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Discrimination on Our Minds

Discrimination is always on the minds of prudent employers. Recent developments in the laws and practices in this ever-changing area gave rise to many of the articles in this issue of the Employee Relations Law Journal.

DISABILITY DISCRIMINATION

In our lead article, "Is Everyone Disabled Under the ADA? An Analysis of the Recent Amendments and Guidance for Employers," A. Dean Bennett and Scott E. Randolph explore the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), under which it seems that nearly everyone with any form of mental or physical disability is considered disabled. The focus now is on whether the employee can perform the essential functions of the job with or without a reasonable accommodation. The authors advise employers to take strategic steps now to ensure compliance and minimize liability under the ADAAA.

Continuing on this theme, Roger B. Jacobs, of Jacobs Rosenberg, LLC, in his article, "Disability Discrimination, Reasonable Accommodation, and the Modified Commute," provides updated analysis of these issues as the disability landscape changes.

FAMILIAL STATUS DISCRIMINATION

In "Familial Status Discrimination: Will Employment Law Build Upon What Housing Law Started?," Kendall D. Isaac explores familial status discrimination in the workplace. The author proposes that if Title VII were to be amended to simply add "familial status discrimination" to the litany of other types of disallowed discrimination, there would finally be consistency in how the law handles these matters.

Laura J. Maechtlen and Tracy Billows address employee relations issues and costs that come with family responsibilities, as well as the legal landmines that employers must navigate under a whole host of federal, state, and local employment laws. Their article, "Caregiver and Family Responsibilities: A Continuing Challenge for Employers," describes the challenges employers face, and offers practical guidance on how to avoid charges of family responsibilities discrimination.

GENETIC DISCRIMINATION IN THE WORKPLACE

Genetic discrimination is also on our minds. Thus, "EEOC Issues Final Regulations on Genetic Discrimination in the Workplace," an article

by Thomas H. Christopher, Louis W. Doherty, and David C. Lindsay, discusses the recent publication of the EEOC's final regulations interpreting the employment-related provisions of the Genetic Information Nondiscrimination Act.

AND MORE …

In addition, we have articles on whistleblowing, the drafting and application of company electronic use policies, training employees to protect consumer rights when using new technology, our "Employee Benefits" column by Anne E. Moran, our "ERISA Litigation" column by Craig C. Martin and William L. Scogland, our "Split Circuits" column by Howard S. Lavin and Elizabeth E. DiMichele, and more!

Enjoy the issue!

Steven A. Meyerowitz
Editor-in-Chief

Is Everyone Disabled Under the ADA? An Analysis of the Recent Amendments and Guidance for Employers

A. Dean Bennett and Scott E. Randolph

Under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), nearly everyone with any form of mental or physical disability is considered disabled. The focus now is on whether the employee can perform the essential functions of the job with or without a reasonable accommodation. The authors of this article advise employers to take strategic steps now to ensure compliance and minimize liability under the ADAAA.

On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Act Amendments of 2008 (the ADAAA). The ADAAA amended the Americans with Disabilities Act of 1990 (ADA) and became effective on January 1, 2009. Generally stated, the ADA prohibits discrimination or retaliation against a person with a disability by an employer. The ADAAA changed the landscape for employers by significantly broadening the statutory definition of "disability." Under the ADAAA, nearly everyone with any form of mental or physical impairment is considered disabled. The new, changing landscape poses obvious challenges for employers.[1] But these challenges are not insurmountable. Employers can minimize their exposure by implementing policy changes to ensure compliance with the latest developments under the ADA. These same policy changes might also make for a more efficient organization.

THE FUNDAMENTALS OF AN ADA CLAIM

The ADA provides that a covered employer may not discriminate or retaliate against a qualified individual on the basis of a disability. A covered employer includes both private and government employers that employ 15 or more employees for each working day in each of

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20 or more calendar weeks in the current or preceding calendar year.[2] A qualified individual includes any person with the skill, experience, or education to perform the essential functions of his or her job, with or without a reasonable accommodation from his or her employer.[3] An accommodation is a modification to the work environment that would allow an employee or prospective employee to perform a particular job. An individual is considered to have a disability for purposes of the ADA under three scenarios:

1. Where the individual in fact has a physical or mental impairment that meets certain conditions;

2. Where an individual has a "record of" having such an impairment; or

3. Where an employee is treated as or "regarded as" having an impairment whether or not the employee has an impairment.[4]

REVISITING THE PAST TO BETTER UNDERSTAND THE PRESENT

To understand the significance of the ADAAA on employers, it is important to understand the ADA as it existed prior to amendments. The original purpose of the ADA, enacted in 1990, was to protect the then-estimated 43 million Americans with some form of physical or mental disability.[5] In the decades following enactment, however, the United States Supreme Court narrowed the reach of the ADA through its interpretation of the meaning of disability. Some scholars suggest that Supreme Court cases narrowed the ADA to protect only about 13.5 million Americans.[6] In response, Congress passed the ADAAA to overturn a number of these cases, most notably *Sutton v. United Air Lines, Inc.*, and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams.*

Sutton v. United Air Lines

In *Sutton v. United Air Lines*,[7] near-sighted twin sisters with 20/20 corrected vision sued United Airlines because the company refused to hire them as commercial airline pilots. The company refused to hire the twins because they could not satisfy the company's uncorrected vision requirements. The United States Supreme Court affirmed dismissal of the disability discrimination claims because, considering the mitigative effect of eyeglasses, the twins were not disabled. Following this decision, lower courts from around the country extended this analysis and considered all kinds of mitigative measures in concluding that individuals were not disabled. This case gave employers attractive "coverage" arguments, meaning whether the individual was disabled and thus covered by the ADA.

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[8] the plaintiff suffered from carpal tunnel syndrome and was unable to perform certain tasks related to her job on the line of a Toyota plant. She requested an accommodation that would have altered her job duties to exclude the tasks that she was not able to perform. Toyota refused and she brought a lawsuit under the ADA. The United States Supreme Court concluded that she was not disabled because her impairment did not prevent or severely restrict an activity "of central importance to daily life." This gave employers other attractive "coverage" arguments.

The Old Battleground of the ADA Focused on "Disability"

In the 20 years since Congress passed the ADA, and thanks to the United States Supreme Court's treatment of the Act in *Sutton* and *Toyota*, one attractive argument for employers is that an individual did not have a "disability." Using that litigation strategy, employers often could prevail at summary judgment. For example, if mitigative measures corrected the impairment, the employee was not considered to be disabled under the ADA. Similarly, if the employee's impairment did not substantially limit a major life activity, the employee was not considered to be disabled under the ADA. And if the employer who regarded an employee as disabled did not consider the disability to be substantially limiting, the employee was not considered disabled under the ADA. Employers would often win summary judgment under any of these scenarios.

Mitigative Measures

Under the pre-amendment ADA as interpreted by *Sutton*, courts could properly consider mitigative measures when determining whether an impairment was a disability. For example, if an employee took medication, wore a prosthetic, or attended therapy, the employer could use these facts to argue that the employee was not disabled. Through the ADAAA, Congress changed the landscape and effectively told employers to view their employees as though they do not take medication, wear the prosthetic, or attend therapy when analyzing whether employees are disabled under the ADA.[9] One exception deals with eyeglasses and contact lenses. The ADAAA allows courts to consider the mitigative effect of eyeglasses or contact lenses in determining whether an employee is disabled.[10] Ironically, given this exception, the *Sutton* case that started the mitigative measure analysis would be decided the same way because United Airlines could still properly consider the mitigative impact of the plaintiffs' corrective lenses when determining whether they were entitled to accommodation under the ADA.

Substantially Limits

To be considered disabled under the ADA, a plaintiff must establish that he or she suffers from a physical or mental disability that substantially limits a major life activity. "Substantially limits" means that a person is "[u]nable to perform a major life activity that a person in the general population can perform" or is "significantly restricted" as to the manner or duration which a person can perform that activity compared with the rest of the population.[11] Because the pre-amendment ADA was "interpreted strictly to create a demanding standard for qualifying as a disabled,"[12] employers could successfully argue that although an employee's impairment somewhat limited the employee's activity, it did not "substantially limit" the activity, and therefore, the employee was not disabled. But under the ADAAA, Congress shifted the battlefield in favor of broad coverage. It directed that the question of whether an impairment "substantially limits" an activity should not demand extensive analysis.[13] Effectively, Congress wrote the "substantially limits" analysis out of the ADA when it passed the ADAAA. The US Equal Opportunity Commission (EEOC) is actively prosecuting cases under this expanded definition. Recently, the EEOC filed three new cases against employers who were alleged to have discriminated against qualified individuals with diabetes, cancer, and severe arthritis.[14] These cases are reflective of what is to come as the EEOC and the plaintiff's employment bar continues to prosecute claims under the expanded statutory definition of disability.

Major Life Activity

Under the pre-amendment ADA, the United States Supreme Court interpreted the term "major life activity" as an activity that is of "central importance to most people's daily lives."[15] Courts around the country often interpreted this to mean that a plaintiff must be substantially limited in an activity deemed by the courts to be "significant."[16] Activities that "lack central importance to daily lives" did not qualify.[17]And "working" was considered as a major life activity only if an impairment limited an employee in a broad range of jobs.[18] Employers could therefore successfully argue that although an employee was substantially limited in an activity, that activity was not a "major life activity." But under the ADAAA, Congress provided two non-exclusive lists of major life activities.[19] These lists are nearly all-inclusive. For example, Congress included working, thinking, concentrating, and communicating among the list of 18 "major life activities." Congress also stated that major life activities include operations of a major bodily function, and then listed every major system of the body. Thus, under the ADAAA, there is little room left for an employer to argue that an activity is not a "major life activity."

"Regarded As"

As identified above, one of the ways for an employee to establish a disability for purposes of the ADA is to prove that the employer treated that person as though that person were disabled, or regarded that person as being disabled. Under the pre-amendment ADA, an employee making a "regarded as" claim also had to prove that the employer perceived the disability to be substantially limiting of a major life activity.[20] But under the ADAAA, Congress made clear that an employee must prove only that the employer treated him or her as though he or she had a physical or mental impairment notwithstanding whether the employer perceived the limitation to be substantially limiting of a major life activity.[21] This amendment further narrowed opportunities for employers to prevail at summary judgment.

The Amendments Have Already Significantly Increased Claims Against Employers

The ADAAA resulted in lower thresholds for bringing a claim and surviving summary judgment. The increase in charges of discrimination and litigation under the ADA since the effective date of the ADAAA has been dramatic.[22] In 2009, the EEOC received 93,277 charges of discrimination. Of that number, 21,451 were based on disability discrimination. In 2010, the EEOC estimates that it will receive 5,561 additional disability discrimination charges (a 26 percent increase from 2009). And in 2011, as awareness of the ADAAA grows, the EEOC estimates that it will receive an additional 9,020 disability discrimination charges, which is a 42 percent increase from 2009. With the increase in charges comes a correlative increase in litigation. For this reason, employers must assess what preventive measures and defenses remain to limit their liability under the ADA.

THE NEW BATTLEGROUND OF THE ADA FOCUSES ON "QUALIFIED INDIVIDUAL"

While Congress drastically expanded the scope of those who are considered to be disabled, it did not modify the way courts consider whether an employee is a "qualified individual." As a result, the new battleground centers around where an employee is a qualified individual. A "qualified individual" is an individual who: (1) with or without reasonable accommodation (2) can perform the essential functions of the position he or she holds or desires, and (3) has the requisite skill, experience, education, and other job-related requirements of the position.[23] It is essential for employers to be conversant with these terms and the related concepts to navigate effectively their obligations under the ADA.

Familiarity with Key Concepts Facilitates Compliance Under the ADA

Reasonable accommodations include modifications to the application process or the work environment that allow a qualified employee or applicant to perform the essential job functions or enjoy "equal benefits and privilege of employment as are enjoyed by its other similarly situated employees without disabilities."[24] An accommodation is not reasonable if it poses an undue hardship on the employer. Undue hardship refers to whether the covered employer would incur "significant difficulty or expense" in implementing the requested accommodation.[25]

The employer must only provide reasonable accommodations for the "essential job functions." Essential job functions are the "fundamental" duties of a given position.[26] Essential job functions are distinguishable from "marginal job functions" which may include job duties that an employee performs but which are not necessary to employment. Whether an employer must accommodate a particular employee and the extent of that obligation is often resolved through what is known as the "interactive process." The interactive process is often described as a constructive dialogue between employer and employee about the employee's job-related limitations and any proposed accommodations that would allow the employee to perform the essential functions of the position. Each of these concepts plays an important role in an employer's effort to remain compliant and minimize liability under the ADAAA.

Implement Steps Now to Minimize Exposure Later

Employers should take action now to minimize their liability under the ADAAA and best position themselves in the event of a claim or charge of discrimination. These steps include:

- Regularly analyzing and updating job descriptions;
- Implementing a centralized decision-making process;
- Promptly engaging the interactive process; and
- Giving a proposed accommodation request a test run.

These proactive steps will not only have the effect of minimizing liability to the employer, but they will also likely result in increased efficiencies to the organization.

Analyze and Update Job Descriptions Regularly

Under the ADAAA, a critical issue remains whether an employee or prospective employee can perform the essential functions of the job

to which he or she is assigned. It follows that employers must analyze and fully understand the essential job functions of each position within their organization. To accomplish that objective, employers without job descriptions should create them. And employers with job descriptions already in place should revisit them regularly to ensure that the written descriptions accurately capture the essential functions and exclude marginal functions for each position. The process of creating and updating job descriptions should be a collaborative one between the employer and its employees. If possible, employers should engage their employees in a dialogue about what the employees perceive to be the essential functions of their positions. Ultimately, the employer should seek to have employees sign off on their job descriptions. This approach minimizes the risk that an employee could later claim that he or she requires accommodation to perform an essential job function when the job function is only a marginal function.

This is not a one-time endeavor. Ideally, employers will regularly review existing job descriptions to ensure that the written job descriptions accurately reflect current essential job functions. At a minimum, this process should occur each time the employer engages in any structural or organizational changes. Often these events result in reallocation of work assignments and job functions. Failure to analyze and update all job descriptions during this period can result in exposure to even well-intentioned employers.

In addition to minimizing liability under the ADA for employers, the process of regular review and analysis of existing job descriptions can eliminate inefficiencies and redundancies that exist within the organization. Although this effort may not completely offset the costs associated with the anticipated increased exposure under the ADAAA for employers, regular review of job descriptions provides an opportunity for employers to remain efficient in the competitive marketplace.

Implement a Centralized Decision-Making Process

Employers can realize significant advantages by implementing a centralized decision-making process for handling all requests for accommodation under the ADA. This might be a single person within the organization or a subset of the human resources department depending on the size of the organization. In all cases, the process should be confidential so that employees feel free to share their medical information without risk of disclosure to persons without a legitimate need for access to the information.

The centralized decision-making process has many advantages for employers. First, an employer is entitled to consider the aggregate costs of a proposed accommodation when determining whether a particular accommodation is reasonable. It is much easier for an employer to calculate the true cost of an accommodation to the organization when a

single person or department is responsible for handling all requests for accommodation. Additionally, the centralized process has the advantage of consistency between departments and decision-makers. An employer is poorly positioned in litigation if a manager in one department routinely approves a particular type of accommodation while a manager in a different department denies the same accommodation as being too costly or burdensome to the company. The employee requesting the accommodation in the other division is certain to discover the pattern of approval by other divisions and use that evidence to show feasibility of the proposed accommodation and the arbitrary decision-making by the employer.

Having a single department or person responsible for handling requests for accommodation has the additional advantage of reducing favoritism between employees or classes of employees. Employers should not, for example, provide costly accommodations for one class of employees, *e.g.*, executives, while refusing costly accommodations for another class of lower compensated workers. By providing an accommodation for an executive, and denying the same accommodation for a non-executive, an employer is exposing itself to unnecessary liability because it could be considered relevant evidence that the accommodation is reasonable.

Another advantage of a centralized process is that employers minimize exposure for claims for retaliation and discrimination where they can show that managers and supervisors were not even aware of a particular employee's disability, much less discriminated against him or her on that basis. In order to obtain this benefit, however, employers must take care to protect against improper dissemination of medical information to supervisors as well as other employees. Failure to safeguard this information can result in exposure under the ADA as well as liability under state and federal privacy laws.

Once an employer implements the centralized decision-making process, the employer should update employee handbooks and training materials. Where an employer implements a centralized decision-making process, but its handbook continues to read "contact your manager, supervisor, or the human resources department to request an accommodation," the benefits of the process are completely negated. Moreover, all managers and supervisors should receive regular training to ensure that all personnel understand how requests for accommodation are to be handled within the organization. Finally, employers should remind supervisors and managers to always base employment decisions on their employee's actual job performance and not on any perceived inability to perform the job duties based on a disability or perceived disability.

Promptly Engage the Interactive Process

The ADA does not expressly provide for how the interactive process should be handled. The regulations do, however, provide that "[t]he

appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with the disability."[27] This should be an employer's focus upon receipt of a request for accommodation, because how the employer handles a request is a critical issue should the dispute proceed to litigation. Generally employees, not employers, must initiate the interactive process unless the need for accommodation is obvious to the employer.[28]

The interactive process contemplates a four-step process[29] that the employer should promptly and respectfully engage in good faith each time an employee makes a request for accommodation. The failure to respond to requests for accommodation in a timely manner can lead to claims of discrimination and potential liability.[30] Additionally, employers are currently facing claims for the failure to engage the interactive process.[31] To minimize this potential liability, employers should promptly undertake the following four steps:

First, upon receiving a request for accommodation, the employer must analyze the essential job functions of the position that are involved in the request for accommodation. With updated job descriptions, prepared with employee input, this should be a relatively simple task.

Second, the employer should consult with the employee to ascertain the specific job-related limitations and how the employee could overcome those limitations through a reasonable accommodation. Whenever possible, the employer should request that the employee or potential employee submit these job-related limitations in writing. It is appropriate for an employer to request a medical certification from the employee's or applicant's medical professional. By insisting that the employee or applicant provide this information in writing, the employer minimizes the potential for misunderstanding about the specific job-related limitations encountered by the employee. The documentation will also prove invaluable should litigation ensue, because it will allow the employer to demonstrate precisely what limitations the employee identified when requesting accommodation.

Third, the employer should identify potential accommodations and analyze the effectiveness of each alternative. This includes any modifications to the work environment that will enable the employee to perform all essential job functions and allow the employee to enjoy equal privileges of employment. When considering this issue, employers should consider whether any tax incentives may be available to defray some or all of the cost of the proposed accommodation.[32] Employers faced with a request for accommodation must analyze what steps can be taken to make existing facilities accessible. In some cases, this includes job restructuring, reassignment of the employee to a vacant position, and may include making readers available to the employee or applicant.

Finally, the employer should select the accommodation that the employer believes is most appropriate under the circumstances. In reaching this decision, the employer should take into account the

employee's preferences whenever possible. Employers may properly consider whether the proposed accommodation poses an undue hardship on the organization. This includes an analysis of the cost of the proposed accommodation, the overall financial resources of the employer, the type of operation involved, and whether the accommodation poses a direct threat to other employees. This last step requires the employer to analyze the duration and nature of the threat as well as the likelihood and imminence of harm to others. An employer may properly reject an accommodation when it concludes that the risk of harm to others is too high.

Even if the process is unsuccessful, the employer should always conclude the interactive process with a defensible response to the last request by the employee. Any such response should be in writing and, if possible, signed by the employer and employee. If the employee refuses a particular accommodation, the employer should insist that the employee sign an acknowledgement to that effect. This allows the employer to demonstrate not only the particular job-related limitations identified by the employee but the accommodations proposed by the employer and the fact that they were rejected by the employee. These records are valuable evidence if an employee or applicant later contests the employer's decisions.

Give Accommodation Requests a Test Run

Even if an employer believes that an accommodation might be too expensive or pose too much of a burden in other respects, an employer should consider implementing the requested accommodation on a temporary basis. The advantage of implementing an accommodation on a temporary basis is that the proposed accommodation might turn out to be reasonable, and the employee can continue working for the employer. If, however, the accommodation proves not to be workable for any number of reasons, the employer can later use that information to justify its decision to eliminate the accommodation and refuse similar requests for accommodation in the future relying on empirical data.

CONCLUSION: TAKE STEPS NOW TO AVOID LIABILITY LATER

The ADAAA poses significant challenges for employers. Under the ADAAA, most employees are considered disabled. The battleground has shifted from whether an individual is disabled to whether that same person can perform the essential functions of his or her job, with or without reasonable accommodations. Employers should regularly create or review job descriptions for each position within their organization. Job descriptions should be updated where they are no longer consistent with the actual job functions performed by the employee. When faced

with a request for accommodation, employers should promptly respond to the request for accommodation and document in writing each request by the employee and response by the employer. By implementing these steps, employers can minimize their liability under the ADA and realize some strategic efficiencies within their organizations.

NOTES

1. The EEOC will soon issue new regulations interpreting the ADAAA. These proposed regulations reflect Congress's mandate in the ADAAA to expand the definition of disability and focus the emphasis on whether the disability can reasonably be accommodated by the employer. The EEOC's proposed rules are available at *http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf* (last visited Oct. 28, 2010).

2. *See* 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1).

3. *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

4. *See* 42 U.S.C. § 12102(1)(A)-(C); 29 C.F.R. § 1630.2(g)(1)-(3).

5. *See* 42 U.S.C. § 12101(a) (2006) ("The Congress finds that-(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.").

6. Ruth Colker, "The Mythic 43 Million Americans with Disabilities," *Wm. & Mary L. Rev.*, 49:1 (2007).

7. 527 U.S. 471 (1999).

8. 534 U.S. 184 (2002).

9. *See* 42 U.S.C. § 12102(4)(E)(i)(I)-(IV).

10. *See* 42 U.S.C. § 12102(4)(E)(ii).

11. 29 C.F.R. § 1630.2(j).

12. *Toyota*, 534 U.S. at 197.

13. *See* 42 U.S.C. § 12102(4)(A)-(C).

14. "EEOC Files Trio of New Cases under Amended Americans with Disabilities Act," EEOC Press Release dated Sept. 9, 2010, available at *http://www.eeoc.gov/eeoc/newsroom/release/9-9-10a.cfm* (last visited Oct. 28, 2010).

15. *Toyota*, 534 U.S. at 185.

16. *See, e.g.*, Adams v. Rice, 531 F.3d 936, 944 (D.C. Cir. 2008).

17. *Id.*

18. *See Sutton*, 527 U.S. at 492 ("To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice.").

19. *See* 42 U.S.C. § 12102(2)(A)-(B).

20. *Sutton*, 527 U.S. at 489–490.

21. *See* 42 U.S.C. § 12102(3)(A).

22. *See* "EEOC, Fiscal Year 2011 Congressional Budget Justification" (Feb. 2010), *http://www.eeoc.gov/eeoc/plan/2011budget.cfm* (last visited Oct. 28, 2010).

23. *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

24. 29 C.F.R. § 1630.2(o).

25. *See* 29 C.F.R. § 1630.2(p) (discussing relevant factors).

26. 29 C.F.R. § 1630.2(n).

27. 29 C.F.R. pt. 1630 App. § 1630.9.

28. *See* "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act," available at *http://www.eeoc.gov/policy/docs/accommodation.html* (last visited Oct. 28, 2010).

29. *See id.* (outlining process employers should follow).

30. Jodoin v. Baystate Health Sys., Inc., No. 08-40037-TSH, 2010 WL 1257985, *18 (D. Mass. Mar. 29, 2010) (analyzing former employee's claim for disability discrimination arising out of, in part, delaying the interactive process by the employer) (slip copy).

31. Reese v. Barton Healthcare Sys., 693 F. Supp. 2d 1170, 1186 (E.D. Cal. 2010) ("Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.") (quoting Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1137–1138 (9th Cir. 2001).

32. Resources relevant to this topic are available at *http://www.business.gov/business-law/employment/hiring/people-with-disabilities.html* (last visited Oct. 28, 2010). The Web site contains links to information regarding tax incentives that exist to help employers and small businesses with the cost of complying with the ADA.

Whistleblowing

Alan D. Berkowitz, Claude M. Tusk, J. Ian Downes, and David S. Caroline

This article provides an overview of the general framework of whistleblower protections and highlights some of the more significant protections that apply to employers in Pennsylvania, New Jersey, and New York.

The figure of the "whistleblower" is a well-known one, both in popular culture and the real world of the workplace. Dating as far back as the inception of the federal False Claims Act, passed in the wake of the Civil War, employers and employees have been subject to myriad laws designed to protect employees from retaliation for exposing or attempting to expose wrongdoing by their employers. Despite their laudatory goals, however, many of these laws have often proven to be confusing and frustrating for employers and employees alike.

Understanding the complex patchwork of whistleblower laws that governs the workplace is critical to any employer's efforts to conduct its business efficiently and ethically. This article both provides an overview of the general framework of whistleblower protections and highlights some of the more significant protections that apply to employers in Pennsylvania, New Jersey, and New York.

WHAT IS "WHISTLEBLOWING"?

Whistleblowing vs. Retaliation

There are innumerable ways in which employees can, and do, attempt to "blow the whistle" on alleged unlawful or improper actions by their employers. Protected whistleblowing by employees can range from internal complaints alleging improper accounting practices, protected by the Sarbanes-Oxley Act, to the provision of testimony or information to a state agency investigating a hospital's alleged failure to comply with required standards of patient care. When employees engage in protected whistleblowing, employers are prohibited from retaliating or discriminating against those employees based on that conduct.

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Generally speaking, any time an employee complains of illegal, unethical, or otherwise harmful or inappropriate conduct by an employer, he or she can be said to have engaged in whistleblowing activity. This article, however, focuses on "traditional" whistleblowing, *i.e.*, employee conduct directed at exposing wrongdoing by an employer that affects the public generally, rather than wrongdoing (such as discrimination) that primarily affects the employer's own employees. Employers must be aware, of course, that nearly every anti-discrimination or individual employee rights law, including those that follow, contain anti-retaliation provisions and that they must tread carefully when dealing with employees who have complained of alleged violations of such laws:

- Title VII of the Civil Rights Act of 1964;
- The Age Discrimination in Employment Act;
- The Americans with Disabilities Act;
- The Family and Medical Leave Act;
- The Fair Labor Standards Act;
- ERISA; and
- Most state and local civil rights laws.

Active vs. Passive Whistleblowing

The most commonly known, and most frequently protected, form of whistleblowing occurs when an employee takes affirmative steps to bring alleged illegality or misconduct to the attention of his or her employer or the government. Such "active" whistleblowing is invariably protected by federal whistleblower laws and by statute or common law in those states that afford any level of protection to whistleblowers.[1] Somewhat less frequently protected is so-called "passive" whistleblowing, in which an employee either simply responds to a lawful request for information from a governmental authority or refuses to engage in illegal or unethical conduct ordered by his or her employer.[2]

For instance, as is discussed below, whistleblower statutes in New Jersey and New York apply to both active and passive whistleblowing. Other states' laws, however, for example Louisiana's whistleblower statute, have been interpreted to deny protection to passive whistleblowers, while the Texas courts have held that the state's public policy exception to the at-will employment doctrine applies only to those passive whistleblowers who refuse to engage in criminal activity.[3]

FEDERAL AND STATE WHISTLEBLOWER PROTETIONS—A COMPLEX PATCHWORK

As noted, the whistleblower protections of which employees may avail themselves are found scattered throughout federal and state statutes and the common law. This section provides an overview of the framework of these laws and the interaction of these various legal requirements, and highlights some of the specific laws that employers are likely to encounter. However, the list of laws discussed below is by no means comprehensive and any employer that is considering adverse action against an employee who has complained, either internally or to a governmental agency, about a perceived violation of any federal, state, or local law must be aware of the risk of potential claims arising from such action.

FEDERAL LAWS

Public Health, Safety, and Environmental Laws

There are dozens of federal health, safety, and environmental statutes that contain provisions that prohibit retaliation by private employers against employees for engaging in whistleblowing activity.[4] Among these are:

- The Occupational Health and Safety Act;[5]
- The Clean Air Act;[6]
- The Clean Water Act;[7]
- The Asbestos Hazard Emergency Response Act;[8]
- The Federal Mine Safety and Health Act;[9]
- The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA);[10] and
- The Migrant and Seasonal Agricultural Worker Protection Act.[11]

Among other provisions, these laws prohibit employers from discriminating or retaliating against employees who provide information concerning potential violations of these statutes to the government or who participate in a governmental investigation of such alleged violations. For instance, the CERCLA states that:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that

> such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.[12]

Many of these laws also protect employees who complain internally to their employers about such alleged violations.

