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Labor and Employment Law Journal

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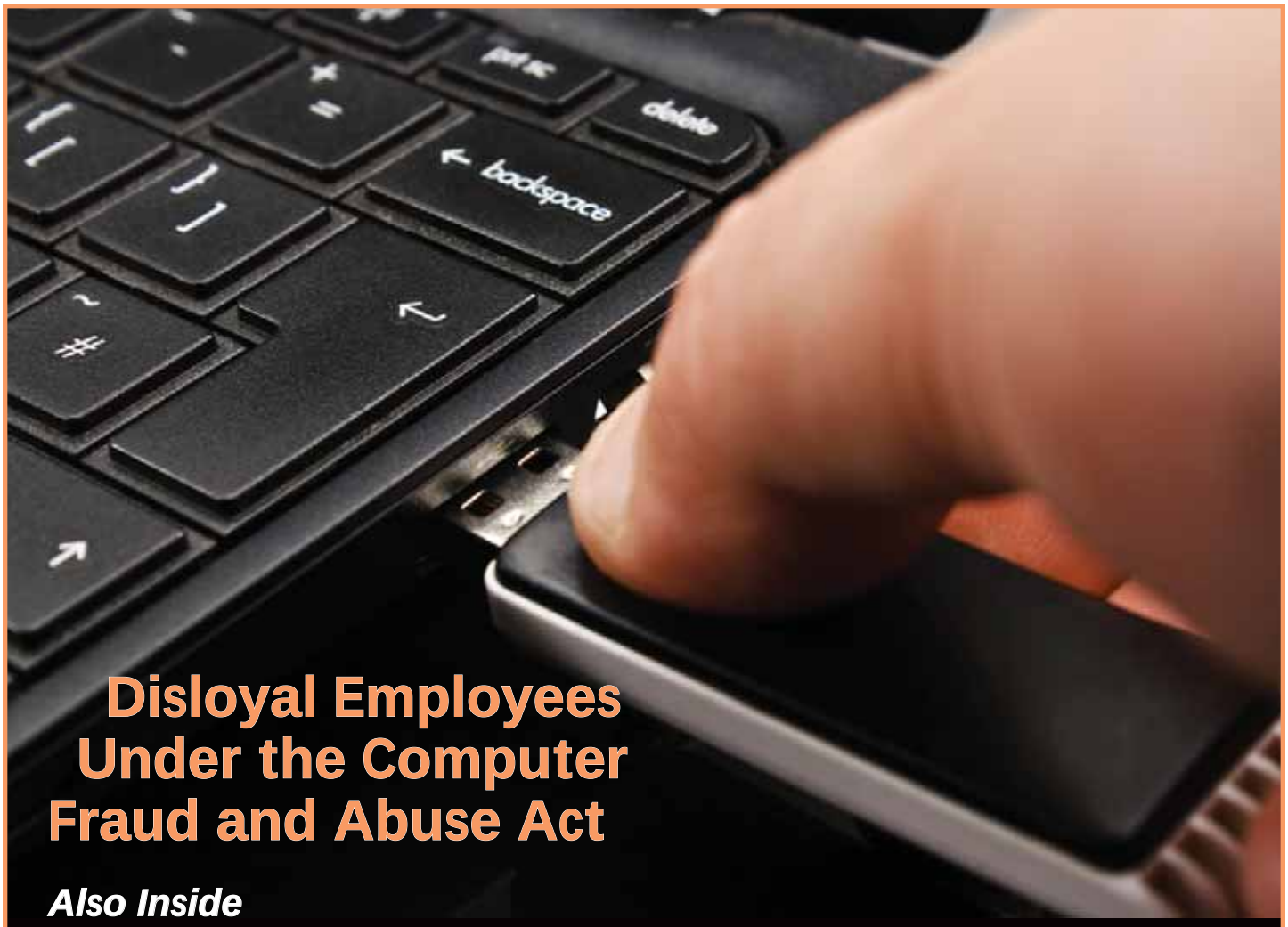

Disloyal Employees Under the Computer Fraud and Abuse Act

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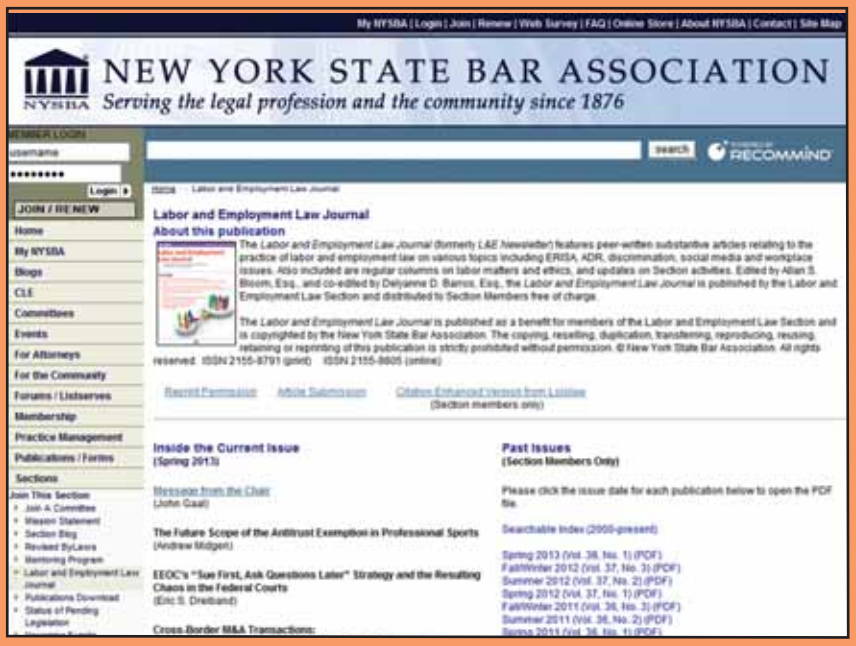

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NYSBA

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Message from the Outgoing Chair

The older I get, the more often I am reminded how "time flies." It truly seems like just last week (it was really June of 2011) that I settled into my role as Chair-elect of the Section and just yesterday (it was really June of 2012) that I took over as Chair. To say that even now, as another year has gone by and my term has come to an end, the time has gone by in a flash is an understatement.

Of course, a big reason for this has been the people I have been fortunate enough to work with as Chair. Whether Past Chairs Al Feliu, Mairead Connor, Don Sapir and many others; our new Chair Jon Ben-Asher; the other officers this past year (Ruth Raisfeld and Willis Goldsmith); our Executive Committee members; or, perhaps most importantly, our NYSBA Liaison Beth Gould, to a person they were endlessly supportive, immensely helpful, and a pleasure to work with. From this vantage point, I have been constantly reminded of the collegiality that marks our Section.

On a more substantive note, I firmly believe the Section had yet another outstanding year. We hosted very successful CLE programs both in conjunction with our Fall Meeting and the Bar's Annual Meeting, as well as several stand-alone programs. We continue to make strides with respect to Committee activities. We will soon have completed a Handbook for new Committee Chairs. Our mentoring program has had a great start and we enter our second year with a new group of mentors and mentees. And our Diversity Initiatives are really "paying off," not only in terms of NYSBA recognition, but far more importantly in the addition of new members from very diverse backgrounds, especially on our Executive Committee.

I suspect like most Chairs at the end of their terms, I reach this point with mixed emotions. In many ways, I am sorry to see this time come to an end. But at the same time I am excited about the promise that accompanies the next wave of leadership as it takes over.

In closing, my thanks to all who helped me this past year (those named above and so many others), and "best wishes" to Jon, Willis, Ron Dunn, and Sheryl Galler as they prepare to take the Section to even greater heights.

John Gaal

Message from the Incoming Section Chair

Labor and employment lawyers are lucky. Every day we get to learn about the workplace, immerse ourselves in the critical legal, economic and human issues our clients face, advocate for them in taxing conflicts, and work toward solving their problems. Our work has drama and meaning, and we always have good stories to bring home.

We are particularly lucky in our Section, because this is a place where we can learn from the lawyers who in another context might be our opponents. We have a tradition of ensuring that all constituencies are valued in our activities, and we place a particular value on collegiality. This allows us to at least hear the other side's perspective, learn from it, and become better lawyers.

Starting my year as Section Chair, I am lucky to have learned over the past two years from John Gaal and Al Feliu, who have done a huge amount to re-energize our Section and move it forward. Section Secretary Ruth Raisfeld was always a source of creativity and ideas. This coming year, I am glad to be able to work with Chair-elect Ron Dunn, our new Secretary Willis Goldsmith, and Secretary-elect Sheryl Galler. And our NYSBA Liaison, Beth Gould, is extraordinary in every way, masterfully handling the always complicated logistics for our meetings, communications and finances. She is always organized and calm, and never loses her sense of humor.

Most importantly, we are lucky for the hard work of our Section's Committees. Since the last issue of the *Journal*, they have been active and productive. Some highlights:

In June, our CLE Committee, chaired by Seth Greenberg and Sharon Stiller, presented live and webcast programs on Employment Law for the General Practitioner and Corporation Counselor, in Albany and New York. Seth and Sharon have also been putting the final touches on our Fall Meeting, October 4–6, at Niagara-on-the Lake, Ontario. Come for three days of incisive CLE, socializing and recreation. (Remember, you'll need a passport.) The CLE Committee is also seeking to sponsor new stand-alone programs, including those with other Sections.

The Diversity and Leadership Development Committee, chaired by Jill Rosenberg and Wendi Lazar, sponsored a well-attended reception in March with EEOC Commissioner Chai Feldblum. Commissioner Feldblum discussed issues arising under the ADA with her trademark insight, directness and humor. Many thanks to Orrick Herrington & Sutcliffe for hosting, and for arranging the excellent catering. Jill and Wendi have also been working to recruit our Diversity Fellows. Based on their efforts, our Section received a NYSBA Diversity Challenge Award for 2012-13.

Rachel Santoro and Genevieve Peeples have done great work chairing our New Lawyers Committee. They continue to oversee our Mentoring Program, which matches mentors and mentees based on practice area, geography, and other commonalities. Genevieve and Rachel would like to expand the program, and so welcome Section members who would like to serve as mentors. The Committee organized a successful reception at Paul Hastings in June with Magistrate Judge James C. Francis (S.D.N.Y.). Judge Francis spoke with candor and wisdom about employment litigation and professional civility. The Committee is also surveying mentors and mentees to get their feedback about their experiences in the Mentoring Program, and how it could be improved.

Thanks to the Communications Committee, chaired by Mark Risk and Jim McCauley, our Section website is thriving. Mark and Jim welcome your contributions and news of committee activities, so please contact them with your ideas and copy. The Committee has posted CLE papers from recent Section conferences on the website, arranged by subject, and is seeking additional bloggers. Meanwhile, NYSBA is revamping its overall website, with a new look, which should be online this fall.

Our substantive law Committees have been particularly active. For example, the ADR Committee (headed by Abigail Pessen, John Higgins and Joni Kletter) organized a program on mandatory arbitration in class actions, with Magistrate Judge Robert Levy (S.D.N.Y), Ted Rodgers, and Adam Klein. Thanks to Nixon Peabody for hosting. Also, thank you to Glenn Doherty for his work over the years as Committee co-chair. The Equal Employment Opportunity Law Committee (Chris D'Angelo and David Fish) met in March, to hear EEOC Supervisory Attorney Nora Curtin speak about the agency's enforcement efforts.

Earlier this year, Bruce Levine, who for many years was co-chair of the Labor Relations Law and Practice Committee, stepped down. Thanks so much to Bruce for his many contributions to the Section. Allyson Belovin has succeeded Bruce as co-chair.

Over my year as Chair, I want to focus on increasing the active participation in Section activities of all constituencies, with a special emphasis on recruiting lawyers from the in-house, employee, union and governmental sectors, as well as new and diverse lawyers. I would also like to foster discussion of some of the new and challenging issues that are reshaping labor and employment law: the outsourcing and off-shoring of technical, professional, customer service and so much other work; the increasing use of independent contractors; the rise of social media as a benefit and peril to both employers and employees; the difficult position of unions, particularly in the public sector; the changing demographics of the workforce, in gender, race and age; and the prevalence of arbitration, the impact of class actions, and the implications of e-discovery for employment litigation.

Our Section prides itself on its openness to our members' contributions and new ideas. I hope you will join a Committee, write an article for the *Journal*, or post on our website. I encourage you to consider what you would like from the Section, what you can contribute, and what you think we can do better. Feel free to contact me either by phone ((212) 321-7075) or e-mail (jben-asher@RCBALaw.com) with your ideas or questions.

Jonathan Ben-Asher

Disloyal Employees Under the Computer Fraud and Abuse Act: Recent Splits of Authority Within the Second Circuit

By Stephen W. Aronson and Ian T. Clarke-Fisher

The Computer Fraud and Abuse Act (CFAA or "the Act")[1] is mainly a federal criminal anti-hacking statute enacted in the 1980s to provide federal court jurisdiction to prosecute attacks from computer hackers.[2] The Act prohibits a list of computer crimes involving the unauthorized access to computer systems.[3] In addition to its criminal provisions, the Act also provides a civil cause of action.[4] Employers have been asserting civil CFAA claims against former employees, alleging that those employees violated the Act by accessing and retaining information to be used to compete against the former employer in the future. The Act's civil provisions enable employers to bring what essentially are common law misappropriation claims in federal court. Using the Act to prosecute disloyal employees arguably tests the boundaries of the Act, calling for examination of its purpose and targeted audience.

I. CFAA's Apparent Ambiguity

An increasing number of employers are filing claims for CFAA violations in situations where employees allegedly took confidential information from their employers' computer systems, where the employees allegedly lacked authorization to access such information or exceeded their authority in accessing such information. Although the Act was designed to prohibit third-party hacking, CFAA also may apply to an individual who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains…information from any protected computer."[5] A computer is a "protected computer" under the Act when it "is used in or affecting interstate or foreign commerce."[6] Given this definition, many employers' computers will qualify as protected computers under the Act. As applied to employees, CFAA seemingly imposes liability against an employee who acts "without authorization" or who "exceeds authorized access"[7] when accessing his employer's computers. The Act defines "exceeds authorized access" as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[8] The Act does not, however, define "without authorization." The apparent ambiguity of these terms ("without authorization" and "exceeds authorized access") as defined by the Act has led to a split among the federal circuit courts. The courts have wrestled with these terms, trying to balance the Act's focus on third party hackers with the plain meaning of "without authorization" and "exceeds authorized access." In applying the Act to the employer-employee relationship, the courts have reached conflicting results.

II. Circuit Split

The federal circuit courts that have considered CFAA in the employment context may be grouped into those favoring a broad application and those favoring a more narrow application. The First, Fifth, Seventh, and Eleventh Circuits have ruled that the language of the Act is broad enough to encompass "the situation in which an employee misuses employer information that he or she is otherwise permitted to access."[9] The Fourth and Ninth Circuits have ruled "that the statute does not reach the mere misuse of employer information or violations of company policies."[10] These two sets of rulings have been coined the "broad approach" and the "narrow approach," respectively.

The courts applying the "broad approach" have relied on "agency" principles to rule that the Act applies when employees use their access to their employers' computers in contravention of their employers' interests.[11] According to those courts, an employee who uses his authorized access for purposes other than those aligned with his employer's interests is accessing his employer's computers without authorization. Stated differently, the courts applying the "broad approach" have determined that employees who violate their duty of loyalty to their employers also have violated CFAA.[12] Other courts have applied the "broad approach" when an employee is alleged to have violated his employer's computer use policy or employee handbook, determining that such actions are deemed to exceed the employee's authorized access under the Act.[13] This latter interpretation arguably poses a significant floodgate issue for the federal courts because routine computer use by employees may exceed their authorization under their employers' computer use policies.[14] Whatever the rationale, the "broad approach" permits the application of CFAA to current and former employees who were authorized to access their employers' computers during the term of their employment but who, as alleged by their employers, exceeded their authorized access.

Conversely, the courts applying the "narrow approach" have relied on three general rationales in declining to extend CFAA to employees. First, the courts have differentiated initial access from later use, determining that CFAA does not prohibit misuse or misappropriation; rather, it merely prohibits improper access by employees. Second, since CFAA is primarily a criminal statute, courts have noted that ambiguities should be interpreted narrowly pursuant to the rule of lenity.[15] Third, courts applying the narrow approach point out that the plain language of the statute and the legislative history show that Con-

gress intended to address outside computer hacking and not to provide federal jurisdiction to protect trade secrets or address misappropriation of properly obtained materials.[16] Thus, the "narrow approach" confines the application of the Act to those more egregious instances where a former employee truly went outside the scope of his authorization or was never authorized to begin with, and differentiates between an employee's access and later use of appropriated information.

While the current split among the circuit courts is clear and the potentially broad application of CFAA to virtually every employee who uses a computer is recognized, neither the United States Supreme Court nor Congress has yet to address these issues. In fact, following a recent Ninth Circuit decision the U.S. Solicitor General declined to petition for certiorari. Following the Fourth Circuit decision, a petition for certiorari was filed but, in January of 2013, the petition was dismissed at the parties' request as they apparently reached a settlement. In the Second Circuit, the scope of CFAA remains undecided and the Act's application continues to be a tool, at least at the pleading stage, for employers to bring actions in federal courts and to address alleged employee wrongdoing with respect to the employers' computer systems.

III. Recent District Court Decisions Within the Second Circuit

While the Second Circuit has not yet ruled on the scope of CFAA in the employment context, district courts within this Circuit have done so with increasing frequency and varied results. Some district courts have used the "broad approach" and permitted claims under CFAA for alleged violations of an employer's computer usage policies, while other courts have adopted the "narrow approach" and prohibited such claims against former employees sounding primarily in misuse and misappropriation.[17]

In March 2013, district courts within the Second Circuit issued two decisions, one in the U.S. District Court for the District of Connecticut and the second in the U.S. District Court for the Southern District of New York, which interpreted CFAA in differing and, arguably, conflicting manners.[18] In *Amphenol Corp. v. Paul*,[19] the Connecticut court denied a former employee's motion to dismiss his former employer's claim, ruling that CFAA could apply to an employee who allegedly misappropriated computer information even though he had authorization through the course of his employment to access such information (the "broad approach"). In *JBCHoldings NY LLC v. Pakter*,[20] the New York court granted the defendant employee's motion to dismiss, ruling that CFAA could not apply to the mere misuse of employer information or violations of an employer's computer policies (the "narrow approach").

In *Amphenol Corp. v. Paul*, the plaintiff employer alleged that the defendant former employee accessed confidential information in violation of a written Intellectual Property Agreement (the "IPA") which included language that the employee "shall have access to such confidential information solely for performing the duties of [the employee's] employment…."[21] There was no dispute that the former employee had permission to access his employer's computers during his employment. The employer argued that, even though the employee had lawfully accessed the employer's computers during his employment, his retention of information following the end of his employment resulted in a violation of the IPA, and effectively retroactively rescinded the employee's once lawful access. Essentially, the employer argued that any actions taken by the employee after his employment that were not solely for his employer were in violation of the IPA. Thus, such actions were without authorization or in excess of the employee's authorized access. The alleged breach of the IPA was determined by the court to satisfy CFAA.

In reaching its decision to apply the "broad approach," the *Amphenol* court explained: "[Employee] did not hack into [employer's] computer system to obtain information nor did he access [employer's] information in the ordinary course of his duties. Until the second circuit determines that the CFAA does not encompass this alleged misconduct [misappropriation], the court concludes that it is appropriate to deny the motion to dismiss."[22] Notably, this holding references the varying decisions and rationales among the district courts within the Second Circuit and beyond, and in so doing, applied the "broad approach" without explicitly weighing the merits of either approach.

In contrast, the *JBCHoldings* court, which issued its decision only a week before the *Amphenol* decision, analyzed the varying approaches of CFAA as applied to employee misappropriation cases, determined under similar facts that the narrow approach should apply, and dismissed the CFAA count.[23] The relevant facts are similar to the allegations in *Amphenol*: the defendants allegedly misappropriated information from their employer in violation of the employer's electronic media policy.[24] The court decided to apply the "narrow approach" based not only on Congressional intent and the plain language of the Act, but also on general policy considerations. The court explained that applying CFAA in such a broad-based manner so as to encompass allegations of employee misuse is unnecessary as there exist multiple claims that cover these areas, both in contract and tort, and "because computers today are ubiquitous, the broad reading of the CFAA would permit such localized wrongs—breaches of contract, in form or substance—to be litigated in federal court."[25] The court concluded that the alleged actions, although arguably in violation of the plaintiff's computer media policy, did not amount to a claim under CFAA "because an employee does not 'exceed authorized access' or act 'without authorization' when she misuses information to which she otherwise has access."[26]

IV. Consequences and Application

As a clear split of authority exists in the Second Circuit, and among other circuits, employers, employees, and their legal counsel are left with continued ambiguity and varied approaches to addressing the scope of CFAA in employment disputes. If the "broad approach" is applied, such as in the recent Connecticut decision, employers have a direct route to federal court where claims related to violations of CFAA, such as breach of written confidentiality agreements, conversion, and misappropriation, increasingly will be litigated. In addition, although not addressed in this article, the "broad approach" may lead to the application of the Act's criminal penalties to disloyal employees who are found liable under the Act. To take full advantage of the broad approach as it presently exists, employers may benefit from implementing or revising their computer use policies, either through general usage policies or in non-compete/confidentiality agreements. Employers may establish boundaries to address unfaithful employees and to provide a foundation for asserting claims under CFAA. If the "narrow approach" is applied, however, such as in the recent New York decision, employers may have to rely on common law contract and tort claims, primarily in state court, as they have in the past, and will not have a direct route to the federal courts. In any event, employers should be wary of granting access to their employees, securely store confidential information, and continue to establish proper usage policies and employment agreements to protect themselves regardless of the eventual interpretation of CFAA.

Endnotes

1. 18 U.S.C. § 1030 (2009).
2. H.R. Rep. No. 98-894, at 10-11 (1984) (The purpose of the Act is to address hackers who trespass into computer systems.).
3. 18 U.S.C. § 1030 (a)(1)-(7).
4. 18 U.S.C. § 1030 (g).
5. 18 U.S.C. § 1030 (a)(2).
6. 18 U.S.C. § 1030 (e)(2).
7. 18 U.S.C. § 1030 (a)(2), (4).
8. 18 U.S.C. § 1030 (e)(6).
9. *JBCHoldings NY, LLC v. Pakter*, 2013 U.S. Dist. LEXIS 39157, at *13 (S.D.N.Y. Mar. 20, 2013); *see United States v. John*, 597 F.3d 263, 271-72 (5th Cir. 2010) (employee "exceed[ed] authorized access" when he used employer information, to which he had access for other purposes, to perpetrate a fraud); *United States v. Rodriguez*, 628 F.3d 1258, 1263-64 (11th Cir. 2010) (employee "exceed[ed] his authorized access" when he accessed information for a non-business reason in violation of employer policy); *Int'l. Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420 (7th Cir. 2006) (based on principles of agency, employee's authorization to use employer's laptop ended once he violated duty of loyalty to employer, and thus employee accessed computer "without authorization"); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 581 (1st Cir. 2001) (disloyal employee "exceed[ed] authorized access" when he breached employer confidentiality agreement by helping competitor obtain proprietary information).
10. *JBCHoldings*, 2013 U.S. Dist. LEXIS at *14; *see WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 203-07 (4th Cir. 2012) (rejecting agency-based theory and holding that employee who downloaded an employer's confidential information, emailed it to his personal account, and provided that information to employer's competitor was not liable under CFAA); *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (en banc) (ruling that "the CFAA does not extend to violations of [employee] use restrictions," where employee of executive search firm used employer's information, in violation of a non-compete agreement, to set up competing executive search firm).
11. *See Int'l. Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418 (7th Cir. 2006).
12. *Id.* at 420-21.
13. *United States v. Rodriguez*, 628 F.3d 1258, 1263-64 (11th Cir. 2010); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 581 (1st Cir. 2001).
14. The criminal component of the act has likewise received significant press in recent months following the tragic suicide in January, 2013, of Aaron Swartz, an internet activist, who was facing felony charges under the CFAA as a result of attempts to download academic articles from JSTOR. Following Mr. Swartz's death, there has been an outcry among certain communities and groups, including the ACLU, to reconsider the CFAA. *See* https://www.aclu.org/secure/help-protect-the-next-aaron-swartz.
15. The rule of lenity directs courts to construe statutory ambiguities in criminal statutes in the defendant's favor. *See U.S. v. Bass*, 404 U.S. 336, 347 (1971).
16. *Univ. Sports Publ'ns Co. v. Playmakers Media Co.*, 725 F. Supp. 2d 378, 383-84 (S.D.N.Y. 2010).
17. *Compare Advanced Aerofoil Techs., AG v. Todaro*, 2013 U.S. Dist. LEXIS 25711 (S.D.N.Y. Jan. 30, 2013) (narrow approach); *Westbrook Techs., Inc. v. Wesler*, 2010 U.S. Dist. LEXIS 70901 (D. Conn. July 15, 2010) (narrow approach); *Univ. Sports Publ'ns Co. v. Playmakers Media Co.*, 725 F. Supp. 2d 378 (S.D.N.Y. 2010) (narrow approach), *with Mktg. Tech. Solutions, Inc. v. Medizine LLC*, 2010 U.S. Dist. LEXIS 50027 (S.D.N.Y. May 18, 2010) (broad approach); *Starwood Hotels & Resorts Worldwide, Inc. v. Hilton Hotels Corp. n/k/a Hilton Worldwide, et al.*, 2010 U.S. Dist. LEXIS 71436 (S.D.N.Y. June 16, 2010) (broad approach).
18. *Schaeffer v. Kessler*, 2013 U.S. Dist. LEXIS 38781 (S.D.N.Y. Mar. 20, 2013), presents a third CFAA/employee decision in the Second Circuit during the month of March; however, the allegations in that complaint include the destruction of computer files, making the decision inapposite from the two discussed.
19. *Amphenol Corp. v. Paul*, No. 3:12-cv-543 (D. Conn. Mar. 28, 2013) (Doc. 143).
20. *JBCHoldings NY, LLC v. Pakter*, 12-Civ. 7555, 2013 U.S. Dist. LEXIS 39157 (S.D.N.Y. Mar 20, 2013).
21. *Amphenol*, *supra* note 19, at 4.
22. *Id.* at 14.
23. *See JBCHoldings*, *supra* note 20, at *16-17 ("This Court finds the narrow approach to be considerably more persuasive: When an employee who has been granted access to an employer's computer misuses that access, either by violating the terms of use or by breaching a duty of loyalty, the employee does not 'exceed authorized access' or act 'without authorization.'").
24. *Id.* at *24-27.
25. *Id.* at *24.
26. *Id.* at *25.

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Internal Investigations in Overseas Workplaces

By Donald C. Dowling Jr.

Internal investigations in the Unites States have become high-profile and big business. Corporate investigations can be hugely expensive: One American personal care products company disclosed in an SEC filing that it had spent *U.S.$247.3 million* on a single investigation. And these investigations can be long and drawn-out: By the time ex-FBI director Louis Freeh wrapped up his thorough internal investigation into child rape allegations at Penn State University, his chief targets were either dead or in prison—Penn State launched its investigation after the scandal broke in late 2011; Joe Paterno died in January 2012; a Pennsylvania jury convicted Jerry Sandusky on 45 counts of child molesting in June; the investigation wrapped up that July.

The highest-profile internal investigations tend to be complex, drawn-out and expensive. Stakes are high when an allegation involves millions of dollars and serious charges—bribery, sabotage, embezzlement, tax fraud, insider trading, antitrust collusion, workplace violence, environmental crime, audit / accounting fraud, conflict of interests. That said, huge internal investigations are the exception. Most internal investigations tend to be fairly streamlined, inexpensive and fast. Investigations into, for example, run-of-the-mill claims of petty theft, bullying, harassment, workplace accidents and expense-account fraud often get wrapped up quickly and inexpensively. But in this era of Sarbanes-Oxley, Dodd-Frank and close scrutiny into corporate compliance and ethics, an internal investigation, be it slow and expensive or fast and streamlined, needs to get done right. Wrongdoers need to be punished.

U.S. multinationals conducting cross-border internal investigations inevitably want to export and use their sophisticated toolkit of American investigatory strategies, which they see as vital in confronting a border-crossing criminal prosecution or civil lawsuit such as a charge under extraterritorial U.S. federal laws like the Foreign Corrupt Practices Act, terrorism financing rules, trade sanctions laws, the Alien Tort Claims statute, international-context violations of Sarbanes-Oxley and Dodd-Frank, extraterritorial provisions of U.S. discrimination laws—even the UK Bribery Act 2010 (which can reach U.S.-based employers).

Recent increases in international criminal and civil charges have focused multinationals on the legal challenges to border-crossing internal investigations. Recent conferences and articles (even some books) explicate many of the legal issues in play here. These conferences and articles tend to focus on the *U.S. law doctrines* reaching U.S.-driven international investigations. Common themes include:

- Attorney-client privilege abroad as contrasted with the privilege in the U.S.
- Effect of foreign "blocking statutes" and foreign data protection laws on U.S. litigation "ediscovery"
- Contrasts between the U.S. Foreign Corrupt Practices Act and the UK Bribery Act 2010
- U.S. bank secrecy laws in the international context
- "Suspicious activity reports" of infractions committed abroad and "self-reporting" to U.S. government agencies
- Overseas whistleblower denunciations under the U.S. Dodd-Frank whistleblower "bounty" program and the extraterritorial reach of U.S. Sarbanes-Oxley "report procedure" provisions
- U.S. "deferred prosecution" and "non-prosecution" agreements in the cross-border context
- Prosecutorial cooperation among enforcement authorities, parallel criminal proceedings in foreign jurisdictions and cross-jurisdictional settlements of criminal charges
- Credit for foreign corporate compliance programs under U.S. criminal sentencing guidelines

These issues can be vital when investigating border-crossing charges that implicate U.S. criminal or civil laws and litigation (although these issues are less relevant to an overseas investigation into charges under foreign domestic law with no U.S. exposure). But because these issues are all anchored in U.S. law, these issues are distinct from the separate challenge, in a cross-border or foreign- domestic internal investigation, of complying with the local domestic law of the overseas workplace. Of course, a U.S. multinational conducting a local investigation abroad needs to comply with local host-country law as well as U.S. law.

Indeed, U.S. headquarters may have to investigate not only the occasional "extraterritorial" charge under U.S. federal law but also far more common claims under foreign local laws that do not trigger exposure under U.S. laws. These foreign domestic investigations are becoming increasingly common. Companies based in Australia, Canada and England have adopted U.S.-like investigatory practices. In some parts of the world, conducting an internal investigation is actually mandatory in certain contexts. For example, Austria's Supreme Court requires employers to investigate sex harassment complaints,[1] as do statutes in Chile, Costa Rica, India, Japan, South Africa, Venezuela and elsewhere. The British Columbia Worker's Compensation Act requires employers to conduct immediate investigations into workplace accidents that require medical treatment, as do other workplace safety laws.

Because American investigatory tools were forged in the uniquely American environment of employment-at-will, U.S. multinationals exporting and using these tools in overseas investigations run into problems. The law of the U.S. workplace imposes fairly few constraints on how American employers can investigate suspicions of employee wrongdoing (*Weingarten* rights and *Upjohn* warnings aside). Overseas, though—especially in Europe—the environment differs greatly. Internal investigations abroad are subject to a panoply of restrictions under the local law and culture of the foreign workplace. A General Electric in-house lawyer, speaking at an American Bar Association conference in Atlanta (November 1, 2012), put it simply: "One of the biggest mistakes an investigator can bring to a foreign investigation is an American mindset."

So a U.S.-headquartered multinational conducting an internal investigation across borders needs to retool American-forged investigatory practices for the very different workplace regulatory environment abroad. Because foreign workplace laws that reach internal investigations tend to have no counterpart under U.S. employment-at-will, they often spring up and catch American investigators off-guard. In this particular respect, lawyers and investigators based overseas actually wield an advantage over their U.S. counterparts because they escape the counterproductive "American mindset." A London solicitor addressing American lawyers about internal investigations outside the U.S. explains:

> Most corporations that have faced a significant [international] investigation will be familiar with the need to balance the thoroughness of the investigation with the need to *respect the* [overseas] *suspect and the informant's data protection rights*. Increasingly we are seeing [overseas employee] *suspects and their advisors seek to exercise these rights to slow down or halt an investigation* [outside the U.S.]. In at least one case where I have been involved, *injunction proceedings were threatened* [to stop the U.S.-driven internal investigation].[2]

Having to retrofit investigatory tools for more-regulated overseas environments can frustrate an American investigator reluctant to tamper with effective strategies and unwilling to compromise best investigatory practices. But *failing* to modify American investigatory practices abroad, when necessary, threatens a serious consequence: It exposes an investigator himself to a charge of breaking the law. Investigators might get denounced (perhaps over a company whistleblower hotline) for breaking the local law of the workplace if they investigate illegally. Then another investigatory team might have to investigate the original investigators. Just as no police detective ever wants to face charges of violating suspects' rights in a criminal investigation, no corporate internal investigator ever wants to stand charged with breaking the law.

Here is a 30-point checklist for adapting domestic American investigatory practices and tools for overseas investigations. The 30 points fall into the four stages of a thorough American-style internal investigation:

(A) Launching an international investigation protocol or framework

(B) Initial response to a suspicion or allegation arising abroad

(C) Interviewing witnesses outside the U.S.

(D) Communications, discipline and remedial measures in a cross-border investigation

A. Launching an International Investigation Protocol or Framework

Americans like flexibility. As to investigatory practices, Americans are reluctant to lock themselves into formal protocols or frameworks that mandate specific steps for conducting all internal investigations. But overseas, an investigation protocol or framework can be helpful for a number of reasons. An Australian law firm addressing Australian clients about internal investigations explains that "[l]ong before a complaint is made or an incident occurs, there are some steps an employer can take that will make it easier to conduct an [internal] investigation when the need inevitably arises."[3] *To pave the way for future internal investigations overseas, take affirmative steps to empower investigation teams that will later look into overseas suspicions or allegations of wrongdoing. Build an investigatory protocol or framework to facilitate a rapid headquarters response.*

1. **Implement a Code of Conduct:** Impose on all affiliate employees worldwide a well-thought-out internal code of conduct or business ethics. In the code, forbid all acts the organization has a compelling business reason to prohibit— insider trading, environmental crime, conflict of interests, bribery / payments violations, intellectual property infractions, audit / accounting impropriety, discrimination / harassment, other offenses. Having drafted, communicated and imposed a tough internal code of conduct becomes essential when an allegation of wrongdoing surfaces later and the organization needs to point to a clear rule that prohibited the alleged misdeed. Without a tough code of conduct, the target may be able to argue he did nothing wrong or even claim he tried to help the organization by, say, paying a bribe or colluding with competitors or cutting corners in disposing of hazardous waste. Be sure both the code of conduct content and the code launch (roll out) comply with local employment law in each affected jurisdiction.

2. **Launch a Whistleblower Hotline:** In the U.S., communicating a whistleblower hotline is a clear best practice for eliciting allegations, complaints

and denunciations for an employer to investigate and then remedy. By law, U.S. publicly traded companies and "foreign private issuers" must make available report "procedures" for the "confidential, anonymous submission by employees" of "complaints and concerns regarding questionable accounting or auditing matters."[4] Liberia and perhaps other jurisdictions have mandated whistleblower hotlines even at non-publicly traded organizations. Further, the U.S. Dodd-Frank government whistleblower bounty program motivates employers to launch robust international hotlines to attract whistleblower denunciations that might otherwise go straight to U.S. government enforcers.

So launch an effective global whistleblower hotline that complies with applicable laws. Overseas, especially in Europe, regulations specifically regulate whistleblower hotlines and are surprisingly complex—Europeans actively invoke their data protection laws to rein in American-style anonymous hotlines. Germany, the Netherlands and other EU member states require consulting with employees before launching a hotline. Belgium, France, Spain and other EU states require government filings that disclose hotlines—and in some cases a government agency must affirmatively approve a hotline. France, Germany and others confine hotlines to accepting denunciations about only a limited pool of infractions. Spain, Portugal and perhaps France prohibit employers from accepting anonymous whistleblower calls (or at least from disclosing that their hotlines accept anonymous calls; France's data protection authority has flip-flopped on this point). Beyond Europe, in Hong Kong and elsewhere employees may need to consent to a whistleblower hotline.[5]

3. **Build Channels for Cross-Border Data Exports:** A U.S. multinational conducting a cross-border investigation inevitably sends ("exports") back to U.S. headquarters personal information that identifies overseas employees—whistleblowers, targets, witnesses. Data protection (privacy) laws in Europe and parts of Latin America and Asia prohibit exporting employee data without first building *data export channels*. In Europe these channels are currently "model contractual clauses," "safe harbor," "binding corporate rules" and (in some contexts only) employee consents. (Europe's data protection law regime will change under an incoming EU data protection "regulation" that will replace the 1995 EU data "directive.")

   Local data protection laws in Belgium, the Netherlands and elsewhere specifically limit cross-border transmissions of *workplace accusations*, and the Article 29 Working Party (the EU's advisory data protection agency) has considered imposing EU-wide restrictions specifically on exporting *investigatory* data.

