this room and beyond can never forget. And a voice and a presence that will be and is already desperately missed.

Alfred G. Feliu, Esq.

Is Your Client Eligible for Unemployment Benefits? Ten Key Issues to Consider While Advising New York Employees

By Delyanne D. Barros

When faced with sudden unemployment, many claimants are often unaware of what may affect their eligibility for unemployment insurance ("UI") benefits. Deciding whether or not to accept a severance package or a part-time job may impact a claimant's qualification for UI benefits. To receive UI benefits, claimants must be unemployed through no fault of their own, have sufficient past earnings, remain "ready, willing and able" to work, and actively seek work during their unemployment period.[1] Attorneys that assist claimants with their application for UI benefits should become familiar with the various factors that may result in the reduction or disqualification of their clients' UI claim. This article outlines ten key issues that may arise when advising clients about their qualification for UI benefits.

1. A claimant may be eligible for UI benefits if the claimant was constructively discharged from his or her employment (i.e., forced to quit)

Generally, under the New York Labor Law ("NYLL"), a claimant is ineligible for UI benefits if he or she voluntarily leaves a suitable employment without good cause. If the claimant alleges that he or she was forced to quit, then the claimant carries the burden of proof. The Unemployment Insurance Board ("UI Board") and New York courts have recognized various instances that qualify as a voluntary quit for good cause. For instance, if the claimant's employer gives him or her a choice of resigning or being terminated, then the UI Board will construe the claimant's subsequent resignation as involuntary.[2]

New York courts have also recognized other instances where the claimant will be eligible for UI benefits because he or she was constructively discharged.[3] For instance, the UI Board found that a claimant voluntarily quit with good cause when he left his job due to his employer's discriminatory enforcement of the company's tardiness policy.[4] The UI Board has also found that a claimant who left his job was entitled to UI benefits because his employer failed to respect the claimant's seniority rights as they applied to promotions.[5] However, not all proffered justifications in support of this claim will be accepted. For instance, the UI Board has held that a claimant voluntarily quit without good cause where she left her job after her manager warned her that she would be terminated the following week if she did not improve her performance.[6]

2. A claimant who is terminated for misconduct is ineligible for UI benefits

To be eligible for UI benefits, the claimant must not have contributed to his or her termination (i.e., misconduct). The employer has the burden to show that the claimant's misconduct was the actual reason for the termination.[7] The employer must also show that the claimant acted in willful and wanton disregard of its interest.[8] In order words, "for a claimant's conduct to rise to the level of disqualifying misconduct for unemployment insurance purposes, the misconduct must either be detrimental to the employer's interest or a violation of a reasonable work condition."[9] The employer must show that the claimant was terminated because his or her conduct was not merely negligent, but was damaging to its economic interest.[10] For instance, a claimant's record of excessive absences for a non-compelling reason may be considered misconduct.[11] If the employer meets this burden of proof, the claimant will likely be disqualified from receiving UI benefits.

3. Acceptance of a severance agreement may affect a claimant's eligibility for UI benefits

A claimant is generally eligible for UI benefits even while he or she is receiving separation-related payments such as severance pay. However, a claimant will be disqualified from receiving UI benefits if the following qualifications are met: the severance pay represents the full salary and benefits the claimant received during his or her employment and the agreement provides that the severance payments will cease if the claimant obtains new employment.[12] While the claimant is receiving these severance payments, he or she cannot obtain new employment, therefore, the claimant is considered to not be "ready, willing, and able" to work as required by the NYLL.[13]

A claimant may also be considered ineligible for benefits if the severance agreement provides that the reason for the termination of employment is a "voluntary separation" without good cause.[14] To avoid this problem, attorneys should negotiate appropriate language regarding the claimant's departure and a clause providing that the employer will not contest his or her UI benefits claims.

4. A claimant may be eligible for UI benefits if domestic violence was the reason for his or her voluntary separation from employment

In relevant part, NYLL § 593(1)(a) provides that "a claimant shall not be disqualified from receiving benefits for separation from employment due to any compelling family reason."[15] Domestic violence is specifically recognized as a "compelling family reason."[16] For a claimant to invoke domestic violence as the reason for voluntarily quitting his or her job, the alleged domestic violence must be authenticated by "reasonable and confidential

documentation which causes the individual reasonably to believe that such individual's continued employment would jeopardize his or her safety or the safety of any member of his or her immediate family."[17] For this finding, the UI Board and New York courts generally evaluate the totality of the circumstances to determine whether the voluntary separation from employment was the direct result of the claimant being a victim of domestic violence.[18] For instance, the UI Board has found that a claimant had a compelling family reason to quit her employment where she reasonably feared for her safety after her former husband, who previously abused her and her children, stalked her near her workplace.[19] The Third Department has also held that a claimant voluntarily quit with good cause "due to her husband's escalating verbal and mental abuse [and] claimant, who was pregnant and suffering from poor weight gain and sleeplessness, resigned from her employment and relocated with her five-year old son to a domestic violence shelter, a decision supported by claimant's obstetrician."[20]

5. A claimant classified as an independent contractor may still be eligible for UI benefits

Generally, independent contractors are not eligible for UI benefits. However, if the employer misclassified a claimant as an independent contractor, the claimant may be eligible for UI benefits. To determine whether a claimant is an independent contractor or an employee, the UI Board will evaluate whether there was an employer-employee relationship between the two parties.[21] To determine the existence of such a relationship, the UI Board and New York courts often apply the fact-intensive common-law test, which evaluates how much supervision, direction, and control the claimant's employer exerted over the claimant's work.[22] The UI Board also considers how the employer compensated the claimant and the nature of the claimant's work. If an employee-employer relationship is established, the claimant will be eligible for UI benefits.

6. A claimant may work part-time while receiving partial UI benefits

If a claimant works part-time during his or her period of unemployment, the claimant may still qualify for partial UI benefits.[23] To receive the partial benefits, the claimant must work less than four days a week and earn no more than $405 of gross income per week. Each day a claimant works reduces the claimant's weekly benefit rate by one-quarter. Therefore, even if a claimant works only one hour on any given day, then his or her benefits will be reduced by one quarter for each day worked. If the claimant's weekly wage is above $405, he or she will not receive the UI benefit payment for that week.

One of the advantages of receiving partial benefits while working part-time is that it extends the length of time the claimant may collect benefits. As provided in NYLL §590 (3)-(4), the duration of UI benefits is calculated in "effective days" not weeks.[24] A claimant is eligible to receive UI benefits for up to 104 effective days within the benefit year. When a claimant is considered partially unemployed for purposes of receiving partial benefits, days on which he or she is not totally unemployed are "saved" and can be used for benefits later on.[25] For example, if the claimant works two days a week, he or she may receive 52 weeks UI benefits at a 50% rate simply by using up to two instead of four effective days per week.[26]

7. Self-employment may affect a claimant's eligibility for UI benefits

Generally, for purposes of determining a claimant's eligibility for UI benefits, the UI Board and New York Courts have interpreted self-employment as having the same effect as other forms of full-time and part-time employment. That is, self-employment will render a claimant ineligible for UI benefits on the days he or she performs such work because the claimant is not "totally unemployed" as required by the statute.[27] Any "activity that brings in or may bring in income at any time" can be considered self-employment.[28] If these conditions are met, the claimant will be disqualified from receiving UI benefits for the days worked on his or her business.[29]

However, if a claimant is pre-approved under the Self-Employment Assistance Program, the claimant may receive an allowance for establishing his or her own business.[30] To participate in this program the claimant must first qualify for regular UI benefits.[31]

8. Volunteer work during the unemployment period may result in the reduction and/or disqualification of UI benefits

Similar to performing self-employment or part-time work, a claimant may also become ineligible for UI benefits while volunteering during the unemployment period. To remain eligible for UI benefits the volunteer work must satisfy certain conditions. First, the volunteer work must be for either a charitable, religious, or a cultural organization.[32] Second, the claimant must not be paid in any form for such work.[33] Third, the volunteer work cannot be a precondition to being hired or rehired into a paid position.[34] Fourth, the claimant's volunteer responsibilities must not impede his or her continued job search.[35] Finally, the volunteer work must not affect or limit the number of day and hours the claimant is willing to work.[36] In essence, prior to doing volunteer work, the claimant must understand that he or she has to remain ready, willing, and able for future employment opportunities.[37]

9. Receiving workers' compensation may affect a claimant's eligibility for UI benefits

When a claimant is receiving workers 'compensation, he or she may still be eligible for UI benefits. The claimant's eligibility will depend on whether he or she is available and physically able to work. While receiv-

ing workers' compensation will not disqualify a claimant from collecting UI benefits, it may decrease his or her weekly UI benefits rate. When the claimant files for UI benefits, he or she must inform the Telephone Claim Center about the workers' compensation benefits. At that point, the Telephone Claim Center will determine if it should reduce the claimant's UI benefits based on his or her receipt of workers' compensation benefits.[38] Note, however, a claimant's weekly workers' compensation and UI benefits cannot exceed his or her weekly wage in the base period.[39]

10. The Department of Labor has the power to recoup a claimant's UI benefit payments if it finds that the claimant was overpaid

In a recent decision, the Third Department confirmed that pursuant to NYLL §597(4), the Department of Labor ("DOL") has the power to recover previously awarded UI benefit payments as overpayment if the claimant received a back pay award for the period he or she was receiving UI benefits.[40] Specifically, the Court noted that when a claimant received a back pay award covering the period he or she was unemployed, the back pay award for that period renders him or her not "totally unemployed" as required by the NYLL. In this context, the Court construed the award of back pay as wages and found that previously awarded UI benefits were recoverable as overpayment. In most cases, the DOL is unlikely to seek recoupment in the absence of fraud or willful misrepresentation and its right to do so is subject to certain time limits. In relevant part, NYLL § 597(3) provides "any determination regarding a benefit claim may, in the absence of fraud or willful misrepresentation, be reviewed only within one year from the date it is issued because of new or corrected information, or, if the review is based thereon, within six months from a retroactive payment…."[41]