The Dodd-Frank and Sarbanes-Oxley Acts

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) into law.[13] Among other things, Dodd-Frank amended the Sarbanes-Oxley Act (SOX) and the Securities and Exchange Act of 1934 (1934 Act), thereby expanding protections for whistleblowers significantly. In addition, new provisions added by Dodd-Frank create incentives for potential whistleblowers to report perceived wrongdoings directly to the Securities and Exchange Commission (SEC) or the Commodities Futures Trading Commission (CFTC), rather than utilizing internal reporting procedures.

The most significant changes enacted by Dodd-Frank are discussed herein and highlighted in Exhibit 1.

Exhibit 1. Expansion of Coverage from SOX to Dodd-Frank

Nine Key Differences	
SOX	**Dodd-Frank**
1. Report either internally or externally	1. Bounty for reporting to SEC or CFTC
2. Only enumerated statutes covered	2. More statutes (and general non-disclosure) covered
3. Only employees of publicly traded companies covered	3. Employees of affiliates and subsidiaries of public companies and in financial services industry
4. Claims brought to OSHA	4. Some claims can be brought directly to federal court
5. "Reasonable belief" in violation required	5. Possibly no "reasonable belief" required
6. 90-day statute of limitations	6. 6-year/3-year/10-year statute for SEC, 2-year for CFTC, others 180 days
7. Mandatory arbitration permitted	7. No mandatory arbitration
8. No right to jury trial	8. Right to jury trial
9. No punitive damages	9. Double or single back-pay damages

SOX Generally

SOX offers protection to whistleblowers by prohibiting employers from retaliating against employees who bring corporate wrongdoing to attention of supervisors, regulators, or law enforcement officials.[14] An employee engages in protected activity by providing information to an individual with "supervisory authority" regarding conduct the employee reasonably believes constitutes a violation of federal laws regarding mail fraud, wire fraud, bank fraud, or securities fraud or of any rule or regulation of the SEC or any federal law relating to fraud against shareholders.

As initially drafted, SOX explicitly covered only employees of publicly traded corporations that were either registered under Section 12 or required to file reports under Section 15(d) of the 1934 Act. Accordingly, many courts held that employees of non-publicly traded subsidiaries of covered corporations were not protected by SOX.[15]

Also, as originally drafted, SOX required that whistleblower complaints be brought in the first instance before OSHA, an agency that did not have much prior experience with the complex accounting and securities-law issues that such complaints typically raise, which meant that the employer frequently needed to educate the agency as the matter proceeded.

Dodd-Frank Whistleblower Rewards and Protections

Dodd-Frank creates a very complex scheme of whistleblower protection and incentives involving at least three new statutory provisions. Perhaps the most-significant change Dodd-Frank makes to the 1934 Act and SOX is its establishment of specific monetary incentives to encourage employees to engage in whistleblowing. Although employees are still able to report suspected violations of accounting and auditing regulations internally, Dodd-Frank introduced what some refer to as "bounty" provisions. Whereas SOX initially offered employees only protection from retaliation, under the new Dodd-Frank laws, employees stand to gain windfalls of at least $100,000 for appropriate reporting. Specifically, employees who provide "original information"[16] to the SEC or the CFTC that leads to a successful enforcement action with sanctions exceeding $1 million are promised awards of between 10 and 30 percent of the sanctions collected.

This shift to a positive incentive structure is further reflected in the expanded scope of Dodd-Frank's coverage. Rewards for reporting extend not just to SOX and 1934 Act violations, but to violations of:

- The Commodity Exchange Act;[17]
- The Securities Act of 1933;[18]
- The Foreign Corrupt Practices Act of 1977;[19]

- The Investment Company Act of 1940;[20]
- The Investment Advisers Act of 1940;[21]
- The Securities Investor Protection Act of 1970;[22] and
- Others.[23]

In addition, Dodd-Frank creates a new Bureau of Consumer Financial Protection (BCFP) in the Federal Reserve System, with power to monitor the provision of financial products and services to the public, and protects whistleblowers who make complaints to this agency.

Expansion of Retaliation Protections

In addition to the positive reporting incentives of the new bill, Dodd-Frank extends SOX's existing anti-retaliation provisions in several significant ways:

- Under SOX, an employee was protected from retaliation only if he or she "reasonably believed" the reported conduct constituted a violation of certain specified statutes. Dodd-Frank extends protection to any employee bringing a complaint to the SEC without specifying the need for that employee to reasonably believe the act constitutes some violation.[24]

- The statute of limitations for reporting is extended drastically. Under SOX, employees had 90 days from when the alleged discriminatory act occurred and was made known to the complainant to report violations. Section 922 of Dodd-Frank extends the statute to the later of *six years* from the date of the discriminatory action, or three years from the date the employee discovers the action occurred (but no later than ten years from the date the action occurred), for complaints made to the SEC, and two years from the alleged discriminatory action for complaints made to the CFTC.[25] Other complaints, including those under Sarbanes-Oxley and those to the BFCP, are subject to a 180-day statute of limitations.[26]

- Rather than reporting a suspected retaliatory act first to OSHA, employees who suspect they were discriminated against for protected whistleblowing to the SEC or the CFTC are now entitled to bring claims directly in a federal district court.[27]

- Employers can no longer rely on mandatory arbitration agreements to resolve retaliation claims for whistleblowing activity. Dodd-Frank specifically amends SOX to provide that, with limited exceptions, "no predispute arbitration agreement shall

be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."[28] Dodd-Frank also authorizes the SEC to issue regulations restricting the use of arbitration agreements under the 1934 Act and the Investment Advisers Act of 1940.[29]

- Dodd-Frank ensures that whistleblowers claiming retaliation (including under SOX) are entitled to a trial by jury.[30]
- SOX is now amended to provide for liquidated damages for successful retaliation claimants in the form of double back pay for complainers to the SEC and single back pay for complainers to the CFTC.[31]

Extension of SOX Coverage to Subsidiaries of Publicly Traded Corporations

Dodd-Frank also significantly expands the scope of SOX's anti-retaliation provisions by amending the law's whistleblowing protections to cover employees of "any subsidiary or affiliate [of a publicly traded company] whose financial information is included in the consolidated financial statements of such company."[32] Finally, Dodd-Frank extends whistleblower protections to all individuals working in the financial services industry—that is, to all employees working for employers engaged in the offering or provision of consumer financial products or services—regardless of whether such individuals are working for a publicly traded company or a subsidiary thereof.

Proposed SEC Regulations

In early November 2010, the SEC published proposed regulations to implement the whistleblower provisions of Dodd-Frank. Many of the proposed rules have to do with technical issues of how to determine how much of a bounty a complainant is entitled to and the like. Three important issues that the SEC sought to address are:

- **The required state of mind on the part of the complainant.** The SEC specified that, in order to be entitled to a bounty, a complainant would have to make his or her complaint under penalty of perjury, and thus have to have at least a good-faith belief in the accuracy of his or her complaint. But the SEC did not address what state of mind requirement if any would be imposed on a complainant seeking redress against his or her employer for retaliatory adverse employment action.
- **Persons who would not be permitted to abuse their positions to obtain a bounty.** The SEC set forth categories of

persons who, because they learned of corporate wrongdoing by virtue of their position, which entailed either obligations of privilege or pre-existing obligations to report the wrongdoing, would not be permitted to obtain a bounty should they complain to the SEC. Attorneys and auditors are the most significant members of these groups.

- **Dilution of incentive for internal corporate reporting.** Perhaps the most important problem with the new statutory scheme that the SEC recognized and sought to deal with was the fact that the bounty provisions would encourage whistleblowers to bypass the internal corporate reporting systems that Sarbanes-Oxley caused many companies to create, and thus deprive companies of the opportunity to fix problems themselves. The SEC addressed this issue in two ways: one actually in the proposed rules and one in the commentary. A proposed rule provides that a whistleblower who first complains internally and then complains to the SEC within 90 days will be treated as if his or her SEC complaint had been made on the date of his or her internal complaint, and thus not lose his or her "place in line" for a bounty by reason of first reporting internally. The SEC commentary added that all complaints brought to it, whether or not there had already been internal reporting, would first be dealt with by contacting the company involved and asking it to investigate the issues raised by the report. The implication is that the complainer would not be more likely to get a bounty if he or she reported first to the SEC. It is, at least, doubtful that either of these provisions would go far towards protecting the viability of internal reporting structures. Several comments from the public have suggested requiring internal reporting before a complainant would become entitled to a bounty. It remains to be seen how the SEC will ultimately deal with this problem.

The False Claims Act

Employees of employers that contract or otherwise do business with the federal government, including those that receive funds from the federal government, possess several whistleblower protections under the False Claims Act.[33] Originally passed to address profiteering following the Civil War, the False Claims Act authorizes private citizens to bring *qui tam* actions on behalf of the United States to remedy fraud and misuse of federal funds. Individuals bringing successful claims under the False Claims Act are entitled to receive 15 to 30 percent of the total amount recovered by the government. The possibility of such a recovery creates strong incentives for employees (and their attorneys) to initiate False Claims Act cases. According to the Department of Justice,

the government recovered more than $2.4 billion under the Act in 2009 alone.[34]

In addition to its *qui tam* provisions, the False Claims Act contains an anti-retaliation provision that states that:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.[35]

STATE LAWS

Nearly all states afford some sort of whistleblower protection to private employees, either by statute, through the common law tort of retaliatory discharge, or both.[36] Indeed, only Alabama and Georgia fail to afford at least some limited protection to whistleblowers.

There are, however, dramatic differences in the protections, limitations, and procedural requirements under each state's laws. For instance, while the courts of 40 states and the District of Columbia have recognized causes of action for wrongful discharge in connection with whistleblowing activity, only 20 states have adopted statutes that afford protections to private employee whistleblowers. And, not surprisingly, scope and limitations of these statutes vary dramatically. Indeed, it is fair to say that there are as many unique legal frameworks applicable to whistleblowers as there are states.

To illustrate the significant variations among state laws, a detailed comparison of the disparate legal protections applicable to whistleblowers in Pennsylvania, New York, and New Jersey is can be found in Exhibit 2.

SIGNIFICANT CONSIDERATIONS IN WHISTELBLOWER CASES

In light of the very substantial differences among the various federal and state whistleblower laws, it is difficult to pinpoint the substantive questions that are likely to arise in a particular case. However, the following general considerations often arise in determining whether an employee is entitled to protection as a whistleblower.

The Genuineness and Reasonableness of an Employee's Belief in the Impropriety of an Employer's Conduct

As illustrated above, the Sarbanes-Oxley Act, the False Claims Act, and the numerous state laws governing whistleblowing impose varied

Exhibit 2. Comparison of Whistleblower Protections Under Pennsylvania, New York, and New Jersey Law

	Pennsylvania	New Jersey	New York
Has the state adopted a whistleblowing statute applicable to private employees?	No	Yes, the New Jersey Conscientious Employee Protection Act (CEPA) N.J. Stat. Ann. § 34:19-3	Yes, the New York Whistleblower Law N.Y. Labor Law § 740
Have the state's courts recognized a cause of action for wrongful discharge in violation of public policy?	Yes	Yes	No
What employee complaints/actions are covered by the state's whistleblower statute?	N/A	Employers are prohibited from retaliating against an employee who: "Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer … that the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law … or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or (2) is fraudulent or criminal. ..." OR	Employers are prohibited from retaliating against an employee who: "(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud;

		"Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer …" N.J. Stat. Ann. § 34:19-3(a)-(b)	(b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer …" N.Y. Labor Law § 740(2)(a)-(b) Complaints of conduct that solely involves financial impropriety are unprotected. *See, e.g., Lamagna v. New York State Ass'n for the Help of Retarded Children, Inc.,* 551 N.Y.S.2d 556 (N.Y. App. Div. 1990)
What degree of knowledge or belief of the illegality or impropriety of the employer's conduct must an employee possess to be covered by the statute?	N/A	To be protected by the CEPA, an employee must have "an objectively reasonable belief … that [the employer's] activity is either illegal, fraudulent or harmful to the public health, safety or welfare." *Abbamont v. Piscataway Twp. Bd. of Educ.,* 138 N.J. 405, 431 (1994); N.J. Stat. Ann. § 34:19-3(a).	The conduct complained of must actually violate a law, rule or regulation AND the violation must create and present a substantial and *specific danger to the public health or safety.* N.Y. Labor Law § 740(2)

Exhibit Continued

Exhibit 2. Continued

	Pennsylvania	New Jersey	New York
		However, an employee's belief that the employer's conduct was unlawful need not be correct: "A plaintiff need not show that his or her employer actually violated a law … just that he or she reasonably believes that to be the case." *Klein v. Univ. of Med. and Dentistry of N.J.,* 377 N.J. Super. 28 (App. Div. 2005)	
Does the statute protect "passive" whistleblowers?	N/A	Yes. CEPA prohibits retaliation against an employee who: "Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law …; (2) is fraudulent or criminal …; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment."	Yes. The Whistleblower Law protects employees "who object to, or refuse to participate in any such activity, policy or practice in violation of a law, rule or regulation." N.Y. Labor Law § 740(2)(c)

Must the employee complain to his or her employer before going to the government?	N/A	Yes, in some cases. "The protection against retaliatory action provided by this act pertaining to disclosure to a public body shall not apply … unless the employee has brought the activity, policy or practice in violation of a law … to the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice. Disclosure shall not be required where the employee is reasonably certain that the activity, policy or practice is known to one or more supervisors of the employer or where the employee reasonably fears physical harm as a result of the disclosure provided, however, that the situation is emergency in nature." N.J.S.A. 34:19-4	Yes, in all cases. "The protection against retaliatory personnel action … shall not apply to an employee who makes [a] disclosure to a public body unless the employee has brought the activity, policy or practice … to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice." N.Y. Labor Law § 740(3)
What are the elements of a cause of action for wrongful discharge in violation of public policy?	"An employee [is] entitled to bring a cause of action for a termination of [the at-will employment] relationship only in the most limited circumstances where the termination implicates a clear mandate of public policy in this Commonwealth."	"'[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions.' Additionally, '[i]n certain instances, a professional code of ethics may contain an expression of public policy.'"	N/A

Exhibit Continued

Exhibit 2. Continued

	Pennsylvania	New Jersey	New York
	McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283 (Pa. 2000) The public policy implicated by a retaliatory discharge must be one of Pennsylvania itself; objecting to an exclusively federal policy will not suffice. *Id.* Examples of laws that provide public policies upon which valid claims may be based include the Pennsylvania's Workers' Compensation Law and the protection of highway safety. *See Schick v. Shirey*, 716 A.2d 1231 (Pa. 1998); *Oliveri v. U.S. Food Svc.*, 2010 WL 521126 (M.D. Pa. 2010) A common law claim for wrongful discharge cannot be maintained where a statutory remedy exists for the alleged violation. *Wolk v. Saks Fifth Avenue, Inc.*, 728 F.2d 1221 (3d Cir. 1984)	*Kommendant v. Diocese of Trenton*, 2010 WL 1526262 N.J.Super. App. Div. 2010) (quoting *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 72, 417 A.2d 505 (1980))	

requirements concerning the knowledge of an employer's wrongdoing that an employee must possess in order to be protected as a whistleblower. In evaluating the circumstances of an alleged whistleblower, an employer must be cognizant of the specific requirements imposed by the law(s) applicable to the employee.

For their part, state laws impose numerous and varied requirements concerning the knowledge or belief an employee must possess in order to be protected by a whistleblower law. These statutes range from requiring knowledge of an actual legal violation (New York, Louisiana), to demanding that an employee possess a reasonable belief that the employer has violated a law or public policy (New Jersey, California), to permitting claims as long as an employee possesses a good faith belief that the employer has engaged in unlawful conduct (Delaware, Connecticut).

Is the Complaining Individual Actually Covered by a Whistleblower Law?

As is the case with most employment statutes, issues of whether an individual is a person "covered" by a state or federal whistleblower law commonly arise. For instance, while Dodd-Frank has answered many questions about the scope of SOX's coverage, SOX still applies only to "employees" of covered employers. Determining whether an individual is a covered employee is governed by a multi-factor test,[37] and the answer is not always clear. Similarly, it is unclear under many state laws whether partners, shareholders, and other "owners" are covered by the state's whistleblower protections.[38]

Is a Whistleblower Claim Under State Law Preempted?

Employees who seek to bring common-law claims for retaliatory discharge may find those claims to be precluded due to the existence of an adequate state or federal statutory remedy for the alleged violation.[39] Further, some claims under state whistleblower statutes may be preempted by federal laws applying to the alleged conduct.[40]

Does the Potential Whistleblower's Complaint Concern a Covered Law or Public Policy?

As noted above, the Pennsylvania Supreme Court has interpreted Pennsylvania's public policy exception to the employment-at-will doctrine narrowly and concluded that only employee conduct related to a "clear mandate" of Pennsylvania public policy will be protected.[41] Similarly, employee complaints will be protected by the New York Whistleblower Law only where they relate to violations of law that "create and present a substantial and specific danger to the public health or safety [or, con-

stitutes health care fraud]."[42] Indeed, even New Jersey's broad CEPA does not apply to suspected violations of all laws or public policies.[43]

Accordingly, an employer attempting to determine whether an employee is protected by a state's whistleblower law must look carefully at both the parameters of that law and the substance of the employee's complaint.

CONCLUSION

16Unfortunately, due to the varied and often confusing intricacies of the protections afforded to whistleblowers under federal and state law, determining the proper response to an employee's complaints of unlawful or improper employer conduct can be an arduous task. Employers seeking to avoid the pitfalls presented by such laws must recognize the panoply of whistleblower laws that may apply to its employees and give careful consideration to the disparate requirements imposed by such laws.

NOTES

1. *See* Daniel P. Westman and Nancy M. Mondesitt, *Whistleblowing: The Law of Retaliatory Discharge* (BNA, 2d ed.), pp. 19–20.

2. *Id.*

3. *See* Wustoff v. Bally's Casino Lakeshore Resort, Inc., 709 S.2d 913, 914–915 (La. Ct. App. 1998); Lisanti v. Dixon, 147 S.W.3d 638, 642 (Tex. App. 2004).

4. Federal employees are generally protected against retaliation for whistleblowing by the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16 (Apr. 10, 1989). Among other things, the WPA provides that employees of the federal government "shall not … take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. ..." 5 U.S.C. § 2302(b)(8)(A).

5. 29 U.S.C. § 660(c).

6. 42 U.S.C. § 7622.

7. 33 U.S.C. § 507.

8. 15 U.S.C. § 2651(a).

9. 30 U.S.C. § 815.

10. 42 U.S.C. § 9610(a).

11. 19 U.S.C. § 1855(a).

12. 42 U.S.C. § 9610(a); *see also* 15 U.S.C. § 2651(a) (Asbestos Hazard Emergency Response Act) (same); 42 U.S.C. § 7622(a) (Clean Air Act) (same); 29 U.S.C. § 660(c) (OSHA) (same).

13. Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered Sections of the U.S. Code).

14. 18 U.S.C. § 1514A.

15. *See* Malin v. Siemens Med. Solutions Health Servs., 638 F. Supp. 2d 492, 499–501 (D. Md. 2008); Rao v. Daimler Chrysler Corp., Case No. 06-13723, 2007 U.S. Dist. LEXIS 34922 (E.D. Mich. May 14, 2007).

16. Original information is defined as "information that (A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information. Dodd-Frank, § 922, 15 U.S.C. § 78u-6.

17. 7 U.S.C. § 1 *et seq.*

18. 15 U.S.C. § 77a *et seq.*

19. 15 U.S.C. §§ 78dd-1 *et seq.* (a part of the 1934 Act).

20. 15 U.S.C. §§ 80a-1 *et seq.*

21. 15 U.S.C. §§ 80b *et seq.*

22. 15 U.S.C. §§ 78aaa *et seq.*

23. *See* 15 U.S.C. § 78u-6 (as amended by Dodd-Frank § 922).

24. The provision does, however, state that the reporting must be "in a manner established, by rule or regulation, by the Commission," 15 U.S.C. 78u-6(a), and regulations have not yet been passed.

25. 15 U.S.C. § 78u-6(h)(1)(B)(iii).

26. 18 U.S.C. § 1514A(c)(1)(D).

27. 15 U.S.C. § 78u-6(h)(1)(B)(i).

28. 18 U.S.C. § 1514A(e).

29. 15 U.S.C. §§ 78o, 80b-5.

30. 18 U.S.C. § 1514A(c)(1)(E).

31. 15 U.S.C. § 78u-6(h)(1)(C).

32. Dodd-Frank § 929A.

33. *See* 31 U.S.C. §§ 3729-30; 18 U.S.C. § 287.

34. *See* Press Release, U.S. Department of Justice, "Justice Department Recovers $2.4 Billion in False Claims Cases in Fiscal Year 2009; More than $24 Billion Since 1986" (Nov. 19, 2009).

35. 31 U.S.C. § 3730(h).

36. Public employees who engage in whistleblowing activity are protected by statute in 48 states and the District of Columbia. Pennsylvania, New Jersey and New York are all among those states with statutory whistleblower protections for public employees.

37. *See, e.g.,* Bothwell v. Am. Income Life, 2005-SOX-57 (ALJ, Sept. 19, 2005) (applying common law agency test to determine if individual classified as an independent contractor was covered).

38. *See, e.g.,* Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228 (2006) (applying factors from Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) and finding that shareholder/director of physicians' association was not covered by CEPA).

39. *See, e.g.,* Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 1221 (3d Cir. 1984); Wiles v. Medina Auto Parts, 773 N.E.2d 526 (Ohio 2002) (finding wrongful discharge claim based on violation of FMLA precluded due to adequacy of statutory remedy); *but see* Liu v. Amway Corp., 347 F.3d 1125 (9th Cir. 2003) (wrongful discharge claim based on FMLA violation permitted to proceed under California law).

40. *See, e.g.,* Botz v. Omni Air Int'l, Inc., 286 F.3d 488 (8th Cir.2002) (holding that federal Airline Deregulation Act preempts state law whistleblower claims related to air safety); *but see Clifford v. R-Motels, Inc*., 2010 WL 3952067 (M.D. Fla. Oct. 8, 2010) (holding that claim under Florida Whistleblower Law was not preempted by Title VII's retaliation provision).

41. McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283 (Pa. 2000).

42. N.Y. Labor Law § 740(2).

43. *See* Blackburn v. United Parcel Service, Inc., 3 F. Supp. 2d 504 (D.N.J. 1998) (employee who merely "questions or disagrees" with employer's practice and has concerns about his or her potential legal impact not protected by CEPA). *See also* E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436 (Del. 1996) (holding that complaints relating solely to corporation's internal business practices do not implicate public policy protected by Delaware law).

The Intersection of Company Policies and an Employee's Assertion of the Attorney-Client Privilege: The Emerging Standard for Effective Drafting and Application of Company Electronic Use Policies

Benjamin J. Kimberley

In a number of recently reported cases, employees used their employer's email system to communicate with their personal attorney, under the false assumption that these communications are private and personal. This article discusses the outcome of those cases and describes measures companies should consider adopting regarding their electronic use policies and procedures in order to avoid litigation in the future.

A dispute between a company and its employees may begin long before litigation is filed against the company. In some instances, the dispute may begin with electronic mail (email) communications between the employee and his or her personal counsel using company information technology, in violation of the company's policies and procedures. In a number of recently reported cases, employees used their employer's email system in this regard to communicate with their personal attorneys, under the false assumption that these communications are private and personal. The fundamental question posed in these cases is whether the company has the right to monitor and/or prohibit such communications over their information technology infrastructure. And, if so, how can a company's policies be drafted and applied in order to ensure that its email system and network are not used for such purposes?

It is a well-settled rule that a company may regulate its employees' use of company assets, including their use of company-issued computers to transmit communications via email.[1] It is also a well-settled rule that email communications between an individual and his or her attorney are generally as protected by the attorney-client privilege as any other form of communication.[2] What happens, however, when these two rules collide: when an employee communicates via email with his or her personal counsel using a company-issued computer?

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Over the past five years, courts have wrestled with how to address the intersection of employer regulation and employee's personal privilege assertions. The prevailing judicial analysis is drawn from both privacy and privilege law and was originally formulated by a New York Bankruptcy Court as a four-factor test in *In re Asia Global Crossing, Ltd., et al.*[3] However, recent decisions have pushed the analytical limits of the test by adding a number of additional considerations for judicial review. These decisions draw the outer contours regarding how and to what extent a company may successfully regulate an employee's use of company assets to communicate with his or her personal attorney. In doing so, they provide corporate counsel with helpful judicial guideposts that can assist them in effectively drafting and applying their company's electronic use policies with the ultimate goal of protecting the company and its assets.[4]

THE *ASIA GLOBAL* ANALYTICAL FRAMEWORK

The most frequently cited case regarding the issue of an employee communicating via email with his or her personal attorney using a company-issued computer is the *Asia Global* case. In *Asia Global*, a Chapter 7 trustee moved to compel production of documents that were withheld by five of the company's principal corporate officers (the Officers). The trustee asserted that the Officers' use of the corporate assets, *e.g.*, company-owned computers and email systems, to communicate with their personal attorneys in violation of company policy resulted in a waiver of any privileges that may otherwise have existed in the Officers' communications.

In exploring how to address the issue, the court first drew upon privilege law. It determined that although email communications are generally considered privileged, the prevailing privilege test did not sufficiently address the existence of a company's regulation of an employee's use of the email system. The court next drew upon privacy law. It focused on the question of an employee's expectation of privacy in his or her office computer and the company email system, but determined that this analysis also did not sufficiently address the issue of a potentially privileged communication. The court concluded that, alone, neither of these bodies of law sufficiently addressed the issue.

However, by drawing upon inquiries from both privilege law (regarding the requirement that communications be made in confidence) and privacy law (regarding an employee's expectation of privacy), the court concluded that the analysis should revolve around whether an employee had a reasonable expectation of confidentiality in his or her communications.[5] The court then created the following four-factor test to analyze this expectation:

1. Does the corporation maintain a policy banning personal or other objectionable use?

2. Does the company monitor the use of the employee's computer or email?

3. Do third parties have a right of access to the computer or emails?

4. Did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?[6]

The court quickly dispensed with the question of access, stating that "sending a message over the [company's] e-mail system was like placing a copy of that message in the company files."[7] The company unquestionably had access to its own email servers and emails on that system could be reviewed and read by anyone with access to the system. Turning to the three remaining factors, the court found the evidence equivocal. Whereas the trustee submitted evidence that the company had two email policies[8] which "[r]ead together … clearly set forth a policy banning personal use of the email messaging system[] and authorize[ed] access and monitoring,"[9] both the Officers and the company's former general counsel testified that they did not know of or inform anyone that the company had such a policy or planned to monitor any employee's email use. Moreover, the policy admitted that occasional personal use of the email system was permitted. Because the evidentiary record was contradictory regarding the existence or notice of the company's policies and monitoring of employee emails, the court determined that no waiver of the Officers' attorney-client privilege resulted and therefore refused to compel production of the emails at issue.[10]

THE *CURTO* ADDITION: HOW DOES THE COMPANY ENFORCE ITS ELECTRONIC USE POLICY?

After the judicial decision in *Asia Global*, a series of courts wrestled with similar issues.[11] Although the *Asia Global* analysiswas not immediately followed[12] or largely followed[13] without direct acknowledgement of the case, it evolved into the applicable standard in most judicial determinations.[14] However, a few courts began to tinker with that analysis.

The first judicial decision to explore *Asia Global*'s outer boundaries was *Curto v. Medical World Communications, Inc*.[15] In *Curto*, the Eastern District of New York affirmed a lower court ruling that emails sent from an employee's work computer to her personal attorney were privileged because, even though the company's electronic use policy banned personal use and this policy was known to the company's employees, the company only monitored the computer use of its employees under very limited circumstances. According to the court, this limited enforcement created a "false sense of security" that "lulled employees into believing that the policy would not be enforced."[16] In ruling so, the court

introduced an additional consideration that received only brief mention in the *Asia Global* ruling: How does the company enforce its electronic use and monitoring policies?

In *Curto*, Lara Curto filed an employment charge against her employer, Medical World Communications Inc. (MWC) soon after being discharged. During her tenure at MWC, Ms. Curto worked from home and used two company-issued laptops to send and receive emails to her personal attorneys (via Ms. Curto's AOL email account) concerning a possible suit against her employer. MWC maintained a policy (the receipt and understanding of which Ms. Curto acknowledged on two occasions, according to the court), which specifically provided that employees had no expectation of privacy in anything on the computer system and that MWC may monitor computer use.[17] Prior to returning the laptops to the company and initiating her lawsuit, Ms. Curto deleted personal files and email communications to her personal attorneys stored on the laptops. In the process of investigating Ms. Curto's claims during discovery, MWC hired a consultant to reconstruct the deleted files and communications, which were then produced to Ms. Curto. Ms. Curto asserted that these documents were protected by the attorney-client privilege. MWC disputed that assertion and sought an order to determine whether the recovered documents were protected from disclosure.