   So before launching any overseas investigation in a jurisdiction with a comprehensive data protection law, build channels that facilitate the export of internal investigation data or expand any existing channels so they specifically reach internal investigation data. Building and expanding these channels can be slow and expensive, but waiting until a specific allegation or suspicion triggers an actual investigation will be too late.

4. **Grant Necessary Data Subject Access:** American investigators keep their investigation files confidential, safeguarding the integrity of investigations and protecting witnesses and whistleblowers. Counterintuitively, data protection laws in Europe, Argentina, Canada, Hong Kong, Israel, Japan, Mexico, Uruguay and beyond expressly require "data controllers" such as employers to turn personal data, including internal investigation notes, reports and files, over to the very investigation targets and witnesses identified in these files, at least if they ask to see the information. This is because in Europe and elsewhere targets and witnesses in internal investigations, as "data subjects," enjoy broad rights to be told investigation files exist in the first place, then to access the files, and ultimately to request deletion or "rectification" of information that names or identifies them. (The employer should redact *others*' names when showing each witness the file.) In jurisdictions like Hungary, employee rights in this regard are particularly strong. One EU body has decreed that employers must tell investigation targets they are being investigated and that an investigation file exists as soon as there is no substantial risk that notice to the target "would jeopardize" the investigation.[6] This said, though, not all data protection laws are so strict in the investigatory context. The British Columbia (Canada) Personal Information Protection Act, for example, offers an investigatory exception that relieves certain obligations to collect employee consents to processing data.

   Having to clue in investigation targets and witnesses about the existence of files naming them while an investigation is in full swing frustrates American investigators. Indeed, some investigators have actually breached data access laws in the name of upholding the integrity and confidentiality of the investigation. Yet again, a rogue investigation that breaches local laws is itself illegal and could itself become the target of denunciations and enforcement proceedings—a scenario every employer needs to avoid. So balance investigatory confidentiality against targets' and witness-

es' legal rights to access data about themselves. Strike this balance *before* a real-world investigation target comes forward and demands access in the heat of a specific investigation. As part of an internal investigation framework, articulate a legitimate business case for delaying employee access until an investigation reaches a stable point. Then grant access requests later, after access becomes legally unavoidable.

5. **Disclose Investigation Procedures:** Europe and other jurisdictions with robust data protection laws might deem an employer's in-house internal investigation framework or protocol a system for processing personal data, and therefore subject to data laws, even before a specific investigation launches implicating actual personal data about individual employees. Many European jurisdictions affirmatively require that employers disclose, both to the local "Data Protection Authority" and to employee "data subjects," "personal data processing systems" including an investigatory framework. In addition, labor laws in Europe and elsewhere can require disclosing ("informing") in-house investigatory frameworks to employee representatives like "works councils" and "health and safety committees." Labor laws may also require bargaining ("consulting") over these frameworks with employee representatives. To Americans, all this disclosure and consultation over an investigation protocol seems intrusive—American multinationals like keeping their investigatory tactics confidential for the same reasons the Secret Service and the CIA do not broadcast investigatory techniques. But a multinational that "bites the bullet" and discloses the outline of its investigatory framework or protocol both complies with local data protection laws and frees itself up to conduct broader international internal investigations when the need arises later.

B. Initial Response to a Suspicion or Allegation Arising Abroad

International internal investigation protocol/framework in hand, a multinational is ready to investigate any suspicion or whistleblower allegation that comes in from abroad. When one comes in, first decide whether it is investigation-worthy—too many multinationals claim to investigate "all" allegations when in fact many are unworthy of investigating (some are too vague, some are obviously groundless, some, even if true, amount to merely questionable judgment or rude behavior, and some are merely mischaracterized human resources gripes best referred to the HR team). Also be sure upper management will support an investigation, whatever the result—avoid the scenario of an investigation report that strongly points to firing a target whom the ultimate decisionmaker insists on protecting. In conducting an investigation of an investigation-worthy suspicion or allegation, tailor the investigation to the specific allegation and to local laws. Begin with a strategic initial response.

6. **Appoint an Investigator or Investigation Team:** An employer might conduct a streamlined investigation into a simple allegation using just a single investigator (supervisor, outside expert or lawyer) who checks a few records and asks a few questions. At the other end of the spectrum, a complex internal investigation can be a costly months- or years-long project that requires mobilizing a team of internal executives, experts, human resources leaders and in-house counsel as well as company directors, outside lawyers, accountants, consultants, forensic experts and translators.[7] Depending on the complexity of a given overseas investigation, either appoint a single investigator or assemble an investigatory team. Select an investigator or team leader competent in investigatory technique, familiar with applicable law and experienced with how investigations in the jurisdictions at issue differ from U.S. domestic investigations. Avoid appointing an all-star team of Americans expert in U.S. law, U.S. investigatory best practices and U.S. criminal prosecutions but with little experience abroad. Many U.S.-led investigations purposely exclude target-country locals from the investigation team on the theory that locals might be incompetent investigators susceptible to bias, prone to confidentiality leaks, or too likely to fall under the influence of the local target himself. In some contexts these might be legitimate concerns. But where appropriate, consider including at least one local outsider (consultant or outside lawyer) on the investigation team who knows the local players, culture, language, and law.

   Be sure no one on the investigation team has a conflict of interest or might be a witness. Include on the team someone with expertise in the subject of the allegation. Consider language fluency. Consider including someone from the internal audit function and an in-house or outside lawyer who can invoke attorney-client privilege (below ¶12). As to outside lawyers, consider tapping investigatory counsel who is *not* the organization's regular advisory counsel and so is less likely to trigger a lawyer-as-witness conflict.

7. **Impose Immediate Discipline if Necessary; Take Interim Steps:** Even where a target's guilt seems clear at the outset, employers conducting internal investigations never want to impose discipline until after they complete their investigation. After all, the very purpose of an internal investigation is to find out whether discipline is appropriate. To impose discipline at the outset of an investigation flies in the face of what an investigation is supposed to be. We do not "shoot first and ask

questions later." Indeed, to fire even a seriously implicated employee at the launch of an investigation would defeat the purpose of the investigation itself.

This logic seems sound, but it betrays an American mindset. In an overseas investigation, immediately check whether local law imposes an almost-instant discipline deadline. Jurisdictions like Austria impose tight deadlines of only hours or days during which an employer can legally invoke evidence of misbehavior as good-cause support for a firing. In Iraq, an employer firing an employee for cause must notify the Iraqi Labour office within 24 hours of the time of the *incident*—not 24 hours after an internal investigation winds up. In Belgium, an employee dismissal for good cause "must occur within three working days from the moment the facts are known to the [employer, and then] the facts must be notified to the dismissed [employee] by registered mail within three working days from the date of dismissal."[8] In these jurisdictions, the "clock" might start as soon as an employer gets solid, credible evidence—not after it formally wraps up a full-blown internal investigation.

Even where local law does not require imposing fast discipline, at the outset of an internal investigation take any necessary interim personnel measures like imposing a suspension (paid or unpaid) or separating an accused harasser from an alleged victim.

8. **Define Investigation Scope and Draft an Investigation Plan:** An investigation without a well-defined scope can take unpredictable turns. Remember the sharp criticisms Ken Starr drew when his Whitewater investigation abruptly shifted into an investigation of Monica Lewinsky.[9] Delineate the investigation's scope. Define its goals and set its boundaries. If a corporate board of directors resolution is necessary to launch the investigation, the resolution should clearly define parameters.

   In defining the scope of an overseas investigation, factor in the nature of the allegation and the logistical, linguistic and geographic barriers. In some European states, where a whistleblower allegation is anonymous, the fact of anonymity itself restricts the scope of the investigation—under data protection law in some European jurisdictions, an anonymous tip is *per se* less credible and hence weaker "probable cause" for conducting a broad internal investigation leading to employee discipline.

   In an international investigation, a good practice is to draft an outline or plan of what the investigatory team will and will not do, consistent with the investigation's scope. According to an Australian law firm advising on internal investigations in Australia:

   > An investigation plan should be drawn up. Key witnesses should be identified, and persons potentially affected by the investigation should be listed. Practical details, such as location and order of witnesses, should be set out. An outline of the questions to be asked should be drawn up. The objective of the investigation should be noted.[10]

   Any investigative plan of this nature needs to account for data subject access rights in the plan itself (above ¶ 4). If the investigatory plan can somehow avoid identifying the whistleblower, target and witnesses, then the plan will not be subject to data law disclosure.

9. **Comply with Investigatory Procedure Laws:** Under American law, a nongovernment employer's internal investigation for the most part is a business matter, not a matter of criminal procedure, because there is no "state action." Not so everywhere abroad. In some jurisdictions in Eastern Europe and beyond, local criminal procedure laws can restrict, even prohibit, private parties such as nongovernment employers from conducting an investigation—the theory is that private parties cannot intrude on the exclusive investigatory power of government law enforcement. In other countries, bar association rules may limit or prohibit lawyers (even American lawyers not on the local bar) from conducting internal investigations—especially but not exclusively if the investigator needs someone to administer an oath, such as for an affidavit or deposition. Before embarking on any cross-border internal investigation, research local procedural rules restricting private-party and lawyer-led investigations. Adapt the investigation to conform. Sometimes it might be enough to recharacterize an internal investigation as mere "analysis," "checking," "verifying" or "asking questions" (below ¶ 19).

   In some contexts it might be possible to conduct the investigation outside the territorial reach of local restrictions against private investigations.

   Separately, comply with local laws that require disclosing evidence to law enforcement (below ¶ 28). And comply with local laws that restrict specific steps within an internal investigation, such as laws regulating: how to conduct searches of employee emails / computers / internet records (below ¶ 17); physical searches of lockers and desks; criminal background checking; video surveillance; and intercepting phone calls.

10. **Research Substantive Law:** The purpose of an internal investigation is to uncover evidence of wrongdoing or illegality. So always ask: Is the alleged behavior wrong or illegal? Violating an organization's internal policies is wrong; violating applicable law is illegal. So check internal policies and then ask: What is *applicable law*? In overseas investigations, U.S. investigators sometimes get consumed by U.S. laws with extraterritorial effect—U.S. trade sanctions laws; U.S. antitrust, securities and discrimination laws; the Foreign Corrupt Practices Act; the Alien Tort Claims Act. Yes, these U.S. laws are "applicable law" abroad to the extent they reach extraterritorially. But never forget *local substantive laws*. For example, a U.S. organization's international bribery investigation should of course investigate possible breach of the U.S. FCPA and maybe the UK Bribery Act 2010. But do not forget to check for a breach of *local domestic* bribery laws. For example, one "American businessman" found "guilty of taking nearly U.S.$5.5 million in bribes as head of [a] Dubai-based company" was sentenced to 15 years in a UAE prison, even as the U.S. government sought to defend him.[11]

    Similarly, in an international investigation into audit / accounting fraud under SOX and Dodd-Frank, check whether the target violated local audit / accounting mandates.

11. **Safeguard Confidentiality:** To guard against data privacy and defamation claims, and to avoid human resources and public relations problems, contain investigation-uncovered information to those with an actual need to know—the investigation team, retained experts, auditors, counsel, upper management, maybe the board of directors. Resist the temptation to keep too wide a circle informed as the investigation proceeds. (Whom to brief about the *results* of an investigation at the end is a separate issue, below ¶ 25.) Also, transmit investigation data back to U.S. headquarters only pursuant to local legal restrictions on data exports (above ¶ 3).

    Unless a self-identified whistleblower expressly consents otherwise, overseas data protection laws may in theory mandate preserving whistleblower confidentiality. But in practice, maintaining whistleblower (and witness) confidentiality can be a tough challenge where circumstances point to a source and where the whistleblower becomes a complaining witness. This is virtually inevitable with a harassment complaint. A best practice is never to *guarantee* whistleblowers or witnesses absolute confidentiality.

12. **Secure Legal Advice and Attorney-Client Privilege:** A Canadian law firm recommends, as to Canadian internal investigations: "Give some thought...at the very beginning of the process… as to whether you wish the investigation process, report and surrounding communications to be privileged. It is much easier to attempt to set this up at the beginning of the [investigation] than mid-way through."[12] While the attorney-client privilege can be vital in an internal investigation, discovery is far less robust abroad, so overseas attacks on the attorney-client privilege may be less frequent. But foreign government agents do seek documents from private parties, and a foreign privilege issue may arise in a U.S. proceeding. So preserving attorney-client privilege in an overseas investigation can be vital.

    Decide who will advise the investigation team on applicable law in relevant jurisdictions. Account for lawyer-as-witness and legal privilege issues including any foreign law analogue for the U.S. domestic investigatory-context privilege.[13] Understand whether lawyers on the investigation team can implicate the attorney-client privilege under applicable law. Depending on the jurisdiction, the local privilege may reach locally licensed outside law firm counsel and maybe locally licensed in-house counsel—although jurisdictions like China may not recognize any attorney-client privilege. Always check whether a jurisdiction extends its attorney-client privilege to foreign (such as U.S.) lawyers not on the local bar. Never assume a U.S.-licensed lawyer falls under a foreign-law attorney-client privilege.

    Privilege issues are much less settled in most jurisdictions outside the common law world. In some jurisdictions the privilege belongs to the lawyer, not the client. Some European Union member states recognize a rudimentary in-house counsel privilege, but there is no European-wide doctrine protecting in-house counsel with attorney-client privilege.[14] Hungary, for example, recognizes no viable in-house lawyer privilege, and in France lawyers who go in-house must resign from the bar, therefore surrendering any claim to privilege. A broad overview published in *Inside Counsel*[15] lists the "EU member states that recognize privilege for the in-house bar" as including "Denmark, Germany, Ireland, Luxembourg, Netherlands, Portugal, Romania, Spain, UK,"—but the *Akzo Noble* case seems inconsistent as to the Netherlands, so *Inside Counsel's* list seems wrong. Always check.

13. **Account for U.S. Government Enforcement Issues:** Increasingly, American multinationals launch cross-border internal corporate investigations responding to inquiries or enforcement actions from U.S. agencies such as the Department of Justice (DOJ), the Securities Exchange Commission (SEC) and (potentially) the Equal Employment

Opportunities Commission. Internal investigations responding to U.S. government inquiries and proceedings raise unique issues of government-context attorney-client privilege waiver and advancing defense fees. The U.S. government has taken formal but changing positions here: Compare the SEC Seaboard Report and the DOJ McNulty Memorandum that replaced the DOJ Thompson Memorandum and the McCallum Memorandum, later withdrawn. Government context privilege waiver and defense fee issues *outside the U.S.* get even more complex; indeed, the various U.S. government positions and memos here have been criticized to the extent they are said to ignore issues under foreign law. Proceed carefully.

14. **Safeguard Disclosures to and from Experts**: Always have retained outside experts (including forensic accountant, forensic computer specialist, investigation consultant, e-discovery provider, translator) contractually commit to uphold confidentiality and applicable data laws. Safeguard the attorney-client privilege over disclosures to experts (above ¶ 12). In Europe and other jurisdictions with robust data laws, an expert's report that identifies specific individuals may be subject to witness disclosure, even to the investigation target (above ¶ 4). Proceed carefully.

15. **Impose an Enforceable Litigation Hold**: "Spoliation" claims (destruction of documents relevant to litigation) are increasingly common in U.S. domestic lawsuits. A strong best practice is to require that employees, worldwide, preserve data possibly relevant to a cross-border investigation at least until the investigation and any litigation wind down. During investigations, multinationals often order staff, across borders, to suspend routine data destruction practices like automatic email deletion and document-destruction policies. Software exists for implementing and enforcing these internal document retention orders, often called "litigation holds" or "DRNs" (document retention notices). Outside the U.S., litigation holds / DRNs are equally important but are less routine and so are less familiar. Fortunately, an overseas litigation hold / DRN rarely raises high legal hurdles, but better explanations and better enforcement become important in countries where these holds are unfamiliar. That said, in Europe and beyond an overbroad litigation hold / DRN in place too long butts into the data protection law prohibition against retaining obsolete personal information. In jurisdictions that require purging obsolete personal data, be sure to articulate a defensible business rationale for any long-term litigation hold. Review the need for the hold frequently.

16. **Secure Evidence Within Management's Physical Custody:** Actively collect and preserve documents and electronic files relevant to the investigation that management can readily get its hands on without breaking into employee-held files and systems. Data laws in Argentina, Canada, Costa Rica, Europe, Hong Kong, Israel, Japan, Mexico, Uruguay and elsewhere may prohibit management from "processing" for investigatory purposes even information already in company files unless the reasons the data had originally been collected expressly included "investigatory purposes"—which too often will not be the case. Therefore (as discussed above ¶ 5), when structuring HR data processing and export systems, be sure expressly to include "processing / storing personal data and documents for internal investigatory purposes" as an express reason for processing. And because data laws can restrict "exporting" personal data to the U.S., consider warehousing investigatory information locally without transmitting it stateside (unless appropriate data export channels are in place—above ¶ 3).

17. **Gather Evidence Outside Management's Physical Custody:** Perhaps the highest legal hurdle in international investigations is gathering up employee documents and data not yet in management's readily accessible files—emails on the company server, internet-use records, Word documents on an employee's hard-drive, papers in an employee's desk. Staff in Europe and elsewhere may firmly believe that their personal business records, even though warehoused on company systems and on company property, are completely off-limits to their employer. And perhaps surprisingly, foreign local data protection laws may support this view even if the employer had issued a U.S.-style policy purporting to reserve its right to search and (ostensibly) defeating employee expectations of privacy in company systems. Employer reservation-of-right-to-search policies are as vital internationally as they are stateside, but American headquarters should not "believe its own PR" and assume its purported reservation of the right to search works overseas the same way it works stateside. Abroad, reservation-of-right-to-search policies may be a mere first step in analyzing whether, or how, the employer can legally access staff emails / internet records / documents.

    Understanding when and how foreign law lets employers conduct these searches is a research project unto itself. Do a country-by-country analysis in light of the specific facts. In Continental European jurisdictions like Austria, Italy, Germany and Poland, a key issue in this analysis will be whether the employer had previously forbidden local staff from using company-owned computers / systems

for even incidental personal use. In other countries a key issue will be whether employees grant "unambiguous," situation-specific consents to search, especially in the "bring your own device" [BYOD] context.

Even where an employer purportedly reserved its "right" to access employee emails / internet use / documents, always get tailored advice under foreign law before actually searching and before ordering polygraphs or drug tests, before launching surveillance tools or video monitoring, before surreptitiously monitoring employees in other ways and before invoking employer-favorable terms in a BYOD policy. Local laws on these issues can be unpredictable. In France, for example, an employer must bring in a court officer or bailiff to oversee its accessing of staff files and documents.

C. Interviewing Witnesses Outside the U.S.

After securing documents, the time comes to interview witnesses. Work out a strategic order for interviews, such as accuser, then witnesses, then target. In conducting each interview, factor in overseas cultural and strategic issues. During interviews, comply with local workplace laws (employment laws and employment-context data protection laws).

18. Verify Sources: When interviewing a whistleblower or complainant, check whether the accuser will stand by the accusations. Firm up the source of the allegations and seek corroborating evidence and witnesses. As mentioned (above ¶ 8), under law in Europe an investigation into an anonymous whistleblower tip cannot plow as deep as an investigation into a tip from a verified source. So where channels to an anonymous overseas whistleblower remain open, try to get him to self-identify.

19. Neutralize or "Demilitarize" Interrogations: Sometimes an American interrogating an overseas employee conveys an air of professionalism and authority that may prove counterproductive and culturally inappropriate. The witness might "clam up." Consider neutralizing the international interrogation process by "demilitarizing" witness interviews, coaxing out better information with a softer touch. For example, an internal investigator's background as a former prosecutor enhances credibility stateside but overseas might be offputting—foreign witnesses actually have alleged harassment when an interrogator introduced himself as an American ex-prosecutor and played up criminal law themes. American witnesses may respect police authority, but abroad, downplaying prosecutorial credentials and criminal issues may help open up a foreign witness.

During overseas employee questioning, actively neutralize the semantics of the interrogation itself. Investigators might refer to their internal investigation and their interrogations as merely "some questions," "talks," "checking" or "verifying." They might refer to an allegation, suspicion, complaint or denunciation as merely an "issue" or "question." Documentary evidence and proof can be mere "papers" or "files." Call whistleblowers, informants, sources and witnesses simply "employees" (those not on the payroll are "business partners"). Call the target of an investigation "our colleague." And an investigator zeroing in on a confession can request a mere "affirmation" or "acknowledgement."

When conducting staff interviews, always be sensitive to local conceptions of privacy. Outside the U.S., the Ken Starr / Monica Lewinsky investigation shocked foreigners—a sitting U.S. president actually had to answer a private lawyer's questions about his sexual life (foreigners often do not understand U.S. civil procedure and deposition testimony subject to the felony of perjury). Outside the U.S., expect staff actually to believe they have a right to refuse to answer questions about their sex lives, hobbies, workplace friendships and personal notes, documents, emails and social media postings. In investigatory interviews abroad, show sensitivity for this viewpoint.

20. Instruct Witnesses to Cooperate, as Permissible: An American investigator ghost writing an employers' staff memo announcing an internal investigation might announce that all employees "must cooperate" with the internal investigation. And American investigators like to begin employee questioning by insisting that each witness "must cooperate." We get away with this in the United States because this approach works under U.S. employment-at-will. But this can backfire abroad. Almost universally outside the United States, foreign laws let employees refuse to cooperate with an employer investigation. Most overseas employees enjoy a labor-law right to remain silent roughly analogous to the American Fifth Amendment in the police-investigation context. Americans may think they have "good cause" to fire an employee for refusing to cooperate in an internal company investigation, but little if any authority abroad supports this view. Indeed, whistleblowing rules in Europe actually forbid employers from unilaterally imposing mandatory reporting rules, such as in codes of conduct, to force witnesses to disclose incriminatory information about their co-workers (above, ¶ 2). An employer order (as opposed to request) to "cooperate" with an internal investigation likely triggers the same legal concerns and so is an impermissible mandatory reporting rule. The lesson: Investigators should speak accurately and think carefully before requiring overseas em-

ployees to cooperate in internal investigations or investigatory interviews.

21. Comply with Consultation and Representation Rules: Labor laws in many jurisdictions (France, for example) require consulting with employee representatives before launching a slate of staff interviews. American investigators who bust into an overseas workplace and question workers without any advance word to their local labor representative (union committee or works counsel) fall into a legal trap. A separate but related issue is foreign local *Weingarten* rights.[16] In jurisdictions including the U.S., to interrogate a specific employee witness implicated in an allegation without first notifying his labor representative is an unfair labor practice (just as a lawyer interrogating a witness known to be represented by counsel without first telling that employee's representative breaches ethics rules). Be sure to respect mandatory interview-context consultation and representation rights.

22. Notify Target and Witness of Their Rights: Americans expect police to read criminal suspects their *Miranda* rights. But in the non-government American employer investigation context, an employee witness enjoys few if any affirmative rights (beyond *Weingarten*, above ¶ 21, and *Upjohn*, below ¶ 23). Not so abroad. Employees in many countries enjoy robust procedural rights in the workplace investigation context. One sweeping right, in Europe, is the right to be told precisely what an employee's other investigatory rights are. Even in countries outside Europe where local law does not force internal investigators to brief witnesses on their rights, local best practices may be to begin an investigatory interrogation by advising each witness that he enjoys due process protections. Australian lawyers, for example, recommend this.[17] Further, data law in Europe and elsewhere requires telling targets and witnesses about internal investigation notes and files that identify them, and then requires offering targets and witnesses limited access to these files and a right to "correct" them (above, ¶ 4)—even while the internal investigation is still pending. This obviously conflicts with the investigatory best practice of keeping an evolving investigations strictly confidential. Strike a balance to comply with legal mandates. Genuinely "anonymizing" names and identities in investigation files eliminates the data-law disclosure obligation here. But in the context of an active investigation, anonymizing is rarely practical.

23. Give *Upjohn* Warnings, Demand Witness Confidentiality, and Conduct Interviews Legally: A lawyer interviewing domestic American employee witnesses in an internal investigation should always give so-called *Upjohn* warnings[18] telling each staff witness that the investigator represents the employer and may be covered by confidentiality obligations and attorney-client privilege, and explaining that the employer might waive its privilege and offer up interview information to third parties including law enforcement.[19] As U.S. domestic law, *Upjohn* is not authoritative abroad, but giving *Upjohn*-style warnings is a clear best practice worldwide.

Beyond *Upjohn*, internal investigators should always warn overseas employee witnesses to keep the interrogation and investigation strictly confidential, not discuss it with other workers. Indeed, to let a (foreign) witness talk about a pending internal investigation could actually violate overseas data protection laws. However, American investigators have recently become reluctant to demand witness confidentiality because, as of 2012, demanding confidentiality in domestic U.S. investigatory interviews risks violating American labor law as an impermissible restriction on "protected concerted activity."[20] Therefore, as of 2012, many American investigators stopped demanding confidentiality of stateside investigatory witnesses. But this issue is confined to U.S. soil. The American "protected concerted activity" doctrine is all but unknown abroad—even in Canada. *Banner Health System* raises a purely domestic U.S. issue; multinationals should always impose a confidentiality mandate on *overseas* witnesses.

Upjohn warnings and the *Banner Health System* confidentiality issue aside, be sure to conduct overseas investigatory interviews legally, complying with local laws. Be careful debriefing employees as to what they may have told local police in criminal-context interviews—some jurisdictions prohibit this line of questioning. When electronically recording staff interviews, get recording consents from witnesses that comply with local law (in writing as necessary).

D. Communications, Discipline and Remedial Measures in a Cross-Border Investigation

After collecting documents and conducting investigatory interviews in an internal investigation, what had been an information-gathering process becomes active decisionmaking. Decide on the investigation findings. Address discipline and remedial measures. Take these steps consistent with investigation findings and with applicable employment, data protection and criminal laws. Memorialize, preserve and report on investigation results.

24. Involve the Audit Function and Comply with FCPA Accounting Rules: Where an investigation uncovered financial impropriety, money losses or bribery / improper payments, tackle the accounting and financial-statement issues. Comply with

U.S. Foreign Corrupt Practices Act accounting (payment-disclosure-reporting) rules as well as SOX accounting mandates and foreign Generally Accepted Accounting Principles. Financial losses at an overseas affiliate reach the "bottom line" of a U.S. parent, so at a publicly traded multinational an overseas investigation might implicate U.S. securities mandates and auditing / accounting disclosures. Manage strategy with inside and outside auditors. Involve the audit function. Implement auditor / accountant recommendations.

25. **Report to Upper Management**: Consider the pros and cons of delivering an oral versus written report to upper management detailing investigation findings. Keep in mind data subject rights of access to a final written report and restrictions on "exporting" investigation data (above ¶ 3). Data protection laws and privilege rules may weigh against a written report. Draft any report carefully with findings of fact grounded in evidence. Refrain from declaring anyone guilty of a crime (internal investigators are powerless to declare guilt in any criminal justice system). And limit the circle of upper management receiving an investigatory report to those with a demonstrable need to know.

26. **Impose Post-Investigatory Discipline**: Where an investigation uncovers solid evidence of wrongdoing (and where the employer did not already take action at the beginning of the investigation, above ¶ 7), impose discipline consistent with investigation findings and upper management buy-in. If the investigation exposed enough evidence to dismiss the suspect for good cause under local law, structure the dismissal as for good cause. But sometimes an investigation uncovers enough evidence of wrongdoing to convince an employer to dismiss the target but not enough evidence to support a good-cause dismissal under tough local employment laws. In those situations the employer (where legal) might decide to dismiss the target for no good cause, paying notice and severance pay.

    In dismissing a guilty target (whether or not for good cause), follow local-law dismissal procedures. Chad, France, UK and many other countries impose detailed dismissal procedures on employers firing even obviously culpable staff. When disciplining a witness, whistleblower or target who had lodged a workplace complaint, comply with anti-retaliation law, such as the laws in Europe that prohibit "victimising" whistleblowers. (U.S. anti-retaliation prohibitions are particularly strict, but most court decisions construing the extraterritorial reach of U.S. retaliation law tend to confine these rules to U.S. citizens or residents.)

27. **Ensure Internal and External Communications Comply**: With confidentiality paramount in internal investigations, a multinational might prefer to keep its investigation results under wraps. But in the real world, especially in high-profile cases, internal and even external communications can be necessary: Employees may demand to know what happened, and word of some internal allegations may inevitably make the newspaper.

    As to post-investigation reporting, a good practice is to close the loop with the original whistleblower (where that channel is open)—tell him what the investigators found out and what the employer will do about it. In internal and external reporting about an investigation, be alert to defamation and tortious invasion of privacy claims. Ensure that mentions of the investigation and the fate of the target are defensible. Heed applicable data-law restrictions against disclosing and exporting personal information.

28. **Disclose to Authorities Appropriately**: Consider turning over to local police or enforcement authorities investigation-uncovered evidence of criminal acts, especially where local or U.S. law imposes a self-reporting obligation. However, absent a valid court order, *data protection* law in some jurisdictions actually restricts an employer's freedom to volunteer, even to government law enforcers, personal information learned in an investigation. Reporting to police could also raise an *employment* law challenge—fired staff in some jurisdictions can actually argue that a police denunciation amounts to additional, illegal employer discipline: Under local employment law, a dismissal may be legal but a denunciation to police may be excessive. On the other hand, local law in other jurisdictions actively *requires* denunciations to local police. Slovakia, for example, requires that parties, including employers with knowledge of a criminal act, notify authorities[21] and New South Wales (Australia) requires parties, including employers with evidence about a "serious indictable offence" to report that to local police. Heed these laws.

29. **Implement Appropriate Remedial Measures**: Implement remedial measures—steps to prevent the problem from recurring, such as new work rules and new tools for oversight, security, monitoring and surveillance. Be sure new measures comply with substantive law, such as data protection rules that restrict employee monitoring: Overseas, an employer cannot always unilaterally start video or computer monitoring, for example, without employee consent. (For that matter, this is also the rule in the U.S. union context.[22])

    Also comply with *procedural* rules. Overseas, collective labor representation laws as well as vested / acquired rights concepts restrict an employer from tightening terms and conditions of employment

(such as by imposing unpopular new remedial measures) without first consulting with employee representatives.

30. Preserve Investigation Data Appropriately: Preserve the investigation file (notes, interview transcripts, expert reports, summary report) consistent with applicable law and investigatory best practices. In America, the best practice here is simple: "The details of every investigation should be memorialized in writing, regardless of the findings, including a description of the allegation, the steps taken to investigate it, factual findings and legal conclusions, and any resultant disciplinary or remedial actions"—of course, the employer then retains that "writing" in case it may be needed later.[23] Even where an investigation finds no probable cause, investigation records will be invaluable if a similar allegation later arises among the same suspects.

But this best practice of retaining investigation documents can be flatly illegal abroad. In some jurisdictions, investigatory file preservation conflicts with the data-law duty to purge obsolete personal information that there is no compelling business case to retain. Of course, any American multinational can articulate a business case for retaining investigation records indefinitely. The problem is that data protection authorities, at least in parts of Europe, will reject that argument as spurious. This can mean destroying or completely anonymizing an investigation file (including even an unanonymized summary report) surprisingly soon after an investigation ends—within two months, under one influential EU recommendation, particularly where the investigation did not lead to discipline.[24]

That said, an employer might be able to justify retaining an investigation file until any relevant statute of limitations runs. One tactic, probably not strictly compliant, is to export investigation data files outside those jurisdictions that impose strict duties to purge, maintaining the files (or copies) offshore, such as in the United States.

* * *

American best practices for investigating a suspicion or allegation of employee wrongdoing are well-developed and sophisticated. U.S. multinationals strongly believe in the value of our evolved American investigatory practices, preferring to export them when looking into an allegation overseas—especially when a domestic U.S. complaint alleging a violation of American law implicates evidence or witnesses abroad. But exporting U.S. internal investigatory practices requires advance planning, flexibility, adaptation and compromise. Adapt U.S. investigatory strategies to the very different realities and the seemingly quirky mandates of the law of the overseas workplace.

Endnotes

1. Austria Supreme Court decision 9 ObA 131/11x, Nov. 26, 2012.
2. J.P. Armstrong, "Anti-Corruption and Bribery Compliance: The U.K. Perspective," NY State Bar *Int'l Chapter News*, Fall 2012, at 5, 9-10 (emphasis added).
3. Harmers Work Insights (Australia), Winter 2012, at p. 9.
4. Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, at § 301.
5. *See* Donald C. Dowling, Jr., "How to Launch and Operate a Legally-Compliant International Workplace Report Channel," 45 ABA *The International Lawyer* 903 (2011).
6. *Opinion 1/2006*, Article 29 Working Party, 00195/06 WP 117 (Feb. 1, 2006).
7. *See* Laura Brevetti, "Self Detection: So Key, So Difficult," *New York Law Journal*, July 13, 2009, at S2.
8. Carl Bevernage, "Belgium," chap. 3 in *International Labor & Employment Laws* vol. IA (ABA/BNA 2009), at 3–38.
9. Cf. Ken Gormley, *The Death of American Virtue: Clinton vs. Starr* (2010) at 324-62.
10. *Harmer's Work Insights (Australia*), Winter 2012, at p. 11.
11. U.S. Businessman Gets 15 years in Dubai Fraud Cases, *Miami Herald*, Mar. 25, 2013.
12. Rubin Thomlinson LLP (Toronto), *Workplace Investigation Alert* #14 (Aug. 2012).
13. For discussions of this U.S. domestic investigatory-context privilege, see L. Krigten, "Waiver of Attorney-Client Privilege to Protect the Company," *Nat'l Law Journal*, Nov. 22, 2012 at 16, and J. Nathanson, "Walking the Privilege Line," *New York Law Journal*, July 13, 2009, at S8.
14. *Akzo-Nobel*, ECJ case c-550/07P (9/14/10).
15. Dec. 2007, p. 50.
16. *Cf. NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).
17. *Harmer's Work Insights*, Winter 2012, at p. 9, 11.
18. *Upjohn v. U.S.*, 449 U.S. 383 (1981).
19. *See* Robert Jossen & Neil Steiner, "The *Upjohn* Pitfalls of Internal Investigations," *New York Law Journal*, July 13, 2009, at S4.
20. *See Banner Health System*, 358 NLRB No. 93 (2012), *questioned by Canning v. NLRB*, case no. 12-1115 (D.C. Cir. 2013).
21. Slovak Crim. Code no. 300/2006.
22. *Cf. Brewers v. Anheuser-Busch*, 414 F.3d 36 (D.C. Cir. 2005).
23. S. Folsom, V. McKenney & P.F. Speice Jr, "Preparing for a Foreign Corrupt Practices Act Investigation," *ABA International Law News*, Winter 2013, at p. 6.
24. Opinion 1/2006, *supra* ¶ 4.

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Developments in NLRB Remedies Under the Obama Board

By Julie Rivchin Ulmet

I. Introduction[1]

The National Labor Relations Act (the "Act") authorizes the National Labor Relations Board (the "Board"), when it determines that a respondent has violated the Act, to issue an "order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."[2] In order to consider whether a remedy "effectuates the policies" of the Act, it is necessary to first identify those policies. The Act explicitly sets forth its "Findings and Policies" in Section 1 of the Act:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[3]

Thus, after linking the Act to Congress's commerce clause power, the preamble explicitly identifies as its policies: (1) encouraging collective bargaining; (2) protecting employees' freedom of association; (3) protecting employees' self-organization; (4) protecting employees' designation of representatives of their own choosing; and (5) thereby, protecting employees' negotiation of terms and conditions of employment and other mutual aid or protection.

The Supreme Court has said that the "power" of fashioning remedies to "undo the effects of violations" of the Act "is a broad discretionary one…for the Board to wield, not for the courts."[4] However, the Court also determined early on that the Board's remedial authority was limited to make-whole awards and could not be "punitive" even where the Board determined that such an award would effectuate the policies of the Act.[5] Instead, the Board may only order affirmative action that is purely "remedial."[6] Accordingly, practitioners interested in shaping remedies must learn to manage the tension between the goal of devising make-whole remedies which "effectuate the policies of the Act" and the requirement to avoid "punitive" pitfalls. This article will review memoranda issued by Acting General Counsel Lafe Solomon (the "General Counsel") and decisions issued by the Obama Board[7] in order to explore how the Board's recent efforts to craft remedies have navigated this tension.

II. General Counsel Memoranda on Remedies

The General Counsel has recently announced initiatives to seek more effective remedies for violations in initial organizing campaigns and in first-contract bargaining cases, as well as to improve the manner in which backpay is calculated.[8] These are not new concerns. General Counsel Solomon is only the most recent NLRB General Counsel to consider these issues.[9]

A. Remedies in Initial Organizing Campaigns

In 2010, the General Counsel announced a prosecutorial priority of ensuring that "effective remedies are achieved as quickly as possibly when employees are unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplaces."[10] GC Memo 10-07 set forth a timeline for Regional processing of such "nip-in-the-bud" cases, including a timeline for considering whether to seek injunctive relief under Section 10(j) in each case. This Memo thus posited that *timeliness* of remedies was essential to effectuating the Act's policies, presumably those of protecting freedom of association, self-organization, and designation of representatives of employees' own choosing.