Endnotes

1. For a detailed description of UI benefit requirements, *see Before You Apply for Unemployment: Frequently Asked Questions*, at http://www.labor.state.ny.us/ui/claimantinfo/beforeyouapplyfaq.shtm#0.
2. A.B. 8963-43 (claimant involuntarily separated from his employment because he was given the option to resign or be discharged after a disagreement with a foreman); *but see also* A.B. 388, 505 (noting "a claimant's choice to leave employment due to a change in claimant's school schedule which the employer is unable or unwilling to accommodate, while continuing work is available in the claimant's usual schedule, is tantamount to a voluntary leaving of employment without good cause").
3. A.B. 13, 297-46 (recognizing that "false accusations or constant insinuation made by the employer that claimant is dishonest" may constitute good cause for voluntary separation from employment).
4. A.B. 6849-42, A-750-323.
5. A.B. 1965-42.
6. A-750-893.
7. *Matter of James*, 358 N.Y.S.2d 411, 414 (1974) ("[T]here is no question that valid cause for discharge must rise to the level of misconduct before an employee becomes ineligible to receives benefit. The division's regulations unequivocally expressed, in classifying, among other things, inefficiency, negligence, and bad judgment, as valid causes for discharge which do not render the employee ineligible.").
8. *Matter of Waszkiewicz*, 684 N.Y.S.2d 52 (3d Dep't 1999) (claimant did not act in willful and wanton disregard of his employer's interest when he refused to sign a Conflict of Interest and Confidentiality Agreement and therefore was not terminated due to misconduct).
9. *Matter Marten*, 680 N.Y.S.2d 28, 28-29 (3d Dep't 1998) (claimant's conduct constituted misconduct because it was damaging to the employer's interest).
10. *See Matter Marten*, 680 N.Y.S.2d. at 29.
11. *See* A-750-1777 (claimant's employment was terminated because of his excessive absence record).
12. *See* note 1.
13. However, a claimant's receipt of unused accrued vacation time will not render him or her ineligible for UI benefits. *See* note 1.
14. *In re Cammissa*, 834 N.Y.S.2d 337 (3d Dep't 2007) ("quitting one's job to accept a severance or early retirement package when continued work is available has been held not to constitute good cause for leaving employment").
15. NYLL § 593(1).
16. NYLL § 593(1)(b) (i).
17. *Id.*
18. A 750-2120.
19. A 750-2121.
20. *Matter of Loney*, 731 N.Y.S 2d 279 (3d Dep't 2001) (Reversing Appeal Board).
21. For a detailed description of an independent contractor and an employee, *see UI and Independent Contractors* at http://www.labor.state.ny.us/ui/claimantinfo/ui%20and%20independent%20contractors.shtm (last visited Dec. 1, 2011).
22. *Matter of Watz*, 60 A.D.2d 259, 261, 400 N.Y.S.2d 889, 891 (3d Dep't 1977), *aff'd*, 387 N.E. 611, 414 N.Y.S. 2d 680 (1979) ("although the existence of an employment relationship is not determined by any single circumstances and all must be weighted, a particularly significant factor to be considered is control").
23. NYLL § 596(5).
24. NYLL § 590(3)-(4).
25. Blum, Richard, Overview of New York Unemployment Insurance Law & Procedure Training Outline, LEGAL AID SOCIETY (October 23, 2009).
26. *Id.*
27. A-750-1417; *see also* A.B. 44, 313 (claimant who spent his evening hours running his gift shop is self-employed and therefore ineligible for benefits).
28. For a detailed description of the conditions, *see Before You Apply for Unemployment: Frequently Asked Questions*, at http://www.labor.state.ny.us/ui/claimantinfo/beforeyouapplyfaq.shtm.
29. *Matter of Huller*, 376 N.Y.S 2d 677(3d Dep't 1975) ("A claimant devoting one hour per day to a real estate brokerage in which he is a corporate officer is not totally unemployed even though there were no sales.").
30. NYLL § 591(a)(1)-(2).
31. A-750-2084 (a claimant must be eligible for regular unemployment insurance benefits to be enrolled in the Self Employment Program).
32. *See Before You Apply for Unemployment: Frequently Asked Questions*, at http://www.labor.state.ny.us/ui/claimantinfo/beforeyouapplyfaq.shtm.

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *See After You Apply for Unemployment: Frequently Asked Questions*, at http://www.labor.ny.gov/ui/claimantinfo/onceyouhaveappliedfaq.shtm#10.
38. *See Before You Apply for Unemployment: Frequently Asked Questions*, at http://www.labor.state.ny.us/ui/claimantinfo/beforeyouapplyfaq.shtm.
39. *Id.*
40. *Matter of Glick*, 909 N.Y.S. 2d 160 (3d Dep't 2010) (claimant charged with an overpayment of $10,165 after receiving a back pay award for the period of time he was collecting UI benefits).
41. NYLL § 597(3)(1).

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Do Labor Arbitrators "Split the Baby" in NYC Teacher Cases?

By Jeffrey T. Zaino

In the news of late, there has been a great deal of controversy with respect to New York City public school-teacher arbitrations. Many questions have been raised in the press and elsewhere, specifically about the teacher arbitration program itself, established by the New York City Department of Education (DOE) and the United Federation of Teachers. As well, some politicians, including Mayor Michael Bloomberg, believe the arbitrators to be the problem. This article looks at the perception, by some, that arbitrators "split the baby" to stay in good graces with both unions and management.

A recent arbitration decision overruled the DOE's attempts to fire fourteen teachers accused of inappropriate behavior. Notable here, it must be made clear that this article does not examine the rationale expressed by the arbitrator for the above decision, only that the facts contained allegations of touching or making sexually suggestive comments to students.

Following the decision, Mayor Bloomberg went as far to state that the arbitrators "don't want to be too tough on the union members because then the union will never allow them to be selected. Now the city has a vote in it as well, but if either one wants to block it they can, and so the allegation is, I don't know whether it's true or not, but the allegation has always been that some of these arbitrators are, not reluctant, just will not impose any penalties."

As suggested by the Mayor, the notion that arbitrators are the cause (that they "split the baby") is nothing new. It has roots embedded from generations of arbitration practice, which developed out of cross-cultural needs to keep peace among nations and / or factions within organized societies, over disputed items being traded between them. Those ideas resulted from a need to combine the concepts of mediation with arbitration.

Evolving into the modern practice of arbitration as a separate, distinct and notably fair profession of decision making, the premise of "splitting the baby"…either as a perfunctory or ritualistic measure, is simply not a realistic practice. Moreover, such practices are certainly not condoned by various agencies that appoint arbitrators or professional associations that have either power or authority to sanction an arbitrator. All labor arbitrators must adhere to high ethical standards and the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*. They are trained and required to render a "fair and impartial decision."

Two prominent New York labor arbitrators have agreed to share their opinions on this latest controversy and provide insight on how they decide arbitration cases. They are Richard Adelman and Jacquelin F. Drucker. Both have been arbitrators for decades, served on teacher cases in NYC, and are members of the National Academy of Arbitrators.

Arbitrator Richard Adelman

> Mayor Bloomberg's comments are the same as the advocate / party who thinks he / she should prevail in every case no matter what evidence is presented. Experienced arbitrators, however, decide cases, and impose penalties, based on the facts; they do not simply "split the baby." Everyone knows that King Solomon did not split the baby, but only threatened to split the baby. The wise King knew that splitting the baby was an unacceptable result which would alienate both parties. Similarly, an arbitrator who inappropriately splits the baby thinking he / she is currying favor with a party often ends up alienating both parties, exactly the opposite result that such baby-splitting is supposedly trying to achieve. Indeed, the Mayor seems to understand that when he says "the City has a vote" in the selection of arbitrators, but the usually sensible Mayor does not follow his thought to its logical conclusion, i.e., that an arbitrator who inappropriately splits the baby in discharge cases where the City should prevail will be found unacceptable by the City, and by the Union in cases where the Union should prevail. The beauty of the arbitration process is that a third-party neutral hears and decides disputes subject to his / her continuing acceptability by both parties. Arbitrators who split the baby inappropriately do not last as arbitrators.

Arbitrator Jacquelin F. Drucker

> Simply put, experienced, qualified labor arbitrators "call them as they see them." They find facts based upon the record and they make decisions by applying the appropriate legal standards to those facts. That is the way—and the only way—an arbitrator fulfills his or her responsibilities to the parties and the process. End of discussion.

I trust that upon reflection Mayor Bloomberg will recognize that, in an arbitrator's decision-making process, there is no place for weighing whether one of the parties is going to be unhappy with the decision for which the facts and applicable standard call. No arbitrator's career would continue, nor could any good arbitrator sleep at night, if he or she allowed such considerations to affect the outcome of cases. Indeed, in nearly every arbitration, one party is going to be unhappy with the decision. That is a fact of arbitral life. That an arbitrator is able to continue in the profession for decades, with repeated joint selections from numerous parties, indicates not that the arbitrator has been able to give each party a little something but, rather, that even losing parties eventually recognize and respect the integrity and analysis that have led to the arbitrator's decisions. That is the way—and the only way—an arbitrator sustains a career.

Conclusion

Without question, the arbitrator responses contained in this article comport with the views held by the greater majority of long-standing and traditional labor arbitrators who practice in this field. Hopefully, they also validate the premise contained above and which is embraced by the tenets of this writer's organization.

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The NYSBA Labor and Employment Law Section has created a new committee: the Technology in the Workplace and Practice Committee. It will focus on the impact of technology on workplace-related issues including the use of social media by employers and employees, the privacy implications of new and existing computer-based technologies, developments under federal and state laws impacting the use of new technologies, ethical and privilege issues associated with electronic communications, and new developments in electronic discovery. The Committee will also address the intersection of new technologies with the practice of labor and employment law. We are planning upcoming events concerning electronic discovery in New York state courts and workplace legal issues concerning social media.

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Between a Rock and a Hard Place: When does an employee have "good cause" to quit his job in order to avoid performing an unethical or inappropriate, but not illegal, act?

By David K. Kessler

In New York, an employee who quits his job is entitled to unemployment insurance benefits only if that employee quits for "good cause." A number of situations can provide the grounds for "good cause," including one in which an employer asks an employee to participate in illegal conduct. For instance, there is no doubt that if a truck driver were asked to transport stolen property, that driver would have good cause to quite his employment. The rationale behind the rule is straightforward: the unemployment system should not force an employee to choose between breaking the law and not receiving unemployment benefits. But what if the employer asks an employee to do something that is not illegal, or at least not clearly illegal, but that nevertheless strikes the employee as immoral or unethical? What if the employee is forced to choose between his unemployment benefits and his ethical compass?

The Third Department of the Appellate Division has suggested in several cases that an employee has good cause to quit when her employer asks her to perform not an illegal act but rather an "unethical" or "inappropriate" one.[1] The unemployment appeals board has recognized that an employee may have good cause to quit in order to avoid a task that would cause "an offense to claimant's conscience on the basis of religion and morals," but those cases all seem to involve the classic conscientious objector who, for reasons related to his religion, refuses service in aid of a war or to work on the Sabbath.[2] Neither the Appeal Board nor the Appellate Division has provided a clear definition of just what kinds of acts are sufficiently unethical or inappropriate to provide good cause for quitting, nor have they provided explicit guidance about whether the act must be merely subjectively immoral or improper or whether it must be objectively so. This article distills a few key principles from the cases involving a claimant who alleged that he quit in order to avoid performing an unethical or inappropriate act.

Acts that seem very close to actual crimes fall on the "good cause" side of the ledger. For example, in *In re Collen*, the claimant, an associate attorney who had joined her firm just three weeks earlier, quit her job because he employer had "sent a client a letter using claimant's signature without her knowledge or permission," which letter "contained misrepresentations and false information," and had "requested that claimant misrepresent to certain clients that she was an independent contractor."[3] The Third Department held that the claimant had good cause for quitting because she had quit "in order to avoid the required performance of an illegal or unethical act." The court did not discuss whether the acts in question were illegal or merely unethical. In another case, ALJ Case No. 525-1427-52R, an ALJ held that a claimant, a bookkeeper and secretary, had quit with good cause because her employer had "paid her salary in the correct amount, but carried her on the record in a smaller sum."[4] The ALJ found that the employee's "leaving was the moral and ethical one and that the arrangement was in violation of law."

The court in *In re Ormerod* suggested an exception to this general rule about illegal or near-illegal acts. There, the claimant quit because he believed his employer, a car dealership, was engaged in a price fixing conspiracy.[5] In determining that the claimant lacked good cause for quitting, the court explained that, even if such a conspiracy had existed, there was no evidence that the *claimant* had been "exposed to criminal liability." *Id.*

On the other hand, mere "disagreement with the employer's method of conducting business"[6] does not constitute good cause.[7] For example, in *In re Donnelly*, the claimant, a sales manager at MCI Worldcom, was concerned about "questionable business practices," including "frequent billing errors," and "their potential impact upon her business reputation."[8] The court held that the claimant's "disagreement with the employer's business practices" did not provide sufficient cause. *Donnelly* is basically a less extreme version of *Collen*, in which the questionable practices were more questionable, if not illegal, and directly implicated the claimant's reputation. *In re Kunzler* involved a situation similar to that in *Donnelly*, with a similar result. There, the claimant, a financial manager in the accounting department of a not-for-profit corporation, resigned because "she disagreed with the employer's financial practices and was concerned that her reputation would be tarnished by her association with an organization that made unprofessional billing errors."[9] The Third Department agreed with the Unemployment Insurance Appeal Board that the claimant lacked good cause for quitting—she "presented no evidence of misconduct on the employer's part" and "conceded in her hearing testimony that the employer did not ask her to do anything illegal or inappropriate." And in case 54969 before the Unemployment Insurance Appeal Board, the

claimant quit after his employer allowed an employee the claimant believed to be unlicensed to drive a truck.[10] The Board concluded the claimant lacked good cause to quit where "the claimant himself was [not] asked to do something illegal" and where the claimant had "primarily a matter of philosophical differences with the owner." Finally, in *In re Fumia*, the claimant, an underwriter, quit because "he felt his employer engaged in unprofessional practices."[11] The court held that the claimant did not have good cause because his "employer did not direct him to do anything illegal or in violation of applicable regulations."

