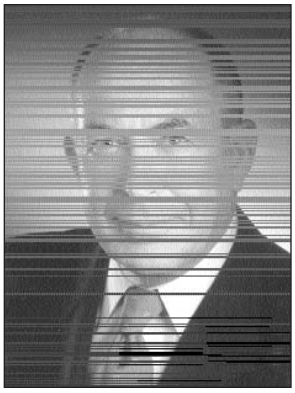
NYSBA WINTER 2002 | VOLUME 27 | NO. 4

L&E Newsletter

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

A Message from the Chair



On October 4-5, 153 attorneys, plus guests, attended the Section's Fall Program on the Cornell University campus in Ithaca, New York. Attendee comments indicate enthusiastic acceptance of the program, noting that it was among the most content-filled and well-presented programs. Program Chair Rich Zuckerman and numerous committee chairs enlisted an outstanding group of presenters who held forth on subjects of current interest to our members. The Plenary Sessions and Workshops elicited lively discussion and afforded opportunities for attendees to engage the speakers. Among the presenters were National Labor Relations Board Associate General Counsel Barry Kearney and Office of Appeals Director Lafe Solomon. Our next program will be at the New Yorker Hotel, Manhattan, on Friday, January 24, 2003, during the New York State Bar Association (NYSBA) Annual Meeting.

The L&E Section's Executive Committee met on October 6. Among other business, we discussed a joint committee report of NYSBA and the Association of the Bar of the City of New York's Committee on Legal Education and Admission to the Bar. The report urged a pilot program which would admit to the New York State Bar graduates of New York State law schools who successfully complete a program of public service in the New York courts, in lieu of taking the written bar examination. The Section's Executive Committee unanimously resolved that it could not, on the basis of the information provided in the joint committee report, conclude that the proposal was justified. We have communicated this position, noting the areas of greatest concern, to the Association's Executive Committee.

The L&E Section's Committee on Public Sector Book, and its Co-Chairs Jerome Lefkowitz, Gary Johnson, Mel Osterman and John Crotty deserve recognition for their efforts in successfully bringing to print the 2002 Supplement of *Public Sector Labor and Employment Law*, NYSBA's authoritative source on public employee labor law in New York State. The editors would appreciate your feedback on the usage and value of the book's later chapters dealing with civil service law, the state retirement system, and employee discipline.

Inside

The 2002 L&E Section membership directory has just come off the press to be distributed to members. This valuable resource takes considerable work to assemble. Our thanks to Judith LaManna for once again shepherding that project.

Our Section committees have been active and I urge you to participate in your committee, or if you have not joined a committee to do so by contacting the Chair of the committee you may be interested in for further information. I plan to appoint a Membership and Finance Committee Co-Chair who will be responsible for developing and nurturing Section membership, including conducting a membership survey. This position requires a person dedicated to assisting the Section Chair and Executive Committee in shaping a Section that is open and responsive to its members and their professional needs. We are also undertaking a study of *pro bono* needs and opportunities at the state and local level to see if there is a role for the L&E Section in making these opportunities known to our members. I look forward to reporting developments in a future newsletter.

I hope you are able to attend the Section's Annual Meeting, half-day CLE program and luncheon on Friday, January 24, 2003, at the New Yorker Hotel in New York City. It's not too early to mark your calendars and consider the Fall 2003 meeting in Ottawa (September 12-14).

Richard N. Chapman

2003 New York State Bar Association

Annual Meeting

January 21-25, 2003

Labor and Employment Law Section Meeting

Friday, January 24, 2003
New Yorker Hotel

From the Editor

In this edition, continuing the occasional publication of articles by non-lawyers, Michael Welner, a forensic psychiatrist, writes about the implications of a recent Supreme Court decision for workers in psychiatric treatment. Thanks also to Susan Corcoran, with an article about domestic violence in the workplace; John Gaal, for his Ethics Matters column; Gary Johnson, with the bi-yearly PERB report; and Deborah Pagnotta, for her article about diversity.

A recent case in the Appellate Division has decided a question left undecided by the Supreme Court in *Wright v. Universal Maritime Service Corp.*[1]: whether a union may prospectively waive its members' individual statutory rights in a collective bargaining agreement. On June 20, 2002, the First Department ruled in *Garcia v. Bellmarc Property Management*,[2] compelling arbitration of an age discrimination claim under a collective bargaining agreement between Local 32B-32J, SEIU and the Realty Advisory Board. The contract expressly provides for arbitration of claims of violations of the Human Rights Law (Executive Law section 296), among others, and states, "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as sole and exclusive remedy for violations."

The decision in the Appellate Division revisits the tension between two different lines of cases concerning arbitration of labor and employment claims and whether collective bargaining agreements come within the purview of the Federal Arbitration Act (FAA).[3] The FAA first expressed Congress' endorsement of commercial arbitrations in 1925, although the Supreme Court had its doubts over the years about the adequacy of arbitration in resolving statutory claims.[4]

In the context of labor relations, the Court developed a strong policy favoring arbitration of collective bargaining disputes. In *Textile Workers v. Lincoln Mills*,[5] it decided that, under section 301 of the Taft-Hartley Act, parties to a collective bargaining agreement could be required to submit labor disputes to binding arbitration. The Court stressed that grievance arbitration is a substitute, not for litigation, but for a strike; agreeing to arbitrate labor disputes in return for agreeing not to strike was the bargain that was to be enforced by the federal courts.

In 1960, the Court announced that grievance arbitration would be the endorsed method for resolving industrial disputes arising under collective bargaining agreements.[6] An arbitrator's award was to be confined to interpretation and application of the collective bargaining agreement and would be enforceable only as long as it "drew its essence" from the contract.

In the *Alexander v. Gardner-Denver* case in 1974, the Court found that a union's collectively bargained agreement to arbitrate employment claims did not preclude its members from filing a Title VII claim after arbitration of a grievance arising from the same facts. It noted the possibility of conflict between the interests of the union and its individual members and found "there can be no prospective waiver of an employee's rights" because, among other reasons, "waiver of these rights would defeat the paramount congressional purpose behind Title VII."[7]

"The decision in the Appellate Division revisits the tension between two different lines of cases concerning arbitration of labor and employment claims and whether collective bargaining agreements come within the purview of the Federal Arbitration Act."

Beginning in the 1980s, the Supreme Court enforced arbitration agreements in a number of commercial, statutory cases under the FAA.[8] As the Court expanded arbitration to commercial statutes, it created a presumption, based on the language of the FAA, that Congress did not intend to prohibit arbitration of statutory claims unless it was clearly prohibited by the statute in question.

The Court first compelled arbitration of a statutory employment claim under the FAA in 1991, where an individual employee in a non-union setting signed an agreement waiving his rights to a judicial forum.[9] The Court distinguished *Gardner-Denver,* holding that statutory rights in a federal forum could not be waived where a collective bargaining agreement compelled arbitration. Unlike *Gilmer, Gardner-Denver* was not decided under the FAA because the agreement to arbitrate was bargained for in a labor contract.[10] Thus, it found, the law in *Gardner-Denver* was that unions may not prospectively waive the rights of individual members to a judicial forum; the law in *Gilmer* was that vol-

untary agreements to arbitrate statutory claims are enforceable when they are made by individuals who knowingly and voluntarily waive their rights to a judicial forum.[11]

In *Wright v. Universal Maritime Service Corporation*,[12] the Supreme Court was presented with the question of whether a general arbitration clause in a collective bargaining agreement could prevent an employee from bringing a claim under the Americans with Disabilities Act (ADA). The Court found the arbitration clause unenforceable because it did not distinguish between statutory and contractual claims, the agreement did not explicitly incorporate statutory anti-discrimination requirements, and compliance with the ADA was not an express contractual commitment.[13]

"Unions must be wary of claims of the breach of the duty of fair representation and may face tough decisions if majority interests within the union conflict with those of the minority."

The Court recognized the tension between its decisions in *Gardner-Denver* and *Gilmer*, but found it did not need to reach the question of union-negotiated waivers because there was, in fact, no waiver. In *dicta*, Justice Scalia wrote

> whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer, Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.[14]

In 2001, the Supreme Court found that employment contracts are included within the ambit of the FAA.[15] That decision formed the basis of an argument, now answered in the affirmative by the Fourth Circuit and the Appellate Division, that collective bargaining agreements are employment contracts within the meaning of *Circuit City* and, thus, subject to the FAA. Citing *Circuit City*—and its well-known decision in *Austin v. Owens-Brockway*[16]—the Fourth Circuit has found that "since the right to arbitrate is a term or condition of employment, the union may bargain for this right," as well as waive it, on behalf of its individual members.[17] It made no distinction between individual statutory rights and rights that exist as a result of union membership. The Eighth Circuit declined to reach the question.[18] The Second Circuit has not been presented with that question and has decided only whether a negotiated waiver was clear and unmistakable.[19]

The *Garcia* case is the second time the First Department has essayed this question. In 1999, it came to a different conclusion in a similar case involving Local 32B-32J and the Realty Advisory Board.[20] There was a general clause in the contract that prohibited discrimination by reason of race, creed, color, age, disability, national origin, sex or union membership. The company argued that the dispute was governed by the FAA and, therefore, the claim was arbitrable. The court declined to decide the FAA question. Instead, it looked to the language of the agreement and found that it did not meet the standards for a clear and unmistakable waiver.

Subsequently, the parties renegotiated the language of the contract to include violations of specific anti-discrimination statutes. In the instant case, Garcia conceded that the language of the waiver was clear and unmistakable and the contract was covered by the FAA, arguing only that the union could not waive his rights.

The Court held as follows:

> While plaintiff does not concede that such a union-negotiated waiver is enforceable, we hold that it is. '[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum.' *(Circuit City Stores v. Adams*, 533 US 105, 123; *cf. Wright*, *supra* at 79-80; *but cf.*, *Crespo v. 160 West End Avenue Owners Corp.*, 253 A.D.2d 28, 32). *Alexander v. Gardner-Denver*, relied on by the plaintiff as holding that contractual anti-discrimination claims are distinct from statutory anti-discrimination claims, and that only the former can be waived, was not decided under the FAA (*see, Gilmer v. Interstate/Johnson Lane Corp.*) and does not reflect modern Federal policy favoring arbitration.[21]

Time will tell whether other jurisdictions will follow suit. If they do, there are some potential problems for practitioners. Unions must be wary of claims of the breach of the duty of fair representation and may face tough decisions if majority interests within the union conflict with those of the minority. In providing a private forum for statutory claims, the parties may also be required to provide a substantially equivalent forum in which process and remedies parallel those available in the courts.

