NYSBA WINTER 2003 | VOLUME 28 | 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

The Labor and Employment Law Section has been remarkably active in the past few months. As a result, there is much to report with regard to the Section's recent past, present, and exciting future. We held a wonderfully successful Fall Meeting in September, we are in the process of implementing important changes and innovations adopted by the Executive Committee, and we are planning an outstanding Annual Meeting in January, additional CLE programs for the spring, and increased opportunities for ongoing member involvement.

Fall Meeting

The Section owes heartiest thanks to the many members who made the 2003 Fall Meeting a roaring success. First among those important contributors is CLE Chair Richard Zuckerman. Rich and the CLE Committee developed outstanding sessions and recruited superb speakers whose presentations were packed with important content and were offered in interesting and engaging ways. The Section also extends its deepest thanks to Linda Castilla. Linda is our NYSBA staff liaison and "Meeting Planner," a title which does not even begin to describe the level of service, dedication, and guidance she provides to the Section. Linda is the logistical expert on our substantive programming and is the mastermind behind the many activities and social functions that are offered at our meetings. For the Ottawa meeting, Linda outdid herself, arranging a tour of Parliament Hill, an afternoon river tour, a golf outing, and the delightful reception at the Canadian Museum of Civilization, during which we had exclusive access to Canada Hall and were free to wander, refreshments and *hors d'oeuvre* in hand, throughout the fascinating exhibits that trace Canadian history from the Viking era onward.

Inside

Our Section also is indebted to The Honorable Alan Gold, our engaging, entertaining, and insightful dinner speaker. A former Chief Judge of the Superior Court of Quebec and Honorary Life Member of the National Academy of Arbitrators, Judge Gold regaled us with amusing yet astute observations about the law, language, lawyers, and judges. His message was peppered with hilarious examples of the use and misuse of language, such as the unintended meaning found in the following sign posted in a small pharmacy: "We dispense with accuracy." Judge Gold poked fun at obtuse statutory and contractual language and went on to offer wise observations about the meaning, role, and passionate pursuit of the law. We pondered and chuckled about his thoughts for days following our gathering in Ottawa.

Changes In Section Structure

The Ad Hoc Committee on Section Structure

At the Fall Meeting, the Executive Committee received the report and recommendations prepared by the Ad Hoc Committee on Section Structure ("Committee on Structure"), which had been formed by my predecessor, Richard Chapman, and was composed of the following past Section Chairs: Evan Spelfogel (Chair), Michael Harren, Frank Nemia, James Sandner, and Rosemary Townley. The Committee on Structure has completed its assigned task of examining the Section's organizational structure and recommending whether and how the Section's committee system and operations should be updated to better meet the needs of the membership and the profession. The collective wisdom of this experienced group produced a set of recommendations that are far-sighted, responsive to the interests that were revealed through our recent member-satisfaction survey, and focused on ensuring that the Section will continue to play a vital and productive role in the field of labor and employment law.

New Committees

Among the recommendations made by the Committee on Structure and adopted by the Executive Committee was the formation of two exciting new committees: the Committee on International Labor and Employment Law and the Committee on Diversity and Leadership Development. Both will exist as ad hoc committees during their formative stages and, after they have been assembled and operational for a period of time, the Section will assess whether they should be made standing committees and permanent parts of the Section structure. The International Labor and Employment Law Committee has begun to take shape under the leadership of co-chairs Wayne Outten and Philip Berkowitz, and you will find a description of this new committee in a separate article in this edition of the *Newsletter*. The Diversity and Leadership Development Committee, headed by co-chairs Louis DiLorenzo (a former chair of the Section) and Allegra Fishel, already has begun work with the NYSBA on an Annual Meeting presentation examining the role of affirmative action in increasing diversity within law firms and within the profession.

Committee Reorganization

To improve the structure and function of the Section, the Committee on Structure recommended several steps of reorganization which were adopted by the Executive Committee. First, the Membership and Finance Committee has been separated into two separate committees to allow greater concentration on each area. Robert Kingsley "Kayo" Hull, who ably has been overseeing Section finances since the mid-1990s, will continue to serve that function as chair of the new Committee on Finance. Bill Frumkin, who co-chaired the combined Committee for the past year and was directly involved with the development of the member-satisfaction survey, now is Chair of the new Committee on Membership. Bill already has begun to focus on ways to make Section membership more appealing and meaningful. For several years, efforts have been made to implement member-outreach efforts through the involvement of our twelve elected District Representatives. To formalize and add structure to these efforts and to ensure broad geographical representation, the District Representatives have been made official members of the Membership Committee, and Section leadership will have the option of adding at-large members.

The Committee on Structure also recommended that the Section's myriad communications functions be consolidated into one committee, appropriately entitled the Communications Committee. The new Communications Committee, headed by Sharon Stiller and Jim McCauley, former District Representatives and developers of our Web site, has within it the Section's Web Site Project, the *Newsletter*, non-treatise publications, a Section historian, media outreach, and the membership directory. The logic of the combination is clear; nearly all of these communication functions cross paths, overlap, and do or will involve some electronic data access. Unifying these functions under the umbrella of the Communications Committee will enhance coordination, continuity, and efficiency of these official organs of the Section.

Permanent Standing-Committee Status for Ad Hoc Committees

The Committee on Structure examined two long-standing ad hoc Committees and recommended that they be made permanent standing committees. They are the Committee on Ethics and Professional Responsibility and the Committee on the Public Sector Book, both of which have functioned productively for many years and have established themselves as important and vibrant elements of the Section. In 1988, under the guidance of

Jerome Lefkowitz as Editor-in-Chief, the Section produced the first edition of *Public Sector Labor and Employment Law,* the definitive treatise on New York public-sector labor law. The Ad Hoc Committee on the Public Sector Book, with Jerry at all stages as Co-Chair, then oversaw the development of the supplements, the second edition, more supplements, and, now, the upcoming third edition. This treatise remains one of our Section's most enduring and valuable contributions to the profession and its oversight Committee now appropriately is a permanent element of the Section. The editors of the forthcoming third edition and the Co-Chairs of what now is the standing Public Sector Book Committee are Jerry Lefkowitz, Melvin Osterman, and Jean Doerr.

In addition, what previously was the Ad Hoc Committee on Ethics has been made into the standing Committee on Ethics and Professional Responsibility. In its ad hoc form, this committee throughout the past six years has provided important information and input. This involvement now will be enhanced by the Committee's permanent status and expanded membership. Co-Chair John Gaal, who took the lead throughout the committee's formative years, now is joined by Co-Chair Nancy Hoffman, and they will guide the Ethics and Professional Responsibility Committee in the development of its formal structure and permanent functions.

Additional Committee Chair Appointments

As a result of some of the appointments noted above, two committee leadership vacancies were created and already have been filled. I am pleased to report that Jonathan Ben-Asher has agreed to serve as Co-Chair of the ADR in Employment Law Committee and that Mimi Satter has accepted appointment as Co-Chair of the Individual Rights and Responsibilities Committee. We welcome Jon and Mimi to the Executive Committee and thank them for their willingness to be of service to the Section.

Committee Membership Recruitment

By the time you receive this edition of the *Newsletter*, you should have received a letter outlining the new committee structure and asking for expressions of interest in Committee membership. The member-satisfaction survey revealed that many members were unsure of whether they were on committees and did not know how to express an interest in becoming active in committees or other Section activities. We hope this effort will help enhance the level of understanding regarding opportunities for involvement and will open more widely the doors of the Section to those who seek a greater level of participation.

Upcoming Events

As you plan for the future, please note that in the Spring of 2004 the Section will be offering a full-day CLE program on the Basics of Public Sector Labor Law. In keeping with preferences expressed in the member-satisfaction survey, this program will be presented at several locations throughout the state.

Our Annual Meeting will be held on January 30, 2004, in Manhattan. Please note that, due to scheduling complications, we will not be meeting at the New Yorker Hotel, our usual location. Instead, the substantive program and business meeting will be at the Association of the Bar of the City of New York, and the luncheon, for which the guest speaker will be The Honorable Cari M. Dominguez, Chair of the Equal Employment Opportunity Commission, will be across 44th Street at the newly renovated Harvard Club. Overnight accommodations and conference rooms for our Committee meetings also will be at the Harvard Club. We will return to the New Yorker for the January 2005 meeting.

We expect a large turnout for our superb substantive program and luncheon on January 30, 2004. Space is limited, so please respond early when you receive your registration packet. Many of the Section's Committees, including those that have been newly formed, will hold meetings either the evening before or in the afternoon after the January 30 program. If you think you might be interested in joining one of the Section's Committees but would like to know more about them, please feel free to drop by any of these meetings. Committee meetings are open to any interested Section members, and we encourage you to attend and to explore both the new and the long-standing opportunities for involvement in the Section's important work and exciting future.

See you in Manhattan in January.

Jacquelin F. Drucker

Catch Us on the Web at
WWW.NYSBA.ORG/LABOR

From the Editor

In this edition, we have articles on a wide variety of topics, as well as the PERB Digest, John Gaal's ethics column and another winning essay in the Section's law school writing competition. Our thanks to Judith Broach and Joshua Parkhurst, Nicole Belson Goluboff, Michael Evan Gold, Gary Johnston, Ira Lobel, Michael Sciotti and Jennifer Stone for their contributions to this edition. In addition there is an announcement by Phil Berkowitz and Wayne Outten of a new Section Committee, the International Labor and Employment Law Committee.

By the time this reaches you, the year-end holidays will be upon us. We wish you all a wonderful holiday season.

In three recent cases, the Second, Eighth and Ninth Circuits considered whether parties to arbitration agreements under the Federal Arbitration Act[1] (FAA) may contractually limit judicial review of awards. Although not employment-related cases themselves, they have broad application to any case brought under the FAA.

On September 3, 2003, the Second Circuit decided in *Hoeft v. MVL Group, Inc.*,[2] that an arbitration agreement could not deprive the court of its authority to review an arbitration award. The dispute concerned the sale of the plaintiffs' business and revolved around a criterion used to value an adjustment to the purchase price.

The parties had agreed to a Stock Purchase Agreement and an Amendment to Stock Purchase Agreement. The Purchase Agreement provided that arbitration would be held under the auspices of the American Arbitration Association. The Amendment included a carve-out provision naming Steven Sherrill to provide a final and binding decision which would "not be subject to any type of review or appeal whatsoever."[3]

MVL Group objected to having Mr. Sherrill hear the case because it believed he had prejudged it. It applied to the AAA for arbitration, which denied its motion.

The arbitrator found for the plaintiffs, they sought to confirm the award and the respondent moved, in the Southern District of New York, to vacate. Over the Hoefts' objections, the judge granted the respondent's request to depose the arbitrator to discover whether he had exceeded his powers, prejudged the dispute and acted in manifest disregard of the law. The district court eventually ruled in favor of MVL Group, basing its decision partly on the premise that the parties could agree to eliminate judicial review.

On appeal, the Second Circuit reversed. The court first considered the enforceability of private agreements to limit judicial review of arbitration awards. Although the federal courts traditionally defer to arbitration agreements, it said, they do so with the knowledge that the agreements must be judicially enforced, and thus reviewed to ensure that "arbitrators comply with the requirements of the statute at issue."[4] In addition, it said, the Supreme Court created a supplement to the FAA: manifest disregard of the law. Taken together, the manifest disregard standard and the grounds for vacatur listed in section 10a of the FAA "represent a floor for judicial review below which parties cannot require courts to go, no matter how clear the parties' intentions . . . Judicial standards of review, like judicial precedents, are not the private property of litigants."[5]

The court then addressed the deposition of the arbitrator and found that allowing questions about the substance of his decision-making was an abuse of discretion.[6] "A manifest disregard claim involves both subjective and objective components," it said, and the decision-making part of the arbitrator's thought processes may not be probed when deposing an arbitrator.[7]

Although the deposition about the arbitrator's alleged disregard of the law was an abuse of discretion, the court used the transcript to proceed to rule on whether the arbitrator had disregarded the law. It found he had not, nor had he exceeded his powers.

The Ninth Circuit case is *Kyocera v. Prudential-Bache Trade Services, Inc.*[8] which, in its many incarnations, has been in contention since 1987. As briefly as possible, I will go over its history.

Kyocera, Prudential-Bache and LaPine Technology Corp. began a technology venture in 1984. Because of business difficulties, the relationship among these entities was subsequently restructured. In their amended agreement, the parties provided for arbitration of disputes and agreed that:

> The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The

> Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous. . . .

In 1987, a dispute arose concerning the reorganization. LaPine filed suit in district court and Kyocera successfully compelled arbitration under the amended agreement. The arbitrators' award, issued in 1994, ordered Kyocera to pay almost $250 million to the plaintiffs, plus $14.5 million in attorneys' fees and court costs. The court denied Kyocera's motion to vacate the award, finding that parties could not by contract enlarge the statutory standard of review provided in the FAA.[9]

On its appeal, Kyocera argued that the court should have applied not only the FAA's standard of review but also the additional provisions in the amended agreement. Since it had relied on LaPine's assurance that the additional provisions would be applied, it asserted, the arbitration award had been procured by fraud or undue means.

The Ninth Circuit reversed the district court's decision, finding that federal court review is not necessarily limited to the FAA standards, but may also include standards provided by agreement of the parties.[10] It remanded the case for decision on the merits and the district court, affirming all but one portion of the award, sent the remaining question back to the arbitration panel and, in 2001, the district court confirmed the award in its entirety.[11]

Kyocera again appealed and the Court of Appeals again confirmed the lower court's decision.[12] Kyocera requested a hearing *en banc*, and the judges requested additional briefing on the original issue of the power of private parties to limit or expand judicial review of arbitration awards. The court, finding itself previously in error, decided:

> In this case, we need not speculate as to whether the arbitration panel properly applied complex California contract law to a complex factual dispute, because we conclude that Congress has explicitly prescribed a much narrower role for federal courts reviewing arbitral decisions. The Federal Arbitration Act enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard. Because the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, we hold that private parties may not contractually impose their own standard on the courts. We therefore review the arbitral panel's determination only on grounds authorized by the statute, and affirm the confirmation of the arbitration award.[13]

In *Schoch v. InfoUSA, Inc.*,[14] the Eighth Circuit Court of Appeals analyzed the issue of the type of review courts will give arbitration awards. The issue was whether the parties to the arbitration agreement could contractually create a broader basis for judicial review. The Eighth Circuit had not previously decided the issue, noting in an earlier case that it was not clear that enhanced review was possible and that, if it was, it would require "clear and unmistakably expressed" intent to do so in the arbitration agreement.[15] In this case there was no such "clear and unmistakably expressed" intent to seek a broader level of judicial review. As a result, the court held that the award could be reviewed only under the FAA exceptions and the "extremely narrow" judicially created exceptions.

Applying those standards, the court noted that the arbitrator did not exceed his authority, disregard the law, or engage in misconduct. The arbitrator did read certain key terms differently than a court might have done, but even if the arbitrator had made legal errors, the court said, he did not "completely ignore the law." Thus, although the court might have disagreed with the arbitrator's factual findings or legal analysis, there was no basis for substituting its judgment for the arbitrator's.

With these decisions, the split among the circuits on this issue has widened to an array of opinions. The score now stands as follows: along with the Second and Ninth Circuits, the Sixth, Seventh and Tenth Circuits limit judicial review to the FAA standards;[16] in the Eighth Circuit, it appears that expanded review may be possible if parties follow certain strict guidelines, although the court expresses some skepticism;[17] and in the Third and Fifth Circuits an expanded standard of review may be contracted for by the parties.[18]

Considering the difference of opinion throughout the Circuits and the number of cases affected, it seems likely that the Supreme Court will grant *certiorari* on this issue eventually.

Endnotes

1. 9 U.S.C. §§ 1–16.
2. 343 F.2d 57.
3. *Id.* at 60. Mr. Sherrill is a Certified Public Accountant who had represented or advised both parties.
4. *Id.* at 63, quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).
5. *Id.* at 64.
6. The court found allowable other portions of the deposition, since arbitrators may be deposed regarding claims of bias or prejudice.
7. *Hoeft v. MVL Group* at 67.
8. 341 F.3d 987 (Aug. 29, 2003).
9. *LaPine Technology Corp. v. Kyocera Corp.*, 909 F. Supp 697 (N.D. Cal. 1995).
10. *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997) [*LaPine I*]. In his dissent, Judge Mayer wrote:

> Whether to arbitrate, what to arbitrate, how to arbitrate and when to arbitrate are matters that parties may specify contractually. However, Kyocera cites no authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision. Absent this, they may not. Should parties desire more scrutiny than the Federal Arbitration Act, authorizes courts to apply, "they can contract for an appellate arbitration panel to review the arbitrator's award[;] they cannot contract for judicial review of that award." I would affirm the district court's self-restraint. [citations omitted]

11. *LaPine Technology Corp. v. Kyocera Corp.*, 2000 WL 765556 (N.D. Cal. 2000) [unpublished order].
12. *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 299 F.3d 769 (9th Cir. 2002) [*LaPine II*].
13. 341 F.3d 987 (Aug. 29, 2003) at 995.
14. 2003 WL 22047827 (8th Cir., Sept. 3, 2003)
15. *UHC Management Co. v. Computer Science Corp.*, 148 F.3d 992 (8th Cir. 1998).
16. *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171 (6th Cir. 1996); *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991).
17. *Schoch v. InfoUSA, Inc.*, 2003 WL 22047827 (8th Cir., Sept. 3, 2003).
18. *Roadway Package Svs., Inc., v. Kayser*, 257 F.3d 287 (3rd Cir. 2001); *Gateway Tech., Inc., v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995). These courts find that the purpose of the Federal Arbitration Act is to enforce the terms of private arbitration agreements, including terms specifying the scope of review of arbitration decisions. They base their opinions on *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), where the Supreme Court determined that "[j]ust as[private parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted," and concluding that scope of review is merely a rule of procedure.

Janet McEneaney

Labor and Employment Law Section

2004 Annual Meeting

Friday, January 30, 2004

Association of the Bar of the City of New York

9:00 A.M. to 12:15 P.M.

Luncheon

Harvard Club

12:30 P.M.

Desert Palace, Inc. v. Costa: The End of the "Direct Evidence" Requirement in Title VII Mixed Motive Cases

By Judith P. Broach and Joshua S.C. Parkhurst

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it an "unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[1] In some cases, an employer's actions may be attributable to more than one motive. If one such motive is discriminatory animus, and the other is lawful, the question then arises as to whether the employer's decision was "because of" the prohibited motive.

For years, the federal courts of appeals have struggled with the question of how discriminatory animus may be proved in a "mixed motive" case. Some courts required that the plaintiff proffer explicit statements by the employer or other direct evidence indicating that discriminatory animus was the basis for the employer's decision. Other courts have permitted proof by indirect, circumstantial evidence.

On June 9, 2003, the Supreme Court of the United States decided the case of *Desert Palace, Inc. d.b.a. Caesars Palace Hotel & Casino v. Costa*.[2] In that case, the Court unanimously held that a plaintiff in a disparate treatment case need not present direct evidence in order to obtain a "mixed motive" jury instruction. Instead, a plaintiff may use either direct or circumstantial evidence to show that a protected characteristic was a "motivating factor" in a defendant's adverse employment decision. The Court's decision puts to rest the conflict among courts of appeals regarding the type of evidence required in a mixed motive employment discrimination case.

The *Price Waterhouse* Decision

The Supreme Court first addressed mixed motive proofs in *Price Waterhouse v. Hopkins*.[3] In that case, the plaintiff, Ann Hopkins, brought suit against the accounting firm Price Waterhouse after she was refused admission to partnership in the firm. At trial, Hopkins presented evidence that some partners at Price Waterhouse made comments indicating that they reacted negatively to her candidacy because she was a woman. This included statements that Hopkins "overcompensated for being a woman"; that plaintiff's conduct was objectionable "because it's a lady using foul language"; and that plaintiff, if she wanted to increase her partnership chances, should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[4] Hopkins also presented expert testimony alleging that certain statements, while neutral on their face, were evidence of "sex stereotyping" by Price Waterhouse's male partners.[5] Price Waterhouse, however, presented evidence that certain partners had raised legitimate concerns that Hopkins was, on occasion, overly aggressive and difficult to work with.[6] The district court concluded that Price Waterhouse's failure to admit Hopkins to the partnership was partly based on legitimate considerations (concerns about Hopkins's interpersonal skills), but also partly based on illegitimate considerations (her gender).[7] The district court held that, in basing its decision in part on unlawful reasons, Price Waterhouse had violated Title VII and discriminated against Hopkins because of her sex.[8] The district court also held, however, that Price Waterhouse could avoid equitable relief if it could prove, by clear and convincing evidence, that it would have made the same decision regarding Hopkins's candidacy for partnership even absent its discrimination.[9] The district court concluded that Price Waterhouse had failed to carry this burden.[10]

The Court of Appeals for the District of Columbia Circuit affirmed the district court's judgment under a slightly different analysis.[11] The court of appeals agreed with the district court's finding that once Hopkins showed that unlawful discrimination played a role in Price Waterhouse's decision, the burden of proof shifted to Price Waterhouse to demonstrate that it would have taken the same actions absent its unlawful considerations.[12] The court of appeals concluded, however, that should Price Waterhouse prove, by clear and convincing evidence, that it would have taken the same actions absent unlawful discrimination, it would avoid liability altogether, not just equitable relief.[13]

The Supreme Court accepted the "mixed motives" analysis of the lower courts, but vacated and remanded the case on the ground that Price Waterhouse should have been allowed to avoid liability if it could demonstrate by a preponderance of the evidence, rather than by clear and convincing evidence, that it would have taken the same action absent unlawful discrimination.[14] No opinion of the Court, however, was joined by a majority of five justices. Writing for a plurality of four, Justice Brennan stated that ". . . when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's

gender into account."[15] Justice White wrote a concurring opinion stating that a plaintiff was required to show that the prohibited consideration was a "substantial" factor in order to shift the burden of proof to the defendant.[16] Justice O'Connor wrote a concurring opinion stating that a plaintiff could shift the burden of proof to the defendant by showing, through the use of "direct evidence" of discriminatory animus, that the prohibited consideration was a "substantial" factor in its decision.[17]

It should be noted that under the holding of *Price Waterhouse*, a Title VII plaintiff who succeeded in demonstrating that the defendant's decision was in part motivated by unlawful reasons shifted the burden of *persuasion* to the defendant. This is in contrast to the burden-shifting model used by the Supreme Court in *McDonnell Douglas v. Green* for single-motive cases, where a plaintiff, upon presenting its *prima facie* case, merely shifts the burden of *production* to the defendant.[18]

The Civil Rights Act of 1991

Congress passed the Civil Rights Act of 1991 ("the 1991 Act") in response to several Supreme Court decisions which had adversely affected Title VII plaintiffs. With respect to the mixed motives issue, Congress addressed a perception that the *Price Waterhouse* decision did not adequately protect employees who could prove that prohibited motivations played at least a partial role in adverse employment actions against them, because the decision allowed employers an affirmative defense by which they could avoid all liability. To address this concern, Congress enacted section 107 of the 1991 Act, which provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated that practice.[19]

Section 107 of the 1991 Act also addresses what remedies are available to plaintiffs in mixed motive cases, when the defendant establishes that it would have taken the same action absent the unlawful motivation:

> On a claim in which an individual proves a violation [in a mixed motive case] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim [of mixed motives]; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment. . ."[20]

Under section 107, therefore, a defendant cannot avoid all liability if discriminatory animus has been demonstrated to be a motivating factor in its decision. Proof of such motive establishes a violation of Title VII. A defendant may, however, assert, as an affirmative defense, that it would have taken the adverse action even in the absence of improper motive. A defendant which successfully asserts such defense will not be subject to damages or be required to hire, reinstate or promote the plaintiff, but will be subject to other remedies.

The Circuit Courts After *Price Waterhouse* and the 1991 Act

The 1991 Act gives a plaintiff who can demonstrate mixed motives a significant advantage. Such plaintiff is entitled to a favorable verdict as to liability without having to establish that any legitimate non-discriminatory reason the defendant may assert is pretextual. It is not surprising, therefore, that litigants have regularly contested the question of when the mixed motive analysis applies. For fourteen years following the *Price Waterhouse* decision, and twelve years following the 1991 Act, the federal circuit courts of appeals issued numerous decisions addressing the level of proof necessary for a plaintiff to establish an improper mixed motive for an employer's decision. These courts generally focused on the Supreme Court's decision in *Price Waterhouse*, and not on the text of the 1991 Act.