Read together, these cases suggest what an employee must show in order to establish good cause for quitting based upon moral or ethical concerns. First, the action that the employee does not want to take must be very wrong—close to a violation of some law or regulation—if not actually illegal. Thus in *Collen* and ALJ Case No. 525-1427-52R, the conduct at issue was essentially fraud, whereas in *Kunzler* it was not even clear that the employee actually believed the conduct to be inappropriate.

Second, the court appears to evaluate the "wrongness" of the action at issue based upon an objective, rather than a subjective, standard. That is, the question is not whether the employee herself *believed* the action to be inappropriate but rather whether the action was objectively inappropriate. Thus in *Fumia* the court emphasized that although the employee "felt" that his employer engaged in unprofessional practices, there was no evidence that anything the employer asked the claimant to do was unprofessional. Similarly, in *Appeal Board No. 54969*, the court ignored that the claimant "believed" the actions at issue to be illegal. More generally, in each of the "no good cause" cases, the court's analysis focused on objective factors—evidence of actual misconduct—rather than upon the employee's own belief.

Third, the wrongful act must directly implicate the defendant. Thus, in *Ormerod* and in *Appeal Board No. 54969*, what mattered was whether the claimant himself had been exposed to criminal liability, not whether the employer was engaged in a price-fixing conspiracy that did not involve the defendant. Similarly, in *Appeal Board No. 137,451*, an employee did not have good cause to quit because he disagreed with the political endorsements made by a newspaper editor because the editorials were unsigned and, therefore, did not implicate the employee or connect him personally with the newspaper's opinions. Compare those situations to that in *Collen*, in which the wrongful act was inextricably intertwined with the employee himself.

As a final note, an employee asked to compromise his ethics or morals must still make reasonable efforts to raise his concern to his employer before quitting. In *In re Frenya*, for example, the court criticized the claimant for failing to "take the actions of a prudent person in bringing her alleged problems with her employer to the attention of her supervisor who was ready to assist claimant at all times."[12] Similarly, the *Ormerod* court faulted the claimant for "fail[ing] to pursue available options to preserve his employment."[13]

The analysis in this article suggests that a claimant faces an uphill battle in establishing that he had good cause to quit a job because he was asked to perform an unethical or inappropriate, although perhaps not illegal, act. Lawyers representing such clients would be well-advised to focus upon the objective inappropriateness of the action in question, rather than upon their clients' own beliefs. Moreover, lawyers advising clients who are considering quitting should urge those clients to take all possible steps to alert their employers of the problem before quitting.

Endnotes

1. *In re Appeal Board No. 540389*, N.Y. State Unemployment Insurance Appeal Board (Mar. 31, 2008).
2. Appeal Board Case Number 34,048-52 (refusal to work at factory assembling tanks); Appeal Board Decisions 174,361 et al. (refusal to continue participating in civilian service as alternative to the draft); Appeal Board Case Number 452,775 (refusal to work on the Sabbath).
3. 74 A.D.3d 1644, 1645 (3d Dep't 2010).
4. Referee's Decision Case Number #525-1427-52R.
5. 242 A.D.2d 804, 804 (3d Dep't 1997).
6. *In re Dunster*, 304 A.D.2d 1015 (3d Dep't 2003).
7. *In re Donnelly*, 308 A.D.2d 630 (3d Dep't 2003); *see also, e.g., In re Appeal Board No. 54969*, N.Y. State Unemployment Insurance Appeal Board (June 5, 2010) ("It is well-settled that a claimant does not have good cause to voluntarily quit his job based on dissatisfaction with the employer's method of operation.").
8. 308 A.D.2d 630 (3d Dep't 2003).
9. 297 A.D.2d 846 (3d Dep't 2002).
10. *In re Appeal Board No. 54969*, N.Y. State Unemployment Insurance Appeal Board (June 5, 2010).
11. 222 A.D.2d 923 (3d Dep't 1995).
12. 212 A.D.2d 921 (3d Dep't 1995); *see also In re Stewart*, 48 A.D.3d 873 (3d Dep't 2008) ("claimant advised the employer that he was leaving his employment without first affording the employer an opportunity to address his concerns and rectify any actual problems"); *In re Appeal Board No. 54969*, N.Y. State Unemployment Insurance Appeal Board (June 5, 2010) (claimant must "tr[y] to protect his employment by notifying management of his concerns").
13. 242 A.D.2d 804, 804 (3d Dep't 1997).

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Family Responsibilities Discrimination After the EEOC Enforcement Guidance

By Geoffrey A. Mort

Discrimination on the basis of "family responsibilities," i.e., against individuals who are caregivers of small children, elderly parents or others, is perhaps the most pervasive form of gender discrimination in the workplace today. Although most employers understand that race discrimination is unlawful and either do not practice it or take steps to conceal it if they do, the same cannot be said of family responsibilities discrimination, sometimes referred to as "FRD." Because this is a relatively new and continually evolving area of employment law, some employers remain ill-informed about whether it is permissible under Title VII and other statutes to treat an employee unfavorably because, for example, she is a mother of young children or wishes to take parental leave.

As a result, the number of lawsuits alleging FRD has been increasing in recent years, and they represent a growing percentage of gender discrimination cases filed in federal court. Moreover, plaintiffs frequently prevail in these cases. This article discusses the EEOC's 2007 Enforcement Guidance on Unlawful Disparate Treatment of Workers With Caregiving Responsibilities[1] which helped to put FRD "on the map"; Supreme Court and other cases that initially recognized FRD as a viable claim under federal anti-discrimination laws; and the development of this area of employment law in the five years since the EEOC Guidance was issued.

The Background of FRD

Early attempts to litigate FRD claims, sometimes under the Pregnancy Discrimination Act, usually were unsuccessful, with courts ruling that FRD was not a form of gender discrimination covered by Title VII. That changed in 1971 with the Supreme Court decision in *Phillips v. Martin Marietta Corp.*[2] *Phillips* was significant because it represented the first time that the Supreme Court recognized what is known as "sex-plus" discrimination. Sex-plus discrimination, one of the two primary theories under which FRD cases are brought, is discrimination based on sex in conjunction with a second characteristic, such as maternity.[3]

Phillips was the first FRD case. The employer did not discriminate against women based on gender *per se;* rather it maintained a policy against hiring women with school-aged children. The policy did not apply to men with small children. The court rejected the employer's argument that treating women without children the same as men somehow excused its discrimination against mothers and recognized a sex-plus subgroup of women with young children—the protected group that had been discriminated against. For more than fifteen years after *Phillips*, sex-plus was essentially the only theory available under which to bring FRD claims. As discussed below, however, it has limitations.

PriceWaterhouse v. Hopkins Changes the Landscape of FRD

The Supreme Court's 1989 decision in *PriceWaterhouse v. Hopkins*[4] recognized a new kind of claim that has had a profound impact on FRD cases, as well as other kinds of discrimination claims. PriceWaterhouse female senior manager Hopkins was denied promotion to partner because she was considered too "macho," was not seen as feminine enough, did not wear jewelry and in the view of some male colleagues needed "a course at charm school."[5]

The Supreme Court held that the firm's perception of Hopkins indicated gender discrimination because Title VII barred not only discrimination on the basis of sex, but also sex stereotyping. By sex stereotyping, the court meant failure to conform to stereotypes associated with one's gender.[6] The court pointed out that "[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group."[7] To this day, many FRD cases cite *PriceWaterhouse* when explaining their rulings.

Courts Increasingly Recognize FRD

For more than a decade after *PriceWaterhouse*, FRD litigation was relatively minimal. Several factors most likely explain this. Many federal courts tended to not apply sex stereotyping in cases involving discrimination against caregivers, and many litigants—perhaps believing that *PriceWaterhouse*, a non-FRD case, would be construed narrowly and confined to conventional workplace discrimination—did not, for the most part, attempt to use sex stereotyping in such cases.

Nonetheless, plaintiffs brought a number of sex-plus FRD cases during this period, including *Fisher v. Vassar College*,[8] where the court accepted the validity of a sex-plus maternity claim (though ruling against the plaintiff based on the facts) and *McGrenaghan v. St. Denis School*,[9] where the court denied the defendant's summary judgment motion seeking dismissal of the sex-plus claim of a woman with a disabled child.

Typical of the 1990s FRD cases in which plaintiffs successfully used the sex-plus theory was *Trezza v. The*

Hartford, Inc.,[10] a failure-to-promote Title VII case brought by a woman with school-age children. The court considered comments by Trezza's supervisors such as the assertion about "incompetence and laziness of women who are also working mothers" and, referring to Trezza's status as an employee with children, "I don't see how you can do either job well."[11] The *Trezza* court explained that "[t]he point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against *all* members of the sex."[12]

After 2000, however, FRD case law moved beyond sex-plus as federal courts began to accept the sex stereotyping theory in these cases.[13] Perhaps the case that, as much as any, signifies the beginning of contemporary FRD litigation is *Back v. Hastings on Hudson Union Free School District*.[14] The plaintiff in *Back* was a school psychologist and young mother who, despite good performance evaluations, was denied tenure. Finding that the *Back* plaintiff had a valid cause of action based in part on comments by supervisors about the lack of mothers' commitment to work, the court ruled that "where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based."[15]

The significance of *Back* and several similar cases in other circuits[16] is that they made it far easier for plaintiffs to bring FRD cases and opened the floodgates to many more such actions. The reason is that, unlike many sex-plus cases, courts in stereotyping cases do not require comparator evidence of one or more employees who are not part of the protected subgroup and were treated better than the plaintiff. The need for comparator evidence, for example, prevented women from suing for sex discrimination where there were no similarly situated men with children in the workplace. As the court in *Back* pointed out, "[t]he relevant issue is not whether a claim is characterized as "sex plus"…but rather whether the plaintiff provides evidence of purposefully sex-discriminatory acts."[17]

FRD Is Not Confined to Women

Although women are the majority of plaintiffs in FRD cases, caregiver bias claims are not confined to women. Despite the fact that both parents in a majority of families with children work, the stereotype that child care is not masculine and should be confined to women persists. Many male FRD claims involve interference with or denial of FMLA or other requests for caregiver leave related to the birth of a child. In these cases, a common fact pattern entails men being penalized at work—demoted, ostracized or even terminated—for running afoul of the gender stereotype that they are the "breadwinner" and child care is only for women.

EEOC v. Commonwealth Edison Co.,[18] which pre-dates *Price Waterhouse* as well as the FMLA, was among the earlier FRD cases brought by men. The employer in that case denied the request of a male employee for unpaid personal leave to care for his infant child. That Title VII action was resolved by a consent decree between the EEOC and the employer that required the employer to provide unpaid leaves to male as well as female employees to care for young children.

