Session 102

Recent Developments in Labor & Employment Law

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DEVELOPMENTS IN DISPARATE TREATMENT, HARASSMENT, SECTION 1981, RIFS, RETALIATION, and COMPENSATION

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A. REQUIRING EMPLOYEES TO REPORT MISCONDUCT

Many employment law practitioners and law firms strongly recommend employers adopt policies requiring at least supervisory, if not all, employees report harassment and other unlawful workplace behavior in which they are not directly involved.

The *City of Boca Raton* and *Burlington Industries* cases established a rule of strict liability for *supervisory* harassment when the harasser has immediate or successively higher authority over the victimized employee and the supervisory harassment was accompanied by a "tangible employment action." Those cases also reaffirmed long-standing practice of applying common-law principles of agency to resolve issues related to liability for *co-worker* harassment.

Pursuant to common-law principles of agency, an employer is liable for *coworker* harassment only if the employer knew or should have known about the employee's acts of harassment and failed to take appropriate remedial action. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67-72 (1986). Regulations of the U.S. Equal Employment Opportunity Commission, and all courts that have considered the question, also adopted that standard:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

29 CFR § 1604.11(d). See *Van Zant* v. *KLM Royal Dutch Airlines*, 80 F.3d 706 (2d Cir 1996); *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1515-1516 (9th Cir. 1989); *Swentek* v. *USAir, Inc*, 830 F.2d 552 (4th Cir. 1987).

In two recent cases, *Distasio* v. *Perkin Elmer Corp*, 157 F.3d 55 (2d Cir. 1998) and *Young* v. *Bayer Corp.*, 123 F.3d 672 (7th Cir. 1997), the court stopped short of directly imputing knowledge of hostile environment harassment to the employer based on an employee's supervisory status and instead relied on company policies *requiring* the employees to inform the company of reported harassment.

The issue in *Distasio* was the extent to which a team group leader's knowledge of otherwise unreported instances of sexual harassment might be imputed to the company. Citing *Torres* v. *Pisano*, 116 F.3d 625 636-38 (2d. Cir 1997), the Second Circuit held that an official's knowledge would be imputed to the employer if (1) the official was of sufficiently high level in the company's hierarchy to qualify as a proxy for management; (2) the official has a duty to act on the knowledge and stop the harassment; or (3) the official has a duty to disclose the harassment to management. 157 F. 3d at 64.

In *Distasio*, the plaintiff worked with six other people under a team leader. Plaintiff claimed that a coworker hugged, touched and propositioned her. She said she told the team leader of these activities on some occasions; other incidents were observed by the team leader. The team leader made some effort to stop some of the activities, but did not report them higher in the company. The Second Circuit stopped short of directly imputing knowledge to the employer based on the team leader's status, perhaps because it was too low in the organization. Rather, the Court imputed knowledge of the harassment to the company on two other grounds. First, the Court stated:

Perkin Elmer's own sexual harassment policy specifically states that 'an employer is considered to have direct knowledge when an employee has complained directly to a supervisor, or Human Resources, or has used any established complaint mechanism.' Because, under the company's policy, Perkin Elmer is considered to have current knowledge of the complaint once an employee complains *to one of the named people in the policy*, we conclude that [the team leaders] knowledge must be imputed to Perkin Elmer as a matter of law.

157 F.3d at 64 (emphasis added). Second, the Court found that:

[the team leader's] knowledge also is imputed to Perkin Elmer on an independent ground, namely that he had responsibility to relay sexual harassment complaints to the company under the express policy promulgated by the company . . . An employer will be liable based on the knowledge of an employee, *who may or may not have management authority*, if the employee 'has an official or strong *de facto* duty to act as a conduit to management for complaints about work conditions . . .' or is responsible for relaying harassment complaints to the corporate hierarchy. The Perkin Elmer company policy directs supervisors, after receiving a harassment complaint, to 'inform

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the Human Resources department of allegations of sexual harassment by employees or non-employees, within 24 hours of the reporting of the incident, and assist, as requested, with the investigation of such allegations.'

Id. (emphasis added).

In *Young*, the Seventh Circuit, citing *Distasio*, framed as the issue to be resolved "whether information comes to the attention of someone who ought *by specification of his duties* or, failing that, general norms of management to do something about it, either directly or by referring the matter to some other corporate employee." 123 F.3d at 675 (emphasis added). Two questions guided the Court's inquiry as to whether the complainant "placed [her] complaint in a proper channel": first, "who had authority to terminate the harassment" complained of; and, second, did the complainant "complain to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it." *Id.*

In *Young*, a production line worker made at least five complaints between 1989 and 1992 of offensive touchings, leers, lewd comments and solicitations by her foreman. She complained to the foreman's supervisor who was the head of a department of sixty workers in which the plaintiff worked. The department head spoke to the foreman, but did not report the plaintiff's complaints to the plant's personnel director, as the company's rules required him to do. The Seventh Circuit held that plaintiff had raised a triable issue as to whether the company was negligent in failing to act promptly on the plaintiff's complaints, finding that notice to the plaintiff's department head was notice to the company. *Id.* It reasoned:

> Inquiry will normally begin [by] . . . identifying the person who has the duty under the employer's rules to channel complaints of sexual harassment to the employees of the company who are empowered to act upon such a complaint . . .. A department head would ordinarily be such a someone with regard to complaints of misconduct lodged by a worker in his department. If he receives such a complaint he would be obligated by elementary principles of management and good sense either to resolve the problem himself or to refer it to someone else within the company, who can.

* * * * *

Under Bayer's internal policies governing harassment, the plaintiff had four authorized channels for lodging a complaint, one of which was to complain to her department head — that is what she did.

* * * * *

[Bayer] must have believed that the department heads would relay complaints, if the head was unable to respond effectively, to some who could.

123 F.3d at 674-75. In light of Bayer's policy requiring department heads to inform the company of reported harassment, the company was charged with knowledge of the harassment to the same extent as the department head.

B. REMEDIES

1. TAX WITHHOLDINGS

The Eighth Circuit in *Newhouse* v. *McCormick & Co.*, 157 F.3d 582 (8th Cir. 1998) held that back pay and front pay awards in an age discrimination suit where the plaintiff was wrongfully denied employment were not wages subject to withholding. This holding is contrary to the Internal Revenue Service ("IRS") position with respect to this issue which is addressed in Revenue Ruling 78-176 (1987-1 CB 303).

A jury found for plaintiff on an ADEA claim arising from denial of a sales position and awarded him a judgment comprised of back pay, front pay and damages. Each portion of the judgment was clearly spelled out in the in judgment entry.

McCormick attempted to satisfy its obligation by presenting Mr. Newhouse two checks — one for the full amount of damages, and the second check representing the front and back pay portions of the settlement, net of withholding taxes. Mr. Newhouse refused to accept the checks. The trial court ordered McCormick to pay the full amount of each award. McCormick appealed, contending that it had an obligation to withhold on the "wage" portion of the settlement in order to avoid penalties for failure to withhold taxes from "wages."

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The court held that IRC Section 3121(d) defines an employee as an individual who is an employee under the usual common-laws tests and, therefore, requires an employer-employee relationship in order to label an award as "wages" for purposes of triggering the withholding requirement.

The IRS filed an *amicus* brief in support of Revenue Ruling 78-176. In this ruling, the IRS held that when a wrongful discrimination precludes the formation of an employer-employee relationship, compensatory payments are considered wages subject to withholding. The Eighth Circuit found that the ruling conflicted with the plain language of the Code.