Finally, there are the practical problems of bargaining to impasse and, in New York State, the conflict with provisions of the Civil Service Law that allow public employees, rather than unions, to elect to opt out of the grievance and arbitration procedure.[22] Each may pose legal challenges that will be interesting to watch.

Janet McEneaney

Endnotes

1. 525 U.S. 70 (1998).
2. 745 N.Y.S.2d 13 (1st Dep't 2002).
3. 9 U.S.C.A. § 1 *et. seq.*
4. *See, e.g., Wilko v. Swan,* 346 U.S. 427 (1953).
5. 353 U.S. 448 (1957).
6. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).
7. *Alexander v. Gardner-Denver*, 415 U.S. 36, 51-52 (1974).
8. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).
9. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
10. *Id.* at 26.
11. *Gilmer,* 500 U.S. at 34.
12. 525 U.S. 70 (1998).
13. *Wright*, 525 U.S. at 76.
14. *Id.* at 76-77.
15. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).
16. 78 F.3d 875 (4th Cir. 1996).
17. *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001).
18. *IBEW Local No. 545 v. Hope Electrical Corp.*, 293 F.3d 409 (8th Cir. 2002).
19. *See, e.g., Rogers v. New York University*, 220 F.3d 73, 75 (2d Cir.), *cert denied*, 531 U.S. 1036 (2000); *Scheiner v. New York City Health and Hospitals Corp.*, 152 F. Supp. 2d 487 (S.D.N.Y. 2001); *Fayer v. Town of Middlebury*, 258 F.3d 117 (2nd Cir. 2001).
20. *Crespo v. 160 West End Avenue Owners Corp.*, 253 A.D.2d 28, 687 N.Y.S.2d 79 (1st Dep't 1999).
21. *Garcia v. Bellmarc Property Mgt.*, 745 N.Y.S.2d 13, 14 (1st Dep't 2002).
22. *See, e.g., Scheiner v. HHC*, 152 F. Supp. 2d 487 (S.D.N.Y. 2001).

Domestic Violence in the Workplace

By Susan M. Corcoran

The good news is that employers have become more prudent and no longer assume violence, including domestic violence, "could never happen" in our offices. Many employers have adopted disaster plans, while others have published zero-tolerance workplace violence policies. While many employers still have not adopted a specific domestic violence policy, family issues cannot be ignored, particularly since they invariably affect the workplace.

Litigation may be the driving force for future changes. With continued skyrocketing jury verdicts in general, employers have no choice but to take action *today* to ensure a safe environment for employee victims of domestic violence and other employees in the workplace, as well as for other individuals who might visit their worksite. Otherwise, an employer risks a whole host of legal and practical problems, including lawsuits for sexual harassment, intentional infliction of emotional distress, wrongful death actions, government citations, adverse publicity and low employee morale and productivity.

Employers' Legal Obligation to Maintain a Safe Workplace for Employees

1. Laws Regulating the Workplace

Under the federal Occupational Safety and Health Act (OSHA),[1] employers have a responsibility to provide a safe and healthy workplace free from hazards likely to cause harm or death. This "general duty" obligation includes preventing workplace violence and creates potential liability for employers that fail to take the necessary precautions against threats and other acts of aggression targeted at an employee. An employer's failure to take steps to meet these obligations could result in civil and criminal penalties, as well as negative publicity.

While OSHA regulations do not specifically address domestic violence, guidelines have been developed to assist employers in thinking about ways to eliminate or reduce worker exposure to conditions that might lead to death and injury from violence. Specifically, guidances have been issued containing preventive strategies for dealing with workplace violence in healthcare settings[2] and night retail establishments.[3] While not mandatory, these guidelines provide helpful hints for employers developing effective safety protocols and practices.

2. Exposure to Potential Lawsuits

Aside from governmental regulations, employers are potentially exposed to negligence lawsuits by individuals, including family members, vendors, visitors or others who may be injured in a violent episode in the workplace.

In 1990, a California court ordered a company to pay $5 million to the families of employees who were shot and killed in its offices by an employee's husband. The company's liability stemmed from its *inaction.* It had been told about threats the killer had made against his wife, an employee of the company, but the company never beefed up internal security. This is just one example of how domestic violence can permeate the workplace.

"With continued skyrocketing jury verdicts in general, employers have no choice but to take action today to ensure a safe environment for employee victims of domestic violence and other employees in the workplace, as well as for other individuals who might visit their worksite. "

Similar to the above case, potential victims may seek compensation for their injuries through the courthouse based on common law negligence theories. For example, employers have a common law duty to exercise reasonable care in protecting third parties who might visit the workplace. Once learning that a potentially violent act might occur in the workplace, an employer has a duty to take appropriate precautionary steps to reduce the risk of harm. Given the alarming rise of violence in the workplace, carrying out this duty is essential to minimize exposure to a variety of negligence actions, including negligent hiring, retention, and supervision. In addition, employers risk wrongful death actions and separate claims for intentional infliction of emotional distress by the employee victim.[4]

Employers' Legal Obligation to Maintain a Harassment-Free Workplace for Employees

Laws Regulating the Workplace

1. New York City's Human Rights Law

New York City's Human Rights law specifically prohibits employment discrimination against actual or perceived victims of domestic violence.[5] In enacting this law, New York City's Council recognized the increase in

incidents of domestic violence, and its impact on the workplace.

2. Title VII and New York Human Rights Law

Under Title VII and the New York Human Rights Law, depending on the facts, domestic violence in the workplace could be viewed as a form of sexual harassment. For example, under the hostile work environment theory of sexual harassment, a company could be found liable for the conduct of a third party, such as a non-employee spouse, if the company knew or should have known about alleged harassment in the workplace, and failed to take immediate and appropriate corrective action. Also, under applicable federal and state law, an individual who complains about being sexually harassed cannot be subject to any retaliation or reprisal for bringing forward such a concern.

As an illustration, consider the following example: At home, Mary is a victim of domestic violence. While she is at work, Mary's spouse faxes her love letters, containing sexually explicit language. She tells her boss that these faxes make her feel uncomfortable, are affecting her ability to concentrate at work, and she does not know what to do. Mary's employer now has the legal obligation to investigate her concern, and determine what, if any, corrective measures should be taken to prevent its reoccurrence. *Inaction* could lead to liability. Further, Mary's employer cannot terminate her or subject her to any form of retaliation for bringing forward her complaint of sexual harassment. Rather, the company should assure Mary that she will not suffer any adverse action in bringing forward her concern.

3. Americans with Disabilities Act and Its State and Local Counterparts

Consider a separate example, the individual who is known to be undergoing therapy because of being traumatized by domestic violence. If the individual requests an accommodation such as, for example, time off to attend a therapy session, an employer must fully understand its obligations under disability-related laws. Open communications and documentation of the interactive process required for exploring appropriate accommodations will be the key to a successful defense in the event the victim later alleges a failure to accommodate.

4. Exposure to Potential Liability

Employers therefore need to be concerned about potential discrimination suits by victims of domestic violence alleging that they somehow have been harassed or discriminated against in the workplace and the company failed to take appropriate, corrective action upon their raising their concerns. The victims may seek compensation for any emotional distress they may have suffered as well as punitive damages against the company.[6]

In defending a sexual harassment claim, the U.S. Supreme Court (in *Faragher v. City of Boca Raton*[7] and *Burlington Industries, Inc. v. Ellerth*[8]) reaffirmed that an employer can avoid liability (*except* when a supervisor engages in the alleged harassment and directly misuses his or her authority to cause a tangible job-related harm to an employee), if it proves, as an affirmative defense, that it had a program to prevent sexual harassment, including an effective complaint procedure, and the employee unreasonably failed to utilize it. Other courts have applied this same principle to harassment based upon other protected bases.[9] Given the Supreme Court's—and subsequent courts'—decisions, to build an effective defense, employers should take steps to ensure they have: (a) *a clearly communicated written policy prohibiting all forms of sexual harassment, and—separately—a policy covering all other forms of harassment;* (b) *a credible complaint resolution procedure, including a well-defined prohibition against retaliation; and* (c) *a comprehensive program for training supervisors and employees on the contents of these policies and use of the complaint procedure*.

"To avoid potential defamation claims, employers should limit disclosure of information about alleged victims of domestic violence to those who need to know. "

Other Important Legal Obligations

1. Victim Assistance/Witness Leave

New York employers are required to provide an employee with unpaid time off to appear as a witness, consult with the District Attorney, or to exercise his or her rights as provided in the Criminal Procedure Law, the Family Court Act, and the Executive Law. The employee must give his or her employer prior day notification.[10]

2. Family and Medical Leave

Under federal law, employees who work for employers with 50 or more employees are eligible for up to 12 weeks of unpaid job-protected leave for their own serious health condition (among other reasons) if: (1) they have worked at least 1,250 hours in the last 12 months; *and* (2) they are employed at a worksite that has 50 or more employees within 75 miles.[11] A victim of domestic violence who is absent because of an injury qualifying as a serious health condition might be eligible for job-protected leave.

3. Confidentiality

To avoid potential defamation claims, employers should limit disclosure of information about alleged victims of domestic violence to those who need to know. Also, under federal law (e.g., the Americans with Disabilities Act), any medical information received must be placed in a *separate* confidential file, apart from the employee's personnel file, and disclosure is limited by law.[12]

"Domestic violence in the workplace remains a reality. Anticipate further legislative initiatives as awareness continues to increase and more employers understand that homeland security has a different meaning to victims of domestic violence."

4. Statutory Benefits

Depending on where any injuries may have occurred, a victim of domestic violence could be eligible for workers' compensation or short-term disability benefits. The individual might be eligible for unemployment insurance if he or she was forced to leave a job because of the abusing partner's actions (e.g., quit job because of harassment at work by an abusing partner).[13]

New York State Legislation

To assist employers to be proactive against the harmful effects of domestic violence in the workplace, New York State passed legislation in 1997 creating a task force within the Office for the Prevention of Domestic Violence to develop a model workplace policy.[14] The model workplace policy has been finalized. Specific items incorporated as part of the model policy include a corporate statement identifying domestic violence as a workplace issue, educating the workforce on currently available community resources, reassurances of job security to victim employees, and protocols to ensure workplace safety. Of course, employers remain free to adopt their own domestic violence policy.