The lower court initially analyzed the privilege issue on the basis that the email communications were inadvertently disclosed to the company. It also considered the four factors pronounced in *Asia Global*. In doing so, the *Curto* court recognized that the "court in *Asia Global* did not explicitly discuss whether the employer actually monitored employees' computer usage."[18] Nevertheless the court asserted that "enforcement [is] a factor to be considered" and determined that a proper review of the issue should include an analysis of "whether or not there was enforcement of [any computer usage] policy."[19] In reviewing the lower court's decision, the Eastern District of New York extensively addressed this factor and concluded that MWC did not sufficiently monitor employees' computer use. For instance, MWC monitored employees' computer use on four instances when the company was requested to do so by a manager or supervisor (or other company representative). The trigger of three of the four instances of monitoring included (a) an employee downloading pornographic materials; (b) an employee playing poker on the Internet; and (c) an employee using the company's computer to conduct outside business. Moreover, at least two of these instances of monitoring occurred in states other than Ms. Curto's home state.

The *Curto* decision is remarkable for its emphasis on the issue of enforcement. By focusing on this factor, the Eastern District of New York appears to have added a new wrinkle to the *Asia Global* question, "does the company monitor employees' use," by analyzing how and to what extent a company monitors employees' use of company assets.

THE *HATFIELD* ADDITION: HOW DOES THE COMPANY INERPRET IS ELECTRONIC USE POLICY?

Following the initial boom of decisions after the *Asia Global* and *Curto* rulings, the issue received relatively little attention in 2007 and 2008. However, in 2009, the subject was revisited extensively, with largely inconsistent rulings based on specific factual circumstances.[20] As it had in 2006, the Eastern District of New York again weighed in on the subject in *U.S. v. Hatfield*.[21] And the court again suggested an expansion of the original *Asia Global* analysis by asking: How does the company interpret its electronic use policy?

In *Hatfield*, the former chairman and CEO of D.H.B. Industries Inc. (DHB), David Brooks, was charged with fraudulent conduct. Following his indictment, the government produced documents to Mr. Brooks which it originally obtained from DHB. Mr. Brooks alleged that a number of these documents (some of which were memoranda transmitted between Mr. Brooks and his personal attorneys that were found on the hard drive of Mr. Brooks' company-issued computer) should not have been produced to the government because they were protected by his attorney-client privilege. As a remedy, Mr. Brooks sought to suppress these documents. After an evidentiary hearing on the matter, the court concluded that Mr. Brooks did not waive his privilege.

As a part of its analysis, the *Hatfield* court drew upon the four-factor *Asia Global* test. Analyzing the first factor, the court found that the DHB policy told employees that they were "'expect[ed]' to use […] company equipment 'solely for business purposes,'" but did not explicitly ban personal use.[22] The court then analyzed the second factor and, following the enforcement considerations emphasized in *Curto*, found that the computer use policy only stated that DHB held the right to monitor employee computer or email files but not that it would or did enforce that policy and actually monitor employees' use. The court held that those two factors weighed against a finding of waiver. The court then turned to the last two *Asia Global* factors. It found that DHB "unquestionably had a *right* to access Brook's computer" and that Mr. Brooks was aware of the use and monitoring policies based upon his status as chairman and CEO of the company.[23] The final two factors therefore weighed in favor of a finding of waiver.

The court did not, however, make its determination based solely on these four factors, but instead added a fifth: "How did DHB interpret its Computer Usage Policy?"[24] The court found that the evidence demonstrated that DHB believed that employees did not forfeit applicable privileges regarding personal legal documents on their company-provided computers. The court came to this conclusion, in part, because DHB's former general counsel made statements that belied the company's assertions regarding the effect of the computer use policy. For instance, he stated that communications between Mr. Brooks and his counsel that

were stored on company property were "inadvertently produced" and "should have been withheld based on attorney-client privilege."[25] The court relied on this "deciding factor"[26] in its determination that the company did not interpret its computer use policy to effect a waiver of an employee's personal attorney-client privilege and, therefore, Mr. Brooks did not waive his attorney-client privilege.

THE *STENGART* EXCEPTION: IS THE USE OF PERSONAL, WEB-BASED EMAIL ACCOUNTS EXEMPT FROM COMPANY REGULATION?

In the five years since *Asia Global*, a number of courts have struggled with a particularly thorny issue: whether email communications sent and received from an employee's personal, Web-based email account should be afforded more protection than those from an employee's workplace email account.[27] Recently, in *Stengart v. Loving Care Agency, Inc.*,[28] the Supreme Court of New Jersey answered this question in the affirmative and suggested that the contents of personal, Web-based email accounts may, in this regard, be exempt from company regulation.

The *Stengart* decision, while not binding authority on any court outside the state of New Jersey, seems to draw a line in the sand regarding this thorny issue, the barbs of which had previously been avoided by both state and federal courts. Although *Stengart* represents the outer contours of prevailing judicial review, it is the first substantive ruling on the issue. In taking that first step, the court's decision may signal a trend toward affording communications sent and received from personal, Web-based email accounts more privilege protections than those from company-issued email accounts.

The factual circumstances of *Stengart* were triggered by an employment discrimination lawsuit that the plaintiff, Marina Stengart, filed against her employer, Loving Care Agency, Inc. (Loving Care). During her employment, Ms. Stengart used her company-issued laptop to exchange emails with her personal attorney through a personal, password-protected, Web-based, Yahoo email account. In preparation for discovery, Loving Care hired a computer forensic expert to recover all files stored on the laptop used by Ms. Stengart, including the emails from Ms. Stengart to her personal attorney. Loving Care then proceeded to use information culled from these emails during the course of discovery. Ms. Stengart's attorney objected to this use and demanded that the emails be identified and returned because of their allegedly privileged nature.

The trial court determined that, in light of the company's written policy on electronic communications, Ms. Stengart waived the attorney-client privilege by sending emails on a company-issued computer. The appellate court reversed the trial court's determination. The New Jersey Supreme Court affirmed the appellate court's ruling, concluding that

Ms. Stengart could reasonably expect that email communications with her attorney would remain private and privileged.

The electronic use policy at issue in *Stengart* stated that email messages were considered a part of the company's records, could be accessed and reviewed, and were not to be considered "private" or "personal."[29] The court found that even though the "principal purpose of [email] is for company business communications," the policy permitted "[o]ccasional personal use."[30] Moreover, the policy did not "warn employees that the contents of [their] emails … can be forensically retrieved and read by Loving Care" and created "ambiguity about whether personal email use is company or private property."[31] These facts persuaded the New Jersey Supreme Court that Ms. Stengart "did not know that Loving Care could read communications sent on her Yahoo account" and reasonably believed she could "shield" the email messages from the eyes of Loving Care.[32]

These determinations alone did not dramatically change the prevailing debate over the issue and generally followed previous judicial determinations, such as *Asia Global* and *Curto*. However, in dicta, the New Jersey Supreme Court suggested that an employee's personal emails would be exempted from any company policy, no matter how worded or applied:

Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system—would not be enforceable.[33]

This language cannot be dismissed as simply a harshly worded indictment of the company's review and use of the contents of Ms. Stengart's potentially privileged communications. Rather, the New Jersey Supreme Court's reasoning represents the kind of line-drawing that will likely spur a number of additional judicial decisions on this issue. Although it is too early to tell whether courts outside the state of New Jersey will follow this reasoning, the mere fact of its existence makes the *Stengart* decision one of a number of considerations for corporate counsel in drafting and applying their company's electronic use policies and procedures.

STRATEGIC ADAPTATION OF COMPANY POLICIES AND PROCEDURES

As is readily apparent, the intersection of a company's electronic use policies and an employee's personal privilege involves a fact-specific inquiry with a number of different possible outcomes based on slight factual variables. However, the last five years of court decisions provide a number of judicial guideposts for companies attempting to formulate

and apply policies and procedures to protect the company from an employee's inappropriate and potentially hostile use of company assets. In particular, the original four-factor *Asia Global* analytical framework appears to have been expanded to include two additional considerations a company should now consider in drafting policies and procedures regarding employees' use of the company's information technology:

1. Does the company maintain a policy banning personal use?
2. Does the company monitor the use of the employee's computer or email?
3. Do third parties have a right of access to the computer or emails?
4. Did the company notify the employee, or was the employee aware, of the use and monitoring policies?
5. How does the company actually enforce its electronic use and monitoring policies?
6. How does the company interpret its electronic use policy?

In answering these questions, corporate counsel should consider some of the common problems found in the drafting and application of electronic use policies and procedures:

- The use of ambiguous language;
- The failure to affirmatively prohibit certain uses;
- The failure to explicitly state that monitoring policies will actually be enforced;
- The failure to issue policies to all new employees (including officers);
- The failure to provide annual policy re-issues and updates;
- The failure to require signatures from all employees (including officers) acknowledging that they have read and understand the policies;
- The failure to train employees and management regarding the policies;
- The failure to uniformly interpret the policy's provisions; and
- The failure to actually enforce the policies through appropriate monitoring.

Additionally, if so desired, companies should consider addressing employees' use of personal, password-protected, Web-based email accounts on company-issued computers and networks. A company may want to consider clearly stating in its company policy that personal use of the company's email system is not private and may be monitored by the company. A company should also consider giving employees explicit notice that emails sent and received using personal email accounts are subject to company monitoring if any company equipment is used to access these accounts. Finally, a company should consider informing employees that email communications from personal email accounts using company networks and computers are stored on the computer's hard drive and may be forensically restored and/or monitored by the company.[34] These policies should be as clear as possible about the limits of personal use and what use is considered company property. The company must consider, however, that the regulation of an employee's use of personal, Web-based email accounts to communicate with his or her personal counsel may be closely scrutinized by the courts and the company should be prepared to justify the regulation of these accounts.

Finally, company officials and the company's legal department should *always* proceed with caution when dealing with communications between an employee and his or her personal attorney. If during a review of an employee's email (for instance, during an investigation leading up to litigation or after litigation has begun) potentially privileged documents are discovered, the company and its legal representatives should immediately cease reviewing these documents and consider the ethical issues, including whether or not they are required to notify the employee's counsel of the communications, and the possible consequences of any proposed course of conduct. The company should also consider whether it should be segregating these communications while conferring with the employee's counsel regarding the issue, and the possible need and timing of potential judicial intervention.

CONCLUSION

In recent years, a number of courts have wrestled with how and to what extent a company may regulate an employee's use of a company-provided computer to communicate with his or her personal attorney and, in many cases, with litigation against the company pending. As demonstrated by this article, the last five years of judicial review has identified six questions that corporate counsel should consider in order to protect the company against this type of hostile use of its information technology infrastructure. The answers to these six questions will guide the company's drafting and application of its policies in a manner that unambiguously informs employees that their email communications are not confidential and, in doing so, protects the company and its assets.

NOTES

1. *See, e.g.*, *Connor v. Ortega*, 480 U.S. 709 (1987); *In re Asia Global Crossing, Ltd.*, et al., 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

2. *See* ABA Formal Ethics Op. 99-413 (Mar. 10, 1999); *see also* N.Y.C.P.L.R. § 4548 (McKinney 1999); Cal. Evid. Code § 917(b) (West 2004); *see generally* Audrey Jordan, "Does Unencrypted E-Mail Protect Client Confidentiality?" *Am. J. Trial Advoc.* 27, 623, 626 n. 25 (spring 2004) (referencing ethical opinions from twenty-three State bar associations).

3. 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

4. It is important to note that this article focuses on an employee's communications to his or her personal counsel using a company-issued computer in violation of company electronic use policies. This analysis can assist in the drafting and application of company policies and procedures, but should not be used as the sole guide in doing so (for example, privacy concerns, among other issues outside the scope of this article, should be addressed, in accordance with applicable laws).

5. This test assumes that the emails were otherwise privileged and that the Officers subjectively intended to correspond in confidence.

6. *Asia Global*, 322 B.R. at 257.

7. *Id.* at 259.

8. Although the Officers assert that the company's general counsel never informed them of an electronic use policy, the Trustee in *Asia Global* identified two e-mail policies. The first, the "Corporate E-mail Policy," states in pertinent part: "The Corporate E-mail systems, and ALL data and information transmitted through [the Corporate E-mail systems] are owned and operated by the Corporation for the sole purpose of conducting the Corporation's business … Incidental and occasional personal use of E-mail is permitted, but such messages are property of the Corporation, and are treated no differently than any other message … Communications on the Corporate E-mail systems are not private or secure…." The second, the "Messaging Policy," states in pertinent part: "… The Corporation ... reserves the right ... to [e]ngage in random or scheduled monitoring of business communications.... Privacy of these messaging systems is not guaranteed, nor implied … All data and content on these messaging systems is the property of the Company. No content on these messaging systems shall be withheld from the Company's authorized security personnel or others specifically authorized by the chief executive officer of the Company."

9. *Id.* at 260.

10. *Id.* at 261.

11. *See Kaufman v. Sungard Inv. Sys.*, 2006 WL 1307882 (D.N.J. May 10, 2006); *Curto v. Medical World Commc'ns, Inc.*, 2006 WL 1318387 (E.D.N.Y. May 15, 2006); *Nat'l Econ. Research Assocs. v. Evans*, 2006 WL 2440008 (Mass. Super. Aug. 3, 2006); *Long v. Marubeni Am. Corp.*, 2006 WL 2998671 (S.D.N.Y. Oct 19, 2006); *TransOcean Capital, Inc. v. Fortin*, 2006 WL 3246401 (Mass. Super. Oct. 20, 2006); *Scott v. Beth Israel Medical Center Inc.*, 847 N.Y.S.2d 436 (2007); *Banks v. Mario Indus. of Virginia, Inc.*, 650 S.E.2d 687 (Va. 2007); *Geer v. Gilman Corp. et al.*, 2007 WL 1423752 (D. Conn. 2007); *Mason v. ILS Techs., LLC*, 2008 WL 731557 (W.D.N.C. Feb. 29, 2008); *Sprenger v. Rector and Bd. of Visitors of Virginia Tech*, 2008 WL 2465236 (W.D. Va. Jun. 17, 2008) (spousal privilege).

12. *See Kaufman*, 2006 WL 1307882 (the District Court of New Jersey held that "all information and emails stored on Sungard's computer systems were Sungard property" based upon the company's policy and that the employee, Kaufman, had no reasonable expectation of privacy or confidentiality as to communications with her attorney when she "knowingly utilized Sungard's network with the knowledge that the company policy provided that Sungard could search and monitor email communications at any time").

13. *See Long v. Marubeni Am. Corp.*, 2006 WL 2998671 (the Southern District of New York found that two executives' email communications to their private attorneys were not protected by the attorney-client privilege based almost exclusively upon the language of the company's written policy, circulated annually, which stated that the communications were company "records" or "property" and that "use of the [company's] systems for personal purposes was prohibited," and the company had the right to "monitor all data").

14. See, e.g., Curto v. Medical World Commc'ns, Inc., 2006 WL 1318387 (E.D.N.Y. May 15, 2006); Scott v. Beth Israel Medical Center Inc., 847 N.Y.S.2d 436 (2007); Geer v. Gilman Corp. et al., 2007 WL 1423752 (D. Conn. 2007); Sprenger v. Rector and Bd. of Visitors of Virginia Tech, 2008 WL 2465236 (W.D. Va. Jun. 17, 2008).

15. 2006 WL 1318387 (E.D.N.Y. May 15, 2006).

16. *Id.* at *3.

17. *Id.* at *1 (the policy at issue in *Curto* stated, in pertinent part, that "[t]he computers and computer accounts given to employees are to assist them in the performance of their jobs. Employees should not have an expectation of privacy in anything they create, store, send, or receive on the computer system. The computer system belongs to the company and may be used only for business purposes.… Employees expressly waive any right of privacy in anything they create, store, send, or receive on the computer or through the Internet or any other computer network. Employees consent to allowing personnel of [MWC] to access and review all materials employees create, store, send, or receive on the computer or through the Internet or any computer network. Employees understand that [MWC] may use human or automated means to monitor use of computer resources").

18. *Id.* at *8.

19. *Id.* at *4.

20. *See Brown-Criscuolo v. Wolfe*, 601 F. Supp. 2d 441 (D. Conn. Mar. 09, 2009); *Leor Exploration & Prod. LLC v. Aguiar*, 2009 WL 3097207 (S.D. Fla. 2009); *Alamar Ranch, LLC v. County of Boise*, 2009 WL 3669741 (D. Idaho Nov. 2, 2009); *U.S. v. Hatfield,* 2009 WL 3806300 (E.D.N.Y. Nov. 13, 2009); *Convertino v. U.S. Dept. of Justice*, 2009 WL 4716034 (D.D.C. Dec. 10, 2009); *Stengart v. Loving Care Agency, Inc.*, Civ. 408 N.J. Super. 54 (2009), overruled in *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 210 N.J. 300 (2010).

21. 2009 WL 3806300 (E.D.N.Y. Nov. 13, 2009).

22. *Id.* at *8.

23. *Id.* at *9.

24. *Id.* at *9–10.

25. *Id.* at *10.

26. *Id.*

27. *See Curto*, 2006 WL 1318387 (E.D.N.Y. 2006) (holding that employee did not waive attorney-client privilege for communications sent using an employer-issued laptop, in part because the emails were sent through her personal AOL account); *Nat'l Econ. Research Assocs., Inc. v. Evans*, No. 04-2618-BLS2, 21 Mass. L. Rptr. 337, 2006 WL 244008 (Mass. Super. Aug. 3, 2006) (holding that employee's use of his employer-issued computer did not waive attorney-client privilege for email messages sent to his personal attorney using his personal, Yahoo! account); *but see Long v. Marubeni Am. Corp.*, 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) (finding no privilege attached to emails sent in contravention of the employer's email use policy even though the "plaintiffs used private password-protected e-mail accounts."); *Pure Power Boot Camp Inc. v. Warrior Fitness Boot Camp, LLC*, 587 F. Supp. 2d 548 (S.D.N.Y. 2008) (suggesting that an employee's implied consent to the employee's personal Hotmail account emails may be derived from clear statements in an employee handbook).

28. 990 A.2d 650 (N.J. 2010).

29. *Id.* at 657 (the policies at issue in *Stengart* state, in pertinent part, that "[t]he company reserves and will exercise the right to review, audit, intercept, access, and disclose all matters on the company's media systems and services at any time, with or without notice.… E-mail messages […] are considered part of the company's business and client records. Such communications are not to be considered private or personal to any individual employee.… The principal purpose of electronic mail (*e-mail*) is for company business communications. Occasional personal use is permitted; however, the system should not be used to solicit for outside business ventures, charitable organizations, or for any political or religious purpose, unless authorized by the Director of Human Resources").

30. *Id.* at 658.

31. *Id.* at 659.

32. *Id.* at 663.

33. *Id.* at 665.

34. Keep in mind privacy concerns under other applicable laws, including the Electronic Communications Privacy Act and the Stored Communications Act.

EEOC Issues Final Regulations on Genetic Discrimination in the Workplace

Thomas H. Christopher, Louis W. Doherty, and David C. Lindsay

The authors discuss the recent publication of the Equal Employment Opportunity Commission's final regulations interpreting the employment-related provisions of the Genetic Information Nondiscrimination Act.

Recently, the Equal Employment Opportunity Commission (EEOC) published its long-delayed final regulations interpreting the employment-related provisions of the Genetic Information Nondiscrimination Act (GINA), a federal law that went into effect for employers on November 21, 2009. GINA prohibits employers from discriminating in employment on the basis of genetic information (including family medical history) and restricts the acquisition and disclosure of genetic information by employers. The new regulations provide guidance for employers on the practical application of GINA's provisions and establish new rules that employers should follow in obtaining health-related information about employees and their family members. Highlights of these regulations are discussed below.

THE NEW GINA REGULATIONS

The employment-related provisions of GINA apply generally to employers with 15 or more employees, as well as to most federal and state governmental offices, regardless of size. Although GINA's provisions expressly protect employees and applicants, the new regulations clarify that GINA protects former employees as well. For example, GINA would prohibit an employer from disclosing genetic information about a former employee to a prospective employer of that individual.

GINA prohibits employers from discriminating in employment on the basis of genetic information and from limiting, segregating, or classifying employees on the basis of such information. The regulations clarify that an employer will not violate these provisions when its actions are required by a law or regulation mandating genetic monitoring, such as certain regulations issued under the Occupational Safety and Health Act.

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Moreover, although GINA does not expressly refer to harassment, the EEOC takes the position that GINA's nondiscrimination provision prohibits workplace harassment based on genetic information.

The provision of GINA likely to have the most immediate and widespread impact on employers is the general prohibition against acquiring genetic information about applicants and employees. GINA broadly defines "genetic information" as information about the genetic tests of an applicant/employee or of the applicant/employee's family members, information about a request for or receipt of genetic services by an applicant/employee or his or her family members, and information about the manifestation of a disease or disorder of the applicant/employee's family members. Thus, GINA generally prohibits employers from acquiring an applicant/employee's family medical history, including any information about a family member's disease or disorder.

The regulations define "family members" as dependents who are or become related to an applicant or employee through marriage, birth, adoption, or placement for adoption and any blood relative within four degrees of relationship to an applicant or employee (that is, as far removed as a great-great-grandparent). The inclusion of persons who are not blood relatives of an applicant or employee may seem odd because they share no inherited genes with the applicant/employee, but the EEOC reasoned that an employer could discriminate against an employee based on the genetic information of a spouse or adopted child out of fear that the family member's condition could run up health insurance costs.

The new regulations note that information about race and ethnicity that is not derived from a genetic test is not genetic information under GINA. Thus, employers may continue to invite applicants and employees to identify their race and ethnicity for applicant-flow and affirmative action purposes without running afoul of GINA.

GINA's restrictions on acquiring genetic information generally bar employers from requesting such information. The EEOC takes the position that requests for genetic information are not limited to inquiries directed to an applicant, employee, or health care provider, however. The regulations state that a request for genetic information includes conducting an Internet search on an individual in a way that is likely to produce results containing genetic information. For example, running an Internet search linking an individual's name with a particular genetic trait would constitute a prohibited request for genetic information.

GINA contains a number of exceptions to its general prohibition against acquiring genetic information, and the new regulations address these exceptions in detail. One of the exceptions provides that an employer does not violate GINA when it inadvertently acquires information about family medical history. The EEOC takes the position that this exception applies to the inadvertent acquisition of any type of genetic information about an applicant/employee or his or her family members and not just genetic information in the form of family medical history.

The regulations provide several examples of situations in which genetic information may be inadvertently acquired. For example, the exception applies to genetic information disclosed in response to an employer's casual question about an individual's general well-being ("How is your son feeling today?") and to genetic information disclosed by an employee or applicant without any solicitation by the employer. When an employer inadvertently acquires genetic information in this manner, however, it may not ask follow-up questions that probe for genetic information (for example, "Do other family members have the condition?"). Similarly, the exception for inadvertently acquired information will ordinarily apply to genetic information that a manager or supervisor learns while reviewing a social networking profile that the manager or supervisor has permission to access, but if a manager or supervisor accesses a social networking site, even with permission, for the purpose of acquiring genetic information, the exception would not apply.

When an employer legitimately seeks health-related information in connection with employment (such as information relating to a request for a leave of absence or for reasonable accommodation of a disability), the employer may sometimes receive genetic information in response, even though the request did not specifically seek such information. The new regulations create a "safe harbor" to ensure that such genetic information will be deemed inadvertently acquired. This "safe harbor" will apply when the employer warns the person from whom it seeks health-related information not to provide genetic information, and the regulations provide sample language to use in giving that warning. Although failure to give the warning ordinarily will not preclude an employer from arguing that genetic information was inadvertently acquired, the EEOC takes the position that a warning is mandatory when an employer engages a health care professional to conduct any type of employment-related medical examination because the health care professional could be expected to acquire genetic information (for example, family medical history) in the absence of a warning. Moreover, the regulations provide that when a health care professional is engaged by an employer to determine an individual's ability to perform a job, the employer must direct the health care professional not to collect genetic information as part of the examination.

Another statutory exception to the general prohibition against acquiring genetic information permits employers to acquire such information when they offer employees health or genetic services (such as a wellness program), provided the disclosure of genetic information by participating employees is voluntary, participating employees give voluntary written authorizations relating to genetic information, and certain safeguards are in place. In connection with these programs, the new regulations allow employers to offer certain financial inducements to participate in health or genetic services as long as employers do not offer inducements to disclose genetic information. For example, if an employer

offers inducements to employees to complete a health assessment form including questions about family medical history, the employer must specifically identify the questions seeking genetic information and make it clear that employees need not answer those particular questions to receive the inducement.

GINA also provides an exception permitting the acquisition of genetic information (typically, family medical history) in connection with a request for leave to care for a family member with a serious health condition under the Family and Medical Leave Act or a similar state or local law. The regulations add that this exception also applies to employers that are not covered by a leave law but that have a uniformly applied policy granting leaves to care for ill family members. The regulations remind employers that family medical information obtained in connection with a leave request constitutes confidential genetic information under GINA and must be kept in a medical file separate from the employee's general personnel file.

Another statutory exception to GINA's general prohibition against the acquisition of genetic information applies to the purchase of commercially and publicly available materials that may include family medical history. The regulations interpret this exception as applying to the acquisition of any type of genetic information (not just family medical history), whether by purchase or otherwise, from commercially and publicly available materials. According to the regulations, this exception applies to genetic information acquired from newspapers, magazines, books, television, movies, and certain Internet resources. With respect to Internet resources, the regulations provide that the exception does not apply to media sources that require permission for access from a particular individual or membership in a particular group such as a professional organization, as those sources would not be considered commercially and publicly available. The mere fact that a Web site requires visitors to acquire a user name and/or password does not take the site outside the scope of the exception, however. Even when a Web site or other information source is commercially and publicly available, the regulations state that the exception does not apply when an employer accesses the information source for the purpose of acquiring genetic information.

The new regulations address additional topics relating to GINA, including confidentiality requirements, permissible disclosures of genetic information, and the relationship of GINA to other federal laws such as the Americans with Disabilities Act (ADA) and the Health Insurance Portability and Accountability Act (HIPAA).

PRACTICAL IMPLICATIONS

The foregoing discussion summarizes only those aspects of the new GINA regulations that are likely to have the most immediate impact on

employers. In light of these regulations, employers should consider taking the following four proactive steps to avoid liability under GINA:

1. Train managers and supervisors about what constitutes genetic information under GINA. The broad definition of "genetic information," which includes information about a disease or disorder that any member of an employee's extended family has, can be a trap for the unwary.

2. Train managers and supervisors about GINA's general prohibitions against acquiring and disclosing genetic information. Although a casual inquiry about the well-being of an employee's relative is permissible, follow-up questions seeking more information about any disease the relative might have may violate GINA, even if asked innocently out of genuine curiosity or concern.

3. Implement procedures to ensure genetic information legitimately acquired by the employer is maintained in confidential medical files separate from the general personnel files. Most employers are well-acquainted with the ADA's requirement that medical information about employees be maintained in separate confidential medical files, but GINA adds the requirement that medical information about relatives of an employee also be kept in such files. This would include, for example, medical information about an employee's family member acquired in connection with a request for family and medical leave. Although the new regulations do not require employers to purge personnel files of genetic information acquired before the effective date of GINA, employers would be prudent to do so to prevent managers and supervisors from having access to genetic information that could be used to discriminate against employees in violation of GINA and to prevent an inadvertent disclosure of genetic information.

4. Employers should modify any forms they use seeking health-related information (for example, medical certification forms used in connection with leave requests and directions for health care providers performing post-offer, pre-employment medical examinations) to add appropriate warnings against disclosing genetic information. Similarly, employers that sponsor employee wellness programs offering inducements for completing a health-assessment form should ensure that the form clearly identifies the questions seeking genetic information and states that employees need not answer those questions to receive the inducement.

Familial Status Discrimination: Will Employment Law Build Upon What Housing Law Started?

Kendall D. Isaac

This article explores the issue of familial status discrimination in the context of housing and employment law.

Familial status discrimination is a phrase that has been gaining momentum as more and more households realize that it takes two working parents to live comfortably, or even to make ends meet. While it has been called many names, such as familial status discrimination, family responsibility discrimination, and caregiver status discrimination, the premise behind the various names is for the most part identical in that the name describes discrimination against working males and females because of their status as parents.