Even though the court held that the back and front pay awards were not wages, it noted that the Supreme Court held in *Commissioner* v. *Schleier*, 115 S.Ct. 2159 (1995) that an ADEA recovery was not excludible from gross income as compensatory damages for personal injury (even before such amounts were limited by statutory amendment to those received on account of physical injury). Thus, plaintiff was only able to avoid the liability for FICA taxes (as would the entity making the payment). Furthermore, the payor entity would be freed from the responsibility to withhold income taxes from the award.

2. VALUE OF STOCK OPTION AGREEMENT

The Washington Court of Appeals held that a former Microsoft employee was entitled to seek money damages in a wrongful termination case for "lost" stock options where the option agreements provided that if the employee was terminated, he would lose any unvested options and would be required to exercise any vested options within 90 days. The plaintiff claimed that the company's handbooks, policies and practices created an implied contract that he could only be terminated for cause, and the jury agreed, awarding damages of $650,000. However, the trial court had previously granted the defendant's summary judgment motion precluding the jury from awarding any damages for the unvested stock options. The Court of appeals reversed that ruling, holding that the general contract principle of "make-whole" remedies applied, reaching back to *Hadley* v. *Baxendale*, and reasoning that the plaintiff was entitled to all money damages he incurred resulting from the cancellation and forced early exercise of the options. *Knox* v. *Microsoft Corp.*, 962 P.2d 839 (Wash. App. 1998).

3. PUNITIVE DAMAGES

The Tenth Circuit held that an employer's knowledge of previous cases of harassment by same harasser is relevant to assessing punitive damages in a sexual harassment case.

The Circuit Court reversed a lower court's grant of a directed verdict to the employer regarding punitive damages in a sexual harassment case. The lower court concluded that the plaintiff failed to show that the employer acted with actual malice or reckless indifference against the plaintiff.

The Circuit Court concluded that even though the employer fired the supervisor in response to the Plaintiff's complaint of sexual harassment, the employer nevertheless knew that the supervisor had a history of harassing behavior against other women. Building on the recent *Kolstad* v. *American Dental Association* case, the appeals court noted that "malice or reckless indifference relates to the employer's state of mind and not necessarily to its actions." [emphasis added] Because the employer was aware of incidents of sexual harassment by the same supervisor against other women, a reasonable factfinder could conclude that the employer acted with malice or reckless indifference. In addition, the court noted that the harasser was rehired by defendant's sister company at a higher salary into a position that could require the Plaintiff to have continued contact with the harasser. This fact additionally could be considered when assessing malice or reckless indifference. *Knowlton* v. *Teltrust Phones Inc.*, 1999 U.S. App. LEXIS 18930 (10th Cir. August 16, 1999)

C. RETALIATION

1. INTERNAL INVESTIGATION AS "PARTICIPATION"

Seventh Circuit held that plaintiff's refusal to file formal charges of sexual harassment is not a protected activity under Title VII. Plaintiff alleged that after she complained to her company's EEO department about sexual harassment, the EEO counselor demanded that she file formal charges, but she refused. The Court

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rejected plaintiff's claim that her subsequent demotion amounted to retaliation for engaging in protected activity. *Williams* v. *West*, 1998 U.S. App. LEXIS 32653 (7th Cir. 1998).

2. REFUSAL TO PARTICIPATE IN INTERNAL INVESTIGATION

In *Clover* v. *Total System Services, Inc.*, 157 F.3d 824 (11th Cir. 1998), the Eleventh Circuit, by a 2-1 vote, became the first appellate court to hold that neither anti-retaliation provision of Title VII — opposition nor participation — protects employees who take part not in a government proceeding but only in an employer's internal investigation of discrimination claims. The Eleventh Circuit majority found that the repeated use of government agency context for the terms "investigation" and "investigate" in Title VII made clear that protection against retaliation extends only to investigations conducted by the EEOC or its designated representative. The court concluded by stating that "[t]he complete absence of any mention of in-house or internal investigations indicates that only EEOC investigations are investigations" under the retaliation provisions of Title VII. Dissenting Judge Albert Henderson contended that such a narrow reading renders the anti-retaliation protection of Title VII "virtually ineffective."

Without comment, the Eleventh Circuit panel has vacated *Clover* and will issue a new decision. *Clover* v. *Total System Services, Inc.* (11th Cir. No. 97-9229, 1999).

3. FLSA CASES

The First Circuit held that an employee, fired after making an internal complaint about unpaid overtime, could proceed under the FLSA anti-retaliation provision. The Sixth, Eighth, Tenth, and Eleventh Circuits have similarly held, while the Second and Ninth Circuits require a formal agency or court filing to support a retaliation claim. *Valerio* v. *Putnam Associates, Inc.*, 5 WH 389 (1st Cir. 1999).

4. ADVERSE ACTION

Relying upon its earlier holding in *Mattern* v. *Eastman Kodak*, the Fifth Circuit held that the refusal of an employer to permit a lateral transfer was not an "ultimate employment decision" necessary to support the requirement of "adverse action" for a *prima facie* retaliation claim. The plaintiff, of Romanian national origin, was an apartment manager and requested a transfer to manage a similar apartment nearer his home. The only substantive difference was the second apartment house might have offered more security, but the court rejected this as irrelevant since he had not been terminated. *Burger* v. *Central Apartment Management, Inc.*, 168 F.3d 875 (5th Cir. 1999).

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5. COWORKER ANIMOSITY

Courts are divided on the issue of whether employers are liable for coworker hostility directed at harassment complainants following the filing of their complaint. The most recent decision is *Gunnell* v. *Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998).

Three Circuits have held that employers are not liable. *Manning* v. *Metropolitan Life Ins. Co.*, 127 F.3d 686 (8th Circ. 1997); *Mattern* v. *Eastman Kodk Co.*, 104 F.3d 702 (5th Cir. 1997); *Munday* v. *Waste Management of North America*, 126 F.3d 239 (4th Cir. 1997). The Fifth and Seventh Circuits, however, *in dicta*, have indicted to the contrary. *Knox* v. *State of Indiana*, 93 F.3d 1327 (7th Cir. 1996); *Wyatt* v. *City of Boston*, 35 F.3d 13 (1st Cir. 1994) (*per curiam*).

In *Gunnell*, the Court held that coworker hostility may constitute an "adverse employment action" for purposes of a retaliation claim if it is "sufficiently severe."

> We hold that an employer can only be liable for coworkers' retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone or encourage the coworkers' actions.

The Court concluded that the few identified actions -- being treated badly and unfavorably by coworkers who allegedly left confidential payroll records on plaintiff's desk and who used an incorrect purchase number in plaintiff's absence, and by being left out of office communications and being shunned -- involved only "incidents of rudeness." Notably, the Court declined plaintiff's invitation to extend application of the negligence standard from coworker harassment to coworker hostility. Because proof of retaliation requires proof of retaliatory intent or motive, the Court rejected the "should have known" component of the negligence standard and held that management must know about the coworker retaliatory harassment.

6. POSITIONS OF TRUST (IN-HOUSE COUNSEL/HR PROFESSIONALS)

The Fifth Circuit vacated a $621,670 jury verdict in favor of an in-house attorney who had disclosed confidential information to a third party about discrimination claims against her employer. The court held that the legal profession's interest in its code of ethics "trumped" the plaintiff's right to engage in protected activity under Title VII. The Department of Energy had a contract with DynMcDermott whereby the company provided the DOE with certain administrative services and was obligated to abide by an anti-discrimination policy. Plaintiff, as in-house counsel, had access to all of the company's legal files and confidential information regarding employee disputes.