Into the Millennium and Beyond

Domestic violence in the workplace remains a reality. Anticipate further legislative initiatives as awareness continues to increase and more employers understand that *homeland security has a different meaning to victims of domestic violence*. Look for more employers, large and small, to take proactive steps to assist victims of domestic violence in the workplace and ensure a safe workplace for all. Domestic violence in the workplace has followed, and will continue to follow, us into the millennium.

Endnotes

1. Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 (1988 & Supp. V 1993).
2. U.S. Dep't of Labor, Occupational Safety and Health Admin., *Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers,* OSHA 3148 (1998) *at* http://www.osha.gov/SLTC/workplaceviolence/guideline.html (last modified Jul. 1, 2002).
3. U.S. Dep't of Labor, Occupational Safety and Health Admin., *Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments,* OSHA 3153 (1998) *at* http://osha.gov/Publications/osha3153.pdf (last modified Jul. 1, 2002).
4. Generally speaking, employees cannot sue their own employers on a negligence theory because Workers' Compensation benefits are the exclusive remedy for employees injured on the job. *See* N.Y. Workers' Comp. Law § 11 (McKinney 1999).
5. N.Y.C. Admin. Code § 8-107.1 (2001).
6. The remedies potentially available to the would-be plaintiff under the Civil Rights Act of 1991 and/or New York's Human Rights Law include back pay, front pay, compensatory damages (which are subject to a cap under federal law, but unlimited under state law), punitive damages (subject to a cap under federal law, but not available under state law), and attorneys fees (federal law only). Under New York City's Human Rights Law, the potential remedies are *all* of the foregoing, with *no* caps on damages.
7. 524 U.S. 775 (1998).
8. 524 U.S. 742 (1998).
9. See *Richardson v. N.Y.S. Dep't of Corr. Serv.*, 180 F.3d 426, 440-443 (2d Cir. 1999); *McCoy v. City of N.Y.*, 131 F. Supp. 2d 363, 371-372 (E.D.N.Y. 2001); *Breland-Starling v. Disney Publ'g*, 166 F. Supp. 2d 826, 835-836 (S.D.N.Y. 2001).
10. N.Y. Penal Law § 215.14 (1996).
11. Family and Medical Leave Act of 1993, 29 U.S.C. §2611 (1995).
12. Americans with Disabilities Act § 102, 42 U.S.C. § 12112(3) (Mc Kinney 1991).
13. N.Y. Labor Law § 593(1) (McKinney 2000).
14. N.Y. Executive Law § 575(9) (McKinney 1997).

Susan Corcoran is a partner with Jackson Lewis LLP, located in the firm's White Plains office. **Special thanks to Cristina Fahrbach for her assistance.**

The Supreme Court's 2002 ADA Interpretations: What *Chevron v. Echazabal* Means for Workers in Psychiatric Treatment

By Michael Welner, M.D.

The Americans with Disabilities Act created protections for many with disabling illnesses. The ADA's promise as a legal safety net encouraged many who have been psychiatrically treated and encounter stigma on the way to reintegration. The reintegration utopia of universal accommodation has since yielded to realism, even as illnesses respond to treatment better than ever before.

Chevron v. Echazabal arose when Mr. Echazabal was laid off from his refinery job because Chevron felt that the position would pose a "direct threat" to his own health. The U.S. Supreme Court held that an employer could, under the ADA, raise risk to the employee's health as a defense to compliance with the ADA.

"Whether it is the self-help societal trend, or success stories of recovery, it is now increasingly clear that maintaining structure in a patient's life, including through work, is ultimately therapeutic."

Is this paternalistic? Does the *Echazabal* decision have especially chilling effects on those with psychiatric conditions, given the often-erroneous stereotypes that erode confidence in the mentally ill as capable employees? Should *Echazabal* have such an effect?

The obvious focus for fallout is the once-suicidal worker. Especially if the previous suicidal attempt was severe, others have established reasons for being paternalistic. Furthermore, the tag of instability that attaches to a suicidal history connotes an inherent unfitness to perform essential functions of most jobs. Even if the job is low stress, who needs an "unstable" employee?

The Court sought to protect against paternalism by noting the EEOC qualification that the "direct threat must be based on a reasonable medical judgment that relies on the most current knowledge, and the best available objective evidence." What happens, however, when the employee has already brought a note from a psychiatrist excusing him from work with the suggestion that the employee cannot handle the job?

Compounding the potential for a struggle with paternalism is, indeed, the inclination to endorse patients' apathy and involution by facilitating their withdrawal from work, and perhaps even sustaining it until the psychiatrist feels the patient can handle it. In certain respects, this reflects the good practice of responding to a patient's assessment of his own potentials and vulnerabilities. In some instances, however, the patient may be wrong, and the physician may do better by pushing the patient to return to the workplace as a therapeutic necessity.

In practice, the latter scenario is unusual; for some, to expect the suffering patient to summon the function to return to the workplace and all its stress would be insensitive. Direction to patients is discouraged within the mental health community; as facilitators, psychologists and psychiatrists are trained to work with someone from the patient's frame of reference. Furthermore, prodding the patient to return to the workplace might trivialize the very condition whose severity we want our patients to be mindful of. More cynically, such an approach makes poor risk management sense, given the obvious risk to liability if it appears that the therapist or psychiatrist did not take the patient's illness seriously enough. In short, psychiatry just can't help but be paternalistic. Such attitudes may have far-reaching, if unintended, effects on employers under *Echazabal;* the medical opinion is a perfect ruse for dismissing and prejudice disguised as paternalism. After all, the doctor said. . . .

Whether it is the self-help societal trend, or success stories of recovery, it is now increasingly clear that maintaining structure in a patient's life, including through work, is ultimately therapeutic. Withdrawing the implicit pressures and structures of work demands erodes financial security, structure to the day, social exposure (for many), even opportunities for creative expression and sense of accomplishment. Unless fully replaced, the void may exacerbate and, eventually, eclipse the problems of depression or hopelessness.

Now that employers can more readily exploit the psychiatric doctor's note to withhold hiring or to terminate rather than accommodate, psychiatrists may have to resist the instinct for more immediate compassion in favor of protecting the patient's rights to warrant accommodation for a psychiatric condition.

Echazabal raises important lessons for human resources professionals at the point of disabilities and workers' compensation claims. The Court endorsed the need for "particularized enquiry into the harms that an employee would face," in denying employment. Such examination should be done at the stage when the employee has been recommended to maintain absence.

Companies that understand why medical opinion specifically recommends absenteeism may resolve the question, "Is the suicidality specifically exacerbated by being at work? Why is that?" Later, this information may be pivotal in resolving whether that employee is at risk to self, and, if so, whether that risk relates to the job or is actually alleviated by work.

"Echazabal's greatest fallout may therefore be to bring the same 'heal thyself' pressures to the greater workforce that we see in professions such as the police, where an admission of mental illness doesn't stigmatize as crazy so much as it ends careers with a designation that sounds a lot like, 'direct threat.'"

All of this seems, unfortunately, to enhance the challenges of successfully integrating some patients who have periodic bumps in the road, particularly when those conditions do have direct connection to their work. The traumatized Lower Manhattan employee who suffers incapacitating flashbacks when returning to Lower Manhattan may be at risk to self. Does *Echazabal* protect companies from claims growing out of employees' efforts to secure transfer to less provocative workplace locations within the same company?

A financial services employee who succumbs to chemical dependency verifies his risk to self on the occasion of his first arrest for driving under the influence, if not sooner. Will we see layoffs and firings more readily for the chemically dependent employee? Certainly public safety and transportation workers demonstrate risk to others with chemical abuse. The Court's willingness to uphold the risk-to-self ADA defense may prompt many companies to take a far less understanding approach to employees who were dispatched to three to six months of rehab.

Perhaps the Court's key protection against a sensitivity sea shift is found in its endorsement of the EEOC's resolution that the direct threat defense must consider the imminence of the risk and the severity of the harm portended. Based on how readily stigma about the mentally ill may foreclose companies' inclinations to accommodate, especially in a tight job market with lots of talent available, further clarification will be needed about what threshold of threat is severe enough to invoke the direct threat risk. Resolving this latter point will have significant implications for psychiatric treatment of the employed; not only in how doctors communicate to the employer, but in the readiness of workers to seek psychiatric help.

Echazabal's greatest fallout may therefore be to bring the same "heal thyself" pressures to the greater workforce that we see in professions such as the police, where an admission of mental illness doesn't stigmatize as crazy so much as it ends careers with a designation that sounds a lot like, "direct threat."

Dr. Michael Welner is a forensic psychiatrist and Clinical Associate Professor of Psychiatry at New York University School of Medicine. Dr. Welner has consulted to plaintiff and defense in a variety of matters, including workplace risk, assessment of ability to perform essential functions, accommodations for employees infirmities, occupation disability claims, and personal injury claims arising from discrimination and harassment. Dr. Welner is Chairman of The Forensic Panel, the first forensic practice in America which provides peer review in its consultations. He can be reached at rwelner@forensicpanel.com.

"Three White Ducks and One Brown": Diversity at the Workplace

By Deborah Volberg Pagnotta

Every day, as I drive my two-year-old daughter to day care, we pass a little pond. She shouts excitedly, "duck, duck!" And every day, I say to her, "Yes, three *white* ducks and one *brown* duck."

We all engage in "discriminatory" behavior. Human beings are wonderfully equipped to categorize and evaluate other beings and things based on visual, verbal, physical and social cues.[1] These capabilities are essential to our survival: we must distinguish who and what are friend or foe. Yet, we often lack "cultural competence," that is, the understanding of cultural characteristics of people other than those we have grown up with.

The concept of culture extends well past the traditional "protected classes" (e.g., race, religion, national origin, gender, age). Numerous other differences, including socio-economic class, educational background, childhood experiences, regional origin, political and other organizational affiliations, even birth order, all may influence our attitudes and perceptions. At the workplace, additional factors may pertain: seniority, experience, position, training, salary, belonging to a union, being full or part time, permanent or temporary.