A few months later, in GC Memo 11-01, the General Counsel elaborated on the "nip-in-the-bud" priority by specifying types of remedies Regional offices should consider in such cases.[11] The Memo identified the goal of these remedies as obtaining "prompt and effective relief to best restore the status quo and recreate an atmosphere in which employees will feel free to exercise their Section 7 right to make a free choice regarding organization."[12] Specifically, under this Memo, Regions were authorized to plead in complaints in appropriate cases: (1) notice-reading by or in the presence of a responsible management official; (2a) union access to the employer's bulletin boards; and (2b) provision of a list of employee names and addresses to the union by the employer.[13] The Memo further instructed Regions to seek authorization from the General Counsel to plead additional remedies where appropriate: (1) granting a union access to nonwork areas during employees' nonwork times; (2) giving a union notice of any address by the employer regarding the issue of representation and providing the union with equal time and facility for the union to respond to such address; (3) affording the union the right to deliver a speech to employees at an appropriate time prior to any Board

election.[14] None of these remedies were novel; all were previously ordered by the Board in prior cases, as noted by citations in the Memo.

The General Counsel advised supporting requests for these remedies with a showing that the remedy was a make-whole, remedial measure. Specifically, "[i]n arguing for such remedies, Regions should articulate the lasting or inhibitive coercive impact inherent in the violations alleged…use additional evidence adduced, where available to demonstrate the actual impact of the violations, and…explain how the remedy sought will remove that impact."[15]

B. Remedies in Initial Contract Bargaining

Next, GC Memo 11-06 discussed enhanced remedies for violations in the context of first-contract bargaining.[16] Elaborating on the policies of former General Counsel Meisburg,[17] this Memo authorized Regional offices to plead certain remedies where appropriate: (1) notice reading; (2) requiring bargaining on a prescribed or compressed schedule; (3) periodic reports on bargaining status; and (4) a minimum six-month extension of the certification year.[18] The Memo also instructed Regional Offices to request authorization from the General Counsel to plead additional remedies where appropriate: (1) reimbursement of bargaining expenses; and (2) reimbursement of litigation expenses. Again, these remedies were not new, and were supported by citations to prior Board cases ordering such remedies. The Memo explained that these remedies were make-whole, not punitive, as they were intended to "restore the pre-violation conditions and relative positions of the parties," which can be viewed in terms of the Act's stated policies of ensuring that employees have freedom of choice on the issue of union representation, free of coercion by any party.[19]

C. Announcements Concerning Traditional Remedies and Procedural Matters

The Acting General Counsel has endeavored to modify backpay awards in order for "employees to be made whole" and "to put the discriminatee back into the same situation s/he would have been in had it not been for the discrimination against her/him"[20]—clearly remedial goals. Specifically, the General Counsel instructed Regions to include specified language in appropriate complaints seeking (1) reimbursement for excess taxes owed in cases where a lump-sum backpay award covers more than one year of backpay; and (2) a requirement that the respondent provide notification to the Internal Revenue Service (IRS) and Social Security Administration (SSA) of the periods to which backpay should be allocated.[21]

III. Recent Board Decisions Relating to Remedies

The Board's decisions in the area of remedies can best be viewed as falling into two categories: adjustments to traditional remedies and awards of extraordinary remedies. "Extraordinary" remedies is a term of art that the Board and courts have used to describe those remedies that are ordered in atypical cases where the Board determines that "traditional" remedies will not be sufficient to remedy the wrongs inflicted by the respondent.[22]

A. Adjustments to Traditional Remedies

In a series of recent cases, the Board has made modifications to its traditional remedies of backpay and notice posting. Backpay serves the goal of making whole an individual who was injured by an employer's legal violations, while notice-posting serves the purpose of reassuring the collective of employees that their rights will be respected.[23]

First, in *J. Picini Flooring*, the Liebman Board adjusted its notice-posting remedy to make it better suited to "today's workplace."[24] The Board set forth its new policy:

> As a matter of general policy, it follows that, in addition to physical posting, notices should be posted electronically, on a respondent's intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by email if the respondent customarily uses email to communicate with its employees or members, and by any other electronic means of communication so used by the respondent.[25]

Thus, in each case, the General Counsel must present evidence concerning the respondent's customary uses of internet, intranet, email communications, or any other "electronic means of communications" in order to demonstrate that such means of notice posting is proper in that case.

Next, in *Latino Express*,[26] the Pearce Board accepted the General Counsel's proposal to make certain adjustments to the calculation of backpay.[27] As proposed by GC Memo 11-08 and pled in subsequent complaints, the Board ordered SSA reporting and reimbursement of excess income tax liability based on the rationale of "ensuring that discriminatees are truly made whole."[28] The Board's decision observes that courts and other administrative agencies have handled backpay awards in these ways for decades.[29]

Thus, the Board's recent adjustments to traditional remedies appear designed to bring these clearly remedial, make-whole measures in line with "today's workplace" and today's legal environment.

B. Orders of Extraordinary Remedies

The Obama Board's decisions ordering various kinds of extraordinary remedies provide a valuable look at how

the Board navigates the tension of effectuating the policies of the Act while not crossing the line into "punitive" remedies. These remedies have included an extension of the certification year,[30] a notice-reading remedy,[31] bargaining schedule,[32] and issuance of a broad cease-and-desist order.[33] In addition, the Board has ordered access remedies, including provision of employees' names and addresses to the union.[34] Even more interesting, however, are cases where the Board has awarded reimbursement of bargaining or litigation expenses. As GC Memo 11-06 remarked, the General Counsel and other practitioners "have not had as much experience" with reimbursement remedies as they have had with these other sorts of extraordinary remedies.[35] For that reason, a close review of recent Board cases awarding these remedies may be instructive.

Reimbursement remedies are not new. They were established by the Board in the early 1970s,[36] and the most in-depth discussion in recent years came in *Frontier Hotel*.[37] Following the *Frontier* decision, these remedies have been awarded infrequently by some Boards and even more rarely under others. Negotiating-expense remedies were awarded in a limited number of cases under both the Clinton- and Bush-era Boards.[38] Litigation-expense reimbursement has been rejected in far more cases than it has been granted.[39]

The first Obama Board case granting notable extraordinary remedies was *HTH Corporation*,[40] a decision by the Liebman Board, with a panel composed of Members Becker, Pearce, and Hayes. The Board, over Member Hayes's objection, ordered a notice-reading, extension of the certification year, and reimbursement of the union for its negotiating expenses. In this case, the employer had discharged seven employees who were members of the union's bargaining committee, bargained in bad faith for an initial contract with the union, unlawfully withdrawn recognition from the union, made various unilateral changes to employees' working conditions, and engaged in an assortment of other violations of the Act.[41] In affirming the awards of reimbursement of negotiating expenses and a notice-reading, the Board set forth various reasons. First, the Board cited the employer's "proclivity to violate the Act,"[42] as evidenced by two earlier Board decisions finding that the employer had committed unfair labor practices and engaged in objectionable conduct during the critical period before an election.[43]

Next, the Board cited the Gould Board's decision in *Frontier Hotel*,[44] in which the Board established a standard for the award of negotiating expenses.[45] The standard established in *Frontier Hotel*, as quoted in *HTH Corporation*, was the following:

> In cases of unusually aggravated misconduct…where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.[46]

Thus, the standard established in *Frontier Hotel* and reiterated in *HTH Corporation* permits awards of negotiating expenses where (1) unfair labor practices were sufficiently "substantial" to "infect[] the core" of the bargaining relationship; (2) traditional remedies will not eliminate the effects of the unlawful conduct; (2) the charging party will not be made whole without reimbursement of the wasted expenses; (3) a restoration of the charging party's economic strength is necessary to restore the status quo at the bargaining table; and (4) there is a direct, causal relationship between the respondent's unlawful conduct and the charging party's losses. These factors appear to emphasize the harm that is caused by the employer's violations, and thus the purely remedial goals of the Board's affirmative orders in remediating these harms.

While the Board elaborated on the specific policies that the notice-reading remedy was designed to effectuate—"enabl[ing] employees to exercise their Section 7 rights free of coercion"[47]—the Board was less explicit about the policies underlying the reimbursement remedy. However, the decision appears to further the policies of "encouraging the practices and procedures of collective bargaining," as described in the Act's preamble.

Following *HTH Corporation*, the Board, through the same panel but with Member Pearce now elevated to Chair, issued decisions in *Whitesell Corporation*[48] and *Camelot Terrace*.[49] The Board in these cases makes more explicit the injury and remedial goals, even if not the underlying policies effectuated by the remedies. In *Whitesell*, the Board awarded reimbursement of bargaining expenses and notice-reading. There, the employer had prematurely declared impasse three weeks into negotiations and one day after contract expiration, and then unilaterally implemented provisions of its final offer.[50] Based on this conduct, the General Counsel successfully petitioned for a 10(j) injunction against the employer, based on charges that the Board later agreed established violations

of the Act.[51] Subsequent to imposition of the injunction, which ordered the employer to bargain in good-faith, the employer made regressive proposals "clearly designed to frustrate bargaining and negate the possibility of reaching agreement." insisted on retaining control over mandatory subjects through proposals which the Board concluded "would have left the employees significantly worse off than they were without a contract," refused to provide requested information about its bargaining proposals, and then obstructed the scheduling of further bargaining sessions.[52] Faced with the threat of a petition seeking to hold the employer in contempt of the 10(j) injunction, the parties entered into a settlement agreement setting a bargaining schedule for ninety days.[53] After the conclusion of those ninety days, the employer returned to regressive bargaining and then again declared impasse and implemented new terms and conditions.[54]

Based on these facts, the Board ordered reimbursement of bargaining expenses and a notice reading. The Board identified the injury to be remediated, stating that the respondent's tactics "effectively reduced the negotiations to a sham and wasted the Union's time and resources."[55] Based on this harm, the Board emphasized that its "traditional remedy of an affirmative bargaining order, standing alone, will not make the Union whole," and thus a negotiating-expense award was a non-punitive, make-whole measure "warranted to make the Union whole and to restore the status quo ante so far as possible."[56] While not specifically identifying the policies effectuated by this remedy, by defining the injury in this way, the Board appeared to connect the remedy to the underlying policies of encouraging the practice and procedure of collective bargaining and protecting employees' designation of representatives for the purpose of negotiating terms and conditions of employment.

Three months later, the Pearce Board again awarded additional extraordinary remedies in *Camelot Terrace*, including bargaining expenses to the Union and litigation expenses to both the Union and the General Counsel.[57] *Camelot Terrace*, similar to *HTH* and *Whitesell*, involved an employer with a history of legal violations and involvement in Board processes. In a case three years earlier, the General Counsel alleged bad-faith bargaining and other violations by the employer with respect to the same union and bargaining unit, which resulted in a post-hearing settlement agreement approved by the administrative law judge.[58] On the basis of the allegations in the complaint before the Board in *Camelot Terrace*, the General Counsel successfully moved to set aside the prior settlement agreement and consolidate hearing the prior charges with the ones underlying the later complaint. Based on exceptions only to the remedies and not to the findings of unlawful conduct,[59] the Board affirmed the judge's findings that the employer had engaged in both sets of unlawful conduct, including bad-faith bargaining, surface bargaining, refusal to provide requested information, direct dealing, and unilateral changes.[60]

Explaining the negotiation-expenses award, the Board articulated the injury caused by the violation and, on that basis, emphasized that the award was purely a remedial measure to make whole the injured party. The Board explained that the employer, by its unlawful acts, "directly caused the Union to waste considerable resources" and "deprived the Union of any real opportunity to achieve contracts that would be acceptable to unit employees."[61] A bargaining-expense remedy was therefore a necessary make-whole remedy in order to "restore the Union's previous financial strength and consequent ability to carry out effectively its responsibilities as the employees' representative."[62] This decision appears to implicitly posit that in order to effectuate the Act's policies of protecting the exercise by workers of designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment, it is necessary for the employees' designated representative to maintain its "financial strength" in order to "effectively" carry out its representational duties.

In awarding litigation expenses, the Board highlights the need to protect the integrity of the Board's own adjudicative process. In a lengthy discussion, the Board located its decision within a well-established tradition of courts' and administrative bodies' "inherent authority" to control their own processes. The Board quoted Supreme Court precedent in asserting that the bad-faith exception to the American Rule permits reimbursement of litigation expenses when a party has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons,'" based on the party's "'actions giving rise to the litigation, in the conduct of the litigation itself, or in both.'"[63]

The Board's stated reasons for finding litigation expenses warranted in *Camelot Terrace* focus on the specific facts of the case before it. Nonetheless, it is possible to discern certain underlying principles and themes. As with its decisions awarding bargaining expenses, the Board here identified an injury and a consequent make-whole award to remediate that injury. The Board asserted that the award was necessary to "protect litigants from the significant economic consequences of such wanton misuse of legal processes in support of a party's unlawful objectives."[64] Because the General Counsel and the union had "incurred the additional expense of the resumed litigation" following the respondent's breach of settlement agreements, the award would make them whole for having suffered that economic injury.[65] Additionally, the litigation-expense award can also be viewed as providing a remedy for an injury to the Board's own process. The Board explained that it possesses the authority to order such a remedy in order to "preserve the integrity of [Board] processes"[66] and asserted that such an award is proper where a respondent "made the Board into an instrument of its own unlawful conduct."[67]

Accordingly, a litigation-expenses award may be viewed as remedial in two senses. First, the award

reimburses the charging party which has suffered the "economic consequences" of the respondent's bad-faith conduct, and second, reimbursement to the General Counsel—the prosecutor in this "quasi-judicial body"[68]—remedies the injury to the "integrity" of the Board process. Such awards may be viewed as effectuating various policies of the Act. First, reimbursement to the charging party, in a case where the underlying unlawful conduct involved bad-faith bargaining and related violations, encourages the practice and procedure of collective bargaining and the employees' full freedom of association. Second, an award intended to "protect the integrity" of the Board's process may be viewed as effectuating a policy set forth in Section 10(a) of the Act: "empower[ing]" the Board to "prevent any person from engaging in any unfair labor practice."[69] While the Board in *Camelot Terrace* does not make such principles explicit, instead emphasizing the employer's "bad faith" by setting forth a litany of facts concerning the employer's unfair labor practices and conduct in the litigation, this framework provides a useful lens to make sense of the Board's decision.

The Board has ordered reimbursement of bargaining expenses in at least one subsequent case,[70] but does not appear to have ordered reimbursement of litigation expenses in any subsequent cases. Such remedies appear to have been requested in at least three subsequent cases in which the Board deemed them unwarranted.[71] It remains to be seen whether the Board will continue to support its remedial orders through fact-specific decisions or whether it will articulate more general principles for the availability of these awards. Nonetheless, in formulating their own arguments and litigation strategies, practitioners may wish to consider these fundamental principles of injury, remedial goal, and policies effectuated by a given remedy. Such a strategy would be consistent with the General Counsel's view that in arguing for a given remedy, Regions "should articulate the lasting or inhibitive coercive impact inherent in the violations alleged," "explain how the remedy sought will remove that impact," and show how remedies are intended to "restore the pre-violation conditions."[72] By doing so, practitioners may invoke the Board's "unique role in determining how best to remedy violations of the [Act]"[73] while still avoiding overstepping into the forbidden "punitive jurisdiction."[74]

Endnotes

1. All views reflected in this article are the author's alone and do not reflect the views of the National Labor Relations Board or the U.S. Government.
2. 29 U.S.C. §160(c) ("Section 10(c)"). *See also* Ellen Dannin, "No Rights Without a Remedy: the Long Struggle for Effective National Labor Relations Act Remedies," Am. Const. Soc'y Issue Brief (June 2011), available at <https://www.acslaw.org/sites/default/files/Dannin_No_Rights_Without_Remedy_0.pdf> (discussing Board and court precedent influencing the availability of NLRB remedies today); J. Freedley Hunsicker, Jr. et al., *NLRB Remedies for Unfair Labor Practices* (1986) (providing a comprehensive discussion of remedies available under the Act based on Board and court precedent).
3. 29 U.S.C. §151.
4. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Dannin observes the "tautology" of the Court's statement that remedies must be "remedial." "No Rights without a Remedy," p. 11.
5. *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 235-36 (1938) ("[w]e think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order").
6. *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 12 (1940).
7. I refer to the "Obama Board" in the same sense as former Board Member Craig Becker defined it—beginning on March 27, 2010, the first date on which a Board possessed of a quorum of members, a majority of whom were appointed by President Obama, was constituted. *See* Craig Becker, "The Continuity of Collective Action and the Isolation of Collective Bargaining: Enforcing Federal Labor Law in the Obama Administration," 33 Berkeley J. Emp. & Lab. L. 401, 402 n. 2 (2012). The Obama Board may be further divided between the 17 months when Wilma Liebman was Chair, and the current Board, beginning August 28, 2011, with Mark Gaston Pearce serving as Chair. *See* "Members of the NLRB since 1935," available at <http://www.nlrb.gov/members-nlrb-1935>.
8. General Counsel memoranda serve two functions: first, they are public documents which communicate the Agency's prosecutorial priorities to the public; and second, they instruct the General Counsel's field staff in the performance of their duties.
9. *See* NLRB General Counsel Mem. 07-08 (May 29, 2007) and 06-05 (April 19, 2006) (memoranda issued by General Counsel Meisburg regarding remedies in first-contract bargaining cases); Operations-Mgmt. Mem. 99-79, 1999 WL 35013069 (Nov. 19, 1999) (in memo signed by Associate General Counsel Richard Siegel, during term of Acting General Counsel Frederick Feinstein, considering various remedial initiatives, including to remedy unlawful organizing interference, "[i]n order to improve the effectiveness of the Agency's remedial arsenal" and observing that it is "the Board's institutional role to serve as a remedial laboratory").
10. NLRB General Counsel Mem. GC 10-07 (Sept. 30, 2010) (hereinafter, "GC Memo 10-07").
11. NLRB General Counsel Mem. GC 11-01 (Dec. 20, 2010) (hereinafter, "GC Memo 11-01").
12. *Id.*, p. 1.
13. *Id.*, p. 6-9.
14. *Id.*, p. 10-11.
15. *Id.*, p. 6.
16. NLRB General Counsel Mem. GC 11-06 (Feb. 18, 2011) (hereinafter, "GC Memo 11-06").
17. GC Mems. 07-08, 06-05.
18. *Id.*, p. 1.
19. *Id.* (citing GC Mems. 06-05 and 07-08).
20. NLRB General Counsel Mem. GC 11-08, p.4 (March 11, 2011) (hereinafter, "GC Memo 11-08").
21. *Id.*, p. 3-4.
22. The term appears to stem from *Gissel*, in which the Supreme Court approved issuance of a bargaining order based on a card-majority, stating, "The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575,

614 (1969). The Board eventually began to refer to various non-traditional remedies as "extraordinary" relief. *See, e.g., United Dairy Farmers Coop. Assn*., 257 NLRB 772 (1981) (in discussing prior case, stating "[i]n addition to ordering its traditional remedies, the Board provided for various extraordinary remedies, but declined to issue a bargaining order" where "extraordinary remedies" included notice reading, union access to bulletin boards, and equal time to union to address employees).

23. *See J.P. Stevens & Co. v. N.L.R.B*., 417 F.2d 533, 540 (5th Cir. 1969) (notice-reading requirement is "an effective but moderate way to let in a warming wind of information and, more important, reassurance").

24. 356 NLRB No. 9, at 3 (Oct. 22, 2010) (internal citation and alteration omitted), *enfd.*, 656 F.3d 860, 866 (9th Cir. 2011).

25. *Id.*, at 3.

26. 359 NLRB No. 44 (2012).

27. The Board invited the parties and interested *amici* to submit briefs on the issues in *Latino Express*, 358 NLRB No. 94 (July 31, 2012).

28. *Id*.

29. *Id.*, p. 3, n.29.

30. *Santa Barbara News-Press*, 358 NLRB No. 141; *Leader Communications, Inc.*, 359 NLRB No. 90 (Apr. 10, 2013); *Universal Fuel*, 358 NLRB No. 150 (2012),

31. *Santa Barbara News-Press*, 358 NLRB No. 141; *OS Transport*, 358 NLRB No. 117 (2012); *Leader Communications, Inc.*, 359 NLRB No. 90; *Sprain Brook Manor Nursing Home*, 359 NLRB No. 105 (April 26, 2013) (order notice-reading *sua sponte*).

32. *All Seasons Climate Control, Inc*., 357 NLRB No. 70 (Aug. 26, 2011); *Camelot Terrace*, 357 NLRB No. 161 (Dec. 30, 2011).

33. *Santa Barbara News-Press*, 358 NLRB No. 141 (justified based on "proclivity to violate the Act" by committing "numerous, serious violations against the same unit employees"); *Sprain Brook Manor Nursing Home*, 359 NLRB No. 105 (based on "demonstrated proclivity to violate the Act" where employer engaged in a "repetition of the same type of misconduct previously found unlawful" by the Board) (citing *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190 (2007)).

34. *OS Transport*, 358 NLRB No. 117 (employer unlawfully retaliated against employees, including through unlawful discharges, involved in an initial union organizing campaign prompted by employer coercing employees to sign "sham" independent-contractor agreements).

35. GC Memo 11-06, p. 6, 7.

36. *Tiidee Products, Inc.*, 194 NLRB 1234, 1236-37 (1972) ("in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including the following costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses").

37. 318 NLRB 857.

38. *See, e.g., Alwin Mfg. Co., Inc*., 326 NLRB 646, 647 (1998) (affirming award of negotiation expenses to union and litigation expenses to both union and General Counsel where respondent did not except to them); *Lake Holiday Assoc., Inc.*, 325 NLRB 469 (1998) (awarding litigation costs and fees to the General Counsel and noting Union had not requested such reimbursement of its costs); *Teamsters Local Union No. 122*, 334 NLRB 1190, 1195 (2001) (ordering union to reimburse employer's bargaining and litigation expenses); *Regency Serv. Carts, Inc.*, 345 NLRB 671 (2005 (granting reimbursement of bargaining expenses but denying request for litigation expenses); *Dish Network Serv. Corp*., 347 NLRB No. 69 (July 31, 2006) (same).

39. *Planned Bldg. Servs., Inc*., 330 NLRB 791, 793 (2000) (denying request for litigation expenses); *Sw. Gas Corp*., 330 NLRB No. 171 (Apr. 11, 2000) (same); *Dish Network Serv. Corp*., 347 NLRB No. 69 (July 31, 2006) (granting reimbursement of bargaining expenses but denying request for litigation expenses); *Regency Serv. Carts, Inc.*, 345 NLRB 671 (2005) (same); *Waterbury Hotel Mgmt. LLC*, 333 NLRB 482, 483 (2001) (denying request for litigation fees where "defenses, although generally meritless, were debatable rather than frivolous); *Cogburn Healthcare Center*, 335 NLRB No. 105 (2001) (rejecting award of litigation expenses); *N & J Constr.*, 348 NLRB 55 (2006) ("this case does not present the level of 'truly frivolous litigation' that warrants such an 'extraordinary' remedy" (citing *Frontier Hotel*); *Sunshine Piping, Inc.*, 351 NLRB 1371, 1380 (2007) ("we cannot conclude that the Respondent's defense was 'entirely without color' and 'wantonly asserted'") (internal citation omitted). *Cf. 675 W. End Owners Corp*., 345 NLRB 324, 326 (2005) (ordering litigation costs incurred in defending against subpoenas respondent issued after identical subpoenas had been revoked by judge).

40. 356 NLRB No. 182 (June 14, 2011), *enfd.*, 693 F.3d 1051, 1061 (9th Cir. 2012) (finding reimbursement award appropriate where, as here, "the Union wasted resources over a period of years during which HTH had no intention of reaching an agreement. HTH is not entitled to benefit financially from the consequences of the delay created by its unlawful bargaining tactics").

41. *Id.*, p. 2.

42. *HTH Corp.*, 356 NLRB No. 182, p. 7.

43. *Pacific Beach Hotel*, 342 NLRB 372 (2004); *Pacific Beach Hotel*, 344 NLRB 1160 (2005).

44. 318 NRLB 857, 859 (1995), *enfd. in relevant part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

45. *HTH Corp.*, 356 NLRB No. 182, p. 7.

46. *Id.* (citing *Frontier Hotel*, 318 NRLB 857, 859 (1995)).

47. *Id.*, p. 8.

48. 357 NLRB No. 97 (Sept. 30, 2011).

49. 357 NLRB No. 161 (Dec. 30, 2011).

50. *Id.*, p. 2.

51. *Whitesell Corp.*, 352 NLRB 1196, 1209 (2008), *enfd.*, 638 F.3d 883 (8th Cir. 2011).

52. *Id.*, p. 3.

53. *Id.*

54. *Id.*

55. *Id.*, p. 5.

56. *Id.*, p. 5. The bargaining expenses ordered by the Board excluded the three months when the employer had bargained pursuant to the settlement of the contempt petition. Chairman Pearce would have awarded bargaining expenses during that three-month period. *See id.*, p.5 n.14. Member Hayes agreed with the award of fees during the period subsequent to the contempt settlement, but not before it.

57. 357 NLRB No. 161.

58. *Id.*, p. 1.

59. *Id.*

60. *Id.*, p. 7-8.

61. *Id.*

62. *Id.*

63. *Id.* (citing *F.D. Rich v. Industrial Lumber Co*., 417 U.S. 116, 129 (1974) and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)).

64. *Id.*, p. 7.

65. *Id.*

66. *Id.*, p. 5 (repeating the phrase "preserve the integrity" no less than six times).

67. *Id.*, p. 6 (citing Teamsters Local No. 122, 334 NLRB 1190 (2001)).

68. *Id.*, p. 5.

69. 28 U.S.C. § 160.

70. *Santa Barbara News-Press*, 358 NLRB No. 141 (2012) (ordering bargaining expenses even where union did not request it from ALJ where case was the second against same employer in two years and Board found that employer "committed numerous, serious violations against the same unit employees" as in prior case).

71. *See, e.g., Douglas Autotech Corp.*, 357 NLRB No. 111 (Nov. 18, 2011) (rejecting request for litigation expenses); *Bettie Page Clothing*, 359 NLRB No. 96 (Apr. 19, 2013) (same); *Chino Valley Med. Ctr.*, 359 NLRB No. 111, n.2 (Apr. 30, 2013) (same).

72. GC Memo 11-01; GC Memo 11-06, p. 1.

73. *Latino Express*, 359 NLRB No. 44, p. 1.

74. *Republic Steel Corp.*, 311 U.S. at 11.

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Limits on Sovereign Immunity in the Post-*NASA v. Nelson* Era: Greater Government Liability for Negligent Hiring

By Zachary Rothken and Jonathan Sturm

"You cannot escape the responsibility of tomorrow by evading it today."

—Abraham Lincoln[1]

I. Introduction

Hiring decisions by employers may often have far-reaching effects. They not only affect the business of an employer. They may also have major effects on the lives of other employees and those who have relationships with the company.

Private employers, upon making employment decisions, are legally liable for the action and inaction of their employees.[2] One such liability is encompassed in the doctrine of negligent hiring.[3] Negligent hiring is the breach of an employer's duty to make an adequate investigation of an employee's fitness before hiring him which proximately causes an injury.[4] Under the doctrine of negligent hiring, an employer may even be held liable for an employee's acts or omissions that occur outside the scope of that employee's duty.[5]

Public employers, on the other hand, have long enjoyed sovereign immunity, a centuries-old doctrine that, under most circumstances, immunizes the government from any liability.[6] Although the government has long enjoyed absolute sovereign immunity, Congress placed on it a significant constraint by enacting the Federal Torts Claim Act (FTCA) in 1946.[7] This essentially allowed tort suits to be brought against the government.[8] Nevertheless, the statute lists several exceptions to this rule, such as the "assault and battery exception"[9] as well as the "discretionary function exception."[10]

Courts have long deliberated over whether tort claims which are caused by negligence may be brought against the government—namely, whether they fall within the "assault and battery exception" of the FTCA.[11] Several United States Circuit Courts of Appeals decisions have split over this issue.[12] The United States Supreme Court, however, has yet to firmly resolve this discrepancy and thus far has failed to take a side on this issue.[13]

Like private employers, the government is free to utilize extensive background checks to screen both potential and current employees in making employment decisions.[14] This notion was reinforced in a recent Supreme Court case, *NASA v. Nelson*.[15] Nevertheless, the Court has still failed to firmly conclude whether the government should be liable for intentional torts caused by negligence, including negligent hiring claims.[16]

This article will discuss the development of the law, from the time governments enjoyed absolute sovereign immunity and onwards.[17] It will explore the doctrine of negligent hiring in both federal law as well as in state law.[18]

Although the Circuit Courts have split over whether intentional torts caused by negligence are included in the "assault and battery exception" of the FTCA, the Court's recent support for the government's broad utilization of background checks in *NASA* clearly indicates that the government should be held to a higher standard—at least as high of a standard as private employers are held.

This article will discuss how negligent hiring claims relate to the "discretionary function exception" to the FTCA.[19] Additionally, this article will discuss how major scandals in recent times have arguably derived from negligent decisions made by employers.[20] This article will discuss why, particularly after the *NASA* decision, the government should unquestionably have liability for negligent hiring claims.

II. The Doctrine of Negligent Hiring

A. Prima Facie Case of Negligent Hiring

Negligent hiring is a breach of an employer's duty to make an adequate investigation of an employee's fitness before hiring him.[21] To make a negligent hiring claim, a plaintiff must prove a prima facie case like most ordinary tort claims.[22] A plaintiff must first show that there was a duty owed to the plaintiff by the employer.[23] Next, a plaintiff must show that the employer breached that duty, namely that the employer knew or should have known about the employee-tortfeasor's unfitness for the particular job.[24] A plaintiff must then show that the employer's breach of that duty—negligently hiring the unfit employee—was the proximate cause of the plaintiff's injuries.[25] To prove that, a plaintiff must show that the employer's failure to make a reasonable inquiry into the employee-tortfeasor's fitness resulted in his hiring and that a reasonable inquiry would have yielded information which would have convinced a reasonable employer not to have hired the employee-tortfeasor in the first place.[26] Lastly, the plaintiff must have incurred damages.[27]

Negligent hiring is a tort that stems from primary liability, not respondeat superior's vicarious liability.[28] In

respondeat superior, an employer can only be held liable for an employee's acts or omissions within the scope of the employee's duty.[29] In negligent hiring, on the other hand, an employer may be held liable for an employee's acts or omissions outside of the scope of the employee's duty.[30] Essentially, the tort of negligent hiring is based upon the conduct of the employer.[31]

The doctrine of negligent hiring originally developed from the common law's "fellow servant rule."[32] The "fellow servant rule" operated to absolve an employer from tort liability when his employee was injured due to another fellow employee's negligence.[33] Under the fellow servant rule, employers were traditionally absolved from liability for the torts of their employees upon the notion that the risk of injury to an employee caused by the actions of his fellow employee is an ordinary risk associated with employment.[34] As tort law expanded, however, courts created several exceptions to the harsh fellow servant rule and soon began to acknowledge an employer's duty to afford employees a safe place to work.[35] Courts soon recognized within this the duty to hire safe employees.[36] With this the doctrine of negligent hiring has its roots.

As the courts gradually became comfortable with the application of the negligent hiring theory, the doctrine began to be applied more broadly.[37] Courts soon developed the scope of the doctrine to "create a duty between employers and third parties based upon the third party's relationship with the employer."[38] Thus, the modern version of negligent hiring was created.[39]

According to the Applicant Screening Company of America, three people a day are killed or assaulted, verbally or physically, in the workplace.[40] If precautions are not taken by employers to create a safe work environment, many lawsuits, including negligent hiring suits, could arise. Many negligent hiring lawsuits are settled for a large sum of money.[41] For example, a negligent hiring case involving a security guard with a history of sexual misconduct settled for $2.4 million.[42] In that case the security guard was hired by a drug store without a competent background check.[43] The security guard went on to sexually harass a thirteen and fourteen year old girl.[44] At first the employer offered a settlement in the hundred thousand dollar range, but after expert testimony the employer raised the settlement to $2.4 Million.[45]

Another case settled in the amount of $5.4 million.[46] The District Attorney involved in the case referred to the employee as "the most prolific serial sex offender we have ever prosecuted in the State."[47] The employee is now serving three life sentences for the sexual molestation of children at a home for the disadvantaged.[48] If, in this case, a background check had been conducted, it is highly unlikely that the employer would have hired such a man to look after disadvantaged children. The employer would have saved himself $5.4 million, but, more importantly, he would have saved children from the sexual abuse.

Similarly, in Arizona, an employer failed to conduct a competent background check of a nanny who molested two boys.[49] The aberration was apparent because the nanny had a prior history of child abuse and had molested a child of a parent whom he listed as a reference.[50] Like the case above, expert testimony was used in the settlement proceedings and the case settled for around $1 to $2 million.[51] An employer is only likely to concern himself with the effect his employees have on others to the extent that he will be held liable. These cases prove that a wider reaching concern exists, one that is real and important. The outcome of these cases, monetarily and socially, should be alarming for employers.

There are a few ways that an employer can protect his business and create a safe workplace.[52] First, an employer should conduct pre-employment screenings.[53] This includes providing employees with verbal notification with the intent to run a background check in accordance with state and federal laws, specifically Title VI, Section 606 of the Fair Credit Reporting Act (FCRA).[54] It also includes obtaining written authorization from the employees in order to research their "financial, medical, criminal, prior employment, drug testing, personality evaluation, education and mode of living checks such as neighbor interviews and character references."[55] An employer can, and should, ask a candidate for personal, work, or community references. Second, an employer should provide awareness and training for all employees in case violence erupts in the workplace.[56] Lastly, the employer should plan for long-term security.[57] If the employer creates a safe and secure environment, it will be less likely that violence will occur at the workplace. If an employer prevents violence at the workplace then he prevents the negligent hiring suits that could stem from that violence.

B. The Background Check and Negligent Hiring

To protect themselves from negligent hiring suits, background checks appear to serve as reasonable safety nets for employers.[58] However, they alone do not always protect employers from liability.[59] Employers are often irresolute as to how deep they should dig into a potential employee's background.[60] Employers must offset this duty alongside the efficiency of probing beyond an ordinary criminal background check.[61] While employers want nothing less than to confidently ensure that they employ only those who pose no risk to others, they often lack the resources required to do so.[62]

As stated above, for a negligent hiring claim, a plaintiff must prove that the employer failed to make a reasonable inquiry into the employee's fitness.[63] Such an inquiry may be in the form of a background check.[64] There is a vast amount of precedent for this notion.[65] A

plaintiff with a negligent hiring claim can assert that if a background check was performed, a reasonable employer would not have hired that employee or the reasonable employer would have taken adequate precautions knowing there was a possible danger in hiring that employee.[66] In response, an employer could argue that he did not breach any duty owed to the plaintiff.[67]

Courts look at the following factors when analyzing whether such a duty exists: "'(1) the degree of relationship between the plaintiff and the employer; (2) whether the plaintiff was brought into the path of the tort feasor [sic] for some purpose of the employer; and (3) the position which the state's courts have taken in similar cases.'"[68] Along these factors, if an employer had used a reasonable amount of care in the hiring process, he would not have owed the plaintiff any duty, and therefore would not be liable for a negligent hiring suit.[69] There are different ways an employer could go about using reasonable care in the hiring process; for instance, verifying information from an employment application, a pre-employment investigation by the local police, conducting an interview, or performing a background check.[70] Even if an employer conducted a background check, the employer would not be held liable for a negligent hiring suit if there was nothing in the employee's history indicating that he would exhibit that type of behavior.[71]

The extent of a background check depends on the work for which it is being conducted.[72] A job that requires a high amount of interaction with others would require a more in-depth background check than a job that requires a lesser amount of interaction with others.[73] In *McLean v. Kirby Co., a Div. of Scott Fetzer Co.*, the court held that Kirby, a manufacturer of vacuums, which employed door-to-door salesmen, had a duty to perform a background check on its salesmen.[74] In that case, a Kirby Salesman raped a prospective client in her own home.[75] The court found that had Kirby conducted a background check, the company would have found the salesman to be a dangerous person.[76] A door-to-door salesman is a type of job that requires a high amount of interaction with others, which is why the employer, Kirby, should have performed a background check.

In a similar case, an owner of a building was sued for negligent hiring because the manager of the building raped a tenant.[77] The justice of the case stated that "[l]iability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation…"[78] The court found in favor of the plaintiff because the owner would have discovered the manager's evil propensities through a reasonable inquiry.[79]

Similarly, in *Kendall v. Gore Properties, Inc.*, a painter hired by the manager of a building killed a female tenant.[80] The court found in favor of the deceased tenant because the manager gave the painter unlimited access to the decedent's apartment, and in doing so failed to inquire about the painter.[81] The court reasoned that a woman living alone could assume that the manager of her building would not give unlimited access to a dangerous stranger.[82] These two cases exemplify that when an employee is more likely to interact with others, there exists a heightened need for background checks.