At a June 1994 meeting between DOE auditors and company officers, Plaintiff, an African-American, was asked about several employee complaints, particularly those filed pursuant to the Equal Pay Act. Plaintiff replied that she did not know about the claims but added "Maybe I'll get my money now," setting forth her own protest of her perceived unequal pay. Plaintiff told the DOE that the situation was "a class action waiting to happen," and after the meeting, disclosed confidential information to a DOE attorney regarding her investigation of one employee's discrimination complaint. In a subsequent written evaluation of Plaintiff, the company downgraded her performance record. Shortly thereafter, Plaintiff submitted a "response letter" in which she claimed that she had been subjected to race and sex discrimination and referred to an internal investigation involving another employee's bias complaint. Plaintiff provided her "response letter" to the company's general counsel, three other employees, and the DOE officer who had attended the earlier DOE meeting. When the company learned that Plaintiff had sent the letter to DOE, it fired her.

In reversing the jury verdict, the Fifth Circuit found that Plaintiff had violated the Rules of Professional Conduct of the Louisiana State Bar that limit an attorney's right to divulge client confidences. The court declared that "the duties of confidentiality and loyalty serve to fortify the client's trust placed with the attorney and to ensure the public's confidence in the legal system as a reliable and trustworthy means of adjudicating controversies." In determining that Douglas violated her employer's confidences, the court cited the "response letter" that she distributed to persons outside the company. Although the court found that Plaintiff's letter satisfied the "litmus" test for protected opposition activity, "[n]ot all activities taken in opposition to an employer's perceived discriminatory practices . . . remain insulated from reprisal under Title VII's shield." Rather, the court applied a balancing test to determine whether Title VII's protections may be denied "in instances where the employee's conduct in protest of an unlawful employment practice so interferes with the

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performance of his job that it renders him ineffective in the position for which he is employed." *Douglas* v. *DynMcDermott Petroleum Operations Company*, 144 F.3d 364 (5th Cir. 1998.

7. EVIDENCE OF HARASSMENT CLAIM

The plaintiff brought suit against her former employer, American Greetings, alleging the company fired her in retaliation for reporting sexual harassment by her supervisor. When the plaintiff sought to testify to the details of the harassment she had allegedly suffered, the district court excluded such testimony. The Eighth Circuit affirmed, finding that the evidence had little probative value because the severity of the harassment would not make it more or less likely for an employer to retaliate. The court also found that permitting introduction of evidence of the details of the harassment created a risk of unfair prejudice (even though the company promptly investigated plaintiff's complaints and terminated the harasser) and would encourage the jury to grant plaintiff relief because she had suffered from the harassment, not because of any retaliation. The Eighth Circuit also affirmed the trial court's exclusion of evidence that the alleged harasser's replacement had made social advances toward plaintiff before he became plaintiff's supervisor, finding that the evidence had little relevance, and its slight probative value was substantially outweighed by counterbalancing Rule 403 considerations. *Easley* v. *American Greetings Corp.*, 158 F.3d 974 (8th Cir. 1998).

8. FAVORABLE TREATMENT

In a fascinating, yet troubling, decision for employers, a federal district court cited plaintiff's "mixed" treatment during the three months between the filing of her promotion discrimination charge and implementation of a reorganization as creating a triable issue as to retaliation.

Plaintiff, a female senior vice-president in the worldwide medicines group of a pharmaceutical company, twice was passed over for promotion during reorganizations, once in 1995 and again in 1997, when another woman was promoted. Shortly thereafter, plaintiff received the direct reporting relationship to the group president she had sought, was made a new member of the executive committee, and received a $75,000 increase in salary, bonus and stock options. However, plaintiff's "licensing" duties were transferred to another group, resulting in the loss of nearly half of her responsibilities, staff and budget. Plaintiff continued to be assigned a variety of "important special projects." The last reorganization occurred within three months of plaintiff's filing of an EEOC gender discrimination complaint.

The Court concluded that the three months between the EEOC filing and the final reorganization was "sufficiently close to protected activity to permit an inference of causation." The Court also, however, rejected the employer's contention that the $75,000 salary increase (to $300,000), the direct report, and the executive committee slot precluded any inference of retaliatory motive, noting that "there is a question, however, whether that favorable treatment was an effort to avert or undermine a claim of retaliation." Plaintiff had contended, of course, that the loss of her part of her responsibilities would likely adversely affect her future promotional and employment opportunities. *Feder* v. *Bristol-Myers Squibb Co.*, 79 FEP Cases 249 (SDNY, January 20, 1999).

D. MANAGEMENT OF THE EMPLOYMENT LAW FUNCTION

1. HANDLING SUPERVISOR'S DESK FILES

In a decision relating to the inadvertent destruction of documents by the employer's in-house legal counsel, the Fifth Circuit held that the district court had abused its discretion when it allowed the employee to call the employer's in-house legal counsel to be questioned before a jury about the destruction. The Fifth Circuit reversed a jury verdict for the employee and remanded for a new trial. The documents involved the original supervisor's file, and no copies were available. Apparently, the documents were contained in a box which was left at a secretarial station at the in-house attorney's office and was thought to have been picked up inadvertently by the after-hours cleaning people. When destruction first became known, the district court, after a hearing on the issue, ruled that the evidence was potentially relevant, but that the destruction was "inadvertent" and refused to impose sanctions. Over objections from the employer's counsel, however, it allowed the employee's counsel to discuss the destruction in the opening statement and allowed the in-house counsel to be called. After the testimony to the jury, the judge commented to the jury that he had already heard the evidence and had ruled that there was no intended willfulness to destroy

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the documents. Over a dissent, the Fifth Circuit stated, "To say the least, this was a highly extraordinary method of informing the jury that the documents were inadvertently destroyed" and found under FRE 403 that the evidence's probative value was "substantially outweighed" by "unfair prejudice" and "confusion of the issues." The Fifth Circuit suggested that it would have been more appropriate for the district court judge, rather than permitting the plaintiff to call legal counsel, to have informed the jury that the documents had been destroyed and that no bad faith was involved. The dissent focused on the fact that this was a fact-intensive case and that the original supervisory documents file could have contained important information on the "subjective state of mind of the [employer's] supervisory personnel who rated [the employee's] performance and decided to lay him off." The dissent also suggested that the issue of whether the employer intentionally destroyed the files may have been one for the jury. *Caparotta* v. *Entergy Corp.*, 168 F.3d 754 (5th Cir.1999).

2. COMPANY-SPECIFIC ELECTRONIC "CHAT-ROOMS"

The *Wall Street Journal*, April 5, 1999, reported "Raytheon Employees Resign in Wake of Lawsuit Protesting Internet Postings." Apparently, two Raytheon Co. employees who posted anonymous messages about the company on an Internet message board resigned. Raytheon filed a lawsuit in February against 21 employees, claiming they had posted "proprietary and confidential information" about the big defense contractor via Yahoo! Inc., whose widely used Web pages include many company-specific electronic message boards. The suit, filed in Massachusetts Superior Court in Cambridge, identified the 21 by their Internet pseudonyms, such as "Raytheonveteran," "Ditchraytheon" and "Rayman-Mass." Electronic privacy experts say businesses have a right to protect trade secrets and confidential information, but there is the danger that some companies might file suits just to quell negative statements. While Yahoo! postings seem anonymous, since Yahoo! doesn't require users to register by name, Yahoo! will, under court order, provide information on the Internet-service provider used by people who post messages, and subsequent subpoenas to those providers can usually pinpoint the authors, Internet-savvy lawyers say.