We each, according to our unique constellation of experiences (our "culture"), have unstated assumptions about a host of matters relating to behavior. These differences manifest themselves in myriad ways: language and communication; appearance and dress; time and time-consciousness; rewards and recognition; roles and responsibilities; values and norms; sense of self and of space; mental processes and learning styles; beliefs, values and attitudes; even food and eating habits. Culture, in subtle and not-so-subtle ways, informs all of our interactions. In our personal lives, we ourselves determine with whom we will socialize and communicate, and most often it is people with whom we already feel comfortable—thus, cultural differences carry minimal significance. However, at the workplace we frequently must interact with myriad individuals, and in situations not of our own choice and often not of our own culture. Moreover, behavior at the workplace is governed by federal, state and local statutes prohibiting "discrimination."

The United States is experiencing dramatic demographic changes, as reflected in Census 2000.[2] The tidal wave of employment litigation which we have seen since 1991 emanates, in some small part, from the friction resulting from an increasingly diverse workforce. At the workplace, misunderstanding and miscommunication resulting from differing cultural expectations and practices can lead to the courthouse.

Employment and labor lawyers necessarily must develop cultural competency. To best serve your clients, it is critical for you, in every aspect of your practice, to understand the role of culture differences, and the problems they may cause. This includes how you: assess a potential client; mediate; negotiate; engage in discovery and motion practice; prepare clients for depositions and trial; assess the merits and value of a case; evaluate witnesses; select a jury; settle and try a case. While discussion of cultural differences fills books, following are some brief illustrations of certain basics. (N.B. References to cultural inclinations or beliefs are general, and do not mean that any person of that background necessarily fits that picture. However, the reality is that cultures are defined by differences.)

Why Should I Care?

Valerie, a female lawyer, warmly greets her new client from Korea, Lee Sung Chu: "Hi, Mr. Chu" she smiles broadly, firmly shaking his hand and looking directly into his eyes. During the course of the meeting, she asks him, "You're not from North Korea, are you?" "Yes, of course," he replies.

What are the cultural clashes in this short interaction? Korean surnames precede given names: his last name is Lee, not Chu. In Korean culture, excessive smiling signals shallowness or thoughtlessness: Valerie's smiling may be inappropriate. Korean women typically do not offer a handshake in greeting. Grammatically in Korea, people use a "yes" when they agree with the literal meaning of the question, regardless of whether the questioner uses a positive or a negative sentence; in fact, Mr. Lee is from South Korea.[3] While Americans favor a firm handshake, Koreans prefer a gentle handshake; Valerie's strong grip may be perceived as overly aggressive. In Korea, her direct eye contact might be considered intimidating or disrespectful. And the list could go on. And these are only Valerie's inadvertent missteps.

Mr. Lee also might unwittingly offend Valerie, perhaps by laughing when she gently tells him that a legal action must be delayed because of a colleague's death on 9/11.[4] Along with several other Asian cultures, Koreans may laugh to cover up embarrassment, anger or surprise. And so on. The moral is not that you should understand every possible culture, but that you should

be alert to the potential for miscommunication through a broad spectrum of behavior. While sometimes the misunderstanding is simply funny, often there could be serious consequences.

Visual Behavior

You interview a 19-year-old potential witness, Marie. During the interview, you feel uncomfortable and impatient and decide not to use her testimony. Later, you identify the source of your discomfort—Marie would not make eye contact.

Consider this: Marie is Native American. In her culture, it is traditionally considered respectful to avoid eye contact with a person in authority.[5] Far from being a non-credible witness, Marie may, with coaching, provide excellent and competent testimony.

Visual cues may differ dramatically from culture to culture. In the "normative" United States culture, we generally understand direct eye contact to establish credibility. During a conversation, if the other person repeatedly looks away or down, we assume either disinterest or falsehood. Yet, in numerous other cultures with large communities in the U.S., direct eye contact with a person in authority is considered to be disrespectful.[6] A fire chief told this writer of an incident in which a young student, "Khalil," was suspected of arson and questioned. To his interrogators, he evidenced clear signs of guilt, including failure to make eye contact, profuse sweating despite the cold weather, and "mumbling." Fortunately, said the fire chief, the real arsonist was apprehended just before this student was charged. The explanation for "Khalil's" behavior? He was Pakistani: in his culture, one does not make direct eye contact with law enforcement officials; he was sweating heavily because he was terrified, based on his family's experiences, that he would be physically beaten by his questioners; and, finally, he spoke softly as a sign of respect, in his culture.

Verbal Behavior

An African-American employee is asked to "fetch" an item by a white coworker.[7] In the context of the troubled history of race relations in this country, with the attendant meaning of "Stepin Fetchit," the African-American woman is very offended.[8]

The coworker had no intent at all to offend. She simply was using a word perfectly acceptable in many other English-speaking environments. However, certain words, phrases and concepts are culturally loaded, carrying great significance to one person and none to another. For example, in August 2002, Target Stores, after public outcry, apologetically recalled a line of their young men's wear emblazoned with "88," a neo-Nazi shorthand for "Heil Hitler." By contrast, in Chinese communities, the number 8 is considered very lucky (in Mandarin it sounds very similar to the word for "prosperity").

Verbal styles differ too. Some cultures tend to use more formal styles, at least initially. In Asian, African-American and even German communities, first introductions use honorifics: "this is Dr. ABC, Mrs. DEF, and the Rev. GHI," rather than the more casual "Deb, Janie and Pete." Immediately using a first name, even diminutizing it, may communicate not the intended friendliness, but disrespect.

Even more subtle but significant cultural differences occur in speech. Latin and Asian cultures tend to use "high context," more indirect communication, whereas Northern and Western cultures tend to use "low context," more explicit communication.[9] High context communication assumes that the recipient already knows much of the requisite information, and very little is in the explicitly transmitted part of the message. Low context communication is just the opposite; that is, the mass of the information is verbally made explicit. The former places value on relationships and unspoken assumptions, in contrast to the latter which depends more on visible and controllable facts. When two individuals with different styles interact, the low-context communicator looks swiftly to "get to the bottom line," as the other seeks to establish a relationship first. Both end up frustrated and annoyed.

Physical Behavior

Sean Kelly has accused a coworker, Mr. Majid, of sexual harassment. Mr. Majid is Middle Eastern. Mr. Kelly states that Mr. Majid, with whom he had initially been friendly, consistently stood too close and made unwanted physical contact by putting his arm around Mr. Kelly.

Chances are that Mr. Majid was acting in a nonsexual manner, according to his cultural background. In Middle Eastern countries, people stand much closer to each other than do Americans.[10] In the Middle East, two men draping their arms around each other or even holding hands in public is unremarkable, simply signaling friendship. In the U.S. that same public interaction generally would imply a gay relationship.

Physical behavior differs culturally in many other ways, including whom and how we touch and gestures we use. Circling the thumb and forefinger in the U.S. generally means "A-OK," but to Japanese it is a symbol for money, to the French it means "worthless" and to Brazilians, Germans, and Russians it means anus or vagina. (In 1952, then-Vice President Nixon nearly caused an international incident when he flashed this gesture with both hands to a crowd in Brazil.) Even the frequency with which we touch during casual conversations is culturally influenced.[11] In 2001, an episode of a very short-lived TV sit-com, the "Fighting Fitzgeralds,"

elicited laughs (or at least a laugh track) when one of the Irish-American characters joked that the last time his father had hugged him was at a wake. Irish-Americans reportedly feel less comfortable with frequent physical contact.

Communication Styles

Other cultural differences include not only how we talk and how we listen but the importance we place on particular topics, how we seek to persuade, how we expect a conversation to proceed, how we make decisions, the development of personal relationships, the observation of status and protocol. In the U.S., for example, we prefer a systematic and orderly approach to problem solving, whereas the Japanese prefer "haragei," circling around a subject in order to get a holistic view.[12] To a Caucasian negotiating a settlement it may appear, incorrectly, that his Japanese-American counterpart is trying to avoid an issue. Yet, many cultures are holistic, requiring all issues to be discussed at once with no decisions made until the end.

The vivid differences in cultural negotiation styles have been amply studied. Assume an informal negotiation among an American, an Arab and a Russian coworker. Research has shown that the American will appeal to logic, the Arab to emotion and the Russian to ideals. The American will make small concessions at first, the Arab all the way along, and the Russian few or none. The American takes deadlines very seriously, the Arab more casually and the Russian ignores them.[13] Outcome? The course of negotiation will not run smooth.

Employment Law Considerations

It is not necessary to understand every aspect of every culture. However, the practice of employment law is fraught with issues of cultural diversity, from the procedural to the substantive aspects, and from the ridiculous to the sublime.

Procedurally, cultural diversity is an issue from the minute you meet a potential client. In choosing clients, you evaluate their demeanor, their credibility, their appearance: Can I work with this person? Are they believable? Are they sympathetic? Are they defendable? You base those assessments on express and implicit cultural assumptions. As the case moves forward, you consistently must make strategic choices, into which you will factor cultural standards. If you make an initial settlement demand, will it be significantly higher than your bottom line figure or very close to it? How do you assess the counter-offer (if there is one)? This will depend on a constellation of factors, including your own experiences, your client's preferences and your opposing counsel, all culturally bound. When you depose a witness, how do you approach them? Do you want them to like you or not? Do you want them to talk or not? Who shall comprise your jury? What's the theme of your case? Do you base it on logic, emotion or ideals? How do you structure your closing argument?

Cultural sensitivity is necessary also in the substantive arena. For example, analysis of a harassment claim requires an understanding of the perspectives of the participants in the interaction. Under *Harris v. Forklift Systems, Inc.*,[14] when determining whether a hostile work environment exists, the harasser's conduct must be evaluated not only from the objective perspective of a "reasonable person" but from the perspective of a "reasonable victim." A "reasonable person" of 73 may have a very different perspective than a "reasonable person" of 35. Similarly, the reasonable perspective of a victim who is Mormon, a wife, a mother and supervisor may be strikingly different from that of a victim who is transgendered, agnostic, HIV-positive and a union rep. It is up to the lawyers to provide a complete picture to the court; therefore you must be able to tease out and articulate the different perspectives.