FAMILIAL STATUS DISCRIMNIATION IN THE HOUSING CONTEXT

The Fair Housing Act prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks or other lending institutions, and homeowners insurance companies whose discriminatory practices make housing unavailable to persons because of: race or color, religion, sex, national origin, familial status, or disability.[1] The Fair Housing Act, with some exceptions, prohibits discrimination in housing against families with children under the age of 18. In addition to prohibiting an outright denial of housing to families with children, the Act also prevents housing providers from imposing any special requirements or conditions on tenants with custody of children.[2]

Although it can be overt, discrimination against families is usually subtle, and can take many forms, including:

- An adults-only provision in the lease;
- Limiting the number of people that can stay in an apartment;

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- Restricting the type or location of property that families with children can rent;
- Refusing to rent for safety reasons associated with children;
- Asking about pregnancy, who takes care of the children, or the ages of those who will be living in the property; and
- Charging more in rent for children.[3]

Under the Fair Housing Act, the Department of Justice (DOJ) may bring lawsuits where there is reason to believe that a person or entity is engaged in a "pattern or practice" of discrimination or where a denial of rights to a group of persons raises an issue of general public importance.[4] Individuals who believe that they have been victims of an illegal housing practice can also file a complaint with the Department of Housing and Urban Development (HUD) or file their own lawsuit in federal or state court. The DOJ brings suits on behalf of individuals based on referrals from HUD.[5]

THE STATUS OF FAMIAL STATUS DISCRIMINATION IN EMPLOYMENT LAW

Clearly, housing law has it right. Individuals should not be discriminated against on the basis of their race, color, religious preference, sex, disability, and of course their familial status. What about employment law? Should an employer be able to refuse a promotion to a woman because she has decided to have a family? Should it be legally permissible for a company to relegate someone to part-time status because of a perceived conflict between family and work priorities? After all, in order to afford to live anywhere, one must typically be gainfully employed. Unfortunately, stereotyping is a key feature in most family responsibilities cases (and at times results in people losing their gainful employment). Employers in these cases have made outdated and incorrect assumptions about how a parent or other caregiver will act or should act and then made personnel decisions based on those stereotypes (*e.g.*, a man should not care for his infant, or a woman who is a mother won't be able to concentrate on her job).[6] Even in cases where employees have had superior records, supervisors have wrongly assumed that employees will have productivity or attendance problems because of their family responsibilities. Supervisors have also downgraded or harassed employees who have become parents or taken family-related leave, sometimes in an effort to make them quit.[7]

If a person's race, color, religious preference, disability, sex, or (in the case of employment law) age (40 or above) impacts their ability to attain or maintain sustained remunerative employment, that person has legal recourse. Indeed, one need simply peruse the Equal Employment Opportunity Commission (EEOC) Web site to find a plethora of

information on how to file a charge of discrimination against one's employer.[8] The EEOC administers charges relative to a variety of laws, such as:

- The Americans with Disabilities Act of 1990 (ADA), as amended;[9]
- The Equal Pay Act of 1963, as amended;[10]
- The Pregnancy Discrimination Act;[11]
- Title VII of the Civil Rights Act of 1964,[12] as amended;
- The Age Discrimination in Employment Act of 1967;[13]
- Sections 501 and 505 of the Rehabilitation Act of 1973;[14] and
- The Genetic Information Nondiscrimination Act of 2008 (GINA).[15]

This is not to say that there is absolutely no protection for working parents with familial responsibilities. There are isolated statutes and case law out there that provide a scintilla of protection. Those who have been discriminated against by someone acting under the authority of local, state, or federal law have the ability to bring a Title 42 U.S.C. Section 1983[16] cause of action. However, this argument is not available for individuals working for private sector employers because they cannot be deemed to be acting under the "authority" of any such law.[17] While a handful of states have proactively enacted statutes banning such discriminatory acts,[18] a substantial number of working parents are seemingly left unprotected. These parents are left to rely on novel and generic (and generally not favored by courts) "public policy wrongful termination" type arguments available in some states[19] to try and get recourse for the perceived wrong, unless they are lucky enough to have a more "on point" statute to protect their specific situation (such as discrimination that would otherwise violate the Family Medical Leave Act[20] or ADA).[21] However, because this area of employment law is being challenged in courtrooms at an ever-increasing rate, uniformity in the law and how one brings about such an action is essential.[22] A look at the EEOC findings on the rate of women in the workforce, those women caring for children, and parents caring for their elderly parents, as well as their children, underscores this problem.[23]

FILLING THE GAP IN EMPLOYMENT DISCRIMINATION LAW

How can the problem be fixed? On first glance, one would think that an amendment to the Pregnancy Discrimination Act (PDA) would suffice. After all, the PDA already addresses issuing involving discrimination against expectant mothers. Would not it be simple to amend it to include discrimination against not just expectant mothers, but also

mothers *and fathers* regardless of whether they are expectant parents or actual parents of children under the age of 18? In fact, courts have broached this subject to a certain extent, showing some willingness to at least consider such an argument.[24] While amending the PDA would be a major step in the right direction, would this be enough?

In reality, the limiting definitions associated with the terms familial status discrimination, family responsibility discrimination, and caregiver status discrimination need to be broadened to address not just discrimination against working parents, but individuals generally based upon their responsibilities to any family member and not just a parental responsibility for children. Therefore, names such as family responsibility discrimination and caregiver status discrimination should be eliminated in consideration of coining one all-encompassing term: "familial status discrimination."

EXPANDING THE SCOPE OF FAMILIAL STATUS DISCRIMINATION TERMINOLOGY

Why is broadening the term important? Consider this example. What if an employee was terminated because his wife (also employed at the same company) brought legal action against the company for a wrongdoing?[25] Unless some local statute speaks specifically to that situation,[26] there would be little to no recourse for the wronged spouse under federal law. The same would be true of a parent terminated from a retail store based upon her child or live-in grandparent bringing a personal injury action against another store within the chain. The question is: Why segregate the discussion into one solely involving issues of parents dealing with children? Issues of married couples and parents and children impacted in the workplace solely because of their family relationship should be deemed equally as problematic to a society that increasingly necessitates dual-income households. Therefore, when we speak of discrimination based on family status, it stands to reason that it should include a conversation on the wrongs associated with not only parental status but more globally any realm of family status (note that some scholars believe that a more appropriate term is family responsibilities discrimination, or FRD).[27]

HOW AN AMENDED TITLE VII CAN EMBRACE THIS FORM OF DISCRIMINATION

Individuals are already attempting to bring familial status discrimination claims pursuant to Title VII, cleverly disguised as gender or sex-based disparate treatment claims. The courts have, at times, been willing to concede that causes of action based on stereotypes about mothers in the workplace may be gender discrimination, and have even disposed of the need for the plaintiffs in stereotyping cases to put forth comparative evidence of more favorably treated, similarly situated male employees.

This is important because the discrimination is essentially one where there may not be a male comparator and it may be that certain women are being treated worse than other women based on their family/caregiver status. Some have considered this a "sex-plus" or "gender-plus" form of impermissible discrimination.[28]

Clearly, courts have occasionally been willing to entertain such an argument. However, this still tends to look only at specific types of family-based discrimination and it takes creative pleading and the arguing of a myriad of different statutes for the crafty plaintiff to survive summary judgment (or the dismissal of the case by the judge prior to trial). Given the certainty and regularity that this type of disparate treatment exists, and indeed will continue to rise in the workplace as multi-generational households and multiple working members of a family become the norm,[29] there needs to be a certainty in the manner and mode of bringing forth this type of discriminatory action.

The framework already exists with Title VII. Indeed, Title VII has a framework not too different from the Fair Housing Act. Both prohibit a variety of discriminatory acts against people based on certain immutable characteristics. Both also have an administrative remedy (filing a charge with HUD or the EEOC, respectively) and allow for a judicial remedy as well. While baby steps have been made to head in this direction with the EEOC giving guidelines for the proper treatment of these matters,[30] definitive legislation is essential.

If Title VII were to be amended to simply add "familial status discrimination" to the litany of other types of disallowed discrimination, there would finally be consistency in how the law handles these matters.[31] The definition of familial status discrimination would have to be broad enough to encompass the garden variety forms of discrimination that currently occur under this umbrella term. This way, it would not be limited to just caregiver status but also would touch on marital status and relationship with the disabled. A potential definition could state that an employee will not be treated in a disparate manner on the basis of familial status, to include:

- Pregnancy;
- Marital status;
- Family relationship to an employee who has taken adverse action against the employer;
- Taking maternity or paternity leave;
- Raising children; and
- Caring for sick, disabled, or elderly family members.[32]

By making such an amendment, the EEOC guidelines would become enforceable and victims of familial status discrimination would have a

logical means and path of redress. And then, the final piece to be connected to the discrimination puzzle involves that elephant in the closet known as sexual orientation discrimination. But that is a different article for a different day!

NOTES

1. 42 U.S.C. 3601 *et seq*.

2. Sec. 802. [42 U.S.C. §3602] Definitions:

> As used in this subchapter—
>
> (k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—
>
> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

3. *http://www.legalmatch.com/law-library/article/family-status-discrimination-in-housing.html*.

4. Sec. 810. [42 U.S.C. § 3610] *et. seq*.

5. Sec. 813. [42 U.S.C. § 3613] *et. seq*.

6. In *Moore v. Alabama State University*, 980 F. Supp. 426 (M.D. Ala. 1997), the employee's supervisor told her he believed women should stay at home with their family and denied her a promotion because the new job would involve too much travel for a "married mother," despite the fact that she applied for the job and had already worked out a plan with her husband to accommodate the travel.

7. *See* Ctr. for WorkLife Law, "Preventing Discrimination Against Employees with Family Responsibilities: A Model Policy for Employers," 7–8, *available at http://www.worklife law.org/EmployerModelPolicy.html. http://www.worklifelaw.org/pubs/Model_Policy_for_ Employers.pdf*.

8. The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. *See http://www.eeoc.gov/eeoc/index.cfm*.

9. 42 U.S.C. § 12101 *et seq*. This law makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments.

10. 29 U.S.C. § 206(d). This law makes it illegal to pay different wages to men and women if they perform equal work.

11. 42 U.S.C. § 2000e(k). This law amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

12. 42 U.S.C. § 2000e *et seq*. This law makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex.

13. 29 U.S.C. § 621 *et seq*. This law protects people who are 40 or older from discrimination because of age.

14. 29 U.S.C. § 791 *et seq*. This law makes it illegal to discriminate against a qualified person with a disability in the federal government.

15. H.R. 493, Pub. L. No. 110-233, 122 Stat. 881, enacted May 21, 2008, GINA. This law makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members (i.e. an individual's family medical history).

16. Section 1983 provides in relevant part that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *See also* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) where the court held that a Section1983 charge is actionable for discrimination against working mothers.

17. In order to establish individual liability under § 1983, a plaintiff must show (a) that the defendant is a "person" acting "under the color of state law," and (b) that the defendant caused the plaintiff to be deprived of a federal right. *See, e.g.,* Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961).

18. *See* Alaska Stat. § 18.80.220 (West 2008) (prohibiting discrimination based on "parenthood"); D.C. Code Ann. § 2-1402.11 (2009) (prohibiting discrimination based on "family responsibilities"); Atlanta, Ga., Ordinances ch. 94, art. V, § 112 (2009) (prohibiting discrimination based on "parental status" and "familial status"); Milwaukee, Wis., Ordinances ch. 109, subch. 3, § 45 (2008) (prohibiting discrimination based on "familial status"); Tampa, Fla. Ordinances ch. 12, art. II, § 26 (2009) (prohibiting discrimination based on "familial status"); Cook County, Ill., Ordinances ch. 42, art. II, § 35 (prohibiting discrimination based on "parental status"); Howard County, Md., Ordinances tit. 12, subtit. 2, § 208 (2008) (prohibiting discrimination based on "familial status").

19. Painter v. Graley (1994), 70 Ohio St. 3d 377, 639 N.E.2d 51 holding that the "clear public policy" sufficient to justify a wrongful-discharge claim "may also be discerned as a matter of law based on other sources, such as the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law. The court required the plaintiff to show four elements for a prima facie case as follows:

> 1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element);
>
> 2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element);
>
> 3. That the plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and

4. That the employer lacked overriding legitimate business justification for the dismissal (the overriding justification element)." *Painter,* 70 Ohio St. 3d at 384, 639 N.E.2d 51.

20. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972, 1982. The Court reasoned that stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

21. Title I of the ADA prohibits discrimination based on an employee's "association" with a disabled person. 29 U.S.C. § 1630.8 (ADA makes it unlawful for employer to "deny equal jobs or benefits to, or otherwise discriminate against," a worker based on his or her association with an individual with a disability). However, note that not all courts have viewed the allegation favorably. *See* Eddy LeCompte v. Freeport-McMoran,1995 WL 313700 E.D. La, where the court held that an employer may violate the ADA where it fires an employee because of the significant costs associated with his child's medical condition

22. Still, M.C., "Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities," San Francisco: Center for WorkLife Law, (2006), from *http://www.worklifelaw.org/pubs/FRDreport.pdf*. Changing workplace demographics have led to more working parents and workers with elder-care responsibilities. The dramatic rise of nearly 400 percent in the number of FRD cases filed between 1995 and 2005 as compared to the previous decade underscores the prevalence of this type of discrimination.

23. US EEOC "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, in *E.E.O.C. Compliance Manual*, 2, § 615, (May 23, 2007), Washington, DC.: retrieved Sept. 1, 2010 from *http://www.eeoc.gov/policy/docs/caregiving.pdf*. The EEOC recently published reports that highlight the ever-growing issue of employment discrimination facing family caregivers:

- 70 percent of U.S. households with children have all adults participating in the labor force.
- Women make up 46 percent of the U.S. labor force, and most (81 percent) of women in the United States have children;
- 25 percent of families take care of aging relatives; and
- 10 percent of employees are taking care of both children and aging parents.

24. *See, e.g.*, Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (evidence that a direct supervisor had "specifically questioned whether [the plaintiff] would be able to manage her work and family responsibilities" supported a finding of discriminatory animus, where plaintiff's employment was terminated shortly thereafter); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044–1045 (7th Cir.1999) (holding, in a PDA case, that a reasonable jury could have concluded that "a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend

more time at home with her children' reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake"); *Id.* at 1044 (remarks by the head of plaintiff's department that "she would be happier at home with her children" provided direct evidence of discriminatory animus).

25. *See* Collins v. U.S. Playing Cards Co., 466 F. Supp 2d 954 (S.D. Ohio 2006) where the plaintiff in that case was terminated because *"his wife"* filed a workers' compensation claim against the company where they both worked.

26. Several states prohibit workplace discrimination based on marital status. *See, e.g.,* Alaska Stat. § 18.80.220 (West 2008); Cal. Govt. Code § 12940 (West 2009); Colo. Rev. Stat. § 8-17-101 (2008) (public works); Fla. Stat. Ann. § 760.10 (West 2009); Haw. Rev. Stat. Ann. § 378-2 (West 2008); 775 Ill. Comp. Stat. 5/1-102 (2009); Mich. Comp. Laws Ann. § 37.2202 (West 2008); Minn. Stat. § 363A.08 (2009); Neb. Rev. Stat. § 48-1104 (2008); N.Y. Hum. Rts. Law § 296 (McKinney 2009); N.D. Cent. Code § 34-11.1-04.1 (2008) (state employment); Wash. Rev. Code Ann. § 49.60.180 (West 2009); Wis. Stat. Ann. § 111.321 (West 2007).

27. *See http://www.workplacefairness.org/family-responsibilities-discrimination?agree=yes,* retrieved Sept. 10, 2010, which states that, "Previously, employment discrimination against workers based on familial caregiving responsibilities was called 'Marital Status' or 'Family Status' Discrimination. This has since changed, and is now called Family Responsibilities Discrimination ('FRD'") to more accurately describe the particular type of discrimination that may affect almost every worker, including married women, engaged women, single men, married men, parents of young children, workers caring for elderly parents or sick significant others."

28. The term "gender plus" (or "sex plus," as it is more commonly known) "refers to a policy or practice by which an employer classifies employees on the basis of sex *plus* another characteristic," Barbara Lindemann and Paul Grossman, *Employment Discrimination Law*, 1:456 (3d ed. 1996). "In such cases the employer does not discriminate against the class of men or women as a whole but rather treats differently a subclass of men or women." *Id. See, e.g.,* McGrenaghan v. St. Denis Sch., 979 F. Supp. 323, 327 (E.D. Pa.1997) ("The rationale behind the 'sex-plus' theory of gender discrimination is to enable Title VII plaintiffs to survive summary judgment where the employer does not discriminate against all members of a sex."). Discrimination that might be called "sex plus" in the Title VII context has, of course, been found to violate the Equal Protection Clause. *See, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L.Ed.2d 514 (1975) (holding that a statute that treats widowers less favorably than widows—which, in the Title VII context, might have been called a "sex plus marital status" claim—violates the Equal Protection Clause).

29. Bureau of Labor Statistics, Dept. of Labor, "Working in the 21st Century," *http://www.bls.gov/opub/working/home.htm* (combined work hours per week for married couples with children under 18 increased from 55 hours in 1969 to 66 hours in 2000).

30. See full text at http://www.eeoc.gov/policy/docs/caregiver-best-practices.html.

31. There are 17 different statutory theories under which family responsibility/status charges and lawsuits have been filed, according the EEOC. *Seehttp://www.eeoc.gov/policy/docs/caregiving.html.*

32. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003), noting that working women provide two thirds of the nonprofessional care for older, chronically ill, and disabled individuals.

Disability Discrimination, Reasonable Accommodation, and the Modified Commute

Roger B. Jacobs

This article examines disability discrimination, reasonable accommodation, and the modified commute to provide updated analysis as the disability landscape changes.

In a series of cases in state and federal courts around the country there have been further clarifications on reasonable accommodation under the amended Americans with Disabilities Act (ADA) as well as meeting the definition of "qualified individual with a disability." The courts uniformly made clear that individuals must be "qualified" in order for the discussion to go further. Once an individual meets the definition of a qualified individual with a disability, the ADA becomes applicable and further discussion with regard to reasonable accommodation is necessary and appropriate.

Moreover, the courts require the interactive process to begin and both employer and employee to meaningfully discuss what works or does not work. The courts made clear again: the employer controls the process, *but* the interactive process does not require a formal trigger. Once an employee communicates a desire to discuss other positions—even positions that do not work—the dialogue must begin. Failure to participate in this dialogue may violate the ADA.

Finally, the courts take an individualized approach with regard to modifications of commutation, including work schedules. While getting to and from work is usually the responsibility of the employee, at least one appellate court has found that under the circumstances of that case, modification of shift was appropriate to permit the employee to make it to her place of employment due to other disability causing transportation issues. This article will examine these ADA issues to provide updated analysis as the disability landscape changes.

CASE UPDATE ON REASONABLE ACCOMMODATION

The federal district court in *Douglas v. Long Island Jewish Medical Center* (LIJMC),[1] held that it was not unreasonable nor did it violate

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the ADA for an employer accused of failing to provide a reasonable accommodation to expect the plaintiff to identify the existence of an appropriate vacancy which she might be transferred to in order to continue employment. In *Douglas*, Ms. Douglas admitted that she was not able to perform her duties in the operating room nor was she aware of any accommodations that LIJMC could have provided her given her restrictions or other positions to which she could have applied or been transferred.

Ms. Douglas conceded she was not aware of any open positions that she was qualified for or could perform. The court concluded that she failed to demonstrate a prima facie case of denial to make a reasonable accommodation.

Plaintiff Douglas had worked at LIJMC in the operating room as a patient care associate. The position required her to be present in the operating room; provide assistance for new patients, including maintaining, cleaning, and sterilizing surgical equipment; check patients' vitals; and assist physicians during surgical procedures, which might include standing for up to seven hours in place. After an initial injury at work, she exacerbated her condition while holding retractors during a procedure. The procedure lasted approximately six to seven hours in the operating room. She was diagnosed with cervical and lumbar radiculitis and was out of work for several months thereafter.

While there was no disagreement between the parties with regard to her diagnosis, problems arose thereafter. She failed to keep the hospital informed about her condition and failed to identify appropriate positions for which she might be qualified. Accordingly, her claims of discrimination were dismissed.

PRACTICE IMPLICATIONS

Obligations exist for employees/plaintiffs to identify appropriate positions they can perform. There is an obligation to keep employers informed about condition. The bottom line is that essential functions need to be performed, or alternate positions that can be performed, must exist and be identified.

But no accommodation is required for perceived or "regarded as" in many jurisdictions. In *Duello v. Buchanan County Board of Supervisors, et al.*,[2] the district court analyzed a claim for an Operator II who worked as a road grader in the road department. While driving a truck hauling rock, he experienced a severe headache and nausea and was later found to have suffered a seizure. His medical restrictions thereafter included being out of work for six months; no driving; and giving up his commercial driver's license (CDL). His treating doctor sent a letter in that regard to the employer stating that Duello would be prohibited from driving for at least six months. However, the doctor advised that Duello was able to work at other tasks not

involving driving, working in a high place, or near moving machinery. Several months later, and after receiving that note, the County Board of Supervisors met and adopted a motion terminating Duello's employment. The Board concluded that due to physical disability preventing him from carrying out his responsibilities, and "with no reasonable prospect of recovery that would enable him to resume his duties," the plaintiff was terminated. The latter part of the sentence, however, was not necessarily accurate.

The plaintiff Duello contended that he was discriminated against because he was disabled and that was the basis for his termination. The court stated that *he must first address the threshold issue of whether he was a qualified individual with a disability*. It noted that temporary impairments with little or no long-term impact are not disabilities and looked at the three factors to determine limitations of major life activity.[3]

In the *Duello* case, the court found that he was restricted from driving or operating moving machinery for six months due to a single seizure which occurred on October 6, 2006. Because of those restrictions, he was unable to perform his duties as Operator II and, arguably, was substantially limited in the major life activity of working. His anticipated duration of impairment was six months. Thus, the court concluded that his impairment was not a disability because it was "temporary and unlikely to have a long-term impact on any major life activity."

Duello also contended he was disabled under the ADA because he was "regarded as" disabled. The court analyzed the facts and deposition testimony with regard to the "regarded as" assertion.

The plaintiff argued that he was considered to be disabled because Buchanan County did not believe he could perform any of the jobs in the road department. His assertion was supported by the deposition testimony of one of the supervisors. Based upon that testimony, the court concluded there was a genuine issue of material fact as to whether Buchanan mistakenly believed the six-month restrictions on driving and operating constituted a permanent disability which substantially limited Duello's ability to work.

Significantly, the court moved on to the key determination regarding summary judgment, that is, whether Duello was a "qualified individual" when he was fired. In order to be a qualified individual, he needed to be able to perform the essential functions of the job and possess the requisite skill, education, experience, and training for the position. Duello claimed he could have worked at other jobs within the department that did not require a driver's license or defendants could have given him a leave of absence.

The question of "regarded as" discrimination and entitlement to accommodation is a significant one for which there is not uniformity in the courts. The Eighth Circuit Court of Appeals, which governs cases out

of Iowa, has held that regarded as disabled plaintiffs are not entitled to reasonable accommodation because of the following:

> ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees.

Quoting from the Eighth Circuit in its discussion of "regarded as" entitlement, the *Duello* court said:

> The reasonable accommodation requirement is easily applied in a case of actual disability. Where an employee suffers from an actual disability, the employer cannot terminate the employee on account of the disability without first making reasonable accommodations that would enable the employee to continue performing the essential functions of his job…. This application of the reasonable accommodation requirement is perfectly consistent with the ADA's goal of protecting individuals with disabling impairments who nonetheless can, with reasonable efforts on the part of their employers, perform the essential functions of their jobs.
>
> The reasonable accommodation requirement makes considerably less sense in the perceived disability context. Imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results. Assume, for instance that [the plaintiff's] heart condition prevented him from relocating to Akron but did not substantially limit any major life activity. Absent a perceived disability, defendants could terminate [the plaintiff] without exposing themselves to liability under the ADA. If the hypothetical is altered, however, such that defendants mistakenly perceive [the plaintiff's] heart condition as substantially limiting one or more major life activities, defendants could be required to reasonably accommodate [the plaintiff's] condition by, for instance, delaying his relocation to Akron. Although [the plaintiff's] impairment is no more sever in this example than in the first, [the plaintiff] would now be entitled to accommodations for a non-disabling impairment that no similarly situated employees would enjoy.

The district court applied the Eighth Circuit's holding and reasoning and found that because Duello claimed he was regarded as disabled rather than having an actual disability, he could only satisfy the ADA's "qualified individual" requirement by showing that he could perform the essential functions of his job without an accommodation. The court concluded it was undisputed that at the time of his termination Duello could not perform the essential functions of his job. Therefore, he was

not protected under the ADA and defendants were entitled to summary judgment on the claim of disability discrimination.

PRACTICE IMPLICATIONS

"Regarded as" is treated differently among the circuit courts. The lack of uniformity makes the issue more complicated when providing advice. Reasonable accommodation is never required and not applied within the Eight Circuit—at this time—to "regarded as" claims of disability discrimination. Particular caution, however, should be utilized since "regarded as" is likely to increase as an area of potential litigation and concern. Geography also plays a role in understanding the ADA landscape on this point.

INTERACTIVE DIALOGUE TRIGGERS

Reasonable accommodation is not automatic. But when an employee requests consideration for a different position, the interactive dialogue required under the ADA may be triggered. In *Brown v. Dunbar Armored, Inc.*,[4] plaintiff Brown underwent a coronary bypass in response to a cardiac stress test. He was placed on leave under the Family Medical Leave Act (FMLA) and his inability to work while recovering was not disputed as a disability under the New Jersey Law Against Discrimination.

There was a factual dispute with regard to whether or not an accommodation was requested for light duty work until recovery.

The plaintiff was terminated one week after his FMLA leave expired. The company did not return Brown to his old job because the replacement employee was doing a superior job. The company alleged that the plaintiff could have been rehired as a driver/guard upon medical release to return to work and offered him that position. One of the fallacies pointed out by District Judge Jerome Simandle in *Dunbar Armored* was that the company required a date certain for his return to work. The court rejected the "date certain" standard. Instead, the court said that a reasonable prediction of return to work and an estimate of same would have been sufficient to force a dialogue with Mr. Brown.

Much of the decision focused on the interactive process required of the parties to determine an appropriate reasonable accommodation. The district court made clear that any request for accommodation, once the employer knows of the disability, must trigger the process. The court noted that even if the accommodation requested is unreasonable, such a request initiates the interactive process.

The court held that "any request for accommodation that makes it clear to the employer that employee seeks accommodation generally, even if the specific accommodation requested is unreasonable, is sufficient to trigger the process." The defendant argued that it was not required to participate in an interactive process because it had not

received any evidence of an expected duration of disability, meaning it could be open-ended. However, the court noted there was an anticipated return date on the short-term disability form. The court concluded that "because of the nature of the human body, it seems unlikely that a doctor will ever predict the date of recovery with more certainty than identifying an anticipated date or a general period of likely recovery."

Judge Simandle ruled that the ADA did not require that the employer know that an accommodation is possible before making reasonable efforts to identify an accommodation. Instead, "the law requires an interactive process, the purpose of which is to search out accommodations that might suffice, not to explore those obvious to the employer before the process even occurs." In *Dunbar*, the court noted that the defendant did not engage in any interactive process simply because it concluded that it believed without a medical release no accommodation was possible or necessary. According to Judge Simandle, this approach was wrong.

The court also noted that New Jersey regulations are quite clear: "an employer must consider reasonable accommodations *before* terminating an employee, not *after*." (Emphasis added.) The court opined that it agreed with the defendant that light duty in this case was not a reasonable accommodation. It further noted that the defendant was not required to create a light duty position and characterized such a request as "a dubious legal claim, at best."

The court ruled that a temporary leave of absence, however, can, under some circumstances, be a reasonable accommodation. Such a determination requires a case-by-case analysis.

The court's language with regard to the defendant's position is, unfortunately, helpful for the readers:

> Dunbar rested its defense of not considering temporary leave as a potential accommodation on reasoning amounting to the fallacy of the excluded middle: that without a date certain, any leave was necessarily indefinite and unreasonable. In fact, there is a middle ground between complete certainty and complete uncertainty about Plaintiff's return to full capability, and that is the reasonable anticipation of his recovery before September.

Similarly, the court found that the defendant's position—that plaintiff was terminated because he did not return to work and could not return to work pursuant to company policy until he was no longer disabled—would "eviscerate the statute." In other words, the defendant's position requiring full recovery is not viable as a matter of law.

The court opined that such a temporary defined leave would have enabled the plaintiff to recover and to return to work full time. The analysis and accommodation was still up to the company as the court described:

> If such a period of temporary leave would not have constituted an undue burden on Dunbar, and if it could have been reached by

> Dunbar's good faith consideration of the option, then the termination of Plaintiff before this accommodation was raised, much less properly considered, is exactly the kind of adverse employment action because of disability the NJLAD is intended to prevent.