3. WORK PRODUCT PRIVILEGE

D.C. Circuit held that the work product privilege barred disclosure to the EEOC of a report prepared by outside counsel summarizing the results of an investigation into alleged violations of Title VII. The report, prepared for the Board of Directors of Lutheran Social Services, summarized the questions asked, the answers the witnesses gave, and counsel's summary opinions and categorization of the information received. At issue was whether the report had been "prepared or obtained because of the prospect of litigation." Although the Social Services had not been sued at the time it hired counsel, the Court concluded that "documents from employees (perhaps future plaintiffs) directly accused the president of creating a hostile work environment" satisfied the objective prong of the work product test, even though the documents were anonymous and the charges nonspecific. *EEOC* v. *Lutheran Social Services*, No. 98-5245, D.C. Cir., 8/24/99.

E. COMPENSATION

1. REMEDIAL PAY PLANS

In *Maitland* v. *University of Minnesota*, 155 F.3d. 1013 (8th Cir. 1998), the Eighth Circuit reversed summary judgment in favor of the employer in an action brought by a male professor protesting a *consent decree* adjusting the salaries of female faculty members.

Female faculty members had sued; in that proceeding, the plaintiffs' regression analysis showed male/female salary disparities between 4.1 percent and 10.3 percent, while the employer's showed a statistically insignificant 2 percent difference. The parties were in disagreement as to the factors that should be included in the regression analysis and used different factors. The original parties then agreed to a compromise regression analysis, which included some, but not all, of the disputed variables and reflected a 6 percent difference. This 6 percent differential was the basis for the "affirmative action" salary plan agreed to in the case at hand.

The Eighth Circuit examined the plan in terms of Title VII and (because the employer is a public entity) Constitutional standards, requiring a "manifest" imbalance to justify action under Title VII and a

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"conspicuous" imbalance to justify action under the Constitution. The court observed that "while a salary imbalance of 6 percent or 10 percent might well be found to be manifest and conspicuous, a statistically insignificant imbalance of 2 percent likely would not."

The trial court had determined which regression analysis should be the basis for the decision (which variables should be included). The Eighth Circuit, however, found this to be an inappropriate resolution of a genuine issue of material fact and, therefore, reversed the summary judgment.

The fact that the plan in question was implemented pursuant to a court-approved consent decree was inconsequential to the Eighth Circuit, which noted that the trial court had not found a manifest or conspicuous salary imbalance. Moreover, the record below indicated that the existence of discrimination with respect to female faculty pay was still an open question at the time of the consent decree.

As in the Fourth Circuit (*see Smith, Degenaro* v. *Virginia Commonwealth University*, 84 F.3d 672 (1996), a dispute as to the variables that should be in the regression analysis that results in a remedial pay plan will preclude summary judgment.

2. EQUAL PAY ACT

In *Stopka* v. *Alliance of American Insurers*, 141 F.3d 681 (7 Cir. 1998), the Court addressed the extent to which putting jobs in the same grade establishes equal work/value.

As vice president of administration for a trade association of insurers, Ms. Stopka was paid less than male VPs "more directly involved in the business of insurance" (research, legislative/regulatory representation, law, tax, public relations) but whose positions "were ranked equally under (the organization's) Salary Administration Program." Her unit had the largest number of employees, and she had the same management responsibilities as the men (hire, fire, budget, etc.).

The trial court granted, and the appellate court affirmed, the employer's motion for summary judgment on the basis that she had failed to establish that her position was substantially similar to those of the higher-paid men. The court's rationale was essentially that the men were in functions that were more integral to the success of the enterprise. The court gave short shrift to the fact she was paid less than the minimum for the grade on the basis that there were many instances where practice did not conform to salary administration policy. The court dismissed her argument to the effect that "same grade" means "equal work" by noting that substantial equality under the Equal Pay Act rests on "actual performance and job content – not job title, classifications or descriptions."

3. STOCK OPTION CLASS ACTION

A federal district court has certified a class of employees to proceed with a lawsuit contending their employer's stock option allocation policies violated Title VII of the Civil Rights Act of 1964.

The suit claims that a discriminatory pattern of option awards left 29 female employees with "table scraps" when their legal information publishing company was sold in 1996. The plaintiffs contended that the female employees were systematically excluded from or given only token option awards compared to their male counterparts. *Carter* v. *West Publishing Co.*, M.D. Fla., No. 97-2537-CIV-T-26A, 5/20/99

4. EMPLOYEE DISCOUNTS ON COMPANY STOCK

Traditionally, employers have relied on IRS guidance in concluding that the discount on employee stock purchase plan shares is not subject to FICA/FUTA. Recently, the IRS indicated to its field auditors that it is changing its long-held stance on this issue. On audit, the IRS is increasingly asserting that the discount an employee receives under an employee stock purchase plan *is* subject to FICA/FUTA. Several high-tech employers have had the issue raised on audit (Micron is currently in litigation over the issue). So far, the issue has only been raised in high-tech audits, according to news reports. *San Jose Mercury News*, July 29, 1999

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F. RESTRICTIVE COVENANTS

1. BAD BOY/CLAW BACK

A federal district court held that a former IBM vice-president who left to join a rival firm may have to repay IBM the profits he made by exercising certain stock options. From 1996 to 1998, IBM employed as vice-president of procurement in North Carolina. He received two stock option awards, one on April 15, 1996, and another on March 13, 1997.

After receiving the 1996 award, the vice-president signed a stock option agreement in which he acknowledged reading the terms of the plan under which the award was issued. The plan provided that an award is subject to forfeiture if the participant goes to work for a competitor within six months after exercise, payment, or delivery of an award.

The vice-president exercised his stock options during March, April and June of 1998. In June 1998, he informed IBM that he was leaving to work for Compaq Computer Corporation, a direct competitor. IBM then demanded payment of the profits that Martson realized from the exercise of the options.

When he refused to repay the company, IBM filed suit for breach of contract.

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The Court found that:

- the New York forum selection clause in the stock option agreements was enforceable.
- "The stock options granted . . . are not wages, and that . . . the profits earned on them can be divested — even though the options had been exercised without running afoul of New York's prohibition against forfeiture of earned wages."
- The divestiture provision "operates as a short-term (six month) covenant not to compete." Under the "employee choice doctrine," an employee can keep his benefits or exercise his right to compete.

The "only bar to applying the employee choice doctrine here would be if the defendant had been involuntarily terminated from his job at IBM," the Court noted. As a result, the court stated that the defendant may avoid forfeiture if he can show that the defendant was constructively discharged by IBM. The court thus gave the defendant additional time "to file an amended answer that explicitly asserts a claim for constructive discharge."