In the end, in evaluating cultural differences, remember the fluidity of the subject. Heed the words of Maurice Maeterlinck (Nobel Prize in Literature, 1911):

> The decent moderation of today will be the least human of things tomorrow. At the time of the Spanish Inquisition, the opinion of good sense and of the good medium was certainly that people ought not to burn too large a number of heretics; extreme and unreasonable opinion obviously demanded that they should burn none at all.

Endnotes

1. Social and biological sciences recognize that all humans categorize things (e.g., gender, age, color), and are also predisposed to evaluate things (e.g., positive or negative, friendly or unfriendly). *See, e.g.*, A.G. Greenwald & M.R. Banaji, *Implicit social cognition: Attitudes, self-esteem, and stereotypes*, Psychological Review, 102, 4-27 (1995).
2. For example, the number of Americans of Hispanic or Latino origin jumped by 58 percent over the past decade, to 12.5 percent of the total population. African-Americans climbed to 12.9 percent of the total, an increase of about 16 percent. Asian-Americans have almost doubled their presence since 1990, to 4.2 percent of the total population. In 1970, one in twenty U.S. residents were either foreign-born or first-generation immigrants. Now the ratio is one in five.
3. *See* Yong Song, *Yes and No* available at http://leo.stcloudstate.edu/kaleidoscope/volune1/yesorno.html.
4. After the 1992 riots in Los Angeles, when over 2,200 Korean businesses suffered about $400 million in damage, attention focused on pre-existing tensions between the Korean and African-American communities. African-Americans complained,

(continued on page 16)

Scenes f

Labor and Employ

2002 Fall

October
The Stat

**The Seven Tests of Just Cause:
Still Relevant in Today's World?
Bruce Millman, Allyson Belovin
Howard Edelman**

Jeff Shapiro and Elayne Gold

**What Labor an
Lawyers Need t
e-learning and
Robert Lipman
Stuart M. B
Senior Referen
Cornell IL**

**Hot Topics in Traditional
Labor Law
Barry Kearney, Dan Silverman, Lafe Solomon
Eve Klein**

**Merrick Rossein,
Secretary-Elect**

Linda Castilla ar

FROM THE

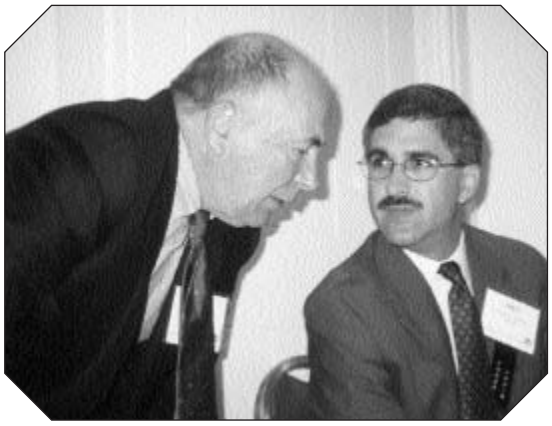
...yment Law Section

... Meeting

...4-6, 2002

...ler Hotel

...d Employment
...o Know About
...d the Internet
... (l) assisted by
...asefsky (r)
...ce Librarian—
...R Library



Dick Chapman and Rich Zuckerman
Section Chair Program Chair

Enron's Impact on Employee
Benefit Plans
Mark Brossman, Martin Ween
Dan Campbell, Bill Frumkin

...nd Cathy Teeter

It's Just Hard to Say Goodbye—
Withdrawal of Recognition and
Decertification under the NLRA
since *Levitz Furniture* and
Allentown Mack
Mark Pearce

Ethical Issues and
Severance Agreements
Peter Shapiro, Alan Koral, John Gaal
Mimi Satter

(continued from page 13)

inter alia, that the Korean store owners were disrespectful, not making eye contact with customers, not smiling and not making physical contact. In the Korean culture, these are not disrespectful actions; to the contrary, they are respectful.

5. *See* Jeanne Connors, Ph.D., *Cultural Diversity in the Classroom: Reaching Out to Native American Students*, available at http://www.wcer.wisc.edu/ccvi/pubs/publication/archive/newsletter/Aug1996_SpEd_SettingStage/Native_Americans_V1_No1.html.
6. "American, Canadian, British, Eastern European, and Jewish cultures favor 'face-to-face' relationships. Hispanic women may often hold eye contact longer than others, even with strange men. But many Asians, Puerto Ricans, West Indians, and African-Americans tend to avoid such direct eye contact." Roger E. Axtell, Gestures: The Do's and Taboos of Body Language Around the World 67 (John Wiley & Sons, Inc., 1998).
7. *When Words Go Too Far: How To Handle Offensive Talk at the Office*, at DiversityInc.com.
8. Stepin Fetchit was an African-American actor, who apparently came to Hollywood as a member of a comedy team known as "Step and Fetch It." Using the names Stepin Fetchit, Gummy and others, he essentially performed the same movie roles of a "dialect-speaking, slump-shouldered, slack-jawed character. . . ." Daniel J. Leab, From Sambo to Superspade: The Black Experience in Motion Pictures 86 (Boston: Houghton Mifflin, 1976).
9. E. T. Hall, Beyond Culture (Garden City, NY: Prentice-Hall, 1976).
10. As a general rule, for example, Asians and people from some African cultures stand quite far apart, as much as three feet. People from the Middle East who are of the same gender are likely to stand quite close to each other (less than 18 inches). On the other hand, Americans with European backgrounds are somewhere in between, standing at arm's length. The exact distance depends on the type of relationship with the other person—the more personal the association, the closer the speakers stand to each other.
11. A researcher observed conversations in several different countries and counted the number of casual touches (of self or of the other person) per hour. The results: San Juan, Puerto Rico, 180 per hour; Paris, 110 per hour; Florida, 2 per hour; London, 0 per hour. Ken Cooper, Nonverbal Communication for Business Success (Amacom, Division of American Management Associations, 1979) (HF5386 .C78).
12. *Haragei*: Most dictionaries define it as the verbal or nonverbal act one utilizes to influence others by drawing upon one's power of accumulated experience in attempt to solve a mutual problem. *Haragei* enables people to reach mutual understanding without confrontation.
13. *See Three Common Negotiation Styles*, available at http://www.andrews.edu/SBA/extension/BSAD560/Negotiation.html.
14. 510 U.S. 17 (1993).

Deborah Volberg Pagnotta, Esq., is President of Interfacet, Inc., which trains employers and employees on sexual harassment, cultural diversity and other employment issues; conducts neutral fact-findings; and mediates disputes. She can be reached at www.interfacet.com.

For Your Information

The New York City Chapter of the Industrial Relations Research Association will be holding its dinner meeting on January 23, 2003, the evening before the Section's Annual Meeting in New York City. All Section members are welcome to attend. The meeting will be at the Williams Club, 24 E. 39th Street, between Park and Madison Avenues, beginning at 5:30 p.m. You can get more details and make reservations in January by calling (212) 769-8105 or sending an e-mail to nyirra@aol.com.

Member News in Brief

Mara Leventhal has joined the **Gregory P. Joseph Law Offices** of Manhattan as an associate of the firm. She is a graduate of Dartmouth College and New York University Law School and was a clerk for the Hon. Jed Rakoff of the Southern District of New York. She was formerly associated with Fried, Frank, Harris, Shriver & Jacobson.

Donald J. Budmen has become a partner in the firm of **Ferrara, Fiorenza, Larrison, Barrett & Reitz** of East Syracuse. Mr. Budmen, a graduate of SUNY Oneonta and Cornell Law School, was previously a partner at Bond, Schoeneck & King, where he was the chair of the School Law Practice Group and Co-Chair of the International/Immigration Law Practice Group. The firm also announces that **David G. Maestri** has become an associate. Mr. Maestri, who previously represented clients in employment litigation matters, is a graduate of Boston College and Syracuse University College of Law.

Ethics Matters

By John Gaal

Q I was employed as in-house counsel until my recent termination. I am contemplating commencing an action against my former employer as a result of that termination. In order to establish my claims, however, I need to rely on certain "confidences" and "secrets" I obtained in the course of my employment. Is that permissible?

A The maintenance of a client's "confidences" and "secrets" is one of the greatest demands placed on an attorney under our traditional rules of professional responsibility. As a result, disclosure of that information is sharply restricted.

The ABA's Committee on Ethics and Professional Responsibility recently dealt with this very issue—a former in-house attorney's use of client secrets to establish an employment claim—in Formal Opinion 01-424. Relying on the provisions of the Model Code, the Committee concluded that it would be permissible for an attorney in the above circumstances to reveal those client secrets or confidences reasonably necessary (but only to the extent necessary) to establish her employment claim.

It is important to note, however, that this ruling is based on the specific language of the Model Rules. Model Rule 1.6(b)(2) permits a lawyer to reveal information relating to representation of a client where reasonably necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . ."[1] Even then, however, the lawyer must prevent the unnecessary disclosure of confidential information and should consider, as appropriate, requesting that a court seal the record of the proceedings or otherwise resort to *in camera* review of protected materials. The Committee concluded that a retaliatory discharge or similar claim brought by an in-house attorney against her former employer is a "claim" within the meaning of Rule 1.6, making disclosure permissible.

This holding, however, must be contrasted with the same situation arising under the provisions of the New York Code of Professional Responsibility. While New York's Code and the Model Rules share many similarities, there are also significant differences between these sets of rules that can lead to very different results. The Code analogue to Model Rule 1.6 is DR 4-101 (C). This DR provides that a lawyer may reveal client confidences or secrets "necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct." Thus, while the Model Code permits disclosure as reasonably necessary to establish any "claim," the New York Code only permits disclosure to establish a claim for fees or for defensive purposes.

The impact of this difference was recently highlighted in *Wise v. Consolidated Edison Company of New York*.[2] In that case, the Court dismissed in their entirety the employment claims of the plaintiff/former in-house attorney against his former employer because "permitting the action to go forward would entail the improper disclosure by plaintiff . . . of client confidences. . . ." Clearly the plaintiff's claims did not relate to the collection of a fee, and the Court concluded that "[p]laintiff's affirmative claims against defendant for damages, grounded in the theory of wrongful discharge, do not fall within the defend 'against an accusation of wrongful conduct'" exception of DR 4-101 (C).