Most courts either explicitly or implicitly held that Justice O'Connor's concurring opinion in *Price Waterhouse*, requiring direct evidence of discriminatory motive to support a liability finding, represented the holding of the Court because it represented the narrowest ground upon which five of the Justices supporting the decision agreed. The First and Third Circuits explicitly held Justice O'Connor's opinion to be the binding holding in *Price Waterhouse*.[21] Several other courts of appeals signaled their adherence to Justice O'Connor's concurring opinion by holding that a plaintiff had to present direct evidence of unlawful motive in order to invoke a mixed motive analysis of the employer's decision. The definition of direct evidence, however, varied from circuit to circuit. The Fourth Circuit held that a plaintiff must present "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision."[22] The Fifth Circuit and Tenth Circuits defined direct evidence as evidence which, if

believed, proves the fact without inference or presumption.[23] The Sixth Circuit defined direct evidence as ". . . evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."[24]

A few courts of appeals held that a plaintiff could use any form of evidence, including circumstantial evidence, to prove that unlawful considerations were a motivating factor in an employer's decision. The District of Columbia Circuit held that either direct or circumstantial evidence could be used in a mixed motive case.[25] The Second Circuit held that a plaintiff may use either direct or circumstantial evidence, so long as the evidence was "tied directly to the alleged discriminatory animus."[26] The Eleventh Circuit, although recognizing that some courts referred to the term "direct evidence," held that any evidence could be used to demonstrate mixed motives so long as "a reasonable fact finder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected characteristic."[27]

Some courts of appeals were not internally consistent in their decisions concerning the mixed motive analysis. For example, the Eighth Circuit in one case held that a plaintiff may prove a mixed motive case through either direct or circumstantial evidence of discrimination, so long as the evidence showed a "specific link" between discriminatory animus and the challenged employment decision.[28] In a subsequent decision, it held that direct evidence was required in order to prove a mixed motive case.[29] The Seventh Circuit issued one decision requiring a plaintiff to produce direct evidence that would "speak directly to the issue of discriminatory intent [and] also relate to the specific employment decision in question."[30] It subsequently held that a plaintiff could present either direct or circumstantial evidence in order to prove a mixed motive case.[31] One First Circuit panel, surveying the state of the law on the subject, noted that the "operose task" of defining direct evidence "not only has divided the courts of appeals but also has created a patchwork of intra-circuit conflicts."[32]

Desert Palace, Inc. v. Costa

In *Desert Palace*, the Supreme Court finally resolved the question of whether direct evidence was required to support a finding of liability in a mixed motive case. The plaintiff, Catharina Costa, worked for the defendant, Desert Palace, Inc., as a warehouse worker and heavy equipment operator.[33] During her employment, Costa was subjected to several disciplinary actions, culminating in her termination after she was involved in a fight with a co-worker.[34]

Costa sued Desert Palace under Title VII for both sex discrimination and sexual harassment. The district court dismissed Costa's sexual harassment claim, but allowed the sex discrimination claim to go to trial. At trial, Costa presented several pieces of circumstantial evidence of discrimination, including evidence that (1) she was singled out for "intense stalking" by one of her supervisors, (2) she received harsher discipline than her male co-workers for similar conduct, (3) she was treated less favorably in the assignment of overtime and (4) that supervisors repeatedly "stacked" her disciplinary record against her and used or tolerated the use of sex-based slurs against her.[35]

The district court gave the following mixed motive instruction to the jury:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.[36]

Desert Palace unsuccessfully objected to the court's instruction on the ground that Costa had not presented any direct evidence of discrimination.[37] The jury found for Costa, and awarded Costa back pay, compensatory damages, and punitive damages.[38]

A panel of the Court of Appeals for the Ninth Circuit vacated the judgment and remanded the case, directing entry of judgment in favor of Desert Palace.[39] The panel held that the district court erred in providing a mixed motive instruction because Costa had failed to present "direct and substantial evidence of discriminatory animus."[40] The panel also concluded that Desert Palace was entitled to judgment as a matter of law because Costa had failed to produce sufficient evidence to demonstrate that she was terminated because she was a woman.[41]

Rehearing the case *en banc*, the Ninth Circuit reversed the panel's decision and reinstated the judgment of the district court.[42] Departing from the other circuits, the Ninth Circuit held that it was not necessary to determine whether direct evidence of discrimination was required by the Supreme Court's holding in *Price Waterhouse*. Instead, it held that the 1991 Act, which codified the mixed motive analysis, abrogated *Price Waterhouse*, and that the 1991 Act did not impose any heightened evidentiary requirement to prove a mixed motive case.[43] The *en banc* court also found that Costa had produced sufficient evidence of sex discrimination to sustain the jury's verdict.[44]

The Supreme Court granted certiorari.[45] In a unanimous opinion, written by Justice Thomas, the Court affirmed the Ninth Circuit's *en banc* ruling. Like the Ninth Circuit, Justice Thomas held that the case was controlled by the 1991 Act, not by the Court's prior opinion in *Price Waterhouse*.

Justice Thomas first examined the text of section 107 of the 1991 Act. According to Justice Thomas, that section unambiguously states that a plaintiff need only "demonstrat[e]" that a prohibited consideration was a motivating factor in an employer's decision. Nowhere, Justice Thomas noted, does section 107 state that direct evidence or any other heightened evidentiary standard is required to prove that unlawful discrimination was a motivating factor.[46]

Justice Thomas then examined the definition for the term "demonstrates" in the 1991 Act.[47] Under section 104 of the 1991 Act, the term "demonstrates" means "meets the burdens of production and persuasion."[48] This definition, Justice Thomas found, contained no heightened evidentiary standard. Justice Thomas also compared section 104 to the text of other statutes which did, in contrast, specifically require heightened evidentiary standards.[49] The statute's silence with respect to the type of evidence required in a mixed motive case, Justice Thomas stated, indicated that the Court should not "depart from the conventional rule of civil litigation that generally applies in Title VII cases."[50] That rule allows a plaintiff to prove the elements of his or her case through either direct or circumstantial evidence.[51]

Finally, Justice Thomas noted that the term "demonstrates" was used in other sections of the statute, and that those sections did not use that term to require a heightened evidentiary standard.[52] For example, in order for a defendant to successfully assert its affirmative defense in a mixed motive case, it must "demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor."[53] Justice Thomas found it significant that, at oral argument, counsel for Desert Palace stated that this language did not require the defendant to satisfy a heightened evidentiary burden in order to assert its affirmative defense. Accordingly, Justice Thomas stated, "Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue."[54]

Based on the above, Justice Thomas concluded that direct evidence was not required in a mixed motive case. "In order to obtain an instruction under [42] § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[55]

Implications of *Desert Palace*

Attorneys for both employees and employers in Title VII discrimination lawsuits may find their future litigation strategies affected by the *Desert Palace* decision. The Court's unanimous and unambiguous decision ensures that counsel will no longer be involved in legal arguments regarding the type of evidence required to obtain a mixed motive jury instruction. Instead, the focus will be on whether the plaintiff's evidence, regardless of whether it is "direct" or "circumstantial," is sufficient to permit the jury to find, by a preponderance of the evidence, that a prohibited characteristic played a part in an adverse employment action.

Because section 107 of the Civil Rights Act of 1991 limits a plaintiff's remedies in a mixed motive case if the defendant establishes that Act's affirmative defense, plaintiff's counsel should still seek to prove that discriminatory animus was the sole basis for an employer's decision. In the majority of cases, however, the employer can proffer at least some credible evidence that a reason other than discriminatory animus was the reason for the employer's decision. Attorneys for employees asserting disparate treatment claims should, therefore, regularly ask a trial court to apply a mixed motive analysis when deciding a case or instructing a jury.

It is important for counsel for employers to realize that even when an employer presents strong evidence of a legitimate, non-discriminatory reason for an adverse employment action, the employer may be found in violation of Title VII on a mixed motive theory if it does not adequately address the evidence of discriminatory animus presented by the plaintiff. Attorneys for employers should expect that their counterparts will try to use the mixed motive analysis more often and prepare to defend a case by both directly refuting any evidence of discrimination presented by the plaintiff and presenting evidence sufficient to establish by a preponderance of the evidence that defendant would have taken the chal-

lenged employment action even in the absence of discriminatory animus.

Endnotes

1. 42 U.S.C. § 2000e(2)(a)(1).
2. 539 U.S. __, 123 S. Ct. 2148 (2003).
3. 490 U.S. 228 (1989).
4. *Id.* at 235.
5. *Id.* at 235–236.
6. 618 F. Supp. at 1112–1113.
7. *Id.* at 2230.
8. *Id.*
9. *Id.*
10. *Id.*
11. 825 F.2d 458 (D.C. Cir. 1987).
12. *Id.* at 470–471.
13. *Id.*
14. 490 U.S. at 253.
15. *Id.* at 258.
16. *Id.* (White, concurring), *citing Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).
17. *Id.* at 261 (O'Connor, concurring).
18. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000).
19. 42 U.S.C. § 2000e-2(m).
20. 42 U.S.C. § 2000e-5(g)(2)(B).
21. *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir 1999); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 337 n.2.
22. *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999).
23. *Brown v. East Mississippi Electric Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999).
24. *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1987).
25. *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 205 (D.C. Cir. 1997) (". . . there is no bar on using circumstantial or inferential evidence to shift the burden of persuasion under *Price Waterhouse*"), *vacated in part on other grounds upon rehearing*, 1998 WL 1988451 (D.C. Cir. 1998).
26. *Rose v. New York City Bd. of Educ.*, C.S.D. #13, 257 F.3d 156, 161 (2d Cir. 2001).
27. *Wright v. Southland Corp.*, 187 F.3d 1287, 1294 (11th Cir. 1999).
28. *Phillip v. ANR Freight Sys., Inc.*, 61 F.3d 669, 673 (6th Cir. 1995).
29. *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640 (8th Cir. 2002).
30. *Oates v. Discovery Zone*, 116 F.3d 1161, 1170 (7th Cir. 1997).
31. *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 369 (7th Cir. 1998) ("Under the mixed motives approach to discrimination cases, a plaintiff may rely on either direct or circumstantial evidence to establish discriminatory intent.").
32. *Fernandes*, 199 F.3d at 581–582 (1st Cir. 1999) (reviewing cases from other circuits).
33. *Desert Palace, Inc.*, 123 S. Ct at 2152.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 2152–2153.
38. *Id.* at 2153.
39. *Costa v. Desert Palace, Inc.*, 268 F.3d 838 (9th Cir. 2002).
40. *Id.* at 889.
41. *Id.* at 890.
42. *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (*en banc*).
43. *Id.* at 851–853.
44. *Id.* at 859–862.
45. 537 U.S. 1099 (2003).
46. *Desert Palace, Inc.*, 123 S. Ct. at 2153.
47. *Id.* at 2153–2154.
48. 42 U.S.C. § 2000e(m).
49. *See, e.g.*, 42 U.S.C. § 5851(b)(3)(D) (In cases involving retaliation against whistleblowers under the Atomic Energy Act, "relief may not be ordered . . . if the employer demonstrates *by clear and convincing evidence* that it would have taken the same unfavorable personnel action in the absence of such behavior") (emphasis added).
50. *Desert Palace, Inc.*, 123 S. Ct at 2154.
51. *Id. citing Aikens*, 460 U.S. at 714 n.3; *Reeves*, 530 U.S. at 147.
52. *Id.* at 2154.
53. 42 U.S.C. § 2000e-5(g)(2)(B).
54. *Desert Palace, Inc.*, 123 S. Ct at 2155, *citing Commissioner v. Lundy*, 516 U.S. 235, 250 (1996).
55. *Id.*

Judith P. Broach is a partner and Joshua S.C. Parkhurst is an associate at the New York City firm of Broach & Stulberg, LLP, which represents public and private sector labor unions, individual employees and employee benefit funds.

For Your Information

Judith LaManna announces the publication of her book *Solvay Stories: A 100-Year Diary of Solvay, New York, its Days and its People*. People today long for community. The 144 pages of this book contain the memories of over 75 people—in the form of very short stories spanning 100 years and many events and topics—that recall the special spirit and community of the village of Solvay, New York (with photos and a contributor and names index, along with some of Judith's own cartoon illustrations). It is available by order from the author and through Borders book stores nationally (ISBN 0-9744046-0-8). Judith plans to donate part of the proceeds of the sale of each book to the Solvay Library.

In re Allen: New York Claims a Free Ride When a Non-Resident Telecommuter Is Shown the Door

By Nicole Belson Goluboff

In July 2003, the New York Court of Appeals decided in *In re Allen*[1] that an employee who telecommuted on a full-time basis from her Florida residence to her New York employer was not entitled to unemployment compensation benefits from New York. The Court suggested the case was one of first impression in the country.

The precedent the Court set, however, is troubling. The Court's construction of New York's labor law to preclude benefits was not a necessary one, and it relied on some faulty assumptions. Moreover, the decision established policy that is harmful to New York.

Non-resident telecommuters can help New York businesses survive a rocky economic environment, and they can help businesses thrive in better times. By discouraging such telecommuters from seeking employment with New York businesses, *In re Allen* creates shortsighted policy on long-distance workers.

The Facts

Reuters America, Inc. hired Maxine Allen in October 1996 as a "development technical specialist." At that time, Allen lived and worked in New York. In July 1997, she relocated to Florida for personal reasons, and Reuters allowed her to telecommute from her Florida home. The company supplied the tools she needed to telework, including, for example, a second telephone line, a laptop computer, and software. Allen performed the same job she had performed while physically in New York.[2]

Allen continued to take orders from the New York office. She was "required to be available during normal business hours . . . or after hours as circumstances dictated; to submit time sheets and requests for vacation time; and to call in sick and to seek permission to 'come in' late or 'leave' early."[3] Further, she "maintained daily contact with her supervisor in New York and responded to her employer's directives by e-mail or telephone. She was [also] required to make weekly status reports to her supervisor in New York, which she submitted electronically."[4]

In March 1999, Reuters decided to end the telework arrangement. It offered Allen the opportunity to work in the New York office, which she declined. She then filed for unemployment insurance benefits in Florida. Although she was initially deemed eligible, Reuters objected, claiming that Allen had "voluntarily quit her job without good cause." Florida agreed with Reuters.

While her Florida claim was still pending, the Florida Department of Labor and Employment Security advised Allen that she might qualify for benefits in New York at a higher rate than Florida could provide. Based on this counsel, Allen submitted an interstate claim form to New York. On the form, she stated that she worked at Reuters' address.[5]

There were a number of New York administrative decisions concerning whether Allen was eligible for benefits from New York and whether she should be charged with a "recoverable overpayment" for having falsely asserted on her interstate claim form that she worked at Reuters' New York address. Most of the rulings were against Allen. In May 2002, the Appellate Division, Third Department, also concluded that Allen was ineligible for benefits and that the assessment of a recoverable overpayment was appropriate.[6] The Court of Appeals affirmed.

The Court of Appeals' Reasoning

Unlike Florida, the New York Court of Appeals did not rest its decision to deny benefits on the ground that Allen voluntarily quit her job.[7] Rather, the Court focused on whether Allen had been "employed" within the meaning of New York's Labor Law.

Under New York's Labor Law, for purposes of unemployment insurance, the term "employment" includes "a person's entire service performed within" New York or performed both within and outside New York "if the service is localized in this state."[8] Pursuant to section 511, service is considered "localized" in New York "if it is performed entirely within the state" or if it is performed "both within and without the state but that performed without the state is incidental to the person's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions."[9] At issue was whether Allen's service for Reuters was "localized" in New York.

Allen argued that "her entire service was realized, and therefore localized, at her employer's mainframe computer in New York even though she initiated this service by making keystrokes on her laptop computer in Florida."[10] The Court disagreed, holding that "physical presence determines localization for purposes of interpreting and applying section 511 to an interstate telecommuter."[11] According to the Court, because Allen "was regularly physically present in Florida when she worked for" Reuters in New York, her work was localized in Florida.

Note that section 511 also sets forth various tests to determine whether a claimant's multi-state work constitutes "employment" when the service is not localized in *any* state: The service may be considered New York employment if the person's "base of operations" is in New York. Or, if there is no base of operations in any state where the worker provides services, his or her employment may be considered New York employment if the service is directed or controlled from New York. If neither of these tests resolves the question, employment may still be allocated to New York if the worker resides here.[12] However, having concluded that Allen's service was localized in Florida, the Court deemed it unnecessary to apply these other tests.

The Court explained that section 511 "derives from a uniform definition of 'employment' adopted by New York and most other states" and that "two basic purposes" underlie this definition: (1) when an employee performs services in more than one state, only one state should be responsible for paying the employee benefits; and (2) the state responsible for benefits should be the one where the individual is most likely to become unemployed and seek new work.

According to the Court, unemployment "has the greatest economic impact on the community in which the unemployed individual resides; unemployment benefits are generally linked to the cost of living in this area. While the drafters of the uniform rule could not have envisioned a world of interstate telecommuting, these underlying purposes remain valid, and are best served by tying localization to the state in which an interstate telecommuter is physically present."[13] The Court explained further that, "the purpose of the uniform rule was to . . . end uncertainty in the application of state unemployment compensation rules. . . ."[14]

Flaws in the Reasoning

1. An Unnecessary Construction of Section 511

As explained above, under section 511, service may be deemed localized in New York if it is performed "both within and without the state but that performed without the state is incidental to the person's service within the state." In concluding that Allen's service was not localized in New York, the Court effectively held that Allen's service in Florida was more than "incidental" to her New York service. The Court could easily have reached the opposite conclusion.

Jobs that lend themselves to telecommuting are those that workers can perform from anywhere. As a result, telecommuting has sometimes been referred to as "location-independent" work. Allen's was that kind of work. According to the Court, while in Florida, Allen "would log on to her employer's mainframe computer each workday. She would monitor the performance of her employer's financial systems, troubleshoot, and recommend system changes and enhancements, *just as she had done when she was physically located in New York.*"[15] Since Allen's relocation did not alter her service, the Court could have found that the service remained New York service after she relocated and that the keyboarding she did in Florida was merely incidental to that work.

Alternatively, the Court could have concluded that Allen's employment, performed simultaneously in New York and Florida, was not localized in either state but should be allocated to New York based on another test set forth in section 511. For example, it could have found that her contemporaneous work in the two states precluded a finding of a base of operations in any one state, but that her work was directed or controlled from the New York office. As noted, Reuters regulated her work time. Allen maintained daily contact with her New York supervisor, "responded to her employer's directives by e-mail or telephone," and was required to submit weekly status reports. One administrative law judge had applied the "direction or control" test to find Allen eligible for benefits in New York, and the Court of Appeals could have relied on these facts to do the same.

Some Faulty Assumptions

The Court's decision also rests on a number of presuppositions. One is that the place where the telecommuter is physically present will be the place where he or she will seek a new job. Another is that the place where the telecommuter is physically present will be the state where the telecommuter resides. In some cases, these assumptions may be misplaced.

1. Where the Telecommuter Will Seek New Work

As described above, the Court asserted that one goal of the uniform definition of "employment" set forth in section 511 is to ensure that the state required to pay benefits is the one where the individual is most likely to become unemployed and seek new work. However, the Court simply assumed that, because Allen was physically present in Florida, Florida was the state where she would seek new work. This view is based on an outdated model of the workplace.

Allen was a seasoned teleworker, having telecommuted from out-of-state to Reuters' office for nearly two years. As an employee with significant experience working from afar in the New York marketplace, she could look for a new position with another New York employer. Or she might search for an employer located outside both New York and Florida. As the trend to exchange the car for the computer continues, workers may feel less constrained by geography when seeking new jobs.

2. Where the Telecommuter Resides

Also as explained above, the Court based its conclusion that "physical presence determines localization" in

part on the ground that unemployment "has the greatest economic impact on the community in which the unemployed individual resides," noting that "unemployment benefits are generally linked to the cost of living in this area." The Court's reasoning suggests an assumption that the state where the interstate teleworker is physically present will always be his or her state of residence. This assumption is also problematic.

Consider, for example, a New Jersey resident who telecommutes to a California employer from an office she rents in New York, a few miles from home. The state where she is physically present while working and her state of residence are not the same. In such a case, one of the *Allen* Court's reasons for establishing the physical presence test does not apply, muddying the rule for determining which state should pay benefits. On the one hand, under the Court's analysis, New Jersey should pay, because, as the telecommuter's state of residence, it is the state where the unemployment will have "the greatest economic impact on the community." On the other hand, New York should pay, because the telecommuter is physically present here while working for her California employer.

Another problem: By assuming that the place where the telecommuter is physically present will be the state of residence, the Court is effectively making residence the test of where work is localized, and this approach may contravene section 511. As explained above, section 511 expressly provides that the employee's residence becomes a relevant test of where the multi-state worker was employed when the determination has been made that the service is *not* localized in any one state.[16] The statute does not identify residency as a relevant consideration in determining where the multi-state service is localized. Arguably, the legislature intended residency to become relevant *only* after there has been a finding that the work is not localized in a particular state.[17]

Detrimental Policy

Telework offers tremendous financial advantages to businesses. These may include, among numerous others, reduced real estate costs, reduced turnover and recruitment costs, and increased productivity. In addition, in these times of potential terror attacks, workplace contagions such as anthrax and SARS, international power outages, and other disasters, a distributed workforce can be essential to a business' survival.

Despite these advantages, *In re Allen* discourages interstate telework. If nonresident telecommuters cannot depend on New York to provide unemployment compensation, they may avoid serving New York employers. Without interstate telework, struggling businesses may be quicker to relocate to areas where large numbers of their employees live and where costs may be lower. Or such businesses may be quicker to fold.

Precisely because telework can help companies reach their bottom lines faster, New York should facilitate, rather than impede, the practice. We should offer non-residents a lift home (or to other alternative worksites), rather than driving them out.

Endnotes

1. *In re Allen,* 100 N.Y.2d 282 (2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *In re Allen,* 741 N.Y.S.2d 342 (App. Div., 3rd Dep't 2002).
7. Arguably, Allen's refusal of on-site work with Reuters after Reuters terminated the telework arrangement would not constitute a disqualifying voluntary termination under New York's Labor Law. Under section 593, "voluntary separation from employment shall not in itself disqualify a claimant if circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance under the terms of subdivision two of this section. . . . [And, under subdivision 2,] [n]o refusal to accept employment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if . . . the employment is at an unreasonable distance from his residence. . . ."
8. N.Y. CLS Labor § 511(2).
9. *Id.*
10. *In re Allen,* 100 N.Y.2d 282 (2003).
11. *Id.*
12. N.Y. CLS Labor § 511(3).
13. *In re Allen,* 100 N.Y.2d 282 (2003).
14. *Id.*
15. *Id.* (emphasis added).
16. NY CLS Labor § 511(3).
17. *See In re Mallia,* 299 N.Y. 232 (1949) ("The purpose of the Legislature is . . . to bring within the scope of the New York act those employees who work both in New York and one or more other States when the most substantial contacts of the employment are in New York. That end is to be effected by applying to their services a number of tests—localization, location of base of operations, source of direction or control, and finally residence of the employee. (section 511, subds. 2, 3). *It is clear that the statutory tests are to be applied in succession to the entire service, both 'within and without this state';* and only if that entire service so considered is not employment in New York may a portion of it be considered separately as employment in one or more other States.") (emphasis added).

Nicole Belson Goluboff writes, speaks, and teaches online seminars about telecommuting, focusing on its legal implications for all types of businesses, as well as the use of telecommuting as a law practice management strategy. She is the author of Telecommuting for Lawyers (American Bar Association 1998), among numerous other publications. She is a former litigator who earned her J.D. from the Columbia University School of Law. She can be reached at Goluboffn@aol.com.

Who Is an Employee Under Federal Discrimination Laws?

By Michael J. Sciotti

As most labor and employment practitioners know, several federal discrimination statutes do not apply to small companies given the lack of a sufficient number of employees. For instance, the Americans with Disabilities Act defines an employer as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person."[1] Title VII of the Civil Rights Act,[2] the Age Discrimination in Employment Act,[3] and the Family and Medical Leave Act,[4] all have similar definitions with some variations of the number of employees. In addition, the New York State Human Rights Law exempts from coverage those employers "with fewer than four persons in his employ."[5]

One of the first questions which counsel must answer is whether the specific statutory claim that has been brought is even applicable to the employer. Counsel must carefully scrutinize the number of employees to determine whether the defendant-employer is in fact a covered entity. When large employers are sued, the answer is usually obvious on its face. However, a more difficult situation arises when a defendant-employer is "on the bubble." That is, if you count an owner of a closely held entity as an employee, the employer is covered. However, if you exclude the owner, the plaintiff's claim will fail as the employer is not covered by the statute.

Counsel have been handed a "how-to guide" for bubble employers by the United States Supreme Court. In *Clackamas Gastroenterology Associates, P.C. v. Wells*,[6] the Court indicated that the following six factors are relevant to the inquiry of whether a shareholder-director is an employee:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. Whether and, if so, to what extent the organization supervises the individual's work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contacts; and
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

The Court's decision in *Clackamas* was limited to what factors are "relevant to the inquiry [of] whether a shareholder-director is an employee" under the Americans with Disabilities Act.[7] However, the application of *Clackamas* should be attempted to be used for purposes of determining who is an employee for purposes of other discrimination statutes. No one factor is decisive, and "all of the incidents of the relationship" between the individual in question and the employer must be examined.[8] In addition, the title of the individual "does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder as opposed to an employee."[9] Also, "the mere existence of a document styled 'employment agreement' [should not] lead inexorably to the conclusion that either party is an employee."[10]

"Counsel must carefully scrutinize the number of employees to determine whether the defendant-employer is in fact a covered entity."

As to the first factor, the more authority the individual in question has to hire and fire other individuals, the more likely this factor would weigh against the person being deemed an employee. However, if the individual does not have the authority to hire and fire, or even if he or she must seek approval of someone higher in the chain of command, this factor would weigh in favor of that individual being deemed an employee.

The second and third factors inquire as to whether or not the defendant supervises the person in question and whether that person reports to someone higher in the chain of command. Arguably, the more supervision and reporting requirements, the more likely that individual will be deemed an employee. Conversely, if no one supervises the individual in question, or if there are limited supervision or reporting requirements, the person in question may be excluded from the employee count.

The fourth factor inquires as to the extent to which the individual is able to influence the organization. The more influence the person has within the organization the more likely they would be excluded from being counted as an employee.

If the employer and the individual want the person to be considered as an employee, this arguably weighs in favor of the person being counted. For instance, the owner of a small, closely held company enters into an employment agreement with the company on behalf of himself, individually. This appears to signify that this person should be counted as an employee. Conversely, the absence of such an agreement may imply the person is not an employee.

Finally, if the individual shares in the profits, losses and liabilities of the employer, that individual will most likely be deemed not an employee.