As long as an employer makes a reasonable inquiry, he is not required to research a prospective employee's criminal record.[83] An employer is required to perform a criminal background check if he "is on notice of the need for one,"[84] or state law provides as such. Employers should be held liable for a failure to perform a criminal background check only when on actual notice because "[t]o hold the [employer] liable…without some knowledge or notice of some kind that the employee was a dangerous individual would require an exploration into the field of intangibles and the adoption of some method not yet devised of determining the unknown and unusual desires of the employee."[85]

Even if an employer looks into the criminal record of a prospective employee, a negative criminal record alone does not constitute a prima facie case of negligent hiring.[86] The existence of a criminal record would only help a plaintiff in his negligent hiring claim if the nature and circumstances of the employee's past criminal conduct related to the work he was hired to perform.[87] The court in *Evans v. Morsell* reasoned that an employer does not have to search for an employee's criminal record because to do so is difficult, placing too high of a burden on an employer, and the employer can assume that the employee has been amended under the legal system.[88]

A duty owed to the public is another reason for a higher standard background check.[89] Where an employment decision has a chance of affecting the public at large, an employer has a responsibility to protect those that would come in contact with that employee.[90] For example, the court in *Burch* held that "there is an indication that carriers might be held to a higher standard in the hiring of their employees than other employers."[91] That higher standard requires a background check, and exists in order to ensure that dangerous individuals are not hired for such a position.[92] What follows *Burch* is that a background check should be required for any employment with a possible effect on the public at large. Similarly, just like a job that entails a high interaction with others requires a stricter background check, the same should hold true for jobs that require interaction with the public at large.

C. Background Checks of Prospective Employees: Statistical Trends in the Private Sector

The use of background checks to evaluate both current and prospective employees has become increasingly more prevalent in recent years.[93] In 2004, the Society for

Human Resources Management (SHRM) conducted a survey which revealed a staggering jump in pre-employment background checks.[94] The survey found that prior to hiring new employees, eighty percent of companies run criminal background checks.[95] Compared to the results of a survey conducted by SHRM in 1996, in which fifty one percent of companies ran pre-employment criminal background checks, SHRM's 2004 results signified a twenty-nine percent growth in less than a decade.[96]

Similarly, in 2010, EmployeeScreenIQ surveyed over 600 employers to identify certain trends in the area of employment background checks.[97] The survey revealed that background checks have become increasingly important in the minds of employers and will continue to become progressively popular.[98] It found that ninety-two percent of employers would reconsider hiring prospective employees when a background check reveals certain unfavorable information.[99] Eight percent of surveyed employers said that when faced with such a situation, they would reject that candidate.[100] Forty-three percent of surveyed employers perform background checks prior to extending an offer to a prospective employee.[101] Sixty-eight of those surveyed conduct background checks for a prospective employee's history of substance abuse.[102]

When asked about the qualitative importance of background checks, nineteen percent said that it was the single most important factor in hiring prospective employees.[103] This is a far cry from employee qualifications, which was ranked the single most important factor in hiring prospective employees by seventy percent of those surveyed.[104]

As would be expected in today's digital age, employees utilize social media in researching prospective employees' backgrounds.[105] Fifty-three percent of those surveyed make use of LinkedIn, forty-eight percent use Google and other Internet search engines, thirty-nine percent use Facebook, and twenty-seven percent use Twitter.[106] Among those that make use of social media to research a prospective employee's background, seventy-three percent said that lies about a candidate's qualifications would prevent his being hired by the employer.[107] Sixty-five percent said that discriminatory remarks made by the candidate on the social networking site would prevent his hiring.[108] Only two states, Connecticut and Delaware, require employers to notify their employees if they monitor their usage of the internet and social media while on the job.[109]

D. The Public Policy Underlying the Doctrine of Negligent Hiring

Negligent hiring claims exist in order to compensate victims injured by employees.[110] The legal system created a liability for the commission of a tort, especially negligent hiring, in order to "punish blameworthy parties, to fulfill society's demand for justice, and to restore aggrieved parties to their status quo."[111] The issue in just punishing the blameworthy employee, who probably would not be able to finance the lawsuit, is that the victim would not be restored to the status quo; some may argue that to punish the employer is to punish a non-blameworthy party.

In order to accomplish these goals, the responsibility has to be placed on the party who can bear the responsibility best, namely the employer.[112] This is so because employers are in the best position financially and are authorized to make the ultimate decisions when hiring an employee.[113] Employers are in the best position to compensate those harmed by an employee because most employers have insurance to cover such lawsuits and employers have the ability to raise prices for goods or services in order to outweigh potential lawsuits.[114] In essence, employers pass on the financial burden to society as a whole when they increase prices.[115] In turn, that spreads the cost of negligent hiring suits, and the burden does not fall solely on the employers.

Furthermore, the fault should be placed on the employer because he should have used reasonable care when hiring the employee.[116] There will always be gray areas, where the employer does not seem to be at fault. However, on the whole, the employer is still in the best position to compensate those harmed by his employees, both financially and morally.

III. Criminal Background Checks and Negligent Hiring: State Law

A. State Negligent Hiring Law

Most states' negligent hiring statutes follow the common law set forth above.[117] Some states' statutes include a presumption against negligent hiring suits if an employer conducted a background check before the hiring.[118] According to Florida's negligent hiring statute, a presumption against a negligent hiring suit exists when an employer conducts a background check that includes:

> (a) Obtaining a criminal background investigation on the prospective employee under subsection (2); (b) Making a reasonable effort to contact references and former employers of the prospective employee concerning the suitability of the prospective employee for employment;
>
> (c) Requiring the prospective employee to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional

> tort, including the nature of the intentional tort and the disposition of the action;
>
> (d) Obtaining, with written authorization from the prospective employee, a check of the driver's license record of the prospective employee if such a check is relevant to the work the employee will be performing and if the record can reasonably be obtained; or
>
> (e) Interviewing the prospective employee.[119]

The statute proceeds to state that just because an employer did not use a method listed above does not mean he failed to use reasonable care.[120] This indicates that an employer can save himself from a negligent hiring claim by implementing a method not listed in the statute as long as he used reasonable care in hiring the employee. To be on the safe side, an employer should follow the methods outlined in the statute above in order to have an assumed reasonable care argument against a possible negligent hiring claim.

B. Criminal Anti-Discrimination Statutes

Fourteen states have statutes banning employment discrimination based on an employee's criminal record.[121] Nine of the fourteen cover the public sector only.[122] Five of the states statutes also disallow discrimination based on a criminal record in the private sector.[123] The intent of these statutes is to open up the job market for those who "have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society."[124]

Most of the statutes stipulate that an employer is allowed to discriminate based on a criminal record if the employee's past criminal activity will have an effect on the employment.[125] In New York, an employer can only discriminate based on a criminal record if there is a direct relationship between the employee's criminal past and the employment or if the hiring "would create an unreasonable risk to property or to public or individual safety."[126] Similarly, in Connecticut a state agency may take into consideration the relationship between the conviction and the job, the employee's rehabilitation from the convicted crime and the time that has elapsed since the crime was committed.[127] In a handful of states—Arizona, Kentucky, Colorado, Louisiana, New Mexico, and Washington—law enforcement agencies are exempted from the law.[128]

There are two methods states use in judging whether the employee's past criminal conduct is related to the employment in question.[129] The first "fact-specific inquiries" method, employed by New York, Connecticut, and Minnesota, is a multi-factor test in which the employer must look not only to the crime committed but also to the circumstances surrounding the crime.[130] The second "element-of-the crime inquiry" method, employed by Wisconsin, looks to statutory elements of the committed crime in deciding its relatedness to the employment.[131]

New York has the model "fact-specific inquiry" anti-discrimination statute.[132] New York's statute lists the following eight factors for an employer to consider when hiring an ex-convict:

> (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
>
> (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
>
> (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
>
> (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
>
> (e) The age of the person at the time of the occurrence of the criminal offense or offenses.
>
> (f) The seriousness of the offense or offenses.
>
> (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
>
> (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.[133]

In *Ford v. Gildin*, a New York court used these factors in analyzing a negligent hiring suit.[134] The employee committed manslaughter in 1955, and was then hired as a porter of a residential building in 1964.[135] During his employment, the employee befriended a resident and subsequently became the godfather of the resident's child.[136] Sometime thereafter, the employee sexually abused the resident's child.[137] The resident brought a negligent hiring suit against the owner-manager of the building, alleging that because of the employee's manslaughter conviction, he never should have been hired as a por-

ter.[138] The court held that the employee's manslaughter conviction twenty seven years ago was not related to being employed as a porter.[139] The court did not want to preclude everyone with a prior conviction from employment, stating that "[i]mposing liability upon an employer under the circumstances presented herein would have an unacceptably chilling effect on society's efforts to reintegrate ex-offenders into mainstream society, contrary to precedent and the explicitly stated public policy of this State."[140]

In *Soto-Lopez*, a similar New York case, an employee who had a manslaughter conviction was denied employment as a housing caretaker.[141] Using the eight factor test laid out in the statute, the court did not find a direct relationship between the past conviction and the employment in question because the employee "had completed probation and his manslaughter conviction was approximately nine years old[,]…the city's refusal to hire him… would have been unlawful."[142]

In the past, Wisconsin had used a fact-specific test similar to New York's.[143] However, more recently the Wisconsin Supreme Court held that an employer could make a reasonable employment decision under Wisconsin law by focusing on "the elements of the crime for which [the applicant] was convicted," and those elements of the crime constitute as the circumstances substantially related to the employment.[144] Wisconsin courts no longer partake in a fact-detailed inquiry into whether a discriminatory employment decision was based on a criminal record.[145]

In *Gibson*, the Court reasoned that a conviction of armed robbery indicated "a propensity to use force or the threat of force to accomplish one's purposes."[146] The Court did not inquire into the purpose behind the crime that was committed; rather, it focused on the threat of violence that stemmed from the elements of robbery.[147] This means that no matter the purpose behind the crime, an employer could refuse to hire an applicant convicted of any violent crime.[148] For example, there would be no difference in an employer's eye between a woman convicted of killing her abuser and a woman convicted of manslaughter.[149] The elements of the crime are the same for both convictions, yet many assume the abused woman had reason to kill and would most likely not have committed manslaughter outside of an abusive relationship.[150] Yet under Wisconsin law, both crimes are viewed equally when it comes to employment decisions. This type of inquiry will hinder more ex-convicts than necessary because the circumstances of their past crimes do not come into play.

The idea in employing ex-convicts is to integrate them into regular society as a form of rehabilitation.[151] Once free, ex-convicts have a need to support themselves and possibly family. Many times, if not done through legal means such as working, ex-convicts can go back to their criminal ways in order to support their families. Even if a person does not want to take that far of a leap, without a job, ex-convicts have more free time that could be occupied by committing more crime.[152] Furthermore, employment is usually one of the conditions for parole.[153] Society can blame a person for committing a crime, but should not fault a person, more than necessary, to make amends for that crime. If it is the government that makes it a condition for ex-convicts to be employed, then many more, if not all, states should have anti-discrimination laws for ex-convicts, as seen in the state statutes above.

After balancing the public policies and statutes above, employers operating in states similar to New York and Wisconsin have a twofold concern. On the one hand, they cannot discriminate based on a criminal record, yet employers can still be held liable for a negligent hiring suit. On the other hand, employers can expose themselves to a charge of discrimination if they refuse to hire an ex-convict; or, if they hire an ex-convict, all employers can do is hope it will not lead to a negligent hiring suit.[154]

States with ex-convict anti-discrimination statutes and negligent hiring statutes are on the path to rehabilitating criminals, whilst still protecting society. Employment stemming from the anti-discrimination statutes will make sure the ex-convicts do not commit further crimes, and at the same time negligent hiring suits will protect society from a possible harm if the integration through employment does not work. The duty falls on the states to create a system outlining how an employer can go about hiring an ex-convict, yet still protect employers from negligent hiring claims. This can come in the form of a guideline that employers would have to follow when interviewing candidates, one of the criteria being how to handle hiring ex-convicts. If the employer did not follow the proper steps, then he would be liable for negligent hiring. In conclusion, the job falls on the state legislatures to find a middle ground between protecting society with negligent hiring suits and rehabilitating ex-convicts through employment.

IV. Sovereign Immunity

According to the common law doctrine of sovereign immunity, without the United States government's consent, it may not be sued.[155] This is not based on "any formal conception or obsolete theory."[156] Rather, it is based on the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[157]

Historically, the doctrine can trace its roots to the old English courts, where the rule was "well established that 'no lord could be sued by a vassal in his own court.'"[158] Although for many years the doctrine was only discussed in dicta, sovereign immunity is now established judicial precedent.[159]

The doctrine of sovereign immunity is nowhere to be found explicitly set forth in the Constitution.[160] Nevertheless, only Congress has the power to "qualify or waive" the sovereign immunity of the federal government.[161] Still, even when sovereign immunity is qualified or waived, "[t]he limitations and conditions that Congress imposes on waivers of sovereign immunity must be strictly observed."[162] Sovereign immunity has been described as "the moat protecting the United States from suit."[163]

V. The Federal Tort Claims Act of 1946

In 1946, Congress enacted the Federal Tort Claims Act (FTCA).[164] This law significantly affected the government's age-old enjoyment heretofore of sovereign immunity.[165] Essentially, by enacting the FTCA, Congress authorized tort suits to be brought against the government.[166] Until the enactment of the FTCA, despite many attempts by both citizens and politicians alike to convince Congress to do so, no legislation had been enacted that granted a financial remedy for particular torts caused by the government.[167]

According to the FTCA statute, individuals may sue the government for injuries suffered "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[168] The statute states the following, in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The FTCA's enactment granted subject matter jurisdiction to federal courts to hear tort claims against the government.[169] By granting the federal courts jurisdiction, the FTCA "effectively transferred responsibility for deciding disputed tort claims from Congress to the courts."[170]

A. The Intentional Tort Exception to the FTCA

1. Introduction

Although Congress waived the government's sovereign immunity by enacting the FTCA, Congress still retained the authority to limit that waiver.[171] The FTCA does not authorize all tort suits to be brought against the United States government; there are, in fact, many exceptions to the rule.[172] Among those exceptions are the "intentional tort exception" and the "discretionary function exception."[173] Accordingly, if an alleged tort does fall within such exceptions, courts must dismiss the claim for lack of subject matter jurisdiction.[174]

Under the "intentional tort exception," the government retains its sovereign immunity for "any claims *arising out of*" assault and battery claims.[175] Courts have since struggled to conclusively identify exactly which claims "arise out of" assault and battery claims. For intentional torts proximately caused by governmental negligence there have been no firm conclusions in caselaw since the enactment of the FTCA.[176] Commentators have explained this phenomenon by noting how Congress, when enacting the intentional tort exception, deliberately considered only purely intentional and purely negligent torts, but failed to consider intentional torts caused by negligence.[177] The U.S. Supreme Court has twice declined to rule on the matter, leaving the issue unresolved to this day.[178]

B. The Heretofore Gray Area: Intentional Torts Caused by Negligence

1. Supreme Court Decisions: Small Yet Insufficient Steps Forward

a. *United States v. Shearer*—A Failed Attempt

In 1985, the Supreme Court was given its first opportunity to contend with the issue in *United States v. Shearer*.[179] In *Shearer*, an army private recently released from prison killed a fellow army private, Private Shearer.[180] The bereaved family brought a suit against the United States for damages under the FTCA, claiming that the government's negligent supervision of the perpetrator caused Shearer's death.[181] The Court of Appeals for the Third Circuit had reversed the district court's ruling, holding that the *Feres* doctrine, which provides that under the FTCA a soldier may not recover for injuries that "arise out of or are in the course of activity incident to service," is inapplicable to a soldier harming another soldier, and therefore Shearer should be able to recover.[182]

The Supreme Court, however, reversed the Third Circuit's ruling, and held that the *Feres* doctrine is in fact applicable to a case such as this, and therefore a soldier may not recover damages for an injury committed by another soldier.[183] Referring to Senate hearings, the Court con-

cluded that the congressional intent in enacting the FTCA was "on the straightforward assurance that the United States would not be financially responsible for the assaults and batteries of its employees.… No one suggested that liability would attach if the Government negligently failed to supervise such an assailant."[184] However, *Shearer* failed to resolve the issue of how to properly interpret the FTCA's intentional tort exception.[185]

b. *Sheridan v. United States*: Another Missed Opportunity

In 1988, in *Sheridan v. United States*,[186] the Supreme Court once again had its chance, and came closer than ever, to address the issue of how to treat intentional torts caused by negligence. In *Sheridan*, a man enlisted in the United States Navy, Carr, was found unconscious and intoxicated by three naval corpsmen.[187] The corpsmen decided to bring Carr to an emergency room, but, on the way there, Carr regained consciousness, displayed a weapon to the corpsmen, and fled—while still intoxicated throughout.[188] According to the Court, Carr was "obviously intoxicated."[189] The corpsmen failed to alert any appropriate authorities about the situation.[190] Later, Carr ended up firing at passing vehicles on a public street.[191]

Since the government had sovereign immunity under the FTCA for intentional torts, the plaintiffs could not sue the government based on Carr's firing at them.[192] The plaintiffs therefore decided to sue the government for the negligent failure of the corpsmen to alert appropriate authorities of Carr's threat to the public safety.[193]

The *Sheridan* court essentially distinguished employees "acting within their scope of duty" from employees "acting outside their scope of duty," stating the following, in pertinent part:[194]

> Although the words "any claims arising out of" an assault or battery are broad enough to bar all claims based entirely on an assault or battery, in at least some situations the fact that injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur.[195] Even assuming that, when an intentional tort is a *sine qua non* of recovery, the action "arises out of" that tort, nevertheless the § 2680(h) exception does not bar recovery in this case. The intentional tort exception is inapplicable to torts that fall outside the scope of the FTCA's general waiver of the Government's immunity from liability.

The Court then proceeded to adopt a framework in which the government could be liable for assault and battery torts caused by governmental negligence. If a government employee commits an assault or battery outside of his "scope of duty" which was caused by negligence on the part of the government, the government could be held liable for that tort.[196] Nevertheless, the Court expressly refused to discuss whether negligent hiring which then leads to an assault and battery outside of an employee's scope of duty could provide a basis for governmental liability under the FTCA.[197] Concurring in judgment, Justice Kennedy essentially justified the Court's reluctance to decide on the matter based on policy reasons, noting how "many, if not all, intentional torts of government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors."[198]

2. Circuit Court Split: Paving the Way for a Supreme Court Showdown

While the Supreme Court has failed to decide whether negligent hiring is included in the intentional tort exception, circuit courts across the country have divergent opinions on the matter.[199] As the Supreme Court's decisions failed to decide on the issue of intentional torts caused by governmental negligence, a circuit court split followed, with the Ninth Circuit deviating from the other circuit courts in deciding not to be bound by the plurality opinions in both *Shearer* and *Sheridan*.[200] Although the circuit court split weighs heavily in favor of including negligent hiring in the FTCA's intentional tort exception, commentators have not ignored the persuasiveness of the minority view. [201]

Most circuit courts have held that if the government owes a duty to the victim of the intentional tort independent of the government's employment relationship with the tortfeasor, the government can be held liable, but to the exclusion of negligent hiring, which leads to intentional torts committed outside of an employee's scope of duty.[202] These courts have thus read the intentional tort exception to cover claims of negligent hiring of government employees who commit assault and battery torts.[203] Such courts include the Second Circuit,[204] Fourth Circuit,[205] Fifth Circuit,[206] Eighth Circuit,[207] and Tenth Circuit[208] Courts of Appeals.

In *Guccione*, a Second Circuit case, Robert C. Guccione, a businessman, charged that the FBI had negligently failed to prevent Melvin Weinberg, a paid operative, "from defaming Guccione to potential lenders and otherwise tortiously interfering with his attempt to secure financing for completion of a casino and hotel project in Atlantic City, New Jersey."[209] Weinberg had been known for most of his life as "a 'con man' operating in the gray area between legitimate enterprise and crude criminality."[210] The Court affirmed the lower court's decision in holding that the government was immune from suit in this case based on the "intentional tort exception" to the FTCA.[211]

In *Leleux*, a Fifth Circuit case, Catherine E. Leleux, a naval recruit, sued the U.S. government for negligence after she contracted a sexually transmitted disease after being seduced by a military recruiter.[212] The court affirmed the lower court's holding and held that such a claim was barred under the "assault and battery exception" to the FTCA.[213]

Many district courts have also interpreted the intentional tort exception to bar claims against the government for assault and battery caused by negligence.[214] In *Badjkowski v. United States*,[215] the Eastern District of North Carolina court barred such a claim with regard to negligent retention and supervision.[216] Similarly, in *Malone v. United States*,[217] the Southern District of Georgia court barred such a claim with regard to negligent supervision.[218]

The Ninth Circuit, however, has long maintained, even prior to *Sheridan*, that negligent hiring is not included in the FTCA's intentional tort exception.[219] In *Bennett v. United States*, for example, the Ninth Circuit held that claims of negligent supervision are not barred by the FTCA's intentional tort exception.[220] In *Bennett*, Terry Lee Hester, a teacher with a seedy past, applied for a teaching position at a boarding school for the Bureau of Indian Affairs (BIA).[221] The BIA is a governmental agency in the U.S. Department of the Interior.[222] In the employment application, Hester admitted to having been arrested and charged with violating an Oklahoma statute.[223] He also admitted that a bench warrant was outstanding on that charge.[224] Hester was never investigated based on that charge, and he was eventually hired as a teacher in the BIA boarding school.[225] Hester, while off duty and in his own quarters, later kidnapped, assaulted and raped several children who were students at the boarding school.[226] According to the court, "[a]ny investigation of Hester's admissions on his employment application would have shown that Hester had been charged with acts of child molestation similar to those he committed at the [BIA] school."[227]

A class of parents and children sued the United States for damages caused by the government's negligence which resulted in the sexual abuse.[228] In holding the government liable, the court stated that the "sole question is whether the retention of sovereign immunity for claims 'arising out of assault [or] battery'…insulates the government from liability where its own negligence was the proximate cause of the injury.… We hold that it does not."[229] The court admitted that "the Supreme Court ultimately could decide that the government is not liable for batteries by negligently hired employees on duty or off duty even though the negligence in hiring and supervision is clear."[230] Nevertheless, it held that the FTCA's intentional tort exception does not bar intentional torts caused by negligence.[231]

C. *NASA v. Nelson*: One Last Hope for Reconciliation of the Law

Although most courts of appeals have held that negligent hiring is barred by the FTCA's intentional tort exception, the Ninth Circuit's persuasive arguments may still influence a future Supreme Court decision or spur legislative reform.[232] The Supreme Court case of *NASA v. Nelson* can have potentially significant ramifications regarding the government's long-standing presumption of sovereign immunity from negligent hiring under the FTCA. The holding in *NASA* may pave the way for the conflicting opinions of the circuit courts to eventually be reconciled in a future Supreme Court decision by providing valuable precedent pertaining, albeit indirectly, to negligent hiring and the FTCA's intentional tort exception.

D. The Discretionary Function Exception to the FTCA and Negligent Hiring

1. Overview of the Discretionary Function Exception

Notwithstanding the circuit court split, the government may be immune from negligent hiring claims under the "discretionary function exception" to the FTCA.[233] Under this exception, the government is immune from "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation...or based upon the exercise or performance [of] a discretionary function."[234] Congress implemented the discretionary function exception to protect the government from an abundance of private lawsuits.[235] The exception applies to governmental bodies and federal programs created by those bodies.[236] The discretionary function goes so far as to immunize the government even if the government acted negligently.[237] The plaintiff has the burden to prove both that the government waived its sovereign immunity and that none of the FTCA exceptions apply to the claim.[238] If a plaintiff cannot prove as such, his claim must be dismissed.[239]

The key issue when dealing with the discretionary function exception is what falls in the scope of the exception; not all governmental acts are immune from liability.[240] At first, the Supreme Court, in *Dalehite v. United States*, held that the government would be liable for decisions "made at [the] planning rather than operational level."[241] In *Dalehite*, the plaintiff's father and husband were killed in an explosion caused by fertilizer that was manufactured by the government.[242] The government was not liable for negligently labeling the flammable material as fertilizer because the decision was made at the planning level.[243] The Court set out the Planning-Operational Standard in which the planning level consists of policy based decisions, whereas the operational level consists of day-to-day decisions.[244] After *Dahelite*, many

lower federal courts used the Planning-Operational standard.[245] It was not until later that a new standard was implemented.[246]

The Supreme Court, in *Berkovitz by Berkovitz v. United States*, tinkered with the Planning-Operational test and in its place created a two-step test to decide what falls under the discretionary function exception of the FTCA.[247] The first step is to determine whether the challenged conduct involved the exercise of judgment or choice by the federal employee.[248] If answered in the affirmative, the second step is whether the judgment or choice in question was grounded in "considerations of public policy" or susceptible to policy analysis.[249] In *Berkovitz*, the Court held that the decisions of two government agencies were not immune from the FTCA.[250] First, the decision of the National Institutes of Health's Division of Biologic Standards (DBS) to license a drug without receiving its safety data was not immune from liability because the agency failed to comply with a mandatory and statutory directive; a discretionary decision was not involved.[251] Second, the decision by the FDA to release an unsafe lot of the drug in question was not subject to immunity because the act to release unsafe drugs was not grounded in considerations of public policy.[252]

Following the *Berkovitz* decision, the Supreme Court refused to apply the Planning Operational standard, and instead applied the *Berkovitz* test.[253] The Court in *United States v. Gaubert* chose not to implement the Planning-Operational standard because, along with policy-making and planning, the government also uses discretion and judgment in day-to-day management decisions.[254] Here, the government, specifically the Federal Home Loan Bank Board (FHLBB), got involved in the day-to-day management of a private company, Independent American Savings Association (IASA).[255] The FHLBB forced out Gaubert, the largest shareholder, as Chairman of the Board and recommended a new Board of Directors.[256] As a result, the FHLBB became more involved in the day-to-day affairs of the company.[257] Soon after, the new directors announced a substantial negative net worth of the company.[258] Following the announcement, Gaubert sued the government for lost value of his shares on the grounds that FHLBB had been negligent for what it had done.[259] The Court reasoned that the acts of the FHLBB were discretionary because there were no statutes regulating what it did.[260] The FHLBB used its judgment as an agent of the government to take on the day-to-day operations of IASA for the purpose of "policy reasons of primary concern"[261] and therefore was immune from the FTCA.[262] An act by an agent of the government is discretionary when the agent uses judgment or choice in deciding how to proceed on the issue.[263] An action would not be discretionary if the government body's action was mandated by law because no judgment would be involved.[264]

Under the second step of the *Berkovitz* test, an act by the government is grounded in public policy when the government's decision is economic, political and social in nature.[265] Furthermore, the conduct has to involve the formulation of a policy, not the execution of a policy.[266] In *Briggs v. Washington Metro. Area Transit Auth.*, the government was immune from liability for the negligent construction of a wooden enclosure because the decision in how to effectively use its resources was grounded in public policy.[267] On the other hand, the government was liable for failing to maintain effective lighting in the enclosure because having only one working light was not an economic, political or social issue that required policy judgment.[268] In summary, the "discretionary function exception" to the FTCA subjects a governmental actor to immunity when that actor make a judgment decision based on a public policy.

2. Negligent Hiring Falls Under the Discretionary Function Exception to the FTCA

The Federal Government employs about two million civilians.[269] Under the FTCA, the Federal Government is considered to employ an individual if the Government "supervised the day-to-day operations or controlled the detailed physical performance of the [individual]."[270] On the other hand, an independent contractor would not be considered a government employee under the FTCA.[271]

Such a large workforce opens up the potential for many lawsuits against the government. The discretionary function exception is one protection the government has afforded itself from the plethora of possible private lawsuits.[272] One of the private torts that falls under this protection is negligent hiring.[273] The hiring of an employee was precisely the kind of conduct Congress had intended to shield under the discretionary function exception to the FTCA.[274] Congress hoped to prevent judicial second-guessing by prohibiting negligent hiring claims against the government.[275]

The decision to employ an individual falls under the exception to the FTCA because such conduct passes both steps of the *Berkovitz* test without issue. Hiring an employee passes the first step because judgment and choice are necessary when deciding whom to employ.[276] The decision to hire an employee "involves the weighing of individual backgrounds, office diversity, experience and employer intuition."[277] It would seem that unless there were abnormal circumstances, a statute, or a law requiring a specific person to be hired, the decision to employ an individual requires the use of judgment and choice. Hiring an employee then passes the second step because it "involves several public policy considerations including the weighing of the qualifications of candidates, weighing of the backgrounds of applicants, consideration of staffing requirements, evaluation of the experience of candidates, and assessment of budgetary and economic considerations."[278]

The court in *LeRose v. United States* used the precise logic above in its decision to bar a negligent hiring claim against the government under the discretionary function exception.[279] In that case, the plaintiffs asserted a negligent hiring claim against William Coger, a former federal correctional officer.[280] The plaintiffs claimed that "Coger inflicted intentional emotional distress upon them 'by attempting to extort and extorting money and other property from each of them.'"[281] The court reasoned that hiring an employee was the exact conduct Congress had intended to shield under the discretionary function exception because the hiring of a correctional officer involved a decision that weighs different public policy considerations.[282] The policy decision entailed the "weighing of the backgrounds of applicants, consideration of staffing requirements, evaluation of the experience of candidates, and assessment of budgetary and economic considerations," making the decision more than mundane.[283]

Negligent hiring claims against the government appear to be an easy issue for courts to deal with. The government is immune from negligent hiring claims, even if the use of this immunity is abused, because hiring involves many public policy considerations.[284] It seems that as long as the government is doing the hiring, it will almost always be protected under the discretionary function exception.

E. State Tort Claim Statutes

State governments are afforded the same freedom from lawsuit under the doctrine of sovereign immunity as the federal government.[285] Along those lines, most states have adopted tort claims acts similar to the FTCA.[286] Just as the FTCA has exceptions to liability so do these states' tort claims acts.[287]

For example, Georgia's Tort Claims Act states the following, in pertinent part:

> The state shall have no liability for losses resulting from:…
>
> (2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;…
>
> (7) Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights;…[288]

This statute reflects the two exceptions under the FTCA as discussed above. A plaintiff in a Georgia case sought damages for sexual misconduct by a state police officer during a regular traffic stop.[289] The plaintiff sued both the officer and the Georgia State Patrol (GSP) under the Georgia Tort Claims Act.[290] The court stated that under the Georgia Tort Claims Act, the government is treated as a private institution unless the case falls under one of the exceptions.[291] In this case, the officer was acting under the auspices of the state as a state employee.[292] It would seem that GSP had waived its immunity and would be held liable; however, the tortious act fell under the assault and battery exception of the Georgia Tort Claims Act, and therefore the state was not held liable for the officer's misconduct.[293]

Similarly, Alaska's Tort Claims Act includes both an assault and battery exception as well as a discretionary function exception.[294] In *Industrial Indemnity Company v. State*, the insurance company of a worker killed in a car accident during the scope of his employment brought suit against the state of Alaska under Alaska's Tort Claim Act for being negligent in its decision not to build a guardrail on a highway.[295] The state countered with a motion for summary judgment, arguing that the decision to build the guardrail fell under the discretionary function exception to Alaska's Torts Claims Act.[296] The court held that the discretionary function exception to the Alaska Tort Claims Act "applies to government decisions entailing planning or policy formation."[297] The Alaska Supreme Court implemented the old planning-operation test once used by the Supreme Court of the United States, as discussed above.[298] This is the test that Alaskan courts use in deciding cases under the discretionary function exception to its Tort Claims Act.[299] The decision not to build the rail was "made at the discretionary level in order to advance the chain of events to the operational stage… Decisions regarding the allocation of scarce resources are usually discretionary, and thus immune from judicial inquiry."[300]

Although Alaska uses a different test than the Supreme Court of the United States, the outcome of this case is similar to the Supreme Court cases mentioned above. One can imagine that a negligent hiring suit under the discretionary function exception to Alaska's Tort Claims Act would be decided similar to federal cases. As mentioned above, the hiring of an employee is the type of conduct that Congress intended to shield under the discretionary function exception to the FTCA, and the same would most likely hold true under Alaska law. Through state tort claims acts many state governments have opened themselves up to liability for tortious acts. However, like the federal government, these states have allowed themselves protections through exceptions to their tort claims acts. These exceptions protect state governments from negligent hiring suits.

VI. Potential Effects of the Outcome in *NASA v. Nelson* on Government Liability for Negligent Hiring Claims

A. *NASA v. Nelson*: Introduction

Although the Supreme Court in *NASA v. Nelson* did not focus on negligent hiring, it did focus on the related topic of employee background checks.[301] As explained

above, an employer could be held responsible under a negligent hiring claim for actions committed by his employee during the scope of employment.[302] What follows is how much leeway an employer should have in researching possible employees. If an employer could be held liable for hiring an unfit individual, he should be allowed to conduct a background check in order to protect himself. Such is the case in the private sector; a private employer is permitted to conduct a background check before hiring an employee.[303] Background checks are also standard for federal civil servants, but were not for employees of federal contractors.[304] The question facing the Court in *NASA* was whether the government held the same right to conduct background checks on employees of federal contractors.[305]

In *NASA*, the employees of the Jet Propulsion Laboratory (JPL), a National Aeronautics and Space Administration (NASA) facility, filed for an injunction against NASA, alleging that the newly imposed mandated background checks under the National Agency Check with Inquiries (NACI) were unconstitutional.[306] The employees claimed the mandated background checks violated their constitutional right of informational privacy.[307] The Supreme Court ruled that no such right exists, and governmental background checks on employees of a federal contractor are allowed.[308] In doing so, the Court reversed the ruling of the U.S. Circuit Court of Appeals for the Ninth Circuit.[309]

B. *NASA v. Nelson*'s Relation to Background Checks

Even though the Court in *NASA* did not discuss the issue, the outcome of the case relates closely to negligent hiring. After the *NASA* decision, federal contractors were given the same right to conduct background checks as most other employers.[310]

This is a very important development for policy reasons. As stated above, a job that has the possibility of affecting the public at large creates a need for employment background checks.[311] The jobs at issue in *NASA* seem to be the type of employment that could have an effect on the public. The NASA agency, specifically JPL, employed many individuals to develop and build spacecrafts to send missions into space.[312] Such employment requires careful detail in the hiring process because a misstep in any stage of development of a spacecraft could mean a possible danger for those in the vessel, as well as the people on earth in the trajectory of the mission. "JPL also conducts a number of space technology demonstrations in support of national security and develops technologies for uses on Earth in fields from public safety to medicine, capitalizing on NASA's investment in space technology."[313] Such development in technology could also affect many people, and therefore JPL owes a special duty to the public at large.

It would seem that NASA should be required to perform background checks in order to make itself immune from negligent hiring lawsuits. Luckily for NASA, this might not be the case because, as a government agency, NASA already has protection under the two exceptions to the FTCA and would likely already be immune from a negligent hiring claim. Perhaps a government agency such as NASA should not be awarded the protections granted by the exceptions to the FTCA. If this is indeed the case, then the outcome in *NASA*, allowing background checks for federal contractors, should become a requirement, to ensure that only fit individuals are hired for such jobs.

C. NASA'S Relation to the FTCA

The employees in *NASA* were federal contract employees, JPL, under the auspices of NASA, a government agency.[314] NASA is considered a government agency as an executive department under the FTCA.[315] A contractor is considered an employee under the FTCA if the government agency manages the details of the contractor's work or supervises him in his daily duties.[316] The employees in *NASA* would fall under the protections of the FTCA because "the extent of employees' 'access to NASA…facilities' turns not on formal status but on the nature of 'the jobs they perform,'" and "the work that [the] contract employees perform is critical to NASA's mission."[317]

D. Sovereign Immunity Despite Utilizing Broad Background Checks

Due to the Supreme Court's decision in *NASA*, in which it reaffirmed the government's broad authorization to conduct certain comprehensive background checks, the fact that the government still enjoys sovereign immunity seems inequitable. Although the government may be sued under the FTCA, the Court has yet to firmly declare whether the government may be sued for negligent hiring.[318] According to the Court, the Government "has a strong interest in conducting basic background checks into…contract employees.…"[319] Such consideration could have future influence in the domain of negligent hiring.[320] These statements may find their way into negligent hiring cases which seek to hold employers to a standard of conducting at least the most basic background checks.[321]

The Government's broad leeway with regard to performing background checks seems to contradict the broad sovereign immunity it has always enjoyed. "An early jaundiced judicial attitude has resolved into a greater respect for the legislative pledge of relief to those harmed by their government."[322] Commentators have begun to suggest, rightfully so, that sovereign immunity should not shield the government from liability when it is negligent.[323]

In fact, in 2005, six years prior to *NASA*, the United States Merit Systems Protection Board (MSRP) provided the President and Congress with a report which advised the Federal Government to be aware of certain issues

regarding reference checking, including the likelihood of potentially being sued for negligent hiring.[324] The report noted that "[t]he courts have rejected FTCA claims involving negligent hiring, supervision and training of employees, finding that they fall within the 'discretionary function exception.' Nonetheless, a prudent course may be to assume that such immunity is never certain."[325] MSRP advised the Government that "an employer's best protection against a negligent hiring claim is to conduct a reasonable inquiry into an applicant's work history—a reference check—and, of course, an employer must do this effectively and impartially with each applicant under serious consideration for employment."[326]

Thus, with the MSRP report, the Government was not only aware of the possibility of liability for negligent hiring claims, it even went so far as to seek advice regarding how to avoid liability for negligent hiring claims. Therefore, it would seem only fitting that six years later, especially after *NASA*, sovereign immunity would be restrained by negligent hiring. Indeed, suits against public employers with regard to negligence in employment decisions have "become sufficiently commonplace that public employers need to be aware of the potential liability threat."[327] "Although there may be sound reasons of governance to shield federal employees from some tort claims, blanket immunity is difficult to reconcile with the goal of forcing the government to account for the cost of its actions."[328]

E. Negligent Hiring and Sovereign Immunity: What Lies Ahead

Some commentators have suggested that negligent hiring suits have been on the decline due to the growth in the number of companies performing background checks.[329] However, the logic of such a notion is somewhat flawed in that companies that perform background checks should be held to a higher standard than those that do not perform background checks. After all, if an employer would do his homework properly, dangerous employees would never make their way into his workforce.