Endnotes

1. *See also Burkhart v. Semitool, Inc.*, 300 Mont. 480 (Mont. 2000).
2. 282 A.D.2d 335 (1st Dep't), *appeal denied*, 96 N.Y.2d 717 (2001).

John Gaal is a member of Bond, Schoeneck & King, PLLC in Syracuse, New York.

Recent Taylor Law Developments

By Gary Johnson

This article reviews the substantive decisions issued by the New York State Public Employment Relations Board (PERB or the "Board") between April and October 2002, and relevant legislation enacted and approved during that period. Readers should always refer to the full text of the decisions and the legislation noted.

Protected Activities: *Weingarten* Rights

Do New York's public sector employees have *Weingarten* rights? Reading section 7 of the National Labor Relations Act (NLRA), the Supreme Court's *Weingarten* decision[1] found that an employee who reasonably fears discipline has a right to refuse to submit to an interview to be conducted by the employer without a union representative present. Section 202 of the Taylor Law[2] is the stateside corollary to section 7, but lacks any reference to "mutual aid or protection." Over the years, PERB's Director, Assistant Director, and various administrative law judges had all weighed in on whether New York's public employees enjoyed a similar right under the Taylor Law, but the Board had never had to decide the issue.

Here, there was an allegation that an employee of the New York City Transit Authority made a racial remark to another employee. The employee who allegedly made the remark first completed an incident report in the presence of his union representative. But then the employer, concerned about the representative's influence, locked the employee in an office and required him to complete a second report without the union representative being present. That action, the Board found, violated the employee's right to participate in union activities without the employer's interference. The Supreme Court's rationale in *Weingarten*, the Board said, was based on "the concerted nature of the request for union assistance," not on any particular emphasis on the words "mutual aid or protection" in NLRA section 7. "We find that there is no clearer expression of participation in an employee organization than the request for union representation at an investigatory interview which may result in discipline . . . ."[3]

What should happen, though, if the parties' agreement addresses the issue of union representation, both pre-interview and during the interview, and the charge alleges both an unlawful interference with representation rights and an unlawful unilateral change? Should the Administrative Law Judge (ALJ) defer the charge to arbitration? That's just what the issue was in *State of New York (Division of State Police)*.[4] The union claimed that the employer had denied it access to an employee during an investigatory interview about a "critical incident." The union filed a charge that the employer's conduct violated CSL § 209-a (1) (a) and (d). The parties' agreement had relevant language about employer-conducted interviews. Faced with a question of deferral—and, at that time, with no guidance from the Board on the *Weingarten* issue—the ALJ focused on whether the charge pleaded a viable violation of subdivision "a." He reasoned that if New York public sector employees did not have *Weingarten* rights, then that allegation wasn't viable. After concluding that *Weingarten* applied, he declined to defer the charge. The Board agreed with the decision not to defer, but pointed out that the ALJ had not had to decide whether *Weingarten* applied. The Board said that since other ALJs had already held that *Weingarten* did apply, the charge "set forth a cognizable violation of § 209-a.1(a) of the Act."

Improper Practices: Past Practice

When an employer allegedly makes a change in terms and conditions of employment, the first issue becomes what was the "past practice"? In *State of New York (Department of Correctional Services—Groveland Correctional Facility)*[5] the union alleged that the employer had unilaterally terminated a practice of allowing employees to convert an absence already charged to sick leave to annual leave. The union's prima facie case allegedly showed what the practice was at a single facility in the state correctional system and the nature of the change in that practice. The ALJ denied the state's motion to dismiss at the close of the charging party's case. The Board reversed.

The Board noted that it had previously held that employees of the correctional system are organized within units defined on a statewide basis, not facility by facility. The proof on the union's direct case established at best that employees on the same shift at a single correctional facility had been allowed to convert sick leave accruals into vacation time, but "failed to establish an unequivocal unit-wide practice that all unit employees could reasonably expect to continue." The proof failed on its face.

Improper Practices: Past Practice

When is a past practice not a past practice? At least not when it's equivocal. The union charged that the City of Peekskill unilaterally changed a non-contractual practice of offering dispatching work to police officers on an overtime basis. The city maintained a list of qualified job titles, including dispatchers and park rangers, in the order in which the city would offer them dispatching as

overtime work if a dispatcher's shift was vacant. The record showed that, from 1995 to 2000, the city progressively dropped on-duty police officers lower on the list.

While the facts did not raise an issue about an unlawful transfer of exclusive bargaining unit work, because employees from other units had also done the work for some time, the ALJ found that the city was not off the hook for that reason alone. The order in which overtime is offered, he said, is a term and condition of employment. The city unlawfully refused to bargain by unilaterally changing that order.

The Board reversed the ALJ's decision. The record also showed, the Board said, that for the past 10 to 12 years, the city had changed the procedures for offering overtime dispatching as its staffing needs had changed. In order to prove an unlawful unilateral change in terms and conditions of employment, a charging party has to first show that there was an unequivocal practice that continued uninterrupted for a significant period of time, such that employees could reasonably expect the practice to continue unchanged. The practice here changed so often and to such a degree, that neither was it unequivocal, nor did it create any reasonable expectation that it would continue unchanged. The Board dismissed the charge.[6]

Proof of a past practice was also at issue in *State of New York (Division of State Police).*[7] The union alleged there that the state started a new practice by asserting the right to terminate, without a hearing, any employee who violated a rule or regulation, if the employee was on probation as a result of a disciplinary settlement agreement. The parties stipulated to a documentary record, and the union rested without calling any witnesses. The state moved to dismiss for failure to prove a prima facie case.

The union argued that, since there was no prior practice, its only burden was to prove that the employer unilaterally implemented a practice that affected a term and condition of employment. Not so, said the Board. Part of the prima facie proof when a charge alleges a change in a past practice is proof "that a change in a work rule has occurred." It's not enough just to establish the current practice. Without proof of work conditions before the alleged change, the union failed to prove that there was a change. The Board dismissed.

Improper Practices: Transfer of Unit Work

Did the New York City Transit Authority unlawfully transfer work performed by its Station Supervisor Levels IIs to its Station Supervisor Level Is? The basic proof of an unlawful transfer of unit work must show two things: (1) that unit employees have exclusively performed the work; and (2) that the transferred work is substantially similar to the work that the unit employees performed exclusively. In this case the union charged, among other violations, that the Transit Authority unilaterally transferred some of the supervisory responsibility over "zones," groups of one or more subway stations, to Level I supervisors.

The ALJ found that zone supervision was the exclusive work of the Level II supervisors. The Board found that the record didn't support that conclusion. The union, it said, failed to introduce any evidence that the Transit Authority assigned either level of supervision by geographical area or zone, and witnesses that the Transit Authority called gave unrebutted testimony that the two titles shared supervisory responsibilities. Therefore, the union failed to establish exclusivity over the at-issue job duties.[8]

Management/Confidential: Policy-Making

Is it enough for a managerial designation for a school district employee simply to attend and participate in the cabinet meetings of the district superintendent by offering advice, information, and opinions? Yes. As the Board has said before, the definition of a policy-maker is sufficiently broad "to include those relatively few individuals who directly assist the ultimate decision makers in reaching the decisions necessary to the conduct of the business of government."

And even if the record had not supported a managerial designation on that basis, the at-issue employees' anticipated duties would have. PERB can base that designation on labor relations, contract administration, or personnel administration duties not yet performed, if the duties can be "reasonably required." They have to be reasonable, direct, major, and involve the exercise of independent judgment. Here, the expectation that the at-issue employees would draft negotiations proposals and be on the district's negotiating team filled the bill.[9]

In addition to failing to prove a nexus, the proof was also lacking on the first prong, protected activity, in *Incorporated Village of Westhampton Beach.*[10]

Doyle, a lieutenant in the village police department, protested the transfer into the department of another officer, Dean, who was soon to become the chief of police. While Dean was the acting provisional chief, Doyle wrote a memo asserting that a recently purchased police cruiser's emergency lights did not comply with the Vehicle and Traffic Law, which was a safety concern. Later that year Doyle protested to the mayor about the scheduling of a promotional test for the chief of police position. Dean was the only person eligible to take the exam, but Doyle believed that he was qualified for the job too. The mayor told Doyle that he was not qualified for the chief's position, that the village board didn't like him, and that if he continued to push, the mayor would consider abolishing the lieutenant's position.

The next July an interest arbitration award issued that included a salary increase and gave the village the right to reduce shifts to eight hours from ten. The village board asked Dean to make recommendations about how to pay the increased costs and how to implement the shift and scheduling changes. That same month, Dean recommended hiring three more officers and increasing the number of sergeants from three to five. He also recommended abolishing Doyle's lieutenant's position and demoting him to sergeant, as a way of saving money, since Doyle had no management responsibilities. The board accepted Dean's recommendations.

In November, about a month after the arbitration award took effect, the village board adopted a resolution abolishing the lieutenant's position. Doyle's return to the rank of sergeant meant a $6,800 loss in salary. His union charged that the demotion was in retaliation for his protected activity in complaining about the police cruiser, Dean's transfer, and the chief's exam.

The ALJ dismissed the charge. He found that Doyle was involved in protected activities that the village's agents knew about, but that the village board transferred Doyle on Dean's recommendation in order to meet the issues raised by the arbitration award.

The Board affirmed the dismissal, but on different grounds. Doyle's complaint about the police cruiser lights was the only arguably protected activity that Dean knew about when he made his recommendation. But that activity, the Board held, was not the exercise of a right protected by the Taylor Law. It was not concerted activity. Doyle made his complaint as an individual, as he understood his duty as a lieutenant required.

In addition, as the ALJ properly found, Dean didn't recommend abolishing the lieutenant's position because of Doyle's memo about the police cruiser lights, but for legitimate fiscal and operational reasons. There was no violation.

Discrimination: Legitimate Business Reason

The Town of North Hempstead transferred LoMonte, the president of the local union, from the in-house title of director of the permit division of its building department to his civil service title of Building Inspector II, in the inspection division. At the time LoMonte was transferred, Wasserman, the new commissioner of buildings, told LoMonte that as part of reorganizing the department Wasserman wanted to use LoMonte's experience with construction inspection to make up for a staff shortage in the inspection division. Before the transfer there were occasions when Wasserman had wanted to speak to LoMonte about pending permit applications, but couldn't reach him by phone.