Another notable FRD case involving men's right to caregiver leave was litigated in the same district more than fifteen years later. *Schultz v. Advocate Health and Hospitals Corp.*,[19] an FMLA case brought by a young male hospital worker who alleged that his employer terminated his employment for taking unpaid leave to care for his aging, ill parents. The case went to trial in 2002 and resulted in an $11.65 million award for the plaintiff.[20]

As FRD case law continues to evolve and men today are less willing than those in prior generations to trade off their families for their careers, males seeking caregiver leave may find the courts more receptive to their FRD claims.

The EEOC Enforcement Guidance

In May 2007, the EEOC issued its Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities. Some have touted the Enforcement Guidance as the most significant development in the history of FRD law. The Enforcement Guidance clearly and succinctly informs employers and the public about what discrimination against caregivers is under Title VII and other statutes and points out that the growing percentage of women in the labor force has made caregiving an increasing topical and litigious issue. The Guidance also observes that nearly a third of families have at least one family member with a disability.

The Guidance goes on to describe both the "maternal wall" that impedes career advancement by women with children as well as the widespread employer stereotyping that affects both female and male employees. Reflecting the increasing number of FRD cases based on stereotyping, as opposed to sex-plus theory, the Guidance discusses stereotyping at length, providing user-friendly examples of how stereotyping manifests itself. These examples address such situations as how stereotyping infects the hiring process, the terms and conditions of employment, promotions and adverse treatment following return from maternity and parental leave.[21]

Additionally, the Guidance explains that in FRD cases based on stereotyping theory, a plaintiff may go forward with a Title VII action even without compara-

tor evidence.[22] (The same is true in a sex-plus case only if the plaintiff has direct evidence of discrimination.) The Guidance goes on to cover a wide range of FRD-related subjects, including pregnancy discrimination, the fact that stereotyping is unlawful even if carried out for benevolent reasons, FRD discrimination against minority women and the "intersectional discrimination" against such employees that can occur and ways in which FRD discrimination affects men as well as women.

Included in the Guidance to support its discussion of FRD is a list of many of the more significant FRD cases during the decades preceding its issuance.[23] One noteworthy case is *Plaetzer v. Borton Automotive, Inc.*,[24] decided the same year as *Back*. In *Plaetzer,* a woman with young children whose employment was terminated after being told that mothers should "do the right thing" and stay home with their families sued her former employer for gender discrimination under Title VII. The employer's argument that the action was a sex-plus case and should be dismissed because there were no comparators was rejected by the court. The court effectively summarized FRD stereotyping theory and decided in favor of the plaintiff when it ruled that comparators are unnecessary where an "employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible."[25] The EEOC stated that it believed the *Plaetzer* court's analysis is the correct one.

Although FRD cases often are brought under Title VII, the Guidance called attention to the fact that such actions also may be brought under the Family and Medical Leave Act ("FMLA") or Americans with Disabilities Act as Amended ("ADAAA") when the caregiver is discriminated against not for having children, but for caring for an ill or disabled relative. As the Guidance observes, the ADAAA "prohibits discrimination because of the disability of an individual with whom the worker has a relationship or association." Although not as often as taking measures based on notions about women with children, some employers may take adverse action against an employee due to a stereotypical assumption that an employee's ability to perform his or her job duties is compromised when that individual also is providing care to a disabled relative or other person.[26] In view of the aging population, such cases may become more prevalent.

The Guidance also notes that caregivers may be subjected to "unconscious" or "reflexive" bias, and that such bias may result in actionable discrimination.[27] Although Title VII requires plaintiffs to show an employer's discriminatory intent or motive, the very concept of stereotyping seems to encompass subjective bias. Such bias can result in discriminatory acts taken without deliberate intent, as the Guidance recognized when it observed that employment decisions based on stereotypes can be unlawful "even when an employer acts upon such stereotypes unconsciously." Some courts have embraced this concept, including the court in *Dow v. Donovan*,[28] which ruled that a plaintiff need not prove a "conscious motivation" on the part of an employer in order to prevail in a discrimination case.

The Guidance gave a substantial boost to FRD litigation. It provided the EEOC's imprimatur to discrimination cases based on caregiver status and informed the public as well as attorneys about this important area of employment law. As discussed below, the Guidance also encouraged a new wave of FRD cases and helped make FRD one of the most rapidly developing areas in employment law.

FRD Case Law Since the EEOC Guidance

The volume of FRD cases brought since the EEOC Guidance is too extensive for a comprehensive discussion. However, a selective discussion of some of these cases provides a useful picture of current FRD litigation and how courts are now approaching these claims. By and large, plaintiffs have been relatively successful in FRD cases using stereotyping theories and, to a lesser extent, with sex-plus claims.

Maternity/Pregnancy Cases

In *Walton v. Best Buy Co., Inc.*,[29] plaintiff Lori Walton's employment was terminated after giving birth to her second child. A triggering event was when Walton left work to pick up her children at daycare, angering her supervisor. The following day, the supervisor told Walton that she didn't "'work with people that have kids so we're going to have to figure something out.'"[30] Walton was placed on a performance improvement plan and, one month later, discharged. Walton brought a sex-plus discrimination claim and was able to identify comparators. The court, denying summary judgment, took note of the supervisor's comments and ruled that there was sufficient evidence "for a jury to conclude…that the plaintiff's failure to perform well was due to the fact that the defendant was not giving her training opportunities that it provided to others and the reason for failing to train her was that she was a mother of young children."[31]

Chadwick v. Wellpoint, Inc.[32] is noteworthy in several respects. First, its facts neatly fit the mold of today's typical successful FRD cases. Second, although it is a relatively recent decision, it represents yet another example of a court confusing sex-plus and stereotyping theories. Chadwick, a long-time, successful insurance company employee, was denied a promotion that went to a less qualified candidate. At the time of the promotion decision, Chadwick was the mother of an eleven-year-old and triplets in kindergarten. Her superior, when advising her that she had not received the promotion, stated, "[i]t was nothing that you did or didn't do. It was just that you are

going to school, you have the kids and you just have a lot on your plate right now."[33] The First Circuit reversed the district court's grant of summary judgment, incorrectly identifying the case as a sex-plus claim. However, the court then proceeded to declare, citing *Price Waterhouse*, that "[t]he type of discrimination Chadwick alleges involves stereotyping based on sex" and observed that "the assumption that a woman will perform her job less well due to her presumed family obligations is a form of sex-stereotyping."[34]

Zambrano-Lamhaouhi v. New York City Board of Education,[35] an FRD gender stereotyping case brought under §1983, involved discrimination based on both pregnancy and maternity. The plaintiff, a teacher and assistant principal at a public high school, was subjected to a harassment campaign by her principal after she disclosed that she was pregnant. When the plaintiff had the opportunity to participate in a professional development program, the principal prevented it and said, "well, you're pregnant, so it doesn't matter if you get to the training or not."[36] The plaintiff left on maternity leave, and when she returned her principal accused her of insubordination and excessive absences. She later was transferred to several undesirable high schools with reputations for student violence.

Partially dismissing the City's summary judgment motion, the court recited a litany of actions and comments by the principal which evinced hostility to pregnant women and mothers of young children. In its decision, the court made reference to "the real world prevalence of the stereotype that pregnant women and young mothers will make undesirable employees" and stated that it took "the recognized pervasiveness of such gender stereotypes into account" when denying summary judgment.[37] *Zambrano-Lamhaouhi* demonstrates not only courts' growing receptiveness to FRD claims, but also the ongoing, widespread nature of maternity and pregnancy discrimination even among presumably sophisticated managers.

The court in *Tingley-Kelley v. Trustees of the University of Pennsylvania*[38] observed that that case was in many respects similar to *Chadwick*. The plaintiff, a mother with young children, applied no fewer than six times to the University of Pennsylvania's veterinary school and always was rejected. As in many other FRD cases, the plaintiff defeated summary judgment by producing direct evidence of bias against women with children. Brought as a sex-plus case, *Tingley-Kelley* featured comments, questions and notes by veterinary school interviewers. (The plaintiff's application was rejected before the interview stage in several instances.) The plaintiff testified that her childcare responsibilities were discussed at length during all of her admission interviews. Not only did the interviewers question her about "whether she was prepared to handle the rigors of [the school's] program and care for her daughter,"[39] but one wrote on his interview review sheet "at school w/2 young children."[40] The court concluded that the plaintiff could produce evidence sufficient to show that she was discriminatorily stereotyped "as a busy mother of two young children who would have a difficult time handling both graduate school and her childcare responsibilities,"[41] and denied the university's summary judgment motion. *Tingley-Kelley* presents another example of savvy, well-educated individuals apparently unaware that sex stereotyping in the employment realm is unlawful.

A case that illustrates the degree to which some courts now take FRD stereotyping claims seriously is *Merrill v. M.I.T.C.H. Charter School Tigard*.[42] The plaintiff in this Title VII gender discrimination termination case was a charter school teacher who sought leave for the birth and care of her child. Despite relatively sparse evidence of discriminatory animus—Merrill's supervisor encouraged her to return to work part-time after her maternity leave and engaged in a dispute with her about the amount of leave she was entitled to—summary judgment was denied. The court found sufficient evidence that the employer harbored a "belief that plaintiff, being a woman, would be less committed to her job after the birth of her child,"[43] and found significant the fact that the plaintiff was the only school employee who had been terminated "mid–[employment] contract" and had good performance evaluations.[44]

If the perception that courts are becoming more sympathetic to FRD plaintiffs is accurate, *Maxwell v. Virtual Education Software, Inc.*,[45] may represent a good example of this trend. The plaintiff, a web designer for a small software company, was the mother of one small child when hired and became pregnant during her employment. There was a moderate amount of evidence that the plaintiff had a bad attitude and alienated her co-workers, and relatively minimal evidence that the plaintiff was being subjected to gender stereotypes. (One supervisor did describe a discussion about whether plaintiff could work an agreed-upon schedule as a "new mother issue."[46]) Nonetheless, the court, interpreting Washington's anti-discrimination law, denied summary judgment.

Although the cases discussed above represent only a small sample of the large number of FRD decisions that have been issued since the EEOC promulgated its Guidance five years ago, those and other cases in this area do suggest that the Guidance has had an impact. Although there certainly was FRD litigation under both the sex-plus and stereotyping theories prior to the Guidance, the Guidance appears have given this area of employment law greater legitimacy and encouraged a growing number of employees to challenge workplace decisions that appear to be motivated by animus toward mothers of young children and other caregivers. And, despite what some consider to be the inherent conservatism of the federal courts, a number of circuit and district courts have

been sympathetic to stereotyping and sex-plus claims and allowed FRD plaintiffs to take their cases to trial.

Non-FRD Stereotyping Litigation

Gender stereotyping and, to a lesser extent, sex-plus theories have been widely used in employment discrimination lawsuits outside the realm of FRD. Numerous sex discrimination cases since 2007 show the different ways in which these theories have been used, and involve gender stereotypes other than those discussed above pertaining to the purported unreliability of women with young children or pregnant women.

For example, the plaintiff in *Knox v. City of Portland*[47] survived summary judgment in a case where she alleged that she was subjected to a hostile work environment based in part on stereotypical views that women are not hard workers, seek special treatment and lack the "toughness" and discipline needed for some jobs.

Nuskey v. Hochberg[48] is another of the many cases in this area. Relying on stereotyping theory, the plaintiff produced evidence that her supervisor considered her insufficiently feminine and compliant. Describing Nuskey, the supervisor who terminated her used such terms as "aggressive woman" and "strong woman."[49] The court ruled that such statements indicated a "discriminatory animus based on gender stereotypes,"[50] and denied summary judgment.