Clackamas may also be helpful in defeating a claim under the New York State Human Rights Law or local discrimination statutes. Many state and local discrimination statutes are interpreted by federal decisions on similar issues.[11] In addition, some state cases may clarify who is considered an "employee" for purposes of state law. For example, in *Germakian v. Kenny International Corp.*, an intermediate New York State Appellate Court indicated who should be counted to determine if an employer is covered by the New York State Human Rights Law.[12] The Court stated an employer "envisions a situation where the employer engages four persons other than himself or herself."[13]

"[I]f the individual shares in the profits, losses and liabilities of the employer, that individual will most likely be deemed not an employee."

In summary, the *Clackamas* decision requires counsel to get into the details of the questionable individual's relationship with the employer. A successful case is in the details. All decisions are made on a case-by-case basis, and no one factor listed above is controlling. By properly developing the facts in support of its position, counsel may be successful in prosecuting or defending the claim.

Endnotes

1. 42 U.S.C. § 12111(5)(A).
2. 42 U.S.C. § 2000e(b).
3. 29 U.S.C. § 630(b).
4. 29 U.S.C. § 2611(4)(A).
5. N.Y. Exec. Law § 292(5) (Lexis 2002).
6. 123 S. Ct. 1673 (2003).
7. *Clackamas*, 123 S. Ct. at 1680.
8. *Id.* at 1681.
9. *Id.* at 1680.
10. *Id.*
11. *See Miller Brewing Co. v. State Div. of Human Rights*, 66 N.Y.2d 937, 498 N.Y.S.2d 776 (1985).
12. *Germakian v. Kenny Int'l Corp.*, 151 A.D.2d 342, 543 N.Y.S.2d. 66 (1st Dep't 1989).
13. *Id.*

Michael J. Sciotti is a partner with the law firm of Hancock & Estabrook, LLP in Syracuse, New York. He is a graduate of the Rochester Institute of Technology (B.S.) and the Syracuse University College of Law (J.D. & LL.M.). Mr. Sciotti can be reached at msciotti@hancocklaw.com.

L&E Newsletter Available on the Web

Back issues of the *L&E Newsletter* (2000-2003) are available on the New York State Bar Association Web site.

www.nysba.org/labor

Click on Member Materials

Back issues are available at no charge to Section members only. You must be logged in as a member to access back issues. For questions, log-in help or to obtain your user name and password, e-mail webmaster@nysba.org or call (518) 463-3200.

***L&E Newsletter* Index**

For your convenience there is also a searchable index in pdf format.
To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase.
Click "Find Again" (binoculars with arrow icon) to continue search.

A Labor Mediator's Perspective on Civil Mediation

By Ira B. Lobel

The use of alternative dispute resolution has increased rapidly in recent years, particularly in the area of mediation. Mediation has been seen as a mechanism to unclog crowded court calendars, to give disputants their "day in court," and in general, to solve world peace and bring prosperity to all mankind. Obviously, with this last comment, I am being extremely facetious; however, if one reads much of the material on mediation, one could believe that mediation offers the potential for such benefits.

Recently, I retired from the Federal Mediation and Conciliation Service after a 30-year career mediating labor disputes. I have also had the opportunity to mediate many civil matters and numerous multi-party matters (environmental disputes, regulatory negotiations, etc.). In short, I have mediated a wide variety of matters in a multitude of forums. This paper is intended to address some conceptual requirements for mediation to be effective.

One must first start with a basic premise. Mediators cannot settle cases unless the parties have a desire to settle. All the skill, creativity and persistence of the finest mediator in the world cannot help the parties reach a settlement unless both sides are willing to reach an agreement. Both sides must be either willing to compromise or one side must be willing to totally capitulate. If capitulation is required, why mediate, unless the mediation sessions are needed for the capitulation to take place?

In the world of collective bargaining, if a company intends to eliminate a union or the union is adamant about striking, no mediator can prevent either from happening, especially if one or both sides are entrenched in their position. Similarly, in a civil matter, if either the plaintiff or the defendant is absolutely convinced of their position, no mediator will be able to help the parties reach an agreement, unless it is by getting one side to abandon its position completely. A matter of constitutional or moral principle, such as a constitutional or abortion issue, is almost impossible to mediate. Both sides usually need to maintain their basic principle until a third-party decision maker (judge) tells them differently. Similarly, a one-issue negotiation (such as union security or an admission of liability) is almost impossible to mediate unless this one issue can be transformed as part of a broader settlement or exchanged for another issue. For example, an admission of liability may be exchanged for money; union security is often very difficult to exchange for anything since it can be a matter of principle for both union and company.

Whether it is labor and management, plaintiff and defendant, landlord and tenant, or two spouses, the good mediator can help parties resolve differences as long as they have a desire to reach an agreement and are willing to compromise to some extent. If mediators were truly honest, they would agree that a large portion of cases should settle with or without a mediator. The mediation session simply provides a forum for both sides to negotiate. The scheduling of the mediation session forces both sides to evaluate and re-evaluate their respective positions. This happens in labor mediation, it happens in civil mediation and it happens in every type of mediation forum. (One must remember that most cases still settle on the courthouse steps. Mediation only helps accelerate the "thinking about" settlement process.)

"It should be emphasized that mediation is simply a continuation of the negotiation process."

It should be emphasized that mediation is simply a continuation of the negotiation process. In the labor field, it is an adjunct to or an extension of the collective bargaining process. In every civil matter, attorneys should always be considering, among others things, whether a case should settle before trial, whether it is appropriate to negotiate a settlement. The mediator thus becomes a conduit, a lightning rod, a vehicle to smooth out some rough spots during negotiations. The mediator is not a substitute for the negotiators or a judge. The mediator's role is simply to get the parties to continually analyze and re-analyze their positions in an effort to get them to modify these positions. The good mediator remembers that the negotiations belong to the parties; in fact, the best settlement takes place without the intervention of a third party. The mediator constantly points out to the parties the practicalities of negotiations: the cost of agreement versus the cost of disagreement and the advantages and disadvantages of various approaches. The good mediator attempts to raise doubt in each side's view, in order to get each side to constantly reassess and reappraise its position.

A mediator is different from a negotiator. The good negotiator uses some mediation skills and vice versa, but the two functions are different. Even the goals are different: the negotiator wants to get the best deal for his or her client; the mediator simply wants to get a settle-

ment. While the negotiator must care about the quality of the deal, the mediator's primary emphasis should be on whether there is a deal. Of course, a mediator should make sure that the parties understand the deal that they are making, but if one side knowingly makes a bad deal or is taken advantage of, it should not be the role of the mediator to intercede.

"Mediators should always remember that the dispute is the party's dispute and the role of the mediator is to help the parties resolve that dispute."

Listening to discussion among mediators in landlord-tenant, matrimonial, civil litigation, and some employment disputes, it is common to hear that one of the mediator's roles is to level the playing field, to make sure the party with the inferior power does not get an unfair deal. If mediators begin to worry about "leveling the playing field," they cease to become mediators, but instead become advocates or judges. The mediator should be careful to make sure he is a conduit for discussion, not an additional decision maker. Similarly, mediators should not have to worry about due process, since during any negotiation, it is up to the parties, not the mediator, to worry about due process. Since the parties are the decision makers, the process is "owned" by the parties, not the mediator. The mediator is there simply as an assistant to the parties and their process. The mediator does not—and should not—have any power, except the power of persuasion. Mediators should always remember that the dispute is the party's dispute and the role of the mediator is to help the parties resolve that dispute. Accordingly, he is a "reactor" to the needs of the parties.

Why Labor Mediation Works

Mediation is used in many court proceedings, matrimonial matters, commercial disputes, etc. While it is difficult to accurately determine the success of any of these mediation programs,[1] it is clear that there are institutional and procedural differences between labor mediation and court-induced mediation, even those involving employment matters. These differences help to make, by many accounts, labor mediation extremely successful. It may be helpful to mediators in other venues to keep these differences in mind when attempting to help parties settle a dispute. Successful introduction of any of these elements may help sow the seeds for settlement. The presence of these elements make the dynamics involving labor mediation different from mediation in other arenas, including mediation of employment disputes (discrimination, wrongful discharge, EEO, ADA, etc.). The elements include the following:

1. Only parties make the decision
2. Power relationship
3. Deadline
4. Continuing relationship
5. Historical perspective
6. Cost

It is important to analyze these factors to understand why labor mediation works in many situations and why the mediation process in the court arena faces unique challenges, unless the parties can develop similar elements that provide a suitable framework to encourage settlement. All of these elements are intertwined and overlapping, as will be apparent from the discussion below.

Only Parties Make the Decision

In a collective bargaining situation, labor and management negotiate over wages, hours and working conditions. In the event of a disagreement, the parties can (1) agree to new terms; (2) continue to bargain and maintain the terms of the expired agreement; or (3) engage in concerted activity (strike or lockout).[2] If there is a disagreement, no third party can substitute his judgment for that of the parties. This means the parties *must* make their own decisions about the terms and conditions of employment. Even if one side can dictate the terms and conditions of employment (because of superior bargaining power), no third party has the legal power to determine the terms and conditions of employment.

In a civil manner, if the parties cannot agree on a resolution, ultimately a judge will make a decision for the parties. The parties can look to the law, equity and the cost of continued litigation as factors in determining whether or not to negotiate and settle; however, both sides know that, ultimately, someone else can dictate the settlement terms for them.

At various times in my career, I have mediated in situations where the parties can move to arbitration if no agreement is reached in mediation. In these situations, the dynamics change, because an outside decision maker can settle the matter. The mediator, instead of using what the other side will do or not do to raise doubt, must try to suggest what the third-party decision maker must do. Whether this is good or not is not important; clearly, the dynamics of the negotiations are different.

The mediator may be able to use the uncertainty of a judge's ruling, delay in the final decision, the cost of

the legal process, etc., as factors that may encourage a party to make difficult decisions prior to a trial. These "doubts" clearly take on a different tenor than raising questions in a labor situation of the practical implications of a strike, lockout, continued negotiations, final offers and the like. The mediator must be able to use the uncertainty (or the certainty) of the outside decision maker as a pressure for the parties to evaluate and reevaluate positions.

Power Relationship

The second element one must consider is the question of power. In a labor dispute, a party has the legal right to be unreasonable; the consequences may be a work stoppage or unhappy employees or poor productivity, but it is up to the parties, singularly or jointly, to make that decision. In the event one side wishes to try to force its will on the other, there is no check, through a court or other third party, on the ability of the party to do this.

Contrast this to a legal proceeding where one party cannot use their power in contravention of the law. Because the judge or third party must look at the law and justice, the parties may defer to the third party's judgment, rather than risk a negotiated settlement that does not achieve the goals they are hoping for. Often, however, one side may use their power of financial backing as an impetus for a settlement. For example, the side with deeper pockets may prolong the litigation, engage in endless discovery, delay trial and have countless appeals and motions. This may prompt the weaker side into a settlement; however, if they can hold out, the case will be decided on law and justice, not on the question of power.

The reality of the "deeper pockets" may be a very powerful weapon, but it takes on a consistency different from the power used in a labor dispute. The power in a labor dispute is more economic muscle—the power to strike or lock out. In a civil matter, it is the power to delay, appeal, cost money, etc. Judges may put a stop to this, but only after significant expense. Both can be extremely potent, but the two are different and should be used differently by a mediator in raising doubt and getting parties to reassess positions.

The mediator should constantly remind the parties that the use of power may have some short- and long-term consequences. The good mediator will constantly remind people of the "cost" of using power and leave it up to the parties whether it is worth using the power.

Continuing Relationship

In a labor matter, the parties know that once the dispute is settled, they must still find a way to work together. Unless one side can absolutely destroy the other side, a collective bargaining relationship is like a marriage without the divorce. The parties know that they must deal with each other in the future. Accordingly, both sides often have an interest in allowing the other side to survive. Mediators can use this "continuing relationship" as a tool to convince one side or the other not to be too harsh. Mediators can indicate that a party may win the battle and lose the war.

"In effect, because the mediation is taking place, it becomes a deadline, or better yet, a time for both sides to look at their cases seriously. "

Similarly, in a civil mediation where the parties have a continuing relationship, such as a matrimonial or partnership matter (or an employment matter where the employee continues employment), the mediator can use the need for a continuing relationship as a means for preventing the parties from trying to "punish" the other side. For example, in an employment dispute, in a situation where the employee will continue his employment, a very effective technique for the mediator may be to focus on the need for the parties to make the decision as part of a continuing relationship. In a situation where the parties are dealing with a singular transaction, such as a medical malpractice or a simple contract dispute, this dynamic is not present. The parties simply want to get the best deal possible and are really not concerned about a continuing relationship, because there is none.

The mediator should be aware of whether there will be a continuing relationship. The mediator will have to adjust questions and methodology, depending on the answer to this question. A dispute where there is a continuing relationship takes on an added dimension of possibilities that a mediator can use in "raising doubt" and trying to get the parties to reconsider their positions.

Deadline

Deadlines force parties to make decisions; lack of deadlines encourages parties to delay and defer decision. Regardless of the subject of the mediation, the reality is that the introduction of a mediator into a dispute often is a sign to the parties that they should begin to get serious. In a labor dispute, the entry of a mediator is often tied to a strike threat or a specified stage in the process. The entry of the mediator into a labor dispute often becomes a signal for the parties to get down to business and try to reach a settlement. In a civil matter, the entry of a mediator will also give the attorneys for both sides a reason to look at the file, to start preparing and to consider alternatives and possible settlements. In

effect, because the mediation is taking place, it becomes a deadline, or better yet, a time for both sides to look at their cases seriously.

Unfortunately, in some civil matters, parties go into mediation when they are not prepared to negotiate. It may be that it is a court-ordered mediation and the proper amount of discovery has not taken place. It may be that the parties see the mediation as a tool for additional discovery or additional delay. Regardless of the reason, civil mediation often does not have the same type of dynamic that labor mediation has in terms of the "time to settle."

In the labor field, many mediators talk to both sides about the proper timing of the mediation. They look to see whether there is any deadline that can be used that will provide pressure for a settlement. In the civil arena, mediators could be very helpful to the process if, when scheduling a mediation, they discuss with the parties the time for scheduling the mediation, particularly as it relates to the discovery process. Scheduling mediation too early in the process may prevent either side from settling, since neither would have a clear idea what a case was worth. Too late in the process may have both sides firmly entrenched in their position. The timing of a motion for summary judgment or some other legal or practical event may help the parties set a deadline. A discussion with both sides may help assess the "appropriate time to mediate." The preparation for mediation that takes place in a civil matter often serves as the impetus for both sides to become more knowledgeable about their case and about whether settlement is appropriate and possible.

Historical Perspective

Mediation has been used to settle labor disputes since the early 1900s. It has a history and an acceptance in the labor/management community. Most labor and management advocates understand the process, have used the process previously, and recognize its advantages and limitations. Many mediators work for a government agency and are provided at no cost to the parties. In many situations, mediation has become an institutional part of the process.

This must be contrasted to the legal arena, where mediation is still a relatively new phenomenon. Many lawyers do not understand mediation, often confusing it with a mini-trial or arbitration. In addition, they have to convince their client of the utility of mediation in a situation where there will be added expense and no guarantee of a definitive outcome.

Further, the entrance of a mediator into a dispute is often court-ordered. If the mediation is court-ordered, the parties may simply go through the motions, only to comply with a court order.

When there is no court order, parties are often reluctant to suggest mediation, because to do so may imply a weakness in their position. Accordingly, mediation is not a formalized part of the legal or negotiations process, but another approach that they must sell to their client and then get agreement from the other side. These levels make "agreement to mediate" more difficult and hence, often not worth the effort.

Cost

In the labor arena, mediation is usually provided free of charge by the government. It is considered a legitimate government expense to promote sound labor relations and, in effect, keep both the economy and government working. Accordingly, the cost of mediation, and often who the mediator is, rarely becomes an issue. (If a government agency is used, the agency usually appoints the mediator with little formal input from the parties.) Mediation will either be offered by the agency such as FMCS, or as part of an impasse procedure dictated by state statute. In either case, the parties do not have the cost of mediation as an issue to settle before they can even start the process.

In the civil arena, my experience indicates that the most successful mediation occurs when the parties themselves choose a mediator with whom they are familiar and mediate on their own initiative, without court involvement or order. The parties pay for the mediation by agreement between them and the mediator. The problem with this approach is that many lawyers do not understand the process and often view a request for mediation as a sign of weakness.

In a court-ordered program, there is always a dilemma between paid mediators and *pro bono* lawyers. The U.S. District Court for the Northern District of New York uses *pro bono* lawyers. One of the difficulties with their system is that advocates do not appear to take the program as seriously as they should. Often, the parties go through the motions at mediation, simply to satisfy the order of the court. Furthermore, since the mediation is often in response to a court order, the parties are often not at all sensitive to timing the mediation to make the process more productive. In some situations, mediators get involved prior to discovery, before either side has an idea how much a case is worth. When questioned, the parties responded that they were both satisfying a judge's order.

It could be argued therefore that paid mediator programs often work better. I believe this to be true. Vermont has a mandatory mediation program where the mediator's fees are paid by the parties, but the parties choose the mediator based on cost and reputation, from a list supplied by the courts. This gives the parties the requirement to mediate and an opportunity to time the

mediation to maximize settlement possibilities. My experience has shown me that the parties are much more sensitive to timing issues. The parties will often postpone mediation until key discovery is completed, but before additional major investments are incurred. Only the parties can make this type of judgment.

The cost of mediation is one of the elements that must be considered. However, if a case can be settled expeditiously with the help of a mediator, the cost may be worth it. It is, however, sometimes very difficult to get two hard-nosed negotiators to settle on a mediation process when they are at each other's throats on substantive matters. This is one reason why it may be helpful to have court-ordered mediation, paid for by the parties, with the mediators selected from a list of lawyers who state their fees and experience up front. The labor arbitration system usually has an administering body submit five to seven names which the parties alternatively strike, leaving the remaining arbitrator as the one selected. In this system, the parties select based on reputation, background, experience and cost, all of which are sent to the parties. I believe that such a system could work very well with court-ordered mediation, particularly if there is some discretion as to when to time the proceeding.

How Do Mediators Really Operate?

Regardless of the forum, whether it is labor mediation or civil mediation, multi-party or environmental, the mediator operates in similar ways to help the parties reach a settlement. Mediators should constantly remind people, in a subtle way, about the cost of disagreement. This means the mediator must constantly ask questions: What will happen if you propose such and such? What will happen if you don't reach agreement? What can the plaintiff do; what can the defendant do? How will a judge decide? How long will it take? What will it do to a continuing relationship (if this is a factor)?

These questions are usually best asked in separate session or caucus. Playing "devil's advocate" and getting the parties to doubt the wisdom of their own cases is a highly effective way of getting the parties to question their own case and hence negotiate. Often I will use the arguments of the other side—"How will you overcome this argument; or how will you deal with this piece of evidence?"—in an effort to get the parties to rethink their position. I will always start slow, in hopes of getting some momentum and try to get simple points out of the way. In a labor case, it may be simple language issues; in a civil matter, it may simply be that the defendant is willing to pay something. Once I can get agreement on a basic principle, such as the defendant will pay something, it is usually possible to bridge the gap of money, simply by being creative in how one receives money—whether it is over time, in a lump sum, in good and services, etc.

The beauty of mediation and the challenge of a good mediator is to try to figure out how to get the parties to reach the conclusions for themselves, rather than you suggesting the answer to them. We deliver offers and explain those offers, but our real efforts are in trying to get the parties to look at issues in different ways, or state concepts in a more positive manner.

Regardless of the forum, mediation is all about people and trying to figure out what it will take to get people to move in a way that will elicit a similar response from the other side. Mediators can assist the parties in making proposals that will elicit an appropriate response from the other side. They use their expertise about people to help the parties make the right move at the right time. The most important concept for a mediator is to remind the parties, in a gentle way, of the cost of disagreement.

The challenge of mediation is to get the parties to work out agreements for themselves as part of the negotiations process, not as a separate process unto itself. Successful mediators are the ones who put the onus for settlement back on the parties and get the parties to realize the benefits of settlement. Mediators in the civil arena should understand the labor mediation process and take from it, at the right time, the elements that will help settle a matter. The more parties settle, the more lawyers and their clients will understand the value of the process and the opportunity it has to settle cases much earlier in the process than at the courthouse steps.

Endnotes

1. Settlement rates, while helpful, may not be an indicator of success, unless there is a control that studies settlement rates of similar cases without mediation. Most cases settle, albeit often close to trial. A legitimate question concerns whether pushing the parties to settle earlier in the process is an effective indicator of success, and if so, how this is measured.
2. In the public sector, the parties can proceed to fact-finding or arbitration (police and fire). Both of these quasi-judicial proceedings will change some of the dynamics explored in this section.

Ira B. Lobel is a mediator and arbitrator of multi-party disputes in Delmar, New York. He holds a B.S. from Cornell University and a J.D. from Catholic University. He can be reached at ilobel@nycap.rr.com.

International Labor and Employment Law Committee Formed

By Philip M. Berkowitz and Wayne N. Outten

The Labor and Employment Law Section of the New York State Bar Association is pleased to announce, as noted in the Message from the Chair, the creation of the International Labor and Employment Law Committee. The Committee, dedicated to this fast-growing field, will be chaired by Philip M. Berkowitz of Seyfarth Shaw LLP and Wayne N. Outten of Outten & Golden LLP.

International issues in labor and employment law have taken on added significance in recent years. First, all of the federal laws prohibiting discrimination in employment have extraterritorial effect: thus, U.S. companies (and foreign companies controlled by U.S. firms) employing U.S. citizens abroad, generally speaking, must comply with Title VII, the ADA, and the ADEA with respect to those employees. Even New York discrimination law has been held to have some extraterritorial application.

U.S. multinationals must also comply with increasingly complex and stringent labor and employment laws overseas. Further, U.S. companies are increasingly the focus of lawsuits in the United States by unions, employees, and others challenging their overseas employment practices, even if they fully comply with foreign law.

Expatriate employees have their own special concerns with regard to their employment agreements and benefits. Many unions represent employees of companies that do business in many countries or employees personally involved in international trade and activities. Finally, foreign companies doing business in the United States need to take care in complying with U.S. employment laws, as they are often unaccustomed to American laws and practices and are vulnerable to enforcement efforts.

This Committee will devote itself to the significant challenges presented by these ever-expanding rights and responsibilities of employers, employees, and unions. Section members interested in joining the Committee should contact Phil at pberkowitz@ny.seyfarth.com or Wayne at wno@outtengolden.com.

REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *L&E Newsletter* Editor

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

Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

The Bottom Line of the "Bottom Line" Defense

By Jennifer Stone

Following a year in which input was solicited from the deans and faculty of the New York State law schools as well as from the Executive Committee of the Labor and Employment Section regarding ways in which the relationship between the law schools and the LSLC could be improved, the LSLC restored the Dr. Emanuel Stein Memorial Writing Competition and initiated the Law School Student Awards. The Committee gave a third-prize award to the following article by Jennifer Stone, a student at Brooklyn Law School.

Introduction

Diversity in selection is not only required by law in the United States, but is also highly valued by many organizations.[1] Companies desire a diverse workforce because of our diverse population and the international nature of American business, which requires an ability to work with people from different backgrounds.[2] The type of clientele an organization serves may make a diverse workforce necessary.[3] Organizations may also desire diversity because they believe it results in a healthy mix of behaviors, ideas, and values within the organization.[4] However, when selecting employees, diversity and productivity are often at odds with each other.[5] Methods of selection used by organizations may be cheap and easy to administer and excellent predictors of job performance and productivity, but may also result in adverse impact, thus limiting the diversity in the organization.[6]

Adverse impact, also known as disparate impact, is the adverse effect of a facially neutral practice that discriminates against people based on a group characteristic.[7] Adverse impact occurs in selection when a test or measurement device results in a substantially lower rate of hiring for members of protected groups.[8] The *Uniform Guidelines on Employee Selection*, produced by the enforcement agencies for equal opportunity employment, define the difference in the rate of hiring to be legally significant when the selection for a minority group is less than 80% of the selection rate for the majority group.[9] This definition is often referred to as the 4/5 rule.[10] When this difference occurs, there is a presumption of discrimination.[11]

No matter what the reasons for adverse impact resulting from a selection examination, an employer is required by law to justify using such a selection device.[12] The Civil Rights Act of 1964 has been interpreted by the Supreme Court to place a burden on employers who use such devices to show that the device is related to the job in question.[13] Although the Court refused to place the burden of persuasion on the employer,[14] Congress reversed that effort with the Civil Rights Act of 1991.[15] It is now clear that if employers use a selection device that results in adverse impact, they will have to justify its use by proving that it is job-related.[16]

When an employer uses one selection device, the analysis is easy. Adverse impact occurs when the device results in significantly more whites being hired than minorities.[17] However, when an employer uses more than one selection device the analysis is more complicated. When more than one selection device is used, one question that arises is where in the process does the adverse impact have to occur for the burden to shift to the defendant?[18] For example, if an applicant must pass one test to get to the next step in the application process, is adverse impact measured at each step or at the final hiring stage? And if the two tests are given at once and the scores are combined, is adverse impact measured from the results of each test or the combined final result?