However, the court said that it now appears that the defendant "resigned his position after lining up a lucrative new job with another major player in the burgeoning personal computer industry." If he fails to file an amended complaint, the court said it will find the employee choice doctrine applicable to the case and rule for IBM. *International Business Machines Corp.* v. *Martson*, S.D.N.Y., 98 Civ. 4956, 2/5/99)

2. TRAVELERS' GROUP CAP VIOLATES CALIFORNIA LABOR CODE

A Los Angeles court recently ruled in favor of class action plaintiffs in a case involving Travelers' so-called "Capital Appreciation Plan," an equity compensation plan maintained by the Citigroup unit. Although the case is unreported and limited information is available, it appears that the restricted stock purchase component of the CAP (under which the employees "purchase" restricted stock and can forfeit the stock if termination occurs within 2 years), has been held to violate California labor law. California law generally does not permit forfeiture of earned pay. *Dow Jones News Wires*, July 15, 1999

G. SECTION 1981 CLAIMS

1. AT-WILL EMPLOYMENT

- The Fourth Circuit held that a Section 1981 claim can be stated for employment racial discrimination notwithstanding the fact that Plaintiff was an employee at will. Spriggs was employed with Diamond Auto Glass as a customer service representative in Diamond's Forrestville, MD, store. During his employment, Spriggs' supervisor used numerous racial epithets, many of them directed at Spriggs. Diamond's management was aware of the comments but failed to stop them. Because of the racial comments, Spriggs left his employment twice, and after each time, Diamond management asked him to return and assured him that they would control his supervisor's comments. The supervisor continued to make racial remarks throughout Spriggs' employment, however, and as a result, Spriggs resigned his employment with Diamond for the third and final time. He then brought his action for racial discrimination against Diamond under 42 U.S.C. § 1981.

  The district court dismissed Spriggs' Section 1981 claim. The lower court concluded that "because at-will contracts 'confer no rights that are enforceable in an action *ex contractu*, . . . [they] cannot serve as a predicate for a Section 1981 action.'" The Fourth Circuit reversed. The appeals court reasoned that even at-will employment involves a contract that can serve as a predicate to a Section 1981 claim. According to the court:

  > When Spriggs began work for Diamond in 1993 — and upon returning to work in both 1996 and 1997 -- he accepted Diamond's offer to enter into a contract. That is, Diamond had offered, either expressly or implicitly, to pay Spriggs if he would perform the duties of customer service representative, and Spriggs accepted that offer by beginning work. Spriggs' performance of the assigned job duties was consideration in exchange for Diamond's promise to pay. The parties' actions thus created a contractual relationship."

  Spriggs v. *Diamond Auto Glass*, 165 F.3d 1015 (4th Cir. 1999)

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- The only other Circuit Court to address directly the issue of whether employment at-will can substantiate a Section 1981 is the Fifth Circuit in *Fadeyi* v. *Planned Parenthood Ass'n.*, 160 F.3d 1048, 1052 (5th Cir. 1998). The Fifth Circuit in *Fadeyi* court reached the same conclusion as the Fourth Circuit in *Spriggs.*

  The Seventh Circuit has suggested *in dicta*, though not decided, that an employment at-will relationship involves no contract, and therefore cannot support a Section 1981 claim. See *Gonzalez* v. *Ingersoll Milling Machine Co.*, 133 F.3d 1025, 1035 (7th Cir. 1998) (suggesting, though not deciding, that a Section 1981 claim could not be stated in an employment-at-will situation). A district court within the Seventh Circuit rejected this *dicta* and held that employment, even at-will, constitutes a sufficient contract to substantiate a Section 1981 claim. *Price* v. *Wisconsin Serv. Corp.*, 1999 U.S. Dist. LEXIS 10913, at *8-9 (E.D. Wis. July 14, 1999).

  Lower courts are split on the issue. Compare *Sheppard* v. *Dickstein, Shapiro, Morin & Oshinsky*, 1999 U.S. Dist. LEXIS 11786 (D.D.C. July 7, 1999) (District of Columbia law treats at-will employment agreements as contracts, and therefore an at-will employee cannot maintain a cause of action under § 1981"); *Moorer* v. *Grumman Aerospace Corp.*, 964 F.Supp. 665 (E.D.N.Y. 1997) (at-will employment does not fall within scope of Section 1981).

2. UNITED STATES CITIZENSHIP

   On April 26, 1999, the U.S. Supreme Court agreed to review a circuit court decision that Section 1981 prohibits private employers from discriminating against workers because they lack U.S. citizenship. The United Brotherhood of Carpenters and Joiners seeks to overturn the decision of the Second Circuit allowing Linden Anderson, an elected business representative of Local 17 and citizen of Jamaica, to proceed with a Section 1981 claim against the union for removing him from office because he was not a U.S. citizen. *Anderson* v. *Conboy*, 156 F.3d 167 (2d Cir. 1998), *cert. granted sub nom.*, *Carpenters* v. *Anderson*, 67 ULSW 3414 (U.S. 1999).

H. FOLLOWING PROCEDURES DURING REDUCTIONS-IN-FORCE

1. In *Brennan* v. *GTE Government Systems Corp.*, 150 F.3d 21, 77 FEP 430 (1st Cir. 1998), the supervisor apparently did not follow the employer's standard procedure in completing the employer's Work Force Analysis Forms which first identified functions to be eliminated and then analyzed the skills of the employees. The selection of employees for termination would then involve identifying the persons who did not have the skills necessary to do the remaining work. In actuality, the supervisor determined the persons to be laid off based on a performance ranking. The First Circuit characterized the evidence as "thin," but nevertheless found it to be directly relevant to proof of pretext and, based on this and other evidence, held that there was sufficient evidence to send the case to a jury.

2. In *Vaughan* v. *Metrahealth Companies*, 77 FEP 734 (4th Cir. 1998), the supervisor, who made the decision to discharge the plaintiff in a RIF, admitted numerous departures from the company policy and from the company "Downsizing Manual." The supervisor also failed to use the company forms which focused attention on the employee's qualifications, specific experience, abilities and strengths. The supervisor, however, did have personal knowledge of the individuals. In the *Vaughan* case, the court said that the failure to follow the normal procedures and the "Downsizing Manual" could be pretextual, but also held that it did not prove that the motivation was age discrimination.

3. In a class action case questioning the basis for the underlying RIF decision, *Mete* v. *New York State Office of Mental Retardation*, 77 FEP 366 (NDNY, 1998), A New York State Government agency, argued that the RIF was forced by a budget reduction. The plaintiff solicited letters from three state congressmen suggesting that the budget cuts did not require the elimination of a class of jobs, including the plaintiff's job. The plaintiff then argued that the program was pretextual. In structuring the RIF, the employer also relied upon several earlier task force studies. The plaintiff was able to show some apparent conflicts between these studies and the conclusions which the employer drew from it. The RIF, which involved the elimination of an entire level of supervisory management, had a disparate impact on older workers compared with the entire work force. The district court rejected the employer's motion for summary

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judgment.

See also, *EEOC* v. *Texas Instruments*, 100 F.3d 1173 (5th Cir. 1996).

I. EVIDENTIARY AND PROCEDURAL ISSUES

1. DELEGATED DISCRETIONARY DECISIONMAKING

The Second Circuit held that class certification can be granted in a race discrimination case even though authority over discipline and promotion decisions rested with individual department supervisors.

Plaintiffs' lawsuit contends that the railroad's standard disciplinary and promotion policies are not followed effectively because of the railway's practice of "overdelegating" decisionmaking authority to individual supervisors. As a result, the Plaintiffs contend that the practice of delegating such authority has a disparate impact on African-American employees. For example, the Plaintiffs' expert determined that African-American employees were three times more likely than white employees to be disciplined. The Plaintiffs also offered statistical evidence that showed that African-Americans were 30 percent less likely to be promoted because of managers' failure to follow posting procedures or only following them as a formality.