PRACTICE IMPLICATIONS

Interactive dialogue must be undertaken by the employer if a request for accommodation is made. The employer cannot impose a requirement of a date certain for return to work as long as there is a reasonable medical prediction regarding return to work.

Commuting as a Reasonable Accommodation

The Third Circuit Court of Appeals, in *Colwell v. Rite Aid Corporation*, ruled that the ADA permits a finding that changing a work schedule to day shifts in order to alleviate disability-related problems in getting to work is a form of accommodation contemplated by the statute.

The court fine-tuned its opinion and held that under certain circumstances the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable. One such circumstance would occur "when the requested accommodation is a change to a workplace condition that is entirely within an employer's control and that would allow the employee to get to work and perform her job."

The lower court had rejected the shift change request as an accommodation and concluded that such a change had nothing to do with how the individual could perform her work. Colwell placed Rite Aid on notice of her blindness and inability to drive at night. Rite Aid rejected an accommodation to avoid night driving for Colwell.[5]

Contrasting language from Judge Dennis Cavanaugh of the US District Court in New Jersey in *Mickens v. Lowe's Companies, Inc.* is interesting where he recently considered a plaintiff's application for reconsideration of summary judgment. Part of the argument had to do with shift changes and reasonable accommodations.

The plaintiff urged that he was required to work in excess of his capabilities and pointed to one particular assignment. The court concluded that even if the plaintiff was correct, an isolated assignment outside of his physical restrictions, which the plaintiff admitted he could freely refuse to do, did not necessarily negate the company's long-term efforts to provide an appropriate accommodation.

The plaintiff testified that whenever he was unable to perform a task, he was permitted to stop without any repercussions. With regard to the shift/accommodation question, the court reiterated its own finding that the plaintiff is not entitled to his own "definition of accommodation" and not entitled to his own selection of choice including hours and type of work. The court found that the defendant created a light duty position

for the plaintiff during the shift for which he was originally hired, which was the night shift.

Judge Cavanaugh stated that while the day shift may have been the plaintiff's preference, he was not restricted to working a day shift and

Defendant was under no obligation to place him in such a position. The employer providing an accommodation has the ultimate discretion to choose between effective accommodations. Plaintiff's night-shift position was not an unreasonable accommodation…. Creating a light duty position on the night shift was a reasonable accommodation by Defendant, despite Plaintiff's efforts to get moved to the day shift.

Thus, there may be a dispute between certain courts and a question with regard to Judge Cavanaugh's shift preference findings in light of the Third Circuit's decision in *Colwell v. Rite Aid* earlier in the year. But this dilemma must be left for further explication by higher authorities.

FINE TUNING "MAJOR LIFE ACTIVITIES"

Not every plaintiff can establish a disability even with recognizable conditions. Great care must be exercised in examining these pleading subtleties.

In *Badri v. Huron Hospital*,[6] Dr. Rafal Badri alleged that he was terminated due to his disability and that other unnamed individuals were not.[7] His claims fell under the ADA as well as the Rehabilitation Act.

The court rejected his claims and essentially found that he could not establish that he was limited in major life activities. For example, although Dr. Badri stated that he had some difficulty with sleeping and that he suffered from Cushing's Syndrome, dysthymic disorder, depression, and migraines, his particular circumstances were not specific. The court found that said since he failed to identify any particular major life activities in his pleadings the court had to "guess."

The court said generalized complaints about sleep have been found insufficient to establish a substantial limitation. Similarly, when the plaintiff talked about cutting back on showering, the court ruled that hygiene problems did not rise to the level of ability to care for one's self. The court made the same conclusion with regard to his personality problems and continued introverted lifestyle. The court noted Dr. Badri was able to get out of bed each morning, go to work, and tend to patients.

As a matter of fact, Dr. Badri's patient activity increased in the dispositive year. With regard to his allegation that migraine headaches, neck pain, and spasms caused severe discomfort, the court found that he was able to continue with his surgeries despite those interruptions.

Dr. Badri further argued that an unnamed other doctor at Huron Hospital was treated differently than he had been despite an addiction problem. The court rejected the anonymous basis of the alleged substance abuse claim and said a "stray reference to an unknown similarly-situated individual cannot carry the burden of establishing pretext."

Defendant Huron Hospital noted that Dr. Badri never requested a reasonable accommodation and that none of the communications from him or his office manager contained any such requests. The doctor argued that he *impliedly* made a request for accommodation when he submitted his medical records with the result of Cushing's Syndrome. He also argued that the hospital should have "intuitively known" he was in need of an accommodation and should have proactively intervened to evaluate his steroid usage.

Plaintiff Badri further urged that Huron Hospital should have forced him into a mandatory drug treatment program. Dr. Badri admitted that he never told anyone at Huron Hospital that he no longer could perform procedures because of any incapacity, never requested leave due to his impairment, and never made any other request. Further, despite the fact that Dr. Badri was examined by a colleague to assess his condition, Dr. Badri argued that Dr. Lightbody (the examiner) should not have relied up upon Dr. Badri's assertion that he had weaned himself off steroids. Instead, he argued that the hospital should have "dug deeper to discover the true nature of his condition and in the process, should have disregarded Dr. Lightbody's evaluation." In other words, even after the hospital conducted an investigation, the plaintiff argued its conclusion should have been rejected because he was untruthful when he was questioned. All of this in spite of his effort to hide his condition from defendants.

The court concluded, in *Badri*, that, despite all of the plaintiff's machinations, he was not a "qualified individual with a disability" nor could he demonstrate that defendants failed to engage in good faith in the interactive process.

The only other point worth mentioning is that the plaintiff's counsel filed a motion to withdraw based upon "irreconcilable differences" with Dr. Badri and his office manager. The request was granted.

PRACTICE IMPLICATIONS

Courts examine underlying facts carefully in determining impact on "major life activities." A good faith effort must be made. But, where a party is duplicitous during an investigation, the employer cannot be faulted for assuming a lack of candor. When an individual cannot meet the ADA definition of "qualified individual," the analysis ends.

CONCLUSION

Courts around the country are not handling or interpreting ADA claims uniformly. For example, accommodation obligations for "regarded as" claims are not handled identically in all of the federal circuits. The Eight Circuit has a different approach which does not require accommodation.

Additionally, continued focus on specific facts and factual allegations with regard to major life activities is a critical exercise. Simply pleading

ADA violations is not enough and corporate counsel should carefully examine the underlying facts. Thus, while the facts in *Badri* were at least superficially appealing, the court's painstaking analysis identified an insufficient hampering of major life activities to be considered a qualified individual with a disability.

A thorough analysis must also be made with regard to identifying alternate positions and shifts. While court rulings are not completely consistent, it is rare that a court will intrude on the commutation issue and will generally leave shift determinations up to the employer.

One of the simplest and easiest oversights by employers can be to avoid interactive dialogue when a determination is made that the employee's approach is facile or even foolish. Based upon the federal court's discussion in *Brown v. Dunbar Armored, Inc.*, once a request of any kind has been made to engage in a discussion, employers should proceed with caution' document all efforts, and advise the employee whether or not an accommodation can be made. To do so is simple; to fail to do so may be fatal. Like everything that evolves, the ADA is organic, seeking dynamic growth, and has not reached final positions in all of its implications.

NOTES

1. 2010 WL 3187929 (E.D.N.Y. July 29, 2010).

2. 2010 WL 1526567 (N.D. Iowa 2010).

3. Factors to consider under 29 C.F.R. §1630.2(j)(1)(i)-(ii):

   1. The nature and severity of the impairment;

   2. The duration or anticipated duration of the impairment; and

   3. The actual or expected long-term impact of the impairment.

4. 2009 WL 4895237 (D.N.J.).

5. One of the arguments put forward by Rite Aid was unfairness to others, which was summarily rejected.

6. 691 F. Supp. 2d 744 (N.D. Ohio).

7. Disparate impact as well as accommodation issues were dealt with by the court.

Caregiver and Family Responsibilities: A Continuing Challenge for Employers

Laura J. Maechtlen and Tracy Billows

In addition to addressing employee relations issues and costs that come with family responsibilities, there are also legal land mines that employers must navigate as family responsibilities can raise issues under a whole host of federal, state, and local employment laws. The authors describe the challenges employers face, and offer practical guidance on how to avoid charges of family responsibilities discrimination.

More employers are struggling with issues related to family and caregiver responsibilities in the workplace, whether in the recruitment of employees; the growth, development, and advancement of employees; responding to employees' needs to for time off; or requests for flexibility in scheduling and other benefits. Family and caregiver responsibilities generally arise for employees who have responsibilities for caring for children, elderly parents, and/or disabled children, parents, or other relatives.

In addition to addressing employee relations issues and costs (*i.e.*, turnover costs, loss of productivity) that come with family responsibilities, there are also legal land mines that employers must navigate as family responsibilities can raise issues under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, and a whole host of other federal, state, and local employment laws. The Center for WorkLife Law at the University of California, Hastings College of Law issued a report in December 2009 and cited a study that found a 400 percent increase in the number of family responsibilities discrimination cases being filed between 1996 and 2005, as compared to 1986 and 1995. Thus, this issue is likely to continue to be a source for increased charges and lawsuits.

FAMILY RESPONSIBILITIES AS A PROTECTED CHARACTERISTIC

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

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individual with respect to … compensation, terms, conditions, or privileges of employment, because of such individual's … sex …."[1] The ADA forbids discrimination by "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."[2]

Although family responsibilities are not presently an explicit protected characteristic covered by federal law, in May 2007, the Equal Employment Opportunity Commission (EEOC) issued an Enforcement Guidance entitled "Unlawful Disparate Treatment of Workers With Caregiving Responsibilities." The EEOC stated that the purpose for the Enforcement Guidance was "to assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminated on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990."

PRACTICAL IMPLICATIONS

So what does this mean for employers? How would family responsibilities discrimination implicate these two statutes if it is not its own protected characteristic? Consider the following hypothetical situations and whether they are problematic:

- Assuming a pregnant woman did not want to travel for client meetings based on her pregnancy.
- Assigning a woman to a less stressful job because she just had her third child.
- Denying a woman a promotion to a position that is high impact and stressful and requires lots of travel and late hours because there is a concern that she could not handle the rigors of the new position because she has been caring for a sick, disabled parent for the last three years.
- Granting women more paid leave to care for their children than granted to men after the birth, adoption, or placement of child in foster care.
- Requesting a male employee who has children to work late but not making the same requests of his female coworker who has children.

The answer to the question, Are any of the above scenarios problematic under Title VII, the Pregnancy Discrimination Act, which amended Title VII, or the ADA? is a resounding "YES."

The problem with each scenario is they involve sex-based treatment, unlawful stereotyping, and/or improper treatment based on association.

Specifically, the EEOC's Enforcement Guidance enumerates six different categories of prohibited conduct that implicate family responsibilities discrimination. They are:

- Sex-Based Disparate Treatment (*e.g.*, whether female applicants, but not male applicants, were asked about their caregiving responsibilities);
- Pregnancy Discrimination (*e.g.*, prohibited acts, such as an employer making assumptions about the commitment of pregnant workers or their ability to perform certain physical tasks);
- Discrimination Against Male Caregivers (*e.g.*, "denied male employees' requests for leave for childcare purposes even while granting female employees' requests");
- Discrimination Against Women of Color (*e.g.*, "a Latina working mother might be subjected to discrimination by her supervisor based on his stereotypical notions about working mothers or pregnant workers, as well as Latinos generally");
- Unlawful Caregiver Stereotyping Based on the ADA (*e.g.*, hostility toward a parent of a disabled child based on the parent's need to take leave to care for that child); and
- Harassment and/or Retaliation.

The EEOC continues to make this one of its priority issues. In May, 2009, the EEOC issued a supplemental memorandum to its 2007 Enforcement Guidance, this time with an emphasis on best practices in the workplace. In this supplemental memorandum entitled "Employer Best Practices for Workers with Caregiving Responsibilities," the EEOC offered "examples of best practices for employers that go beyond federal non-discrimination requirements and that are designed to remove barriers to equal employment opportunity." The EEOC focused on all aspects of the employment relationship, including general overall considerations, recruitment, hiring, and promotion, and terms and conditions of employment, including performance management, flexible work arrangements, overtime, reassignment of job responsibilities, and leaves of absence. Accordingly, employers should be looking at these areas as well.

In addition to federal law concerns, family responsibility issues are also implicated by state and local laws. Presently four states have statutes addressing familial responsibilities, either as a protected characteristic (Alaska and the District of Columbia; New Jersey for state employers only) or prohibiting employers from making inquiries related to familial responsibilities (Connecticut). Five more states have pending bills

related to family responsibilities discrimination. Additionally, according to the Center for Worklife Law, at least 63 municipalities (cities, counties, etc.) in at least 22 states have laws that specifically create a protected category for familial or parental status or family responsibilities. These statutes vary in their definition of what is protected, who is covered, and what acts are prohibited. Thus, it is critical that employers familiarize themselves with any state or local laws that might provide protections or regulations concerning family responsibilities.

OTHER FEDERAL, STATE, AND LOCAL LAWS IMPACTED

Family responsibilities implicate not only discrimination issues but also other conduct regulated by federal, state, and local laws. For example, under the Employment Retirement Income Security Act (ERISA), it is unlawful for an employer to terminate an employee because the employer believes the employee's dependent's significant medical conditions will drive up health care costs and premiums.

Under the Family and Medical Leave Act (FMLA), an eligible employee is entitled to job-protected leave to care for a parent, child, or spouse with a serious health condition. If medically necessary, this leave can be taken on an intermittent or reduced work schedule basis. In addition, the FMLA was amended to 2008 to provide for up to 26 weeks of leave to care for an injured service member. The amendment also adds the right to take up to 12 weeks of leave to address work-life issues arising out of the deployment to active duty of a parent, child, or spouse. Moreover, various states and municipalities have similar laws to the FMLA, that in some cases provide greater protections and rights, including but not limited to covering more employees and employers, providing longer periods of leave, and providing paid leave and leave for greater reasons/individuals than covered by the FMLA.

Thus, regardless of whether family responsibilities is a protected category for discrimination purposes, employers need to ensure they are complying with all other laws and regulations that touch on family responsibilities in the workplace.

WHAT EMPLOYERS SHOULD DO

Because family responsibilities are likely already affecting your workplace, we recommend that employers take the following proactive steps to ensure compliance with applicable laws and utilization of best practices:

- Review the demographics of your workforce to assess your organization's vulnerability to these issues based on its workforce demographics, either as a whole, or by location or department.

- Review your policies to ensure compliance with all applicable laws implicating family responsibilities issues, including non-discrimination and non-harassment policies, time off and leave policies, alternative work arrangements (*e.g.*, telecommuting, reduced schedules, job sharing) criteria for transfers, promotions, and job assignments, and benefits.

- Train your supervisors and managers on family responsibilities issues, protections, and prohibited conduct. Training should cover all aspects of the employment relationship, including hiring, promotion, discipline, scheduling, training, and termination decisions. Remind supervisors and manager to seek out Human Resources when confronted with these issues to determine how best to proceed.

- Ensure that all attendance, performance, or other similar issues that might implicate family responsibilities claims are properly documented to demonstrate the legitimate, non-discriminatory basis for the discipline or employment action.

- Take claims of family responsibilities discrimination as seriously as other complaints of discrimination or harassment, even if you are in a jurisdiction that does not specifically include this as a protected characteristic, as the organization may still have issues under existing federal, state, and local laws protecting gender, race, disability, and other forms of discrimination.

NOTES

1. 42 U.S.C. § 2000e-2(a).

2. 42 U.S.C. § 12112(b)(4).

The European Court of Justice Denies Professional Legal Privilege to Employed Lawyers

Maurits Dolmans, Dirk Vandermeersch, and Jay Modrall

The authors of this article discuss a much-awaited ruling by the European Court of Justice confirming that written communications between a company-client and its employed in-house lawyer do not benefit from legal professional privilege and are thus not protected against disclosure in the context of EU competition law investigations.

On September 14, 2010, the European Court of Justice (Court) issued judgment in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v. European Commission,* relating to legal professional privilege (LPP) under European Union (EU) law.[1] In the much-awaited ruling, the Court confirms that written communications between a company-client and its employed in-house lawyer do not benefit from LPP and are thus not protected against disclosure in the context of EU competition law investigations. Crucially, the Court found that this holds true even where the employed lawyer is a member of a national Bar and where both applicable Bar rules and the in-house lawyer's employment agreement aim to guarantee independence from the employer.

The judgment maintains the Court's long-standing holding in the 1982 *AM&S* case,[2] which reserved LPP to outside legal counsel who are members of a Bar. The judgment comes as a disappointment to much of industry, including the European Company Lawyers' Association (ECLA), which have long advocated extending LPP to in-house counsel in EU competition law investigations.

BACKGROUND

In its 1982 *AM&S* ruling, the Court held that lawyer-client communications benefit from LPP if they are (1) made for the purpose and in the interests of a client's rights of defense, and (2) exchanged between a client and an "independent lawyer that is to say one who is not bound to his client by a relationship of employment" and who is member of a Bar.[3]

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Akzo sought to expand the scope of LPP following a 2003 on-site inspection by the European Commission during which internal written communications from a Dutch Akzo in-house counsel were seized. The in-house counsel was a member of the Dutch Bar and subject to rules aimed at guaranteeing the full independence of employed lawyers. Akzo took the view that LPP should therefore apply and that the relevant internal communications should be returned to it. The Commission refused to return the documents, and Akzo appealed the Commission's decision to the General Court.

In a 2007 ruling, the General Court sided with the Commission.[4] The General Court reiterated the *AM&S* criterion of "full independence," adding that LPP applies only where legal advice is provided by a lawyer "who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice."[5] Any changes in national laws regarding LPP since *AM&S* were not, according to the General Court, sufficient to change the Court's *AM&S* rule, and only the Court could overturn that rule. Akzo then appealed to the Court. The key issue before the Court on appeal was whether written communications between a Dutch employed lawyer (*Advocaat*) who is a member of the Bar (*Nederlandse Orde van Advocaten*) and the lawyer's employer-client are protected by the EU rule on the confidentiality of lawyer-client communications.

THE COURT'S JUDGMENT

On the Requirement of Independence

The Court's judgment centers on the issue of independence, more specifically whether employed lawyers can satisfy the requirement of independence as laid down in the *AM&S* judgment. In essence, the Court held that employed lawyers do not enjoy the same degree of independence as external lawyers working in law firms, and thus communications with the former cannot, and do not, benefit from LPP. According to the Court "the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers."[6]

Referring to the Advocate-General's Opinion,[7] the Court added that:

> the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal

> effectively with any conflicts between his professional obligations and the aims of his client.[8]

According to the Court, the fact that an employed lawyer may be subject to ethical and disciplinary rules is not sufficient to ensure the independence of employed lawyers. The Court observed that "the professional ethical obligations [under Dutch law] … are not able to ensure a degree of independence comparable to that of an external counsel." This was even more so given that the position of an employee lawyer "(…) by its very nature, does not allow [the lawyer] to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence."[9] The Court also added that the fact an employed lawyer "may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the policy of the undertaking" only reinforces the close ties between an employed lawyer and the lawyer's employer and by implication undermines the lawyer's independence.[10]

In conclusion, the Court considered that it followed "both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer."[11]

Changed Circumstances Since AM&S Not Sufficient to Alter Case Law

Adopting the General Court's findings, the Court further considered that the evolution of the Member States' legal systems does not support a departure from the *AM&S* rule. The Court noted that "the legal situation in the Member States of the European Union has not evolved, since the judgment in *AM&S Europe v. Commission* was delivered, to an extent which would justify a change in the case law and recognition for in-house lawyers of the benefit of legal professional privilege."[12]

Similarly, developments in EU law, most notably the modernization of EU competition law enforcement pursuant to Council Regulation 1/2003 (Regulation 1/2003), do not warrant a reinterpretation of the *AM&S* rule. The Court noted that LPP is not "at all the subject-matter of the regulation" and thus it does not "aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege."[13] Thus, the Court focused on the wording of Regulation 1/2003, while failing to comment on the voluntary compliance regime that it established (and the associated need for in-house counsel LPP).

On Breaches of Principles of Equal Treatment, Rights of Defense, and Legal Certainty

The Court also rejected arguments based on breaches of equal treatment, the rights of defense, and the principle of legal certainty.

As regards the principle of equal treatment, the Court considered the EU Charter of Fundamental Rights and its prior case law. Because employed lawyers are economically dependent on, and personally identify with, their employers, the Court concluded that "in-house lawyers are in a fundamentally different position from external lawyers, so that their respective circumstances are not comparable."[14] Accordingly, the Commission's failure to recognize LPP for communications with employed lawyers does not breach the principle of equal treatment.

With respect to the alleged breach of rights of defense, and more specifically the freedom to choose one's lawyer, the Court observed that "any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions."[15]

Finally, regarding the principle of legal certainty, the Court underlined the division of powers in competition law enforcement (and the difference in enforcement procedures) between, on the one hand, the Commission and, on the other hand, the national competition authorities. According to the Court, LPP may "vary according to that division of powers and the rules relevant to it." The principle of legal certainty does not require that the same LPP standard be applied in both EU and national enforcement of EU competition rules. EU rules apply to the Commission, while national rules apply in proceedings conducted by the national authorities. The Court thus concluded that "the fact that, in the course of an investigation by the Commission, legal professional privilege is limited to exchanges with external lawyers in no way undermines the principle [of legal certainty]."[16]

Breaches of the Principles of National Procedural Autonomy and Conferral

The Court also rejected arguments based on the principles of national procedural autonomy and conferral. The Court underlined that the

uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the Commission in anti-trust proceedings may be carried out under conditions in which the undertakings concerned are treated equally. If that were not the case, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.[17]

As regards the principle of conferral, the Court held that it could not be invoked in the present case, as the matter fell within the exclusive competence of the EU, *i.e.,* ensuring the proper functioning of the internal market (which includes the power to adopt rules of procedure with

respect to EU competition law). Thus, "the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law."[18]

LPP Is Breached as Soon as Confidential Communications Are Seized

Finally, the Court followed the General Court's findings and held that LPP is breached as soon as the Commission seizes documents to which confidentiality attaches, and not only if the Commission relies on privileged documents in a decision. The Commission had argued that Akzo had no interest in bringing the proceedings because the Commission had not relied on the contested documents in its final decision. The Court rejected the Commission's argument and held that a "breach of legal professional privilege in the course of investigations does not take place when the Commission relies on a privileged document in a decision on the merits, but when such a document is seized by one of its officials."[19]

CONCLUSIONS

Despite years of advocacy to extend LPP to in-house counsel, the Court has confirmed the narrow scope of LPP in EU competition law investigations. The Court's ruling excludes LPP for any employed lawyers, whether or not they are subject to ethical and disciplinary rules. This will have important ongoing implications for companies with in-house legal departments. They will continue to need to consider carefully what precautions to take in light of the absence of LPP for in-house counsel.

Fortunately, the *Akzo* ruling, like *AM&S*, is limited to enforcement proceedings by the European Commission. It does not affect national rules on legal privilege, which will continue to apply in enforcement of national competition law and, according to the principle of procedural autonomy, in national enforcement of EU competition law. Unfortunately, however, there is some risk that the *Akzo* ruling may encourage national competition authorities to align their procedures to the more restrictive EU standard on LPP as articulated by the Court. For example, following the General Court's 2007 ruling in *Akzo*, the Belgian Competition Authority's investigators ceased to recognize LPP for members of the Belgian *Institut des juristes d'entreprise*, a national association for employed in-house lawyers that is set up by law.

LPP for in-house counsel remains critically important to ensure that companies can freely seek and rely on legal advice from their in-house legal departments. In-house counsel have long benefited from LPP in the United States, where in-house lawyers are seen as critical contributors to

companies' compliance efforts. In view of the Court's ruling, and subject to possible further challenges before the European Court of Human Rights, efforts to extend LPP to in-house counsel in EU competition law investigations may have to shift to the legislative realm. Since the Commission (at least at present) would not propose such a change itself, the only prospect for such a step would be the introduction of a provision recognizing LPP for employed lawyers by the Council of Ministers or the European Parliament in an amendment to another measure proposed by the Commission. Unfortunately, such a change is unlikely to take place any time soon, but we encourage employed lawyers and companies to seek opportunities to introduce LPP for employed lawyers in appropriate EU legislation and to ensure that lobbyists on their behalf focus on this issue.

NOTES

1. Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission, judgment of Sept. 14, 2010 (not yet published).

2. Case 155/79 AM&S Europe Limited v. Commission of the European Communities[1982] ECR 1575.

3. *AM&S*, at paras. 23–27.

4. Cases T-125/03 and T-253/03, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities, [2007] ECR II-3523, at para. 123.

5. Cases T-125/03 and T-253/03, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities, [2007] ECR II-3523, at para. 168.

6. Case C-550/07 P Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd v. European Commission, judgment of Sept. 14, 2010 (not yet reported), at para. 44.

7. Opinion of Advocate-General Kokott in Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission, at paras. 61–62.

8. *Ibid.* at para. 45.

9. *Ibid.* at para. 47.

10. *Ibid.* at para. 48.

11. *Ibid.* at para. 49.

12. *Ibid.* at para. 76.

13. *Ibid.* at paras. 83–87.

14. *Ibid.* at para. 58.

15. *Ibid.* at para. 96.

16. *Ibid.* at paras. 100–106.

17. *Ibid.* at para. 115.

18. *Ibid.* at para. 119.

19. *Ibid.* at para. 25.

Better Work: Problems with Exporting the Better Factories Cambodia Project to Jordan, Lesotho, and Vietnam

Paul Harpur

Over the last decade, the International Labor Organization (ILO) has managed a dynamic project in Cambodia which has resulted in drastically improved working conditions in Cambodian textile and apparel factories. The success of the Better Factories Cambodia project has led the ILO to expand the project beyond Cambodia to other jurisdictions. The new Better Work Project will develop micro-level projects in Jordan, Lesotho, and Vietnam to improve the respect for workers' rights in those jurisdictions. This article analyses what enabled the Better Factories Cambodia Project to be so successful and analyse the barriers in operationalizing the Better Work Projects in Jordan, Lesotho, and Vietnam.

During the 1990s, the production of retail goods increasingly moved from wealthy, developed countries to less-developed countries where production costs were cheaper. Reports began to emerge that the working conditions in some less-developed countries resembled sweatshops and the competitive advantage gained by the outsourcing of products often came at the expense of the human rights of workers.[1] As globalization removed the barriers restricting trade across borders, corporations took advantage of the opportunities to outsource work to intermediary agents and factories across the globe. Substantial regulatory challenges have been created by the increase in these global supply chains, which often contain a large number of separate corporate entities situated in literally dozens of different nations. Both developed and developing countries proposed a range of regulatory interventions to improve labor rights while maintaining trade. Less-developed countries have struggled to find strategies to maintain their economic growth while protecting labor rights. Cambodia is one less-developed country that has worked with the International Labor Organization (ILO) successfully to increase the recognition of labor rights without economic harm.

The regulatory interventions in Cambodia, which resulted in increased labor rights without damaging trade, were made possible by the micro

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and macro involvement of the ILO in developing and implementing the Better Factories Cambodia Project. The effectiveness of the Better Factories Cambodia Project has resulted in the ILO expanding this project into the independent Better Work Projects in the countries of Jordan, Lesotho, and Vietnam.

This article argues that the Better Factories Cambodia Project model can be successfully transplanted to Jordan, Lesotho, and Vietnam only if the Better Work Projects carefully manages the challenges associated with the transplantation. This article analyses the barriers which the Better Work Projects will confront in transplanting the Better Factories Cambodia Project model and recommends how these challenges can be managed. To analyse the barriers associated with the transplantation of the Better Factories Cambodia Project model, this article uses a doctrinal comparative law approach. This approach is used to analyse the similarities and differences between the jurisdictions and the range of incentives available to the Better Work Projects to encourage participating countries and their factories to respect labor conditions.

THE BETTER FACTORIES CAMBODIA PROJECT

The ILO is the paramount international institution charged with ensuring that countries maintain a regulatory framework that facilitates the protection of labor rights.[2] The ILO was founded in 1919 by the Treaty of Versailles and became the first specialized agency of the United Nations in 1946. The ILO's roles include conducting discussions with governments, employer groups and employee groups, drafting treaties, and handling their ratification. The ILO has drafted numerous conventions which aim to protect labor rights. Due to the support from the United Nations and ILO member countries, the ILO arguably has considerable credibility in setting labor standards and vehicles for their enforcement.