Neither the ALJ nor the Board found any union animus in the record. The ALJ rejected the town's "legitimate business reason" defense. Wasserman, she found, transferred LoMonte because he was out of the office twice a week on contractual release time for union business. There was no evidence that Wasserman was displeased with LoMonte's work; his testimony that he made the move to be able to hire a full-time plans examiner, despite a tight budget, was not credible; and Wasserman had alternative means to reorganize the department to add plan-examination hours available to him. Therefore, budgetary reasons were not the primary reason for the transfer.

The Board reversed. Just because the town might have addressed the staffing issue a different way, didn't render its stated reason for making the transfer pretextual. Wasserman's testimony was largely unrebutted and there was no evidence of animus. The Taylor Law, the Board said, doesn't insulate union officers from the effects of properly motivated managerial decisions. It only ensures that they are not treated unfairly because of their decisions regarding union membership and participation.[11]

Interference: Withholding Deducted Dues

What's an employer to do with the dues it deducts from employee paychecks if two unions are contesting which of them is the bargaining unit representative? Answer: Follow the certification order.

In *Board of Education of the City School District of the City of Long Beach*,[12] a national organization, AFSCME, issued a new mandate to a local, Local 1671: Affiliate with a council and pay dues to the council and to AFSCME. After AFSCME advised the local that it was now part of Council 66, some members of the local disaffiliated and started their own union. The school district refused the new union's request for recognition. The new union filed a representation petition at PERB and ultimately, after an election, Local 1671 was decertified, and the new union was certified in March 2001.

In the meantime, in December 2000, the new union had written to the school district claiming to be 1671's successor in interest. In response, the district took the arguably reasonable course of holding in escrow the union dues that it deducted from employees' checks between December and March.

Reasonable, perhaps, but unlawful. The Board did not have the issue of the reasonableness of the course that the employer chose in front of it. Neither was this, as the new union argued, an internal union dispute that PERB did not have jurisdiction over. Local 1671 charged that the failure to remit the deducted dues interfered with its rights as the exclusive agent of the bargaining unit. The Board agreed. The charge wasn't about an

internal union matter; it alleged a statutory interference with a statutory right. That was in PERB's jurisdiction. "[U]ntil there has been a decision issued by this Board decertifying an incumbent employee organization, the public employer is required by the Act to remit to that organization any and all membership dues and agency shop fees deducted from unit employees' paychecks."

Negotiability: *Cohoes* Revisited

If there's a demand to modify a contract provision and you're trying to figure out the result under *Cohoes*, should you focus your analysis on the existing contract provision or the demand? In *City of Cohoes*[13] the Board held that, as to police and firefighter contracts, an otherwise non-mandatory subject of negotiation that is included in the contract becomes a mandatory subject. A primary reason for adopting that principle was to enhance the bargaining process by enabling parties to argue at interest arbitration that a contract provision dealing with a non-mandatory subject should be removed from the contract. But in *Greenburgh No. 11 Union Free School District*,[14] the Board extended the holding in *Cohoes* to all contracts, not just police and fire.

Suppose, then, that a party demands to modify a provision. When does *Cohoes* apply? In a case from two years ago, *City of White Plains*,[15] the police union demanded to modify the existing internal investigation procedure, a mandatory subject of negotiation, but the proposed modifications had to do with *Miranda* warnings and a right to take notes during criminal investigations, a non-mandatory subject. The Board held that *Cohoes* didn't apply because the proposed modifications had no relation to the existing grievance procedure. The demands were non-mandatory in and of themselves.

The case at issue here, *Town of Yorktown*,[16] also involved police officers and a demand to modify an existing contract provision. Under the contract in *Yorktown* the town was required to give the union at least three months advance notice of any change in working methods or conditions that occurred because of an emergency or major disaster over which the town had no control. The union proposed in negotiations to reduce the notice time from three months to seven days.

The town argued that the existing provision was mandatory because three months' notice was reasonable, but the demand, it said, was non-mandatory, because seven days notice was not reasonable. With one eye on *Cohoes*, the town argued that *White Plains* stands for the proposition that *Cohoes* doesn't make mandatory a non-mandatory demand that relates back to a mandatory contract provision.

At least one problem with the town's argument was its premise—that the contract provision was mandatory. The ALJ found, and the Board at least implicitly agreed, that the contract provision was non-mandatory because it only permitted the town to change working conditions and methods without advance notice in emergency circumstances over which the town had no control. That limitation was too restrictive of the employer's right to respond to emergencies no matter what kind they were. The contract provision, therefore, was a non-mandatory term that converted to a mandatory term under *Cohoes*. Thus, the demand, which was specifically related to that term, was mandatory too.

The lesson of these decisions seems to be that when you're struggling with a *Cohoes* issue, first correctly analyze the relationship between the demand and the existing contract provision. If there is no relationship, look to the demand. If there is a relationship between them, then *Cohoes* comes into play. If the contract provision is non-mandatory, everything converts under *Cohoes*. Whether the demand is mandatory or non-mandatory in its own right, won't matter.

Does being a Taylor Law "public employee" entail receiving a public salary? This question confronted the Board for the first time in *State of New York (State University of New York at Buffalo)*.[17] Nagy, a doctor, held a full-time, unsalaried position on the university faculty. All of his compensation came from participating, as required, in a clinical practice associated with the university hospital, the income from which was managed under a plan devised by the university trustees. Nagy never received any salary from the university itself.

Nagy and some other doctors fell out of compliance with the plan in protest over how the plan distributed income among the participants. In response, the university removed his faculty status and designated him a volunteer. Nagy filed a grievance.

In the meantime, the university restored his faculty status, conditioned on his coming into full compliance. But Nagy decided he still wasn't going to participate in the plan without a salary. A step-one decision on his grievance came down, finding that the issues the grievance raised were moot because the university had reinstated him. But Nagy pressed ahead with the grievance and his non-compliance with the plan. The university sent him a notice of non-renewal.

The at-issue charge alleged that the notice of non-renewal was in retaliation for filing the grievance. The ALJ found that Nagy failed to prove any nexus between the two and dismissed the charge. The Board affirmed the dismissal on other grounds. The ALJ, it said, erred in not first deciding whether Nagy was a public employee within the meaning of the Taylor Law, since, if he was not, then PERB didn't have jurisdiction over the charge. Citing traditional concepts of employment, an earlier opinion of counsel, and a decision of the New York City Office of Collective Bargaining, confirmed by state

Supreme Court, the Board held that unsalaried workers are not Taylor Law public employees. It dismissed the charge for lack of jurisdiction.

A number of other cases decided during the last twelve months involved jurisdictional, procedural, or remedial issues:

State of New York (Unified Court System):[18] The Board declined to take jurisdiction over the interlocutory motion by one union regarding the grant of intervenor status to another union in a transfer-of-unit-work case. It also found that any purported prejudice that arose from the conference ALJ's refusal to grant a motion to recuse was cured by PERB's practice of appointing a hearing ALJ to decide the charge. In addition, the moving party would have the opportunity to ask the Board to review the conference ALJ's pre-hearing handling of the charge on any appeal of the hearing ALJ's decision.

Organization of Staff Analysts:[19] The charge failed to plead a duty of fair representation charge where the stipulated record showed that in response to the charging party's letter of complaint, the union met with him, called him, met with the employer's representatives, and paid for his representation by an attorney at a disability hearing. There was no showing of arbitrary, discriminatory, or bad faith conduct.

State of New York (State University of New York—SUNY at Buffalo):[20] The charge here alleged that the State University unlawfully discriminated against a physician-faculty member of the medical school's faculty. The state, the charge pleaded, unlawfully prevented the doctor from participating in a clinical practice operated by his department's pediatric faculty practice group, resulting in a loss of income.

The ALJ dismissed the charge on the merits. Both parties filed exceptions, the state claiming that PERB did not have jurisdiction. The Board agreed. The practice group was a separate legal entity under statute and the policies of the university trustees. While SUNY had some limited involvement and control, the practice group was a private corporation that exercised substantial control over the terms and conditions of employment of the participating doctors. They had no civil service status, and the practice didn't receive public money or serve any governmental purpose. Since it was a private employer, PERB did not have jurisdiction.

State of New York (Unified Court System):[21] Union One alleged that the court system unlawfully transferred bargaining unit work to Union Two. A week or so before the pre-hearing conference, the second union advised the ALJ and the parties that counsel intended to attend the conference. On the day of the conference, Union Two orally moved to intervene. After Union One objected that the motion wasn't in writing as the Rules require, and declined the ALJ's request to agree to an adjournment in order to allow Union Two to make a written motion, the ALJ ruled that Union One had waived its objection, and he granted the motion. The Board said that was error. The Rules require a written motion. Motion denied, without prejudice to renewing the motion in writing.

Research Foundation of the City University of New York and the City University of New York:[22] Two unions that already represented employees of the City University of New York filed separate petitions for unit clarification/placement in regard to various employees of the Research Foundation of the City University of New York. But was the Research Foundation a public employer within PERB's jurisdiction or a private employer in the jurisdiction of the National Labor Relations Board? A Regional Director of the NLRB had already held that the foundation was not under the NLRB's jurisdiction, but that determination was on appeal to the full national board. PERB's ALJ decided that it would be better to await the final word from the NLRB, than to go ahead and process the petitions. On review of the petitioners' interlocutory appeals of the ALJ's decision, the Board agreed with the ALJ. Waiting for word from the NLRB avoided the possibility of inconsistent determinations and the possibility of further litigation on the jurisdiction issue. Any lack of finality to the proceeding, however, would delay the representation process and could deprive the at-issue employees of their right to organize and bargain collectively.

Buffalo Police Benevolent Association (Pitts):[23] The Appellate Division, Fourth Department, annulled the Board's finding of a violation as to three charging parties, confirmed the finding of a violation as to three others, and remitted the charge to the Board to modify its remedy. Having found that the union violated its duty of fair representation to three charging parties by taking a position in an Article 78 proceeding that was inconsistent with its position representing the charging parties on their individual grievances, the Board ordered the union to reimburse the charging parties for their legal costs and expenses in the Article 78 proceeding, as well as for the cost of hiring outside counsel to represent them on the grievances.

Council 82 (Bruns):[24] An earlier Board order dismissing a charge as duplicative was not a directive to the ALJ to hear every allegation in the previously pending charge. The ALJ did not err in limiting a hearing on that charge to three allegations regarding the settlement of a grievance. As to the merits, neither the employer nor Bruns' union unlawfully discriminated against him by settling the grievance.