The Second Circuit reversed the lower court's ruling that class certification was not appropriate. The lower court had denied class certification on the basis that the class claims lacked commonality and typicality as decisions were vested in various department supervisors. According to the court:

> "Though proving that the grant of discretionary authority to supervisory employees either results in a pattern and practice of discrimination or affects one class of employees more harshly than others is likely to be extremely difficult. . . the fact that the Class Plaintiffs challenge the subjective components of company-wide employment practices does not bar a finding of commonality under either the disparate treatment or disparate impact model."

Furthermore, the court concluded that the Plaintiffs can make some showing that the challenged overdelegation of authority caused a pattern of disparate treatment against African-Americans, or had a disparate impact on them. *Caridad* v. *Metro-North Commuter Railroad*, 1999 U.S. App. LEXIS 17892 (2d Cir. July 30, 1999)

2. SUBJECTIVE SELECTION CRITERIA

A hospital social worker, who applied for a new position after his old position was abolished in a hospital reorganization, did not state a gender discrimination claim where he alleged that the interview process was purely subjective, the interviewers were predominately female, and the individuals selected for the position were women. Affirming summary judgment to the employer, the Seventh Circuit held that federal law permits subjective interviews and does not require private employers to "behave as if they were running paper-heavy bureaucracies and to prefer paper-heavy evaluations over contextual assessments by knowledgeable reviewers." The court added that traits such as warmth and caring are appropriate traits for social workers, and that it is possible that reliance on those qualities in the selection process might lead to unequal representation between the sexes. The court concluded, however, that the hospital could ask about warmth or helpfulness in the selection process without predictably screening out men, just as law firms can screen potential trial lawyers for dogged combativeness without discriminating against women.
Scott v. *Parkview Memorial Hospital*, 1999 WL 236469 (7th Cir. 1999).

Reversing district court's denial of JMOL, Seventh Circuit held that flaws during the interview process cited by Plaintiff — that he was given a shorter interview, that the questions asked of him were more difficult than those asked of the other candidates, and that his past work history and experience was disregarded — had "no hint of age bias to it." Plaintiff must prove not merely that he was treated differently, but that he was treated differently because of his age. *Diettrich* v. *Northwest Airlines*, 168 F.3d 961 (7th Cir. 1999).

3. PROOF OF SPECIFIC JOB OPENINGS

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The Second Circuit, 2-1, affirmed summary judgment against the Title VII claims of a black female receptionist who alleged discriminatory denial of dozens of promotions after she had indicated generally her interest in being promoted. What makes the case noteworthy is that the numerous job openings were mostly not posted, plaintiff claimed an informal grapevine favored whites, and she made reasonable efforts during two annual reviews to notify supervision of her interest in promotion. She was once told of being too valuable as a receptionist. The court required more specificity, especially of her interest in the few posted jobs, and saw severe public policy problems in burdening employers to keep track of all employees who have generally expressed an interest in promotion and consider each of them for any opening for which they are qualified but did not specifically apply. It rejected as inconsequential evidence of stray remarks and statistical patterns unrelated to any policy or practice. The majority also rejected applicability of the futility doctrine based on plaintiff's having indicated her own interest in promotion, evidence that she did not believe it to be a vain gesture. *Brown* v. *Coach Stores, Inc.*, 78 FEP 917 (2d Cir. 1998).

4. FAILURE TO APPLY DESPITE FUTILITY DOCTRINE

A white male terminated by his female supervisor in City job abolishment sued for race and sex discrimination under Title VII when a black applicant obtained a newly created, but similar, position. He argued, alternatively, that he assumed he was automatically a candidate for the second job pursuant to City rules, and that application would have been futile given his supervisor's comments about diversity and what the dissent described as a racial pogrom in terms of forced turnover and replacements. The Fourth Circuit, 2-1, found plaintiff had not met his burden to prove futility which could have excused his failure to apply. Although plaintiff knew the general pattern of elimination of white males' jobs, nothing his supervisor said in his exit interview should have dissuaded him from applying for the other job. As a result, the Court affirmed there was no triable issue of race and sex discrimination. *Brown* v. *McLean*, 159 F.3d 989 (4th Cir. 1998).

5. SAME-ACTOR INFERENCE

Seventh Circuit held that where the same manager both hired and fired the plaintiff, the inference that the discharge was not from an improper motive will not often be dispositive, because a manager might hire a member of a group with stereotypical expectations and then discharge him or her if expectations are not met, or the manager might not be aware of his or her animus until working with such an employee. *Johnson* v. *Zema Sys. Corp.*, 170 F.3d 734 (7th Cir. 1999).

6. COMPARATIVE JOB QUALIFICATIONS

Fifth Circuit held that disparities in qualifications between job candidates are generally not probative of discrimination unless the disparities so favor a plaintiff that reasonable persons of impartial judgment would have to agree that the plaintiff was clearly better qualified. *Deines* v. *Texas Dep't of Protective & Regulatory Servs.*, 164 F.3d 277 (5th Cir. 1999).

7. ADMINISTRATION OF PERFORMANCE EVALUATIONS

The Fifth Circuit recently affirmed summary judgment on a promotion discrimination claim despite a supervisor's numerous references to the black employee as "Buckwheat" and other derogatory terms. The fact that the employee had never challenged the accuracy of his performance review and indicated agreement with it by signing it on the date it was prepared negated any inference of discriminatory intent, the Court reasoned. *Boyd* v. *State Farm Insurance Co.*, 158 F.3d 326 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1357 (1999).

8. EXPERT TESTIMONY

- The Supreme Court held that the so-called Daubert criteria used by judges to determine whether scientific experts can testify during trials should also be applied to nonscientific experts and suggesting, however, that flexibility is needed in its application to the particular circumstanceThe district courts were directed to act as "gatekeepers." *Kumho Tire Co.* v. *Carmichael*, 67 USLW 4179 (U.S. 1999) (No. 97-1709)

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- The increasingly common attempts by plaintiffs to use experts to testify on the ultimate issue of liability was rejected by the Seventh Circuit in a decision affirming summary judgment and holding it was appropriate to disregard the opinion of a supposed expert "business psychologist" who reviewed various documents and opined that the plaintiff appeared more qualified than several other candidates for promotion. Because the plaintiff had several documented performance problems, the Seventh Circuit ruled that the psychologist's proffered opinion simply second-guessed the employer's decision to promote others and inappropriately invited the District Court to assume the role of a super-personnel board. *Larimer* v. *Dayton Hudson Corp.*, 137 F.3d 497 (7th Cir. 1998).

9. STANDING/TESTERS

Federal District Court refused to permit a suit to proceed under a "testers" theory, holding that two college students who applied for receptionist positions but were not offered jobs lacked standing under Article III of the United States Constitution to sue the employer for race discrimination. The two African-American plaintiffs had presented fictitious resumes showing them to have stronger credentials than two white testers who also applied for the jobs. The white testers were tested, given second interviews, and offered positions, while the plaintiffs were rejected after their initial interviews. Because the plaintiffs neither wanted nor intended to accept a job offer, and the employer was not in a position to rectify any possible wrongdoing in any event, the federal District Court found that the plaintiffs had no stake in the outcome of the lawsuit. *Kyles* v. *J.K. Guardian Sec. Servs.*, 77 FEP 1473 (N.D. Ill. 1998).