Historically, the ILO has encouraged compliance with labor standards prescribed in conventions through moral persuasion, publicity, shame, diplomacy, dialogue, and technical assistance.[3] While the ILO has traditionally been involved at a macro level by encouraging nations to establish a regulatory framework in which labor rights can be respected, more recently, the ILO has become increasingly directly involved with ensuring that labor standards are respected in international supply chains by becoming involved at the micro level.[4] One of the ILO's most successful projects has been the Better Factories Cambodia Project.

Cambodia is a country in Southeast Asia with approximately 13.3 million people.[5] This less- developed country has suffered some major blows in the recent past. During the rule of the Khmer Rouge Regime from 1975 to 1979, over two million people were victims of genocide. The Khmer Rouge lost power when Vietnam invaded in the Cambodian–Vietnamese War which resulted in Vietnamese occupation from 1975 to 1989. Cambodia then benefited from international intervention during

the United Nations' Transitional Authority in Cambodia from 1992 to 1993. To date, the United Nations and other international bodies are heavily involved in supporting Cambodia through removing landmines, funding education, and supporting democracy.[6] This article focuses on the international support Cambodia has received to promote a vibrant export textiles and apparel industry that respects labor rights. The ILO is driving the labor rights intervention in Cambodia through the Better Factories Cambodia Project.

The Better Factories Cambodia Project became possible initially due to a free trade agreement between the United States and Cambodia called the United States–Cambodia Bilateral Textile Trade Agreement of 1999. This agreement sought to promote Cambodia's fledgling export market, which was responsible for approximately 75 percent of all Cambodia's exports.[7] When the United States was negotiating the free trade agreement, the United States desired to ensure that their market was not flooded by sweatshop products. Despite the passage of the 1997 Cambodian Labor Code, labor abuse was relatively common in Cambodia's approximately 200 factories in 1999.[8] To reduce the instance of sweatshop products being sold in the United States, the United States–Cambodia Bilateral Textile Trade Agreement linked labor rights with increased trade opportunities through a social clause.

A social clause links countries' treatment of social issues, such as human rights or labor rights, with continuing trade.[9] These social clauses can either rely upon countries' stated intentions to enforce labor rights or can have provisions to motivate compliance. Provisions that enforce compliance can either rely upon enforcement provisions or encourage compliance through linking trade incentives to respecting labor rights. The United States–Cambodia Bilateral Textile Trade Agreement incorporated a social clause with trade incentives in a dynamic approach.

To monitor the labor rights in the FTA, the Cambodian parties invited the ILO to become involved at the micro and macro level in Cambodia. After consulting with the country's parties, factories, and trade unions, the ILO agreed to monitor labor conditions in Cambodian factories producing textile and apparel products for export to the United States.[10] The way in which the United States–Cambodia Bilateral Textile Trade Agreement linked labor rights at the factory level, auditing by the ILO, and the use of trade incentives, had not been attempted prior to this agreement.[11]

To monitor labor conditions, the ILO developed a project called the ILO Garment Sector Working Conditions Improvement Project. Subsequently, in 2001, this project changed its name to the Better Factories Cambodia Project, which is the name used in this article. Better Factories Cambodia provided assistance to Cambodia by providing guidance and support in improving domestic labor laws, providing advice to factories, and generally improving Cambodia's capacity to improve labor conditions. Arguably, the aspect of the project which had the greatest impact on improving labor conditions in Cambodia was the rigorous factory audits.

Factory audits remain a major part of the Better Factories Project. To generate these factory audits, the Better Factories Project's teams inspect factories three months after factories sign up with the project. After providing a report to the factory, six months later, Better Factories' inspectors re-audit the factory and make both reports publicly available in quarterly synthesis reports.[12] After this initial period, factories are inspected approximately every nine months and the results are uploaded onto the project's Information Management System's Web site. The factory can then use its password to view its factory audit or give its password to third parties who can also view factories' audits directly from the Better Factories Cambodia Project's Web site.

The Better Factories Cambodia Project summarizes the factory audit data from the Information Management System and creates overall synthesis reports. These synthesis reports provide reasonably accurate data on what is occurring in Cambodia's factories. These synthesis reports were previously used by the United States to determine whether or not Cambodia was entitled to benefit from increased trade access through the trade incentive. The ILO was engaging here in a major micro-level project. The ILO was not assessing the extent to which Cambodia enforced its laws; the ILO was assessing whether Cambodian factories respected labor rights. Even though the conduct of the Cambodian government was not being assessed, clearly the Cambodian government had a vested interest in ensuring Cambodian factories passed the ILO's audits.

The existence of the trade incentive was arguably a significant motive for the Cambodian government to adopt substantial regulatory interventions to ensure Cambodian factories' labor conditions met international standards, which would pass the ILO's inspections. In 1996, Cambodia enacted the 1997 Cambodian Labor Code. This enactment had a number of worker protections. The largest problem in Cambodia was not the existence of labor laws but the failure to enforce those laws. Kolbe analysed the literature on the situation in Cambodia and concluded that prior to the United States–Cambodia Bilateral Textile Trade Agreement there were "pervasive violations of health and safety standards embodied in the Cambodian Labor Code, including inadequate toilet facilities, inadequate medical care and poor ventilation in factories."[13] This created a substantial barrier to Cambodia receiving the benefits from the trade incentives.

To improve domestic labor standards, Cambodia utilized the assistance of the ILO. The United States–Cambodia Bilateral Textile Trade Agreement did not require all factories to participate in the Better Factories Project. The voluntary nature of the Better Factories Project created concerns in Cambodia that some factories would become free riders.[14] The concern was that free-riding factories would gain the benefits of the national positive trade incentives without improving their factories' labor conditions. This would provide free-riding factories with a significant economic advantage over factories that respected labor rights.

As factories that abused labor rights would reduce their labor costs, this would likely result in factories that respected labor rights losing trade to free-riders. This would create pressure upon factories that respected their workers' labor rights to reduce their labor costs by lowering working conditions.[15] In addition to internal pressure upon factories to cut labor standards, the Cambodian government was also concerned that the existence of free-riders threatened the increased market access that Cambodian exports enjoyed under the United States–Cambodia Bilateral Textile Trade Agreement.

To reduce the problem of free-riders and to increase the involvement of the ILO in improving labor standards, the Cambodian government implemented Ministerial Regulation 108 of 2001 which only permitted factories that were participating in the Better Factories Project to gain the benefits from the positive trade incentives flowing from the United States–Cambodia Bilateral Textile Trade Agreement. The Cambodian government achieved this through only giving export licenses to factories that participated in the Better Factories Cambodia Project.[16] This approach was not perfect. As the Better Factories Cambodia Project did not have any enforcement powers and the issue of trade incentives was implemented nationally, individual factories that rated poorly on the audit may not necessarily have lost trade benefits if most other factories in Cambodia passed the audit.

The positive incentive under the Better Factories Project was possible due to the operation of the Multi-Fibre Agreement. This agreement permitted countries that imported products to place quotas on textile imports when surges in imports of particular products threatened domestic industries. This enabled the United States to provide Cambodia additional market access in the United States–Cambodia Bilateral Textile Trade Agreement. The Agreement on Textiles and Clothing resulted in these quotas being removed in 2005. On its face, the removal of the trade incentive reduced the motivation for Cambodia to ensure labor rights were respected. This article now analyses the research that demonstrates that labor conditions continued to improve while the trade incentive was operational under the United States–Cambodia Bilateral Textile Trade Agreement and also when this trade incentive was removed.

The regulatory framework in Cambodia has not significantly altered since the quotas were removed. After the trade incentives ceased to operate, the Cambodian government has continued the policy of requiring all factories that are exporting manufactured textiles and apparel to participate in the Better Factories Cambodia Project. Due to this policy, the research indicates that the respect for labor rights has not diminished when the trade incentive was no longer operational. Pulaski has reviewed the results from the first eight synthesis reports and has concluded that labor conditions in Cambodia have improved due to the ILO's involvement.[17] She noted that 61 percent of factories have implemented about half the suggestions flowing from the audits. When the suggestions concerned wage-related matters, Pulaski notes that the

synthesis reports indicate 95 percent of factories complied with the audit suggestions, but only 41 percent complied with suggestions concerning hours of work and overtime. Wells performed an analysis of published research on the status of labor conditions in Cambodia.[18] He observed that companies such as Nike and Disney, which had left Cambodia prior to 1999, have returned due to the reliable factory audits and the improvements in labor conditions. Wells has concluded:

> Based on evidence provided in these reports from 2001 to 2005, it appears that while there is a considerable distance to go in achieving full compliance with international and Cambodian labor standards . . . [The United States–Cambodia Bilateral Textile Trade Agreement] with its ILO plant monitoring led to significant improvement in many important labor standards.[19]

Based upon the ILO-produced synthesis reports and the literature, it appears the Better Work Cambodia Project has had a significant, positive influence on workers' rights in Cambodia.

Why has the Better Factories Cambodia Project been so successful, even without a trade incentive motivating compliance? Perhaps one reason that Cambodian labor conditions continue to be respected after the trade incentives ended is the culture that was created during the period of time when the trade incentive was operational. Cambodia gained a reputation for respecting labor rights and could use this as a competitive advantage over other jurisdictions. While other jurisdictions could have private corporate social responsibility supply chain auditors, Cambodian factories could rely upon ILO audits.[20]

In addition, the Cambodian government has continued the program of reforming Cambodian labor laws, which started when the trade incentive was operational. The ILO, the United States, and Cambodia have worked together to identify regulatory improvements. One major improvement was the development of the Arbitration Council to hear disputes.[21] The Arbitration Council has become extremely effective in hearing disputes and has the confidence of factories and unions to resolve disputes justly.[22] In this industrial climate, workers became increasingly collectivized and empowered.[23] Once workers became collectivized, they were in a stronger position to resist unilateral actions by factory management through domestic and international campaigns.

While the increased respect for workers' rights is extremely positive, the recognition of workers' rights arguably increases labor costs. The increased cost of production may make some countries and factories reluctant to participate fully in similar schemes. It is therefore important to determine whether the improvement in labor rights has resulted in any economic harm. Considering the size of the export textiles and apparel industry in Cambodia and the growth enjoyed by this sector, it is arguable that the Better Factories Cambodia Project has provided a positive boost to Cambodia's economy. It is possible to track how

Cambodia's economy has continued to grow during the operation of the Better Factories Cambodia Project. Eighty percent of Cambodia's exports are connected with exports in the textile and apparel industries and Cambodia has become the first developing country to achieve $1 billion USD in annual exports.[24] Part of this economic growth can be attributed to the United States–Cambodia Bilateral Textile Trade Agreement. During the first six years of this agreement Cambodia's textile and apparel exports quintupled to $1.9 billion USD and employment levels almost tripled. Rather than resulting in economic damage, the Better Factories Cambodia Project can be associated with substantial economic improvements in Cambodia.[25]

BETTER FACTORIES CAMBODIA BECOMES BETTER WORK

The success of the Better Factories Cambodia Project has motivated the ILO to use this project as a launching platform to expand the Better Factories Program by transplanting this model into other nations. In 2009, the ILO Better Factories Project became the Independent Better Factories Project and the Better Work Project was created.[26] The Better Work Project is currently developing projects with Jordan, Vietnam, and Lesotho.[27] This article now analyses the challenges the Better Work Projects will confront in transplanting the Better Factory Cambodia Project model into Jordan, Vietnam, and Lesotho.

The Development of the Better Work Projects

When transplanting a legal project from one jurisdiction to another, it is crucial to consider the historical, social, economic, political, cultural, and psychological context which has impacted on the operation of the existing laws.[28] The fact that a law has successfully achieved its purposes in one jurisdiction does not mean that same regulatory model will achieve the same outcome in another jurisdiction. Montesquieu famously declared in 1748 that "political and civil laws of each nation . . . should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another."[29] Lord Denning has remarked on the problems of transplanting laws where his Honour observed that: "Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending."[30]

Perhaps the least challenging legal transplant confronting the ILO is the Better Work Vietnam Project. Cambodia and Vietnam have comparatively similar Southeast Asian cultures and share a common border. In contrast, Jordan's culture is based around Arab and Islamic influences and is situated in the Middle East, and Lesotho has a tribal African culture and is surrounded on all sides by South Africa. Economically, all of

these countries have substantial textile and apparel sectors. For example, Jordan's export textile and apparel sector made up approximately 30 percent of this country's total exports in 2005 and the sector employs over 54, 000 workers (two thirds of whom are guest workers).[31] Similarly to Jordan, both Vietnam and Lesotho have significant export textile and apparel industries. While all three countries have textile and apparel exports, the economies of these jurisdictions are substantially different. Lesotho is a small country with a gross domestic product (GDP) of approximately $3.8 billion USD while Cambodia's GDP is approximately $30.6 billion USD, Vietnam's GDP is approximately $85 billion USD, and Jordan's GDP is approximately $26.8 billion USD and supported by large oil exports.

Regardless of the similarities between jurisdictions, a law will have the greatest probability of being successfully transplanted if key stakeholders in the transplanted country are consulted and the transplanted law is modified where appropriate. When implementing the Better Work Projects in Jordan, Lesotho, and Vietnam, the Better Work Projects have worked with local stakeholders and have adopted the operation of the Better Work Project to reflect local conditions.

The least-developed Better Work Project is the Better Work Lesotho Project. This project started with an action plan in May 2006 at the conference, Destination Lesotho: On the Road to Responsible Competitiveness.[32] While Better Work Lesotho has not released reports thus far, it can be noted that Lesotho has ratified the core ILO Conventions and has enacted domestic industrial relations laws, which on a brief inspection appear to provide adequate labor protections on paper. The Labor Code Order 1992 (Lesotho) provides for protection of wages in parts IV and VII, contracts, severance pay, and dismissal protection in part V, safety at work in part VIII, and contains some anti-discrimination provisions in part IX. In 2006, this law was amended by the Labor Code (Amendment) Act 2006 (Lesotho) which provided protection for people with HIV from discrimination and made some other administrative changes.

The Better Work Projects in Jordan and Vietnam are far more advanced than the project in Lesotho. The Better Work Jordan Project has a range of interventions to improve the competitiveness and labor conditions in its textile and apparel sector. Better Work Jordan is preparing to commence independent enterprise assessments to ascertain the level of compliance with ILO standards and Jordanian laws.[33] Following this step, the Better Work Jordan Project intends to engage in "training and remediation" to improve the respect for labor rights. Finally, this project will work towards shared solutions with government, employers, unions, and international buyers to improve labor conditions.

The Vietnam Better Work Project is the only Better Work Project that is fully operational, with the Better Work Vietnam Project commencing on July 30, 2009.[34] One of the motivations behind factories signing on to Better Factories Vietnam is the anticipated reduction in private factory corporate social responsibility inspections.[35] Currently, some

factories are audited several times a year by representatives in different supply chains. The Better Factories Vietnam Project aims to replace the repeated inspections by different supply chain representatives with one reliable yearly inspection. It is intended that the Better Work Vietnam Project inspection will have sufficient creditability so that foreign supply chain representatives will be satisfied with relying on the Better Work Vietnam Project inspection, rather than performing their own private audits. Ms. Tara Rangarajan, Program Manager of Better Work Vietnam, explained:

> The goal is to find practical solutions that will decrease costs for project participants, enhance factory competitiveness in international markets, and reduce poverty among Vietnamese apparel workers, their families, and communities. … The focus of Better Work Vietnam is to make "practical improvements through a focus on workplace cooperation, combining independent assessments of labor standards with advice and training."[36]

Importantly, all the Better Work Projects have been modified and developed with local support. In Jordan, the Jordanian government has worked with the ILO and the International Finance Corporation to develop the Better Work Jordan Project.[37] In Lesotho, the Project is being developed following consultations and contributions with key stakeholders including buyers, non-governmental organizations (NGOs), trade unions, and government officials.[38] The Better Work Vietnam Project was developed with local stakeholders and the pilot Project steering committee includes Molise (which is the Ministry of the Government of Vietnam, which carries out the country's administration of labor), VCCI (which is a national organization which represents Vietnam's business community) and VGCL (which is a socio-political organization representing workers).[39] The fact that Better Work Projects are working with local stakeholders and are prepared to modify the model increases the probability that these Projects will be successful. This article now turns to analysing two major barriers which will arise in successfully implementing the Better Work Projects:

- The absence of a trade agreement with trade incentives; and
- Ensuring the accuracy of Better Work Project factory audits and their economic and legal consequences.

Absence of a Trade Agreement with Trade Incentives

The most substantial difference between the establishment of the Better Work Project in Cambodia and the Projects in Jordan and Vietnam are the absence of international trade agreements with trade incentives. The positive incentive program associated with the Better Factories Cambodia Project motivated the Cambodian government to make substantial reforms

to its domestic laws and to make significant efforts to enforce labor laws. The immediacy of trade incentives acted as a motivation for Cambodia and Cambodian factories to improve their respect for labor rights. Once the program was established and the trade incentives removed, the respect for labor rights continued. Without the support of trade incentives, the Better Work Projects will need to find a different motive to ensure sufficient public and private support to enable the Projects in Jordan, Lesotho, and Vietnam to be implemented successfully.

While it is difficult to speculate whether Jordan, Lesotho, and Vietnam will make similar efforts to Cambodia's in implementing their Projects, it can be noted that it is crucial that Better Work encourages these jurisdictions to review the operation of their domestic labor laws to ensure they comply with international standards. It is beyond the scope of this article to perform a review of Lesotho, Jordanian, and Vietnamese labor laws. It can be noted that there are substantial differences between the coverage of Jordanian and Vietnamese labor laws. For example, Section 2 of the Labor Code of the Socialist Republic of Vietnam protects all workers employed under employment contracts and other groups including trainees and domestic workers. The main labor law in Jordan has a far more limited coverage than the law in Vietnam. Act No. 8 of 1996 to Promulgate the Labor Law of Jordan provides workers with general employment protections including some anti-discrimination and occupational health and safety protections. This law however excludes a substantial number of vulnerable workers. Article 3 of the Act No. 8 of 1996 to Promulgate the Labor Law of Jordan excludes certain workers from the operation of the statute, including public and municipalities' employees, family members of the employer who work in their business against no wage, domestic workers, cooks, and people in similar occupations, and agricultural workers, unless provided for expressly by law or regulations.

This means that a large number of potentially vulnerable workers will receive no protection under the Labor Law of Jordan. For example, the operation of Article 3 means that all home-based textile and apparel workers will not gain industrial relations protection if they work for a family member without pay. This means if a wife and children work for their husband/father without receiving wages, they receive no labor protection. Home-based outworkers are a vulnerable sector of the economy and require protection.[40] It is crucial for the Better Work Jordan Project to find vehicles to encourage Jordan to address this apparent regulatory gap in its laws. While it is positive that Lesotho, Jordan, and Vietnam have ratified all the major ILO Conventions, it is crucial that Better Work identifies strategies to motivate the country to ensure that the domestic legislation provides protection in accordance with ILO standards and that those laws are enforced.

In identifying potential strategies, the Better Work Projects need to find motivations without seeming to punish these countries for participating in projects which are trying to improve labor conditions. For example, if one of these countries received additional negative attention from the Better

Work Projects because the country has problems with its labor laws, then this may result in that country being less willing to continue working with the Better Work Projects. Rather than substantially criticizing a country for its labor laws, perhaps the Better Work Projects could require participating countries to implement certain law reforms prior to the Project commencing. This would ensure there is a reduced variance between the Better Work Project audit criteria and the domestic state and should reduce the instance of companies receiving significantly negative reports.

Perhaps the Better Work Projects could encourage countries to use their synthesis reports to demonstrate compliance with existing international obligations. This is especially relevant with Jordan, which has a free trade agreement with the United States entitled the Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area (2000). This agreement was the first US Agreement to place the labor provisions in the main part of the Agreement and renders a dispute over these provisions subject to the general dispute resolution provisions.[41] Comparatively speaking to other US free trade agreements, the US–Jordan Free Trade Agreement has a reasonably strong social clause that requires Jordan to strive to ensure labor laws are enforced.[42] If the Better Work Projects are able to be successfully utilized by countries to demonstrate a level of compliance with labor rights, then perhaps future free trade agreements may more heavily integrate auditing projects similar to the United States–Cambodia Bilateral Textile Trade Agreement.

As the Better Work Projects is primarily focused on auditing factories, perhaps the focus on providing micro-support and audit reports to factories may provide sufficient motivation for those factories to respect labor rights. To support the Better Work Projects, governments could use their procurement practices to only purchase from factories that have reliable corporate social responsibility audits or have Better Work Project audits. A similar procurement program is currently in operation in some jurisdictions in the United States.

The development of procurement policies that are linked to labor rights has developed out of the sweat-free movement in the United States. This movement was started by the State of Maine, and requires all corporations that supply products to the public bodies associated with the State of Maine, not to have acquired those products from domestic or international sweatshops.[43] Similar laws have now been introduced in other jurisdictions, including California,[44] Pennsylvania,[45] Portland, Maine[46] New Jersey,[47] and San Francisco, California.[48]

Ensuring the Accuracy of Better Work Project Factory Audits: Economic and Legal Consequences

The Better Factories Cambodia Project has blanket coverage over the textile and apparel industry in Cambodia. The Better Work Projects in

Jordan and Vietnam currently do not audit a significant number of factories. As the Better Factory Projects in Jordan and Vietnam are still in their developmental stages, the scope of coverage is not surprising. However, if the participation of factories with the Better Work Projects does not increase substantially, then the nature of the Better Work Projects must alter. Better Factories Cambodia releases reports on how Cambodian labor laws are being respected at the macro and micro level. If the Better Work Projects in Jordan and Vietnam have a more limited role, it will be important for the Projects to focus upon reporting on Better Work Project participants only.

The different processes involved in producing micro reports when compared to macro reports can potentially threaten the Better Work Projects' reputations. There are significant differences between macro and micro reports. Macro reports generally comment upon the content of domestic laws, the extent of prosecutions, and whether those laws are being enforced generally. In developing these reports, institutions such as the ILO, work with the target country. In contrast, micro reports can focus upon the labor conditions in one single factory. Focusing upon micro reporting creates numerous logistical problems. For example, the Better Work Projects may be able to have a reasonable understanding of a country's accuracy on country-based reporting of labor rights and labor activities generally in that country. In determining how a state is likely to respond, the Better Work Project can draw from ILO reports and publications by the United Nations. In contrast, the Better Work Projects will need to understand the activities of private actors in those jurisdictions. Where there are only a few hundred countries in the world, there are literally millions of workplaces across the globe. For example, in 2000, the Asia Monitor Resource Centre reported there were over 5,000 toy factories across China, with a working population of over 1.3 million.[49]

Perhaps one reason behind the ILO structuring the Better Work Projects as independent bodies was to isolate the ILO from any negative consequences flowing from micro reporting. Alston has cautioned that the ILO's move to promote rights at the micro level rather than focusing upon state compliance with treaties at the macro level has the potential to weaken the role of the ILO.[50] In creating the independent Better Work Projects, the ILO has reduced its micro-level involvement in these projects. This will enable the Better Work Projects to increase their expertise in micro-level auditing. When inspecting private entities, the Better Factory Projects must ensure that their inspections are performed in a way that reduces the possibility that factories are able to hide labor abuses from the inspectors.

Performing audits of factories is a substantially difficult process and even major players in the social auditing market have attracted criticism. For example, while accounting firms come with centuries of credibility with auditing financial accounts, these entities failed to successfully audit corporate codes. Accounting firms proved to lack sufficient expertise in

auditing environmental, employment, occupational safety and health, and other areas related to social responsibility.[51] In addition to accounting firms' apparent lack of qualified social auditors, for-profit auditing firms were regarded by workers as merely an extension of management and were viewed with suspicion. O'Rourke has concluded:

> [A]counting firms retained by manufacturers are not the appropriate organisations to be conducting audits of labor . . . conditions. Accounting firms such as Ernst & Young simply do not have the training, independence, or the trust of workers, to perform comprehensive, unbiased audits of working conditions.[52]

To date, the Better Factories Cambodia Projects or the Better Work Projects focus only on auditing the factories and their workers. If that factory outsources production to home-based outworkers or small subcontractors, it is critical for the audits to include all parties in the factory's supply chain. If audits do not incorporate the supply chains, there is a real risk that factories will simply outsource the labor abuses to smaller and harder to regulate subcontractors and outworkers.

It is crucial for the Better Work Projects to ensure that their factory audits are rigorous and do not attract criticism for failing to detect labor abuses. If the Better Work Projects do attract such criticism, these Projects will lose their creditability as independent experts and international supply chains will likely stop relying on their Better Work Project reports to determine factories' labor conditions. This could potentially undermine the ability of the Better Work Projects to encourage countries and factories to participate in the projects.

In addition to losing credibility, if the Better Work Projects provide negligent audit reports, they could be liable under US laws. Some corporations have been accused of using factory audits as exculpatory propaganda—as a form of ideological social control rather than a genuine effort to improve labor conditions.[53] The reliance upon apparently inaccurate factory audits came to a head in the US case of *Nike Inc. v Kasky*.[54] In response to substantial negative media attention about labor conditions in their supply chains, protests, and a decline in sales, Nike launched a public relations blitz.[55] This public relations blitz largely consisted of Nike claiming it had complied with its corporate code of practice, and that labor conditions in its supplier factories was acceptable. A consumer activist, Kasky, filed suit against Nike, claiming, in effect, Nike was lying. Kasky claimed Nike was, in fact, acting socially irresponsibly, and that its public relations blitz consisted of false and misleading commercial statements in violation of California's unfair trade practices and false advertising laws, found in the California Business & Professional Code. The unfair competition law defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law]."[56]

Nike did not seek to deny that it had lied. To defend the case, Nike argued, *inter alia*, that the claim was flawed and that it should not be liable for its representations because it had a constitutional right to free speech in the First Amendment to the US Bill of Rights. In essence, Nike pleaded that constitutionally, it has a right to mislead the public in its corporate social responsibility propaganda. Piety explains Nike's position as follows:

> [Kasky] claimed Nike lied, and Nike replied (in effect), "So what? The First Amendment protects everything your lawsuit alleges we said, even if we lied."[57]

This case was never heard on its facts. Nike attempted to have the case struck out on constitutional grounds through the lower courts, to the California Supreme Court and ultimately to the US Supreme Court. The US Supreme Court did not hand down a judgment on the substantive issues in the case. The US Supreme Court held *certiorari* was "improvidently granted."[58] Kasky's claim was struck down and the veracity of Nike's public relations' claims was never tested. Even though the US Supreme Court declined to hear the case and provide a precedent, human rights advocates have rated *Nike Inc. v Kasky* as a victory, in the sense that it provides a warning to corporations and other entities that they run the risk of litigation if they use knowingly inaccurate or suspect audit reports.[59] This means that if the Better Work Projects provide audited reports of factories and fail to identify substantial labor abuses in those factories, then there is a risk that the Better Work Projects could be sued.

THE BENEFIT OF BETTER WORK: CREATING ECONOMIC GROWTH THROUGH RIGHTS AND NOT THEIR ABUSE

The Better Work Projects represent an extremely positive policy shift for many developing countries. Previously, some countries aimed to create economic growth through abusing labor rights. The most egregious policies to create economic growth through abusing labor rights can be evinced by special economic zones or export processing zones. These zones are geographical areas that are designated to be largely free from domestic regulation, providing that all products manufactured in the zone are exported outside the country.[60]

Prior to the 1970s, Asian manufacturing factories generally manufactured products for domestic consumption. With the encouragement of major international institutions such as the World Bank and the International Monetary Fund, Asian nations developed special economic zones to assist in these states' economic growth.[61] The purpose of these zones was, and continues to be, to attract investment in building factories and exporting goods in a regulatory environment that does not

enforce labor rights. Through abusing workers' rights, factories are able to reduce costs and under cut factories that respect labor rights. For example, special economic zones were introduced in China, *inter alia*, to develop economically and to improve the employment prospects of its under-utilized population.[62] Factories took advantage of these zones and exploited labor in the factories.[63] The introduction of special economic zones as a vehicle for economic growth has resulted in substantial adverse results for workers.[64]

In contrast to special economic zones that aim to create economic growth through abusing rights, the Better Factories Projects aim to create economic growth through improving labor rights. The success of the Better Factories Cambodia Project has resulted in three jurisdictions embracing the model of improving labor rights as an approach to improving economic growth. The policy shift that underpins the expansion of the Better Work Projects has the potential to improve the lives of tens of millions of workers across the globe as states move away from abusing rights towards respecting workers' rights.

CONCLUSION

In 1999, the ILO became involved with a dynamic project in Cambodia to improve respect for workers' rights in the textile and apparel sector. This project became known as the Better Factories Cambodia Project. This project has been credited with improving the labor conditions of Cambodian workers. The success of the Better Factories Cambodia Project has resulted in the ILO expanding this concept into other jurisdictions. The new Better Work Projects are developing Projects in Jordan, Lesotho, and Vietnam. This article has analysed the reasons behind the success of the Better Factories Cambodia Project and speculated whether the format of the emerging Better Work Projects will achieve similar success.