With the rapid, seemingly unstoppable growth of technology, information about both current and potential employees is readily and easily available with the click of a button.[330] One commentator has suggested that finding suggestive pictures of an employee on social media should send a signal to the employer that he could potentially face future negligent hiring or negligent retention claims, as these pictures may suggest that the employer had, or should have had, knowledge of an employee's particular risks.[331]

Further, negligent hiring cases have made front page news in recent times. For instance, the infamous and disturbing sex abuse scandal of Penn State's former assistant coach Jerry Sandusky was a major news story in late 2011.[332] In one Sandusky civil case, an alleged abuse victim of Sandusky sued both The Second Mile, a private nonprofit organization,[333] and the Pennsylvania State University, a governmental public research institution,[334] claiming his injuries were a result of the negligent retention of Sandusky.[335] In delineating the charges against Sandusky, a grand jury found that "several university officials had reason to suspect the abuse, but didn't report it to authorities."[336]

However, Professor Doriane Coleman of Duke University School of Law predicted at the time that, despite the horrid abuse and pain that the plaintiffs allegedly suffered, it would be very difficult for the plaintiffs to prevail in such a case due to Penn State's sovereign immunity.[337] Professor Coleman distinguished the Penn State case from recent lawsuits against the Catholic Church involving allegations of sexual abuse[338] in that Penn State is a state institution protected by sovereign immunity.[339] Coleman noted the difficulty in overcoming this hurdle.[340] Indeed, Penn State may seek shelter in a Pennsylvania state law that protects universities that receive state funding from specific types of litigation.[341]

However, prominent Philadelphia attorney Gerald McHugh, Jr. indicated that since Penn State is categorized as a "state-sponsored" institution, and not a governmental entity, it would therefore not be afforded the defense of sovereign immunity.[342] McHugh explained that Pennsylvania's university system is structured differently than other states' university systems and therefore it is essentially in a category of its own.[343]

VII. Conclusion

Although there is a lack of uniformity in the various Circuit Courts of Appeals, the time has come for the government to take the responsibility it appropriately deserves to bear. While sovereign immunity is an important right of the government, it is inappropriate to afford the government such broad authority to perform broad background checks on its potential and current employees without bearing some responsibility. Although private employers are afforded the authority to perform broad background checks on potential and current employees, this power is counterbalanced with the looming threat of suit should they act—or fail to act—negligently in their employment decisions. Government employers, who are afforded the same sweeping authority to perform broad background checks, should face the same looming threat of being sued for negligent hiring that private employers face every day. After all, "[t]he real and effectual discipline which is exercised over a workman, is not that of his corporation, but that of his customers. It is the fear of losing their employment which restrains his frauds and corrects his negligence."[344]

Endnotes

1. *Abraham Lincoln Quotes*, A LINCOLN LIBRARY, http://www.alincoln-library.com/abraham-lincoln-quotes.shtml (last visited Nov. 21, 2011).
2. *See infra* Part II.
3. *Id.*
4. Michael Silver, *Negligent Hiring Claims Take Off*, ABA J., May 1987, at 72, 73.
5. *See* Frank C. Morris, *Negligent Hiring*, C429 ALI-ABA 221, 223 (1989).
6. *See infra* Part II.
7. *See infra* Part V.
8. *Id.*
9. Throughout this article, the terms "assault and battery exception" and "intentional tort exception" are used interchangeably.
10. *See infra* Part V.
11. *Id.*
12. *Id.*
13. *Id.*
14. *See infra* Part II.
15. 131 S. Ct. 746 (2011).
16. *See infra* Part V.
17. *See infra* Part II.
18. *See infra* Part III.
19. *See infra* Part V.
20. *See infra* Part VI.
21. Silver, *supra* note 4.
22. *See* Morris, s*upra* note 5.
23. *Id.* at 225.
24. *Id.*
25. *Id.* at 226.
26. *Id.*
27. *Id.*
28. Michael F. Wais, Note, *Negligent Hiring—Holding Employers Liable When Their Employees' Intentional Torts Occur Outside of the Scope of Employment*, 37 WAYNE L. REV. 237, 246 (1990).
29. Morris, *supra* note 5, at 224.
30. *Id.*
31. Mark Minuti, Note, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employers*, 13 DEL. J. CORP. L. 501 (1988).
32. *Id.* at 502.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 503.
38. *Id.*
39. *Id.* at 531.
40. *Protect Your Business Against Workplace Violence and Negligent Hiring Lawsuits*, APPLICANT SCREENING COMPANY OF AMERICA, http://www.apscreenemploymentscreening.com/apscreenemploymentscreening/articles/workplace-violence.htm.
41. Thomas C. Lawson, *Example of Recent Cases Served*, APPLICANT SCREENING COMPANY OF AMERICA, http://www.apscreenemploymentscreening.com/articles/case_samples.pdf (last visited March 14, 2012).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *See Protect Your Business Against Workplace Violence and Negligent Hiring Lawsuits*, *supra* note 40.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 190 (2008).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *See supra* Part II.A.
64. 25 CAUSES OF ACTION 2D 99 (originally published in 2004).
65. *See, e.g.*, McLean v. Kirby Co., a Div. of Scott Fetzer Co., *infra* note 74; Read v. Scott Fetzer Co., 990 S.W.2d 732 (Tex. 1998); Stires v. Carnival Corp., 243 F. Supp. 2d 1313 (M.D. Fla. 2002).
66. *Id.*
67. *Id.*
68. Creed, *supra* note 58 at 189 (*citing* Lex K. Larson, Employment Screening § 10-2.3 (LexisNexis 2006) (defining negligent hiring)).
69. *Id.*
70. *See, e.g.*, Focke v. U.S., 597 F. Supp. 1325, 1346 (D. Kan. 1982); Burnett v. C.B.A. Sec. Serv., Inc., 107 Nev. 787, 789 (1991).
71. *See* 30 C.J.S. EMPLOYER—EMPLOYEE § 203.
72. *Id.*
73. *Id.*
74. 490 N.W.2d 229, 245 (N.D. 1992).
75. *Id.* at 232.
76. *Id.* at 245.
77. Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 908 (Minn. 1983).
78. *Id.* at 911.
79. *Id.* at 912.
80. 236 F.2d 673, 675 (D.C. Cir. 1956).
81. *Id.* at 675, 677.
82. *Id.* at 678.
83. *See* Garcia v. Duffy, 492 So. 2d 435, 441 (Fla. Dist. Ct. App. 1986).
84. Creed, *supra* note 58 at 192.
85. *Id.* (*citing* Riddle v. Aero Mayflower Transit Co., 73 So. 2d 71 (Fla. 1954)).

86. 30 C.J.S. EMPLOYER—EMPLOYEE § 203.

87. *See* Evans v. Morsell, 284 Md. 160, 167, 395 A.2d 480, 484 (1978).

88. *Id.*

89. Silver, *supra* note 4, at 74.

90. *See id.*

91. Burch v. A & G Assocs., Inc., 122 Mich. App. 798, 807 (1983).

92. *Id.*

93. D. Frank Vinik et al., NAT'L ASS'N OF COLL. & UNIV. ATT'YS, *Negligent Hiring and Retention: Background Checks, Reference Checks, and Other Issues* 1 (2006), *available at* http://www.milesstockbridge.com/pdfuploads/129_NegligentHiringandRetention-BackgroundChecksReferenceChecksandOtherIssues.pdf.

94. *Id.*

95. *Id.*

96. *Id.*

97. Trends in Employment Background Screening, 2011 Results, EMPLOYEESCREENIQ, at 1, *available at* http://www.employeescreen.com/ESIQ_Trends_2011.pdf.

98. *Id.*

99. *Id.* at 2.

100. *Id.*

101. *Id.* at 3.

102. *Id.*

103. *Id.* at 4.

104. *Id.*

105. *Id.* at 10.

106. *Id.*

107. *Id.* at 11.

108. *Id.*

109. 2007 Electronic Monitoring & Surveillance Survey, AM. MGMT. ASS'N (Feb. 28, 2008), *available at* http://press.amanet.org/press-releases/177/2007-electronic-monitoring-surveillance-survey/.

110. *See* Cindy M. Haerle, *Minnesota Developments: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303, 1306-07 (1984).

111. *Id.* at 1304.

112. *See id.*

113. *See id.* at 1305.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See supra* Part II. *See, e.g.*, NM R CIV UJI 13-1647; *see also* Creed, *supra* note 58 at 196; Nev. Rev. Stat. Ann. § 41.130 (West).

118. *See, e.g.*, FLA. STAT. ANN. § 768.096 (West); LA. REV. STAT. ANN. § 23:291; TEX. CIV. PRAC. & REM. CODE ANN. § 145.003 (West) (but only applies to in-home service company or residential delivery company).

119. FLA. STAT. ANN. § 768.096 (West).

120. *Id.*

121. http://www.lac.org/toolkits/standards/Fourteen_State_Laws.pdf.

122. *See* ARIZ. REV. STAT. § 13-904(E); COLO. REV. STAT. § 24-5-101; CONN. GEN. STAT. § 46a-80; FLA. STAT. § 112.011; KY. REV. STAT. § 335B.020; LA. REV. STAT. § 37:2950; MINN. STAT. § 364.03; N.M. STAT. §§ 28-2-3, 28-2-4, 28-2-5, & 28-2-6; WASH. REV. CODE §§ 9.96A.020, 9.96A.060, & 9.96A.030.

123. *See* HAW. REV. STAT. § 378-2.5; KAN. STAT. ANN. § 22-4710(f); N.Y. EXEC. LAW § 296(15); N.Y. CORRECT. LAW §§ 750-753; N.Y. CORRECT. LAW § 754; 18 PA. CONS. STAT. § 9125; WIS. STAT. § 111.335.

124. COLO. REV. STAT. § 24-5-101.

125. *See* N.Y. EXEC. LAW § 296(15); N.Y. CORRECT. LAW §§ 750 to 753. *See also* ARIZ. REV. STAT. § 13-904(E) (in Arizona, an employer can only discriminate based on a criminal record if there is a reasonable relationship between the employee's criminal past and the employment); KAN. STAT. ANN. § 22-4710(f) (in order to discriminate, the applicant's criminal record must reasonably bear on his trustworthiness or on the safety of others); HAW. REV. STAT. § 378-2.5(a) (an employer may take into account an applicant's criminal record if the record is rationally related to the employment).

126. N.Y. EXEC. LAW § 296(15); N.Y. CORRECT. LAW §§ 750 to 753.

127. CONN. GEN. STAT. § 46a-80.

128. http://www.lac.org/toolkits/standards/Fourteen_State_Laws.pdf.

129. Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 541 (2007).

130. *Id.*

131. *Id.*

132. *Id.*

133. Creed, *supra* note 58, at 197.

134. 613 N.Y.S.2d 139, 141-42 (N.Y. App. Div. 1994).

135. *Id.* at 139.

136. *Id.*

137. *Id.* at 140.

138. *Id.*

139. *Id.*

140. *Id.* at 142.

141. Soto-Lopez v. New York City Civil Serv. Comm'n, 713 F. Supp. 677, 678 (S.D.N.Y. 1989).

142. *Id.* at 679.

143. *See* Williams, *supra* note 129, at 543.

144. Gibson v. Transp. Comm'n, 106 Wis. 2d 22, 25, 315 N.W.2d 346, 347 (1982).

145. *See* Williams, supra note 129, at 545.

146. *Gibson*, 106 Wis. 2d at 349.

147. *See id.*

148. *See* Williams, *supra* note 129, at 548.

149. *See id.* at 457-48.

150. *See id.*

151. *See* Creed, *supra* note 58, at 194.

152. *Id.*

153. *Id.*

154. *See* Creed, *supra* note 58, at 199.

155. HENRY COHEN & VANESSA K. BURROWS, CONG. RESEARCH SERV., RL 95-717, FEDERAL TORT CLAIMS ACT 1 (2007), available at http://assets.opencrs.com/rpts/95-717_20071211.pdf, *citing to* Fed. Housing Admin. v. Burr, 309 U.S. 242, 244 (1940). *See also* Shuler v. United States, 531 F.3d 930, 932 (D.C. Cir. 2008) (government preserved immunity under FTCA from conduct involving discretionary function); Rebecca L. Andrews, Note, *So the Army Hired an Ax-Murderer: The Assault and Battery Exception to the*

Federal Tort Claims Act Does Not Bar Suits for Negligent Hiring, Retention and Supervision, 78 WASH. L. REV. 161, 167 (2003).

156. Kawananakowa v. Polyblank, 205 U.S. 349, 353 (1907).

157. *Id.*

158. Alden v. Maine, 527 U.S. 706, 741 (1999).

159. Charles Alan Wright *et al.*, Jurisdiction Over Actions Against the United States, 14 FED. PRAC. & PROC. JURIS. § 3654 (3d ed.).

160. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523 (2003).

161. COHEN & BURROWS, *supra* note 155, *citing to* United States v. Chemical Foundation, Inc., 272 U.S. 1, 20 (1926).

162. In re Nofziger, 938 F.2d 1397, 1403 (D.C. Cir. 1991).

163. Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1107 (2009).

164. 28 U.S.C. § 1346.

165. COHEN & BURROWS, *supra* note 155. Although it is, arguably, the broadest waiver of sovereign immunity, the FTCA is not the only one. For example, under the Tucker Act, Federal courts have jurisdiction to hear claims against the United States government founded "upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Additionally, Federal courts have jurisdiction to hear suits against the United States for patent infringement, but a plaintiff's remedies are limited. *See* 28 U.S.C. § 1498. This is, in effect, not an exercise of absolute sovereign immunity, nor an exception to the ordinary doctrine of sovereign immunity; instead, it is a middle ground.

166. 28 U.S.C. § 1346.

167. *See* Figley, *supra* note 163, at 1107-1108.

168. 28 U.S.C. § 1346(b)(1).

169. *Id.* § 1346(b).

170. Figley, *supra* note 163, at 1107.

171. *Id.* at 1121.

172. *See id.* § 2680, which states the following, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to--
>
> **(a)** Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> **(h)** Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

173. *See id.*

174. Fed. R. Civ. P. 12(h)(3). *See also* Lambertson v. U.S., 528 F.2d 441, 443 (2d Cir. 1976) ("Since the United States has not consented to be sued for these torts, federal courts are without jurisdiction to entertain a suit based on them.").

175. 28 U.S.C. § 2680(h) (emphasis added).

176. *See* Andrews, *supra* note 155, at 169 n.62.

177. *See, e.g.*, *Sheridan*, *infra* note 195 at 410-411; David M. Zolensky, Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803, 810 (1981). Zolensky points out how the Senate report at the time of the legislation of the intentional tort exception reveals that Congress enacted the amendment in response to events involving a federal raid which Congress interpreted as consisting of purely intentional conduct. *See id.* nn.41-42, *citing* S. REP. NO. 93-588, 93rd Cong., 2d Sess. 2, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790. *See also* Andrews, *supra* note 155, at 169-170.

178. Jack W. Massey, *A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act*, 82 TEXAS L. REV. 1621, 1622 (2004).

179. 473 U.S. 52 (1985).

180. *Id.*

181. *Id.*

182. *Id.*, *citing to* Feres v. United States, 340 U.S. 135, 146 (1950).

183. *Shearer*, 473 U.S. at 54-57.

184. *Id.* at 55.

185. Massey, *supra* note 179, at 1625.

186. 487 U.S. 392 (1988).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. COHEN & BURROWS, *supra* note 155, at 17.

193. *Id.* at 17-18.

194. *Sheridan*, 487 U.S. at 392-393.

195. *Comparing to* United States v. Muniz, 374 U.S. 150 (1963).

196. *Sheridan*, 487 U.S. at 401. *See also* Andrews, *supra* note 155, at 170-171.

197. *Sheridan*, 487 U.S. at 403 n.8 ("Because Carr's employment status is irrelevant to the outcome, it is not appropriate in this case to consider whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee.").

198. *Id.* at 407.

199. COHEN & BURROWS, *supra* note 155, at 18.

200. Massey, *supra* note 179, at 1625.

201. *See, e.g.*, Massey, *supra* note 179.

202. Andrews, *supra* note 155, at 179.

203. *See generally* Andrews, *supra* note 155, at Part IV.

204. *See, e.g.*, Guccione v. United States, 878 F.2d 32 (2d Cir. 1989) (originally decided in 1988, prior to *Sheridan*, holding that negligent supervision barred by FTCA). Guccione v. United States, 847 F.2d 1031 (2d. Cir. 1988). Appellant then petitioned for rehearing of that decision, contending that *Sheridan* decision obligated court to reinstate his claim. Court held that negligent supervision still barred by FTCA, contending that *Sheridan* does not help his claim, and denied his petition for rehearing.).

205. *See, e.g.*, *Sheridan*; Thigpen v. United States, 800 F.2d 393 (4th Cir. 1986) (barred assertion of a negligent supervision claim against United States by children who were sexually assaulted by naval hospital employee).

206. *See, e.g.*, Leleux v. United States, 178 F.3d 750 (5th Cir. 1999).

207. *See, e.g.*, Billingsley v. United States, 251 F.3d 696 (8th Cir. 2001) ("We find the Fifth Circuit's analysis persuasive."). *Id.* at 698.

208. *See, e.g.*, Franklin v. United States, 992 F.2d 1492 (10th Cir. 1993). ("We note that neither the complaint nor the pretrial order alleges a claim for negligent hiring, training, or supervision of the VA personnel involved, and, in any event, even after *Sheridan* it is doubtful on our alleged facts whether such a claim, which would still ultimately derive from the government's employment relationship to the immediate tortfeasors, would escape the reach of § 2680(h)."). *Id.* at 1499 n.6.

209. *Guccione*, 847 F.2d at 1032.

210. *Id.*

211. *Id.*

212. *Leleux*, 178 F.3d at 753.

213. *Id.* at 756.

214. Andrews, *supra* note 155, at 182-183.

215. 787 F. Supp. 539 (E.D.N.C. 1991).

216. *See* Andrews, *supra* note 155, at 182-183.

217. 61 F. Supp. 2d 1372 (S.D. Ga. 1999).

218. *See* Andrews, *supra* note 155, at 183.

219. Andrews, *supra* note 155, at 184.

220. 803 F.2d 1502 (9th Cir. 1986).

221. *Id.* at 1502-1503.

222. INDIAN AFFAIRS, http://www.bia.gov/index.htm (last visited Nov. 21, 2011).

223. *Bennett*, 803 F.2d at 1503. Hester was arrested and charged with violating an Oklahoma statute ("Openly outraging public decency"), which provides as follows (emphasis added):

> Every person who willfully and wrongfully commits any fact which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which **openly outrages public decency**, including but not limited to urination in a public place, and is injurious to public morals, although no punishment is expressly prescribed therefor by this code, is guilty of a misdemeanor.

21 OKL. STAT. ANN. § 22.

224. *Bennett*, 803 F.2d at 1503.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 1505.

231. *Id.*

232. Massey, *supra* note 179, at 1622.

233. *See* 28 U.S.C. § 2680(a).

234. *Id.*

235. *See* Gibbons v. Fronton, 533 F. Supp. 2d 449, 455 (S.D.N.Y. 2008), *citing to* United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 808 (1984).

236. *See* 107 AMJUR POF 3d 241.

237. *Id. See also* COHEN & BURROWS, *supra* note 155.

238. *See* Welch v. United States, 409 F.3d 646, 650-651 (4th Cir. 2005).

239. *Id.*

240. *See* 28 U.S.C. § 2680 (listing the exceptions to the FTCA).

241. 346 U.S. 15, 42 (1953).

242. *Id.* at 17.

243. *Id.* at 42.

244. *See* Camozzi v. Roland/Miller & Hope Consulting Grp., 866 F.2d 287, 292 (9th Cir. 1989), *citing to* Madison v. United States, 679 F.2d 736, 739 (8th Cir. 1982). The government's decision to close garbage dumps in national parks in order to prevent human-bear contact was made at the planning level, and fell under the exception. Martin v. United States, 546 F.2d 1355 (9th Cir. 1976).

245. *See, e.g.*, Nat'l Union Fire Ins. v. United States, 115 F.3d 1415, 1417 (9th Cir. 1997); ALX El Dorado, Inc. v. Sw. Sav. & Loan Ass'n/FSLIC, 36 F.3d 409, 410 (5th Cir. 1994); C.R.S. by D.B.S. v. United States, 11 F.3d 791, 794 (8th Cir. 1993).

246. *See* Berkovitz by Berkovitz v. United States, 486 U.S. 531 (1988).

247. *See id.* at 536. Under the *Berkovitz* test, the same governmental body can make both discretionary and non-discretionary decisions. Smith v. United States, 546 F.2d 872, 877-78 (10th Cir. 1976). The park service's decision to leave areas undeveloped was discretionary, but not placing warning signs in those dangerous areas was not a discretionary decision. *Id.*

248. *See Berkovitz*, 486 U.S. at 536.

249. *See id.*

250. *Id.*

251. *See id.* at 531-32.

252. *See id.* at 545-48.

253. *See* United States v. Gaubert, 499 U.S. 315 (1991).

254. *Id.* at 325.

255. *Id.* at 321.

256. *Id.* at 319-20.

257. *Id.* at 321.

258. *Id.* at 320.

259. *Id.*

260. *Id.* at 330.

261. *Id.* at 331.

262. *Id.* at 329.

263. *Berkovitz*, 486 U.S. at 536.

264. *Gaubert*, 499 U.S. at 331.

265. Briggs v. Washington Metro. Area Transit Auth., 293 F. Supp. 2d 8, 12 (D.D.C. 2003) (quoting *Gaubert*, 499 U.S. at 325).

266. *Briggs*, 293 F. Supp. 2d at 12.

267. *Id.* at 14.

268. *Id.*

269. *Career Guide to Industries, 2010-11 Edition*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oco/cg/cgs041.htm (last visited Nov. 3, 2011).

270. 166 A.L.R. FED. 187 (*citing to* 28 U.S.C § 2671).

271. 28 U.S.C. § 2671.

272. *Gibbons*, 533 F. Supp. 2d at 455.

273. LeRose v. United States, 285 F. Appx. 93, 95 (4th Cir. 2008).

274. *See id.* at 97.

275. *See* Tonelli v. United States, 60 F.3d 492, 496 (8th Cir. 1995).

276. *See Gibbons*, 533 F. Supp. 2d at 456. A footnote in *Red Elk ex rel. Red Elk v. United States* explains that "[t]he hiring and selection of an employee is a discretionary function of the government-employer.

It is a matter based on its own judgment." 62 F.3d 1102, 1107 (8th Cir. 1995).

277. *Tonelli*, 60 F.3d at 496.

278. *LeRose*, 285 F. App'x at 97.

279. *See generally id.* Plaintiffs brought a negligent hiring claim against the United States government alleging that postal workers stole mail from plaintiffs' post office box. *Tonelli*, 60 F.3d at 493. The Post Office was immune from the claim because hiring falls under discretionary function exception to FTCA. *Id.* at 496.

280. *LeRose*, 285 F. App'x at 95.

281. *Id.*

282. *See id.* at 97.

283. *Id.*

284. *See Tonelli*, 60 F.3d at 496.

285. *State or Local Government Tort Claims Acts*, LAW OFFICES OF A.P. PISHEVAR & ASSOCS., P.C., http://www.afshinpishevarlaw.com/lawyer-attorney-1114921.html (last visited Mar. 14, 2012).

286. Edward Richards, *State Tort Claims Act*, PUBLIC HEALTH LAW MAP-BETA 5.7, http://biotech.law.lsu.edu/map/StateTortClaimsActs.html (last updated April 14, 2009).

287. *Id.*

288. GA. CODE ANN. § 50-21-24.

289. Davis v. Standifer, 275 Ga. App. 769, 770 (2005).

290. *Id.* at 769.

291. *Id.* at 773-74.

292. *Id.*

293. *Id.*

294. *See* ALASKA STAT. ANN. § 09.50.250 (West).

295. 669 P.2d 561, 562 (Alaska 1983).

296. *See id;* ALASKA STAT. ANN. § 09.50.250 (West) ("the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused.…").

297. See *Indus. Indem. Co.*, 669 P.2d at 563.

298. *See id.*

299. *See id.*

300. *Id.* at 564-65.

301. *See generally NASA*.

302. *See supra* Part II.

303. *NASA*, 131 S. Ct. at 749.

304. *Id.* at 752.

305. *Id.* at 751.

306. *Id.* at 751-52.

307. *Id.* at 754.

308. *Id.* at 763.

309. *Id.*

310. *See supra* Part V.A.

311. *Supra* Part I section B.

312. *See* Dr. Charles Elachi, *About JPL: From the Director*, NASA JET PROPULSION LABORATORY: CALIFORNIA INSTITUTE OF TECHNOLOGY, http://www.jpl.nasa.gov/about/index.cfm (last visited Mar. 14, 2012).

313. *NASA*, 131 S. Ct. at 763.

314. *Id.* at 751.

315. 28 U.S.C. § 2671.

316. 166 A.L.R. FED. 187 (originally published in 2000) (citing 28 U.S.C. § 2671).

317. *NASA*, 131 S. Ct. at 759.

318. *See Shearer*; *Sheridan*.

319. *NASA*, 131 S. Ct. at 759.

320. Sheryl Allenson, *Supreme Court Offers Guidance on Background Checks in* NASA v. Nelson, WOLTERS KLUWER LAW & BUSINESS, Jan. 23, 2011, http://www.employmentlawdaily.com/index.php/2011/01/23/supreme-court-offers-guidance-on-background-checks-in-nasa-v-nelson/.

321. *Id.*

322. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 522 (2008).

323. *See, e.g.*, Gabrielle D'Alemberte, *Does Florida's Sovereign Immunity Shield a School from Liability—Even If it is Negligent?*, INJURYBOARD BLOG NETWORK, http://miami.injuryboard.com/property-owners-liability-slip-and-fall/does-floridas-sovereign-immunity-shield-a-school-from-liability-even-if-it-is-negligent-.aspx?googleid=279830 (Mar. 30, 2010, 11:27 AM).

324. *Reference Checking in Federal Hiring: Making the Call*, U.S. MERIT SYSTEMS PROTECTIONS BOARD, *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=224106&version=224325&application=ACROBAT.

325. *Id.* at 18.

326. *Id.*

327. Robert J. Walter, *Public Employers' Potential Liability from Negligence in Employment Decisions*, 52 PUB. ADMIN. REV. 491 (Sep.-Oct. 1992).

328. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1560 (1992).

329. *See, e.g.*, Jason Morris, *Criminal Records and Employment Seminar at Cornell*, IQ BLOG, Dec. 12, 2011, http://www.employeescreen.com/iqblog/criminal-records-and-employment-seminar-at-cornell/.

330. *See, e.g.*, Jennifer Preston, *Social Media History Becomes a Job Hurdle*, N.Y. TIMES, July 20, 2011, http://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html?pagewanted=all.

331. *See* Trina Fairley-Barlow, *The Changing Employment Legal Climate: More Obligations and Liability for Employers*, 2012 WL 191185 (ASPATORE) at 4. In the article, Ms. Fairley-Barlow wrote the following, in pertinent part:

> Another area for potential liability is posed by the following scenario. An employer finds pictures on Facebook of an employee whose job includes periodically driving a company-issued car. These pictures show that the employee often appears to drink while driving his personal vehicle during non-working hours. If the employer takes no action against that employee, and he ultimately gets into an accident and hurts someone while driving the employer's company car, the employer could be subject to negligent hiring or negligent retention claims, among other claims, if it can be proved that the employer knew or should have known of the risks. Turning a blind eye to information that could impact an employee's ability to do his or her job is generally never a good idea. But before making employment decisions related to such information, it is important to conduct a careful legal analysis.

Id.

332. *See, e.g.*, Mark Viera, *Former Coach at Penn State is Charged with Abuse*, N.Y. TIMES, Nov. 5, 2011, http://www.nytimes.com/2011/11/06/sports/ncaafootball/former-coach-at-penn-state-is-charged-with-abuse.html?pagewanted=all.

333. *About Us*, THE SECOND MILE, http://www.thesecondmile.org/aboutUs.php (last visited Feb. 19, 2012).

334. *Penn State's Mission and Public Charter*, PENN STATE, http://www.psu.edu/ur/about/mission.html (last visited Feb. 19, 2012).

335. Jerry Sandusky Civil Complaint, *available at* http://www.jdsupra.com/post/documentViewer.aspx?fid=6706ea15-33a6-4c08-8e54-68f218f0d992.

336. Andrew Longstreth, *Analysis: Penn State Shouldn't Hide Behind Legal Moves—Lawyer*, REUTERS (Nov. 15, 2011, 4:48 PM), http://www.reuters.com/article/2011/11/15/us-usa-crime-coach-lawsuits-idUSTRE7AE1XY20111115.

337. Bill Pennington, *Penn State Officials, Including Paterno, Could Face Civil Lawsuits*, N.Y. TIMES, Nov. 11, 2011, http://www.nytimes.com/2011/11/12/sports/ncaafootball/penn-state-officials-including-paterno-could-face-civil-lawsuits.html?_r=1.

338. *See generally*, Janna Satz Nugent, Note, *A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy*, 30 FLA. ST. U. L. REV. 957 (2003).

339. Bill Pennington, *Penn State Officials, Including Paterno, Could Face Civil Lawsuits*, N.Y. TIMES, Nov. 11, 2011, http://www.nytimes.com/2011/11/12/sports/ncaafootball/penn-state-officials-including-paterno-could-face-civil-lawsuits.html?_r=1.

340. *Id.*

341. Longstreth, *supra* note 337.

342. Pennington, *supra* note 340.

343. *Id.*

344. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 80 (Digireads.com Publishing), *available at* http://books.google.com/books?id=rBiqT86BGQEC&printsec=frontcover#v=onepage&q&f=false.

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A Model for Success: Why New York Should Change the Classification of Child Models Under New York Labor Laws

By Craig Tepper

"It's never too late to have a happy childhood."[1]

Introduction

There are few institutions as rich in history over the past century as New York's fashion modeling industry.[2] Beginning in 1903, when Ehrlich Brothers, a specialty store in New York City, conducted what is widely considered to be America's first fashion show, the fashion and modeling industries became a national phenomenon.[3] A few decades later, the seeds for what is now known as the semiannual New York Fashion Week were planted when, in 1943, a fashion publicist named Eleanor Lambert organized a convention to allow American fashion designers to exhibit their latest creations, via the use of runway shows.[4]

While the modeling industry may not be novel, in today's age of social media, the industry is in the public eye more than ever. Through a growing social and online media presence, the industry is reaching out and connecting to a wide consumer base;[5] due to this increased media exposure, more young boys and girls may be aware of the opportunity to try the trade than ever before. In fact, Funnyface Today Inc., a modeling agency in New York, saw a 50% increase in child model applications between 2006 and 2009.[6] However, despite the longstanding presence of the modeling scene in New York, and the increasing number of youths seeking to break into the industry, the New York legislature continues to statutorily discriminate against child models by excluding them from the definition of "child performers" under state labor laws.[7] This exclusion prevents child models from enjoying the physical, educational, and financial protection that New York labor laws allot to those children the legislature considers to be performers.[8]

With the average model's career over by age 20,[9] this quickly extinguishing flame of fame often means that their stories are never told, that any adversity, mistreatment or unfair labor practices that they were subjected to will forever be stifled and hidden under the surface of, say, the latest Louis Vuitton advertisement in last month's edition of *Vogue*. Yet when a young model defeats the law of averages and continues to model as an adult, his or her trials and tribulations have a much greater chance of being heard.[10] One young model to accomplish this rare career feat was Brooke Shields.

Shields, well known as a model, actress, and former wife of tennis great Andre Agassi, continued her modeling career in 1975[11] when, at the tender age of 10, she was hired to pose nude for a photo shoot in New York for a publication known as *Sugar and Spice*.[12] The photographs, financed by Playboy Press and taken by famed photographer Garry Gross,[13] portrayed Shields "in thick makeup and bejeweled, sitting and standing in a steaming, opulently decorated bathtub,"[14] all while shockingly visibly nude. In order for Shields, who was legally considered an infant, to be permitted to participate in such a risqué, controversial and adult-like display of modeling,[15] her mother, Teri Shields, granted written consent to the defendant in two respects.[16] These included both the right to use, reuse and publish the photographs taken, and the waiver of any right to approve of the means in which the photographs were used.[17]

Five years later, after discovering that these photographs, with Gross's permission, had been published in a French magazine, Shields brought suit to permanently enjoin Gross from any future use or distribution of the photographs.[18] Shields claimed that based on common law and Section 3-105, the section of McKinney's General Obligations Law pertaining to the protection of infants,[19] a court was required to review the contracts of infants before any terms could be consented to.[20] However, the Court of Appeals of New York did not agree with Shields, instead finding that neither the statute in question nor the common law applied to child models; instead only the contracts of infant child *performers* could be reviewed prior to their inception.[21] Therefore, due to Shields' status as an infant model, the consent given by her mother was valid and could not be negated by the aforementioned Section 3-105 of McKinney's, and consequently Shields was barred from bringing legal action.[22] Despite her deep desire to put these photographs behind her and move on with what was to become an illustrious career, due to the state of New York's labor laws, Shields could not enjoin Gross from using, reusing or publishing the photographs.[23]

On the surface, the Shields case seems to be relatively procedural: since she was a child model and not a child performer under the statute, she did not have a claim to revoke the previously given consent to take and use the photographs.[24] However, the precedent that this case sets—and its overall impact going forward—speaks volumes. Based on her mother's consent,[25] Shields was, and remains to this day, barred from preventing the photographs from being used in any and all (non-pornographic) publications and displays.[26] Since she was not,

as a child model, provided adequate protection under the law, Shields will forever be subject to reminders of her participation in an activity as a child that she would not have participated in as an adult;[27] the photographs will forever remain an albatross on her otherwise illustrious career.[28]

While Brooke Shields was able to have a successful and profitable career despite the inadequate protection available under the labor laws of New York, she is vastly in the minority.[29] Every year, an increasing number of teen and pre-teen models[30] flock to the fashion mecca of New York City[31] in an attempt to break into the industry. As Amy Odell phrases it in her piece *The Struggles of Girl Models*, "like the clothing business, the modeling business has trends, and the look of very young girls has been a fairly long-lasting one with troubling repercussions."[32] Unlike Shields, most of them do not go on to glamorous careers, but rather work for a short period of time, earning a minimal amount of money.[33] In New York, these short bursts occur primarily during New York's Fashion Week, which takes place every February and September.[34] During all modeling jobs, not just Fashion Week, these young models are exposed to the sexualized, adult-like modeling industry at a very tender and impressionable age.[35] This industry is entirely focused upon physical appearance which, according to Sara Ziff, president of the Model Alliance,[36] "has no restrictions regarding who can model clothing for adults."[37] These models are regularly without supervision by parents or guardians, leaving them exposed to sexual harassment by the fashion designers or photographers who employ them.[38] Additionally, the constant pressure on these young models to be as thin as possible exposes them to a variety of mechanisms for losing weight, including anorexia, bulimia, and even hard drugs like cocaine.[39] Aside from this persistent pressure, these models are simply worked to the bone.[40] While on paper there are restrictions on work hours for models under the age of 18,[41] they are rarely adhered to, and "plenty of young girls will find themselves working long, late hours without proper meal and rest breaks or chaperones, with little or no money to show for it."[42]

As highlighted by Brooke Shields' ordeal, the hardships faced by young models in New York are largely attributable to the subpar and rarely enforced labor laws that protect child models.[43] Whereas other states, such as California, include models in their definitions of "minors in the entertainment industry," ensuring that they receive the same protection as other child performers,[44] New York continues to keep models and performers statutorily separate.[45]

I. The Current State of New York Labor Law Legislation

A. New York's Legislation for Child Performers

Before exploring the lack of adequate child model labor protection, it is important to first examine New York's existing legislation designed to protect child performers.