J. HARASSMENT

1. TANGIBLE EMPLOYMENT ACTION

- The Third Circuit held that the Ellerth/Faragher "tangible adverse action" requirement includes not only a loss of compensation, but also the loss of any significant job benefits or characteristics, citing loss of an office and secretary, and loss of necessary files. *Durham Life Ins. Co.* v. *Evans*, 166 F.3d 139 (3rd Cir. 1999)

- Possibility that co-workers' harassment contributed to plaintiff's medical disability of paranoid schizophrenia requires reversal of summary judgment for employer, as plaintiff's disability benefits were less than her regular salary, and this would be a tangible employment action. *Wilson* v. *Chrysler Corp.*, 1999 U.S. App. LEXIS 5792 (7th Cir. 1999).

2. ABSENCE OF TANGIBLE EMPLOYMENT ACTION

- On remand from the Supreme Court following Ellerth/Faragher, the Eighth Circuit held that the affirmative defense many not apply to a situation involving a single incident of "severe, unanticipatable" harassment. The Court also remanded to the trial court for decision as to whether the alleged harasser, who was not in plaintiff's chain of command at the time of harassment, qualified as a "supervisor" within the meaning of Ellerth/Faragher. *Todd* v. *Ortho Biotech, Inc.*, 1999 U.S. app. LEXIS 8280 (8th Cir. 1999).

- Third Circuit affirmed judgment for plaintiff policewoman on various Title VII claims, including sexual harassment. Although defendant had a written anti-harassment policy, it failed to implement the policy; it knew about the harassment but failed to stop it; and it did not investigate harassment after being placed on notice of it. Thus, employer was precluded from asserting the Ellerth/Faragher affirmative defense. *Hurley* v. *Atlantic City Police Dep't.*, 1999 U.S. App. LEXIS 4582 (3d Cir. 1999).

- Fifth Circuit reversed grant of summary judgment entered prior to Ellerth/Faragher, where employer could not prove as a matter of law the second element of the new affirmative defense — that plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise. Plaintiff had taken advantage of the union grievance procedure. *Watts* v. *Kroger Co.*, 170 F.3d 505 (5th Cir. 1999).

  Fifth Circuit affirmed grant of summary judgment to school district on sexual harassment claim where

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district conducted swift, good-faith investigation in response to complaints about a school principal and where the complaining teacher failed to reasonably avail herself of preventive/corrective sexual harassment policies and lied to investigators about the principal's conduct. *Scrivner* v. *Socorro Ind. Sch. Dist.*, 169 F.3d 969 (5th Cir. 1999).

- D.C. Circuit reversed summary judgment for U.S. Navy, finding that mere reasonable care to prevent and correct harassment is insufficient. Under Faragher/Ellerth test, Navy must also show both that plaintiff inexcusably delayed in reporting alleged rape by her supervisor and that a reasonable person in plaintiff's place would have come forward early enough to prevent the alleged harassment from becoming "severe or pervasive." *Greene* v. *Dalton*, 164 F.3d 671 (D.C. Cir. 1999).

3. NOTICE OF HARASSMENT

- Female employee subjected to graphic verbal abuse (lewd cursing) did not put employer on notice of the severity of the conduct merely by asking a supervisor if cursing was allowed on the sales floor. An employer is put on notice only "where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it." *Kunin* v. *Sears Roebuck & Co.*, 1999 U.S. LEXIS 8100 (3d Cir. 1999.

- Eleventh Circuit reversed a grant of summary judgment in light of Ellerth/Faragher, despite employer's immediate investigation and discharge of offending harassers; finds issue of fact as to whether employer was on notice about hostile environment prior to plaintiff making a report. *Dees* v. *Johnson Controls World Servs., Inc.*, 168 F.3d 417 (11th Cir. 1999)

4. UNREASONABLE REPORTING

A federal district court granted summary judgment in favor of the employee based on its prompt and effective response to Coates' belated claim of supervisor harassment. Plaintiff had told a coworker of an early problem, and the employer had managed to find out and deal with it. Coates kept subsequent evidence to herself, although she frequently talked to her female supervisor about personal non-business things during the next several months. The Eleventh Circuit affirmed, applying both pre- and post-*Ellerth* and *Faragher* authority to the employer'' dual defenses of reasonable care and plaintiff' unreasonable failure to alert the employer. Here, Sundor met its burdens by demonstrating a user-friendly policy, amply disseminated, which snapped into implementation when Coates finally specified her claims. Coates inadequately notified Sundor that her earlier grievances were unresolved or that they had escalated. The Court concluded: "[w]hen an employer has taken steps, such as promulgating a considered sexual harassment policy, to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer's directives have been breached so that the employer has the opportunity to address the problem." *Coates* v. *Sundor Brands, Inc.,* 164 F.3d 1361 (11th Cir. 1999)

5. CO-WORKER HARASSMENT

- Seventh Circuit affirmed summary judgment in favor of the employer, finding that two employees accused of harassment were not supervisors for purposes of imputing liability to employer; they were not entrusted with authority to hire, fire, demote, promote, transfer or discipline other employees. The employer is not liable for the alleged harassment by these two "co-employees", because it effectively corrected the harassment upon receiving complaints and thus was not negligent in discovering or remedying it. *Parkins* v. *Civil Constructors*, 163 F.3d 1027 (7th Cir. 1998).

- Sexual harassment case can be established even though much of the conduct creating the hostile environment is not obviously sexual or gender-motivated. Plaintiff alleged that co-workers created a hostile work environment by:

  - One co-worker, Jones, made fun of his wife and made derogatory comments about women, such as that women talk too much or are less intelligent than men;
  - Jones told other co-workers that Plaintiff was "incompetent, overemotional, and hysterical" and that women in general were incompetent, stupid, and scatterbrained;

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- Jones described to a co-worker a dream he had about a naked woman jumping on a trampoline;
- Jones commented to a co-worker that *Playboy* is better than a wife because it offers variety;
- Jones told co-workers that Plaintiff was going to file a sexual harassment claim against him;
- Employees ignored plaintiff, withheld business information from her, and became "generally uncooperative;"
- Male co-workers rarely invited her to lunch, stopped discussing business matters when she was around, and refused to give her necessary business information.

Even though much of the conduct of which Plaintiff complained was not sexual in nature or obviously gender-motivated, a reasonable jury could conclude that such conduct was relevant to whether a hostile work environment existed, the court reasoned. *O'Shea* v. *Yellow Technology Serv., Inc.*, 1999 U.S. App. LEXIS 17769 (10th Cir. July 28, 1999):

6. MEASURES REASONABLY CALCULATED TO END HARASSMENT

Summary judgment denied where employer initially issued a verbal reprimand to the harasser, but harassment thereafter became more severe and pervasive, which then resulted in only a written reprimand. A jury ". . . could conclude that the [subsequent] written reprimand was not reasonably calculated to prevent future instances of harassment." *Glickstein* v. *Neshaminy Sch. Dist.*, 1999 U.S. Dist. LEXIS 727 (E.D. Pa 1999).

7. REINSTATING HARASSOR

Fourth Circuit reversed district court order denying enforcement to arbitration award which converted the discharge of sexual harasser to a nine-month suspension. The arbitration award did not violate a "well defined and dominant" public policy. *Westvaco Corp.* v. *United Paperworkers*, 79 FEP 595 (4th Cir. 1999).