The courts' focus on the final hiring result is called the bottom line concept.[19] In *Connecticut v. Teal*, the Supreme Court held that in a case where a selection test was used to eliminate applicants from going any further in the hiring process, the absence of adverse impact in the final hiring numbers is not a defense.[20] In other words, the bottom line is no defense in such a case.[21] However, it is unclear whether or not this holding should be applied to cases in which the employer uses a battery of tests and combines the scores into one composite score.[22] The circuit courts have decided it does not, and that is the correct result.[23] The Civil Rights Act of 1991 and the rationale in the Court's decision make it clear that the *Teal* holding should be limited to cases where a selection test serves as a pass-fail barrier to employment.[24]

Studies conducted by industrial psychologists also indicate that this is the correct result. In an effort to reduce adverse impact in selection, industrial psychologists have focused on conducting batteries of tests.[25] The scores on these tests are then put into a regression equation, weighting the different factors based on how well they predict job performance.[26] New statistical methods weigh factors based on their resulting adverse impact and validity in addition to job performance.[27] Validity is a measure of how well a measure predicts performance. So far the results largely indicate that an organization that is willing to use test batteries will ultimately have to sacrifice some of the value of the testing method to the organization because a reduction in adverse impact also results in a loss in validity.[28]

The law should encourage organizations to use batteries in selection by allowing the bottom line as a defense in cases where every individual has the opportunity to take every test. Congress, the Supreme Court and the lower courts indicate that this is the right result because everyone has an equal opportunity to be hired. Further, industrial psychologists have found that batteries provide one of the most promising methods of achieving diversity and maximum prediction of worker productivity. Organizations should be encouraged to continue this research by being allowed to use their bottom line hiring numbers as a defense.

Part I of this article outlines the bottom line defense and how it has been used in the courts. Part II describes the industrial psychological research on the adverse impact that results from different selection measures. Finally, Part III argues that, based on the law and the psychological research, when batteries of tests are used in selection, adverse impact should be measured from the bottom line.

Part I: The Bottom Line Defense

An organization cannot use its bottom line hiring numbers to rebut a prima facie case of discrimination when the organization uses more than one test, and one of those tests is a pass-fail barrier to employment.[29] However, the question of using bottom line hiring numbers as a defense in cases where more than one test is used but every applicant has the opportunity to take every test is still an open question. Legislation and judicial decisions indicate that when test batteries are used, the final hiring results should be analyzed for disparate impact, not each test's results alone. The Civil Rights Act of 1991 says that functionally integrated practices which are components of the same criterion may be analyzed as one employment practice.[30] The Eleventh Circuit has highlighted the difficulty of separating some hiring tests in a series of tests for analysis.[31] The Second Circuit has held that test results should be analyzed using final hiring numbers because it makes no sense to analyze each component separately.[32] Finally, the Ninth Circuit has also held that when there is no dispositive event between two rounds of testing the results from the two tests should be analyzed together.[33]

The Supreme Court established that a plaintiff can make a prima facie case of discrimination if the plaintiff can show that an employment selection device or qualification has a disparate effect on minorities.[34] In *Griggs v. Duke Power Co.*, the plaintiff, who was black, applied for a job that historically had only been given to whites.[35] After the passing of the Civil Rights Act of 1964, the company instituted the requirements of a high school education and the passing of standardized intelligence tests as a condition of employment.[36] These requirements effectively excluded most blacks.[37] The Court held that this significant exclusion of blacks constituted a prima facie case of discrimination.[38] Further, the Court held that the prima facie case cannot be rebutted by showing that the defendant had no discriminatory motive by requiring these selection devices.[39] The defendant must show that the selection device is job-related to rebut the prima facie case.[40]

Some courts interpreted *Griggs* to mean that adverse impact was measured by the effects selection devices had on the final hiring result.[41] For example, in *Rule*, a union instituted the requirements of a high school diploma and passing certain standardized tests to become employed after the Civil Rights Act of 1964 was passed.[42] To select who would become part of an apprenticeship program, a point system was used in which points were assigned to education, physical ability, past experiences, references, residence, an oral interview, and an aptitude test.[43] To pass, an applicant must have scored above 70 (out of 100).[44] Then applicants were rank-ordered and the positions were filled by the highest-ranking applicants.[45] The plaintiffs in the case focused their discrimination claim on the disparate impact that resulted from one aptitude test.[46] The court held that the application process must be viewed as a whole and that the plaintiffs could not establish a prima facie case unless the entire selection process resulted in significantly more whites being hired than blacks.[47] The disparate impact of the one aptitude test was insufficient to make a prima facie case.[48] The *Uniform Guidelines* agree with this reading.[49] They state that if there is no adverse impact in the final hiring, then the agency will not take enforcement action based on adverse impact that occurs from each step or component in the hiring process.[50]

However, the Supreme Court has held that in some cases the bottom line defense is not a valid defense.[51] In *Teal*, four black employees were provisionally promoted to supervisory positions but were denied permanent status as supervisors.[52] To become a permanent supervisor the employees had to first take a written examination.[53] A significantly higher number of whites than blacks passed this written exam, and the plaintiffs were excluded.[54] The plaintiffs argued that the disparate impact resulting from this examination constituted a prima facie case of discrimination.[55] From the list of people who passed the test, the defendant chose people for permanent positions based on past work performance, recommendations of the candidates' supervisors and to some extent seniority.[56] A program described as an affirmative action program was also used.[57] This process resulted in 22.9% of black candidates and 13.5% of white candidates receiving a promotion.[58] The defendants argued that this bottom line result was a complete defense to the charges of discrimination brought by the plaintiffs.[59]

Teal dealt with a situation where the selection device was an absolute barrier to promotion, that is, an appli-

cant could not continue in the application process without first passing the written test.[60] Focusing on individual opportunity, the Court held that the claim of disparate impact resulting from the "pass-fail barrier" to an employment opportunity, i.e., the written examination, states a prima facie case, and the defendant's nondiscriminatory bottom line was no defense.[61] The Court stated that the purpose of federal anti-discrimination laws is to achieve equal opportunity by the elimination of "artificial, arbitrary, and unnecessary" barriers to employment that are discriminatory.[62] The language of the federal statute states that practices are prohibited that deprive "any individual of employment opportunities."[63] The Court said that rather than protecting groups as a whole, the intent of the law is to protect individuals.[64]

The Supreme Court addressed the bottom line as part of the plaintiff's prima facie case in *Wards Cove*.[65] In this case, plaintiffs cited several practices that they said were responsible for the significantly larger number of whites than blacks working for the defendant.[66] These practices included nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within.[67] The Court held that the plaintiffs could not make a prima facie case of discrimination by just showing that there was a racial imbalance in the workforce.[68] Generally a plaintiff must show that a specific employment practice has created the disparate impact.[69] The Court called this "an integral part" of the plaintiff's prima facie case.[70]

Congress responded to the *Wards Cove* decision by passing the Civil Rights Act of 1991.[71] The Act states that "An unlawful employment practice based on disparate impact is established under this Title only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . . and the respondent fails to demonstrate that the challenged practice is job related . . ."[72] This language seems to affirm the part of the *Wards Cove* decision that requires plaintiffs to show that a specific practice resulted in disparate impact.[73] However, the Act goes on to state that

> "With respect to demonstrating that a particular employment practice causes a disparate impact . . . the complaining party shall demonstrate that *each particular challenged employment practice* causes a disparate impact, *except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice*."[74]

When the Civil Rights Act of 1991 was enacted, part of the compromise that led to its passing the Senate and the House was a statutory designation of what was to be considered legislative history.[75] The pertinent language states that "When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice."[76] The question of when multiple components are capable of being separated is one that is still unanswered.[77] It is unclear whether the citation to the *Dothard* case meant that weight and height should not be separated because they could not practically be separated for statistical analysis, or because both of those measurements were used as a proxy for strength and should be analyzed as one component.[78] However, the measurements of weight and height could have easily been separated and then analyzed.[79] Therefore, Congress intended that combined measurements should be analyzed as one composite measure.

The question that remains is whether or not the *Teal* holding is limited to cases where selection devices are used as pass-fail barriers or whether this holding also applies to situations in which several selection devices are used at the same time to make one determination.[80] The difficulty in separating factors for adverse impact analysis can be seen in an Eleventh Circuit case where an employer used a number of subjective tests in hiring.[81] Applicants completed a written application and then had an individual interview.[82] Hiring decisions were made by one person based on the four subjective factors of appearance, articulation, attitude and experience.[83] The court found that the plaintiffs had not made a prima facie case of discrimination based on adverse impact because they had not successfully identified the practice that led to a discriminatory result.[84] It can be extremely difficult to causally link subjective methods to discriminatory results, especially when they are used in a battery of tests.

The Second Circuit has taken the view that *Teal* does not apply in cases where the discriminatory selection procedure is not a pass-fail barrier.[85] The court stated that although *Wards Cove* held that generally a plaintiff cannot rely on the overall decision-making process of an employer as a specific employment practice, the Civil Rights Act of 1991 "softened" that holding, allowing plaintiffs to rely on the overall decision-making process if they can show that the elements of that process are not capable of separation for analysis.[86] In a later case, the court explained its position by distinguishing between cases where all candidates participate in the entire employment process and cases where a dispositive barrier prevents some candidates from participating in some

aspects of the employment process.[87] In the first case, the court stated that it would make no sense to scrutinize individual steps and it would be difficult to do so, while in the second case it does make sense to scrutinize individual steps and it would be relatively easy to do so.[88] Therefore, the *Teal* holding should be limited to cases where pass-fail barriers to employment are used, and should not apply to cases where all applicants take a battery of tests and the results are combined for one final score.

The Ninth Circuit has also held that *Teal* only applies in situations where the employment practice was a pass-fail barrier to hiring.[89] Plaintiff postal inspectors, all female, applied for promotions.[90] A review panel screened all candidates based on supervisor evaluations and applications.[91] Those identified by the panel as the most qualified candidates were interviewed by a separate selection committee, which made the final hiring decision.[92] Later another round of screening took place because one of the selected candidates declined an offer.[93] All candidates were again considered in the second screening.[94] The court held that the intermediate screening stage done by the review panel constituted a pass-fail barrier to further consideration because only those applicants identified by the panel were interviewed, and only those interviewed were offered employment.[95] The disparate impact resulted from the interview screening decisions, not the bottom line promotion decisions.[96] Further the court held that the two screening rounds did not have to be analyzed separately because there was no pass-fail barrier to further consideration between the rounds.[97] Everyone in the first round was again considered in the second round, therefore each individual had an opportunity to be considered for the position in both rounds.[98]

Part II: Industrial Psychology Research on Adverse Impact

Introduction

Research in industrial psychology indicates that a bottom line defense is appropriate when using a combination of tests. Industrial psychologists have been researching how to maintain or even increase profits while increasing diversity, in response to laws prohibiting discrimination and in response to a growing desire by organizations to have a more diverse workforce. Test batteries where each applicant takes every test have proven to be highly promising. Although they have not yet been shown to be as valid as other methods, some companies have opted to use them anyway to increase diversity. These companies, and further research in this area, should be encouraged in order to achieve even more successful results.

The field of industrial psychology, through scientific research, has been able to accurately predict who will perform well in a particular job.[99] In the past, researchers focused on how to make the best predictions in the cheapest way possible.[100] Organizations are often concerned with the costs and benefits of a selection device, and if the cost outweighs the benefits then it is unlikely the device will be used.[101] As discrimination law has developed, however, organizations and industrial psychologists have been forced to re-examine their use of certain selection devices.[102] Laws concerning adverse impact are forcing companies to spend more money on research and sacrifice some of the benefits of the predictive value of selection devices.[103] Industrial psychologists have become more sought-after by companies to develop hiring processes, both because of their ability to predict which applicants will perform well on the job and their ability to defend lawsuits. Both of these aspects greatly influence companies' profits.

The typical dilemma faced by employers is that of being forced to choose between productivity and diversity.[104] If a selection measure is related to good job performance then it will successfully predict which applicants will perform well on the job.[105] However, if the selection measure results in substantially lower hiring rates for minorities, the measure causes adverse impact. Then the employer must decide between employing the most productive people and risking a possible lawsuit, or having a diverse workforce.[106] This is the case with cognitive ability tests.[107]

One common practice that organizations have followed is to select employees using a cognitive ability test, which is cheap and easy to administer, as a first step in selection.[108] Then organizations use more expensive and comprehensive measures for those who pass the first test.[109] This process results in high adverse impact—large numbers of minority applicants will be dismissed before ever being measured for the other skills and abilities the job requires.[110] The Supreme Court's decision in *Teal* means that companies that use this practice will also have to show that the cognitive ability measure is job-related.[111]

Discrimination law has largely created the dilemma faced by many employers of choosing between using selection devices that are good predictors of performance but result in adverse impact, or choosing a diverse workforce.[112] Besides forcing employers to choose between their bottom line and a diverse workforce, the law has also spurred new research. One suggestion to eliminate employers' choice between productivity and diversity is to consider more aspects of the job than were previously considered.[113] Traditionally organizations used cheap, easily administered tests of basic knowledge even when jobs required more skills than the one being tested.[114] Rather than just focusing on one skill,

researchers and organizations are now considering more of the skills and abilities required for the effective performance of a job.[115] The rationale for this expanded examination of required job skills is that the measurement of some of these other skills often results in less adverse impact.[116] Another added benefit may be that by considering other skills and abilities needed for a job, a more accurate predictive test may be developed, resulting in better predictions of which job applicants will perform effectively.[117] Considering a broad range of skills and abilities needed for a job may result in more competent applicants being selected and reduced adverse impact.[118]

Part III: Research on Test Batteries

Pulakos and Schmitt conducted a study to investigate what happens when additional tests measuring other job-related abilities are added to the selection process.[119] The researchers wanted to develop a battery of selection tests for a highly competitive public-sector job that would result in excellent predictors of performance while at the same time minimizing adverse impact.[120] They gave employees measurements based on ten skill areas identified as important for the job.[121] These measurements included a measure of verbal ability (similar to the traditional cognitive ability test), a video job simulation test, a writing job simulation test, a biodata inventory, a situational judgment test, and a structured selection interview.[122] To validate these measurements, employees were rated by their supervisors.[123]

The researchers found that adding additional tests to the battery resulted in improved validity of the overall measure, rather than giving the verbal ability test alone.[124] In this case, the biodata, the situational judgment test, and the structured interview each added to the validity of the "effort and professionalism rating."[125] All of the measures given added to the validity of the "core investigative rating."[126] Not only was the validity of the measure improved, but the group differences (i.e., racial differences) that resulted were considerably smaller than those that resulted from the verbal ability test alone.[127] The researchers further found that the verbal ability test did not add substantially to the validity of the measure but did result in substantially higher group differences.[128] Without the verbal ability test included in the battery, the battery's results met the requirements of the 4/5 rule.[129]

The results of this study were promising. The researchers pointed out that although this particular job required a broad array of skills, most jobs require different abilities.[130] Therefore this approach could work for many jobs.[131] However, they warned that the interaction of the tests and the adverse impact is quite complex.[132] For example, in this study when two tests with virtually no adverse impact were added to the battery with the verbal ability test, which results in large group differences, there was still significant adverse impact.[133] Because of all the factors involved in this interaction, including the selection ratios of minority and majority groups and the correlation between the different predictor measures, the researchers suggested that more research be done on how the interaction works.[134] That is exactly what the next study examined.[135]

Researchers attempted to answer the question of what the adverse impact will be when two predictors are combined to form a composite.[136] They felt that this would illuminate issues they had recently seen in two lawsuits.[137] One issue is whether or not additional tests with less adverse impact decrease the overall adverse impact of the composite test.[138] Another issue is whether a test used as a pass-fail barrier would result in less adverse impact if it was combined into a composite score.[139]

When one predictor was examined, they found that group differences are greater as an organization becomes more selective.[140] They also found that even group differences typically viewed as small often result in a violation of the 4/5 rule depending on the ratio of people selected.[141] They further observed that at the level of group difference typically caused by cognitive ability tests between black and white people, violations of the 4/5 rule did not occur only at the very highest selection ratios (that is, when most applicants are selected).[142]

When a composite score of two predictors was examined, they found that the more correlation between the two predictors that exists, the less the amount of group differences resulting.[143] This result is disturbing because typically the more correlation that exists among predictors, the less validity the composite score has.[144] They also found that depending on the correlation, when a predictor with large group differences is combined with a predictor with small group differences, the group differences caused by the composite score can actually be larger than the predictor with the large group difference![145] The more similar the amount of group differences, the lesser the effect on the composite group differences.[146] These results show that when calculating the composite group differences, it is incorrect to "split the differences" or subtract the smaller group difference from the larger one and divide by 2, as was often assumed by researchers.[147] Splitting the difference of the scores greatly underestimates the composite group differences.[148]

In addition to adding predictors with high correlation, another way the researchers found that composite score group differences decrease is by adding predictors with no group differences.[149] However they did find that contrary to the popular assumption, most changes to the composite score group differences will occur by adding

two or three predictors.[150] Adding four or more predictors with no group differences will not substantially reduce the group differences seen in the composite score.[151] Finally, researchers found that by differentially weighting predictors, group differences in the composite score can be decreased.[152] As more weight is applied to a predictor that results in fewer group differences, or as less weight is applied to a predictor that results in greater group differences, the group differences resulting from the composite score are decreased.[153] This indicates that an organization can decrease group differences by putting more weight on less discriminatory predictors.

The next study examining group differences with multiple predictors expanded previous work.[154] This study examined the effects of number of predictors, the correlation between each of the predictors, the validity of each predictor and the level of group differences of each predictor, on composite score group differences.[155] Researchers used the results of studies already conducted over the past 15 years on the different types of predictors they examined, including cognitive ability tests, structured interviews, personality, and biodata.[156] First they used these results to analyze validities, predictor intercorrelations, and group differences of the four types of predictors.[157] Then they computed the adverse impact ratios for different combinations of predictors using different selection rates.[158] Finally, they estimated group differences with different combinations of the predictors, at different correlations between the predictors, with different group differences for each predictor.[159]

They found that it is possible to eliminate adverse impact under the 4/5 rule by adding alternate predictors to a cognitive ability score.[160] However, at many selection ratios, adverse impact, although decreased, still existed even with the additional predictors.[161] Also, the alternate predictors added to the cognitive ability measure can add substantial incremental validity to the overall composite.[162] So it is possible to improve validity and avoid adverse impact, but as previous research indicated it is not quite that easy.

Group differences remained high in many of the combinations that the researchers examined.[163] Some combinations even yielded more group differences than the cognitive ability predictor alone![164] Therefore adding additional predictors with low group differences will not necessarily reduce the adverse impact of predictors with high adverse impact.[165] The best alternate predictors to add are those that have group differences near zero and whose validities and intercorrelations are high.[166] Generally, the more of these factors added the better the results, but adding more factors is not as important as the group differences, validity and intercorrelation of the factors.[167]

The largest conflict seen between productivity and diversity goals in the study was the fact that highly correlated predictors result in fewer group differences *and* less validity.[168] This means that although highly correlated predictors reduce adverse impact in a composite score, they also do not add as much to the validity of the composite scores.[169] Finally, the validity of the predictors is important because in a typical regression equation used for this work by industrial psychologists, the predictors with the highest validities will be weighted more than the other factors with lower validities.[170] This means that if those predictors with high group differences also have high validity, such as a cognitive ability measure, then the resulting adverse impact will be high.[171]

Another researcher has investigated how to weigh predictors in a composite to comply with the 4/5 rule yet still achieve high validity.[172] This study is unique in that it investigated how to weigh predictors while balancing the two goals of eliminating adverse impact and maximizing the quality of selected applicants.[173] Past studies have used the typical regression process of weighing predictors based on how well they predict performance.[174] This new process inevitably results in lower predictability than the old process because of the balancing with adverse impact concerns.[175] However, it also allows practitioners to estimate the difference in predictive ability, allowing industrial psychologists and organizations to consider the different results and make informed choices.[176]

Because researchers have been able to use composite scores to predict job performance with the same accuracy as cognitive measures, industrial psychologists have suggested this means cognitive ability tests are not "perfectly" valid measures.[177] These industrial psychologists see hope for the future in techniques such as selection batteries and weighting of composite factors because these methods have resulted in high predictive validity and low adverse impact. However, this research is complicated and expensive. That is why the law should encourage research into test batteries by allowing their use to defend a prima facie case of discrimination when they result in nondiscriminatory hiring.[178]

Conclusion

Because of developments in the law and in industrial psychology, in the case of test batteries, the courts should analyze adverse impact using the results from all tests combined instead of separately analyzing each test result. Congress and the courts have indicated, through legislation and court decisions, that the final result should be analyzed. The rationale given by the Supreme Court in these cases indicates that the final result should be analyzed. Industrial psychologists have found that batteries show great promise for developing diversity in

companies while maximizing profits. Companies that choose to use batteries should be rewarded for that choice, rather than forced to defend a lawsuit. If the bottom line can serve as a defense in the case of test batteries, then research will continue to develop and diverse organizations will become a reality.

The Uniform Guidelines issued by the EEOC, the body authorized to enforce antidiscrimination laws, state that if there is no adverse impact in the final hiring decisions of an organization, they will not pursue legal action against the organization. The Court in *Teal* found that this is not a fair result in all cases. When tests constitute a pass-fail barrier to hiring, employers should have to justify their use. The Court stated that each individual applicant should have an equal opportunity to compete for a job. However, the Court said nothing about the situation in which applicants take a battery of tests that form one composite score. In that case, each individual does have an equal opportunity to compete for a job because each individual takes all tests in the battery. The Court's rationale in *Teal* leads to the conclusion that courts should examine the adverse impact in overall composite scores when batteries are used.

The Civil Rights Act of 1991 makes it clear that this is the intent of Congress. It states that if components in a hiring process are incapable of being separated for analysis, then the overall hiring result should be analyzed. The legislative history that has so uniquely been defined for this Act gives as an example a case where height and weight were measured for one construct. The legislature said that this is a case where measurements should be considered together, not separately. The only possible reason for this is that both measurements were used for one construct, and therefore should not be separated for analysis.

When batteries are used in selection, examining the effects of one particular component of that battery may not give an accurate picture of whether adverse impact exists.[179] One example is where individual components do not cause adverse impact, but the composite score of the battery does cause adverse impact.[180] In this case separating out components will not reveal the discriminatory effects of the overall measurement.[181] This is exactly what the legislature meant by scores that are not capable of being separated for analysis; statutory goals of protecting individual opportunities require examining composite scores' impact on hiring.[182] This suggests a more complicated factual inquiry in the case of composite scores.[183] Employers should not be allowed to defend their selection process by showing that one aspect of a composite is job-related.[184] Further, it can be almost impossible to analyze components of a composite separately, especially in a case where subjective measures are used.[185] If the composite score causes disparate impact, the employer should have to justify the use of the composite score.[186]

The law has forced employers to choose between profits and a diverse workforce. It has also led to new research in industrial psychology. That research shows that it is possible to reduce adverse impact and select qualified applicants at the same time. Batteries of tests make it possible to reduce adverse impact.[187] To reach the same level of validity as a cognitive measure it may take several of the best noncognitive measures.[188] Even if that is successful, leaving out a cognitive test will probably result in some loss in prediction, and therefore some loss in performance and productivity.[189] The process of developing a battery is complicated and expensive. The 4/5 rule is extremely hard to satisfy with some commonly used measures, even when selecting most applicants. Companies should be allowed and encouraged to develop batteries that reduce adverse impact while still selecting qualified individuals. The law resulted in new research before, and will continue to spur new research if organizations can use their bottom line hiring numbers as a defense to a prima facie case of discrimination.

By allowing organizations to use batteries of tests without having to defend every component of the battery, the law is giving organizations a fair chance to make money and create a diverse workforce. Further, the rationale behind the law in this area indicates that individual opportunity is what is important. Batteries give individuals equal opportunity because everyone is taking each test. Each person has the same chance to succeed. For these reasons, the bottom line defense should still exist in the case of composite test scores.

Endnotes

1. *Doctors, Soldiers, and Others Weigh in on Campus Diversity*, N.Y. Times, Feb. 23, 2003, at WK7 (describing a brief submitted to the Supreme Court by more than 60 corporations, including Microsoft, Boeing and American Express, in support of affirmative action).
2. *Id*.
3. Elaine D. Pulakos & Neal Schmitt, *An Evaluation of Two Strategies for Reducing Adverse Impact and Their Effects on Criterion-Related Validity,* 9(3) Human Performance 241, 242 (1996).
4. *Id*.
5. *Id*.
6. *Id*.
7. Black's Law Dictionary 483 (7th ed. 1999).
8. Stephen Wollack, *Confronting Adverse Impact in Cognitive Examinations*, 23(2) Public Personnel Management 217 (1994). *See also* Ivan T. Robertson & Mike Smith, *Personnel Selection*, 74 Journal of Occupational and Organizational Psychology 441, 445 (2001); Richard S. Barrett, *Adverse Impact*, *in* Fair Employment Strategies in Human Resource Management 201 (Richard S. Barrett ed., 1996).
9. Barrett, *supra* note 8, at 201. *See also* 29 C.F.R. § 1607.4C (1988).
10. *Id.*
11. *Id*.
12. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
13. *Id*.

14. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).
15. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991).
16. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 352 (2d Cir. 1997).
17. *Griggs*, 401 U.S. at 853.
18. John F. Buckley IV & Michael R. Lindsay, Defense of Equal Employment Claims § 3.82 (2d ed.), *available at* Westlaw DEFEECL § 3.82.
19. *Id*.
20. *Connecticut v. Teal*, 457 U.S. 440, 452 (1982).
21. *Id*.
22. Employment Discrimination Coordinator ¶ 25,129 (Mar. 13, 2003), *available at* Westlaw EDC P 25,129.
23. *See generally Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); *Stout v. Potter*, 276 F.3d 1118 (9th Cir. 2002).
24. *Infra* Part III.
25. Pulakos, *supra* note 3, at 243.
26. Neal Schmitt et al., *Adverse Impact and Predictive Efficiency of Various Predictor Combinations*, 82(5) Journal of Applied Psychology 719, 728 (1997).
27. Wilfried De Corte, *Weighing Job Performance Predictors to Both Maximize the Quality of the Selected Workforce and Control the Level of Adverse Impact*, 84(5) Journal of Applied Psychology 695 (1999).
28. *Id*.
29. *Teal*, 457 U.S. at 444.
30. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991).
31. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1269 (11th Cir. 2000).
32. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347 (1997).
33. *Stout*, 276 F.3d at 1122.
34. *Griggs*, 401 U.S. at 853.
35. *Id*.
36. *Id*. This was probably in response to the Civil Rights Act of 1964.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Rule v. Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558 (1977).
42. *Id*. at 563
43. *Id*.
44. *Id*.
45. *Id*.
46. *Id*. at 566 n.10.
47. *Id*.
48. *Id*.
49. 29 CFR § 1607.4C (1988) (stating that "If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact, of any component of that process. . . .")
50. *Id*.
51. *Teal*, 457 U.S. at 440.
52. *Id*. at 443.
53. *Id*.
54. *Id*.
55. *Id*. at 444.
56. *Id*.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*. at 443.
61. *Id*.
62. *Id*.
63. 42 U.S.C. § 2000e(a)(2).
64. *Teal*, 457 U.S. 440, 453–54.
65. *Wards Cove*, 490 U.S. at 642.
66. *Id*. at 647.
67. *Id*.
68. *Id*. at 657.
69. *Id*.
70. *Id*.
71. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
72. *Id*.
73. Buckley & Lindsay, *supra* note 18.
74. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (emphasis added).
75. *Id*. at § 105(b).
76. Interpretive Memorandum at vol. 137 Congressional Record S-15276 (daily ed. Oct. 25, 1991). *See also* Ramona L. Paetzold & Steven L. Wilborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. Rev. 325, 379.
77. Paetzold & Wilborn, *supra* note 76, at 379. *See also* Joel W. Friedman & George M. Strickler, The Law of Employment Discrimination 233 (2001).
78. Friedman & Strickler, *supra* note 77, at 233.
79. Paetzold & Wilborn, *supra* note 76, at 379.
80. *The Bottom Line Concept: Is it a Defense?*, *available at* WL 7 Employment Coordinator ¶ EP-18,133.
81. *Joe's Stone Crab*, 220 F.3d at 1269. Adverse impact claims also apply to subjective hiring methods. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).
82. *Joe's Stone Crab*, 220 F.3d at 1269.
83. *Id*.
84. *Id*.
85. *District Council 37*, 113 F.3d at 347.
86. *Smith*, 196 F.3d at 367–68.
87. *District Council*, 113 F.3d at 353.
88. *Id*.
89. *Stout*, 276 F.3d at 1122.
90. *Id*. at 1121.
91. *Id*.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*. at 1122.

96. *Id*.
97. *Id*.
98. *Id*.
99. Pulakos & Schmitt, *supra* note 3, at 242.
100. *Id*. at 256–57.
101. *Id*.
102. *Id*. at 242.
103. *Id*. at 257.
104. Paul R. Sackett, *Interpreting the Ban on Minority Group Score Adjustment in Preemployment Testing*, *in* Fair Employment Strategies in Human Resource Mgmt. 248 (Richard S. Barrett ed., 1996).
105. *Id*.
106. *Id*. at 249.
107. Pulakos & Schmitt, *supra* note 3, at 242.
108. *Id*. at 256.
109. *Id*.
110. *Id*. at 257.
111. *See generally Teal*, 457 U.S. 440.
112. Sackett, *supra* note 104, at 250.
113. Wollack, *supra* note 8, at 223.
114. *Id*.
115. Pulakos & Schmitt, *supra* note 3, at 243.
116. *Id*.
117. *Id*.
118. Wollack, *supra* note 8, at 223.
119. Pulakos & Schmitt, *supra* note 3.
120. *Id*. at 244.
121. *Id*. at 245.
122. *Id*.
123. *Id*.
124. *Id*. at 251.
125. *Id*.
126. *Id*.
127. *Id*.
128. *Id*. at 252.
129. *Id*. at 255.
130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*.
135. Paul R. Sackett & Jill E. Ellingson, *The Effects of Forming Multi-Predictor Composites on Group Differences and Adverse Impact*, 50 Personnel Psychology 707 (1997).
136. *Id*. at 708.
137. *Id*.
138. *Id*.
139. *Id*.
140. *Id*. at 711.
141. *Id*. at 712.
142. *Id*.
143. *Id*. at 714. *But see id*. at 716–17 stating that as average intercorrelation is increased there are decreasing gains. Correlation refers to how much variance is accounted for by a predictor; intercorrelation refers to how much common variance each of the predictors accounts for.
144. Schmitt et al., *supra* note 26, at 727.
145. Sackett & Ellingson, *supra* note 135, at 714.
146. *Id*. at 714.
147. *Id*. at 715.
148. *Id*
149. *Id*. at 716.
150. *Id*.
151. *Id*.
152. *Id*. at 718.
153. *Id*.
154. Schmitt et al., *supra* note 26, at 720.
155. *Id*. at 720.
156. *Id*. at 721.
157. *Id*. at 722.
158. *Id*.
159. *Id*. at 724.
160. *Id*. at 727.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*.
165. *Id*.
166. *Id*.
167. *Id*.
168. *Id*.
169. *Id*.
170. *Id*. at 728.
171. *Id*.
172. De Corte, *supra* note 27, at 695.
173. *Id*.
174. *Id*.
175. *Id*.
176. *Id*. at 696.
177. *Id*.
178. *Id*.
179. Paetzold & Willborn, *supra* note 76, at 380.
180. *Id*.
181. *Id*. at 384.
182. *Id*. at 380.
183. *Id*.
184. *Id*. at 386.
185. *See generally Joe's Stone Crab*, 220 F.3d 1263.
186. Paetzold & Willborn, *supra* note 76, at 386.
187. Kevin R. Murphy, *Can Conflicting Perspectives on the Role of g in Personnel Selection Be Resolved?*, 15(½) Human Performance 173, 176 (2002).
188. *Id*. at 181.
189. *Id*.

Ethics Matters

By John Gaal

Q My client has been sued over a recent termination. The employer believes it caught the employee stealing, but the employee thinks the termination was racially motivated and has filed a claim with the Division of Human Rights and the EEOC. My client wants me to contact the former employee's attorney and tell him that if we cannot find a quick and cheap way out of these baseless discrimination claims, I am going to report the theft to the DA's office. Can I do that?

A Disciplinary Rule 7-105 provides: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The rationale for this rule is explained in EC 7-21:

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce the adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired.

Thus, it has been recognized that the lawyer who represents a party which has a basis for asserting a criminal charge is forbidden by this rule from injecting this possibility of criminal liability into settlement negotiations.[1] A violation of this rule can lead to disciplinary action.[2]

On the other hand, the rule does not prohibit the attorney for the party at risk of criminal charges from raising the subject in the course of settlement discussions on a civil matter.[3] Once raised by that party, it may be freely discussed by both sides. Thus, in your situation, you should not raise the issue in your settlement discussions. However, if the former employee's attorney raises the issue, you are free to fully discuss it.

Obviously, the reason the former employee's lawyer might raise the issue is in hopes of securing, as part of the settlement arrangement, a commitment from your client that it will forgo initiating criminal proceedings against the former employee. It appears that such a commitment is permissible, so long as it is understood that your client would merely be agreeing to forgo initiation of criminal proceedings, and would not be agreeing, explicitly or implicitly, to falsify, suppress, alter or destroy any evidence of a crime or to refuse to comply with any lawful process.

If you go down this path, you should make sure that you and your client have not violated any criminal statute. Compounding a crime in New York consists of offering a benefit or accepting a benefit in return for not reporting criminal conduct.[4] Extortion consists of obtaining property from a person by instilling fear that they will be accused of a crime.[5] In both cases, an affirmative defense exists where the benefit offered or accepted, or the property obtained, essentially amounts only to restitution for an underlying criminal act. Consequently, care should be exercised before proceeding in this manner.

The Model Rules of Professional Conduct, which apply in most states but not in New York, do not have a comparable provision to DR 7-105. The drafters of the Model Rules determined that other provisions of the Rules, which prohibit attorneys from engaging in unlawful activity, provided sufficient protection in this area. Thus, under the Model Rules, either party is free to insert the issue of avoiding criminal liability into civil negotiations. In ABA Formal Opinion 92-363 (1993), the Committee on Ethics and Professional Responsibility established several guidelines for lawyers operating in this area. First, it is appropriate to inject the criminal liability element into the discussions only if the criminal liability relates to the civil claim. For example, you could not use the threat of a criminal prosecution against an individual as a result of something he did in his personal life in the past as leverage to settle an employment case. Second, the criminal claim must be well-founded. Third, the threat of a criminal filing should not be made solely to harass the other side, nor should it be made if there is no actual intention to file a claim. Finally (and most applicable in cases where the other side is not represented), there should be no suggestion that the lawyer threatening the filing has any undue influence over, or otherwise can control, the outcome of the criminal process.

Finally, even in circumstances where it may be ethical to settle a civil matter based in whole or in part on an agreement not to initiate criminal proceedings, that agreement may be unenforceable as against public policy.

Endnotes

1. Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics ("N.Y.C. Op.") 1995-13.
2. See *In re Glavin*, 107 A.D. 2d 1006 (3d Dep't 1985).
3. N.Y.C. Op. 1995-13.
4. N.Y. Penal Law § 215.45.
5. N.Y. Penal Law § 155.05.

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC in Syracuse, New York, and an active Section member. If there is a topic/ethical issue of interest to all labor and employment law practitioners that you feel would be appropriate for discussion in this column, please contact John at (315) 218-8288.

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 March and September 2003, and notes some recent relevant legislative developments. Readers should always refer to the full text of the decisions reviewed and the legislation noted.

Declaratory Rulings: Availability

Section 210.1 (a) of PERB's Rules provides that any "person, employee organization, or employer"[1] may file a petition for a declaratory ruling with the Director of Public Employment Practices and Representation. Under the Rules, a filer can seek a ruling on the scope of negotiations or whether the Taylor Law applies to the filer or any other person, employee organization, or employer. The Director must then determine if issuing a ruling would be in the public interest as reflected by the policies that underlie the Taylor Law.

The New York State Conference of Mayors and Municipal Officials sought a ruling declaring whether procedures for determining and reviewing benefits under General Municipal Law sections 207-a and 207-c are mandatory subjects of negotiation. The Director dismissed the petition, finding that a declaratory ruling was not in the public interest since there was no justiciable controversy about a particular bargaining demand, there were numerous PERB decisions on the issue, and the Conference of Mayors was not one of the entities that section 210 applied to.

Citing its precedents, the Board affirmed. Since there was no justiciable controversy, it was not in the public interest to spend administrative time and resources on the petition. In addition, the Taylor Law limits PERB's jurisdiction to matters involving public employers, public employees, and unions representing public employees. Whatever meaning is to be given to the word *person* as used in PERB's Rules, it could never be given any broader meaning than the statutory limit on PERB's jurisdiction itself. *City of Hornell*.[2]

Improper Practices: Constructive Discharge

Does the Taylor Law ban on discrimination because of protected activity cover a constructive discharge that arises out of the discrimination violation as well?

The State promoted Martinez, a Grade 5 Cleaner on a state university campus, to Grade 6 Laborer, with a one-year probation. He received four evaluations during the probation year, all of which noted various deficiencies and specific areas of his supervisors' concern. All of the evaluations also spoke of Martinez's alleged lack of self-confidence; one of them defining the substance of his lack of self-confidence as getting his union involved in matters that he should have discussed with his supervisors first.

The record also showed that one of the evaluating supervisors, Buske, objected to Martinez getting help from his union when he had a problem with Buske, believing that Martinez should speak to a supervisor before going to the union.

Because of the poor evaluations, the State terminated Martinez in the Grade 6 Laborer position. Both the ALJ and the Board agreed that the evaluations based on the protected activity of involving his union in employment matters violated Civil Service Law § 209-a (1) (a) and (c), and that the resulting termination was a violation too. But, the Board said, the violation was not based on Buske's animus. The Board found a violation because the State failed to rebut the presumption of a Taylor Law violation that arose from the evidence that the evaluations were based in part on Martinez's protected activity.

As it happened, when Martinez learned about failing the Grade 6 probation he resigned, apparently out of frustration, from his Grade 5 Cleaner position, too. But he soon had a change of heart. When he asked to withdraw the resignation, Santiago, the college's human resources manager, denied the request, finding no compelling reason to let him take it back. The ALJ found that Martinez's resignation was a direct result of his tainted failure on probation. Therefore, she ordered the State to rescind the evaluation, reinstate Martinez on probation in the Grade 6 position, with back pay, and re-evaluate him without considering any protected activity.

On exceptions to the Board, Martinez's union argued that the State in fact had constructively discharged him, which was certainly reason enough to sustain his reinstatement. The Board found, though, that there was no constructive discharge because Martinez's resignation was voluntary. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to resign. Martinez's frustration at being demoted didn't make his working conditions intolerable. Given his voluntary resignation, the Board modified the remedy by limiting the make-whole element to an order requiring the State to rescind the tainted evaluation.

The issue of the relation of the concept of constructive discharge to a Taylor Law discrimination or interference charge was therefore left to be resolved another day. *State of New York (SUNY Oswego)*.[3]

Transfer of Unit Work: Employer's Knowledge

Just as knowing when a union learned about non-unit employees performing exclusive unit work is important to deciding the timeliness of a transfer-of-unit-work charge, determining whether the employer knew what the non-unit employees were doing is important to deciding if there was a violation.

Cold Spring Harbor Central School District[4] involved Academic Intervention Services (AIS). These services are provided by direction of the education commissioner to schools that are in danger of performing poorly on standardized tests. Here, it turned out that two teaching assistants were providing AIS without any teacher supervising them. When the president of the teachers union found out, the union brought an unlawful transfer charge based on the position that unsupervised teaching was the union's exclusive bargaining unit work. The ALJ sustained the violation. The Board reversed.

There's no question, the Board said, that the two teaching assistants were teaching without supervision by a teacher. The issue that the charge raised, however, was "whether their performance of the work without supervision by a teacher was pursuant to an assignment by the District." The record showed that both elementary principals understood that teachers would supervise the teaching assistants on the AIS assignment. In fact, one assistant's assignment memo specifically named the teacher who was to supervise her, and even the union president had thought that teachers were supervising the assistants doing AIS. In effect, then, the Board found that just because the school district may have dropped the ball in failing to make the nature of the assignment clear to the teaching assistants or to those who should have been supervising them, that didn't mean that the district had deliberately transferred bargaining unit work in violation of Civil Service Law § 209-a (1) (d).

Uniting: Managerial Policy Making

The Board found that an ALJ properly included several contested titles in a bargaining unit of unrepresented town employees. The at-issue titles included Director of Building, Planning and Zoning, Director of Youth Counseling Services, and Recreational Facilities Manager. The record did not establish that these employees participated regularly in determining the town's goals and objectives or the means for accomplishing them, or that they directly assisted the town's ultimate decision-makers "in reaching the decisions necessary to conduct the business of government." As such, the ALJ properly did not exclude them from the bargaining unit as managerial employees. *Town of Ramapo*.[5]

Discrimination: Relevant Evidence

The charge in *County of Erie and Erie County Community College*[6] involved a tangle of "transfer of unit work" and retaliation charges. As to the first, the Board's finding that the county unlawfully transferred exclusive bargaining unit work involved a straightforward analysis of that kind of charge. More notable were the Board's holdings regarding two related discrimination charges. The union alleged here that at the conclusion of the pre-hearing conference on three earlier charges, after the ALJ left the room, the county's director of labor relations told two union representatives that the county would now be revoking a schedule accommodation it had made for a bargaining unit employee because "we don't accommodate people who bring us to PERB."

The county maintained that the comment was lamentable but not actionable, pointing to PERB's policy of excluding from evidence discussions at any pre-hearing conference. The Board disagreed. That policy, which is "intended to render settlement discussions at pre-hearing conferences inadmissible at a subsequent hearing," did not apply here. The offending comment, made after the conference and out of the ALJ's presence, was not in the nature of a settlement discussion, and therefore was admissible.

In addition, the ALJ had dismissed a portion of one of the charges which alleged that when the local community college's director of buildings and grounds was challenged in January 2002 for not arranging to have a unit employee do an absent employee's bargaining unit work, the director retaliated in February 2002 by changing the schedule of one of the employees who challenged him. The ALJ found that that the only evidence of a causal connection between the challenge and the change in schedule was the proximity in time, which was not enough by itself to prove a violation.

The Board reversed. The college claimed that it changed the employee's schedule after receiving some complaints about the maintenance of its facilities. But only one of those complaints came in before the employee's schedule was changed. In addition, in deciding another one of the charges, the ALJ had found that the buildings director harbored sufficient union animus to support a violation. That finding of animus supported finding a violation in regard to the schedule change as well.

Discrimination: Protected Activity

Taylor Law discrimination cases turn on three points—proof that the at-issue employee was engaged in a protected activity, that the employer knew about that activity, and that the employer acted because of the protected activity.

Proof was lacking on the third prong in *City of Rochester*.[7] The charge there alleged that Bergin, an assistant superintendent in the water bureau, harassed Giannavola, a water maintenance worker, for the three years

that Giannavola worked for him, because Giannavola was a friend of the local unit president. But the record, the Board found, showed that Bergin was verbally abusive to all employees and that every time Bergin allegedly harassed Giannavola, he had violated a work rule. Therefore, the Board said, Giannavola's union failed to prove a prima facie case of discrimination. Bergin didn't harass him because he was friends with the union president, but because of "his work performance, or lack thereof. . . ." The Board dismissed the charge.

Duty to Bargain: Information Relevant to Negotiations

When a union is negotiating a new contract, what duty, if any, does the union have to disclose information about the salaries of workers that the unit employees hire to clean the employer's physical plant?

International Union of Operating Engineers, Local 409,[8] involved school custodial engineers who received a salary from their employer, the Buffalo Board of Education, plus a an additional amount to pay for custodial and maintenance services in their respective school buildings. Whatever part of that additional amount the engineers didn't spend they could keep.

In negotiations for a new contract, their union, Local 409, proposed increases in the engineers' salaries and in the custodial services funds. The school district, asserting that it wanted to get a complete picture of how retention of the unexpended custodial funds was adding to the engineers' total compensation package, requested certain information from Local 409. The school district claimed it needed that information to be able to analyze the union's proposal. The items that the school district wanted to see were the collective bargaining agreement between the custodial engineers and the union that represented their employees; the job titles, work hours, and pay rates of the engineers' employees; and specified receipts, expenditures, and fund balances related to the custodial funds.

When the union declined to turn over the demanded information, the school district filed a charge alleging that the union was not bargaining in good faith. In its defense the union maintained that the parties had successfully negotiated a contract provision that applied to the school district's demand. As to the substance of the charge, the union president testified that he asked the union membership at a special meeting to provide copies of their records relating to unexpended custodial funds, but they unanimously voted not to.

The Board found that the requested information was not covered by the agreement and was reasonably necessary for negotiations. Local 409, the Board said, used the "no" vote to avoid disclosing the requested information. The union violated the Taylor Law by refusing to explain the rationale for its demand. Finding a violation, the Board ordered Local 409 to disclose the requested information or to make a good faith effort to get it if it didn't already have it.

Duty to Bargain: Use of Video Surveillance Footage

If a mass transit system installs video surveillance cameras on its buses, does it have to bargain before it can use the video footage from those cameras against an employee in a disciplinary proceeding? In *Niagara Frontier Transit Metro System, Inc.*,[9] the transit system acquired new buses, each complete with a six-camera digital video recording system. When the transit system terminated one of its drivers over an incident with a passenger, it sought to introduce the surveillance video from the driver's bus into evidence before a disciplinary arbitrator. The union balked and demanded impact bargaining on the issue of using surveillance video footage in disciplinary proceedings. The employer refused to bargain.

That refusal to bargain, the Board held, was a violation. While, as the ALJ noted, the union's amended charge "could be read as alleging a request for impact bargaining as to the installation of video cameras on buses and decisional bargaining on the use of the video footage in a disciplinary proceeding," the Board agreed with the ALJ that the parties' stipulation of fact cleared up any confusion. At issue was the impact of the use of the video footage in disciplinary proceedings.

Therefore, the Board rejected the union's argument that the transit system couldn't use the footage before it negotiated the impact. Under the long-standing principles of impact bargaining the transit system was free to implement the managerial decision to use the footage in the hearing, before negotiating the union's demand to bargain the impact of that decision on the mandatory subject of discipline.

The Board also rejected two arguments that the transit system advanced—that it had no duty to negotiate the impact of an investigatory procedure, and that there was no violation because the parties had later agreed on the procedure that allowed the union to review the video footage.

The first argument failed, the Board held, because there was no record evidence about the purpose of installing the cameras. Thus, there was no evidence that any investigatory procedure was at stake. The second argument failed because the stipulation specifically recited that the transit system "rejected" the union's demand for impact bargaining. The later agreement could not unring the bell of the earlier refusal to bargain.

Duty to Bargain: Defunct Union

What's the status of collective bargaining where one of the parties to a collective bargaining agreement goes out of existence? That was the issue in *Avon Central School District*.[10]

In March 2001, the members of Union A voted to disband. The next month, Union B filed a petition to represent A's old unit. The ALJ found that Union A was defunct, therefore its 2000-2004 contract with the school district did not bar the petition. PERB then certified Union B. In January 2002, B demanded negotiations to modify the current contract, but the school district demurred, claiming that its contract with Union A was still in effect. When Union B filed an improper practice charge, an ALJ found that the school district had a duty to bargain a new agreement with B, effective at the start of the district's next fiscal year.

On the Board's review of the school district's exceptions, at least three questions were lurking in the record. What duty did the school district have to bargain with Union B? What was the status of the 2000-2004 contract once Union A went out of existence? And, practically speaking, did the contract's status really matter?

The Board agreed with the ALJ that, upon certification, Union B had a right to negotiate a new collective bargaining agreement, and the school district's refusal to bargain violated the Taylor Law. But the ALJ had also found that as a successor union, B substituted for A, "as the representative and administrator of the existing agreement." The Board disagreed. In regard to the second question above, the Board found, citing *Cuba-Rushford Central School District v. Rushford Faculty Association*,[11] that when Union A became defunct, the agreement terminated, since one of the parties to the agreement no longer existed.

As to the third question above, earlier decisions already held that the employer's duty was "to maintain the status quo as to terms and conditions of employment for members of a newly certified bargaining unit until a wage and benefit package was fixed by collective negotiations with the certified bargaining agent." The status quo here, the Board said, was the terms and conditions of employment that existed when Union B filed its certification petition. And when PERB certified Union B as the successor union, B "assumed the right and responsibility to have the status quo maintained for unit employees until a new collective bargaining agreement is negotiated." Therefore, as a practical matter, terminated or not, the terms of the old contract defined the status quo as to the subjects it had covered.

Jurisdiction and Procedure

The Board remanded an improper practice charge where the ALJ found that the employer's creation of a Transitional Work Program for police officers receiving benefits under General Municipal Law § 207-c was an unlawful unilateral imposition of a section 207-c procedure. None of the program's provisions involved mandatory subjects of negotiation, the ALJ decided issues that the charge did not raise, and the ALJ failed to decide issues that the charge did raise.[12]

On a different procedural note, can a discrimination charge based on conduct of an employer that is "related" to two earlier charges, and which occurred more than four months before the filing of the new charge, be timely under a "continuing violation" theory? Besides those stale allegations, the Director found that the allegations in the charge at issue in *State of New York (Department of Insurance)*[13] were also conclusory. He described both shortcomings in a brace of notices to Shayne, the charging party, who twice amended the charge, to no avail. The Board said that evidence that an alleged violation continued after a charge is filed "may be relevant if it demonstrates a continued course of conduct that relates back to the original charge." But while that may be proof to be put on at a hearing of the charges originally filed, it wasn't grounds for a new charge. And here it certainly wasn't grounds for a timely charge.

A number of other recently decided cases also involved jurisdictional, procedural, or remedial issues. Among them, in *State of New York (Unified Court System)*[14] the Board denied an interlocutory appeal of an ALJ's denial of a party's request for subpoenas for documents and testimony. There was no threat of prejudice from the ALJ's denial of the subpoena request because under PERB's Rules "attorneys have the authority to issue subpoenas in PERB proceedings."

Shenendehowa Central School District[15] turned on a procedural issue. The Department Administrators Association filed a petition to fragment 14 administrators from a bargaining unit represented by the Shenendehowa Teachers Association. The Board held that the Director correctly dismissed the petition because one page of the showing of interest filed in support of the petition described the existing unit, rather than, as the Rules require, the unit that the Administrators Association was seeking to represent. The other pages of the showing of interest didn't have any unit description at all.

The Board also rejected the petitioner's argument that any deficiency was cured because the declaration of authenticity described the unit that the petitioner was seeking to represent or that it was cured by affidavits from the employees who had signed the showing of interest. The Board's Rules and precedents require that a showing of interest that complies with the requirements of the Rules be filed simultaneously with the representation petition.

The availability of an interlocutory appeal was the issue in *United Federation of Teachers (Fearon)*.[16] The ALJ who conducted the pre-hearing conference on Fearon's duty of fair representation charge ruled that it pleaded only that Fearon's union failed to prosecute her grievance to step three, not that the union failed to respond to a certain letter. The ALJ refused to entertain Fearon's oral motion to amend the charge, because the Rules require a motion in writing, but the conference ALJ also ruled that Fearon could file a written motion with the hearing ALJ.

The Board declined to entertain Fearon's interlocutory appeal from the conference ALJ's ruling. Fearon did not show any irreparable harm, the ALJ had ruled that a written motion to the hearing ALJ was in order, and Fearon could take exceptions to the hearing ALJ's ruling on the motion to amend the charge if need be. Since Fearon could not show any prejudice, the Board put the greater weight on avoiding the inefficiencies and delay associated with interlocutory review. It denied the motion. The Board also denied Fearon's motion to reconsider that denial. The motion to reconsider was not based on any new evidence.