1. Defining "Child Performer"

The Child Performer Education and Trust Act of 2003 (CPETA)[46] amended New York labor law by adding Article 4-A, entitled "Employment and Education of Child Performers."[47] The purpose of this amendment was to provide detailed regulations of both the employment and education of these young performers, as well as to outline civil penalties for failure to enforce the regulations.[48] According to former State Senator Guy Velella, who was Chair of the New York Senate Labor Committee at the time the bill for this Act was passed, "this bill will ensure that child performers receive an adequate education and have better protections for their earnings."[49] Article 4-A begins with a lengthy list defining what constitutes an artistic or creative service, which includes "actor, actress, dancer, musician, comedian, singer, stunt-person, voice-over artist…songwriter, musical producer or arranger, writer, director," among others.[50] However, the lengthy list does not include models.[51] Article 4-A proceeds to define a "child performer" as any child younger than 18 years of age who either "resides in the state of New York and who agrees to render artistic or creative services" or who "agrees to render artistic or creative services in the state of New York."[52] This provision has proven particularly frustrating for Model Alliance founder Sara Ziff in her quest to prove that child models deserve to be on equal footing with child performers.[53] While testifying in front of the New York State Department of Labor in September 2012, Ziff stated that "children who are paid to model render the same 'artistic or creative services' as dancers, actors, and other children who are protected by the regulations…modeling in a runway show…before an audience is no different than any other choreographed stage performance in which a dancer or actor might engage."[54]

2. Necessity of Work Permits

Article 4-A also includes a number of requirements which outline the process for a child to obtain a work permit, a necessity in order to receive and maintain employment as a performer.[55] One such requirement makes it absolutely mandatory for a child performer to have an employment permit,[56] and another allows that as long as such a permit has been issued, "a child performer may be employed, used or exhibited in any of the…performances set forth in…section 35.01of the arts and cultural affairs law."[57] In consideration for the safety, physical and educational well-being of child performers, Article 4-A includes a provision under which the Department of Labor can refuse to grant a permit in the event that granting it would "allow a child to participate in an exhibition, rehearsal, or performance which is harmful to the welfare, development or proper education of such child."[58] This provision also grants the Department of Labor the authority to revoke, for good cause, any permit

that may have already been granted.[59] In similar fashion, the Department drafted a section of 4-A that incentivizes employers to ensure that their child performers have the required permits.[60] Under this provision, "failure to produce any permit or certificate either to work or to employ is prima facie evidence of the illegal employment of any child performer whose permit or certificate is not produced.[61]

3. Education Requirements

In addition to employment requirements, the New York legislature also drafted a number of education requirements as part of Article 4-A.[62] These requirements mandate that "a child performer shall fulfill educational requirements as set forth in part one of article sixty-five of the education law."[63] Should the child performer be unable to meet these educational requirements, the employer must "provide a teacher, who is either certified or has credentials recognized by the state of New York, to such child performer to fulfill educational requirements pursuant to the education law."[64] In addition, the legislature included a provision ensuring that the parents of child performers stay involved in their educational well-being, mandating that the parents "shall work with the certified teacher provided to the child performer and the child's school of enrollment to fulfill such educational requirements."[65]

4. Enforcement Mechanisms

While it may be difficult to pass legislation of any type, it is even more difficult to ensure that such legislation is enforced without the proper mechanisms in place. The New York legislature created such a mechanism in the form of civil penalties.[66] Should the Department of Labor find "that a child performer's employer has violated any provision of this article [4-A]," the Department is entitled to assess civil penalties of up to $3,000 per violation.[67] The money collected for these violations is subsequently placed in the Child Performer Trust Account (Trust Fund or Trust Account).[68]

5. Trust Accounts

In addition to creating Article 4-A of the New York Labor Law, the CPETA also provided for the creation of a Trust Fund.[69] This provision created a formal procedure, via the establishment of a trust account, for the handling of finances for child performers.[70] This legislation was added primarily to avoid a situation in which employers take advantage of the youth of the performers by withholding money owed to them.[71] Under this statute, within 30 days of employment, an employer "is required to transfer fifteen percent of gross earnings to the custodian of the child performer's trust account."[72] If no account has yet been established by the parents or guardians of the performer, then the employer must transfer the money "to the state comptroller for placement into the child performer's holding fund."[73] Aside from employers, the custodians or guardians of child performers must also comply with the "Trust Account" provisions; the law states that "within fifteen days of the commencement of employment the child performer's guardian or custodian must establish a child performer trust account," and must subsequently notify the employer of its existence.[74] Additionally, as a "safety net" offering further financial protection, "once the child performer's trust account balance reaches two hundred fifty thousand dollars or more a trust company shall be appointed as custodian of the account."[75] Once the child performer reaches the age of 18, the legislation permits him or her to terminate the Trust Account.[76]

The passing of the CPETA was undoubtedly a major recognition by the New York State Senate of the significant problems plaguing children employed in the entertainment industry. As then-State Senate Majority Leader Joseph L. Bruno stated, "this legislation will protect New York's children working in the entertainment industry while providing them an education outside of their trade and ensuring their financially stable future."[77] Senator Bruno also stated that "safeguarding our children has always been a priority of the Senate, as it should be for each person who raises a child."[78] However, it seems as though by failing to include child models under this Act, the New York Senate chose to only safeguard some children, while leaving those in the modeling industry significantly less protected.[79]

B. New York's Legislation for the Employment of Minors

While the CPETA amended the New York Labor Law to include Article 4-A, which pertains specifically to child performers, the New York legislature enacted Article 4 in 1962, which pertains generally to the employment of minors.[80]

1. Limitations Based on Age-Bracket

Throughout Article 4, the legislature drafted a number of different provisions for minors of different age brackets.[81] For minors under 14 years of age, the legislature expressly prohibits the employment of minors "in connection with any trade, business, or service," unless they fall under one of the exceptions listed in the section.[82] One such exception allows the employment of a minor under 14 years of age as a **child performer**, as long as such employment complies with the Department of Labor's child performer laws (as discussed above in Part I-A).[83] Another exception allows the employment of a minor less than 14 years of age as a child model, as long as such employment complies with the Education Department's child model laws (as discussed below in Part I-C).[84] Whereas Article 4 imposes heavy restrictions on the employment of minors under 14, it is more lenient for minors between the ages of 14 and 17.[85] Article 4 only prohibits the employment of these minors when "attendance upon instruction is required by the education law."[86]

Aside from discussing whether or not minors are allowed to work, Article 4 also outlines restrictions for those minors who are permitted to obtain employment.[87] Minors 14 and 15 years of age may not work "more than three hours on any school day," or "more than eight hours on any day when school is not in session," nor may they work more than "eighteen hours a week," "more than six days a week," or "after seven o'clock in the evening or before seven o'clock in the morning."[88] However, these work restrictions do not apply to child models whose employment is governed by the Education Department's child model laws (as discussed below in Part I-C).[89]

2. Enforcement Mechanisms

Additionally, Article 4 contains mechanisms to enforce the previously discussed provisions, in the form of both civil and criminal penalties.[90] If it is discovered that any provision of Article 4 has been violated by an employer of minors, the Department of Labor may "assess the employer a civil penalty of not more than one thousand dollars for the first such violation, not more than two thousand dollars for the second violation, and not more than three thousand dollars for a third or subsequent violation."[91] Additionally, should a minor suffer serious injury or death in relation to an employer's violation of Article 4, "such penalty shall be treble the maximum penalty allowable under the law for such a violation."[92] Aside from civil penalties, employers who knowingly violate Article 4 may face criminal penalties, as they will be "guilty of a misdemeanor, and upon conviction therefore shall be punished by a fine of not more than five hundred dollars or imprisonment for not more than sixty days."[93]

As demonstrated by the highlighted provisions of Article 4 of the New York Labor Law, there are many enforcement mechanisms in place to ensure a safe environment for minors in the work force, such as age restrictions,[94] a concern for school days,[95] limitations on working hours,[96] and both civil penalties[97] (monetary) and criminal penalties[98] (either monetary, imprisonment, or both) for lack of enforcement. However, the New York legislature, in every one of the provisions mentioned above, goes out of its way to state that Article 4 (and all of its safety mechanisms) does not apply to child models; instead one must look to the Education Department, rather than the Department of Labor (whose entire purpose is to regulate the work force) for any law regarding the employment of child models.[99]

C. New York's Existing Legislation for Child Models

Under New York Law, unlike child performers, child models are not regulated by the Department of Labor; instead they are regulated by the Department of Education via N.Y. Arts & Cultural Affairs Law § 35.05[100] and the New York Compilation of Codes, Rules and Regulations § 190.2.[101] Not only do these entangled regulations offer minimal protection for the models, they make it difficult for people, mainly the employers who are supposed to abide by these laws, to even locate them to know what the laws mandate.[102] Even Sara Ziff, founder of The Model Alliance and a former child model, had a difficult time locating the rules contained in the child model regulations.[103] In an interview with Buzzfeed.com, Ziff voiced her frustrations with the oversight for child models.[104] Ziff stated that "one day she decided to call the Department of Labor in New York to find out if the laws for child models are on the books anywhere. Within a few hours and 'after getting passed around to like 50 different people' because 'no one knew anything'…she found them."[105]

1. The Education Department's Work Permit Requirement

In wording quite similar to that required by the New York Department of Labor for child performers, the Education Department mandates that "it shall be unlawful to employ, use, exhibit, or cause to be exhibited a minor as a model unless…a child model work permit has been issued."[106] However, unlike the labor laws for child performers, under this law, employment of a minor as a model must be "in accordance with the rules and regulations promulgated by the **commissioner of education**,"[107] rather than by the Department of Labor. In order to obtain a permit allowing a minor to be employed as a model, the minor or his or her parent or guardian must apply to the commissioner of education, and must include with the application a certificate from a physician showing that the minor is physically fit to be employed or exhibited as a model.[108] Once the child model work permit has been issued by the commissioner of education, the permit must be "signed by each person employing, using or exhibiting the minor **prior to the commencement** of the minor's employment," and such employment cannot commence unless the permit has been signed by the employer.[109] In order to enforce these permits, the "commissioner of education may promulgate rules and regulations…designed to protect the health and welfare of child models,"[110] and the permits "may be revoked by the certificating officer at any time for good cause."[111] Additionally, the Department of Education claims that "violation of this section shall be a misdemeanor."[112] However, despite this declaration, the Department of Education provides no guidelines or mechanisms to enforce these requirements.[113] While this law does not state what types of child models it applies to, it explicitly states that "this section shall not apply to the employment…of a minor as a model…in a television broadcast or program for whom a permit has been issued pursuant to section one hundred fifty-one of the labor law."[114]

2. Supervision and Age Restrictions

In addition to work permits, the Education Department has also drafted legislation requiring the supervi-

sion of child models.[115] This law provides that a minor employed as a model "shall be accompanied by the parent or guardian of such minor or by an adult designated in writing by such parent or guardian," and that no minor shall be employed as a model "during the hours he is required to be in attendance in the school which he is enrolled."[116]

The Education Department additionally provides a list of restrictions on working hours for minors employed as models based on their ages.[117] Children under the age of seven may not be employed as a model "for more than 2 hours in any 1 day and not more than 10 hours in any 1 week, nor shall such minor be so employed… between the hours of 6 p.m. to 9 a.m."[118] For those child models between the ages of seven and 13, they may not be employed during the school year for "more than three hours in any one day in which school is in session or four hours in any one day in which school is not in session, but not more than 18 hours in any such week,"[119] and "no such minor shall be employed…between the hours of 6 p.m. and 9 a.m."[120] For those child models aged 14 or 15, they may not be employed during the school year "more than three hours in any one day in which school is in session or eight hours in any one day in which such school is not in session, but not more than 23 hours in any such week."[121] When school is not in session,[122] they may not be employed "more than 40 hours in any such week,"[123] and they shall never be required to work between the hours of 6 p.m. and 9 a.m.[124]

For the slightly older models, those between 16 and 17 years of age, they may not be employed as a model during the school year for "more than four hours in any one day in which such school is in session or eight hours in any one day in which such school is not in session, but not more than 28 hours in any such week."[125] When school is not in session, no such minor may be employed as a model "more than 48 hours in any such week."[126] Additionally for this age bracket, "no male minor 16 or 17 years of age shall be employed…as a model between 12 o'clock midnight and 6 a.m. and no such female minor shall be so employed between 10 p.m. and 7 a.m."[127] In addition, these age restrictions reiterate the necessity of a child model work permit, stating that these permits "shall accompany each minor…employed as a model,"[128] and notes that these permits "may be revoked by the certifying officer at any time for any violation of law or of these regulations or for any other good cause."[129] However as discussed immediately below, the Education Department has failed to provide a system to enforce these regulations.

3. The Lack of Enforcement Mechanisms

While the permit process and the age and hour restrictions seem thorough on their own, there are practically no mechanisms for enforcement of these provisions by the Education Department, aside from the vague threat of a misdemeanor.[130] This lack of enforcement leads to an overabundance of direct violations of these permit, age and hourly provisions; according to Ziff, "in my 15 years working as a model, I have never seen a child model carrying a work permit, nor has a single agent I've asked."[131] A significant part of the problem is that, as Ziff pointed out earlier, the child model regulations are extremely difficult to locate, and they are more than likely unbeknownst to potential employers.[132] As Buzzfeed.com writer Amy Odell notes:

> Inspectors certainly don't roam castings and fashion shows to make sure 16 and 17-year-old models are getting their permits signed. That's good for the foreign models who are just here for a couple of weeks to see if they can "make it," aren't legal to work here, and probably wouldn't be able to get permits—but not so great for the industry as a whole.[133]

As a result, countless numbers of these young models, who are simply happy to find employment, even on short term bases, are more than likely at the complete control of their employers or photographers, no matter what that might entail. If by some small chance the model was aware of these regulations, and attempted to enforce them, the employer could easily choose another off of the endless assembly line of young models, one who would be more willing to adhere to his or her conditions. It is this fear of unemployment that keeps these models from protesting,[134] and these inadequate and rarely enforced regulations allow this cycle to continue.

II. The Detriment Faced by Child Models

In the Brooke Shields case examined above, Shields was fortunate enough to be in a position to both overcome the adversity she faced as a 10-year-old child,[135] and to continue on to have a celebrated career despite her unsuccessful suit to enjoin the photographer from continuing to use the photos.[136] However, Shields is in the minority. The vast majority of young runway and print models are too afraid—of losing out on an opportunity to break into the industry, or of being forced to go back empty handed and unemployed to the country or city from whence they came—to bring attention to issues that they might face.[137] In her interview with Odell, Sara Ziff stated, "I don't think anyone would disagree that really young models generally are not willing or able to stand up for themselves or ask to be paid for their work or set limits on the kind of pictures they want to take and whether they want to appear nude or not."[138]

This article will now examine the physical health and safety detriment, the educational detriment, and the financial detriment that regularly plague child models. Additionally, it will examine how these dangers and detriments can be diminished to the point of near extinguishment by a classification of child models as "child performers" under the New York Labor law.

A. The Physical Health and Safety Detriment

While certainly not the only detriment that child models regularly face, arguably the most prominent issue in the public eye is the constant compromise of models' physical health and safety.[139] Due to the lack of legislatively mandated regulation over the child modeling industry, young models are frequently unsupervised.[140] Consequently, these young models are often left to essentially supervise themselves, which leaves them vulnerable to pressures from their employers or the industry in general.[141]

1. Cruel Labor Practices

Of the various harms that frequently envelop these young models, one of the most significant is the frequency of cruel labor practices.[142] According to Sara Ziff, 16-hour work days were common for her and her peers when she was a 15-year-old model in the late 1990s.[143] Additionally, according to Amy Odell, the majority of the teenage models hired to work during New York Fashion Week do not have the required permits, and are often required to work until extremely late hours,[144] which blatantly ignores the regulations for child models[145] as set out by the New York Education Department.[146] For many young models, the extended working hours simply mean they will get back to their homes at a later time than they anticipated. Yet there are just as many of these young models who come from around the world seeking to break into the modeling industry, and these unfair labor practices have significantly more of a detrimental effect upon them.[147]

This behavior by the modeling industry and the impact it has on foreign child models is at issue in the 2012 documentary *Girl Model*.[148] The film provides an unflattering and realistic depiction of the exploitive nature of the modeling industry, focusing in particular on very young models who travel to faraway countries "without chaperones or things as basic as work hour limits and monetary compensation."[149] The film focuses on a 13-year-old aspiring model from Russia named Nadya. Naïve Nadya, who speaks no language but her native tongue, is plucked from her home by an intimidating Russian agent and whisked to Tokyo, because "the Japanese like their models young and fresh."[150] Young Nadya has an ominous first experience in Tokyo, where she is dragged to the city morgue by the Russian agent, a common practice of his that he claims to do to "show them just how badly things can end for a recruit who doesn't do what she is told."[151] The film proceeds to follow Nadya to casting calls, where she is forced to stand in a skimpy bathing suit amongst hundreds of similarly clad girls.[152] These girls are required to stand in front of a panel of casting directors and judges who take their measurements with a tape measure and poke and prod them like farm animals.[153] At one of these casting calls, one man, while helping Nadya with her wardrobe and make-up, suggests that she tell the casting directors she is 15 rather than 13, as it would be easier for her to find work that way.[154] Throughout the film, 13-year-old Nadya is seen trying to navigate Tokyo by herself, in order to make it from one casting call to another, while failing to receive monetary compensation from any of them.[155] In fact, she is forced to live in a tiny apartment with other aspiring models while paying rent directly out of her pocket, a pocket that, as a poor 13-year-old from Russia, is not particularly deep.[156] In one heart-wrenching scene, Nadya, after leaving a casting call, is seen hysterically crying on the phone to her mother and begging to come home, while her mother insists that she stay.[157] While the film is left open-ended regarding Nadya's career prospects, the statistics are not encouraging. According to Ashley Arbaugh, a modeling scout featured in the film, "fewer than a handful of recruits will ever actually make it as a model," and subsequently the rest of these aspiring models are sent home to their parents in severe debt, without any of the money that they may have been promised at the outset.[158]

Girl Model, while not taking place in New York, should, as Amy Odell writes, "resonate with a lot of models currently walking the runways at New York Fashion Week."[159]

2. Sexual Exploitation and Harassment

In addition to cruel labor practices, another constant threat to the physical harm and safety of child models is the ever-present threat of sexual exploitation and harassment.[160] Whereas New York's labor laws require a highly strict degree of supervision for actors, singers, and other types of child performers, due to the lack of regulation of the child modeling industry, models often find themselves unsupervised at a very young age (like Nadya in the *Girl Model* documentary), leaving them quite vulnerable to advances by agents, employers, or photographers.[161] These young models are often put into compromising positions where they feel that, out of fear of losing out on a job or modeling opportunity, they are not in a position to reject such advances, no matter how unwanted they may be.[162]

In a recent survey conducted by the Model Alliance, an astounding 87% of the underage models surveyed claim that they have been asked to pose completely nude during a modeling job or a casting session without any form of advanced notice; of those models put in such an uncomfortable position, 27% agreed to the request, because they felt that they had to out of fear of losing their job.[163] Additionally, not only did 30% of the models surveyed say that they have been touched inappropriately during modeling jobs, but an eye-opening 28% confessed that they had actually been pressured to engage in sexual acts with someone at work.[164] While New York's labor laws provide child performers with an outlet, in the form of unions,[165] to bring forth their problems, no such outlet

exists for child models.[166] In the same survey, only 29% of models who had been sexually harassed during a modeling job felt that they could tell their agencies, and two-thirds of those who had the courage to speak up found that their agents failed to take any action.[167] The fact that over 70% of the models surveyed felt that they could not come forward to their agencies[168]—the very entities that matched them up with their sexually exploitive employers in the first place—speaks volumes about the need for reform, so that these young models can have powerful outlets to bring forth their problems and concerns without fearing for their jobs.

3. The Presence of Cocaine

Aside from overbearing labor practices and the constant presence of sexual harassment and exploitation by employers, child models regularly face a plethora of other threats and exposures that put their health at risk. Young models are regularly pressured to lose weight by both their agencies and employers.[169] In fact, according to the survey conducted by the Model Alliance, over 64% of models have been asked to lose weight by their agencies or employers, and over 31% have subsequently developed an eating disorder.[170] Due to the constant threat to lose weight, young models are regularly exposed to the dangerous drug cocaine.[171] Since suppressed appetites are a major side effect of the drug,[172] it is quite commonly found throughout the modeling industry.[173] In the Model Alliance's survey, over 50% of the models surveyed claim to have been exposed to cocaine in the workplace, and almost 25% surveyed say that such exposure has led to a development of a drug or alcohol problem.[174] As child models are not protected by New York's labor laws, they do not have outlets such as labor unions to turn to with their issues or who will negotiate solutions for them.[175] Consequently, almost 30% of these young models lack health insurance,[176] causing the metaphorical knife of the health risks of the modeling industry to dig even deeper.

B. The Educational Detriment

In addition to the various physical health and safety issues that could be significantly mitigated by the reclassification of child models, these models are also at risk of being educationally disadvantaged by their exclusion from the labor laws. As examined above, the CPETA requires that the employers of child performers provide a teacher to the performers if the minors are required to miss a substantial amount of normal schooling, and the employers must also coordinate with the child's school to ensure that all educational requirements are being met.[177] However, there exists no such requirement for child models.[178]

With days routinely extending to 16 hours[179] there is not much time left in the day to devote to studying, and without supervision, these young models are likely to advance into adulthood without much of an education.[180] With the nature of the modeling industry being competitive, and with careers being short-lived,[181] countless former child models are left facing the majority of their lives with their intended career already in the rearview mirror, and due to their minimal education, there are not a surplus of doors open to them. According to Ziff, "without provisions for tutors, many young models drop out of school to pursue short-lived careers that leave them in debt to their agencies."[182] By classifying child models as child performers under New York labor laws, it would go a long way towards ensuring not only that these children who find themselves in the modeling industry keep up with their schoolwork, but that they also are put on a path to succeed in the inevitable life after modeling.

C. The Potential for Financial Exploitation by Parents

A major issue regarding the financial well being of child models involves the potential for financial exploitation by their own parents. While Brooke Shields certainly may have been a photogenic child, she most certainly did not approach photographer Garry Gross or *Sugar and Spice* magazine[183] as a 10-year-old seeking to be photographed nude in a bathtub for national publication. Rather the "method behind the madness" was Shields' ambitious mother, Teri.[184] Teri Shields began exploiting her daughter's photogenic qualities when Brooke was only 11 months old, putting her in magazine advertisements and television commercials.[185] The exploitation continued as Brooke aged, as in addition to the infamous bathtub photo shoot, Teri also helped Brooke land roles in the movies *Pretty Baby*, where as an 11-year-old she played a prostitute, and *Blue Lagoon*, where at 14 years old she was required to repeatedly be nude[186] (although a body double was used for the nude scenes). When interrogated about her decisions regarding her daughter, Teri responded that "fortunately, Brooke was at an age where she couldn't talk back," and that "people who accused her of exploiting her child were jealous."[187]

While some parents, like Teri Shields, might exploit their children as models out of greed, many force their children into modeling out of economic necessity.[188] In the wake of the economic downturn of recent years, many parents are signing their children up with modeling agencies to add some extra income to the household.[189] In an interview with the *Wall Street Journal*, the mother of a 4-year-old girl said of signing her up with a modeling agency, "in a weak economy, with five kids' college tuitions to plan for…I want to make the most out of whatever resources we have."[190] Consequently, with more parents out of work during harsh economic times, they have more free time to take their children to modeling auditions.[191] Therefore the competition is stiffer, and parents are more likely to put their children in less-than-ideal situations in order to bring home a paycheck.[192] Essentially these parents are admitting to exploiting their

children as models for monetary purposes, but using the rationale of economic necessity to shield themselves from liability or criticism.

Whether the child models later become famous (like Shields) or are attempting to break into the industry, there is an actual danger of financial exploitation by these models' parents.[193] If child models were to simply be included under the classification of child performers under New York Labor Laws, then the CPETA would apply to them, thus requiring these ambitious parents to establish a trust.[194] By requiring a large percentage of the model's earnings to be placed in the trust, becoming accessible only to the model upon his or her 18th birthday,[195] it would essentially add a speed bump between a child model's earnings and the parents' bank accounts, and it might make some of these parents think twice before thrusting their children onto runways in provocative outfits,[196] or into the pages of magazines wearing little to no clothing,[197] and would further protect the young models of New York.

D. Potential for Financial Exploitation by Employers and Agents

Under current New York law, child models are left extremely vulnerable to the possibility of financial exploitation by not only their own parents, but their agencies and employers as well.[198] Due to the youth of these models and their lack of life experience, they rarely have the upper hand in any sort of financial negotiation.[199] Says Amy Odell, "many of these young girls haven't had more than a babysitting job, much less the experience to know how to negotiate complicated contractual agreements with their agencies and clients as freelance workers."[200]

For every legitimate agency on the market there are a number of "scam" operations, which take advantage of naïve young models.[201] One such operation commonplace in the modeling industry is the "photo mill" modeling scam, where models are recruited by an "agent" to have expensive photographs taken on site.[202] These operations "travel the country setting up shop in a mall, a convention hall, a hotel, a studio, or any other venue that they can fit many people into."[203] The models are required to both pay for the photographs up front and to leave their contact information so the "agency" can find placements for them, which of course they rarely do.[204] Aside from high start-up costs,[205] it is common for agencies to take advantage of young models, who either through naïveté, a language barrier, or some combination thereof, are oblivious of the specifics of the financial arrangements into which they are contracting.[206] When disputes arise, these models are left unaware of how to handle them.[207]

In 2012, Anderson Cooper conducted an expose of the child modeling industry in order to illustrate the expenses that parents are willing to incur to break their children into the business, as well as the frequency of agency scams that these parents are likely to encounter along the way.[208] In one segment of the show, a hidden camera was set up in a fake modeling agency office in midtown Manhattan, where parents, with young children by their side, met with an "agent" (played by an actor).[209] The parents were asked questions pertaining to what their children would be comfortable doing for a modeling opportunity.[210] One parent, when told that before any casting decisions for her daughter would be made, she would need to pay $750 to $1,000 up-front to have photographs taken, agreed without hesitation.[211] Subsequently one of Cooper's correspondents entered the room to explain the ruse, pointing out that the parent did not make any effort to research who this modeling agent was before either going to speak with him or offering to hand him large sums of money up-front.[212] While Cooper's hidden-camera experiment may have saved a few young models from financial exploitation by agencies, countless others will not be as fortunate, and will naïvely end up paying large sums of money to agencies for little to no return on their investment.

Aside from modeling agencies, child models in New York are often left extremely vulnerable to financial exploitation by their employers.[213] A main reason for such exploitation is that due to a lack of a governing agency, union, or regulator over the models, there is no industry standard that mandates how models receive payment for their work.[214] Consequently, at many modeling jobs and opportunities, especially during New York's high-paced Fashion Week, "payment for runway modeling often comes in the form of clothing or accessories (known as "working for trade") instead of actual money."[215] While on paper, receiving free clothing may seem like a nice perk that comes with the territory of being a model, when it comes in substitution of an actual paycheck, it is blatantly problematic.

It would be easier to rationalize the "working for trade" phenomenon if it was being orchestrated by up-and-coming companies, who might not have the disposable income necessary to pay their models at events such as New York's Fashion Week. However, this practice is widely conducted by large-name brands in the fashion industry.[216] One top designer, Marc Jacobs, whom Ziff describes as "at the helm of a big global brand,"[217] is notorious for this behavior.[218] This issue was brought to the forefront when a 17-year-old model named Hailey Hasbrook publicly complained about her treatment when employed by Marc Jacobs.[219] Hasbrook complained that she was required to often work until 4:30 in the morning while working with the Jacobs team.[220] Marc Jacobs himself, in response to Hasbrook's accusations, responded seemingly indifferently, stating that "models are paid in trade. If they don't want to work with us, they don't have to."[221] According to Odell, there was a rumor in the industry that the Marc Jacobs label was to begin paying its models in 2013.[222] However, one young model told Odell

that the Jacobs label has regularly made such promises, but has never made any significant attempts to follow through.[223] A consequence of this behavior by Marc Jacobs, and other large brands in its class, is a trickle-down effect.[224] If these large, global brands are not paying their models, it takes away the incentives for smaller brands to do so, leading to this behavior becoming the standard within the industry.[225]

Unfortunately, in New York models are legally treated as independent contractors, making it impossible to unionize.[226] Without unionization, there is neither a governing body nor a negotiating committee to ensure that models are even paid in actual currency.[227] Therefore, even if child models were included in the definition of child performers under New York labor laws, there would still be a significant amount of loopholes for employers themselves to continue to financially exploit child models.[228] Additionally, the modeling agencies cannot guarantee employment to the child models they represent, so even if child models were reclassified as performers, there is no guarantee of income that would be protected by the CPETA.[229] Amending New York's labor laws would contribute significantly to reducing the potential for physical and educational harm, and would substantially hinder financial exploitation by the parents of models. However, making such an amendment would not cut off all avenues of exploitation, and it is conceded that other avenues of progress must be considered in order to pave the way for complete protection of New York's child models.

III. Looking to California as a Standard

Aside from the state (and city) of New York, the most prominent state in the entertainment industry is California.[230] With Los Angeles, its most populous city,[231] producing a significant quantity of the world's television shows, films, stage productions and music, there is a substantial need for proper labor laws to ensure that the industry continues to run smoothly. In response to this need, California's Department of Industrial Relations (Division of Labor Standards Enforcement) decided, unlike its East Coast counterpart, to classify models under its definition of the "Entertainment Industry."[232] Under these regulations, the division lists minors engaged in "modeling" alongside those engaged in motion pictures, theatrical or musical performances, photography, circuses, rodeos, and "any other performances where minors perform to entertain the public."[233]

One of the most prominent features of these California laws is the institution of what they refer to as a "studio teacher."[234] A studio teacher, by definition, is a "certified teacher who holds one California teaching credit… that is valid and current, and who has been certified by the Labor Commissioner."[235] Additionally, employers of minors in the entertainment industry are required to provide a studio teacher on "each call for minors age fifteen (15) days…to age eighteen (18).[236] However, in addition to being an actual teacher of educational material, studio teachers also serve as a general guardian for the minors in their care.[237] The studio teachers "shall also have responsibility for caring and attending to the health, safety, and morals of minors under sixteen (16) years of age for whom they have been provided by the employer, while such minors are engaged in or employed in any activity pertaining to the entertainment industry."[238]

Additionally, whereas the models of New York are regularly exposed to dangerous working conditions, cruel labor practices, drugs and sexual exploitation,[239] in California the studio teachers can act as a buffer to shield young models from such perils.[240] In the course of his or her employment, "the studio teacher shall take cognizance of such factors as working conditions, physical surroundings, signs of the minor's mental and physical fatigue, and the demands placed upon the minor in relation to the minor's age, agility, strength, and stamina."[241] Subsequently the studio teacher, if he or she feels that working conditions are not or are no longer ideal for the minor, "may refuse to allow the engagement of a minor on a set or location and may remove the minor therefrom, if in the judgment of the studio teacher, conditions are such as to present a danger to the health, safety, or morals of the minor."[242] California's labor laws also require an employer in the entertainment industry to obtain permits from the Division of Labor Standards Enforcement.[243] Whereas the permit process for models outlined by the New York Department of Education[244] has no true enforcement mechanism, any violation of California's child labor regulations by an employer can result in the revocation or suspension of a permit.[245] Additionally, such employers are prohibited from taking action against any studio teacher who may have reported such a violation of the labor laws.[246]

IV. Why Child Models Should Be Classified as Child Performers Under New York Labor Laws

In order to ensure their utmost protection from the perils of the modeling industry, New York's Department of Labor should classify child models under the definition of child performers. Procedurally, this reclassification would have the effect of providing child models with the protections granted by the CPETA.[247] Under this Act, child models, like their child performer counterparts, would be required to obtain permits from the Department of Labor, which employers would be mandated to check at the risk of facing civil penalties.[248] Additionally, this Act would ensure that child models would receive proper education, by requiring employers to provide teachers to the model minors if their modeling schedule prohibits them from receiving adequate and regular schooling.[249] This teacher would also serve as a supervisor or chaperone of sorts, and would provide a buffer

between the child models and an array of dangerous or exploitative behavior. This Act would also establish a trust account for child models, which would help reduce the incentive for, and results of financial exploitation by parents and employers.[250]

Without proper protection, or mechanisms to enforce those protections, young models will continue to be vulnerable to a number of dangerous physical workplace situations. Sexual exploitation or harassment by employers who threaten that the models could lose their jobs unless they comply, or the ever-present access and pressure to use cocaine to aid in weight loss, will continue to run rampant throughout the industry.[251] Additionally, for models who proceed to illustrious careers, like Brooke Shields, or those who find less success, like Nadya from the film *Girl Model*, the possibility of financial exploitation by parents, employers, and agents will continue to be a persistent threat.[252] Aside from physical and financial detriment, these young models will continue to be educationally disadvantaged, as there will be nothing to require them to keep up with their schooling.[253] This lack of educational supervision could prove extremely disadvantageous for aspiring models, who more often than not are subject to short-lived careers.[254]

Despite the dangers and detriments child models regularly face, a significant reason why they continue to be statutorily segregated from child performers is due in large part to the inherently fleeting nature of the modeling industry.[255] Unlike actors or other performers who work on either a movie or television studio or at a theater or concert venue for long periods of time, modeling jobs are quite irregular.[256] Due to this irregularity, New York seems, in the opinion of this author, reluctant to subject the employers of models to the same high standards that it has for the employers of other performers. A major reason for this could be that if all of these employers are suddenly subject to significantly more liability, it could subsequently lead to an influx of litigation against such employers. This added liability could cause a massive hindrance to not only the modeling industry, by introducing many obstacles to the process of hiring a model for such a short period of time,[257] but to the court system as well, due to the flood of litigation that is sure to occur against modeling agencies and employers by jilted models who wish to take advantage of their new-found legal basis.[258]

If the New York legislature is not willing to change the statute completely, thus holding employers to a much higher burden, it should at least institute a more strict policy of checking the permits for child models required under N.Y. Arts & Cultural Affairs Law 35.05,[259] similar to that required by the New York Labor Law. Under this law, "no permit shall allow a child to participate in an exhibition, rehearsal, or performance which is harmful to the welfare, development, or proper education of such child. A permit may be revoked by the department for good cause."[260] By strengthening the permit-checking and monitoring process, especially at major events such as New York Fashion Week, it could at least lighten the load of child models who are unfit to be working or who are forced to work under dangerous conditions.[261]

Additionally, New York should take a page from California's book and institute a version of the "studio teacher" required by the latter's labor laws.[262] In California, these studio teachers are required not only to serve as tutors for the child performers, but they also must keep up with the physical and mental well-being of the performers, as well as monitor the environment in which they work.[263] If a problem arises, these studio teachers have the ability to report it directly to California's Division of Labor Standards Enforcement.[264] If the New York Department of Labor were to require some form of a guardian akin to these studio teachers to accompany underage models, even if feasible at only larger events, such as runway shows or photo shoots for major publications, it would be a step in the right direction. These guardians would go a long way towards protecting young models from the perils of the modeling industry, while holding employers to a higher standard of accountability.[265] The presence of such protective figures could also contribute significantly towards the educational well-being of underage models, by ensuring that they obtain the appropriate schooling, and subsequently remain on a positive educational track.[266]

Conclusion

The New York Department of Labor should amend its labor laws, specifically the CPETA, to include child models under the definition of child performers. This amendment would substantially protect child models from the physical, financial and educational perils they regularly face, while granting them the same privileges and protections allotted to their colleagues in other areas of the performance industries.[267] If the New York legislature is not willing to fully amend the statute, it should look to California's standard of requiring a studio teacher to chaperone child models, which would go a long way towards protecting the overall well-being of young models.[268] As the opening quote of this article states, "It is never too late to have a happy childhood,"[269] and by reclassifying child models as child performers, New York could do its part to ensure that such a mantra for child models remains true.

Postscript

On June 12, 2013, a bill recognizing runway and print models under 18 years of age as child performers was passed by both houses of the New York State legislature. As of this writing, it is awaiting Governor Cuomo's signature to become law.