Legislation

Finally, the following legislation was enacted and approved:

Laws 2002 (S.6220). As to members of negotiating units designated as the security services and security supervisors units, restricts applicability of the interest arbitration provisions of CSL § 209 to those who are police officers or who are employed by the state Department of Correctional Services and are designated as peace officers pursuant to Criminal Procedure Law (CPL) § 2.10 (25).

Laws 2002 (S.6926). Amends the interest arbitration provisions of CSL § 209 that apply to state troopers, investigators, and officers of the Division of State Police to exclude those provisions from applying to issues relating to "disciplinary procedures and investigations or eligibility and assignment to details and positions."

Endnotes

1. 450 U.S. 251 (1975).
2. Civ. Serv. Law (CSL) §§ 200-14.
3. *New York City Transit Authority*, 35 PERB ¶ 3029 (Oct. 2, 2002).
4. 35 PERB ¶ ____ (Oct. 2, 2002).
5. 35 PERB ¶ ____ (Oct. 2, 2002).
6. *City of Peekskill*, 35 PERB ¶ 3016 (Apr. 25, 2002).
7. 35 PERB ¶ 3024 (Aug. 19, 2002).
8. *New York City Transit Authority*, 35 PERB ¶ 3028 (Aug. 19, 2002).
9. *Board of Education of the City School District of the City of Buffalo*, 35 PERB ¶ 3018 (June 12, 2002).
10. 35 PERB ¶ 3026 (Aug. 19, 2002).
11. *Town of North Hempstead*, 35 PERB ¶ 3027 (Aug. 19, 2002).
12. 35 PERB ¶ 3020 (June 12, 2002).
13. 31 PERB ¶ 3020 (1998) (later history omitted).
14. 32 PERB ¶ 3024 (1999).
15. 33 PERB ¶ 4588, *aff'd*, 33 PERB ¶ 3051 (2000).
16. 35 PERB ¶ 3017 (Apr. 25, 2002).
17. 35 PERB ¶ 3025 (Aug. 19, 2002).
18. 35 PERB ¶ ____ (Oct. 2, 2002).
19. 35 PERB ¶ ____ (Oct. 2, 2002).
20. 35 PERB ¶ 3019 (June 12, 2002).
21. 35 PERB ¶ 3021 (June 12, 2002).
22. 35 PERB ¶ 3013 (Apr. 25, 2002).
23. 35 PERB ¶ 3014 (Apr. 25, 2002), *petition for review pending*.
24. 35 PERB ¶ 3023 (Aug. 19, 2002).

Gary Johnson is PERB's Associate Counsel and Director of Litigation. Views expressed in this article are his own, and do not necessarily reflect the views of the Board or any of its members, officers, employees, or agents.

Committee Reports

From the Legislative Committee, as of September 26, 2002.

New and Pending Legislation: An Analysis of A.11784/S.7822

By Howard C. Edelman, Ivor R. Moskowitz and James N. Schmit

Labor Law § 211-a, ch. 453, L. 1996 prohibits monies appropriated by the state for any purpose from being used by or made available to employers to train managers, supervisors or other administrative personnel in methods whose purpose is to discourage union organization.

A.11784 (same as S.7822) would amend and expand the coverage and scope of Labor Law § 211-a. It prohibits the use of state funds and facilities to "assist, promote or deter union organizing." Section 1, part 2 of the bill adds to the present provisions of the law by barring the use of state funds for training supervisors, hiring or paying attorneys, consultants or others to encourage or discourage employees from participating in a union organizing drive or from hiring employees or paying the salary of persons whose principal tasks include encouraging or discouraging employees from participating in union organizing.

Section 1, part 3 requires employers to keep records of expenditures of funds sufficient to show that such funds have not been used in any prohibited manner. Section 1, part 4 empowers the Attorney General to apply for a restraining order to enjoin the prohibited conduct and provides authority for a court to impose a penalty of not more than $1000 or three times the amount illegally spent if the behavior was intentional and/or repeated.

Section 1, part 5 directs the Commissioner of Labor to issue regulations prescribing the form and content mandated by the law. The effective date will be 90 days after the act will take effect.

The bill has passed the Assembly and Senate and has been, or will be, forwarded to the Governor for action.

From the Law School Liaison Committee

Awards Program

By Robert T. Simmelkjaer

During its April 2002 meeting, the Executive Committee approved a new initiative submitted by the Law School Liaison Committee (LSLC). Commencing in fall 2002, the LSLC will launch an awards program designed to enhance the participation of the students and faculty of New York State law schools in the activities of the Labor and Employment Section.

Pursuant to this objective, a letter was sent to all law school deans which, *inter alia,* stated:

> While the committee will retain the general purpose of its existing competition, namely, "to recognize excellence among law school students in the area of labor and employment law and to cultivate the relationship between the Labor and Employment Section and future Labor and Employment practitioners," it contends that, in addition to essay writing, other contributions to the profession can be equally significant.

The LSLC proposal approved by the Executive Committee provides that "each law school dean will annually nominate a student who the law school believes has made an outstanding contribution to the profession of labor and employment law." The participating law schools will be further advised that, while "the dean will have sole discretion in determining whether a student has made an outstanding contribution," the Executive Committee of the L&E Section reserves the right of final approval of the award recipients and the right to make changes in the procedures and guidelines.

The new awards program will broadly distinguish two categories of participation, namely: (1) the writing competition (i.e., a written article, essay, or other exposition on the subject of labor and employment law); or (2) a substantial academic contribution, community service or innovative activity in the area of labor and employment law.

Category One will continue the existing writing competition, the first prize of which is the "Dr. Emanuel Stein Memorial Award," underwritten by Kenneth Stein. Three prizes for essay writing will be awarded: a first prize of $750; a second prize of $500 and a third prize of $250.

The members of the LSLC will evaluate and rank the writing submissions in this category, adhering to pre-existing standards, and award the prizes subject to final Executive Committee approval.

Category Two will recognize service to the field of Labor and Employment Law. As noted in the letter to the deans, this recognizes " a substantial service or innovative activity in furtherance of some aspect of labor and employment law. . ." These activities include, but are not limited to,

> facilitating conflict resolution or peer mediation programs for secondary school students; obtaining a grant to research issues or revising curricula in the field; organizing and/or conducting programs beneficial to the propagation of labor and employment knowledge and skills; utilizing the Internet and its components (e.g. World Wide Web/e-mail) to disseminate or receive labor and employment information.

Three awards will be made in this category, with the same prize structure: first prize, $750; second prize $500; third prize, $250. Here again, the LSLC and Executive Committee will retain the right of final approval.

All participants who do not receive either a Category One or Category Two award will be cited for honorable mention. In all categories, participants will receive a paid student membership to the L&E Section for one year.

Finally, all participants will receive a certificate from the L&E Section (suitable for framing) and their contributions will be recognized in a special supplement of the *L&E Newsletter*.

The LSLC looks forward to implementing the new awards program in fall 2002 and working collaboratively with the deans, faculty members, and student participants.

Section Committees and Chairs

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

Alternative Dispute Resolution

Alfred G. Feliu
(212) 763-6802

Eugene S. Ginsberg
(516) 746-9307

Wayne N. Outten
(212) 245-1000

Continuing Legal Education

Richard K. Zuckerman
(516) 663-5418

Employee Benefits

Mark E. Brossman
(212) 756-2050

Jennifer A. Clark
(315) 422-7111

Equal Employment Opportunity Law

Alan M. Koral
(212) 407-7750

Pearl Zuchlewski
(212) 869-1940

Government Employee Labor Relations Law

Douglas E. Gerhardt
(518) 782-0600

Individual Rights and Responsibilities

Allegra L. Fishel
(212) 245-8909

Theodore O. Rogers, Jr.
(212) 558-3467

Internal Union Affairs and Administration

Robert L. Boreanaz
(716) 849-1333

Labor Arbitration and Collective Bargaining

Arthur Riegel
(516) 295-3208

Labor Relations Law and Procedure

Peter D. Conrad
(212) 969-3020

Donald D. Oliver
(315) 422-7111

Law School Liaison

Robert T. Simmelkjaer
(212) 650-5188

Legislation

Howard C. Edelman
(516) 764-4316

Ivor R. Moskowitz
(518) 213-6000

James N. Schmit
(716) 856-5500

Membership and Finance

Robert Kingsley Hull
(315) 536-9820

Ethics—Ad Hoc Committee

Marilyn S. Dymond
(518) 257-1000, ext. 1443

John Gaal
(315) 422-0121

Publications and Media—Ad Hoc Committee

Judith A. La Manna
(315) 478-1122, ext. 16

Public Sector Book—Ad Hoc Committee

Gary Johnson
(518) 457-2678

Jerome Lefkowitz
(518) 257-1000, ext. 1443

Melvin Osterman
(518) 487-7600

Section Newsletter

Janet McEneaney
(718) 428-8369

Publication—Editorial Policy—Non-Member Subscriptions

Persons interested in writing for the *L&E Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *L&E Newsletter* are appreciated.

Publication Policy: I would appreciate it if you would call or e-mail me to let me know your idea for an article. You can reach me at (718) 428-8369 or mceneaneyj@aol.com.

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

Editorial Policy: The articles in the *L&E Newsletter* represent the author's viewpoint and research and not that of the *L&E Newsletter* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscriptions: The *L&E Newsletter* is available by subscription to non-attorneys, libraries and organizations. The subscription rate for 2002 is $75.00. For further information, contact the Newsletter Department at the Bar Center, (518) 463-3200.

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

Thank you for your cooperation.

Janet McEneaney
Editor

L&E Newsletter

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

Section Officers

Chair
Richard N. Chapman
99 Garnsey Road
Pittsford, NY 14534
(585) 419-8606

Chair-Elect
Jacquelin F. Drucker
432 East 58th Street, Suite 2
New York, NY 10022
(212) 688-3819

Secretary
Richard Adelman
69 The Oaks
Roslyn, NY 11576
(516) 621-6960

Secretary-Elect
Merrick T. Rossein
65-21 Main Street
Flushing, NY 11362
(718) 575-4316

ISSN 1530-3950

NYSBA
Labor and Employment Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155