The major difference between the Better Factories Cambodia Project and the emerging Better Work Projects is the motivation countries have to be involved. The Better Factories Cambodia Project was created as part of an international trade agreement that provided Cambodian exports increased access to trade with the United States if the ILO determined that Cambodian factories were complying with ILO labor standards and Cambodian labor laws. This created a significant trade incentive for the Cambodian government and factories to respect labor rights. In contrast, the new Better Work Projects are not associated with any international trade agreement involving incentives to improve labor rights. The Better Work Projects rely on improving the efficiencies of, and attracting supply chains to, participating jurisdictions. While the Better Work Projects offer enormous resources to participating countries, the level of this support may not motivate the same level of compliance as incentives linked to an international trade agreement. If states participating in the

Better Work Projects are not committed, this creates a potential barrier to these Projects' success. As the Better Work Projects will be performing factory audits, the Projects will attract negative publicity and litigation if labor abuses emerge in audited factories. Under the Better Work Vietnam Projects, factories will only be audited once a year. This creates a large window of opportunity for factories to abuse workers' rights. The success of the Project will therefore depend upon the ability of participating countries to enact and enforce domestic laws. To support the Better Factories Cambodia Project, Cambodia enacted new laws and enforced those laws. Countries that participate with the Better Work Projects should be expected to review their domestic laws to ensure they meet ILO standards, review those laws where appropriate, and enforce those laws. While the development of the Better Work Projects will be complex, if the improvement in labor rights from Cambodia can be replicated in other states, then the ILO's decision to devote resources for micro-level development will be vindicated.

NOTES

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Employee Training Key to Dodging Business Risks and Protecting Consumer Rights When Utilizing New Technology

Stephanie Sheridan and Alison Williams

Technological advances are exciting and bring many benefits for both businesses and consumers. Yet this is also a time when people are increasingly concerned about their consumer rights, and well-intending, yet oftentimes difficult to navigate, laws have been implemented as a result. Because new technology tools depend on employee support and implementation, employee knowledge about applicable risks and laws and compliance therewith are crucial to success. In this article, the authors discuss recent technological innovations and their impact on the workplace.

As technology advances, so do the opportunities for companies that utilize it. Businesses are becoming more efficient by replacing manual employee timesheets and cumbersome membership cards with biometric scanning. Smartphone apps allow companies to know when a particular customer is in their stores and what that customer does while he or she is there, as well as to send the customer coupons for instant in-store savings. And the days of the paper gift certificate will soon be behind us. But possibilities aside, the success of these new developments will depend in large part on the employees that are charged with putting them into practice on a day-to-day basis. Therefore, preparing employees to confront these new programs, as well as to understand the risks and laws that accompany them, cannot be overlooked.

BIOMETRIC SCANNING

Biometric scanning, which is a method of identifying people through the recognition of intrinsic physical behaviors or traits, is being used for clocking in hourly employees, checking in gym members, gaining entrance to night clubs or private clubs, checking out library books, keeping track of subsidized meals for school children, and using skate parks. The traits used in biometric scanning can include fingerprints, palm prints, facial features, DNA, retinas, irises, odors, rhythm, gait and voice. In order for a company to identify a person based upon his or

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her biometric information, an initial scan must be taken and stored in the company's database.

Biometric scanning can benefit businesses, employees, and customers. For example, using biometric scanning to clock in employees means that timesheets are automatically reflected in payroll records, without the need for manual punch cards. That means less paperwork coupled with increased efficiency and accuracy. Likewise, because a person always has his or her biometric information with him, he or she will no longer be inconvenienced by leaving a gym or library card at home. On that same note, many businesses enjoy the "cutting edge" image that accompanies biometrics.

Providing this information, however, comes with certain risks because biometric information, if compromised, cannot be replaced. Companies and their employees must therefore take extra precautions if they want to use biometric scanning in their business models. Biometric information that is stored on company databases must be sufficiently encrypted so that it cannot be reverse engineered. Also, companies should limit the amount of biometric information they collect from people to prevent thieves from building a composite with someone's information. Increased diligence must also be employed when destroying information, as well as when informing employees or consumers of a breach.

MINORS

Other issues come into play when obtaining biometric information from minors. Locations using fingerprint scans for children include school cafeterias and libraries, as well as skate parks, which have found biometric information useful in preventing bullying and vandalism. Businesses signing up minors for such programs must obtain parental consent before submitting the minor to the scan, and parents should be informed of what the information will be used for and how it is stored and secured. Added protections must be taken in circumstances surrounding children because the child will not be the ultimate person providing consent as to his own information, and the consequences of a person's biometric information being compromised at an early age are unfair as that minor conceivably could be disadvantaged for his entire life. Alternatives must also be made available for children who do not wish to submit to the scan.

PERSONALIZED MARKETING

Today, personal data are constantly being collected and stored by retail interests for marketing purposes. A basic example is asking a customer for his or her email address or other contact information while the customer is in a store or making a purchase, and then

storing this information in the company's database to keep track of the customer's purchases or to send the customer promotional materials.

A more advanced technique comes in the form of smartphone virtual loyalty program applications. One of the most recent and highly developed examples of such a smartphone loyalty program is Shopkick. A customer downloads the app, and activates it on his or her smartphone. Then, when the customer walks into a participating store, the customer's smartphone picks up a high-frequency, inaudible sound from a device installed in the store. Once the smartphone picks up the signal, it alerts the company that the customer is inside the store. Because the store knows the consumer is present, it can send the customer coupons for immediate use, which the customer can redeem by giving the cashier his or her phone number. Customers also may earn "loyalty points" from Shopkick's rewards program in return for in-store behaviors, such as trying on clothes, which can be monitored as well.

PRECAUTIONS TO AVOID LIABILITY UNDER PRIVACY STATUTES

While, with some caveats, it is legal for companies to request personal information about their customers and maintain databases about their shopping habits, this increased access to information, particularly that afforded by the smartphone apps, raises heightened privacy and legal concerns. First and foremost, to avoid becoming ensnarled in certain consumer protection laws, customers must be reminded that providing personal information is voluntary, and this reminder must come from the employees who are requesting it on behalf of the store. For example, when asking a customer for an email address, the employee must ensure that the customer knows that providing the information is not required to complete her purchase. Even though it seems obvious that providing such information is never mandatory, the company runs the risk of violating laws such as California's Song-Beverly Credit Card Act under which companies may not request and record personal identification information from a customer during a credit card transaction in a way that makes the customer think it is a condition of completing the transaction. Likewise, when an employee at a store participating in Shopkick's program asks a customer for his or her phone number so that the customer can redeem his or her coupons, the employee should err on the side of caution by reminding the customer that the phone number is needed to retrieve the coupon only, and is not a general requirement of the transaction.

As technology advances and consumers increasingly provide their personal information to retailers, the amount and variety of information that companies store increases as well. To ensure that consumer privacy rights are protected, databases must be adequately protected and their

use restricted to businesses and individuals that are specifically disclosed to consumers.

A recent lesson on this topic comes from Facebook, where some of its popular applications have been found to be transmitting personal information to advertisers and Internet tracking companies due to an allegedly inadvertent leak in the program. Creators of these apps have also been accused of selling this information to third parties. And, not surprisingly, class action lawsuits were quickly filed against all of the companies involved as a result of unauthorized third parties receiving consumer information.

As a takeaway point, companies maintaining databases with private information must take careful steps to identify program weaknesses before these issues arise. Furthermore, privacy protection policies should be implemented that specify how information is stored and used, and employees need to be well versed in what these policies are in order to inform consumers about their protections, and refer consumers to other resources (either online or in-store signage) about these policies for their reference.

NEW RULES GOVERNING GIFT CARDS

Finally, new gift card rules came into effect in August 2010, as the final rollout of provisions from the Credit Card Act of 2009. Retail employees issuing and accepting gift certificates, store gift cards, and general use gift cards such as Visa or American Express gift cards should be familiar with these guidelines.

The new rules require that the gift card be good for at least five years. If money is reloaded onto the card, then it must be good for five years from that date. And while the card may expire, it is important to note that the underlying funds on the card do not. If there are remaining funds on any expired card, the customer may request that her gift card be reissued in the remaining amount, which must be done at no charge.

Furthermore, only specific fees may be assessed against the card's balance. No inactivity or service fees may be charged for the first 12 months after a gift card is issued. After this 12-month period has elapsed, only one inactivity or service fee can be deducted from the balance each month. This restriction does not apply to one-time fees such as activation fees.

Certain disclosures must also be printed on each card. For example, information about the frequency and amount of any fees that may be charged for things like inactivity must be disclosed. Information about expiration must also be on the card, as well as a toll-free number and the address for a web page that the customer can consult for further information.

Although these rules are already in effect, one caveat applies to gift cards that were printed prior to April 1, 2010. The Eco-Gift Card Act was

enacted to prevent the destruction of the approximately 100 million gift cards that were printed without the required disclosures. Thus, gift cards that were produced prior to April 1, 2010, may be sold through January 31, 2011, but they are still subject to the expiration, fee, and disclosure rules of the Act. Because the disclosures are not printed on these cards, businesses selling these cards must use alternative methods to make the disclosures, such as posting signs in stores or on web sites. Gift cards that were printed after April 1, 2010, must have the required disclosures printed directly on the cards.

Technological advances are exciting and bring many benefits for both businesses and consumers. Yet this is also a time when people are increasingly concerned about their consumer rights, and well-intending, yet oftentimes difficult to navigate, laws have been implemented as a result. Because new technology tools depend on employee support and implementation, employee knowledge about applicable risks and laws and compliance therewith are crucial to success. Consultation with legal counsel knowledgeable about these issues is key before implementing any new programs to ensure that proper security and training methods are in place for the protection of the business and its consumers alike.

Litigation Lessons Impacting Franchise Relationships

Steven E. Clark

This article considers recent legal developments from the perspective that they will impact franchise relationships in litigation. Although these developments will certainly affect other areas of law, it is useful to consider their implications on both franchisor and franchisee.

A franchisee/franchisor relationship requires ongoing communication that is not always friendly or even pleasant. At no time is this relationship more contentious than in the midst of litigation. Recent case law developments will impact both sides of this relationship. This article summarizes and discusses recent legal developments that are likely to impact franchise relationships in litigation.

ELECTRONIC COMMUNICATIONS AND THEIR IMPACT ON THE FRANCHISOR/FRANCHISEE RELATIONSHIP

As in other business relationships, email and text messaging have become primary and convenient means of communication between franchisor and franchisee. In some instances, these forms of communication have even replaced more formal communication through letters and memoranda. Unfortunately, most people approach email and texting very informally, and do not review their content critically before hitting the send button. This in turn leads to statements that may later be viewed as damaging when a dispute arises between parties, whether in the employment or business relationship.

A recent jury verdict in a franchise case confirms this line of thought. A franchisee was terminated and asserted a counterclaim for retaliation. The CEO sent an email response to the franchisee's complaint over being terminated based on racist policies, and angrily responded by stating "I am not going to tolerate your behavior toward myself or my people any longer" and indicated that failure to abide by the franchisor's request would result in the termination of the franchise

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agreement. Fewer than six hours after this email, the CEO sent out a letter terminating the franchise, even though the franchise agreement had an opportunity to cure deficiencies provision which gave the franchisee up to 30 days to cure the default. This email and the franchise cure provision became the framework during closing argument and resulted in the jury finding that the termination was unlawful retaliation by the franchisor.

As in all business matters, care should be taken in responding to email that may form the basis of a future dispute and litigation. A thoughtful and careful response, sent to legal counsel prior to forwarding, may avoid the email from becoming the centerpiece of an opponent's evidence and closing argument.

PROVING CONTRACT AND INTELLECTUAL PROPERTY DAMAGES

In the same franchise case discussed above, the franchisor attempted to prove past and future lost royalties through its comptroller.

At the close of the franchisor's case, counsel for the franchisee moved for a directed verdict on the breach of contract and intellectual property claims on the basis that the franchisor had failed to present competent evidence of damages to support submission to the jury.

Breach of Contract Damages

Without an analysis of "the reasonable value of what defendant may have received from the plaintiff by way of part of performance," a franchisor cannot prove legally sufficient evidence of damages.[1] A valuation of hypothetical royalties does not satisfy this test.

Here, the plaintiff's witness did not perform a separate calculation using any of the general contract remedies. As stated in her testimony, she calculated one figure concerning royalty payments under the agreement, including advertising revenue, but provided no analysis regarding what lost profits were, restitution for investments made by plaintiff, or any benefit of the bargain losses.

The sole analysis for breach of contract damages was based on royalties that would have been paid under the agreement, assuming certain hypothetical facts. Because there was no assessment of general damages, under contract law, the only available remedy was for damages pursuant to the express terms of the agreement. Article 13(f) of the franchise agreement provided for damages that constitute restitution or "benefit of the bargain" damages: "the total amount of royalty payments and PIAP payments that the Company would have received from operation of Franchisee's Restaurant from the date of Termination through expiration of the Term of this Agreement." Under Texas law, such damages include the "reasonable value of what defendants may

have received from the plaintiff by way of part performance."[2] Because the calculation of contract damages was based on an improper methodology, the contract claim failed.

Lanham Act Damages

Should lost profits arising from lost sales not be recoverable, the plaintiff will typically present a damages demand based on the award of a reasonable royalty. The franchisor attempted to rely on the comptroller's testimony of a future reasonable royalty rate as supporting evidence for their Lanham Act claim under 14 U.S.C. Section 1114. However, such reliance was deficient because that testimony was not based on the 15-factor *Georgia-Pacific* analysis, but an unreliable estimation.[3] The witness testified that she determined the royalties and advertising fees based on the percentages provided under the Franchise Agreement, which was 4 percent for the royalties and one percent for advertising fees. She clearly indicated that this calculation of a future reasonable royalty was based only on the past percentages provided under the Franchise Agreement.

This is an incorrect computation of reasonable royalties. In *Holiday Inns, Inc. v. Airport Holiday Corporation*,[4] the defendant motel operator was a licensee of the plaintiff Holiday Inns, Inc. Among other things, the defendant's license permitted it to use the Holiday Inn servicemarks. Holiday Inn later terminated the defendant as a licensee, but the defendant continued using Holiday Inn's marks without paying royalties.

Addressing the proper measure of damages, the Northern District of Texas explained that "royalties normally received for the use of a mark are the proper measure of damages for misuse of those marks."[5] The court then held that the plaintiff was entitled to damages based on the royalty fees it should have received from Holiday Inn's use of its protected marks.

In the instant case, the franchisor established that its franchisees paid royalties in exchange for a wide variety of benefits in addition to the use of its marks. These benefits included its established system of doing business, proprietary recipes, and extensive training programs for managers and owners. The franchisor was unable to specify the portion of royalties it charged for use of its protected marks; therefore, it was denied an award of reasonable royalties under the Lanham Act.

Furthermore, the lack of sufficient data and factual support failed to confer any indicia of reliability in the franchisor's royalties calculation. In *Lumber Liquidators, Inc. v. Stone Mountain Carpet Mills, Inc.*,[6] the court found that the plaintiff's expert testimony "lacks the required indicia of reliability to be admitted as expert testimony regarding the proper measure of damages in this case ..." because the expert's opinion applied only three of the 15 *Georgia-Pacific* factors.

Misappropriation of Trade Secret Damages

Damages for misappropriation of trade secrets include damages that are "a direct and proximate result of the defendants' use of the trade secret."[7] A "reasonable royalty" calculation of hypothetical amounts that may have been owed under the Franchise Agreement—which was the damages theory proffered by the franchisor—does not constitute damages that are "a direct and proximate result" of the defendants' use of the trade secret. Rather, the franchisor proffered a "benefit of the bargain" analysis instead of analysis based on "direct" damages that are "the proximate result" of the use of the trade secret. Precedent dictates that if a franchisor offers no testimony concerning damages that are the "direct and proximate result" of the alleged misappropriation of trade secrets, it will ultimately fail to support a cause of action for misappropriation of trade secrets.

Stacking Damages

In *Tu v. TAD System Technology Inc.*,[8] the Eastern District of New York rejected the plaintiff's attempt to stack damage awards under the Copyright Act, the Digital Millennium Copyright Act, and the Lanham Act, holding that "Plaintiffs are not entitled to duplicative recoveries for the same intellectual property theft under multiple theories of liability. ..."[9]

The franchisor submitted one hypothetical and unreliable royalty calculation as its damage model for all of the causes of action in this case. The reasonable royalty calculation is alleged to cover damages for breach of contract, violation of the Lanham Act, misappropriation of trade secrets, and unfair competition claims. As reflected in the *Tu* case, duplicative recoveries for the same intellectual property theft is not allowed. Thus, the franchisor's entire damages calculation was ruled inadequate as a matter of law.

PROOF OF ATTORNEY'S FEES

Typically, reasonable attorney's fees in civil rights cases are based on what is called the "lodestar:" the number of hours worked multiplied by the normal hourly billing rate. This lodestar is then modified to take into account the extent of the plaintiff's success, or lack thereof.

In *Perdue v. Kenny*,[10] the Supreme Court considered the question whether the "lodestar" calculation of attorneys' fees may be increased based on the quality of an attorney's performance and the results obtained. The short answer is that enhancement of attorneys' fees under the lodestar analysis is permissible only in truly extraordinary circumstances.

According to the Court, the two factors—the quality of the attorney's performance and the results obtained—should be treated as one because

"superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance." The Court listed three rare and exceptional situations in which an enhancement to the lodestar may be appropriate:

1. "Where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value";

2. "If the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted"; and

3. Where "an attorney's performance involves exceptional delay in payment."[11]

As a general consequence of the Court's holding in *Perdue*, attorneys will likely charge higher hourly fees. With respect to contingency fee cases, attorneys will likely declare a higher range of reasonable hourly rates. While higher hourly attorney's fees may not be a big issue for franchisors with a large number of resources, it is potentially troublesome for the small franchisee.

The franchise case discussed above was significantly more novel and complex than a typical employment case of wrongful termination because the franchisee was forced to defend against a breach of contract claim and numerous intellectual property claims. These claims required familiarity with contract law, franchise law, and intellectual property law. Even though the franchisee did not prevail on all his claims or receive all the damages he requested, the results obtained from the litigation were extraordinary. It is not easy for a franchisee to prevail on counterclaims for retaliation, yet this is exactly what the franchisee did. Moreover, he defeated the franchisor's claims under the Lanham Act, for misappropriation of trade secrets, and unfair competition. However, the franchisee was dissuaded from asking for an enhancement to his attorney's fees because of the difficult standard set by *Perdue*. Instead, the franchisee asked that he receive at least the same amount of attorneys' fees that the franchisor' attorneys would be entitled to because the franchisee was successful where the franchisor was not.

Generally, it will be an exceedingly rare case in which the lodestar may be enhanced based upon superior performance by a prevailing plaintiff's attorney. However, if there is a lesson to be learned in the recent case of *Nassar v. University of Texas Southwestern Med. Center*[12] it is that an attorney who puts on a "superb" civil rights case can win nearly all requested attorney's fees—even when that attorney charges $750 an hour. US District Judge Jane Boyle of Dallas approved nearly half a million dollars in attorney's fees requested by four lawyers who represented a plaintiff in a successful employment discrimination and retaliation suit against UT Southwestern.[13] Although this came as a

surprise to the legal community, Judge Boyle noted that the court has discretion to award attorney's fees to the prevailing party in a Title VII case:

Sparse as the descriptions are, [the plaintiff attorney's] preparation was evident and her preparation at trial superb. While the description is hardly illuminating, the number of hours claimed appears to be reasonable in light of the results obtained and the court's observation of the attorney's performance at trial.[14]

The level of "superior attorney performance" required for enhancement is subject to a highly subjective standard that will certainly be difficult to meet. Yet the *Nassar* holding suggests that reaching this level is not impossible.

CONCLUSION

Although these developments will certainly affect other areas of law, it is useful to consider their implications on both franchisor and franchisee.Moving forward, franchisors will likely need to reconsider their litigation strategies regarding damages calculations and requests for attorney's fees. Even before reaching litigation, it will be prudent for both franchisors and franchisees to adopt a more formal approach to electronic communications.

NOTES

1. *See* IT Corp. v. Motco Site Trust Fund, 903 F. Supp. 1106 (S.D. Tex. 1994).

2. *Id.* at 1133.

3. *See* Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116 (S.D.N.Y. 1970).

4. 493 F. Supp. 1025, 1028 (N.D. Tex. 1980).

5. *Id.*

6. 2009 WL 5876245, at *3 (E.D. Va. July 23, 2009).

7. Alcatel USA, Inc. v. DGI Techs., Inc.,166 F.3d 772, 784 (5th Cir. 1999); Phillips v. Frey, 20 F.3d 623, 627 n. 5 (5th Cir. 1994); Taco Cabana Intern., Inc. v. Two Pesos, Inc.,932 F.2d 1113, 1123 (5th Cir. 1991).

8. No. 08-CV-3822 (SLTRM), 2009 WL 2905780 (E.D.N.Y. Sept. 10, 2009).

9. *Id.* at 3–5.

10. 130 S. Ct. 1662, 559 U.S. ___ (2010).

11. *Id.*at 1668.

12. No. 3:08-cv-1337 (May 24, 2010).

13. No. 3:08-cv-01337-B (N.D. Tex. – Dallas, May 28, 2010).

14. *Id.*

Roth In-Plan Conversions: New Opportunities for 401(k), 403(b), and Governmental 457(b) Plans

Anne E. Moran

The rules governing Roth IRAs change in 2010. Higher income individuals are able, for the first time, to convert their traditional IRAs to Roth IRAs. As discussed below, Roth IRAs have potential tax advantages, depending on individual circumstances and changes in marginal tax rates. Those individuals who believe that conversion to a Roth IRA is attractive in their circumstances may want to contribute as much as possible to the Roth IRA. Until passage of the Small Business Jobs Act of 2010 (the Act), the only way to effect this conversion was to elect a distribution from a 401(k) or other qualified retirement plan and roll over the distribution to a Roth IRA.[1] This is because the law did not provide for the special tax advantages of Roth conversion for in-plan transfers from a traditional retirement plan account to a "Designated Roth Account" in 401(k) and 403(b) plans. The Act changed this. It allows participants to transfer benefits from their traditional 401(k) or 403(b) accounts to a Designated Roth Account inside a qualified plan and treats the transfer like a conversion to a Roth IRA for tax purposes. (Note that distributions from the Designated Roth Account are not treated exactly the same as Roth IRA distributions, as discussed below.) Plans and employers are not required to offer this new feature; it is voluntary. This article discusses some of the issues that employers must consider if they decide to offer this new option.

Background

There are two basic types of individual accounts available for retirement savings. The first is a traditional IRA, to which either deductible or nondeductible contributions may be made (depending in large part on the taxpayer's income level). The second is a Roth IRA, to which nondeductible contributions can be made. The annual limit on both types of IRA contributions is $5,000 ($6,000 if age 50 or over) in 2010 and 2011, although larger rollover contributions can be made.

The Small Business Jobs Act of 2010, signed by the President on September 27, 2010, allows participants in a 401(k) or 403(b) plan to transfer benefits from their traditional 401(k) or 403(b) accounts to a Designated Roth Account established under the same plan. In 2012, governmental section 457(b) plans will be able to establish a Designated Roth Account and permit such conversions. This new option, which is a voluntary feature that an employer can choose to offer, is discussed below.

In a traditional IRA, contributions can be deducted by a taxpayer depending on a taxpayer's income and whether the taxpayer or spouse is an "active participant" in a qualified retirement plan.[2] *Earnings* under a traditional IRA (whether or not the contributions were deductible) are not taxed until a distribution is made from the IRA. Distributions made prior to age 59½ are subject to a 10 percent early distribution tax unless specific exceptions apply. Finally, distributions from a traditional IRA generally must begin within a stated period of time after age 70½ or death.[3]

Contributions to a Roth IRA are *not* deductible. Taxpayers with incomes over $105,000 ($162,000 for married filing jointly) cannot make contributions directly to their IRAs, although after 2009 they can *convert* traditional IRAs to Roth IRAs or roll over funds from a qualified plan to a Roth IRA. If certain conditions are met, the Roth IRA distribution will be "qualified" and the earnings will never be taxed. A qualified distribution from a Roth IRA must be made after the five-year period beginning with the first taxable year for which a contribution was made to *any* Roth IRA established by the individual. In addition, the qualified distribution must be made on or after age 59½, on account of disability or death, or for a qualified first home purchase (subject to a $10,000 lifetime cap).[4]

Section 401(k) and 403(b) plans can have accounts available for participant contributions that are similar but not identical to these IRAs. If the plan permits salary deferrals, taxpayers of all incomes can defer their salary up to a stated level ($16,500, plus a potential $5,500 catch up for persons age 50 or older) into a 401(k) or 403(b) plan (subject to nondiscrimination rules). Those salary deferral contributions (and earnings) will not be taxed until they are distributed.

If the plan so provides, a participant's salary deferral contributions can be made to a "Designated Roth Account." Like the Roth IRA, in that case the contributions would not be excludable from income but the earnings would grow tax free. And similar to the Roth IRA, if amounts are held in the Designated Roth Account for at least five years, *and* if the distribution is made on or after age 59½, disability, or death, the earnings will be distributed tax free. (The exception for a first-time home purchase that applies to Roth IRAs does not apply here.) For this purpose, the five-year period is measured from the first day of the year of the participant's first contribution to the Designated Roth Account in the plan. Unlike the rule for Roth IRAs, plan contributions to Designated Roth Accounts in other qualified plans are not aggregated unless the amounts are *directly* transferred from one plan to another; a distribution followed by a rollover would not be considered a transfer for this purpose.

Employer contributions made to a 401(k) or 403(b) plan also are not taxed until distribution. The maximum amount of employer contributions (or match) is a function of plan design as well as Tax Code limits and nondiscrimination rules.

Eligible rollovers from retirement plans can be rolled over, tax free, to an IRA or to another qualified plan that accepts such rollovers. An eligible rollover distribution is, generally, all or part of taxable distribution paid as a lump sum or in installments of less than ten years; they generally cannot include any required minimum distributions. Rollovers can include salary deferral contributions as well as employer contributions.

Taxpayers have had the opportunity to convert their traditional IRAs to Roth IRAs, and to convert pre-tax distributions from qualified plans to Roth IRAs. By taking the converted or distributed amounts into income upon conversion, taxpayers could then hope to enjoy the tax advantages of Roth distributions in the future. Until 2010, this IRA conversion right was not available to individuals with incomes over $105,000 ($167,000 for married taxpayers). After 2009, there are no income limits on conversion opportunities. In addition, a special income inclusion timing rule applies to rollovers to Roth IRAs or conversion to Roth IRAs for 2010 only: Any amount otherwise includible in income in 2010 will not be included in income in 2010, but will be included in income in equal amounts for 2011 and 2012.

Differences Between Roth IRAs and Designated Roth Accounts

Designated Roth Accounts do not have all of the features of Roth IRAs. First, Roth IRAs are not subject to the minimum required distribution rules that mandate that distribution begins within a stipulated period after 70½ (or termination of employment) and death. Designated Roth Accounts in a 401(k) or 403(b) plan are subject to those minimum distribution rules.

Second, the withdrawal ordering rules for the two arrangements differ. IRA distributions are treated as after-tax first (to the extent in after-tax contributions are made) and so IRAs are not taxed until all after-tax amounts are distributed. (Of course, this "basis-first" rule would be irrelevant assuming the distributions from the Roth IRAs are qualified distributions because the holding period requirements have been met. In that case, the entire distribution would be tax free.) By contrast, income and "basis" (*i.e.*, after-tax contributions) from a Designated Roth Account in a qualified 401(k) or 403(b) Plan are distributed on a pro-rata basis.

Third, there is no exception from the five-year rule for first-time home purchases in a Designated Roth Account; this exception applies only to the Roth IRA.

Finally, individuals who elect a Roth IRA have an opportunity to rescind their election by the due date for filing their return.[5] This could prove helpful if account values plummet. Designated Roth Accounts in a 401(k) or 403(b) plan do not have this option.

Effect of the Act

The Act allows participants in a 401(k) or 403(b) plan to transfer funds from their pre-tax accounts to a "Roth" account maintained in the same plan, if those amounts are otherwise distributable and the plan allows the transfer. The provision amends the rules for plans of a state, a political subdivision of a state, an agency or instrumentality of a state, or an agency or instrumentality of a political subdivision of a state (collectively, "governmental 457(b) plans") to allow the establishment of Roth accounts and in-plan conversions in 2012.