Yet another variation on gender stereotyping is seen in *Marquez v. Harper School District No.* 66.[51] The plaintiff in *Marquez*, a school custodian, was subjected to discrimination in the terms and conditions of her employment in such ways as being directed to clean toilets and having her work sabotaged. The plaintiff introduced such evidence as a supervisor's comments that it would not be safe to have a "young woman in the building alone,"[52] (which affected the shifts available to her), and that a male co-worker should not be expected to get things "woman clean."[53] The court denied summary judgment, finding that this was sufficient evidence of stereotyping.[54]

Men also have used stereotyping theory to bring non-FRD gender discrimination claims. One example is *Prowell v. Wise Business Forms, Inc.*,[55] a retaliation case brought by a male employee who had been discharged. The court acknowledged a problem that arises in many such cases when it stated that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw."[56] The plaintiff in *Prowell*, who conceded that he had a high voice and walked in an effeminate manner, was harassed by his co-workers for his speech and mannerisms. After he complained of mistreatment, his employment was terminated. The court, denying summary judgment, stated that there was sufficient evidence that "Prowell was harassed because he did not conform to [the company's] vision of how a man should look, speak and act—rather than harassment based solely on his sexual orientation,"[57] and that there also was evidence he was terminated because of his discrimination complaint.[58]

Conclusion

After a slow start, FRD has come into its own as a major area of employment discrimination litigation. Not that long ago, the use of litigation to remedy discrimination against caregivers was considered by some to be little more than a theory—in part because such discrimination is not *per se* unlawful under Title VII. However, the EEOC Guidance, characterized by some commentators as perhaps the single most important event in the development of FRD litigation, has confirmed that attacking FRD by using gender stereotyping, sex-plus and other theories in federal and state court is viable and accepted by many courts.

Despite the increase in the amount of FRD litigation, much remains to be done before discrimination against caregivers is effectively addressed on a broad scale. Although the Guidance clearly has had an impact, many companies and supervisors remain unaware that discrimination on the basis of maternity, pregnancy and the like is unlawful. Further, courts in FRD cases continue to rely heavily on comparator evidence. This is particularly troubling because of widespread sex-segregation of jobs, which prevents women from identifying male comparators and leads to dismissal of their cases on motions. Yet, as discussed above, the Guidance emphasizes that plaintiffs in FRD gender stereotyping cases can make out a *prima face* case of sex discrimination under Title VII without comparator evidence. (There are numerous ways to raise an inference of caregiver discrimination without the use of male comparators, e.g., by evidence of harassment.) Employers, the EEOC and the private bar need to do more to educate both the workplace world and the judiciary about this issue.

Although numerous obstacles remain before female and male caregivers receive full protection under the law against caregiver discrimination, the EEOC Guidance—as demonstrated by the case law in the five years since its issuance—may well be a turning point in the development of FRD litigation into a fully accepted approach to combating bias against caregivers.

Endnotes

1. EEOC Compl. Man. (BNA) § 615 (May 23, 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf (hereinafter *Enforcement Guidance*).
2. 400 U.S. 542 (1971).
3. *Dervings v. Walmart Stores, Inc.*, 374 F.3d 428, 439 n. 8 (6th Cir. 2004).
4. 490 U.S. 228 (1989).
5. *Id.* at 235.
6. *Id.* at 250-51.

7. *Id.* at 272-73.
8. 70 F.3d 1420 (2d Cir. 1995).
9. 979 F. Supp. 323 (E.D. Pa. 1997).
10. 1998 U.S. Dist. LEXIS 20206 (S.D.N.Y.).
11. *Id.* at *5.
12. *Id.* at *19 (emphasis in original).
13. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000) (that supervisor in termination case has "specifically questioned whether [the plaintiff] would be able to handle her work and family responsibilities" is evidence of discrimination under sex stereotyping theory).
14. 365 F.3d 107 (2d Cir. 2004).
15. *Id.* at 121.
16. *See e.g., Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).
17. *Id.* at 118-19.
18. 1985 U.S. Dist. LEXIS 18361 (N.D. Ill. 1985).
19. No. 01 C 712, N.D. Ill..
20. *See also Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (plaintiff state trooper brought successful FRD claim under FMLA and §1983 when denied leave to care for newborn child; plaintiff was told that his wife had to be "in a coma or dead" for him to qualify for caregiver leave).
21. *Enforcement Guidance*, *supra* note 1, at 5-18.
22. *Id.*
23. *Enforcement Guidance*, *supra* note 1, at 21-27.
24. 2004 WL 2066770 (D. Minn. 2004).
25. *Id.* at *3.
26. *See, e.g., Abdel-Khalke v. Ernst & Young, LLP*, 1999 WL 190790 (S.D.N.Y.) (summary judgment denied where employer refused to hire applicant due to belief that she would take too much time off to care for child with disability).
27. *Enforcement Guidance*, *supra* note 1, at 11.
28. 150 F. Supp. 2d 249, 263-64 (D. Mass. 2001).
29. 2010 U.S. Dist. LEXIS 83788 (E.D. Michigan).
30. *Id.* at *11–*12.
31. *Id.* at *28.
32. 561 F.3d 38 (1st Cir. 2009).
33. *Id.* at 42.
34. *Id.* at 44.
35. 2011 U.S. Dist. LEXIS 133863 (E.D.N.Y.).
36. *Id.* at *8.
37. *Id.* at *58.
38. 677 F. Supp. 2d 764 (E.D. Pa. 2010).
39. *Id.* at 777.
40. *Id.*
41. *Id.*
42. 2011 U.S. Dist. LEXIS 36497 (D. Ore. 2011).
43. *Id.* at *14.
44. *Id.* at *17.
45. 2010 U.S. Dist. LEXIS 79682 (E.D. Wash.).
46. *Id.* at *12.
47. 543 F. Supp. 2d 1238 (D. Ore. 2008).
48. 657 F. Supp. 2d 47 (D.D.C. 2009).
49. *Id.* at 58.
50. *Id.*
51. 2011 U.S. Dist. LEXIS 64390 (D. Ore.).
52. *Id.* at *35.
53. *Id.* at 36.
54. *See also Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1039 (8th Cir. 2010) (summary judgment denied in sex stereotyping action brought by terminated hotel front desk clerk who testified that she was criticized by superior for lack of "prettiness" and "Midwestern girl look").
55. 579 F.3d 285 (3d Cir. 2009).
56. *Id.* at 291.
57. *Id.* at 292.
58. *See also McMullen v. Southern California Edison*, 2008 U.S. Dist. LEXIS 95635 (C.D. Calif.) (motion to dismiss against effeminate male employee's gender stereotyping claim dismissed).

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Independent Contractors Under Title VII

By Hon. Katherine A. Levine

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000-e *et seq.* ("Title VII"), protects employees from employers who "fail or refuse to hire or...discharge any individual, or otherwise...discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of such individual's race, religion, color, sex, or national origin. 42 U.S.C. §2000e-2(a). To prevail on a Title VII claim, the plaintiff must prove the existence of an employment relationship, *Mathews v. N.Y. Life Ins. Co.*, 780 F. Supp. 1019, 1024 (S.D.N.Y. 1992), which is "jurisdictional." *Keller v. Niskayuna Consolidated Fire Dist. 1*, 51 F. Supp. 2d 223, 226 (N.D.N.Y. 1999). Thus, a plaintiff must prove that he is an employee, as Title VII does not protect independent contractors. *Mathews, supra*, 780 F. Supp. at 1024. Similarly, the defendant must come within the definition of "employer" in order for the court to have jurisdiction. *Keller, supra*, 51 Supp. 2d at 226; *Serrano v. 900 5th Ave Corp.*, 4 F. Supp. 2d 315, 316 (S.D.N.Y. 1998).

The U.S. Supreme Court has held that "where a statute containing the term 'employee'" does not helpfully define it, "the courts should apply the common law agency test." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23, 117 L. Ed 2d 581 (1992). Since Title VII only contains a "circular" definition of the term employee (see *Tagare v. NYNEX Network Systems Co.*, 994 F. Supp. 149, 154 (S.D.N.Y. 1997), the courts look to common law agency principles to determine whether a plaintiff is an employee or independent contractor. *Nelson v. Beechwood Org.*, 2004 U.S. Dist. LEXIS 25622 (S.D.N.Y. 2004); *Tagare, supra*, 994 F. Supp. at 154.

For purposes of Title VII, whether a claimant is an employee is "to be determined under the common law of agency rather than individual state law." *Salamon v. Our Lady of Victory Hosp.*, 514 F. 3d 217, 226 (2d Cir. 2008); *Johnson v. Fedex Home Delivery*, 2011 U.S. Dist. LEXIS 142425 (E.D.N.Y. 2011). Therefore the standards enunciated by the New York Court of Appeals in such cases as *Bynog v. Cipriani Group*, 1 N.Y. 3d 193 (2003) to determine whether an employment relationship exists within the meaning of the state's Labor Law or Human Rights Law are not governing. Rather, a plaintiff must refer to the federal common law governing the issue of employment status in the Title VII context in order to withstand dismissal of the federal claim. *Johnson v. Fedex, supra* (comparison of state and federal standards to determine employment status). *See Serdans v. Presbyterian Hosp. in N.Y.*, 2011 U.S. Dist. LEXIS 109350 (S.D.N.Y. 2011).

The Second Circuit has established a two-part test to determine whether an individual is an "employee" as defined by Title VII. *Summa v. Hofstra University*, 2011 U.S. Dist. LEXIS 37975 (E.D.N.Y. 2011). As a threshold matter, the plaintiff must show that he was hired by the putative employer by "establishing he received some sort of direct or indirect remuneration from the putative employer." *U.S. v. City of N.Y.*, 359 F. 3d 83, 91-92 (2d Cir. 2004); *York v. Assn. of the Bar*, 286 F. 3d 122, 125-26 (2d Cir. 2002). Although the remuneration need not consist of a formal salary, it must consist of "substantial benefits not merely incidental to the activity performed." *U.S. v. City of N.Y., supra*, 359 F. 3d at 91-92. Other such benefits include health insurance, vacation, sick pay or the "promise of any of the foregoing." *York v. Assn. of the Bar, supra*, 286 F. 3d at 125-26. However, where no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship can be said to exist and the court need not inquire further. *York, supra* at 126; *Nelson v. Beechwood, supra* at 4.

Once a plaintiff demonstrates that he received remuneration, the court must examine the 13 factors enunciated by the Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 104 L. Ed 2d 811 (1989) to determine whether an employment relationship exists. *City of N.Y., supra*, 359 F. 3d at 92. The factors to be considered are:

> [1] the hiring party's right to control the manner and means by which the product is accomplished…[2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment; [9] the hired party's role in hiring and paying assistants; [10] whether the work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; and [13] the tax treatment of the hired party.

Reid, supra, 490 U.S. at 751-52 (footnotes omitted). *See Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 113-14 (2d Cir. 2000); *Attis v. Solow Realty Dev. Corp.*, 522 F. Supp. 2d 623, 627 (S.D.N.Y. 2007).

In *Eisenberg, supra*, the Second Circuit indicated it should disregard those *Reid* factors which were either ir-

relevant or of an "indeterminate weight," i.e., those facts which were essentially in equipoise. The greatest emphasis is placed on the first factor—"the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks." 237 F.3 at 113-14 (plaintiff—a warehouse loader—unloader—was deemed to be an employee since she was paid on an hourly basis and was required to punch in and out and was given orders as to her daily job duties). *See also, Tadros v. Coleman*, 717 F. Supp. 996, 1004 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 10 (2d Cir. 1990) ("A Title VII plaintiff is only an 'employee' if the defendant both pays him and controls his work"); *Summa v. Hofstra*, *supra* at 9. "Stated another way, under Title VII, an employer compensates and controls an employee's work." *Nelson v. Beechwood*, *supra*, at p. 2. Additionally, while an employer generally "directs an employee as to which tasks to perform,...an independent contractor is obligated only to perform whatever tasks it has agreed to by contract." *Johnson v. Fedex*, *supra* at 10.