Legislative Developments

Finally, at least two pieces of "extender" legislation should be noted. Laws 2003, chapter 90, extended the injunctive relief provisions of Civil Service Law § 209-a (4) and (5) to June 30, 2005, and Laws 2003, chapter 57, extended the compulsory interest arbitration provisions of CSL § 209 (4) (d) to July 1, 2005.

Endnotes

1. 4 NYCRR 210.1 (a).
2. 36 PERB ¶ 3033 (Sept. 26, 2003).
3. 36 PERB ¶ 3015 (Apr. 4, 2003), *petition for review pending.*
4. 36 PERB ¶ 3016 (Apr. 4, 2003), *petition for review pending.*
5. 36 PERB ¶ 3027 (Aug. 18, 2003).
6. 36 PERB ¶ 3035 (Sept. 26, 2003).
7. 36 PERB ¶ 3025 (Jun. 30, 2003).
8. 36 PERB ¶ 3034 (Sept. 26, 2003).
9. 36 PERB ¶ 3036 (Sept. 26, 2003).
10. 36 PERB ¶ 3032 (Aug. 18, 2003).
11. 182 A.D.2d 127 (4th Dep't 1986).
12. *Village of Hamburg*, 36 PERB ¶ 3030 (Aug. 18, 2003).
13. 36 PERB ¶ 3026 (Jun. 30, 2003).
14. 36 PERB ¶ 3031 (Aug. 18, 2003).
15. 36 PERB ¶ 3020 (May 7, 2003).
16. 36 PERB ¶ 3023 (May 7, 2003).

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.

NEW YORK STATE BAR ASSOCIATION

MORE for less.

MORE…

- More than **250 CLE courses at 30% member discounts** — the most New York law specific courses anywhere
- **Unparalleled analysis of New York state legal issues** — in members-only publications
- **News and information important to you,** through Sections devoted to your practice areas
- **Online resources to save you time** at www.nysba.org
- **Opportunities to network** with leaders in the profession
- **Savings on insurance** (life, disability, professional liability) and other benefits

FOR LESS THAN…

- A couple of billable hours
- Dinner and tickets to the theatre
- The fees for other large professional membership organizations
- The time you'd spend accumulating these resources yourself

NYSBA.

More value…for less money.
Renew your membership for 2004.

MAKE NYSBA YOUR OWN. AGAIN.

New York State Bar Association
518.463.3200 / 800.582.2452
www.nysba.org

NYSBA

Some Recent Developments in Federal and State Labor and Employment Law

By Michael Evan Gold

I. The United States Supreme Court[1]

A. Cases with Opinions

1. Arbitration: Who Applies the Limitations Period?

Howsam v. Dean Witter Reynolds, 123 S. Ct. 588 (2002)

The Supreme Court held that whether a time limit for invoking arbitration had been satisfied was a question for an arbitrator, not a court, in the absence of a statement to the contrary in the arbitration agreement.

A stockbroker recommended certain investments to an investor. The investor came to believe that the broker had misrepresented the virtues of the investment. This controversy fell within an arbitration agreement between the broker and the investor. The agreement allowed the investor to choose the arbitration forum; she chose the National Association of Securities Dealers and agreed to abide by its rules. One rule was that a dispute had to be submitted for arbitration within six years of the event giving rise to the dispute.

The broker sued in federal court to enjoin the arbitration, arguing that the six-year limitations period had expired. The District Court dismissed the action, but the Court of Appeals for the Tenth Circuit reversed on the ground that the suit raised the question of arbitrability, which is presumptively a question for a court. The Supreme Court reversed the judgment of the Tenth Circuit.

Writing for seven Justices (Justice O'Connor not participating and Justice Thomas concurring in the judgment), Justice Breyer conceded that whether parties have agreed to arbitrate a dispute is a question for a court unless the parties have clearly provided otherwise. But he added that this rule applies only where the parties expect a court, not an arbitrator, to make the threshold decision. Parties expect a court to make the decision about whether they are bound by an arbitration agreement, as well as the decision about whether a particular dispute is covered by the agreement; but parties expect an arbitrator to make decisions about procedural questions that grow out of the dispute, for example, whether conditions precedent to arbitration (such as steps in a grievance procedure) have been satisfied, and whether defenses to arbitration like waiver and delay are valid. Time limits fall in the latter category and are for the arbitrator to apply, absent a statement to the contrary in the arbitration agreement.

One may wonder whether the parties have any genuine expectations on these issues, apart from the arbitration agreement and their understanding of the law.

2. Arbitration: Class Actions

Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 2402 (2003)

The contract between a lender and its customers contained a clause referring all contract-related disputes to arbitration. The arbitration clause did not expressly address whether a customer could pursue a claim on behalf of a class of customers. The lender argued in the courts of South Carolina that the clause impliedly prohibited class claims, but the Supreme Court of South Carolina disagreed; the court held that the contract was silent on class claims and that, in such a case, state law permitted them. The U.S. Supreme Court granted certiorari to determine whether this holding was consistent with the Federal Arbitration Act.

Justice Breyer, joined by Justices Scalia, Souter, and Ginsburg, relied on the basic rule that when parties agree to submit all disputes to arbitration, the parties should receive the decision of an arbitrator, not of a judge. It is true that an exception to this rule exists. Courts assume that parties intend that certain issues are for judges, viz., whether the arbitration clause is valid and whether a dispute is covered by the clause. However, the question of whether a clause allows or prohibits class claims is not one of those issues; rather, this question concerns contract interpretation and arbitration procedures, which arbitrators are well situated to decide. Therefore, the question of whether the arbitration agreement permitted class claims should have been answered by an arbitrator, not by the court, and for this reason the judgment below was vacated.

Justice Stevens concurred in order to create a controlling judgment of the Court. Nevertheless, he believed that the Federal Arbitration Act did not preclude either holding of the Supreme Court of South Carolina.

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, dissented in the belief that a court should decide whether an arbitration agreement allows class claims. "Just as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted," 123 S. Ct. at 2409. Therefore, if the arbitrability of a dispute is for a court to decide, so is how the arbitrator is to be selected—one arbitrator per dispute or one arbitrator for a class of disputes. Thus, the Federal Arbitration Act did not preempt the Supreme Court of South Carolina from deciding whether the arbitration clause permitted class claims; however, that court misinterpreted the clause. Read as a whole, the agreement prohibited class claims. For this reason, the dissenters would have reversed the judgment below.

Justice Thomas dissented on the ground that the Federal Arbitration Act does not apply to proceedings in state courts and, therefore, cannot be the ground for preempting a state court's interpretation of an arbitration agreement.

One's first thought might be that lenders, employers, and their ilk can simply include a provision in the arbitration agreement specifying that class claims are not allowed. Based on Justice Breyer's opinion, we think this tactic will probably succeed, though it would have to overcome the argument that the provision is unconscionable. A possible risk of such a provision would be the decision of a sympathetic judge to permit a class action in court on the ground that the class claim could not be pursued in arbitration.

3. Late Assignment of Retirees, Coal Industry Retiree Health Benefit Act

Barnhart v. Peabody Coal Co., 123 S. Ct. 748 (2003)

The Coal Industry Retiree Health Benefit Act of 1962 required that the Commissioner of Social Security "shall, before October 1, 1993," assign each retiree who is eligible for benefits to an operating company, which became responsible for funding the retiree's benefits. Eligible retirees who were not assigned were not to lose benefits; rather, their benefits would be paid by other sources. The Commissioner assigned approximately 10,000 retirees after the deadline. Two of the companies to which these retirees were assigned sued in order to be relieved of funding benefits for the tardily assigned retirees. The District Court ruled for the companies, and the Court of Appeals for the Sixth Circuit affirmed. The Supreme Court reversed.

Justice Souter, joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Ginsburg, and Breyer, ruled that a statement that the government "shall" act within a specified time is not a jurisdictional limit that precludes later action. A requirement that a detention hearing shall be held immediately after a person's first appearance before a judicial officer did not bar detention following a tardy hearing, and a mandate that the Secretary of Health and Human Services make a report within a certain time did not deprive the Secretary of power to act thereafter. In general, wrote Justice Souter, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." 123 S. Ct. at 755, quoting from *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (following footnote omitted).

Justice Scalia, joined by Justices O'Connor and Thomas, dissented, asserting in his usual diplomatic manner that the majority's holding "makes no sense. When a power is conferred for a limited time, the *automatic* consequence of the expiration of that time is the expiration of the power. If a landowner authorizes someone to cut Christmas trees 'before December 15,' there is no doubt what happens when December 15 passes: The authority to cut terminates. And the situation is not changed when the authorization is combined with a mandate—as when the landowner enters a contract which says that the other party 'shall cut all Christmas trees on the property by December 15.'"

Given the opportunity, one might wish to ask Justice Scalia whether the federal courts remain courts of equity as well as courts of law. The Secretary's delay in assigning retirees caused no prejudice to the companies; and, as the majority pointed out, Congress did not provide the Secretary with sufficient funds to complete the assignments before the deadline.

4. Damages for Fear of Developing Cancer: Federal Employers' Liability Act

Norfolk & Western Ry. Co. v. Ayers, 123 S. Ct. 1210 (2003)

Under the Federal Employers' Liability Act (FELA), a common carrier is liable in damages to employees for work-related injuries caused, in whole or in part, by the carrier's negligence. The plaintiffs contracted asbestosis and brought suit in a Circuit Court of West Virginia against the railroad for which they had worked. Two unrelated issues of law arose. DAMAGES: Under the FELA, may a worker's recovery for pain and suffering for a work-related disease include dam-

ages for the worker's genuine fear that cancer will later result from the disease? The trial court held yes and so instructed the jury. APPORTIONMENT: When third parties who are not before the court may have contributed to a worker's injury, is an employer in an FELA suit answerable in full to an injured worker, or is the employer liable only for the harm that it caused? The trial court held the railroad liable in full and refused to instruct the jury to apportion damages among the plaintiffs' employers. The jury returned a verdict for the plaintiffs, and the trial court entered a judgment of approximately five million dollars. The Supreme Court of Appeals of West Virginia declined to review the judgment. The U.S. Supreme Court affirmed the judgment on both issues.

APPORTIONMENT: The FELA makes a common carrier liable for occupational injuries "resulting in whole or in part from the negligence of the carrier." This text, along with consistent judicial application, convinced all of the justices that the railroad was liable to the plaintiffs for the full amount of their damages.

DAMAGES: Harkening to common law principles, Justice Ginsburg, joined by Justices Stevens, Scalia, Souter, and Thomas, pointed out that recovery is permitted under the FELA for pain and suffering resulting from a negligently inflicted physical injury. An occupational disease like asbestosis counts as a physical injury for this purpose. Emotional distress is an element of pain and suffering. Therefore, emotional distress resulting from an occupational disease is compensable. Fear of developing cancer from an occupational disease is an element of emotional distress. It follows that a worker's genuine fear of developing cancer from an occupational disease like asbestosis is compensable as part of the worker's damages for the pain and suffering resulting from asbestosis.

The Court noted that compensation for fear of developing a disease is distinct from compensation for the increased risk of developing a disease. Damages for increased risk are not allowed. Note also that, should a plaintiff actually develop lung cancer in the future, one would be entitled to compensation for a separate occupational injury.

The parties agreed that asbestosis is a cognizable injury under the FELA, and the evidence showed that asbestosis develops into mesothelioma, a deadly lung cancer, in about 10 percent of cases. The plaintiffs testified to their fear of developing mesothelioma, and the railroad did not challenge the sufficiency of the evidence to support the jury's verdict that this fear was genuine. Thus, the Court allowed the plaintiffs to recover, as part of their damages for having contracted asbestosis, compensation for the fear that asbestosis was a precursor of cancer.

The Court distinguished the plaintiffs' claim from claims for "stand-alone emotional distress," in which the distress was not brought on by a physical injury. Recovery is permitted for stand-alone claims only if the common law "zone-of-danger" test is satisfied. The zone-of-danger test allows damages for emotional distress if the plaintiff sustained a negligently inflicted physical impact, or if, though not physically impacted, the plaintiff was within the zone of danger of physical impact.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Breyer, dissented on this issue. The dissenters were concerned that the fund for compensating victims of asbestosis was limited, and that, by the time cancer actually develops in some of the victims, the fund will have been exhausted. In addition, the dissenters believed that the plaintiffs' fear of cancer was not the direct result of their injury and that, although a correlation may exist between asbestosis and cancer, no causal connection was established.

Causation was perhaps the most interesting issue in the case. Mesothelioma, which otherwise occurs rarely, follows asbestosis in 10 percent of cases. Does asbestosis cause mesothelioma, or do they have a common cause in these cases? The dissenters answered no, and one may wish that the majority had addressed this significant question in depth.

5. Preemption of Any Willing Provider Statutes: Employee Retirement Income Security Act

Kentucky Ass'n of Health Plans v. Miller, 123 S. Ct. 1471 (2003)

Health maintenance organizations (HMOs) in Kentucky maintained exclusive provider networks of doctors and hospitals. In exchange for reducing the price they charged for services rendered to patients belonging to the HMO, providers in the network received an increased volume of patients. Kentucky statutes required that health insurers, including HMOs, accept into their exclusive networks any provider who was willing to meet the terms and conditions of membership. HMOs claimed that these statutes were preempted by the Employee Retirement Income Security Act of 1974. ERISA preempts all state laws that relate to employee benefit plans, but does not preempt state laws that regulate insurance. The District Court rejected the HMOs' claim, holding that the statutes regulated insurance and were not preempted. The Court of Appeals for the Sixth Circuit affirmed, as did a unanimous Supreme Court.

The central question was whether the statutes regulated insurance. In previous ERISA cases, the Court had looked to the McCarran-Ferguson Act, under which three criteria determined whether practices constituted the business of insur-

ance: whether the practice transferred or spread the policyholder's risk; whether the practice was an integral part of the relationship between the insurer and the insured person; and whether the practice was limited to entities in the insurance industry. Breaking with this precedent, the Court announced a new standard for ERISA. A state law regulates insurance under ERISA if the law is specifically directed toward insurers and the law substantially affects the risk-pooling arrangement between insurers and insured persons. The Kentucky statutes satisfied the first element of the standard because the statutes were aimed at insurers. The statutes also satisfied the second element of the standard because, said the Court, they expanded the number of providers in the insurers' networks. Insured persons in Kentucky could no longer seek insurance from an exclusive network in exchange for lower premiums, and thus the statutes affected the type of risk pooling arrangements that insurers could offer.

One might question whether the Court applied its new standard with the proper facts in mind. It seems doubtful that the Kentucky legislature passed the statutes out of fear that the method of risk pooling reflected in exclusive provider networks was unsound. More likely, the legislature was responding to pressure from two sources: providers who wanted access to the networks in order not to lose patients, and patients who wanted to be covered for services rendered by their favorite providers. Viewing the case in light of these facts might have influenced its outcome. The statutes may have been directed more toward the practices of health care providers and the freedom of choice of patients, and less toward the pooling of risks.

6. Who Counts as an Employee?: Americans with Disabilities Act

Clackamas Gastroenterology Assoc. v. Wells, 123 S. Ct. 1673 (2003)

The Americans with Disabilities Act of 1990 covers employers of fifteen or more employees. A medical clinic, organized as a professional corporation, had fifteen employees only if its four physicians, who owned the shares of the corporation and constituted its board of directors, were counted as employees. When a worker sued the clinic, alleging disability discrimination, the clinic moved to dismiss because it had too few employees to be covered by the Disability Act. The District Court granted the motion, finding the physicians to be analogous to partners in a partnership. The Court of Appeals for the Ninth Circuit reversed on the ground that a professional corporation should not be allowed to claim corporate status for some purposes and partnership status for other purposes. The Supreme Court reversed the judgment of the Ninth Circuit and remanded the case for further proceedings.

Justice Stevens, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas, ruled that, because Congress had used the term "employee" essentially without defining it (the act defines "employee" as "an individual employed by an employer"), the common law test should be used to determine the status of an individual. The Court endorsed the guideline in EEOC Compliance Manual §§ 605:0008–605:00010 (2000), which the Commission uses to determine whether partners, officers, members of boards of directors, and major shareholders are employees. The guideline, which appears to be an adaptation of the right-of-control test to contemporary organizational structures, lists several factors that should be taken into account. The factors include whether the organization can hire or fire the individual in question; whether the organization supervises or oversees the individual's work; whether the individual can influence the organization; whether the individual shares in the profits, losses, and liabilities of the organization; and whether the organization and the individual intend the individual to be an employee. Other factors may be relevant as well.

The Court specifically noted that the EEOC guideline on this score asserts that it is applicable to other federal antidiscrimination statutes. The Court also stated that it had applied the common law test to the Employee Retirement Income Security Act of 1974, which, like the Disability Act, defines "employee" as "any individual employed by an employer." It seems likely that the Court will apply the common law test, as illuminated by the EEOC guideline, to other civil rights statutes with similar definitions of "employee," such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967.

Applying the common law test to persons in the place of the physicians, the Court wrote that one is an employer who owns and manages the enterprise, hires and fires employees, assigns tasks to employees and supervises their performance, and decides how profits and losses are to be distributed. Titles and documents are not controlling. No single factor dominates the others; rather, the determination of an individual's status depends on all of the incidents of the relationship. The Court remanded the case so that this standard could be applied to the facts.

Justices Ginsburg and Breyer dissented. They argued that one could be both a proprietor and an employee. They also noted that the physicians claimed status as employees for some purposes, such as the Employee Retirement Income Security Act and the state's workers' compensation law, and that, by incorporating, the physicians enjoyed the benefit of limited liability. As the Ninth Circuit said, they were not entitled to secure the best of both possible worlds.

The dissent brings to mind *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947), in which the Court said, in effect, that a worker could be a supervisor at some times and an employee at other times, and therefore supervisors were employees under the National Labor Relations Act. Congress disagreed and amended the act to provide that a supervisor is not an employee under the act.

7. Removal from State to Federal Court: Fair Labor Standards Act

Breuer v. Jim's Concrete of Brevard, 123 S. Ct. 1882 (2003)

A worker sued his former employer for unpaid wages under the Fair Labor Standards Act (FLSA) in state court. The employer removed the case to federal court pursuant to 28 U.S.C. § 1441(a), which allows removal of any civil action of which federal district courts have original jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress." The worker sought an order remanding the case to state court, arguing that the FLSA contained an express provision barring removal. The provision on which the worker relied was section 216(b) of the FLSA, which provides, in relevant part, "An action to recover . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." The District Court denied the motion to remand and certified the issue for interlocutory appeal. The Court of Appeals for the Eleventh Circuit affirmed, as did the Supreme Court.

Writing for a unanimous Court, Justice Souter found that section 216(b) was not an express prohibition of removal. The FLSA does not mention removal, and the phrase "may be maintained" is too ambiguous to be an express prohibition; for example, the phrase can mean to continue (as opposed as to commence) an action, or to bring or file an action. In contrast, unambiguous prohibitions on removal occur in other statutes, one being 28 U.S.C. § 1445(a) ("[a] civil action in any State court against a railroad . . . may not be removed to any district court of the United States"). In addition, a number of other statutes use the same phrase as section 216(b), for example, the Employee Polygraph Protection Act of 1988 and the Family and Medical Leave Act of 1993, and it is unlikely that Congress intended the right to "maintain" all such actions to displace the right to remove them.

The worker argued that removal would effectively kill many legitimate claims that are too small to litigate in federal court. One who sympathizes with this argument may find hope in another source. Increasingly, employers are requiring workers to agree to arbitrate all employment disputes, and the courts are enforcing such agreements. Although probably designed with discrimination claims in mind, the agreements may well cover FLSA claims, thereby providing the worker with a forum less costly than a federal court.

8. Eleventh Amendment Immunity: Family Medical and Leave Act

Nevada Dep't of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003)

The state of Nevada discharged an employee who sued it in federal court for violating his rights under the Family and Medical Leave Act of 1993 (FMLA). The District Court awarded the state summary judgment on the ground that the claim was barred by the Eleventh Amendment. The Court of Appeals for the Ninth Circuit reversed the judgment, and the Supreme Court affirmed the Ninth Circuit's ruling.

Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined. The Eleventh Amendment, wrote the Chief Justice, immunizes states from suits in federal court by citizens of another state or subjects of a foreign state; however, Congress may abrogate this immunity if Congress makes its intent to abrogate unmistakably clear and is validly exercising the power created by section 5 of the Fourteenth Amendment. The intent to abrogate in the FMLA was clear beyond debate. Therefore, the issue became whether Congress acted within its authority under section 5.

The Chief Justice continued that Congress may enforce the guarantee of equal protection of the laws, not only by proscribing violations of the Fourteenth Amendment, but also by deterring and remedying conduct that is not itself forbidden by the Amendment. (One is reminded of the penumbra of the Bill of Rights cited by the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), to invalidate a state law against using contraceptives.) "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." 123 S. Ct. at 1977. An example is the Voting Rights Act, which bans literacy tests and requires pre-clearance for changes in voting procedures. Such prophylactic legislation must satisfy a three-step test. First, Congress must identify violations of the Constitution by the states. Second, Congress must enact legislation with the goal of remedying those violations; Congress may not attempt to redefine the states' legal obligations. Third, the legislation must be an appropriate remedy for the identified violations; that is, the "legislation must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" 123 S. Ct. at 1978, quoting from

City of Boerne v. Flores, 521 U.S. 507 at 536 (1997). (Query from a former student of geometry: if one object is congruent with another, are they not, by necessity, proportional as well?)

The first step of the test was to identify constitutional violations by the states. States frequently limited women's employment opportunities in the past, such as by prohibiting women from tending bar or practicing law. Similar discrimination continued to the date of the FMLA. For example, fifteen states offered mothers up to one year of extended maternity leave, but only four granted fathers a parallel benefit. This difference was not attributable to the different physical needs of women and men, but to the pervasive stereotype that caring for family members is women's work. Congress was also aware that states applied facially neutral policies in discriminatory ways. In addition, gender discrimination was rampant in the private sector.

Did this evidence suffice to demonstrate unconstitutional behavior by the states? The answer depended on the standard for judging the evidence. In stating the standard, the Court distinguished its rulings that Congress could not abrogate the states' Eleventh Amendment immunity regarding age and disability discrimination. Like most other acts of government, acts that classify by age or disability are judged by the rational basis test: has the government taken a rational step toward a legitimate objective? This, the most permissive test under the Equal Protection Clause, leaves the least room for Congress to enact prophylactic legislation under section 5 of the Fourteenth Amendment. "Congress must identify, not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria." 123 S. Ct. 1982, quoting from *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62 at 89 (2000). Congress had no such evidence regarding age and disability discrimination by the states, and, therefore, the attempts to abrogate the states' immunity were unconstitutional in the Age Discrimination in Employment Act of 1967 and in Title I of the Americans with Disabilities Act of 1990.

In contrast, acts of government that classify by gender are judged by the intermediate scrutiny test: is the act substantially related to an important objective of government? This test affords Congress greater scope than the rational basis test for enacting prophylactic legislation under section 5 of the Fourteenth Amendment. The Court held that the states' record of participation in, and tolerance of, gender discrimination in leave benefits justified the enactment of prophylactic legislation under section 5 of the Fourteenth Amendment.

The second step of the test was easily satisfied. The aim of the FMLA was to protect workers from gender discrimination in the workplace.

The third step of the test was also satisfied. For two reasons, "the FMLA is 'congruent and proportional to the targeted violation.'" 123 S. Ct. at 1983, quoting from *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 at 374 (2001). The first reason is that Congress outlawed gender discrimination and abrogated the states' immunity in Title VII of the Civil Rights Act of 1964, but gender discrimination by states did not cease. Congress addressed the issue again in the Pregnancy Discrimination Act of 1978, and still gender discrimination persisted. A statute that mirrored Title VII and simply mandated gender equality in the administration of leave benefits would not have achieved Congress's remedial objective, for states could have satisfied the statute by providing no family leave at all; because two-thirds of non-professional caregivers are women, a policy of no leave would have excluded far more women than men from the workplace. Added prophylactic measures were therefore in order. The measure Congress chose was congruent and proportional for two reasons: (1) the FMLA provides a benefit for men as well as women; thus, the act combats the stereotype that only women are responsible for caregiving in the family and ensures that employers cannot not evade their obligations by hiring only men, and (2) the scope of the FMLA is limited. It requires only unpaid leave, applies only to employees who have worked at least 1,250 hours within the preceding year, and excludes high-ranking employees and employees in sensitive positions (such as elected officials and their staffs and policymakers). In addition, employees must give advance notice of foreseeable leaves; employers may require certification of the need for leave by a health care provider; and the act requires only twelve weeks of leave. And damages for violations of the act are restricted to actual monetary losses, limited by a two-year limitations period.

Justice Scalia dissented on the ground that a violation of the Constitution by one state does not justify abrogating the immunity of another state. Justice Kennedy, joined by Justices Scalia and Thomas, also dissented. Justice Kennedy did not believe that Congress had identified a pattern of gender discrimination by the states, and he argued that the FMLA was not a remedial measure, but an entitlement program.

We find the dissenters' points hard to answer, but two other points are even more interesting. In addition to rational basis and intermediate scrutiny, the Court discussed the third test of equal protection. Citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which upheld the Voting Rights Act of 1965, the Court alluded to the strict scrutiny test, which is used regarding acts of government that classify by race or alienage or that burden fundamental interests like voting. Such acts

must be narrowly tailored to accomplish a compelling objective of government and, said the Court, they are "presumptively invalid," 123 S. Ct. at 1982. Based on the Court's discussion of the relationship of the level of equal protection scrutiny to the scope of permissible prophylactic legislation, one may readily infer that the strict scrutiny test leaves Congress the greatest room for prophylactic legislation. In addition, one might think that the prophylactic legislation approach would be applicable to deciding the constitutionality of another kind of governmental action that is judged under equal protection, namely, affirmative action. This approach, however, was not used in *Grutter v. Bollinger* or *Gratz v. Bollinger*, which dealt with affirmative action by government and were decided this term; they are discussed below.