Endnotes

1. Tom Robbins, Still Life With Woodpecker 28 (Bantam, 1990).
2. Amanda Fortini, *How the Runway Took Off*, Slate (Feb. 8, 2006), http://www.slate.com/articles/arts/fashion/2006/02/how_the_runway_took_off.html.
3. *Id.*
4. *Id.*
5. Hitha Prabhakar, *How the Fashion Industry is Embracing Social Media*, Mashable, (Feb. 13, 2010), *available at* http://mashable.com/2010/02/13/fashion-industry-social-media/. Last year's Victoria's Secret Fashion Show, which took place in New York, offered viewers seven different ways to view the show online alone. *Online*, Mashable (Dec. 4, 2012), *available at* http://mashable.com/category/victoria-s-secret/.
6. Anjali Athavaley, *How Tough Times Yield Model Children*, Wall St. J., (Nov. 3, 2009), *available at* http://online.wsj.com/article/SB10001424052748703740004574513651147082402.html.
7. Discussed *infra* Part I.
8. Discussed *infra* Part I.
9. *Fashion Model Size Requirements*, Modelingadvice.com (2010), http://www.modelingadvice.com/fashionModelSize.html. Additionally, many fashion agencies will refuse to take on new models over the age of 18. *Age, Sex and Race in Modeling*, newmodels.com (2006), http://www.newmodels.com/race.html.
10. *See* Shields v. Gross, 58 N.Y.2d 338, 448 N.E.2d 108 (1983).
11. Shields' mother, Teri Shields, had Brooke modeling since she was only 11 months old, when she was featured in a magazine advertisement for Ivory Soap. William Yardley, *Teri Shields, Mother and Manager of Brooke Shields, Dies at 79*, The New York Times, (Nov. 5, 2012), *available at* http://www.nytimes.com/2012/11/06/arts/teri-shields-brookes-mother-and-manager-dies-at-79.html.
12. *Shields*, 58 N.Y.2d at 342.
13. Gross, the photographer, was the defendant of the suit brought by Shields.
14. Dennis Hevisi, *Gary Gross is Dead at 73; Photographer of Clothes and Their Absence*, The New York Times (Dec. 7, 2010), *available at* http://www.nytimes.com/2010/12/07/arts/design/07gross.html?_r=0.
15. To see the controversial images in question, see *Children and the Fashion Industry: When Are They TOO Young?* Beautifully Invisible (Jan. 11, 2011), http://www.beautifully-invisible.com/2011/01/children-and-the-fashion-industry-when-are-they-too-young.html.
16. *Shields*, 58 N.Y.2d at 342.
17. *Id.* The Consents provided in pertinent part, "I hereby give the photographer, his legal representatives, and assigns, those for whom the photographer is acting, and those acting with his permission, or his employees, the right and permission to copyright and/or use, reuse and/or publish, and republish photographic pictures or portraits of me, or in which I may be distorted in character, or form, in conjunction with my own or a fictitious name, on reproductions thereof in color, or black and white made through any media by the photographer at his studio or elsewhere, for any purpose whatsoever; including the use of any printed matter in conjunction therewith…I hereby waive any right to inspect or approve the finished photograph or advertising copy or printed matter that may be used in conjunction therewith or to the eventual use that it might be applied."
18. *Shields*, 58 N.Y.2d at 346.
19. This law has since been repealed; however there exists no negative treatment as to this case itself.
20. *Shields*, 58 N.Y.2d at 346. Throughout the case, the term "infant" is used interchangeably with the term "minor," with both terms understood to mean a person under the age of 18.
21. *Id.* at 346. Emphasis added.
22. *Id.* at 346.
23. This was also a terrible financial arrangement for Shields, who was only paid $450 for the photo shoot (a mere fraction of what it must have cost in legal fees to see this case all the way to New York's highest court) with no clause in the contract for additional compensation for any future use of the photograph. *Shields*, 58 N.Y.2d at 346.
24. *Id.* at 346.
25. The court in the *Shields* case does not discuss whether Shields' mother could have later revoked the consent that she gave on behalf of Brooke, rather the discussion is focused around Brooke's inability to revoke the consent given by her mother.
26. *Id.* at 346. The trial court enjoined the use of the photographs in pornographic publications, and neither party challenged this injunction upon appeal.
27. Shields said of the incident, "[at the time of the photo shoot] I wasn't uncomfortable doing it. When I was 16, I wouldn't have done it. That guy [original photographer Garry Gross] waited until I was 16 before he decided to publish it—he tried to take this famous person and sell her out." Kate Bussman, *Brooke's Side*, Easy Living Mag. (Apr. 20, 2011), *available at* http://www.katebussmann.com/brookeshields.pdf.
28. These photographs continue to cause controversy; one of them was to be featured at the London Modern Art Museum in an exhibit entitled "Pop Life: Art in a Material World" but was removed after the Obscene Publications Unit of the Scotland Yard thought it possibly could be considered child pornography. Sammy Rose Saltzman, *"Spiritual America" Brooke Shields Naked Photo Removed From Tate: Child Porno or Art?* CBS News (Oct. 1, 2009), http://www.cbsnews.com/8301-504083_162-5355524-504083.html.
29. Bussman, *supra* note 27.
30. *Wall Street Journal* writer Anjali Athavaley notes that "more parents are signing their children up with modeling agencies and talent classes, in search of fame and, even better, a little extra money in a weak economy," and that a booker from Funnyface, a popular New York talent agency, "estimates the agency's children's division has seen a 50% increase in applicants in the past three years." Athavaley, *supra* note 6.
31. To highlight the prevalence of fashion in New York, there is a three-avenue, 10-block radius near Times Square, the most bustling part of the city, known as the "fashion district" or "garment district." *Garment District*, NYC.com, http://www.nyc.com/visitor_guide/garment_district.75853/editorial_review.aspx.
32. Amy Odell, *The Struggles of Girl Models*, Buzzfeed (Sept. 10, 2012), http://www.buzzfeed.com/amyodell/the-struggles-of-girl-models. Odell also attributes the young starting age of a number of famous supermodels as a major reason for the continuing prevalence of this trend. She specifically mentions Karlie Kloss, Gisele Bundchen and Kate Moss, who began their careers at 13, 13, and 14, respectively.
33. U.S. Bureau of Labor Statistics, March 29, 2012, http://www.bls.gov/ooh/sales/models.htm.
34. *New York Fashion Week Fall-Winter 2013 Schedule*, Newyorkfashionweeklive.com (Jan. 9, 2013), *available at http*://neworkfashionweeklive.com/NYFW-Live/ny-fashion-week-fal-winter-2013-schedule.
35. Tamara Abraham, *Parents' Outrage as Toddlers & Tiaras Star Aged SIX Gyrates on Runway at New York Fashion Week*, Dailymail.co.uk (Sept. 16, 2011), *available at* http://www.dailymail.co.uk/news/article-2037913/Toddlers--Tiaras-Eden-Wood-gyrates-runway-New-York-Fashion-Week.html.
36. The Model Alliance is a nonprofit organization consisting of a network of models and leaders in the modeling and fashion industries. The group, which is based in New York, dedicates

itself to improving the standards of the modeling industry, fighting for the rights of models, and providing an outlet to models to air their grievances. Sara Ziff, a 29-year-old former child model and current adult model, is the founder and president of the alliance. *Mission,* ModelAlliance.org (2012), *available at* http://modelalliance.org./mission.

37. Sara Ziff, *Regardless of Age, It's About Rights,* N.Y. Times, (Nov. 12, 2012), *available at* http://www.nytimes.com/roomfordebate/2012/09/13/sweet-16-and-a-runway-model/regardless-of-a-fashion-models-age-its-about-rights.

38. Hayley Phelan, *The Model Alliance Industry Survey Finds Nearly 30% of Models Have Been Sexually Harassed and 50% Exposed to Cocaine,* Fashionista (March 16th, 2012), *available at* http://fashionista.com/2012/03/model-alliances-industry-survey-finds-nearly-30-of-models-have-been-inappropriately-touched-on-jobs-and-50-exposed-to-cocaine/.

39. *Id.*

40. Odell, *supra* note 32.

41. Discussed *infra* Part I-A.

42. Odell, *supra* note 32.

43. *Id.*

44. Discussed *infra* Part III.

45. Discussed *infra* Part I. On February 19, 2013, the New York Department of Labor submitted a Notice of Adoption of 12 NYCRR Part 186. This law, which took effect on April 1, extended the protection allotted to child performers to children "appearing as a model in a television broadcast or program." N.Y. Comp. Codes R. & Regs. tit. 12 § 186-2.1(a)(1) (2013). However, in including children who model on television, the N.Y. legislature explicitly excluded children employed as runway models or those appearing in print media. This separate distinction of models "in a television broadcast or program" is not new; in N.Y. Arts & Cultural Affairs Law 35.05 (discussed *infra* Part II-C), in which the N.Y. Department of Education provides the regulations for child models, the department explicitly defers regulation of a minor employed as a model in a television broadcast or program to § 151 of the N.Y. Labor Law, which applies to child performers. Therefore, there seems to be historical evidence that the N.Y. legislature has always considered child models appearing on television to be performers, and thus separate from other child models.

46. This law took effect on March 28, 2004.

47. See S. 4696-B, Reg. Sess. (N.Y. 2003), the New York Senate Sessions Law on describing the passing and content of this Act, *available at* http://www.labor.ny.gov/workerprotection/laborstandards/PDFs/Child%20Performer%20law%204696-B.pdf.

48. *Id.*

49. *Senate Passes Child Performer Education and Trust Act of 2003,* Serphin R. Maltese Archives (June 24, 2003), http://www.serfmaltesearchives.com/index.php?option=com_content&view=article&catid=16%3A2003&id=143%3A2403--senate-passes-child-performer-education-and-trust-act-of-2003&Itemid=6.

50. N.Y. Lab. Law § 150 (McKinney 2004).

51. *Id.*

52. *Id.*

53. Odell, *supra* note 32.

54. Kelli, *Testimony to the New York State Department Of Labor,* ModelAlliance.org (2012), http://modelalliance.org/2012/testimony-to-the-new-york-state-department-of-labor/testimony-to-the-new-york-state-department-of-labor.

55. N.Y. Lab. Law § 151 (McKinney 2004).

56. *See id.* § 151(1)(b) (McKinney 2004).

57. *See id.* § 151(1)(a) (McKinney 2004). Section 35.01 of the Arts and Cultural Affairs Law pertains to the employment of children as performers. Its purpose is to prohibit a child from being used as a performer **unless** those in custody or control of the child have adhered to the permit process outlined in § 151 of the New York Labor Law. Emphasis added.

58. N.Y. Lab. Law § 151(1)(e) (McKinney 2004).

59. *Id.*

60. *See id.* § 151(5) (McKinney 2004).

61. *Id.*

62. N.Y. Lab. Law § 152 (McKinney 2004).

63. *See id.* § 152(1) (McKinney 2004). Article 65 of the NY education law lists a variety of compulsory educational provisions, such as mandatory attendance requirements and records, duties of supervisors and teachers, child abuse prevention, and administration of reading tests, etc. N.Y. Educ. Law Ch. 16, T.IV, Art. 65 (McKinney).

64. N.Y. Lab. Law § 152(2)(a) (McKinney 2004).

65. *See id.* § 152(2)(b) (McKinney 2004).

66. *See id.* § 153 (McKinney 2004).

67. *Id.*

68. *Id.* The full text of this provision states that:

> If the commission finds that a child performer's employer has violated any provision of this article or of a rule or regulation promulgated thereunder, the commissioner may by an order which shall describe particularly the nature of the violation, assess such employer a civil penalty of not more than one thousand dollars for the first violation, not more than two thousand dollars for a second violation and not more than three thousand dollars for a third or subsequent violation. Such penalty shall be paid to the commissioner and placed into the child performer's protection fund…and administered by the department. Monies accredited to the child performer's protection fund shall be utilized for the purpose of this article. The department shall promulgate rules and regulations for the administration of the child performer's protection fund.

These civil penalties, while not particularly large sums of money, help to hold employers accountable. A provision like this does not exist for the enforcement of laws regarding child models, which is yet another reason to include models under the provisions of Article 4-A of the New York Labor Law.

69. Serphin Maltese Archives, *supra* note 49.

70. *Id.* To create this provision for trust accounts, the Child Performer Education and Trust Act of 2003 amended Article 7 of the New York Estates, Powers and Trusts Law to include part 7, entitled "§ 7-7.1: Child Performer Trust Account."

71. While these provisions aid in maintaining financial transparency between employers and the child performers, they do not provide a solution for the so-called "Coogan Problem" as it is known in California, in which the parent of a child performer, by maintaining access to the child's funds until the child turns 18, squanders the child's money. *Coogan Law,* Sag-Aftra (2013), http://www.sagaftra.org/content/coogan-law.

72. N.Y. Est. Powers & Trusts Law § 7-7.1(2)(a) (McKinney 2004).

73. *Id.*

74. N.Y. Est. Powers & Trusts Law § 7-7.1(2)(b) (McKinney 2004).

75. *Id.* This last phrase of section 2(b) requiring the assignment of a trust company once the child's account surpasses $250,000 is especially important to avoid messy situations such as child actor Macaulay Culkin's, who sued his parents via a guardian ad litem

for squandering a large part of his $17 million earned through his prosperous child-acting career. The suit also involved a dispute between Culkin's parents over who would control what remained of his fortune. Brentrup v. Culkin, 166 Misc. 2d 870, 635 N.Y.S. 2d 1016 (Sup. Ct. 1995) *rev'd sub nom.* P.B. v. C.C., A.D. 2d 294, 647 N.Y.S. 2d 732 (1996).

76. N.Y. Est. Powers & Trusts Law § 7-7.1(2)(c) (McKinney 2004).
77. Serphin R. Maltese Archives, *supra* note 49.
78. *Id.*
79. The only protection in the Act afforded to child models was the creation of the Child Performer Advisory Board to Prevent Eating Disorders under § 154 of Article 4-A of the N.Y. Labor Law, which applies to both child performers and models.
80. NY Lab. Ch. 31, Art. 4.
81. N.Y. Lab. Law §§ 130-132 (McKinney 2004).
82. N.Y. Lab. Law § 130(1) (McKinney 2004).
83. N.Y. Lab. Law § 130(2)(a) (McKinney 2004). Emphasis added. So the legislature is, for laws pertaining to the employment of minors as child performers, deferring to the aforementioned Article 4-A of the New York Labor Law and Section 35.01 of the Arts and Cultural Affairs Law, both discussed earlier in this article.
84. N.Y. Lab. Law § 130(2)(b) (McKinney 2004). Throughout Article 4, all provisions relating to child models defer to N.Y. Arts & Cult. Aff. Law § 35.05. Essentially the New York legislature did not intend for the New York Department of Labor to be regulating child models, and instead deferred that regulation to the Department of Arts and Cultural Affairs.
85. N.Y. Lab. Law §§ 131, 132 (McKinney 2004).
86. *Id.*
87. *See id.* § 142 (McKinney 2004).
88. *Id.* Emphasis added.
89. N.Y. Lab. Law § 142(4) (McKinney 2004). N.Y. Lab. Law § 143 (McKinney 2004), which applies to hours of work for minors 16 or 17 years of age, contains the same language as § 142(4) regarding the non-applicability of this section to child models.
90. N.Y. Lab. Law § 141 (McKinney 2004); *see also* N.Y. Lab. Law § 145 (McKinney).
91. N.Y. Lab. Law § 141 (McKinney 2004).
92. *Id.* This provision for treble damages for serious bodily injury or death would certainly come into play in the modeling industry, where eating disorders run rampant. However, due to the phrases in the aforementioned provisions disclaiming their applicability to child models, these civil penalties of § 141 do not apply to the child modeling industry.
93. N.Y. Lab. Law § 145 (McKinney). Once again, since the provisions of Article 4 do not apply to child models, the criminal penalties outlined here are inapplicable to the modeling industry.
94. *See id.* §§ 130-132 (McKinney 2004).
95. *See id.* §§ 131, 132,142 (McKinney 2004).
96. *See id.* § 142 (McKinney 2004).
97. *See id.* § 141 (McKinney 2004).
98. *See id.* § 145 (McKinney 2005).
99. *See* N.Y. Lab. Law §§ 130, 131, 132, 142 (McKinney 2004).
100. As mentioned earlier, all provisions of the aforementioned Article 4 that discuss child models defer to N.Y. Arts & Cult. Aff. Law § 35.05.
101. N.Y. Comp. Codes R. & Regs. tit. 8 § 190.2 (1962).
102. Odell, *supra* note 32.
103. *Id.*
104. *Id.*
105. *Id.*
106. N.Y. Arts & Cult. Aff. Law § 35.05(1)(a) (McKinney 2004).
107. N.Y. Arts & Cult. Aff. Law § 35.05(1)(b) (McKinney 2004). Emphasis added.
108. *See id.* § 35.05(3)(c) (McKinney 2004).
109. *See id.* § 35.05(6)(a) (McKinney 2004). Emphasis added.
110. *See id.* § 35.05(7) (McKinney 2004). This, according to Ziff, includes breaks for rest and meals. Ziff, *supra* note 37.
111. *See id.* § 35.05(6)(d) (McKinney 2004).
112. N.Y. Arts & Cult. Aff. Law § 35.05(9) (McKinney 2004).
113. *Id.*
114. *See id.* § 35.05(8)(a) (McKinney 2004). This is essentially the Education Department's statement that it does not regulate child "models" who are classified under § 151 of the labor law, which as examined above applies to child performers.
115. N.Y. Comp. Codes R. & Regs. tit. 8 § 190.2 (1962).
116. *See id.* § 190.2(a) (1962).
117. *See id.* § 190.2(c) (1962).
118. *See id.* § 190.2(c)(1) (1962).
119. *See id.* 190.2(c)(2)(i) (1962).
120. *See id.* § 190.2(c)(2)(iii) (1962).
121. *See id.* § 190.2(c)(3)(i) (1962).
122. "Not in session" here means extended breaks such as summer, winter or spring vacations, not simply weekends.
123. N.Y. Comp. Codes R. & Regs. tit. 8 § 190.2(c)(3)(ii) (1962).
124. *See id.* § 190.2 (c)(3)(iii) (1962).
125. *See id.* § 190.2 (c)(4)(i) (1962).
126. *See id.* § 190.2 (c)(4)(ii) (1962).
127. *See id.* § 190.2 (c)(4)(iii) (1962).
128. *See id.* § 190.2(d) (1962).
129. N.Y. Comp. Codes R. & Regs. tit. 8 § 190.2(g) (1962).
130. N.Y. Arts & Cult. Aff. Law § 35.05(9) (McKinney 2004).
131. Ziff, *supra* note 37.
132. Odell, *supra* note 32.
133. *Id.*
134. Phelan, *supra* note 38.
135. As of January of 2013, "there remains no policy of informed consent for jobs involving nudity." Sara Ziff, *Regardless of Age, It's About Rights* (NYT.com, September 14, 2012). Additionally, there remains no regulation of whether a model even has a say over whether or not a photographer can Photoshop a picture of child model's face onto a nude body. Odell, *supra* note 32.
136. *Shields*, 58 N.Y.2d at 346.
137. Odell, *supra* note 32.
138. *Id.*
139. Phelan, *supra* note 38.
140. *Id.*
141. *Id.*
142. Ziff, *supra* note 37.
143. *Id.*
144. Odell, *supra* note 32.
145. An example of this is discussed *infra* Part II-D, in which a 17-year-old model spoke out against the Marc Jacobs company for making her work until 4:30 in the morning, despite N.Y. Comp. Codes R.

& Regs. tit. 8 § 190.2(c)(4)(iii) (1962), which states that no female minor 16 or 17 years of age shall be required to work past 10 p.m.

146. However as discussed *supra* part I-C, the lack of enforcement mechanisms of the existing New York laws regarding working hours of child models dilutes the incentive for employers to adhere to them.

147. Nicole Rowlands, *A Not-So-Pretty Look at Child Modeling*, Lasisblog.com (Oct. 23, 2012), *available at* http://www.lasisblog.com/2012/10/23/a-not-so-pretty-look-at-child-modeling/.

148. A trailer for the film can be viewed here: http://www.youtube.com/watch?v=XbALBvRek1k.

149. Odell, *supra* note 32.

150. Rowlands, *supra* note 147.

151. *Id.*

152. *Id.*

153. *Id.*

154. Virginia Sole-Smith, *The Prettiest (Exploited, Underage) Workers in the World*, Slate (March 19, 2012), *available at* http://www.slate.com/blogs/xx_factor/2012/03/19/girl_model_the_prettiest_exploited_underage_workers_in_the_world.html.

155. *Id.*

156. Rowlands, *supra* note 147.

157. *See* note 148.

158. Rowlands, *supra* note 147.

159. Odell, *supra* note 32.

160. Phelan, *supra* note 38.

161. According to a survey done by the Model Alliance, 52% of models surveyed said that while under the age of 18, they were "never" or "rarely" accompanied by parents or guardians to casting sessions or modeling jobs. Phelan, *supra* note 38.

162. *Id.*

163. *Id.*

164. *Id.*

165. The list of these unions includes the Screen Actors Guild and American Federation of Television and Radio Artists (SAG-AFTRA) for film, television, and radio performers, the American Guild of Musical Artists (AGMA) for ballet dancers and opera singers, and Actor's Equity for Broadway performers and other stage actors. *Position Statements*, Child Performers Coalition (2010), http://www.childperformerscoalition.org/position-statements/.

166. Ziff, *supra* note 37. In fact, since models are classified in New York as independent contractors, it is legally impossible for them to unionize. Daniel Lehman, *Model Alliance Fights Abuse and Harassment of FashionModels*, Backstage.com (April 11, 2012), *available at* http://www.backstage.com/news/model-alliance-fights-abuse-and-harassment-of-fashion-models/.

167. Phelan, *supra* note 38.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. National Institute on Drug Abuse, *Drug Facts: Cocaine*. Drugabuse.gov (March 2010), http://www.drugabuse.gov/publications/drugfacts/cocaine. While cocaine may decrease appetites, it also can lead to serious gastrointestinal complications and malnourishment, as well as cardiac arrest, sudden seizures, and death.

173. Phelan, *supra* note 38.

174. *Id.*

175. Again since models are classified as independent contractors rather than employers, it is impossible for them to unionize. Lehman, *supra* note 166.

176. *Id.*

177. N.Y. Lab. Law § 152 (McKinney 2004).

178. Ziff, *supra* note 37.

179. Kelli, *supra* note 54.

180. *Id.*

181. *Id.*

182. *Id.*

183. A publication that, again, was financed by Playboy. *Shields*, 58 N.Y.2d at 342.

184. Yardley, *supra* note 11.

185. *Id.*

186. *Id.*

187. *Id.*

188. Athavaley, *supra* note 6.

189. *Id.*

190. *Id.*

191. *Id.*

192. For a comical (and simultaneously depressing) example of these type of parents, see this short clip from the film *Bruno*, http://www.youtube.com/watch?v=1eePO_7pcw8, in which actor Sacha Baron Cohen goes undercover as a child modeling agent, where parents unblinkingly consent when asked for permission to photograph their infants in dangerous or disturbing situations (ex: Question: "Is your baby comfortable with dead or dying animals?" Answer: Yes!").

193. *Shields*, 58 N.Y.2d at 342; Athavaley, *supra* note 6.

194. N.Y. Est. Powers & Trusts Law § 7-7.1(2)(a) (McKinney 2004).

195. N.Y. Est. Powers & Trusts Law § 7-7.1 (McKinney 2004).

196. Abraham, *supra* note 35.

197. *Shields*, 58 N.Y.2d 338 at 346

198. Odell, *supra* note 32.

199. *Id.*

200. *Id.*

201. *See* Joe Edelman, *The Business of Modeling*, JoeEdelman.com, http://www.joeedelman.com/modeling-agencies/.

202. *Id.*

203. *See Modeling Scams—Photo Mills*, Auditions.free.com, http://www.auditionsfree.com/modeling-scams-photo-mills/.

204. Edelman, *supra* note 201.

205. The Funnyface agency in New York charges approximately $1,000 per child, for a number of services including photo sessions, composite cards, and individual photo prints, all before any placements or jobs are found for the aspiring models. Athavaley, *supra* note 6.

206. Odell, *supra* note 32.

207. As Sara Ziff told Amy Odell, a top model came to the Model Alliance because her agency was withholding $50,000 from her, and she was unaware of how to handle it. *Id.*

208. The video of this hidden camera modeling agency segment can be viewed on Anderson Cooper's website: '*Latest Teen Modeling Scams Exposed' with Kelly Cutrone / Plus, Susan Sarandon*, Andersoncooper.com (Sept. 5, 2012), *available at* http://www.andersoncooper.com/episodes/susan-sarandon-kelly-cutrone-latest-teen-modeling-scams-exposed/.

209. *Id.*

210. One parent, when asked whether her nine-year-old daughter would be comfortable wearing lingerie and swimsuits, affirmatively answered "yes," while her daughter sat next to her squirming uncomfortably and appearing on the verge of tears. Another parent, when asked whether her daughter would be willing to buzz off her long hair, bleach it platinum blonde, and paint a red stripe down the middle, answered "yes" without the slightest hesitation. *Id.*

211. *Id.*

212. *Id.*

213. Odell, *supra* note 32.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. Dimitria Parisis, *The Marc Jacobs/Hailey Hasbrook Conundrum: Working for Trade; A New Vicious Cycle?*, Scallywag and Vagabond (March 7, 2012), http://scallywagandvagabond.com/2012/03/the-marc-jacobshailey-hasbrook-conundrum-working-for-trade-a-new-vicious-cycle/.

219. *Id.*

220. This is in violation of N.Y. Comp. Codes R. & Regs. tit. 8 § 190.2(c)(4)(iii) (1962), which states that no female minor 16 or 17 years of age shall be required to work past 10 p.m. However, as discussed in the section describing New York's existing legislation for child models, there are no enforcement mechanisms in place to see that these laws are adhered to, which seemingly acts as an invitation for employers to violate them without fear of consequences.

221. Parisis, *supra* note 218.

222. Odell, *supra* note 32. The jury is still out on whether Jacobs will pay his models.

223. *Id.*

224. Parisis, *supra* note 218.

225. *Id.*

226. Lehman, *supra* note 166.

227. Odell, *supra* note 32.

228. *Id.*

229. N.Y. Est. Powers & Trusts Law § 7-7.1 (McKinney 2004).

230. *The Global Cities Index 2010*, Foreignpolicy.com (2010), http://www.foreignpolicy.com/node/373401.

231. *Id.*

232. Cal. Code. Regs. tit. 8, § 11751(a) (1986).

233. *Id.*

234. Cal. Code. Regs. tit. 8, § 11755(a) (1986).

235. *Id.*

236. *See id.* § 11755.2 (1986).

237. *See id.* § 11755.3 (1986).

238. *Id.*

239. See the earlier discussion *supra* part II-A on the health and safety detriments faced by child models in New York.

240. Cal. Code. Regs. tit. 8, § 11755.3 (1986).

241. *Id.*

242. *Id.* If an employer wishes to challenge such removal, he or she may make an appeal to the Labor Commissioner.

243. Cal. Code. Regs. tit. 8, § 11751(b) (1986).

244. Discussed *supra* Part I-C.

245. Cal. Code. Regs. tit. 8, § 11758 (1986).

246. *See id.* § 11758.1 (1986).

247. Discussed *supra* Part I-A.

248. N.Y. Lab. Law § 153 (McKinney 2004).

249. *See id.* § 152 (McKinney 2004).

250. N.Y. Est. Powers & Trusts Law § 7-7.1(2)(a) (McKinney 2004).

251. See the discussion *supra* part II-A.

252. See the discussion *supra* part II-C.

253. See the discussion *supra* part II-B.

254. *Id.*

255. U.S. Bureau of Labor Statistics, *supra* note 33.

256. *Id.*

257. While larger design labels might have the manpower to successfully meet all of the requirements of both Article 4 of the New York Labor Law and the CPETA, smaller companies could possibly be burdened by adhering to the permit process required by N.Y. Lab. Law § 151, the age and working-hour limitations of N.Y. Lab. Law § 130, § 131, § 132, and § 142, and the higher financial standards mandated by the Education and Trust Act.

258. This includes the civil and criminal penalties in N.Y. Lab. Law § 153 and § 145, respectively, for employers who fail to adhere to the labor requirements.

259. N.Y. Arts & Cult. Aff. Law § 35.05.

260. N.Y. Lab. Law § 151 (McKinney 2004).

261. Odell, *supra* note 32.

262. See the analysis *supra* part III.

263. Cal. Code. Regs. tit. 8, § 11755.3 (1986).

264. Cal. Code. Regs. tit. 8, § 11758.1 (1986).

265. To see how this works for California, see *id.*

266. *Id.*

267. *See* the analysis *supra* Part II.

268. *See* the analysis *supra* Part IV.

269. Robbins, *supra* note 1.

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The End of the World as We Know It? The Impact of e-Discovery on Individual Employment Cases

By William D. Frumkin and Elizabeth E. Hunter

As the explosion of technology continues, particularly the growth in electronic social media, there is no doubt that electronic discovery is here to stay. It can only be anticipated that as time moves forward, the need to discover Electronically Stored Information (ESI) in employment litigation will dwarf paper discovery and, for all we know, may render it extinct. Procedures for conducting electronic discovery are in the process of being formulated in both federal[1] and New York state[2] civil procedure rules. In the absence of definitive action in the form of new rules, some courts and judges are making their own rules,[3] and various bar associations and bar committees have issued reports and guidelines on ESI discovery.[4] Everyone affected—litigants, counsel, judges, court personnel, arbitrators, and others—has started to and will continue to deal with ESI discovery on a regular basis.

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The increasing prevalence of ESI discovery has raised important questions regarding the scope of ESI discovery, in what format it should be produced, how to prevent and handle issues of inadvertent disclosure in ESI, and many other issues. What is becoming of paramount concern, however, is who will pay for it? Especially here in New York, the law on cost allocation for ESI discovery has been in flux.

In federal court, the presumption is that the party producing the ESI pays for the cost of production, unless there are special circumstances, a court order, or a party agreement. In *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, Judge James Francis recognized that under the federal rules, the presumption is that the responding party bears the expense of complying with discovery requests, but that under FRCP 26(c), a court may protect the responding party from "undue burden or expense" by shifting some or all of the costs of production to the requesting party.[5] Judge Francis recognized that there are eight relevant factors to determine when discovery costs should be shifted back to the requesting party: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.[6] Then, a slightly different seven-factor test was established by the court in *Zubulake v. UBS Warburg LLC*[7]: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. These *Zubulake* factors, which have been regularly followed in federal courts, are to be weighed in descending order, with the first factor being the most important and the seventh factor the least important.[8]

On the other hand, in New York state courts, until very recently, the general rule applied was that the party requesting the ESI generally pays the costs of ESI discovery.[9] In *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, however, the court declined to follow the "well settled rule" in New York that the party seeking discovery should bear the costs and denied defendant's motion for a protective order to require plaintiff to bear the cost of defendant's production ESI.[10] Then, on February 28, 2012, in a unanimous decision, the Appellate Division, First Department, held in *U.S. Bank N.A. v. GreenPoint Mortgage Funding, Inc.*, that the better approach was "to place the cost of discovery, including searching for, retrieving and producing ESI, at least initially, on the producing party.[11] The First Department adopted the *Zubulake* seven-factor test for determining whether to shift ESI discovery costs to the requesting party. Until the approach taken by the First Department in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.* is followed by the Court of Appeals, however, or at least the other departments of the Appellate Division, the law on cost-allocation in New York courts will remain unsettled.

Moreover, even if a requesting party is not required initially to pay the costs of ESI discovery, it could be required to reimburse ESI discovery costs incurred by a prevailing party under Federal Rule of Civil Proce-

dure 54(d)(1) and 28 U.S.C. § 1920(4). Federal courts have taken varied approaches to this issue, with some limiting taxation of ESI discovery costs to the costs of conversion and transferring between different formats and the scanning of documents, as these services are seen as equivalent to making copies of materials,[12] other courts allowing taxation of costs related to ESI experts or project managers,[13] other courts allowing broad taxation of many costs related to ESI discovery,[14] and other courts not allowing taxation of any costs related to ESI discovery.[15]

Given the lack of clear guidance or certainty from the rules or case law on how ESI discovery costs should be allocated, the burning question becomes how will a litigant, particularly an individual plaintiff, and/or his or her attorney (who cannot afford to advance or reimburse the cost of obtaining the requisite experts or software to assist in dealing with ESI) continue to avail himself or herself of the courts? None of the caselaw or procedural rules seem to deal with the issue of what happens when the plaintiff simply cannot afford to engage in e-discovery.[16]

This problem is like no other. We are not talking about case law that impacts negatively on a plaintiff in terms of winning or losing. Historically, there have been cases that have changed the applicable legal standards, and there have been efforts to undo or circumvent those cases. For example, in 1991, the Civil Rights Act of 1964 was amended to rectify a number of decisions that impacted negatively on plaintiffs, by securing the right to trial by jury on discrimination claims and introducing the possibility of emotional distress damages. Moreover, in recent years there have been United States Supreme Court cases that have also negatively affected plaintiffs' ability to win their cases on the merits.[17] These cases and their impact upon employment litigation, while significant, do not inhibit a plaintiff's practical ability to litigate his or her case. It may be harder in certain ways to get around the impact of these cases, but overall, their impact is not a game changer in the sense of whether a case can be pursued on a practical level. When we consider the impact of not being able to afford to obtain ESI, we are potentially not just talking about a game change, we are talking about *game over*.

The cost of engaging a vendor, consultant or expert for purposes of obtaining ESI discovery can be staggering.[18] While plaintiffs have always been confronted with having to pay or advance costs for economic, psychiatric, vocational, and other experts, these costs are not comparable to ESI discovery costs. In those situations, counsel and clients may engage in strategic decisions that may result in deciding to forgo the retention of an expert due to the cost of retaining one, which could have the result of risking or forgoing a component of the plaintiff's damages. With respect to e-discovery, however, a decision not to retain an expert to due cost could result in effectively not being able to engage in discovery at all.

In light of the above, the question becomes whether we are getting to the point where a plaintiff's practitioner with limited resources (who is representing an unemployed client who can barely afford to pay even the most minimal costs) is going to be forced to abandon the case before litigation has commenced. Without examining any statistical studies, just based on looking at the membership of the National Employment Lawyers Association, which is the largest plaintiffs employment bar association in the country, the number of solo and small (less than 5 attorneys) law firms representing employees predominates over larger firms to a significant degree. The question we need to ask ourselves, as stated in the title of this article, is: will ESI discovery be the death knell for the individual plaintiff's employment case? It would appear that larger firms, especially those interested in class actions, will be able to afford at least to advance the costs and hopefully be repaid either through settlement or a successful litigation. Cost sharing may be available, but can the individual plaintiff even afford to pay his or her share of the cost? If these issues cannot be resolved, the impact that limited financial resources will have upon the outcome of a case will shift from potentially causing a negative outcome to preventing a case from being pursued in the first place.

As for a solution, it would appear at this point that this issue of cost allocation for ESI discovery at least needs to be studied and considered much further. Organizations such as the National Employment Lawyers Association will certainly *have* to explore this and possibly come up with recommendations to be considered by lawmakers and the court systems. Likewise, the Labor and Employment Law Section of the New York State Bar Association would do well to study the issue and make recommendations as well. Lawyers and their clients contribute through their taxes and filing fees to enable the court system to exist, and judges' salaries, court personnel's salaries, utility costs, rent, building management, etc. are all addressed through these taxes and fees. Should the cost of ESI for a plaintiff who cannot afford it be considered as a basic cost along with filing fees? While that may seem far-fetched, the federal, state, and municipal anti-discrimination statutes will be rendered moot if the ultimate impact of technology on the litigation process will prevent those designed to be protected from discrimination from vindicating their rights. While the poor may be assisted by legal service organizations, this issue is even more extensive because there are even many middle-class individuals who cannot afford to advance the costs of obtaining ESI. At this point, there are more questions than answers, but the bottom line is: what will our litigation system look like ten years from now if the

cost of engaging in e-discovery does not become more manageable?

For those of you who represent management, you may be saying to yourself: *I am glad I do not represent plaintiffs.* However, there is no doubt that small businesses are going to be strapped with the same costs and same burdens of having to engage in e-discovery. Even those that have Employee Practices Liability Insurance will certainly be affected when the insurance companies themselves are forced to pay significantly more in terms of representation costs due to the impact of e-discovery. In addition, this issue is likely to affect parties even prior to litigation, as ESI may be sought in investigations at the Equal Employment Opportunity Commission, New York State Division of Human Rights, and other anti-discrimination agencies.

For those of you who are neutrals, you may be saying: *I am glad I am not an advocate.* However, because the costs of arbitration of employment disputes are already significant, the cost of engaging in e-discovery will likely cause those costs to go through the roof. How this will impact upon the ability of plaintiffs to engage in arbitration remains to be seen. Furthermore, since the financial cost-sharing fairness has been a hallmark of enforceability of such arbitration provisions,[19] how the cost of obtaining ESI is going to be factored in to the consideration of whether such provisions should be enforced (if a plaintiff cannot afford to engage in e-discovery) also remains to be seen. Maybe this problem will move cases away from arbitration and more toward court, if in fact the court system at some point picks up on subsidizing the plaintiffs' ability to engage in e-discovery.

In sum, could this be the end of the world as we know it? The challenge becomes how to prevent this from happening. No one can stop progress, and there is no doubt that e-discovery is here to stay. What the ultimate impact on employment litigation will be for the individual plaintiff (and small business) is unclear. To negate shutting the courthouse doors to those affected, we should be exploring ways to address this potentially system-crashing problem.