The Second Circuit also noted that those positions requiring "specialized skill" obtained through experience and education, such as architect, computer programmer, graphic artist or photographer, suggested that the worker was an independent contractor. *Eisenberg*, *supra*, 237 F. 3d at 118. The Court admonished against applying greater emphasis on employee benefits and tax treatment in the anti discrimination context since employers could avoid compliance with the laws by simply devising compensation packages that included no-benefits and no-tax deductions clauses to insure that all workers are deemed to be independent contractors. *Id* at 117.

The term employer is broadly defined as a person who has 15 or more employees for each working day in each of 20 or more calendar weeks—42 U.S.C. §2000 e (b). The plaintiff bears the burden of establishing that at least 15 of the individuals working for the defendant are employees and not independent contracts or volunteers. *Keller v. Niskayuna Cons. Fire Distr.*, *supra*, 51 F. Supp. 2d at 227. Regular part-time workers meet the definition of "employee" and may be counted toward meeting the jurisdictional minimum number. *Cohen v. S.U.P.A.*, 814 S. Up. 251, 255 (N.D.N.Y. 1993). *See also Zena Jones v. Mega Fitness Inc.*, 1996 U.S. Dist. LEXIS 6875 (S.D.N.Y. 1996).

Sample Cases

Nelson v. Beechwood Org., 2004 U.S. Dist. LEXIS 25622 (S.D.N.Y. 2004). Plaintiff drove trucks for DMP, which was the subcontractor for defendant Beechwood. The court denied defendant's motion for summary judgment because plaintiff alleged sufficient facts that Beechwood was a joint employer in that it supervised and coordinated all functions and duties performed by DMP drivers who had to report and answer to DMP supervisors every day. Additionally, plaintiff alleged that Beechwood determined work sites, assigned projects, and managed work.

Summa v. Hofstra University, 2011 U.S. Dist. LEXIS 37975 (E.D.N.Y. 2011). Plaintiff, a student manager for the university football team, was an employee under Title VII as she received a $700 cash stipend for her services. A Title VII employment relationship could exist even where the putative employee received no salary so long as the employee received numerous job related benefits. *See Pietra v. Bd. of Fire Comm'rs of Farmingville Fire Dist.*, 180 F. 3d 468, 473 (2d Cir. 1999) (a volunteer firefighter receives "indirect but significant remuneration" through benefits such as a disability pension, survivors' benefits, group life insurance, and scholarships for dependents upon death, thus creating an employment relationship under Title VII).

Mary Lou Stetka v. Hunt Real Estate Corp., 859 F. Supp. 661 (W.D.N.Y. 1994). Plaintiff real estate agent deemed to be an independent contractor, despite the fact that she was required to serve "floor time" two hours per week, attend weekly sales meetings, and was given a desk and supplies. Plaintiff scheduled her own hours, marketed her own listings and was expected to develop her own business leads. She was paid on a commission basis predicated upon her actual sale of homes; no taxes were deducted from her gross commissions, and she was not covered by either workers' compensation or unemployment insurance. Finally, the defendant did not exercise day-to-day control over plaintiff.

Curtis Johnson v. Trinstar Enterprises, 2011 U.S. Dist. LEXIS 142425 (E.D.N.Y. 2011) illustrates that there is "no real conflict" between the standards enunciated by the Second Circuit (*Reid* factors as refined by *Eisenberg)* for use in Title VII cases and by the N.Y. Court of Appeals for use in State Division of Human Rights ("DHR") claims. Plaintiffs provided deliveries for Federal Express under an Operating Agreement whereby plaintiffs utilized their own delivery company to hire workers who used plaintiff's van.

The district court first found that plaintiffs had abandoned their Title VII claim by failing "to refer to the federal common law governing the issue of employment status in the Title VII context or to Title VII at all." Rather, plaintiff referred to the standards utilized by the New York Court of Appeals in cases such as *Bynog v. Cipriani Group*, 1 N.Y. 3d 193* (2003), where the "critical inquiry in determining whether an employment relationship exists pertains to the *degree of control exercised by the purported employer over the results produced or the means used to achieve the results*." 1 N.Y. 3d at 198 (emphasis added). The Court of Appeals identified five non-exhaustive factors that should be considered in assessing the degree of control: "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule." *Id.* at 198. *See Scott v. Mass. Mut. Life Ins. Co.*, 86 N.Y.2d 429, (N.Y. 1995)

(applying these standards to determine whether someone is an employee under the State Human Rights Law).

Yet, despite its dismissal of the Title VII claim, the district court reverted back to the *Reid* factors to determine plaintiffs' status. The district court found it proper to utilize the *Reid* factors since the standards cited by both the *Reid* and *Bynog* courts emanated from the common law of agency and were non-exhaustive. Furthermore, despite their different formulations and factors, both tests demanded "an identical inquiry" which placed "primary importance on the purported employer's control over the work. *Johnson supra* at p. 7.

The court found the following factors to be indeterminate: a) the location of work, since the very nature of delivery work requires deliverers to travel from a centralized pick-up location to remote drop off locations; b) the method of payment, since the record did not indicate what portion of the Johnsons' total compensations was a daily wage (indicative of employee status) and what portion was predicated upon their completion of specific tasks (indicative of independent contractor).

The following factors inured in favor of employee status: a) plaintiffs' work was to provide services that were central to FedEx's entire business—the picking up and delivering of packages; b) the long duration and permanent nature of the relationship between the Johnsons and Fed Ex; c) the relatively unskilled nature of the job.

The following factors inured in favor of independent contractor status: a) lack of sufficient employee benefits; b) plaintiffs were responsible for the source of instrumentalities and tools, i.e use and upkeep of their own van, including payment of fuel costs; c) plaintiffs had broad discretion and a predominant role in hiring, paying, and supervising their drivers and "hired and paid others to do the actual work they were obligated to perform under the Operating Agreement"; d) the Johnsons were only obligated to perform delivery services and FedEx could not reassign them to perform other tasks; e) tax treatment—plaintiffs received an income statement on a Form 1099 (generally used for independent contractors) rather than on a Form W-2 (employees); f) the Operating Agreement prohibited FedEx from prescribing hours of work or when plaintiffs could take a break. While the Johnsons were obligated to work on certain days and times compatible with customers schedules, this in and of itself was not indicative of employee status since even independent contractors are required to keep a schedule.

The district court found that the most important factor—the right to control the manner and means of work—led to the conclusion that the Johnsons were independent contractors. The *Reid* factors already considered that weighed in favor of independent contractor status were also those most indicative of control—the Johnsons provided their own equipment, could not be reassigned to other tasks, had broad discretion over their hours, and could hire others to do their work.

Judge Katherine A. Levine was elected to the Civil Court of the City of New York, Kings County, in November 2007 and has sat on the bench in both Richmond and Kings Counties since January 2008. A number of her decisions have been published in the Official Reporter. Prior to being elected to the bench, Judge Levine worked as a Senior Counsel with the Office of James R. Sandner, New York State United Teachers, for 23 years where she specialized in labor, education, administrative and constitutional law, with an emphasis on the First Amendment Rights of Free Speech and Academic Freedom, as well as the Establishment Clause. She obtained a jury verdict of $1,350,000 after a four-week trial before the late Judge Robert Ward on behalf of a college administrator in Israel who was terminated after speaking out against the improper entanglement of religion and state funds in the administration of an overseas program.

Judge Levine attended the School of Industrial & Labor Relations at Cornell University and the University of Maryland Law School where she was a Notes & Comments Editor on the Law Review. She has presented before the Labor and Employment Law Section of the New York State Bar Association on the First Amendment Rights of Public Employees. She is on the Executive Committee of the Labor and Employment Law Section of the New York State Bar Association and both the Legal Referral Services and International Human Rights Committees of the New York City Bar Association. She chairs the Program Committee at, and is on the Board of Directors of, Congregation Mt. Sinai and serves on the School Leadership Team at P.S. 193.

Ethics Matters

By John Gaal

Q The other day, I received a copy of an email my adversary sent to his client. While I am not sure how this happened, I suspect I was inadvertently included. I am hoping I can make use of the email, since there is some information in it that will be really helpful and I otherwise would never have discovered it.

A As a matter of ethics, the "rules" for handling this kind of situation have been undergoing some changes.

Twenty years ago, in ABA Formal Opinion 92-368, the ABA's Committee on Ethics and Professional Responsibility applied the then existing version of the Model Rules (which was silent on this issue) and concluded that a lawyer receiving materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, and not intended to be sent to the receiving lawyer, should not review those documents beyond the point of recognizing the transmission error. Rather, sending counsel was to be notified of the apparent error, and the materials were to be handled and disposed of in accordance with that counsel's directions. ABA Formal Opinion 92-368.

Although the Model Rules at the time contained no explicit provision on this subject, the ABA Committee considered several factors to support its conclusion: (1) the importance the Model Rules accord maintaining client confidentiality; (2) the law governing waiver of the attorney-client privilege; (3) the law governing missent property; (4) the similarity between these circumstances and other conduct the profession universally condemns; and (5) the receiving lawyer's obligations to his client. ABA Formal Opinion 92-368. It ultimately based its Opinion on the premise that confidentiality is a fundamental aspect of the right to the effective assistance of counsel, and the very nature of confidentiality strongly supported a rule requiring lawyers to refrain from reviewing inadvertently disclosed confidential or privileged information. The Committee concluded that the various competing principles, including the obligation of zealous advocacy on the part of the receiving attorney, "pale[d] in comparison to the importance of maintaining confidentiality." *See, e.g.*, ABA Formal Opinion 92-368 (1992).

Numerous state and local ethics committees, applying either their own version of the Model Rules or the prior Model Code, have concurred with the ABA's conclusion and followed at least generally Formal Opinion 92-368 in interpreting their own standards of attorney conduct. This was true in New York. For example, New York County Opinion 730 (2002) followed ABA 92-368, observing that the "absence of a directive regarding misdirected communications in New York's Code of Professional Responsibility did not relieve lawyers of the obligation to "share responsibility for ensuring that the fundamental principle that client confidences be preserved—the most basic tenet of the attorney-client relationship—is respected." In New York City Opinion 2003-04 (2003), the Association of the Bar of the City of New York also generally followed the dictates of ABA 92-368, although it concluded that:

> a receiving lawyer may ethically retain a misdirected communication for the sole purpose of presenting it to a tribunal for in camera review, if the lawyer (1) promptly notifies the sending lawyer about the mistaken transmission, and, if requested, provides a copy to the sending lawyer, (2) believes in good faith, and in good faith anticipates arguing to the tribunal, that the inadvertent disclosure has waived the attorney-client or other applicable privilege or that the communication may not appropriately be withheld from production for any other reason, and (3) reasonably believes disclosing the communication to the tribunal is relevant to the argument that privilege has been waived or otherwise does not apply.

The New York City Opinion also recognized that a receiving lawyer should not be penalized for making use of information obtained prior to realizing the misdirected nature of the information received.