Also, one might have been startled by some of the evidence which Chief Justice Rehnquist cited. He wrote that a statute that merely ordered gender equality in leave benefits would not have achieved Congress's objective, as the states could have complied by providing no family leave for either gender; because—here is the startling part—two-thirds of caregivers are women, a no-leave policy would have excluded many more women than men from the workplace. In other words, a no-leave policy would have had a disparate impact on women! Recall that the Court's standard required Congress to find violations of the Fourteenth Amendment by the states. Recall as well that the Court has steadfastly held that acts of government with a disparate impact do not violate the Constitution. *Washington v. Davis*, 426 U.S. 229 (1976). Yet the Chief Justice declared that the disparate impact of no-leave policies by states justified prophylactic legislation aimed at remedying unconstitutional discrimination. One might draw some fine lines here. For example, the Chief Justice used this evidence in the portion of his opinion in which he was discussing whether the FLMA was congruent and proportional to the violation, not in the portion of his opinion in which he discussed the record of the states' discriminatory practices. Even if we have not stumbled upon evidence that disparate impact is creeping its way into the Court's constitutional discourse, we may wonder whether the Court allowed Congress to use disparate impact to re-define the states' obligations.

9. Direct Evidence in Mixed-Motive Cases: Title VII of the Civil Rights Act of 1964

Desert Palace v. Costa, 123 S. Ct. 2148 (2003)

The Civil Rights Act of 1991 sets forth the standard for mixed-motive cases under Title VII of the Civil Rights Act of 1964. An unlawful employment practice occurs when race, sex, etc. is a motivating factor in the defendant's decision, even though other factors also motivated the decision. Thus, the defendant is liable if the decision was motivated, in whole or in part, by race or sex. Relief, however, is subject to an affirmative defense. After liability is established, the burden shifts to the defendant to prove that it would have taken the same action in the absence of the unlawful reason. If the defendant carries this burden, the remedy may not include damages, back pay, or an order to hire, reinstate, or promote the plaintiff.

A woman who had been discharged sued her employer for sex discrimination under Title VII of the Civil Rights Act of 1964. She offered circumstantial evidence that an unlawful reason motivated her discharge; the employer responded with evidence of lawful reasons. The District Judge proposed to instruct the jury that if it found the employer had been motivated by both lawful and unlawful reasons, the plaintiff was entitled to damages unless the employer proved that it would have treated her similarly in the absence of the unlawful reason. Based on Justice O'Connor's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the employer objected, arguing that the burden should shift to the defendant only when the plaintiff establishes liability with direct, not merely circumstantial, evidence. The District Judge overruled this objection, and the jury returned a verdict for the plaintiff. A panel of the Court of Appeals for the Ninth Circuit agreed with the employer, but the Ninth Circuit en banc affirmed the District Court. The Supreme Court unanimously affirmed the Ninth Circuit.

Justice Thomas delivered the opinion of the Court. He wrote that the relevant text of Title VII is unambiguous. It states that the defendant's liability is established by a plaintiff who "demonstrates" that race or sex was a motivating factor in the decision; the statute does not require a heightened showing like direct evidence for this purpose. Also, section 701(e) states, "The term 'demonstrates' means meets the burdens of production and persuasion," again without reference to a heightened showing. In addition, the conventional rules of civil litigation apply to Title VII cases, and they recognize the equal utility of direct and circumstantial evidence. Finally, the statute uses the word "demonstrates" in describing the defendant's affirmative defense. Sauce for the goose is sauce for the gander, yet counsel for the defendant did not concede that the defendant must meet a heightened burden of proof; absent congressional indication to the contrary, a term in a statute should not vary in meaning depending on whether the rights of the plaintiff or the defendant are at stake.

Although we find the result of this case unimpeachable (the contrary decisions in the lower courts seem to have been driven more by ideology than law), we must observe that Justice Thomas flirted with what we consider to be a serious error. Defense counsel's unwillingness to concede a point (that if the word "demonstrates" requires a heightened show-

ing of a plaintiff, the word requires the same of a defendant) was altogether irrelevant. What a single party concedes, or refuses to concede, should not control the interpretation of a statute that applies to all persons. A party may present inconsistent arguments, and the inconsistency may be a good reason for rejecting them; but a party does not own a statute, and the party's refusal to acknowledge an inconsistency (or any other point, for that matter) is of no consequence. Thus, neither a plaintiff nor a defendant need satisfy a heightened burden, not because the defendant in this action refused to make a concession, but because the statute does not mention such a burden, the conventional rules of civil litigation apply to Title VII, and so forth.

10. Race as a Selection Criterion: Title VI of the Civil Rights Act of 1964; 42 U.S.C. § 1981; Fourteenth Amendment

Grutter v. Bollinger, 123 S. Ct. 2325 (2003)

A white applicant was denied admission to the law school of the University of Michigan. She sued, claiming the school's affirmative action program discriminated against her because of her race. The District Court ruled that the school's policy flunked both parts of the strict scrutiny test: the goal of attaining a racially diverse student body was not a compelling interest, and the school's policy was not narrowly tailored to further that interest. Sitting en banc, the Court of Appeals for the Sixth Circuit disagreed on both parts of strict scrutiny and reversed the District Court's judgment. The Supreme Court affirmed the judgment of the Sixth Circuit.

Justice O'Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer, took guidance from the reasoning of Justice Powell in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978), which has become the touchstone for applying strict scrutiny to race-conscious admissions policies. On the first part of strict scrutiny, Justice Powell had written that attaining a diverse student body was a compelling interest because a university may select students who will contribute to the robust exchange of ideas; such exchange is paramount to the university's mission of training the future leaders of the nation. Race may be one—but not the only—"element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body." 123 S. Ct. 2337, quoting from *Bakke*, 438 U.S. at 314 (Justice Powell).

Strict scrutiny is sensitive to context, and so Justice O'Connor turned to whether the precise goal of the law school was compelling. That goal was to attain "the educational benefits that flow from a diverse student body." 123 S. Ct. at 2338. Noting that the school's judgment of the value of this goal was entitled to a degree of judicial deference, the Court agreed with the school that a diverse student body lies at the heart of the mission of the school. Diversity promotes cross-racial understanding and helps to break down racial stereotypes. Diversity enables spirited and enlightening discussions (both inside and outside the classroom, we may add), thereby enhancing learning outcomes and preparing students for the increasingly diverse society in America and the increasingly global marketplace. In addition, universities and law schools are the training ground for many of the nation's leaders. In order for those leaders to be legitimate in the eyes of the citizenry, the path to leadership must be "visibly open to talented and qualified individuals of every race and ethnicity." 123 S. Ct. at 2341.

Having found the law school's goal to be a compelling interest, Justice O'Connor turned to the second part of strict scrutiny, whether the school's means were narrowly tailored to achieve diversity. Justice Powell in *Bakke* had written that a race-conscious admissions program must consider all the elements of diversity and, in doing so, may treat an applicant's race as a "plus." In pursuit of diversity, the weight placed on race may vary from candidate to candidate. Diversity that passes muster as a compelling interest comprises many factors, including having lived abroad, possessing fluency in foreign languages, having overcome adversity in one's life, having performed extensive community service, having pursued a career in another field, as well as being an under-represented minority. Diversity of this breadth does not unduly burden an applicant who is not a minority, for this person may contribute to diversity in several other ways.

A critical mass of minority students is necessary to achieve racial diversity. According to the law school's Director of Admissions, "critical mass means . . . a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." 123 S. Ct. at 2333 (internal quotation marks omitted). A race-conscious admissions program may not use quotas to achieve a critical mass, but may use a flexible goal. A goal allows for individual consideration of each candidate and does not insulate a candidate from comparison with all other candidates. The law school had a goal and not a quota. Between 1993 and 2000, the representation of African-American, Native American, and Latino students in each class varied from 13.5 to 20.1 percent.

The plaintiff and the United States argued that the law school's plan was not narrowly tailored because the school's objectives could have been achieved without taking race into account. The Court responded, "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." 123 S. Ct. at 2344. Narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." 123 S. Ct. at 2345. (We note that narrow tailoring differs from the earlier version of strict scrutiny, under which the means

had to be the least restrictive possible.) The District Court suggested a lottery, but a lottery would relinquish other educational values and kinds of diversity. Lowering admission standards for all students would change the character of the school and sacrifice a vital component of its mission. Admitting all students above a certain class rank (the "Texas plan"), even if practicable for a graduate professional school, would preclude individual assessments necessary to assemble a student body that is diverse in all the ways the school desires.

Because "[a] core purpose of the Fourteenth Amendment was to do away will all governmentally imposed discrimination based on race," 123 S. Ct. 2346, quoting from *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), a race-conscious admissions program must be limited in time. Sunset provisions and periodic reviews suffice for this purpose. The law school avowed that it would like nothing better than to revert to a race-neutral admissions formula and would do so as soon as practicable. Justice O'Connor wrote that twenty-five years had passed since race-conscious admission was approved in *Bakke*, and she expected that twenty-five years hence racial preferences would no longer be necessary. May we all live to see her expectation fulfilled!

Concurring, Justice Ginsburg, joined by Justice Breyer, found the law school's system constitutional because "conscious and unconscious race bias, even rank discrimination, remain alive in our land, impeding realization of our highest values and ideals." 123 S. Ct. at 2347–8.

Justice Scalia, joined by Justice Thomas, dissented. Justice Scalia argued that cross-racial understanding is learned, not only in school, but also in other social venues; thus, if the law school could admit a critical mass of minority students, so could the state's civil service system. This was the first item in a parade of horribles, perhaps the most frightening of which was a lawsuit claiming that an institution was truly committed to educational diversity because the institution tolerated minority-only student organizations, housing, student centers, and graduation ceremonies.

Concurring and dissenting, Justice Thomas, plainly speaking from his own experience, quoted Frederick Douglass: "What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. . . . I have but one answer from the beginning. Do nothing with us! . . . [I]f the negro cannot stand on his own legs, let him fall. . . . All I ask is, give him a chance to stand on his own legs!" 123 S. Ct. at 2350, quoting the *Frederick Douglass Papers* 59, 68 (J. Blassingame & J. McKivigan eds., 1991). Justice Thomas continued, "Like Douglass, I believe that blacks can achieve in every avenue of American life without the meddling of university administrators." 123 S. Ct. at 2350. But affirmative action stamps minorities with a badge of inferiority. "When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement." 123 S. Ct. at 2362. Further, Justice Thomas maintained that the law school was not pursuing a compelling state interest. The school's real interest was not educational diversity; rather, because the school could have increased minority enrollment by lowering its admission standards, the interest the school actually pursued was maintaining its prestige, which was hardly a compelling interest. Based on precedents, he found that only national security—preventing anarchy and violence—can justify racial classifications. Justice Scalia joined in these parts of Justice Thomas's opinion.

Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, dissented. The Chief Justice argued that the law school was not in fact seeking a critical mass of minority students. Between 1995 and 2000, the school admitted approximately 100 African-Americans, but only 15 Native Americans and 50 Hispanics. "If the Law School [truly seeks to prevent] African-American students from feeling isolated or like spokespersons for their race, one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans." 123 S. Ct. at 2366. If the law school was not really trying to create critical masses of minorities, what was it doing? The Chief Justice observed that the percentages of minorities that were accepted to the school closely tracked their representation in the pool of applicants. In short, concluded the Chief Justice, the school operated "a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups," 123 S. Ct. at 2369, and this was patently unconstitutional racial balancing.

Justice Kennedy wrote separately. He accepted Justice Powell's view in *Bakke* that a college "may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual," 123 S. Ct. 2370, but dissented on the ground that the law school was not truly making individual determinations. Justice Kennedy noted that unlike schools such as Amherst, where the percentage of African-Americans enrolling fluctuated substantially from year to year, the percentage of African-Americans enrolling in the law school varied by only three-tenths of one percent from 1995 to 1998; greater variation over a longer period was explained by changes in the law school's target. "The narrow fluctuation band raises an inference that the Law School subverted individual determination. . . ." 123 S. Ct. 2373.

Grutter suggests to us that properly constructed affirmative action programs of public employers will remain constitutional for another twenty-five years—or until the composition of the Supreme Court changes.

Gratz v. Bollinger, 123 S. Ct. 2411 (2003)

A European-American applied to the undergraduate program of the University of Michigan at Ann Arbor to be admitted in the fall of 1995, and another European-American applied to be admitted in the fall of 1997. Both applicants were rejected. They filed a class action against the university on the ground that they were treated less favorably on the basis of race than African-American, Native American, and Hispanic ("minority") applicants. The university changed its admission policy a number of times during the period relevant to the case. During 1995 and 1996, all applicants were initially awarded points according to the same criteria; then race was factored in, always to the advantage of a minority applicant over a white applicant with the same number of points. In 1997 the initial criteria were expanded to include points for being a minority. In 1998 a new point system was implemented; of a possible maximum of 150 points (100 being necessary for admission), 20 points were automatically awarded to minorities but not to whites. Up to 5 points could be awarded to anyone for characteristics like artistic talent. Between 1995 and 1998, the university managed its system of rolling admissions so as to protect a number of seats for certain categories of students who applied later in the admissions cycle; the categories eligible for protected seats were athletes, foreign students, ROTC candidates, and minorities. The protection of seats was abandoned in 1999; the 1998 point system was continued, including the award of 20 points for minority status, with the modification that admissions counselors forwarded to a review committee applications from academically prepared students who had a characteristic that would contribute to the quality of the entering class. The committee could ignore an applicant's points as it considered characteristics such as high class rank, unique experiences, challenges, interests, talents, socioeconomic disadvantage, geographic origin, and race. During the years 1995 through 2000, the university admitted virtually every academically prepared minority applicant. (It appears to us that the salient difference between the law school's admissions process in *Grutter* and the undergraduate college's admissions process in *Gratz* was the latter's use of points.)

The parties filed cross motions for summary judgment with respect to liability. Following the opinion of Justice Powell in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978), the District Court found that creating a racially diverse student body was a compelling governmental interest. The court also held that the admission policy used in 1999 and 2000, which awarded twenty points for being a minority, was narrowly tailored, and not a quota, because minority applicants still competed with other applicants. The policy used between 1995 and 1998, however, was an unconstitutional quota because protecting seats for minorities saved them from competing against unprotected applicants for those seats. Accordingly, the court granted the plaintiffs' motion as to the policies of 1995 through 1998 and the university's motion as to the policy of 1999 and 2000. The court certified the issues for interlocutory appeal. The case was argued before the Court of Appeals for the Sixth Circuit en banc on the same day as *Grutter v. Bollinger*. The Sixth Circuit decided *Grutter* first. When a petition for writ of certiorari was filed in *Grutter*, the plaintiffs in *Gratz* also petitioned for certiorari, which was granted before the Sixth Circuit could decide *Gratz*. In *Grutter* the Supreme Court reversed the portion of the District Court's decision that upheld the university's policy of 1999 and 2000.

Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, first ruled that the plaintiffs had standing to sue (Justice Stevens, but not the parties, having raised the issue) and then turned to the merits. All racial classification by government, regardless of the race burdened or benefited, must be judged by the standard of strict scrutiny. The opinion focused on the means element of the standard, in this case, whether the university's admissions policy was narrowly tailored. The Court held that the policy was not narrowly tailored because it automatically awarded twenty points, one-fifth of the points needed for admission, to every minority.

Reviewing Justice Powell's opinion in *Bakke*, the Chief Justice stressed that the sort of admissions program of which Justice Powell had approved "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to the university's diversity," 123 S. Ct. at 2428; instead, in a lawful system in which race is considered, each characteristic of each applicant must be considered. Whereas in a lawful system "the race of a 'particular black applicant' could be considered without being decisive . . . the [university's] automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every qualified underrepresented minority applicant." 123 S. Ct. at 2428, quoting *Bakke* at 317. The Chief Justice quoted the following example from Justice Powell's opinion:

> The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic background was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black applicants much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it*.

123 S. Ct. 2428–9, quoting *Bakke* at 324 (emphasis by the Chief Justice). The university's point system was flawed in part because even if C were a budding Monet or Picasso, C could be awarded no more than 5 points. Although the review committee could ignore points, an applicant reached the committee only after an admissions counselor had automatically awarded 20 points to minority but not to other applicants.

One aspect of Chief Justice Rehnquist's opinion may generate unnecessary confusion. Above we quoted his statement that, whereas in a lawful system "the race of a particular black applicant could be considered without being decisive . . . the [university's] automatic distribution of 20 points has the effect of making the factor of race . . . decisive for virtually every qualified underrepresented minority applicant" (internal quotation marks omitted). The meaning of "decisive" is important. As used by the Chief Justice, the word did not mean simply changing or deciding the outcome (being a but-for cause); if the word carried this meaning, race could be even a "plus" and would become a prohibited factor. Rather, as the quotation from Justice Powell's opinion made clear, the Chief Justice used "decisive" to mean always giving an advantage. Race must not be allowed to advantage a minority over an otherwise indistinguishable non-minority in every case, but race may confer an advantage in some cases. For example, if the entering class needed more students of color in order to achieve diversity, a minority might be preferred over an indistinguishable non-minority; but if the entering class needed more musically or athletically talented students in order to achieve diversity, a non-minority musician or athlete might be preferred over an otherwise indistinguishable minority. Race would change the outcome in the first example, but such use of race is permissible. In neither example would race be decisive as the Chief Justice used the word.

Justice O'Connor, joined in large part by Justice Breyer, concurred because of her belief that the college did not "provide for a meaningful individualized review of applicants," 123 S. Ct. at 2431. Every minority automatically received a 20-point bonus, in contrast to the system approved in *Grutter v. Bollinger*, which "enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class." 123 S. Ct. at 2432.

Justice Stevens, joined by Justice Souter, dissented on the ground that the plaintiffs, who were not seeking admission as freshmen to the university, lacked standing to seek an injunction against the admission process for freshmen.

Justice Souter, joined by Justice Ginsburg, agreed with Justice Stevens as to standing, but added that the admissions system was not unconstitutional. Unlike the system in *Bakke*, in which only minorities were considered for certain spots in the class, the system at Michigan let all applicants compete for all places based on many factors, of which race was only one; thus, non-minority applicants could readily outscore minorities who received the 20-point bonus. That minorities were awarded a specific number of points did not condemn the admissions system, for 20 points could also be awarded for athletic ability, socioeconomic disadvantage, attendance at a minority high school, or any reason the provost deemed worthy; and lesser numbers of points were available for other factors. The use of points itself should not be faulted. "Since college admission is not left entirely to articulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a number scale what the law school accomplishes in its 'holistic review,'" 123 S. Ct. at 2441, citing *Grutter*, 123 S. Ct. at 2343.

Justice Ginsburg, joined by Justice Souter, argued that because of historical and contemporary discrimination, a distinction should be drawn between racial classifications that are used to maintain racial inequality and those that are used to achieve equality.

B. Cases Pending

1. Rehiring a Disabled Worker Who Was Discharged for Cause: Americans with Disabilities Act

Ratheon Co. v. Hernandez, No. 02-749

Did an employer that refused to rehire workers who had been discharged for cause deny re-employment to a former employee, who had separated from the firm because of testing positive for cocaine, because the firm regarded him as being disabled or he had a record of having been disabled? A worker alleged that he had failed a drug test and been allowed to resign. Two years later, after successfully completing rehabilitation, he applied for a job with the same employer. His application was rejected because of the employer's policy of not re-employing workers who had been discharged for cause or had resigned in lieu of being discharged. The worker argued that this policy discriminated against him because of his record of having a disability or because he was regarded as being disabled. The company replied that the policy was not discriminatory because former drug users were treated the same as other employees who had been discharged for cause. The Court of Appeals for the Ninth Circuit held the employer's policy, as applied to rehabilitated drug users, violated the Disability Act. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030 (9th Cir. 2002).

One might be thinking that the employer's policy had a disparate impact on disabled workers. *Raytheon* will not address this possibility, however, because the plaintiff failed to plead disparate impact.

2. Reverse Discrimination: Age Discrimination in Employment Act

General Dynamics Land Systems v. Cline, No. 02-1080

Does the Age Discrimination in Employment Act prohibit reverse discrimination? A collective bargaining agreement provided that the employer was not responsible to pay the full cost of medical insurance for employees when they retired except for employees aged 50 and older on a certain date. The class of employees aged 40 to 49 as of that date sued, claiming age discrimination. The Court of Appeals for the Sixth Circuit held the plaintiffs had stated a claim on which relief could be granted. *Cline v. General Dynamics Land Systems*, 296 F.3d 466 (6th Cir. 2002). This decision created a conflict in the circuits, as the First and Seventh Circuits had held that the Age Act does not support a claim of reverse discrimination. *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988) (Breyer, J.); *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992).

3. Limitations Period: 42 U.S.C. § 1981(b)

Jones v. R.R. Donnelley & Sons, No. 02-1205

What is the limitations period for claims arising under the amendments to 42 U.S.C. § 1981 enacted by the Civil Rights Act of 1991? In *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), the Supreme Court held that section 1981 prohibited racial discrimination only regarding the formation of contracts and access to the legal process concerning the formation of contracts. Section 101 of the Civil Rights Act of 1991 amended section 1981 to broaden its coverage to include the performance, modification, and termination of contracts. Plaintiffs sued their employer under section 1981 for discriminatory transfers and terminations and a racially hostile work environment. Per *Patterson*, these claims were not cognizable before the 1991 amendment. The employer moved to dismiss the claims as untimely. Section 1981 itself contains no limitations period. In the past, the courts applied the appropriate limitations period of the forum state. Using this limit, the plaintiffs' claim was untimely. However, 28 U.S.C. § 1658 provides a four-year limitations period for all actions arising under federal statutes enacted after December 1, 1990. Plaintiffs' claim was timely under this limit. The Court of Appeals held that the claim arose under a statute enacted before 1990 and was therefore time-barred. *Jones v. R.R. Donnelley & Sons*, 305 F.3d 717 (7th Cir. 2002). This decision accorded with the decisions of the Third and Eighth Circuits in *Zubi v. AT&T*, 219 F.3d 220 (3d Cir. 2000) and *Madison v. IBP, Inc.*, 257 F.3d 780 (8th Cir. 2001), but conflicted with the decision of the Tenth Circuit in *Harris v. Allstate Ins. Co.*, 300 F.3d 1183 (10th Cir. 2002).

II. Decisions of the New York State Court of Appeals

1. Vacation of Arbitration Awards: N.Y. Public Authorities Law § 1204(15)

New York City Transit Authority v. Transport Workers Union, 99 N.Y.2d 1 (2002)

A subway train operator was discharged for forgetting to set a hand brake, and a bus driver was discharged for injuring a pedestrian. Their union grieved both discharges. The arbitrators ruled that discharge was too severe a penalty in each case. The train operator was demoted and reinstated without back pay; the bus driver was reinstated without back pay. The employers brought proceedings to vacate the arbitration awards, arguing that New York Public Authorities Law § 1204(15) required them, in the exercise of their responsibility to manage transportation services, automatically to dismiss employees who violated safety rules. The union cross petitioned to confirm the awards. In the train operator's case, the Supreme Court agreed with the union and confirmed the award. In the bus driver's case, the Supreme Court agreed with the employer and vacated the award of reinstatement with demotion. The Appellate Division ruled for the employers in each case. The Court of Appeals reversed. It held that neither section 1204(15) nor public policy required automatic discharge.

2. Stay of Arbitration: CPLR Article 75

In re Arbitration Between the City of Johnstown and the Johnstown Police Benevolent Ass'n, 99 N.Y.2d 273 (2002)

A contract between a city and a police union provided for the calculation of some employees' benefits under a certain statute. When the statute was amended, the parties disagreed on how the amendment affected the contract, and the union demanded arbitration. The city petitioned to stay arbitration; the Supreme Court granted the stay, but the Appellate Division reversed and dismissed the petition. The Court of Appeals affirmed. Nothing in the state's constitution, statutes, or public policy prohibited arbitration of the issue. As to whether the grievance was arbitrable under the contract, the court's task was merely to determine whether a reasonable relationship existed between the subject matter of the dispute and the subject matter of the contract. The contract dealt with compensation, and therefore the dispute was arbitrable.

3. Establishing a Residency Requirement: N.Y. Civil Service Law §§ 20, 23(4-a)

Trager v. Kampe, 99 N.Y.2d 361 (2003)

The Nassau County Civil Service Commission promulgated Rule X, setting forth residence requirements for positions in county government, except that members of the police force would be governed by the requirements of the Public Officers Law. Neither Rule X nor the Public Officers Law imposed a residency requirement on candidates for the police officer examination. Thereafter, the commission published a notice for examination for police officer. The notice contained a residency requirement. A man who did not satisfy the requirement in the notice took the examination, passed, and was subjected to a background check. Upon discovering that he did not satisfy the residency requirement in the notice, the commission disqualified him, and he sued. The Supreme Court ruled for the county; the Appellate Division ruled for the man, as did the Court of Appeals. The residency requirement contained only in the notice of examination was invalid under Civil Service Law § 23(4-a), also under section 20, which requires a public hearing.