As discussed above, prior to the Act, pre-tax amounts could be transferred to a Roth IRA. A participant who made a transfer to a Roth IRA would include the transferred amount in income, but the participant would not be subject to the 10 percent early distribution excise tax. Under a special rule for 2010 only, a participant who transferred amounts in 2010 would include half of the taxable amount in income in 2011 and half in 2012.

The Act permits in-plan conversations to Roth accounts without a distribution and rollover to an IRA as described above. The tax rules applicable to the transfer would be the same (income inclusion, but no 10 percent penalty tax, and the special income inclusion timing rules for 2010 only). This change was made in response to concerns that participants would withdraw significant amounts of money from their employers' plans in order to roll over such funds to a Roth IRA. Policymakers expressed concern that by encouraging such distributions, participants might make significant withdrawals from qualified plans, but might not transfer the *entire* withdrawal to a Roth IRA, thus causing "pension leakage" of otherwise available retirement savings. There was also another reason for this provision. It is estimated to raise over $5 billion dollars over ten years, because participants who convert their pre-tax accounts to Designated Roth Accounts recognize income in the year of the conversion (except for 2010). Any tax advantages of a Designated Roth Account to participants are spread out over later years, so they have less effect on short-term budget projections.

Considerations for In-Plan Conversions

Only Distributable Amounts Taxable

In-plan conversion can only apply to amounts that are otherwise permitted under qualified plans. Thus, for example, pre-tax salary deferrals cannot be distributed or converted before the participant is 59½, terminates employment, or is disabled.

Employer matching or nonelective contributions made to satisfy a safe-harbor 401(k) plan design are subject to the same restrictions

because under the law, they have the same distribution restrictions as salary deferral contributions.

Other employer contributions to a 401(k) or 403(b) plan are not subject to these specific distribution restrictions, but are distributable only as permitted under the plan terms. Generally, under the law, these contributions can be distributed if held and they are "seasoned," *i.e* ., held in the plan for a specified period of time—usually after at least five years of participation or two years after the contribution has been made to the plan.[6] In many cases, plans deliberately restrict distributions of employer contributions until termination of employment or attainment of a later age. This is because many employers view these contributions as a replacement for a pension and may wish employees to receive the contributions only at, or close to, retirement or termination of employment. Given this opportunity to convert to Roth accounts, some employers may consider allowing such "seasoned" contributions to be distributed at an earlier time. Under the anti-cutback rules applicable to retirement plans, once these distributions are permitted, the plan will not be able to re-impose any prior restrictions, except on future additions to the participants' accounts.[7]

Limits on Conversion Opportunities

The explanatory materials accompanying the Act allow the plan to limit distributions to in-plan *conversions only*,[8] thus preventing any "pension leakage." Note that this limit cannot be applied to amounts that were *currently* distributable due to the anti-cutback rules discussed above, but it could be applied to future contributions.

The legislative history of the Act makes it clear that an employer is not required to offer new distribution options to its plan. Thus, a plan might only offer the conversion feature to amounts that are already distributable (*e.g*., accounts of participants over 59½, and/or pre-tax rollovers). The legislative history is not clear as to whether a plan could limit conversion opportunities to selected distributable amounts. For example, plans may want to allow in-plan conversion only for *active* employees, even though former employees with vested accounts have distributable amounts in the plan. Government officials are considering this issue.

2010 Distribution Required to Be Able to Spread 2010 Income Inclusion to 2011 and 2012

In order to take advantage of the special tax deferral rules for 2010 (upon conversion in 2010, income would not be recognized until 2011 and 2012), the distribution *must* be made in 2010. A plan can be amended in the future to allow a distribution and in-plan conversions after 2010. In the latter case, the special tax-spreading benefit will not

be available, but some participants may nonetheless find the ability to make a Roth conversion within the plan attractive.

Need for Separate Designated Roth Account

Of course, plans also must provide for a separate Designated Roth Account, which separately tracks Roth contributions and earnings, to accommodate the rollovers. Such an account can be added if one does not already exist.

Plan Amendments

Generally, discretionary plan amendments such as those needed to implement a Roth conversion must be adopted by the end of the plan year in which they are put into effect. Since the legislation was only passed in September, the legislative history suggests that the Internal Revenue Service provide some relief in this regard, at least for 2010 changes. No relief has been provided as of this date.

Administrative Issues

There are numerous administrative considerations that must be addressed when allowing a Roth in-plan conversion. Plan administrators need to be able to identify and account for the amounts that are distributable. In many cases, plans might not have established separate recordkeeping for different forms of contributions if contributions are generally distributable only at 59½. For example, a plan with a safe harbor match cannot distribute that match until the participant is 59½ or terminates employment. If the plan has another type of employer contribution, it potentially could be distributed earlier as a "seasoned" contribution, discussed above, but if there is no separate record of such contributions, and they are combined with the safe-harbor match, then as a practical matter the plan might not be able to allow distribution of employer contributions before 59½.

Plan administrators must also consider how withholding rules will apply to these conversions; the IRS has not yet issued guidance on this question.

Communications

Finally, as numerous commentators have noted, whether conversion to a Designated Roth Account or a transfer to a Roth IRA makes sense for an individual depends on that person's age, life expectancy, and the anticipated future income and tax rate for the individual at the time of distribution and taxation. Conventional wisdom might say that deferring

income inclusion until after retirement at a time when one's income (and tax rate) is likely to be lower might make sense, and support a decision *not* to convert to a Roth. On the other hand, if tax rates are expected to rise, being taxed currently might be advantageous. One also must consider the advantage of tax-free earnings (assuming of course that the earnings are not subject to a significant market loss such as those experienced by many participants over the last few years).

As the discussion above illustrates, the decision whether to convert to a Roth must be based on individual circumstances and forecasts, and does involve "guesswork." But some sort of basic communication about the issues probably needs to be prepared, or at least a statement emphasizing the personal nature of the decision, the employer's neutrality on tax matters, and recommendation to seek personal tax and financial advice. Most plans do not try to anticipate all eventualities, but merely summarize the features of the Roth arrangements and recommend that participants obtain professional advice. It may be helpful to participants, however, to know of certain differences between a Roth IRA and a Roth account in a 401(k) or 403(b) plan (see the discussion above), but even this should be presented in a nonjudgmental tone.

Summary

The in-house Roth conversion may be attractive to certain participants, but there are numerous structural, recordkeeping, and communication challenges that must be addressed when establishing a Designated Roth Account and conversion opportunity, and employers need to address these challenges.

Notes

1. *See* Judson, "Qualified Plan Issues Relating to Rollovers for Roth Conversions," *Employee Relations Law Journal*, 36:4, p. 77 (Summer, 2010) for a detailed discussion of issues involving rollovers from qualified plans to Roth IRAs.

2. *See* IRC § 219(g).

3. *See* IRC § 408(a)(6).

4. *See* IRC §§ 408A(d) and 72(t)(2) and Treas. Reg. § 1.408-6, Q&A 1.

5. *See* IRC § 408A(d)(6) and Treas. Reg. § 1.408A-5 Q&A-9.

6. *See* Treas. Reg. § 1.401-1(b)(1)(ii) and Rev. Rul. 54-231, 1954-1 C.B. 150, and Rev. Rul. 68-24, 1968-1 C.B. 150.

7. *See* Treas. Reg. § 1.411(d)-4, Q&A-1.

8. Joint Committee on Taxation, Technical Explanation of the Tax Provisions in Senate Amendment 4594 and H.R. 5297, the "Small Business Jobs Act of 2010," scheduled for consideration by the Senate on September 16, 2010 at 37.43 (JCX47-10, Sept. 16, 2010).

Plaintiffs Found to Have Actual Knowledge for Purposes of ERISA Section 413 Despite Failure to Read Plan Documents in the Sixth Circuit's Opinion in *Brown v. Owens Corning Investment Review Committee et al.*

Craig C. Martin and William L. Scogland

Several months ago, the United States Court of Appeals for the Sixth Circuit issued a ruling on statute of limitations issues in *Brown v. Owens Corning Investment Review Committee et al.*[1] that attorneys will likely be citing regularly in defending ERISA fiduciary breach litigation.

In September 2006, a group of former employees of Owens Corning, on behalf of a putative class, brought a lawsuit suit against the fiduciaries of Owens Corning's (Owens) defined contribution plans (the Plans), alleging that they breached their fiduciary duties by not divesting the plan of Owens common stock before the company entered bankruptcy and the stock became "virtually worthless."[2] The participants also sued Fidelity as the plan trustee, alleging it failed to protect the assets of the participants in later bankruptcy proceedings by neglecting to file a proof of claim against the Owens defendants.[3]

The Northern District of Ohio held that the plaintiffs' claims were time-barred by the statute of limitations due to the plaintiffs' actual knowledge of the relevant facts more than three years before filing suit.[4] On appeal, the Sixth Circuit affirmed the district court's ruling.[5]

Background on the Plans

The plans offered several investment options, including one that primarily invested in Owens common stock.[6] Plan participants received quarterly statements containing messages from the plan administrator.[7]

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In the Summary Plan Description (SPD), the Owens Corning Benefits Review Committee is disclosed as the Plan Administrator and the Owens Corning Investment Review Committee as the Named Fiduciary.[8] In addition, the SPD disclosed that the Plans were managed by various fiduciaries.[9] Some named plaintiffs disputed whether they received SPDs.[10]

Owens was obligated by the Plans to partially match contributions.[11] Prior to 2000, these contributions, and profit-sharing contributions were invested in the Owens stock fund.[12] Beginning in 2000, however, Owens employees were permitted to direct their new investments and transfer their previous investments to any of the investment options.[13]

In September 2000, Owens closed the stock fund to new investments and began allowing immediate transfer of investments in the stock fund to other options.[14] Owens's CEO, Glen Hiner, notified participants by letter of this decision, and provided contact information for Owens's Benefits Call center and for Fidelity, the Plan's trustee, for any participants wishing to learn more about this decision.[15]

Asbestos, Amchem, and Ortiz

At the same time, Owens was preparing to file bankruptcy.[16] Owens, which manufactured an industrial insulating product containing asbestos, was plagued with increased liability in the 1990s from asbestos litigation claims.[17] Settlement of these claims became dramatically more difficult after two oft-cited Supreme Court cases in the late 1990s— *Amchem Products, Inc. v. Windsor*[18] and *Ortiz v. Fireboard Corp.*[19] —curtailed the abilities of companies to settle through class action or a mass-settlement fund.[20]

Due to the fall-out from these cases, prior to filing for bankruptcy, the company stock had fallen to about $1.81 a share from around $35.44 per share the day the *Ortiz* case was decided.[21] The stock fund lost tens of millions of dollars.[22] Owens filed for bankruptcy on October 5, 2000.[23]

Procedural History

The Owens defendants moved to dismiss the complaint, in part because the plaintiffs had actual knowledge of all the relevant facts more than three years before filing suit, so were precluded by the ERISA Section 413 statute of limitations.[24] The Northern District of Ohio converted the motion to dismiss into a summary judgment motion and, after allowing discovery on the motion, denied it.[25]

Thereafter, the plaintiffs amended their complaint, alleging that the plaintiffs had no knowledge that the Plans had fiduciaries who managed it until 2006 or 2007.[26] The Owens fiduciaries then filed a motion for reconsideration on the statute of limitations issue.[27] The plaintiffs sought leave to amend their complaint again.[28] The district court reversed itself

on its summary judgment ruling, holding that the claims were barred by the statute of limitations and found that the motion for leave to amend was moot.[29] The plaintiffs filed a motion to amend or alter the judgment arguing that the district court erred by failing to make findings regarding the Fidelity defendants and by denying it leave to amend their complaint again.[30] The district court partially granted the plaintiffs' motion, altering the judgment to clarify that it was dismissing the motion to amend the complaint on the basis that the motion was futile, not moot, and including its rationale for entering summary judgment in favor of Fidelity on the statute of limitations issue.[31]

The Sixth Circuit Appeal

On appeal, the Sixth Circuit affirmed. In doing so, they addressed two critical issues for defense counsel. *First*, the court analyzed whether the plaintiffs had "actual knowledge" of their claims against the defendants. The Sixth Circuit found that they did. *Second*, the court determined whether the district court erred by not allowing the plaintiffs to amend their complaint to add allegations to show fraudulent concealment. The Sixth Circuit found that it did not.

The ERISA Fiduciary Breach Statute of Limitations

ERISA's statute of limitations provides for three-year and six-year time periods during which a plaintiff may bring suit alleging breach of fiduciary duty.[32] The six-year limit generally applies, but the period is shortened to three years where "the plaintiff had actual knowledge of the breach or violation."[33] The statutory period, however, might be extended "in the case of fraud or concealment" where the "action may be commenced not later than six years after the date of discovery of such breach or violation."[34]

Actual Knowledge Requires Knowledge of the Relevant Facts, Not That the Facts Establish a Cognizable Claim

The Sixth Circuit held that "actual knowledge" only requires "knowledge of all the relevant facts, not that the facts establish a cognizable legal claim under ERISA."[35] The plaintiffs argued that they did not have "actual knowledge" until 2006 or 2007, when they allegedly first learned that the Plans had fiduciaries, there was an Investment Review Committee, and fiduciaries were responsible for managing the stock fund.[36]

But the court noted that the plaintiffs knew by 2000 that Owens was entering bankruptcy and that the stock was virtually worthless.[37] Even more telling, the plaintiffs knew "someone" had discretion to made decisions regarding the Plans.[38] They had received the CEO's September

2000 letter notifying participants of the decision to close the stock fund to new investors and a message from the Plan Administrator on the quarterly statements, which gave the plaintiffs "actual knowledge" that they were not locked into the stock fund and that "someone had the power to take steps to protect their Plan investments."[39]

The court rejected the plaintiffs' response that these changes merely related to plan amendment, and not plan management because "this is a difference in semantics only."[40] The court rejected the plaintiffs' arguments that they did not know the specific identities of the responsible persons or committees.[41] Instead, the court held that the plaintiffs could have sued "John Doe" as a placeholder, and sought discovery into the entities responsible for the Plans.[42]

The fiduciaries were also clearly disclosed in the SPDs.[43] The plaintiffs argued that there is no proof participants read the SPD, and that they were only given access to an SPD, rather than a copy, making their knowledge constructive only.[44] The court swiftly rejected these arguments: "When a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms." [45]

The court also rejected an argument that the nature of the violation here—a failure to act, rather than an affirmative act—requires more information to trigger the "actual knowledge" provision.[46] Because the "Plaintiffs knew (1) that they had been harmed because their investments in Owens stock had lost almost all value, and (2) that someone was acting to manage those investments," the three-year statute of limitations was triggered for the claims against the Owens defendants.[47] Similarly, because the plaintiffs knew that "their investments had suffered, Fidelity was significantly involved in managing the Plans, and no one had sued Owens on behalf of the Plans," the three-year statute of limitations was triggered for the claims against Fidelity.[48] It was not necessary for the plaintiffs to know that Fidelity was legally deemed a trustee or that, as a result, it had a duty to sue the Plan fiduciaries.[49]

Attempt to Add Allegations of Fraudulent Concealment Would Be Futile

The court then addressed the plaintiffs' appeal from the ruling denying their proposed amended complaint, which would have added allegations they hoped would satisfy the "fraudulent concealment" provision of the statute of limitations.[50] As noted above, allegations of "fraudulent concealment" can increase the statute of limitations to six years after the discovery of the alleged breach or violation.[51]

The Sixth Circuit affirmed the district court's ruling on the motion for leave to amend. It held that the plaintiffs' attempt to allege that the Owens defendants fraudulently concealed their violations would have been futile because the majority of the acts the plaintiffs alleged proved

fraudulent concealment occurred after the date of actual knowledge—September 2000, the date of the CEO's letter.[52] As the court noted: "the [Owens] Defendants could not have engaged in fraud to conceal from the Plaintiffs what the Plaintiffs already knew." [53] Other proposed allegations were insufficient because the defendants "must have engaged in 'some trick or contrivance intended to exclude suspicion or prevent inquiry.'"[54] Accordingly, adding these allegations would not satisfy the "fraudulent concealment" clause, and the proposed amendment would have been futile.[55]

Practitioners can expect to see *Brown vs. Owens CorningInvestment Review Committee et al.*, cited in dispositive motions across the nation.

Notes

1. Case No. 09-3692, slip op. (6th Cir. Sept. 27, 2010).
2. *Id.* at 2.
3. *Id.* at 5-6.
4. *Id.* at 2.
5. *Id.*
6. *Id.* at 3.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 4.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. 521 U.S. 591 (1997) (limiting the ability to settle claims through an asbestos class action).
19. 527 U.S. 815 (1999) (limiting the ability to settle claims through an asbestos mass-settlement fund).
20. Brown v. Owens Corning, Case No. 09-3692, slip op. at 4 (6th Cir. Sept. 27, 2010).
21. *Id.*

22. *Id.*
23. *Id.*
24. *Id.* at 6.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 7.
31. *Id.* at 7.
32. *Id.* at 8 (citing 29 U.S.C. § 1113).
33. *Id.*
34. *Id.*
35. *Id.* at 8.
36. *Id.* at 9.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 11.
42. *Id.* at 11–12.
43. *Id.* at 9–10.
44. *Id.* at 10.
45. *Id.* at 10.
46. *Id.* at 12.
47. *Id.* at 13.
48. *Id.* at 18.
49. *Id.*
50. *Id.* at 13.
51. *Id.*
52. *Id.* at 14.
53. *Id.* at 15.
54. *Id.*
55. *Id.* at 15–16.

To Reassign or Not to Reassign

Howard S. Lavin and Elizabeth E. DiMichele

Under the Americans with Disabilities Act of 1990[1] (the ADA), is an employer mandated to reassign a qualified disabled employee to a vacant position, contrary to the employer's own implemented policy of hiring the best candidate for the position? The circuit courts are split on this question, with the Tenth and the DC Circuits requiring mandatory reassignment of a disabled employee and the Eighth and the Seventh Circuits allowing for an exception to the employer's reassignment duty if the employer has an actual policy and practice of hiring the most qualified candidate for open positions.

The Eighth Circuit held in *Huber v. Wal-Mart Stores, Inc.*, that "the ADA does not require Wal-Mart to turn away a superior applicant for the … position in order to give the position to [the disabled employee]."[2] Similarly, the Seventh Circuit held in *EEOC v. Humiston-Keeling, Inc.*, that an employer is not required to "to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant."[3]

In conflict with *Huber* and *Humiston-Keeling*, are the decisions of the Tenth Circuit in *Smith v. Midland Brake, Inc.*[4] and the DC Circuit in *Aka v. Washington Hosp.Ctr.*[5] In those cases, the circuit courts held that the word "reassign" must mean more than allowing an employee to apply for a job with everyone else, as to hold otherwise would render "reassignment," as a reasonable accommodation, a nullity.

Although the US Supreme Court granted *certiorari* in *Huber*, the case was dismissed because the parties settled outside of court. Consequently, the divide between the circuit courts remains.

Background

The issue underlying this circuit split is the scope of an employer's reassignment duty under the ADA when considered in tandem with its

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own hiring policies. An employer violates the ADA when, among other things, it fails to make "reasonable accommodations" "to the known physical or mental limitations of an otherwise qualified … employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."[6] Section 12111(9)(B) of the ADA defines "reasonable accommodation" as, among other things, "reassignment to a vacant position." Over the years, an employer's duty under the ADA to reassign a disabled employee has been further delineated by caselaw.

For example, in *U.S. Airways, Inc. v. Barnett*, the Supreme Court held that an employer's entrenched seniority system trumps the reassignment claim of a disabled employee unless the employee can show special circumstances "that make 'reasonable' a seniority rule exception in the particular case."[7] In so holding, the Court noted that entrenched seniority systems, whether or not in the collective bargaining context, provide important employee benefits including, but not limited to, workforce expectations of fair treatment and job security.[8]

Although *Barnett* addressed the validity of entrenched seniority systems in an ADA reassignment claim, it left an open question: whether an employer's policy of hiring the best candidate for a vacant position would similarly trump the employer's duty to reassign a disabled employee. With the Tenth and DC Circuits ruling in favor of mandatory reassignment and the Seventh Circuit in favor of the employer policy, a decision by the Supreme Court in *Huber* would have brought clarity to the long-debated interpretation of the ADA's reassignment provision.

The Eighth Circuit's Huber *Decision*

In *Huber v. Wal-Mart Stores, Inc.*, Pam Huber (Huber) filed claims of discrimination under the ADA against her employer, Wal-Mart Stores, Inc. (Wal-Mart).[9] Huber, during her employment with Wal-Mart, sustained a permanent injury to her right arm and hand making it impossible for her to perform her job as an order filler. Huber sought a reasonable accommodation by way of reassignment to a vacant "router" position. Wal-Mart, pursuant to its stated policy of hiring the best qualified applicant, insisted that Huber apply and compete for the position with other applicants. Subsequently, Wal-Mart gave the job to a non-disabled applicant and Huber was eventually reassigned to a lower-paying maintenance position. Huber argued that Wal-Mart should have automatically reassigned her to the router position and that its aforementioned policy was not applicable in the face of the ADA's reasonable accommodation mandate. The district court granted summary judgment to Huber and Wal-Mart appealed.

On appeal, the Eighth Circuit discussed the circuit split and agreed with the Seventh Circuit's decision in *EEOC v. Humiston-Keeling, Inc.* The Eighth Circuit held that an employer is not required "to reassign

a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate."[10] To insist on mandatory reassignment, the court reasoned, effectively would make the ADA a mandatory preference statute and create an unreasonable imposition on employers.[11] The court found Wal-Mart's eventual reassignment of Huber to the lower-paid maintenance position an appropriate accommodation, on the grounds that an employer is not required to provide an ideal or preferred accommodation, merely a reasonable one.[12]

The Tenth Circuit's Midland Brake *Decision*

In *Smith v. Midland Brake, Inc.*, the Tenth Circuit considered the scope of the employer's obligation to offer an employee a reassignment job.[13] Robert Smith (Smith), an employee of Midland Brake, Inc. (Midland Brake), became disabled as a result of on-the-job injuries and eventually was fired due to Midland Brake's admitted inability to accommodate his disability in the department in which he had been employed.[14] The district court granted Midland Brake summary judgment on all claims and Smith appealed to the Tenth Circuit, which affirmed the grant of summary judgment. Smith, in turn, petitioned the Tenth Circuit for *en banc* review of the panel decision and limited review was granted. The *en banc* Tenth Circuit considered, among other things, the proper interpretation of the ADA's reasonable accommodation requirement with respect to an employer's obligation to reassign a disabled employee to a vacant position and reversed the grant of summary judgment to Midland Brake on Smith's ADA claim arising out of Midland Brake's failure to reassign him.

The Tenth Circuit, *en banc,* rejected a narrow definition of "reassignment" that would permit an employer to deny a qualified, disabled employee reassignment if there were a more qualified applicant for the position, reasoning that such a reading would invalidate the reassignment language in the ADA.[15] Instead, the court held that "reassignment" must mean more than the basic opportunity to apply for a job like anyone else.

Referencing the EEOC's Interpretative Guidance regarding reassignment, the court held that if the disabled employee is qualified for the vacant position, the employer must reassign the employee.[16] The court noted that the right to reassignment is not absolute and listed certain limitations: the position must be vacant and the position is not vacant if other employees have a "legitimate contractual or seniority right" to it; granting a promotion is not necessary; the employee must be qualified, though the employee does not have to be the best qualified applicant; and the reassignment must be reasonable and not pose an undue hardship.[17] The court stated that certain policies of an employer "might have to be subordinated to an employer's reassignment obligation under the

ADA because to do otherwise would essentially vitiate the employer's express statutory obligation to employ reassignment as a form of reasonable accommodation."[18]

In *Duvall v. Georgia-Pacific Consumer Products, L.P.*,[19] the Tenth Circuit reaffirmed its decision in *Midland Brake*, holding that an employer's statutory duty to reassign disabled employees to vacant positions is mandatory and that "the employer must do more than consider the disabled employee alongside other applicants; the employer must offer the employee the vacant position."[20] The *Duvall* court nevertheless affirmed the grant of summary judgment to the employer that failed to transfer the disabled employee to positions held by temporary employees on the grounds that they were not "vacant" within the meaning of the ADA's reassignment duty. The Tenth Circuit held that for such purposes, a position is "vacant" when it "would have been available for similarly situated nondisabled employees to apply for and obtain."[21]

Other Circuits' Decisions

In *EEOC v. Humiston-Keeling, Inc.*, an employee brought a claim against her employer under the ADA, alleging that by not reassigning her to a vacant clerical position, the employer failed to provide a reasonable accommodation for her disability.[22] The employer had a "bona fide policy, consistently implemented, of giving the best job to the best applicant rather than to the first qualified one."[23] The Seventh Circuit found that "requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of [a statutorily protected group] … is affirmative action with a vengeance."[24] Accordingly, the court held that the ADA does not require reassignment of a disabled employee if there is a better applicant, provided that the employer has a legitimate policy of hiring the best, and not simply the first, applicant for the position.

In *Aka v. Washington Hosp. Ctr.*, the DC Circuit, *en banc*, held that an employee who is allowed to compete for a job has not been "reassigned" because any position the employee attains has been attained under the employee's own power[25] and therefore, the word "reassign" must mean more than allowing a disabled employee to compete for a vacant position with other applicants.[26] Subsequently, in *Alston v. Washington Metro. Area Transit Auth.*, the DC District court, noting that the holding of *Aka* has been disputed by other circuit courts, clarified *Aka's* holding. The *Alston* court stated that the ADA reassignment provision imposes an affirmative duty on an employer to find a position for the employee who becomes disabled. Therefore, even an employer's long-held policy of hiring only the best qualified candidate for a position cannot trump the duty to reassign a disabled employee to a vacant position for which he or she has met the minimum qualifications.[27]

Looking Ahead

The *Huber* case demonstrates the current tension between an employer's right to create and adhere to non-discriminatory hiring policies and the employee's rights to reasonable accommodation under the ADA. Given the continuing, conflicting decisions of the circuit courts over the scope of an employer's reassignment duty under the ADA, it is likely that this question will come again before the Supreme Court.

The impact of such a ruling would be substantial and would provide employers a greater degree of certainty when faced with a request to reassign an employee with a disability to a position for which he or she is not the most qualified applicant. If the Court were to hold that an employer's policy trumps the duty to reassign, as have the Seventh and Eighth Circuits, the employer, particularly if it has adopted a "Best Candidate Hire" policy, would be able to hire the most qualified applicant with a reasonable degree of comfort. Of course, the employer's determination of which candidate was most qualified would still be open to challenge.

If the Court were to accept the Tenth and DC Circuits' interpretation, employers would be obligated to transfer a disabled employee to a vacant position for which he or she was qualified regardless of whether there were more qualified applicants. Employers would lose some ability to control their hiring decisions and disputes would shift to whether a disabled employee who was denied a transfer met the minimum qualifications for the new position.

Regardless of how the Court ruled in a *Huber* -like case, any decision would settle a much debated area of employment law and clarify the scope of an employer's duty under the ADA to reassign a disabled employee.

Notes

1. 42 U.S.C.S. § 12101 *et seq*.
2. 486 F.3d 480, 484 (8th Cir. 2007).
3. 227 F.3d 1024, 1029 (7th Cir. 2000).
4. 180 F.3d 1154 (10th Cir. 1999).
5. 156 F.3d 1284 (D.C. Cir. 1998).
6. 42 U.S.C.S. § 12112(b)(5)(A).
7. 535 U.S. 391, 393 (2002).
8. *Id*. at 1524.
9. 486 F.3d 480.
10. *Id*. at 483.

11. *Id*. (*quoting* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000)).

12. *Id*. at 484.

13. 180 F.3d 1154 at 1159.

14. *Id*. at 1160.

15. *Midland,* 180 F.3d at 1164.

16. *Id*. at 166–167.

17. *Id*. at 1170.

18. *Id*. at 1176.

19. 607 F.3d 1255 (10th Cir. 2010).

20. *Id*. at 1260.

21. *Id*. at 1264.

22. 277 F.3d 1024 (7th Cir. 2000).

23. *Id*. at 1027.

24. *Id*. at 1029.

25. 156 F.3d 1284, 1302 (D.C. Cir. 1998).

26. *Id*. at 1304.

27. No. 07-0122, 2008 U.S. Dist. LEXIS 95781 (D.C. Dist. Ct. Aug. 12, 2008). The *Alston* case was brought pursuant to the federal Rehabilitation Act of 1973, 29 U.S.C.S. § 701 *et seq*., which is interpreted and enforced pursuant to the same standards as the ADA. *Alston*, No. 07-0122, 2008 U.S. Dist. LEXIS 95781 at *6.