Authorities in many other jurisdictions reached similar conclusions. *E.g.*, Maryland Bar Association Opinion 2000-04 (materials not to be used); Utah Ethics Opinion No. 99-01 (1999) (same); Oregon Formal Opinion 1998-150 (1998) (a lawyer's ethical duty of zealous representation does not obligate a lawyer to read an unexamined privileged document that had been inadvertently produced, and a lawyer is ethically required to return a privileged document without examining it); North Carolina Ethics Opinion RPC 252 (1997) (materials are not to be used); Virginia Legal Ethics Opinion NO. 2702 (1997) (inadvertently received documents are to be returned) (*but see* Virginia Legal Ethics Opinion NO. 2786 (2004) (notice to adversary and return of documents might not be required if not originals)); Connecticut Bar Informal Opinion 95-4, 96-4 (1996); Kentucky Bar Association Opinion

E-374 (revised) (1995); *see also Report: Ethical Obligations Arising out of an Attorney's Receipt of Inadvertently Disclosed Information*, Record of the Association of the Bar of the City of New York, Vol. 50, no. 6, PG. 660 (1995).

However, some states and local authorities issued opinions that at least varied somewhat from Formal Opinion 92-368. For example, some states adopted a "notice-plus" modification to the ABA's Opinion, requiring notification in many circumstances, but with a return of the documents required only in more limited cases. Some authorities required notice and return when the receiving lawyer was aware that the disclosure was inadvertent (as per ABA Opinion 92-368), but required only notice when the receiving lawyer reviewed a communication before realizing that its disclosure was inadvertent. *See, e.g.*, Colorado Bar Association Ethics Committee Opinion 108 (May 20, 2000); Illinois Bar Association Opinion No. 98-046 (1999) (if unaware of inadvertent transmission, may use information sent); District of Columbia Bar Opinion No. 256 (1995) (following ABA Formal Opinion 92-368 in part, but finding that the receiving attorney's duties depend on whether he or she knows of the inadvertence of the disclosure before examining the documents).

At the opposite end of the spectrum, some authorities adopted rules contrary to ABA Formal Opinion 92-368, not requiring either notice or a return of documents. *See e.g.*: Virginia Legal Ethics Opinion 1786 (2004) (notice may not be required where client originally had authorized access to the documents and only provides his lawyer with copies and not originals); Massachusetts Bar Association Committee Opinion NO. 2999-4 (1999) (may have an obligation to use documents); Alabama State Bar, Office of General Counsel, Informal Opinion of April 12, 1996; Philadelphia Bar Association Professional Guidance Committee Opinion 94-3 (June 1994) (a lawyer who receives a misdirected communication has no obligation to notify the sender or to abide by the sender's request for return of all copies of the communication), *but see* Pennsylvania Informal Opinion 95-57 disapproving of the Philadelphia view; *see also* Pennsylvania State Bar Association Report No. 2000.200 (2000) (noting absence of controlling Pennsylvania rule and holding that issue must "'be resolved through the exercise of sensitive and moral judgment guided by the basic principles of the Rules.' The decision of the lawyer will depend on the lawyer's view of his obligations, the nature of the information, how and from whom the information was received, attorney-client privilege and work product rules, and common sense, reciprocity and professional courtesy."); Maryland Bar Association Opinion No. 89-53 (June 23, 1989) (a lawyer who inadvertently receives confidential documents of an opponent is obligated to preserve the originals, if any, from destruction but is under no obligation to reveal the receipt of the documents to the court or the opponent); Michigan Opinion CI-1970 (1983) (confidential document of the opposing party may be used at trial where neither the attorney recipient nor his client procured removal of the documents from the possession of the other party). The *Restatement* view is that if the disclosure ends the privileged nature of the document, they can, and may have to, be used by the receiving attorney. *Restatement (Third) of the Law Governing Lawyers* § 60, Comment m.

These contrary opinions and commentary have often been based on the view that the ethical duty to represent one's client zealously within the bounds of the law not only permits but requires the lawyer to employ all resources at the lawyer's disposal, including those obtained due to another person's mistake, so long as those resources were obtained without the lawyer's wrongdoing.

A few years ago the ABA's Model Rules were significantly modified to expressly address this issue, albeit in a very unsatisfying way. New MR 4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." MR 4.4(b). The revised Comment notes that whether the receiving lawyer is obligated to return the document is "a matter of law beyond the scope of these rules." In other words, the ultimate issue is left unanswered. Where a lawyer is not required by some "applicable law" to return the material, the decision to voluntarily do so "is a matter of professional judgment ordinarily reserved to the lawyer." *Id.* at Comments 2 and 3.

The ABA's Committee on Ethics and Professional Responsibility subsequently issued a new opinion, Formal Opinion 05-437, reflecting this change in the Rules. As a result, this new Opinion withdraws Formal Opinion 92-368 and now merely provides that upon receiving an inadvertent transmission of material, the receiving lawyer's only ethical obligation is to notify the sender. Beyond that, the opinion merely repeats Comments 2 and 3, referenced above.

When New York adopted its "new" Rules of Professional Conduct in 2009, it included a provision identical to MR 4.4, providing simply that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

In what appears to be the first ethics opinion to address Rule 4.4, the New York City Bar Association has followed the lead of the ABA in Opinion 05-437, withdrawing its earlier adoption of ABA 92-368. Thus under the New York Rules as well, the only ethical obligation a lawyer has upon the inadvertent receipt of information is to notify the sender.

As simple as this Rule sounds, a few notes are worth making. First, the Rule applies to any "document." As New York City Opinion 2012-1 points out, the Comments to Rule 4.4(b), adopted by the New York State Bar Association, provide that "[f]or the purposes of this Rule, 'document' includes email and other electronically stored information subject to being read or put into readable form." Consequently, "documents" include paper correspondence, emails, voicemails and "other communications that may be read or transcribed." Second, under this Rule it does not matter whether the sender of the document is opposing counsel, an opposing party, a third party, or even a tribunal—the Rule applies the same in each case. Third, the Rule is not limited to "confidential" or "privileged" information; it extends to "any" inadvertently received document. Fourth, the Rule only applies to "inadvertently" received information. There is no Rule covering, for example, information deliberately, albeit perhaps inappropriately, sent.

Perhaps most significantly, and as New York City Opinion 2012-1 makes clear, the Rule merely answers the question of a lawyer's *ethical* obligation in this situation. There could be other legal issues or court rules that could come into play and restrict the ability of a lawyer to use this inadvertently sent information, at least where it constitutes attorney-client privileged information. As noted in Comment 2 to Rule 4.4, "a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion."

Finally, as the Comments to the Rule also note, subject to applicable law and the responsibility of lawyers to consult with their clients, decisions as to how to use such documents are left to the lawyer's professional judgment.

In other words, while we now have a clear cut "ethics" answer—notice is required—that is not necessarily the end of the analysis. Legal rules relating to ownership of the document could come into play, as well as court rules which seek to protect certain types of information. Especially when dealing with information that could be attorney-client privileged, a lawyer would be well advised to seek judicial review before assuming he or she is free to make use of this information. Mishandling of privileged information could easily lead to disqualification in pending litigation.

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.

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Data Breach Notification and the Multinational Employer

By Donald C. Dowling, Jr.

Imagine a serious data security breach that leaks names and private data of a multinational's employees across a number of countries. The breach might be due to a hacker, to a lost laptop, to data stolen by a rogue departing employee, or to any other security breakdown. Of course, the employees whose personal data got breached will want to know about the incident, if only to monitor identity theft and credit fraud. And the data protection agencies around the world that enforce data laws will also want to know of the breach if only because it might evidence lax security that violates data security mandates.

But in many situations an employer victimized by a data breach may have good business reasons not to broadcast news of the breach too widely, or too early. Does applicable law require disclosure? If so, when? And to whom? Even an employer willing to notify both government authorities and all employees affected by a breach needs to know the applicable breach notification deadlines and procedural mandates. The legal question becomes: *What are a multinational employer's precise obligations to notify government authorities and affected employees when personal data about employees in several jurisdictions get leaked?*

The answer, not surprisingly, depends on "applicable" law. Although each breach of employee data—each incident of hacking, each lost laptop, each rogue employee data theft—usually occurs in just one country, the applicable breach-notification requirements tend to be the mandates, if any, of all the principal places of employment of affected employees, plus maybe the law of the jurisdiction where a main server is located and possibly the law where the breach occurred. For most practical purposes, complying with applicable law after a data breach that affects employees across a number of jurisdictions often means ascertaining and complying with the breach notification rules of each home jurisdiction of each breach-victim employee.

What are those mandates around the world? Few if any breach notification mandates apply specifically to the *employment data* context, but many *general* data breach notification laws can reach employee victims of a data breach. Here we address global data breach-notification compliance from three geographical perspectives: the United States, Europe and the rest of the world. Then we touch on the legal issues in a breach of employment data beyond data breach notification mandates.

United States: U.S. state laws regulate breach notification obligations to U.S. residents—potentially including employees—whose data get compromised in a breach. Federal bills have been proposing federal legislation that might someday preempt this area, but according to an article of September 2011, there are "no immediate prospects for a federal law."[1]

Generally speaking, personal data protection / privacy in the U.S. is far less comprehensively regulated than in jurisdictions like the European Union, Australia, Canada, Hong Kong, Japan and the growing club of Latin American countries with omnibus data laww, Argentina, Chile, Mexico, Uruguay. But in our particular context here, data breach notification, U.S. states impose some of the world's most specific and tough obligations. Back in 2003 California passed a groundbreaking data security breach notification law and now 46 U.S. states have followed, imposing laws that require notice to data breach victims in certain contexts.[2] Many of these laws offer a private right of action.

These U.S. state breach notification laws generally require database owners to notify affected "customers" and other data subjects, possibly including employees, of a breach. And some of these laws require notice to state attorneys general or credit bureaus. U.S. state breach notification laws may be aimed primarily at remedying breaches of consumer data, but depending on the situation they can reach employee data breaches, as well particularly breaches implicating employee credit checks,

payroll, benefits, medical information, social security data and direct deposit information.

When a U.S.-based multinational employer suffers an employment data breach on U.S. soil, most of the affected employees often prove to be U.S. residents. In those cases, complying with U.S. state data-breach notification drives global breach-notification strategy. But word gets around; human nature being what it is, as soon as an employer notifies its U.S. employees consistent with any applicable state breach notification laws, the Americans might be expected to mention the breach to colleagues overseas. For several reasons, a widely followed practice is for a multinational to notify *all* its affected employees, worldwide, of a breach of their H.R. data, even including employees who work outside the U.S. and in jurisdictions that may not compel notice.[3]

Europe: A data breach that implicates employee victims who work outside the U.S. broadens the employer's breach-notification-obligation analysis to the domestic mandates of all affected overseas employees' home jurisdictions. The European Economic Area imposes the world's toughest data protection laws,[4] and so the focus often turns quickly to Europe.

But outside the telecommunications sector, current European data law is surprisingly sketchy as to breach-notification mandates. Europe might boast the world's toughest *general* data-protection regime, but European jurisdictions cannot claim leadership in imposing unambiguous breach-notification mandates.[5] A January 2012 report by the European Union agency ENISA repeats itself saying "[d]ata breach notifications are not yet mandatory in most countries in the European Union…. It should be noted that data breach notifications are not yet mandatory in most EU countries."[6]

This will change. A draft EU regulation issued in January 2012, meant to replace the current EU Data Protection Directive, proposes at its articles 31 and 32 to impose new, strict breach notification mandates, requiring data controllers to notify government data protection authorities of a breach within *24 hours* and to notify all where implicated data subjects are likely to be "adversely affected" within 24 hours, too.[7] But that proposal is controversial, not yet law.

The reason current European data law might lack clear data breach mandates is because Europe's general data-notification rules under the original EU Data Directive[8] grew up around the idea of forcing "data controllers" to tell government Data Protection Authorities [DPAs] and individual "data subjects," in the first instance, about their data processing *systems*. Current European data laws implementing ("transposing") the EU Data Directive focus so intently on requiring these notifications about systems, in the first place, that perhaps these laws neglect breaches that might occur later. In a sense, Europe's current data notice mandates are preventive; they try to "close the barn door before the cow gets out." Meanwhile, the U.S. states focus on post-crisis breach notification, the steps to take "after the cow gets out." But the future European regime under the pending data regulation will change this.