4. Spousal Waiver: Employee Retirement Income Security Act of 1974; Retirement Equity Act of 1984

Silber v. Silber, 99 N.Y.2d 395 (2003)

A husband designated his wife Barbara as the primary beneficiary of his pension plan; if he died before retiring, Barbara was to receive the full death benefit. Then they divorced. The divorce decree awarded Barbara half of the death benefit, and in 1993 the man filed an appropriate change-of-beneficiary form with the pension plan. The man married another woman, also named Barbara (surely a wise decision, as he guaranteed that he would not utter the wrong name at an inopportune moment) and changed the beneficiary designation so that Barbara No. 1 would receive half of the death benefit and Barbara No. 2 would receive the other half. A few years later, Barbara No. 1 asked the man to create separate annuities for her, thereby giving her immediate access to her half of the death benefit. He agreed and stipulated to a qualified domestic relations order (QDRO) under which No. 1 took ownership of the new annuities and he assumed sole ownership of the remainder in the pension fund. By its terms, the order superceded all prior agreements and orders, and No. 1 waived her rights to the remainder in the pension fund. Both parties and their attorneys signed the order. The man sent a copy of the order to his pension plan, but died before filing an appropriate change-of-beneficiary form. The pension plan paid half the remaining death benefit to No. 2, but withheld the other half because No. 1 claimed it on the basis of the beneficiary form filed in 1993. The parties went to court. The Supreme Court ruled in favor of No. 1, but the Appellate Division ruled in favor of No. 2. The Court of Appeals affirmed the Appellate Division. A QDRO may serve as a document of a pension plan that changes the beneficiary designation. Agreeing with the majority of circuits of the federal circuit courts, the Court of Appeals held that the validity of a waiver of rights should be judged by the common law standard: the waiver must be explicit, voluntary, and made in good faith. No. 1's waiver satisfied this standard, so No. 2 was entitled to the second half of the remaining death benefit.

5. Demolishing or Altering a Building: N.Y. Labor Law § 241(1)

Panek v. County of Albany, 99 N.Y.2d 452 (2003)

New York Labor Law § 241(1) requires contractors and owners in the erection, demolition, repairing, or altering of a building to furnish scaffolding, ladders, etc. that give workers proper protection. Plaintiff sued under this section after he fell from a ladder while salvaging equipment from a building that was scheduled to be demolished. The plaintiff moved for summary judgment on section 241(1) liability. The defendant cross moved for summary judgment, arguing that the plaintiff was not protected by section 241(1) because removal of the equipment was not part of the demolition project, for which a separate contract had been let, and that salvaging the equipment was not an alteration of the structure. The Supreme Court held that the plaintiff was not involved in demolishing the structure, but was involved in altering it, and so granted the plaintiff's motion and denied the defendant's. The Appellate Division reversed; it found the plaintiff was involved in neither demolition nor alteration. The Court of Appeals reversed and reinstated the order of the Supreme Court. The high Court concurred that the plaintiff was not demolishing the building; a third party was on tap to do that after the plaintiff finished removing the equipment. But the plaintiff was altering the building. Altering under section 241(1) means making a significant physical change, as distinguished from routine activities such as maintenance and decoration. The plaintiff was engaged in making a significant change to the building; that it was to be demolished thereafter was irrelevant.

6. Unjust Dismissal, Common Law Employment at Will: Education Law § 6509(9); Rules of the Board of Regents § 29.1(b)(8)

Horne v. The New York Times, 100 N.Y.2d 85 (2003)

A physician was employed at will by a company as its associate medical director. Her duties included providing medical care to other employees and monitoring their workers' compensation claims. Believing that medical ethics required her to protect her patients' confidential information, she consulted the state Department of Health, and then refused to divulge patients' information to the legal and human resource departments of the company without the employees' consent. Her position was eliminated, and she sued, alleging that the true reason for eliminating her position was her refusal to violate her patients' confidentiality. The company moved to dismiss the complaint. The Supreme Court denied the motion, and the Appellate Division affirmed. The Court of Appeals reversed. It said that the common law rule should be changed only by the legislature; an employer may discharge at will, absent a constitutionally impermissible purpose, a statutory proscription, a covenant implied in law, or an express limitation in an individual contract of employment. *Wieder v. Skala*, 80 N.Y.2d 628 (1992), was distinguished. An associate in a law firm alleged he was discharged for asking the partners to report another associate for misconduct to the disciplinary committee. In deciding whether to sustain the dismissal of his complaint, the Court of Appeals rejected his argument that public policy warranted recognition of a tort of abusive discharge, but accepted his argument based on breach of contract. His position was distinguishable from the accountant in *Sabetay v. Sterling Drug*, 69 N.Y.2d 329 (1987), who asserted he was dismissed for refusing to participate in financial activities that were illegal, unethical, and violated the employer's personnel policy manual and accounting code. Whereas the accountant provided professional services in furtherance of the company's objectives, the lawyer in *Wieder* provided professional services as a member of the bar to the firm's clients. A lawyer's duties as an attorney and as a member of a firm are inseparable. Also, the ethical rule at issue was indispensable to the self-regulation of attorneys, which the courts understand well because they oversee it. Indeed, if the plaintiff had failed to report the other associate, the plaintiff risked disbarment. These factors justified finding an implied-in-law obligation in the contract of employment between the plaintiff and his law firm that the firm would not discourage his compliance with the ethical obligations of the profession. The doctor in the case at bar, however, was not like the lawyer in *Wieder*. The doctor provided medical services on behalf of her employer. When she assessed work-related injuries, she was furthering the goals of the company. Unlike the lawyer, for whom giving legal services to clients was the core of his employment, the doctor's treatment of patients was not the core of her job; therefore, the ethical standards which the company required her to violate were not central to the discharge of her duties to her employer. Also, the physician-patient privilege is not a self-policing rule that is crucial to the self-regulation of the profession. In the absence of a common professional enterprise between the doctor and her employer, the provisions of Education Law § 6509(9) and section 29.1(b)(8) of the Rules of the Board of Regents do not impose any obligations on the company or the doctor as its employee.

7. Unemployment Insurance for Out-of-state Telecommuters: Labor Code § 511

In re Allen, 100 N.Y.2d 282 (2003)

The claimant telecommuted. The employer's office was in New York; she lived in Florida. The employer paid for a telephone line to her home and supplied her with a computer, software, and access to its mainframe computer in New York. She worked regular business hours, submitted time sheets and requests for vacation time to New York, and called New York to ask for sick leave or permission to begin work late or leave early. She filed weekly status reports in New York. The employer decided to end this arrangement and offered her work in the New York office, but she declined. Her application for unemployment insurance in Florida was denied on the ground that she had voluntarily quit without good cause. Following lower-level determinations, her application for unemployment insurance in New York was denied by the Unemployment Insurance Appeal Board because her employment had been in Florida; she had not worked in New York under Labor Law § 511 because she discharged her responsibilities entirely outside the state. The Appellate Department affirmed, as did the Court of Appeals. Section 511 defines "employment" as service within the state, or service both within and without the state if the service is localized in the state. In the latter event, the out-of-state service must be incidental to the in-state service, for example, be temporary or consist of isolated transactions. The Commissioner found that the claimant's service was localized in Florida. This finding was correct because physical presence determines localization for purposes of applying section 511 to an interstate telecommuter.

8. Pregnancy Discrimination: Executive Law § 296(1)

Mittl v. N.Y. State Div. of Human Rights, 2003 WL 21285212, 2003 N.Y. Lexis 1313 (2003)

The employer discharged his secretary because she became pregnant and his wife thought he was the father. The secretary complained to the Division of Human Rights, alleging sex discrimination based on pregnancy; the Commissioner held a hearing, found the employer had violated Executive Law § 296(1), and ordered back pay and damages for anguish. The employer sued to annul the Commissioner's order; the secretary cross petitioned for enforcement. The Appellate Division decided there had been no sex discrimination, arguing that the employer had been forced to choose between keeping his secretary and saving his marriage. The Court of Appeals held the Appellate Division had applied an improper standard. Judicial review of a decision after a hearing is limited to whether substantial evidence supports the agency's

determination. Substantial evidence supported the Commissioner's decision that the employer's reason for discharging the secretary was her pregnancy. For example, the employer said to the secretary that her pregnancy was becoming a problem, and when she asked for time off for a prenatal appointment, the employer's wife objected that the secretary had too many appointments. The employer offered evidence of a non-discriminatory reason, but substantial evidence supported the Commissioner's conclusion that this evidence was false. For example, the employer conceded that he was satisfied with the secretary's job performance (one trusts the Commissioner exercised sufficient restraint to refrain from asking precisely which performance the employer had in mind) and no records supported the assertion that she had an attendance problem. Cases like *Kahn v. Objective Solutions, Int'l*, 86 F. Supp. 2d 377 (S.D.N.Y. 2001), in which claims of sex discrimination were rejected where the plaintiffs were terminated in the aftermath of consensual sexual relationships with their employers, were inapposite because neither party in the case at bar contended that the termination was connected to a sexual relationship.

III. Amendments to the Federal Rules of Civil Procedure Regarding Class Actions

On March 27, 2003, Chief Justice Rehnquist submitted to Congress a number of amendments to the Federal Rules of Civil Procedure.[2] Among them were amendments to Rule 23, which pertains to class actions. Although all of the amendments to Rule 23 are important, some deserve particular attention.

Before addressing the amendments, we must note that no change to Rule 23(b) is proposed.[3] The three categories of class actions will remain: (b)(1) separate actions would create the risk of inconsistent adjudications for the defendant, or adjudication of one plaintiff's claim would impair the ability of others to protect their interests; (b)(2) the defendant has acted on grounds applicable to the class; (b)(3) common questions of law or fact predominate over individual questions.

Timing of Certification	
At Present	**Amendment**
23(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. . . .	23(c)(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

The amendment pertains to when certification of the class occurs. At present, certification occurs "as soon as practicable"; the amendment changes the time to "an early practicable time." The change was made in part because, for good reasons, the courts have not been certifying classes "as soon as practicable." One good reason is that time may be needed to gather necessary information. Discovery in aid of certification may include information on the issues for trial. Some courts are requiring before certification that the plaintiff present a trial plan that describes issues likely to arise at trial. Another good reason is that the defendant may prefer to win dismissal or summary judgment before certification of the class. A third reason is that time may be needed to gather information regarding whether to appoint the named plaintiff's attorney as counsel for the class. Thus, this amendment will allow courts to take a flexible approach to certifying classes, in contrast to the current rule's emphasis on dispatch.

Conditional Certification and Cut-off to Amend Certification	
At Present	**Amendment**
23(c)(1) . . . An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.	23(c)(1)(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

This amendment contains two changes. First, it deletes the present text allowing conditional certification. The new rule is intended to make clear that a court that is not satisfied that the requirements of class certification have been met should refuse to certify the class until the requirements have been met. Second, the amendment changes the cut-off point for amending class certification from "before the decision on the merits" to "before final judgment." The reason for this change is an ambiguity in the present text. For example, it is common to divide class actions into liability and remedial stages. The present wording "before decision on the merits" could be construed to disallow amendment to the class certification after the conclusion of the liability phase of the action, though it may become apparent in the remedial phase that

the certification should be amended. The new wording "before final judgment" allows appropriate flexibility. (Note that if a class certified under Rule 23(b)(3) is amended to include members who have not been given notice and the chance to request exclusion, such notice must be directed to the new class members.)

Notice to (b)(1) and (b)(2) Classes	
At Present	**Amendment**
23(c)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicableunder the circumstances. . . . 23(d)(2) . . . the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given. . . .	23(c)(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

The existing rule says nothing about notice to members of (b)(1) and (b)(2) classes. Implicit warrant for such notice exists in Rule 23(d)(2); the amendment makes this warrant explicit. A benefit of notice would be facilitation of the opportunity of members of the class to participate in the action. Notice to members of (b)(2) and (b)(3) classes will not be required, however. One reason for not requiring notice would be that, in an action in which damages are not sought, the cost of notice might overwhelm a public-interest group with modest resources. In deciding whether to require notice, the court should weigh the risk that the action would be abandoned if notice were required against the benefit that notice would produce in the particular case. If the court opts to require notice, it need not be the same as notice in (b)(3) cases; informal methods of giving notice may suffice, for example, posting notice in a place visited by many members of the class. (Of course, if a 23(b)(3) class is certified in conjunction with a (b)(2) class, notice must be given to the (b)(3) class.)

Plain, Easily Understood Language	
At Present	**Amendment**
23(c)(2) . . . The notice shall advise each member that	23(c)(2)(B) . . . The notice must concisely and clearly state in plain, easily understood language. . . .

That members of a class be provided with notice they can understand, which has been aspirational in the past, is now required.

Settlement: Approval and Notice	
At Present	**Amendment**
23(e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.	23(e)(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. (C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

The existing rule is ambiguous with respect to whether the court must approve a settlement, voluntary dismissal, or compromise of a class claim (hereafter, "settlement") that resolves only the claims of the class representatives, but does not bind the class. Some courts have held that the existing rule requires court approval of this sort of settlement, and other courts have held otherwise. The amendment makes clear that court approval is needed only if the settlement would bind the class. Such settlements can occur before the class is certified by the court.

The amendment states that notice of settlement is not required if the settlement binds only the class representatives as individuals. The amendment preserves the present rule that when a settlement binds the class, notice to the class is required. Notice is required whether settlement follows certification of the class, or whether certification and settlement occur simultaneously. Notice must be reasonable; thus, in some cases notice to every individual in the class may not be required.

When required and appropriate, notice of settlement may need to conform to the same requirements as notice of class certification. Individual notice would be appropriate, for example, if members of the class are required to take action, such as filing claims, or are permitted by the court to opt out of the settlement.

The amendment mandates the common practice of holding a hearing as part of approving a settlement.

The standard a court should apply in deciding whether to approve a settlement is whether it is "fair, reasonable, and adequate." For a review of factors to take into account, the Committee Note refers the bench and bar to *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283 316–324 (3d Cir. 1998).

Disclosure of Side Agreements Affecting Settlement	
At Present	**Amendment**
	23(e)(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

Under the present Rule 23(e),[4] parties seeking to settle a class action are required to disclose to the court all of the terms of the settlement agreement. The amendment preserves this requirement, and adds the additional requirement that the parties identify any side agreement that may have influenced the terms of the settlement, such as trading advantages to the class in return for advantages to other persons. This disclosure is not meant to authorize additional discovery either by the parties or by objectors to the settlement. Nevertheless, the court may direct the parties to provide a summary or a copy of any side agreement that has been identified. The court may also require production of any agreement not identified by the parties if the court considers the document relevant to review of the settlement agreement. The court may proceed in steps, for example, first calling for a summary of a side agreement and then, if necessary, asking for a copy of the side agreement. The court is expected to heed the parties' legitimate interest in confidentiality, which may militate for protection of some information from general disclosure; the court should also allow parties to claim protection for work product and the like.

Second Chance to Opt Out	
At Present	**Amendment**
	23(e)(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

The amendment allows a court to condition approval of the settlement of (b)(3) class actions (but not of (b)(1) or (b)(2) actions) on a second notice to the class, allowing members another chance to withdraw from the class. Such a

notice would allow a member to base one's decision on the terms of the settlement. Exactly this opportunity is afforded to individual litigants, and also to members of a class when the notices of certification of the class and of the settlement of the action are combined. If settlement appears imminent, a court might choose to economize by delaying notice of certification so that it and the notice of settlement may be combined. Many factors may influence the court in deciding whether to require that members be afforded a second chance to opt out, including whether the parties have agreed to it and whether significant new information has become available since the first notice. The court may guard against misuse of the second notice, such as by requiring that class members who elect exclusion in the second round be bound by rulings on the merits made before the settlement was approved.

Criteria for Appointment of Class Counsel	
At Present	**Amendment**
	23(g)(1) (A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. (B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class. (C) In appointing class counsel, the court (i) must consider: • the work counsel has done in identifying or investigating potential claims in the action, • counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, • counsel's knowledge of the applicable law, and • the resources counsel will commit to representing the class (ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; (iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and (iv) may make further orders in connection with appointment.

The text of the amendment is new, but most of its content is not. Under the existing rules, courts judge the competence of counsel under Rule 23(a)(4), which allows certification of a class "only if . . . the representative parties will fairly and adequately protect the interests of the class." The amendment seeks to distill and make explicit the best practices from years of experience. For example, the amendment states that it does not override specific procedures in existing statutes, such as the Private Securities Litigation Reform Act of 1995, and that counsel is obligated to represent the interests of the entire class as opposed to the interests of any individual members of the class. Nevertheless, some rules are left implicit. For example, it should be understood class counsel must be appointed for each subclass that has divergent interests, and that class representatives may not discharge counsel at will, or command counsel to accept or reject a proposal of settlement.

The amendment specifies criteria a court must use in deciding whether a given attorney may be appointed counsel to a class. The court must consider the work the attorney has put into identifying and investigating class claims, the attor-

ney's experience in similar litigation, the attorney's knowledge of the relevant law, and the resources the attorney would commit to the case. Naturally, an attorney's application for appointment as class counsel will address these criteria. The criteria are not exclusive, however, and the court may take other considerations into account. The amendment identifies one such optional criterion, namely, how attorney's fees will be handled. Another optional criterion could be how parallel litigation might be coordinated or consolidated with the instant action. All criteria should be weighed, and no single factor should determine a ruling. For example, counsel must be prepared to commit sufficient resources to the case, but the court should not limit consideration to attorneys with the greatest resources.

The amendment allows the court to make orders in connection with the appointment of counsel. One such order could be terms for the award of attorney's fees. Another order could pertain to information that is relevant not only to appointment of class counsel, but also to adversarial preparation of the case; the court could shield such information from disclosure to other parties.

If no attorney who has applied to represent the class would be satisfactory counsel, the court may deny certification of the class, reject all applications, recommend modification of an application, invite new applications, or make any other appropriate order.

Procedures for Appointing Class Counsel

At Present	Amendment
	23(g)(2) (A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action. (B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the best able to represent the interests of the class. (C) The order appointing class counsel may include provisions about the award of attorney fees and nontaxable costs under Rule 23(h).

The amendment specifies the procedures for appointing counsel to the class. Counsel may be an individual attorney, an entire firm, or numerous attorneys who are not otherwise affiliated.

The interests of a putative class must be represented before the class is certified and counsel for the class is formally appointed. The motion to certify the class must be prepared, and for this purpose some discovery may be necessary; also, motions must be responded to, or may be made, before certification, and settlement may be discussed as well. Ordinarily, the attorney who filed the action will do such work, and it is not necessary that the court designate this attorney as interim counsel. But in some circumstances, for example, rivalry between counsel, the court may need to designate interim counsel. Whether or not designated as interim counsel, an attorney who represents a putative class must act in the best interests of the class; for example, an attorney who negotiates a pre-certification settlement must seek one that is fair, reasonable, and adequate for the class.

A court may defer certifying a class and appointing counsel for a reasonable period, for example, to allow competing applications to serve as class counsel when more than one class action has been filed, or to allow an additional application to be filed if the initial applicant has been found inadequate.

If only one attorney applies to be class counsel, naturally the attorney must satisfy the criteria of Rule 23(g)(1). If more than one adequate attorney applies, the court should compare the strengths of each applicant and choose the one best able to represent the class. The existence of an attorney-client relationship between an applicant and a proposed class representative may be relevant in this regard.

The order appointing counsel may include provisions regarding attorney's fees and nontaxable costs.

Attorney's Fees	
At Present	**Amendment**
	23(h) In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows: (1) A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. (2) A class member, or a party from whom payment is sought, may object to the motion. (3) The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a). (4) The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

At present, attorney's fees in class actions are handled under Rule 54(d)(2),[5] but that rule does not address the specific issues that arise in class actions; the amendment is directed to those issues. The amendment applies both before and after a class is certified; thus, the amendment controls cases in which a motion for certification of the class is submitted simultaneously with a proposal for settlement. The amendment applies to all awards of attorney's fees, not merely to the award to class counsel; for example, the amendment applies to the award of fees to other counsel whose work has benefited the class, such as an attorney who acted for the class before it was certified but was not appointed class counsel.

The amendment does not create new grounds for an award of attorney's fees or nontaxable costs. The amendment provides for reasonable fees, which are customarily awarded under the common-fund theory, but does not take a position on whether the court should apply the "lodestar method" or the "percentage method" of calculating a reasonable fee. The amendment does contemplate that, in determining a reasonable fee, the court will take into account the actual benefit achieved for the class. In settlements that provide for future payments to the class, the court may decide to defer some portion of the fee award until actual payments to the class are known. A reasonable fee may be appropriate when relief does not take the form of a monetary benefit to the class, for example, an injunction or a declaration in a civil rights case; in this regard, see *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989).

An order from the court regarding attorney's fees, issued in connection with the appointment of class counsel under Rule 23(g), will, of course, have a strong influence on the award of fees under this amendment. Agreements among the parties regarding fees may also be influential. Fees charged by class counsel or other attorneys for representing individual claimants or objectors may be taken into account.

The amendment specifies that attorney's fees may be awarded only on motion under Rule 54(d)(2), which invokes the provisions for the timing of appeal in Rule 58 and Appellate Rule 4. The amendment controls the disposition of fee motions in class actions; Rule 54(d)(2) controls matters not addressed in the amendment. The court should direct when the motion for fees must be filed. In cases that are proposed to be settled, the fee motion should be made in time for information about fees to be included in the notice to the class about the proposed settlement. Notice of a motion for fees must be "directed to the class in a reasonable manner." This phrase was used to make clear that individual service of notice may not be necessary in every case.

Any party with an interest may object to a motion for fees. Thus, any member of the class, as well as any party from whom payment is sought, may object, but a non-settling defendant may not object. The court is expected to set a date by which objections are due. The court may allow limited discovery relevant to an objection, but the court should weigh the need for the information against the cost and delay attendant on discovery. If the material submitted in support of the motion for fees is thorough, the burden should fall on the objector to justify discovery.

The amendment permits, but does not require, a hearing on fees. In actions that are settled, a hearing on the motion for fees might be combined with proceedings under Rule 23(e). Taking into account cost and delay, the court may submit issues regarding fees to a special master or magistrate judge. The amendment requires findings and conclusions of law under Rule 52(a).

Endnotes

1. Not every decision which might bear on an issue in labor and employment law is discussed herein. Some such cases, plus most of the cases mentioned below, are discussed in Maria O'Brien Hylton, *The Supreme Court's Labor and Employment Decisions: 2002-2003*, a draft copy of which is available at http://www.abanet.org/labor/hyltonam03.pdf.
2. The text of the amendments appears in 123 S. Ct. Ct. R-1 to Ct. R-26 (2003). Our comments on the amendments are drawn from the excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Dec. 11, 2002, *id*. at Ct. R.-27 to Ct. R.-48, and the committee notes following proposed changes to the Federal Rules of Civil Procedure, submitted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, May 20, 2002, *id*. at Ct. R.-46 to Ct. R.-140.
3. Rule 23(b) provides that an action may be maintained as class action if—

   (b)(1) (A) separate actions would create a risk of inconsistent adjudications that would establish incompatible standards for the defendant, or (B) adjudication of one plaintiff's claim would dispose of the claims of other persons not parties to the action or impair their ability to protect their interests;

   (b)(2) the defendant has acted on grounds generally applicable to the class, so that declaratory or injunctive relief would be appropriate for the whole class; or

   (b)(3) questions of law or fact common to the class predominate over questions affecting only individuals

   Sections (b)(2) and (b)(3) are used in claims of employment discrimination.
4. Rule 23(3) provides, "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."
5. Rule 54(d)(2) provides:

   (A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

   (B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

   (C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a).

   (D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

   (E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

Michael Gold is Secretary-Elect of the Section on Labor and Employment Law. He is an associate professor at the New York State School of Industrial and Labor Relations at Cornell University. His research has been in the field of employment discrimination law; his most recent article, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 Berkeley J. of Emp. and Lab. Law, argues that disparate treatment and disparate impact are indistinguishable except for intent. Prior to Cornell, he was an associate attorney in Los Angeles with Schwartz, Steinsapir & Dohrmann, a firm representing labor unions. He is a graduate of the University of California at Berkeley and the Stanford Law School.

This report was presented to the Section at the recent Fall Meeting in Ottawa.

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
Jonathan Ben-Asher
(212) 509-1616

Alfred G. Feliu
(212) 763-6802

Eugene S. Ginsberg
(516) 746-9307

Wayne N. Outten
(212) 245-1000

Communications
James N. McCauley
(607) 257-0121

Sharon P. Stiller
(585) 258-2851

Continuing Legal Education
Richard K. Zuckerman
(516) 663-5418

Diversity and Leadership Development
Louis P. DiLorenzo
(315) 422-0121

Allegra L. Fishel
(212) 245-8909

Employee Benefits
Mark E. Brossman
(212) 756-2050

Jennifer A. Clark
(315) 422-7111

Equal Employment Opportunity Law
Alan M. Koral
(212) 407-7750

Deborah S. Skanadore Reisdorph
(315) 733-2974

Ethics and Professional Responsibility
John Gaal
(315) 218-8288

Nancy E. Hoffman
(518) 257-1000, ext. 1443

Finance
Robert Kingsley Hull
(315) 536-9820

Government Employee Labor Relations Law
Douglas E. Gerhardt
(518) 449-1063

Individual Rights and Responsibilities
Theodore O. Rogers, Jr.
(212) 558-3467

Mimi C. Satter
(315) 471-0405

International Labor and Employment Law
Philip M. Berkowitz
(212) 218-5501

Wayne N. Outten
(212) 245-1000

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
William D. Frumkin
(914) 328-0366

Public Sector Book
Jean Doerr
(716) 847-3449

Jerome Lefkowitz
(518) 257-1443

Melvin Osterman
(518) 487-7600

Union Administration and Procedure
Robert L. Boreanaz
(716) 849-1333

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 2004 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
Jacquelin F. Drucker
432 East 58th Street, Suite 2
New York, NY 10022
(212) 688-3819

Chair-Elect
Pearl Zuchlewski
500 5th Avenue, Suite 5100
New York, NY 10110
(212) 869-1940

Secretary
Merrick T. Rossein
65-21 Main Street
Flushing, NY 11362
(718) 340-4316

Secretary-Elect
Michael Evan Gold
293 Ives Hall, Cornell University
Ithaca, NY 14853
(607) 255-7646

Copyright 2003 by the New York State Bar Association.
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