Endnotes

1. Federal Rule of Civil Procedure (FRCP) 26 was amended in 2006 to include ESI discovery (both in the scope of discovery and in the discovery planning process), and FRCP Rule 34 was also amended in 2006 to cover the production of ESI. In addition, Federal Rule of Evidence 502 was amended in 2007 to address concerns of waiver of attorney-client privilege or attorney work-product protections in the context of ESI discovery.
2. New York Civil Practice Law and Rules (CPLR) 3122(c) provides for production of documents as they are kept in the regular course of business or labeled to correspond to the categories in the request. New York Uniform Trial Court Rules, 22 N.Y.C.R.R §§ 202.12 and 202.70, provide for discussion of ESI discovery at the preliminary conference.
3. In Manhattan, Commercial Division Justice Jeffrey K. Oing, Part 48 is utilizing an ediscovery pilot program. The Commercial Division, Nassau County has issued the Guidelines for Discovery of ESI (Nassau Guidelines). In January 2013, the New York Office of Court Administration sought public comment on a proposal to expand the rule for addressing e-discovery issues in Commercial Division cases, and to extend that rule to cases where e-discovery is likely in all of the state's trial courts, under 22 N.Y.C.R.R §§ 202.12 & 202.70.
4. The Association of the Bar of the City of New York (ABCNY) Joint Committee on Electronic Discovery issued a report in August 2009, "Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR, available at http://www.nycbar.org/pdf/report/uploads/20071732ExplosionofElectronicDiscovery.pdf. The ABCNY Joint Committee on Electronic Discovery also issued a Manual for State Trial Courts Regarding Electronic Discovery Cost Allocation, in Spring 2009. NYSBA's E-Discovery Committee released a report entitled, "Best Practices in EDiscovery in New York State and Federal Courts." in July 2011. The ABA has an active E-Discovery Committee that has issued lengthy books, guidelines, practice guides, and up-to-date articles. The Sedona Conference Working Group on eDiscovery has also issued various reports, guidelines, and principles that are followed by many courts.
5. 205 F.R.D. 421, 428 (S.D.N.Y. 2002).
6. *Id.* at 429.
7. 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (*Zubulake I).*
8. *Id.* at 323.
9. *See, e.g, Waltzer v. Tradescape*, 31 A.D.3d 302 (1st Dep't 2006) (noting that "as a general rule, under the CPLR, the party seeking discovery should bear the cost incurred in the production of discovery material; however,…[t]he cost of an examination by defendants' agents to see if they should not be produced due to privilege or on relevancy grounds should be borne by defendants"); *T.A. Ahern Contractors Corp. v. Dormitory Auth. of the State of N.Y.*, 875 N.Y.S.2d 862, 869 (N.Y. Sup. Ct., N.Y. Co. Mar. 19, 2009) (stating that it was "not empowered—by statute or case law—to overturn the well settled rule in New York state that the party seeking discovery bear the cost incurred in its production" and observing that the requester pays standard gives a party "a strong incentive to formulate its discovery requests in a manner as minimally burdensome as possible."); *Finkelman v. Klaus*, 856 N.Y.S.2d 23 (Sup. Ct., Nassau Co. 2007) (subpoenaing party must bear "the costs incurred in producing the email records."); *Lipco Electrical Corp. v. ASG Consulting Corp.*, 798 N.Y.S.2d 345 (Sup. Ct., Nassau Co. Aug. 18, 2004) (under the CPLR, the party seeking discovery should incur the costs incurred in the production).
10. 895 N.Y.S.2d 643, 654 (N.Y. Sup. Ct., N.Y. Co. Jan. 14, 2010).
11. 94 A.D.3d 58, 63 (1st Dep't 2012).
12. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 164-67 (3d Cir. 2012) (*Race Tires II*) (limiting the taxation of ediscovery costs to the conversion and transferring between different formats and the scanning of documents, as these services were equivalent to making copies of documents); *BDT Prods. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 420 (6th Cir. 2005) (electronic scanning and imaging could be interpreted as exemplification and copies of papers); *Hecker v. Deere & Co.*, 556 F.3d 575, 591 (7th Cir. 2009) (costs of converting computer data into a readable format in response to plaintiffs' discovery requests…are recoverable); *Brown v. The McGraw Hill Cos., Inc.*, 526 F. Supp. 2d. 950, 959 (N.D. Iowa 2007) (electronic scanning of documents is the modern day equivalent of "exemplification and copies of paper."); *Country Vintner of N.C., LLC v. E & J Gallo Winery, Inc.*, No. 5:09CV326BR, 2012 U.S. Dist. LEXIS 108905, 2012 WL 3202677, at *23 (E.D.N.C. Aug. 3, 2012) (only awarding costs for the "tasks that involve copying [such as] the conversion of native files to TIFF and PDF formats and the transfer of files onto CDs.").

13. *Jardin v. DATAllegro, Inc.*, No. 08CV1462, 2011 WL 4835742, 2011 U.S. Dist. LEXIS 117517 (S.D. Cal. Oct. 12, 2011) (awarding costs associated with hiring an ediscovery project manager to oversee the data conversion process); *Tibble v. Edison Int'l*, No. 075359, 2011 U.S. Dist. LEXIS 94995, 2011 WL 3759927, at **67 (C.D. Cal. Aug. 22, 2011) ("costs associated with the technical expertise required to unearth electronically stored information are [recoverable]" as costs "were not accrued merely for the convenience of counsel, but were necessarily incurred in responding to Plaintiffs' discovery requests"); *CBT Flint Partners LLC v. Return Path*, 676 F. Supp. 2d 1376, 1380-81 (N.D. Ga. 2009), *vacated on other grounds by* 654 F.3d 1353 (Fed. Cir. 2011) (approving costs for a consultant who helped "collect, search, identify and help produce electronic documents" because ediscovery vendors highly technical services are the 21st century equivalent of making copies).

14. *In re Online DVD Rental Antitrust Litig.*, No. M 092029, 2012 U.S. Dist. LEXIS 55951, 2012 WL 1414111, at *1 (N.D. Cal. Apr. 20, 2012) (holding that court had ability to broadly construe section 1920 with respect to electronic discovery production costs and awarding over $700,000 in costs, including file conversions and professional fees); *Parrish v. Manatt, Phelps & Phillips, LLP*, No. C 1003200, 2011 U.S. Dist. LEXIS 41021, 2011 WL 1362112, at *2 (N.D. Cal. Apr. 11, 2011) ([t]he reproduction costs defendants incurred in collecting, reviewing, and preparing client documents for production were necessary expenditures made for the purpose of advancing the investigation and discovery phases of the action); *Lockheed Martin Idaho Techs. Co. v. Lockheed Martin Advanced Envtl. Sys., Inc.*, No. CV98316, 2006 U.S. Dist. LEXIS 52242, 2006 WL 2095876, at *2 (D. Idaho July 27, 2006) (cost of creating litigation database was necessary and thus recoverable "due to the extreme complexity of this case and the millions of documents that had to be organized").

15. *Little Rock Cardiology Clinic, P.A. v. Baptist Health*, No. 4:06CV01594, 2009 U.S. Dist. LEXIS 29395, 2009 WL 763556, at *4 (E.D. Ark. Mar. 19, 2009) (no recovery for reproduction, scanning or production of documents); *Fells v. Virginia Dep't of Transp.*, 605 F. Supp. 2d 740, 743 (E.D. Va. 2009) (refusing to expand the traditional notion of copying to include a burgeoning array of electronic discovery techniques).

16. While factors 3, 4, and 5 of the *Zubulake* factors consider the plaintiff's ability to pay, they are not determinative and an individual plaintiff could still be required to pay the costs of discovery. *See Quinby v. WestLB AG*, 245 F.R.D. 94, 109 (S.D.N.Y. 2006).

17. *See, e.g., Hosanna Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012) (expanding ministerial exception to anti-discrimination laws for religious employers); *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343(2009) (precluding use of a mixed-motive instruction in an age discrimination case, and requiring proof of but-for causation).

18. E-discovery litigation support vendors may charge from $75,000 to $180,000 per 100 gigabytes for assisting with deduplication, culling, processing and analyzing of data, including the vendor's software and related fees and costs. "Accounting for the Costs of Electronic Discovery," by David W. Degnan, published in the winter 2011 issue of the Minnesota Journal of Law, Science & Technology, *available at* http://mjlst.umn.edu/previousissues/vol12iss1/home.html. In addition, as of 2007, electronic discovery consultant fees were starting at $275 an hour, and costs of collecting, reviewing and producing a single e-mail were running between $2.70 and $4. See "Rising Costs of EDiscovery Requirements Impacting Litigants," by Ann G. Fort, *available at* http://www.depo.com/resources/aa_thediscoveryupdate/rising_costs_ediscovery.html.

19. *See, e.g. Green Tree Fin. Corp.Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (noting that the existence of large arbitration costs could preclude a litigant…from effectively vindicating her federal statutory rights in the arbitral forum).

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"Other Mutual Aid or Protection": Collective Legal Claims as Concerted Activity in *D. R. Horton, Inc.* and Beyond

By Amanda Jaret

I. Introduction

As it prepared for the busy holiday shopping season, eBay implemented a new policy requiring its online vendors to submit to arbitration to resolve any legal disputes that may arise during their relationship with the popular website.[1] While arbitration agreements have become commonplace,[2] one term eBay included in its agreement has not met such universal approval: its requirement that all claims be resolved individually in arbitration.[3] Because such an agreement requires users to preemptively waive their rights to pursue class and collective actions, it might fundamentally alter or even eliminate the legal claims and remedies eBay users may pursue.[4]

While eBay's arbitration policy may be a cause of concern for the site's users, perhaps more troubling is employers' increasing tendency toward requiring employees to sign similar agreements.[5] First, employees lack two alternatives would-be eBay users had when presented with the agreement: they could sell their wares on other sites, or they could exercise their right to opt out of the agreement.[6] Second, and more importantly, employees have rights under the National Labor Relations Act (NLRA or the "Act") to engage in protected concerted activity with a nexus to their terms and conditions of employment.[7] Recently, the National Labor Relations Board (NLRB) held that mandatory arbitration agreements that require employees to waive their right to pursue collective legal claims unlawfully abridges their federal right to engage in concerted activity.[8]

Part II addresses the enforceability of mandatory arbitration clauses that curtail access to collective and class remedies. Part III provides background on employees' section 7 rights and especially focuses on the context of employees pursuing collective legal claims. Part IV discusses the Board's decision in *D. R. Horton* and determines that *D. R. Horton* was correctly decided. This part also considers why allowing employees to pursue collective legal claims is a core component of section 7's protective ambit. Part V concludes.

II. Recent Developments Under the Federal Arbitration Act

A. Background: The Road to *D. R. Horton*

The Federal Arbitration Act (FAA) provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] This statute was enacted to combat judicial hostility to arbitration.[10] The FAA permits courts to enforce arbitration agreements in a wide variety of contexts, including agreements to arbitrate employment claims.[11] The Supreme Court has recently interpreted the provisions of the FAA increasingly broadly.[12] The Court has explained that the FAA articulates a "liberal federal policy favoring arbitration,"[13] and it has insisted that arbitration agreements are to be enforced just like any other contracts.[14]

On most counts, the FAA, as interpreted by the courts, has been successful in its goal of promoting arbitration.[15] Arbitration has become extremely commonplace. Although it is difficult to gauge how many cases are arbitrated or how many people consent to binding arbitration each year, the American Arbitration Association alone conducts over 100,000 cases per year.[16] Arbitration has been an especially useful dispute resolution tool in the labor and employment context, and the Supreme Court has placed its imprimatur on this mechanism and has credited it with contributing to industrial peace.[17]

B. *AT&T Mobility LLC v. Concepcion*

The most recent development in the Court's jurisprudence regarding the FAA is *AT&T Mobility LLC v. Concepcion*.[18] At issue in *Concepcion* was an adhesionary agreement that required consumers to resolve their legal disputes with AT&T individually through arbitration. The plaintiffs attempted to bring a class action claiming that AT&T engaged in false advertising and fraud by charging $30.22 in sales tax on cell phones that the company advertised as free.[19]

Because California law empowers courts to invalidate or limit unconscionable clauses in contracts,[20] and many California courts have struck down class-action waivers in arbitration agreements as unconscionable pursuant to that authority,[21] the plaintiffs argued that the arbitration agreement was unenforceable[22] under the exception in section 2 of the FAA for defenses that "exist at law or in equity for the revocation of any contract."[23]

The Supreme Court rejected the plaintiffs' argument and upheld the agreement, concluding that it barred consumers from pursuing their claims in a consolidated litigation or arbitration.[24] The Court reasoned that because the California policy disfavored enforcing arbitration agreements in accordance with their terms, it was incon-

sistent with the policy underlying the FAA.[25] The saving clause in section 2 of the FAA, therefore, could not apply because the act could not be held "'to destroy itself.'"[26]

The Court also went further in *Concepcion*, opining that class-wide arbitration is inconsistent with the FAA.[27] While it recognized that parties could consensually agree to class-wide arbitration, courts could not "manufacture[]" requirements that arbitration be class-wide.[28] The Court observed that the principal benefit of arbitration is its informality and determined that class-wide arbitration sacrifices that benefit by making the process slower and more costly.[29]

III. Primer on Employees' Rights Under the National Labor Relations Act

The NLRA protects employees' rights to engage in concerted protected activity.[30] While some associate the Act with collective bargaining and assume it only applies in unionized work settings,[31] it protects all those defined as "employees,"[32] including those who are not union members.[33] Some regard the Act's broad applicability as one of the "best-kept secrets of labor law"[34] because so few are aware of its potential protections for non-unionized employees.[35]

Section 7 of the Act is generally regarded as the heart of the NLRA because it enumerates employees' core rights.[36] Section 7 safeguards all employees' rights to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[37] Section 7 also provides that employees are free to refrain from engaging in the above conduct and proscribes discrimination against anti-union employees.[38] The protections of section 7 extend not only to communication that has the immediate goal of organizing, securing, or enforcing collective bargaining rights,[39] but also to discussions about improving terms and conditions of employment,[40] communications purporting to induce group activity or on behalf of at least one other employee,[41] and, most importantly for this article, the act of joining together to pursue workplace grievances.[42]

As a general matter, section 8(a)(1) of the NLRA provides for the enforcement of these section 7 rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their section 7 rights.[43] A violation of section 8(a)(1) may exist even absent evidence that policies abridging section 7 rights are actually enforced;[44] the mere existence of policies that threaten employees' ability to engage in concerted activity may constitute an unfair labor practice if they either explicitly restrict section 7 activity or would be reasonably construed as prohibiting section 7 activity.[45]

IV. *D. R. Horton* Was Correctly Decided

A. The Board's Decision in *D. R. Horton*

In *D. R. Horton, Inc.*, the NLRB addressed whether a mutual arbitration agreement that an employer required its employees to sign as a condition of employment unlawfully abridged employees' section 7 rights.[46] The charging party in *D. R. Horton*, Michael Cuda, initiated a putative class action arbitration claiming that the company systematically misclassified workers as supervisors when in fact they were employees entitled to the Fair Labor Standards Act's protections.[47] When the employer asserted that the mutual arbitration agreement prohibited arbitration of collective claims, Cuda filed an unfair labor practice charge claiming that the employer violated sections 8(a)(1) and (4) of the Act by limiting employees' ability to pursue collective claims or have recourse to the NLRB's processes.[48]

The Board determined that an employer violates section 8(a)(1) of the Act[49] by requiring employees to sign agreements that limit their ability to file "joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial."[50] Because the Board viewed employees' right to "join together to pursue workplace grievances" as foundational, it concluded that "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA."[51] Accordingly, the mutual arbitration agreement, which curtailed employees' ability to seek collective redress for their grievances, violated the Act by requiring employees to prospectively waive their rights to engage in section 7 activity.[52] The Board likened this agreement to a yellow-dog contract and emphasized that it is also likely unlawful under the Norris-LaGuardia Act.[53]

The Board also concluded that the FAA did not conflict with federal labor law and policy.[54] The Board recognized that the potential conflict between the FAA and the NLRA was an issue of first impression and emphasized its intent to resolve the issue "in a way that accommodates the policies underlying both statutes to the greatest extent possible."[55] Because the Supreme Court has held that contracts that interfere with the functions of the NLRA must "yield or the Act would be reduced to a futility,"[56] the Board determined that the contract could be invalidated on the basis of a defense that was not solely applicable to contracts related to arbitration, as required by *Concepcion*.[57]

B. Analysis of *D. R. Horton*

D. R. Horton was correctly decided for three main reasons.[58] First, the Board's holding is crucial to preserving employees' substantive section 7 rights.[59] The Supreme Court has consistently reaffirmed the central importance of employees' right to seek "to improve their

working conditions through resort to administrative and judicial forums."[60] As the Board observed in *D. R. Horton*, the same is "equally true of resort to arbitration."[61]

The substantive section 7 right to act for mutual aid and protection is separate from any procedural rights to raise collective claims employees might have.[62] The Board castigated the employer and amici's attempts to conflate procedural rules like Rule 23 of the Federal Rules of Civil Procedure with employees' substantive right to act collectively to pursue their legal claims.[63] Indeed, the very act of joining together to pursue legal claims falls comfortably within the Board's interpretation of section 7's guarantee that employees have the right to act in concert for their "mutual aid or protection."[64] This broad language embraces a wide swath of activity so long as it pertains to workers' "terms and conditions of employment."[65] Although the paradigm examples of concerted activity tend to revolve around employees attempting to organize a union or striking, "the class plaintiff" is also "invoking a Section 7 right" when she joins with her fellow employees to attempt to improve their terms and conditions of employment.[66]

Some have been less sanguine about the Board's conclusion that the NLRA provides employees with the right to pursue collective legal remedies. Former NLRB Member Marshall Babson, who assisted the United States Chamber of Commerce in writing an amicus brief filed in *D. R. Horton*, expressed concerns that the NLRB's reading of concerted activity is too broad.[67] He emphasized that the NLRA "was not intended to be a 'super class action statute' that protects and preserves the right to proceed as a class in all circumstances without regard to the usual considerations by the court."[68] Professor Kenneth T. Lopatka also questions whether section 7 rights confer any special standing to pursue class claims, concluding that the Court would likely find that the FAA's policy in favor of arbitration and enforceability of arbitration agreements outweighs any other rights employees have under the NLRA.[69] Because the Court rejected an attempt to invalidate a class action ban in *Concepcion*, in Professor Lopatka's view, a similar rationale would be viewed as an "arbitration-frustrating contrivance" of the sort that "failed to persuade" the Court before.[70]

These commentators miss the mark for several reasons. First, the NLRB expressly cabined the scope of its holding in *D. R. Horton*, emphasizing that section 7 does not create a right to class certification and does not displace procedural rules that might deprive employees of the opportunity to mount a successful class action.[71] The unlawful aspect of the kind of arbitration agreement at issue in *D. R. Horton* is instead in its requirement that employees preemptively waive the ability to act collectively to pursue a potential class action in the first place.[72] Whether a class is certified or not is immaterial to the NLRB's analysis; what counts is employees' full and free ability to attempt to better their terms and conditions of employment through pursuing their collective legal claims.[73]

The second reason *D. R. Horton* was correctly decided relates to the Board's conclusion that the NLRA and the FAA do not conflict where an arbitration agreement requires employees to waive other substantive rights they possess under federal law.[74] Although the Court found that the FAA trumped a contrary California Supreme Court doctrine in *Concepcion*,[75] the Court has never been presented with the question of whether the FAA preempts the NLRA.[76] As the Board emphasized in *D. R. Horton*, the FAA was intended to leave other substantive rights under federal law undisturbed.[77] Although the FAA is intended to facilitate arbitration and requires that arbitration agreements stand on the same footing as other types of contracts,[78] it is meant to function as a shield, not a sword.[79] When enforcing an arbitration agreement has the result of infringing on other substantive rights an employee has under the NLRA, *Gilmer* teaches that the substantive rights ought to take priority.[80] This reasoning also explains why the apparent ban on class action arbitrations the Supreme Court located in *Concepcion* is inapposite in the context of the NLRA, where collective participation in bringing legal claims takes on substantive, and not merely procedural, significance.[81]

Finally, even if the FAA does apply to the kind of arbitration agreement at issue in *D. R. Horton*, the saving clause in section 2 of the FAA would allow a court to invalidate a contract that requires employees to prospectively waive their section 7 rights.[82] Although the Supreme Court found this defense did not apply in *Concepcion* when presented with similar facts,[83] the crucial distinguishing factor is that the defense plaintiffs proffered in *Concepcion* was unique to the arbitration context.[84] The Court found the unconscionability defense at issue in *Concepcion* to be at odds with the policies underlying the FAA. No analogous concern should arise if the limited section 7 right to engage in collective action is found to be applicable in this context because this defense does not operate to disadvantage arbitration.

Section 2, by its own terms, recognizes that arbitration agreements may be unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[85] There are two potential defenses that would render arbitration agreements like the one at issue in *D. R. Horton* unenforceable if they would abridge employees' section 7 rights under the NLRA. Restatement (Second) of Contracts provides that a contract is unenforceable as against public policy if "legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[86]

First, section 7 of the NLRA and the provisions of the Norris-LaGuardia Act are examples of legislation providing that an arbitration agreement that cabins the scope of

employees' rights is unenforceable.[87] Because arbitration agreements that cause employees to prospectively waive their section 7 rights violate section 8(a)(1) of the NLRA, they might be unenforceable for illegality.[88] Second, the common law of contracts and many statutes confirm that agreements that violate public policy are unenforceable.[89] Because this "generally applicable contract defense[]"[90] does not "apply only to arbitration," it does not run afoul of the rule announced in *Concepcion*, which only forbids invalidating arbitration agreements on the basis of defenses that apply only to arbitration or "derive their meaning from the fact that an agreement to arbitrate is at issue."[91]

V. Conclusion

As our online vendors discovered when eBay imposed new conditions for resolving legal disputes, arbitration agreements continue to proliferate.[92] For employees faced with a requirement of signing agreements that prevent them from joining together to assert mutual claims that pertain to their terms and conditions of employment, however, there may be an even bigger cost. While the Board's decision in *D. R. Horton* is pending before the Fifth Circuit,[93] a number of courts have rejected the Board's reasoning.[94] It is crucial that the Fifth Circuit uphold the Board's decision to ensure adequate protection of employees' section 7 rights under the NLRA. The precedent could not be clearer: when employees act together for "mutual aid or protection" concerning their terms and conditions of employment, they are entitled to protection. Workers' substantive rights cannot yield for the sake of potential procedural efficiencies.

Endnotes

1. *See* <http://pages.ebay.com/help/policies/user-agreement.html> (last visited 12/3/12).
2. Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 Yale L.J. 2346, 2350-51 (2012) (outlining the increasingly common use of mandatory arbitration clauses in diverse contexts).
3. <http://pages.ebay.com/help/policies/user-agreement.html> (last visited 12/3/12).
4. *See* Farmer, *supra* note 2, at 2356 n.26.
5. *See* Steven Greenhouse, *Labor Board Backs Workers on Joint Arbitration Cases*, N.Y. Times, Jan. 6, 2012, at B1 (explaining that more than 25 percent of non-union workers have signed similar mandatory arbitration agreements as a condition of employment).
6. *See* <http://pages.ebay.com/help/policies/user-agreement.html> (last visited 12/3/12).
7. *See* 29 U.S.C. § 157 (2006). *See also infra* Part III.
8. *See* D. R. Horton, Inc., 357 N.L.R.B. No. 184 (2012).
9. 9 U.S.C. § 2 (2006).
10. *See Hall Street Assoc., LLC v. Mattel*, 552 U.S. 576, 581 (2008) (detailing the origins of the FAA).
11. *See, e.g.*, *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).
12. *See* Iliza Bershad, Note, *Employing Arbitration: FLSA Collective Actions Post-Concepcion*, 34 Cardozo L. Rev. 359, 361 (2012).
13. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).
14. *E.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).
15. *See, e.g.*, Farmer, *supra* note 2, at 2351.
16. *See id.*
17. *See, e.g., United Steelworkers of Amer. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.").
18. 131 S. Ct. 1740 (2011).
19. *Id.* at 1744.
20. Cal. Civ. Code Ann. § 1670.5(a) (West 1985).
21. *See, e.g., Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005); *Cohen v. DirecTV, Inc.*, 48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006).
22. *Concepcion*, 131 S. Ct. at 1746-47.
23. 9 U.S.C. § 2 (2006).
24. *Concepcion*, 131 S. Ct. at 1748.
25. *Id.* at 1748-49.
26. *Id.* at 1748 (quoting *Amer. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998)).
27. *Id.* at 1751.
28. *Id.*
29. *See id.*
30. *See* 29 U.S.C. § 157 (2006).
31. *See* Gary W. Spring, *A New Methodology for Testing Politically Permissible Political Communications in the Workplace*, 2008 Mich. St. L. Rev. 1023, 1029 (2008) ("While the NLRA is universally recognized as governing union and management relations, it also provides guarantees to employees in the private sector, even those who are not members of labor unions."); *cf.* Greenhouse, *supra* note 5 (describing business managers' confusion when the NLRA is applied in non-union environments).
32. *See* 29 U.S.C. § 152(3) (2006).
33. *See, e.g., NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962) (holding that employees involved in a walkout were covered by section 7 of the NLRA despite their non-union status).
34. *See* IBM Corp., 341 N.L.R.B. 1288, 1306 (2004) (Liebman, dissenting).
35. *See* Greenhouse, *supra* note 5 (describing businesses' lack of awareness of the breadth of the Act's protections).
36. *See* William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 Berkeley J. Emp. & Lab. L. 259, 270 (2002).
37. 29 U.S.C. § 157 (2006).
38. *See id.*
39. *See, e.g., Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 542 (1972) (explaining that section 7 "includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves").
40. *E.g., Eastex Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (extending section 7 protection to the distribution of newsletters promoting legislation that would advance employees' interests).
41. *E.g., NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984).
42. *See Le Madri Rest.*, 331 N.L.R.B. 269, 275 (2000) ("[T]he filing of a civil action by employees is protected activity unless done with malice or in bad faith."); *United Parcel Serv.*, 252 N.L.R.B. 1015, 1018 & 1022 n.26 (1980), *enforced* 677 F.2d 421 (6th Cir. 1982) (concluding that an employee class-action lawsuit was protected

concerted activity); *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948–49 (1942).

43. 29 U.S.C. § 158(a)(1) (2006).
44. Lafayette Park Hotel, 326 N.L.R.B. 824 (1998).
45. *See* Lutheran Heritage Vill.–Livonia, 343 N.L.R.B. 646-47 (2004).
46. *See* 357 N.L.R.B. No. 184, slip op. at 1 (2012).
47. *See id.*
48. *Id.* at 1-2.
49. *See* 29 U.S.C. § 158(a)(1) (2006). The Board declined to pass on the administrative law judge's conclusion that the agreement also violated section 8(a)(4) of the Act because such a finding would not have materially affected the remedy. *See D.R. Horton*, 357 N.L.R.B. No. 184 at 2 n.2.
50. 357 N.L.R.B. No. 184, slip op. at 1 (2012).
51. *Id.* at 3.
52. *Id.* at 2.
53. *Id.* at 5 (citing 29 U.S.C. § 101 et seq.). A "yellow dog contract" requires employees to agree to abstain from union activity as a condition of employment. *See id.* For an enlightening comparison of mandatory arbitration agreements requiring employees to proceed individually to yellow dog contracts, see Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).
54. *See D. R. Horton*, 357 N.L.R.B. No. 184, at 1.
55. *Id.* at 8.
56. *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).
57. *D. R. Horton*, 357 N.L.R.B. No. 148, at 9 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011)).
58. The question pending before the Fifth Circuit regarding whether the Board had a validly constituted quorum to render its decision in *D. R. Horton* is beyond the scope of this article. For a discussion of the salient aspects of that issue, see Greenhouse, *supra* note 5.
59. *See* 29 U.S.C. § 157 (2006); *supra* Part III.
60. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978).
61. *D. R. Horton*, 357 N.L.R.B. No. 184, at 2.
62. *Id.* at 9.
63. *Id.*
64. 29 U.S.C. § 157 (2006). *See* Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173, 204 (2003) ("A class action lawsuit easily comes within the existing interpretation of concerted activity.").
65. 29 U.S.C. § 158(d) (2006).
66. Hodges, *supra* note 64, at 207.
67. Greenhouse, *supra* note 5.
68. *D. R. Horton*, 357 N.L.R.B. No. 184, at 9.
69. *See* Kenneth T. Lopatka, *A Critical Perspective on the Interplay between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 43-44 & 91 (2011).
70. *Id.* at 94.
71. *D. R. Horton*, 357 N.L.R.B. No. 184, at 10 (explaining that inasmuch as detractors of the Board's approach "mean that there is no Section 7 right to class certification, they are surely correct.").
72. *See id.*
73. *See id.*
74. *Id.* at 11.
75. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747-48 (2011).
76. The Board addressed this question in *D. R. Horton* and concluded that both statutes must be accommodated to whatever extent it is possible to do so. 357 N.L.R.B. No. 184, at 8.
77. *E.g. Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).
78. *See supra* Part IIA.
79. *See* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 Case W. Res. L. Rev. 91, 106 n.84 (2012).
80. *See Gilmer*, 500 U.S. at 26.
81. D. R. Horton, Inc., 357 N.L.R.B. No. 184, slip op. at 10 (2012).
82. 9 U.S.C. § 2 (2006).
83. *See supra* Part IIB.
84. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).
85. *Id.*
86. Restatement (Second) of Contracts § 178(1) (1981).
87. *See id.*
88. *See* 29 U.S.C. § 158(a)(1) (2006).
89. *See, e.g.*, *Schlessinger v. Valspar Corp.*, 686 F.3d 81, 88 (2d Cir. 2012) (emphasizing that contracts may be unenforceable if they are against public policy).
90. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).
91. *Concepcion*, 131 S. Ct. at 1746.
92. *See* <http://pages.ebay.com/help/policies/user-agreement.html> (last visited 12/3/12).
93. *See D. R. Horton, Inc. v. NLRB*, No. 12-60031.
94. *See, e.g.*, *Sanders v. Swift Transp. Co. of Ariz., LLC*, No. 10-cv-03739, 2012 WL 523527 (N.D. Cal. Jan. 17, 2012).

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Early Discovery Protocols for Employment Arbitration Cases

By Jeffrey T. Zaino

In the fall of 2012, the American Arbitration Association (AAA) brought together seasoned New York employment arbitrators to form a working group and review early discovery protocols being piloted by judges throughout the United States District Courts. Because of concerns about rising costs and delays in employment arbitration cases, the working group wanted to assess if similar protocols tailored to employment arbitration would benefit the process. This article will discuss the background behind the federal protocols and recent efforts to introduce similar protocols to the arbitration process.

The federal protocols were developed in 2011 by a committee led by United States District Judge John G. Koeltl of the Southern District of New York. By design, the committee had a balance of both plaintiff and defense attorneys from across the nation. As noted in the federal protocols, "[t]he project grew out of a 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rights, for the purpose of re-examining civil procedure and collecting recommendations for their improvement. During the conference, a wide range of attendees expressed support for the idea of case-type-specific 'pattern discovery' as a possible solution to the problems of unnecessary cost and delay in the discovery process." There was consensus at the conference that employment cases would be best suited for any type of experimentation because they are regularly litigated and have recurring issues.

Following the conference, the committee led by Judge Koeltl worked diligently over the course of one year to develop what is now called the *Initial Discovery Protocols for Employment Cases Alleging Adverse Action*. The stated purpose of the protocols is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery."

Application to Employment Arbitration

Recognizing the significant differences between arbitration and litigation, the members of the AAA working group agreed that the arbitration process could be made far more efficient and economical and generally benefit from similar protocols tailored to employment arbitration. The consensus of the working group was that protocols tailored for employment arbitration should be drafted and piloted in New York.

The working group drafted the *Initial Discovery Protocols for Employment Arbitration Cases*, which borrows many provisions from the federal protocols but has been carefully tailored for both promulgated and individually negotiated employment arbitration cases. These new protocols, while not mandatory, are presumptively applicable to all AAA employment arbitration cases subject to the pilot program unless determined otherwise by the arbitrator or mutually agreed by the parties not to be applicable or appropriate.

The following is the protocol prepared by the working group:

Pilot Project Initial Discovery Protocols for AAA Employment Arbitration Cases

Definitions

The following definitions apply to cases proceeding under the Initial Discovery Protocols for Employment Arbitration Cases.

a. ***Concerning***. The term "concerning'' means referring to, describing, evidencing, or constituting.

b. ***Document***. The term "document" includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data. The term "document" also includes electronically stored information in any medium, including emails, text messages and similarly stored information that can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

c. ***Identify (Documents).*** When referring to documents, to "identify'' means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document ; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was sent; or, alternatively, to produce the document.

d. ***Identify (Persons).*** When referring to natural persons, to "identify'' means to give the person's: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and, (v) relationship, if any, to the

claimant or respondent. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in subsequent discovery requesting the identification of that person.

e. ***Initial Discovery***. Initial Discovery comprises the documents and information specified below in Part 2 (for claimant) and Part 3 (for respondent).

Instructions

a. For this Initial Discovery, the time period being no more than three years before the date of the matter(s) in controversy, unless otherwise specified.

b. This Initial Discovery is not subject to objections except with respect to (i) claims of privilege and (ii) specific limitations based on electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the arbitrator may nonetheless order discovery from such sources if the requesting party shows good cause. The arbitrator may specify conditions for the discovery.

c. A party or counsel is required to certify, by signature, that the discovery provided is complete and correct at the time it is produced. If a partial or incomplete answer or production is provided, the responding party shall state the reason that the answer or production is considered partial or incomplete.

d. Documents must be produced as kept in the normal course of business, and must be organized and labeled to correspond to the numbers of the requests. Electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form and must be organized and labeled to correspond to the numbers of the requests.

Part 2: Production by Claimant

(1) Timing

a. The claimant's Initial Discovery shall be provided within 30 days after the respondent has submitted a responsive pleading or motion, unless the arbitrator rules otherwise.

(2) Documents that Claimant must produce to Respondent

a. All communications concerning the factual allegations or claims at issue in the arbitration between the claimant and the respondent.

b. Claims, lawsuits, administrative charges, and complaints by the claimant that rely upon any of the same factual allegations or claims as those at issue in the arbitration.

c. Documents concerning the formation and termination, if any, of the employment relationship to the extent either is relevant to the claims or issues in the arbitration, irrespective of the relevant time period.

d. Documents concerning [the terms and conditions] of the employment relationship, to the extent relevant and material with respect to the claims or issues in the arbitration.

e. Diary, Journal, and calendar entries, whether written or electronic, maintained by the claimant concerning the factual allegations or claims at issue in the arbitration.

f. The claimant's current resume(s).

g. Documents in the possession of the claimant concerning any application or claim for unemployment benefits, [unless production is prohibited by applicable law].

h. If mitigation of damages is an issue in the case, documents concerning: (i) communications with potential employers; (ii) job search efforts; (iii) offer(s) of employment, job description(s), and income and benefits of subsequent employment, and (iv) the termination of any subsequent employment. The respondent shall not contact or subpoena a prospective or current employer to discover information about the claimant's claims without first providing the claimant 30 days' notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

i. Any other document(s) upon which the claimant relies to support the claimant's claims.

(3) Information that Claimant must produce to Respondent

a. Identify persons the claimant believes to have knowledge of the facts concerning the claims or defenses at issue in the arbitration, and brief description of that knowledge.

b. Describe the categories of damages the claimant claims and the amounts of damages with respect to each category to the extent feasible.

c. State whether the claimant has applied for disability benefits and / or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any. Identify any document concerning any such application.

Part 3: Production by Respondent

(1) Timing

a. The respondent's Initial Discovery shall be provided within 30 days after the respondent has submitted a responsive pleading or motion, unless the arbitrator rules otherwise.

(2) Documents that Respondent must produce to Claimant [See comments to prior section about terminology]

a. All documents concerning the factual allegations or claims at issue in the arbitration among or between:

(i) The claimant and the respondent;

(ii) The claimant's manager(s) and / or supervisor(s), the respondent's human resources representative(s) and any other decision maker.

(iii) Respondent and any non-party (except to the extent a privilege applies).

b. Responses to claims, lawsuits, administrative charges, and complaints by the claimant that rely upon any of the same factual allegations or claims as those at issue in the arbitration.

c. Documents concerning the formation and termination, if any, of the employment relationship to the extent either is relevant to the claims or issues in the arbitration, irrespective of the relevant time period.

d. The claimant's personnel file, in any form maintained by the respondent, including files concerning the claimant maintained by the claimant's supervisor(s) and / or manager(s), respondent's human resources representative(s) and any other decision maker, irrespective of the relevant time period. If not included in the personnel file, the claimant's performance evaluations and formal discipline reports or write-ups.

e. Documents relied upon to make the employment decision(s) at issue in the arbitration.

f. Workplace policies or guidelines relevant to the claimant's claims or respondent's defenses and / or counterclaims in effect at the time of the adverse action, including policies or guidelines that address:

(i) Discipline;

(ii) Termination of employment;

(iii) Promotion;

(iv) Discrimination;

(v) Performance reviews or evaluations;

(vi) Misconduct;

(vii) Retaliation; and

(viii) Nature of the employment relationship.

g. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

h. Job description(s) for the position(s) that the claimant held if relevant to the claimant's claims or respondent's defenses.

i. Documents showing the claimant's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefits summary plan descriptions, and summaries of compensation.

j. Documents concerning investigation(s) of any complaint(s) about the claimant or made by the claimant, if relevant to the claimant's factual allegations or claims at issue in the arbitration and not otherwise privileged.

k. Documents in the possession of the respondent and / or the respondent's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.

l. Any other document(s) upon which the respondent relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

(3) Information the Respondent must produce to Claimant

a. Identify the claimant's supervisor(s) and / or manager(s).

b. Identify the individual(s) who were involved in making the decision to take the adverse action.

c. Identify individual(s) the respondent believes to have knowledge of the facts concerning the claims or defenses at issue in the arbitration, and a brief description of that knowledge.

d. State whether the claimant has applied for disability benefits and / or social security disability benefits after adverse action. State whether the respondent has provided information to any third party concerning such application(s). Identify any document concerning any such application or any such information provided to a third party.

Jeffrey T. Zaino is the Vice President of the Labor, Employment and Elections Division of the American Arbitration Association in New York. He oversees the operations, business development, and panel of arbitrators for the Labor and Employment Arbitration caseloads in New York.

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You are encouraged to participate in the programs and on the Committees of the Section.
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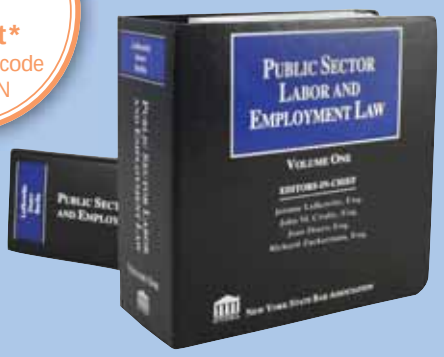

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