None of this is to say that a European employee victim of a data breach, today, has no arguments for notification under current law. A handful of individual European states impose their own specific breach-notification obligations: For example, a German law from 2009 mandates breach notification to local German DPAs and data subjects; laws in Spain and Ireland impose certain notice obligations; and Norway expressly requires notifying the Norwegian DPA even if just one Norwegian is affected by a breach.[9] And in a number of European jurisdictions that do not yet impose clear statutory breach-notification mandates, DPAs and affected data subjects might argue that broad *general* rules somehow require data controllers to notify DPAs and data subjects about data breaches. One argument is that a data breach is a *per se* violation of general data law which, by law, must be reported. These arguments seem strongest in Austria,[10] Czech Republic,[11] Denmark,[12] Slovakia,[13] Sweden,[14] and the U.K.[15] Another argument, maybe applicable across Europe, is that unless the data controller had previously disclosed "breaches" as one form of its data processing, then general data processing law may obligate the controller to notify DPAs and data subjects after an unanticipated breach occurred the breach being a new but as-yet-undisclosed form of data processing.

In researching and interpreting current breach notification requirements in Europe, focus on two prongs:

- ✓ First, ask whether the data controller must notify DPAs. At most only a handful of European states, including Germany and Norway, flatly require breach notification to DPAs but surely someone in every European state will argue that DPA notification of a serious breach is "recommended" or "encouraged."
- ✓ Second, ask whether the data controller must notify *affected data subjects* about the breach. Distinguish where notice is mandated versus jurisdictions that merely "recommend" or "encourage" notice.[16] This prong then splits into two halves: notice requirements to "direct data subjects" like employees versus notice to "indirect data subjects" like employees' e-mail correspondents. Where a multinational employer that suffers a breach of employee data decides, for human resources or business reasons, promptly to notify all affected staff worldwide, then the issue of whether current laws in Europe compel notice to European employees as direct data

subjects can drop out, as a practical matter, because the employer complies anyway.

Breach notification mandates aside, any publicized data breach in Europe not only brings bad publicity, it risks drawing close scrutiny from European DPAs and data subjects (data subjects have private rights of action). European states impose heavy penalties for widespread data-law violations, such as where sloppy data security allegedly caused the breach. DPAs and affected data subjects could always sue alleging a data breach resulted from illegally lax data security. Therefore, a multinational's breach-notification strategy in Europe should always factor in the high stakes: No company wants its breach notification to become an invitation to sue for illegally lax data security.

Beyond the U.S. and Europe: Stepping outside the U.S. and Europe, breach notification follows a broadly similar analysis. First ask: Which jurisdictions' laws control? In the employment context that will primarily be the laws of affected employees' places of employment. Then ask: Do any applicable jurisdictions' laws impose actual breach notification obligations (as opposed to recommendations and suggestions)? Often they will not. For example, according to the Australian Office of the Privacy Commissioner (now known as the Office of the Australian Information Commissioner) 2008 Guide to Handling Personal Information Security Breaches, Australia's "Privacy Act does not expressly require…an organisation to notify individuals if personal information is subject to a breach…."[17] Similarly, the newly enacted omnibus privacy laws in much of Latin America tend not to contain specific breach notification mandates. And (U.S. states aside) countries that do not impose broad omnibus data protection laws are even less likely to require employee breach notification.[18]

In a jurisdiction where local law does compel some actual breach notification, ask: What are the law's precise obligations to notify government agencies and affected data subjects? When a multinational employer makes the business decision to notify all affected employees worldwide of a breach, the focus should shift to notification obligations to government authorities. Very few jurisdictions outside the U.S. and Europe require notifying government agencies about breaches of *human resources* data, but some might, and some H.R. data breaches might fall under breach notification mandates for other types of data. Where laws do not compel notice to either government or affected data subjects, then consider what notice is "recommended" or "encouraged" as a good practice.

Legal issues beyond breach notification mandates: In many jurisdictions, whether any breach notification mandates apply to a specific H.R. data breach incident will depend on the facts, because even where no data breach notification law *per se* applies, some context-specific mandate could compel certain notifications in certain scenarios. That is, data breaches can sometimes implicate notification requirements from laws other than data laws, such as financial disclosure laws. Where an H.R. data breach somehow leaks regulated information about publicly traded securities (such as data about employee equity plans), securities laws might kick in—for example, Australia's Corporations Act of 2001[19] mandates stringent notice to the Australian Securities and Investments Commission, and at least one lost laptop in the U.K. triggered a huge fine from the U.K. Financial Services Authority because the laptop contained financial data. Europe also imposes special breach notification rules in the electronic communications and telecommunications sector,[20] and in some cases third party contracts or a company's own data policies might impose additional breach obligations, and may trigger claims or penalties.

These scenarios, though, for the most part lie outside the human resources data breach context. And few employment laws, collective bargaining agreements or laws requiring disclosures to labor agencies explicitly mandate H.R.-data breach notification although after a widely publicized data breach, employees, employee representatives, and labor agencies might argue the employer should have made certain notifications.

As such, whenever a data breach implicates employees' personal data, strategic human resources and labor practices, along with legal compliance initiatives, become vital.

Endnotes

1. Judy Greenwald, "Federal Data Breach Notification Law Could Simplify Process," Business Insurance (Sept. 18, 2011) (*available at* http://www.businessinsurance.com/article/20110918/NEWS07/309189980). For a discussion of U.S. federal laws that impose certain niche breach notification obligations in specific scenarios (not general obligations and for the most part not relating to employment data), see Gina Stevens, "Federal Information Security and Data Breach Notification Laws," Congressional Research Service Paper, Jan. 28, 2010 (*available* at http://opencrs.com/document/RL34120/).
2. A table listing these 46 laws appears at http://www.ncsl.org/issues-research/telecom/security-breach-notification-laws.aspx; the National Conference of State Legislatures website.
3. The issue becomes timing: Breach notice may need to be expedited or delayed in some jurisdictions.
4. EU Data Protection Directive, 95/46/EC (24 Oct. 1995) and member state laws transposed under it. On January 25, 2012, The EU Commission proposed a sweeping new EU Regulation which would replace this 1995 Directive. EU Commission Proposal for a Regulation, COM (2012) 11 final (25 Jan. 2012) (*available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf). While some EU regulation appears certain to replace the current EU data directive in coming years, the January 2012 Commission proposal merely offers a first draft. The final regulation is likely to differ.
5. For a summary of EU data breach notification rules *before* the January 2012 Proposal for a Regulation (*supra* note 4), see European Network and Information Security Agency [ENISA],

"Data Breach Notifications in the EU" (13 Jan. 2011) (*available* at http://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/dbn).

6. "Data Breach Notifications in the EU," *supra* note 5, at 11, 12.
7. Proposal for a Regulation, *supra* note 4. Recital 67, *id.*, explains that "[a] breach should be considered as adversely affecting the personal data or privacy of a data subject where it could result in, for example, identity theft or fraud, physical harm, significant humiliation or damage to reputation."
8. *Supra* note 4.
9. The German Federal Data Protection Act (BDSG), as amended in September 2009, at sec. 42a, requires breach notification to the data protection authority and to data subjects. Spain Royal Decree 1720/2007 imposes some breach notification obligations, as does an Irish Data Protection Commissioner Code of Practice, the Guidance on Data Breach Measures (*available at* http://www.dataprotection.ie/docs/7/7/10_-_Data_Security_Breach_Code_of_Practice/1082.htm). See "Data Breach Notification in the EU," *supra* note 5, at 12-13.
10. *Cf.* Austrian data law art. 24(2)(a).
11. *Cf.* Czech data law art. 40(1),(2).
12. *Cf.* Danish data law Title II, Chap. 4, sec. 5(1).
13. *Cf.* Slovak data law sec. 19(4).
14. *Cf.* Swedish data law sec. 38.
15. *See, e.g.*, citations in "Data Breach Notifications in the EU," *supra* note 5, at 12-13, noting that "[i]n 2008, the United Kingdom's Information Commissioner's Office (ICO) issued a guidance note on notification of data security breaches to the ICO. The ICO advised that it should be notified of serious breaches, although there was no legal obligation." *See* U.K. I.C.O. Guidance on Data Security Management (imposing certain notification obligations) (*available a*t http://www.ico.gov.uk/for_organisations/data_protection/~/media/documents/library/Data_Protection/Practical_application/GUIDANCE_ON_DATA_SECURITY_BREACH_MANAGEMENT.ashx).
16. *See, e.g., supra* note 10.
17. August 2008, at p.12 (*available at* http://www.privacy.gov.au/materials/types/guidelines/view/6478). As of March 2012, there were calls in Australia for breach notification law. *E.g.* Tim Lohman, "Call for Mandatory Data Breach Notifications Renewed," CSO Security and Risk Data Protection (3/16/12) (*available* at www.csoonline.com).
18. A somewhat outdated chart summarizing breach notification laws around the world appears in a 2009 article by Alana Maurushat, "Data Breach Notification Law Across the World from California to Australia," Univ. of New South Wales Faculty of Law Research Series paper #11 (available at http://law.bepress.com/unswwps/flrps09/art11/).
19. Available at http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/.
20. EU ePrivacy Directive, 2002/58/EC as amended by EU Directive 2009/136/EC.

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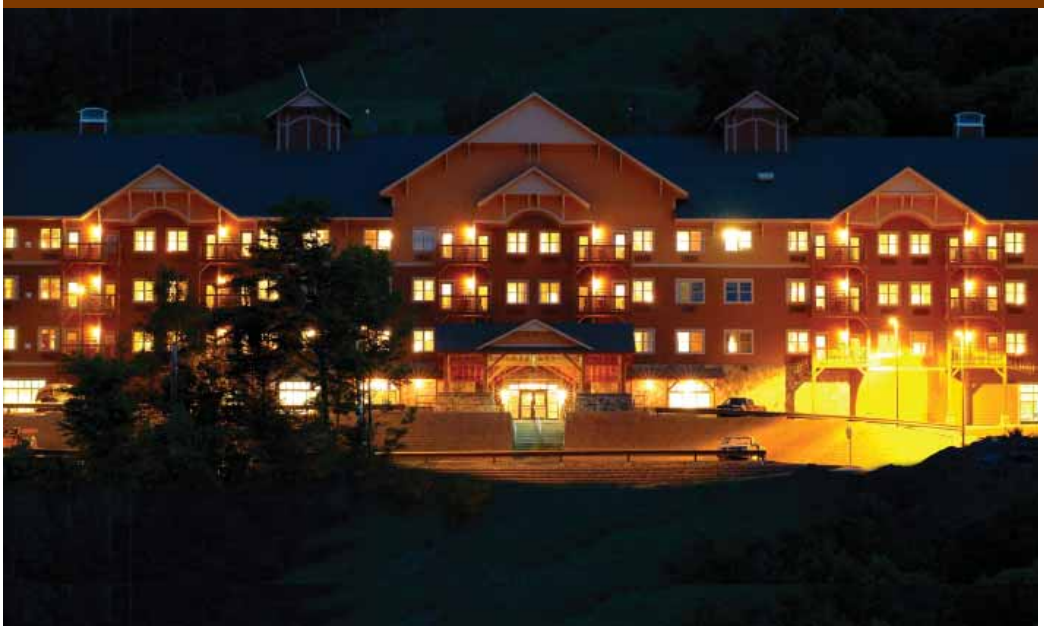

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