8. FTC STAFF OPINION LETTER

The FTC staff issued an advisory opinion that Sections 603(f) and 606 of the Fair Credit Reporting Act (the "FCRA") notice and consent requirements apply to employers who use outside organizations that regularly engage in investigations of sexual harassment complaints for a fee even if the scope of their investigation does not exceed the employer's workforce or company documents. According to the FTC staff, "The relevant inquiry here is not whether the scope of the investigation goes beyond the employer's workforce or internal documents. Section 603(f) of the FCRA defines a consumer reporting agency ('CRA') as any person who for monetary fees, assembles or evaluates credit information or other information on consumers for the purpose of regularly furnishing consumer reports to third parties using any means or facility of interstate commerce. A consumer report is, in turn, defined in Section 603(d)(1) as a report containing information bearing on an individual's character, general reputation, personal characteristics, or mode of living that is used or expected to be used for the purpose of serving as a factor in establishing the consumer's eligibility for, among other things, employment."

K. EMPLOYEE PRIVACY

1. VIDEOTAPING CO-WORKERS

Plaintiff sued a coworker who, while actually employed by ABC, obtained employment as a "telepsychic." The coworker wore a small video camera hidden in her hat, covertly videotaping conversations. Employees sat a cubicle desks giving telephonic readings to customers. They could easily overhear conversations conducted in surrounding cubicles or in the aisles near the cubicles. Among the conversations taped was one in which plaintiff discussed his personal aspirations and beliefs and gave the ABC employee a psychic reading. Plaintiff sued for invasion of privacy by intrusion.

Although a jury found for plaintiff, the intermediate appellate court reversed on the ground that plaintiff could have no reasonable expectation of privacy in his workplace conversations which could be overheard by others in a shared office space.

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The California Supreme Court reversed, holding that "where the other elements of the tort of invasion of privacy by intrusion are proven, the cause of action is not defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears." It reasoned that "in the workplace, as elsewhere, the reasonableness of a person's expectations of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion.". In this case, the employee who lacks a "reasonable expectation of complete privacy" in his/her conversation, because it could be seen and overheard by coworkers (but not the general public), "may nevertheless have a claim for invasion of privacy based on a television reporter's covert videotaping of that conversation", the Court concluded. *Sanders* v. *ABC*, No. S059692, Calif. Sup. Ct., 6/24/99.

2. SPOUSE'S CREDIT REPORT

An employer is not entitled to obtain the credit profile of an employee's spouse, even if the employer is evaluating whether the employee, whom it suspects is stealing company funds, should be terminated. The "employment purposes" provision of the FCRA is limited solely to employees and not their families. Since the credit report was retrieved inadvertently, however, there was no FCRA violation. *Davis* v. *Asset Servs.*, 1998 U.S. Dist. LEXIS 20085 (M.D. La. 1998).

L. EEOC "REGULATORY" ACTIONS

1. REASONABLE ACCOMMODATION

EEOC issued "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act." The "Guidance" goes far beyond statutory requirements including: (1) rejecting the "cost/benefit analysis" as part of the reasonableness examination; (2) the requirement that a disabled individual be qualified in his/her present job before obtaining a transfer to a vacant position and incorporates a preference ("The employee need not be the best qualified individual for the position in order to obtain it as a reassignment"); (3) when an employee is given a leave of absence as a reasonable accommodation, an employer must hold open the employee's job unless it would impose an "undue hardship"; and (4) in determining a disabled individual's productivity, the employer cannot consider the effect of leaves of absence or part-time schedules.

2. TENDER BACK

EEOC published for comment proposed rulemaking under OWBPA entitled "Waiver of Claims: Tender Back of Consideration" intended to incorporate the holding in *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998). EEOC did not use the negotiated rulemaking procedure. In addition to outlawing "tender back", the proposed rules would (1) make invalid any "covenant not to challenge a waiver agreement, or any other arrangement that imposes any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge a waiver agreement" and (2) limit recovery by the employer of "restitution, recoupment, or setoff" to the lesser of the consideration the employee received for signing the waiver agreement or the amount recovered by the employee." In addition, an employer (1) "is not entitled to restitution, recoupment, or setoff for any costs, attorneys' fees or other amounts claimed as damages attributable to an alleged breach of such a covenant or other arrangement" and (2) may not ". . . unilaterally abrogate its duties under a waiver agreement to any signatory, even if one or more of the signatories to the agreement or EEOC successfully challenges the validity of that agreement under the ADEA."

3. MEMORANDUM OF UNDERSTANDING
WITH OFCCP

On April 7, 1999, the Equal Employment Opportunity Commission and Department of Labor signed two memorandums of understanding (MOUs). One increases the enforcement authority of the Office of Federal Contract Compliance Programs in seeking damages, and the other aims to strengthen enforcement of compensation discrimination cases.

The first memorandum of understanding allows the OFCCP to act as the EEOC's agent in enforcing

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Executive Order 11246 and Title VII violations. The agreement will for the first time allow the OFCCP to seek monetary damages for the resolution of discrimination complaints involving federal contractors. Therefore, it will no longer be necessary for complainants to file charges with the EEOC to obtain damages.

According to the agreement, the OFCCP will investigate the charges, issue findings, and attempt voluntary conciliation for damages. The agency will not, however, have the authority to litigate Title VII damages or to seek Title VII damages outside the voluntary conciliation process.

The second memorandum of understanding was announced a part of the Clinton administration's $14 million Equal Pay Initiative. It calls for joint training of Wage and Hour investigators in recognizing potential compensation discrimination, and encourages the exchange of information among the EEOC, the OFCCP, and the Wage and Hour Division of the Department of Labor. It is expected that they will share information, including supporting documentation and potential complainants, in pay discrimination cases. The EEOC and the DOL will also provide each other wish semi-annual reports on their actions on compensation discrimination.

M. RACE

1. In a race case which may have only limited application to the employment area, the Supreme Court on March 21, 1999, granted certiorari on the issue of whether Hawaii may limit by race the persons who may vote to elect a nine-member board that oversees a program benefiting only residents of Hawaiian blood. The law established for electing office trustees limits the voting to native Hawaiians. About 20% of the state's population have some Hawaiian blood, according to the Office of Hawaiian Affairs. *Rice* v. *Cayetano*, 146 F.3d 1074 (9th Cir. 1998), *cert. granted*, 67 USLW 3577 (U.S. 1999) (No. 98-818)

2. RACE OF CHILD AS SOURCE OF EMPLOYMENT DISCRIMINATION

   In a ruling of first impression, the Sixth Circuit held that a white worker who alleged that he was discriminated against because he had a mixed-race child could proceed with a race discrimination suit. The court concluded that Title VII protects against discrimination based on the "contrast in races" between the plaintiff and his daughter. The plaintiff alleged that once his supervisor learned that he had a mixed-race daughter, the work atmosphere quickly deteriorated. The plaintiff alleged that the supervisor would insult him about his weight in front of other employees and said that the fact that the plaintiff had a mixed-race child would hurt the employer's image in the community. The court concluded that a "white employee who is discharged because his child is biracial is discriminated on the basis of his race, even though the root animus for the discrimination is prejudice against the biracial child." *Tetro* v. *Elliot Popham Pontiac*, 1999 WL 184064 (6th Cir. 1999).

N. AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION

1. In a reverse discrimination case brought by a white male, the Eleventh Circuit held that a statement by the supervisor that he believed that the plaintiff had not been hired due to race or gender and a request for an additional justification for selecting a male when three females were available were not direct evidence of discrimination. The court stated that "only the most blatant remarks, whose intent could be nothing other than to discriminate" could be direct evidence. The Court, however, held that a request for additional justification in each case where a female was not selected was sufficient to make out a *prima facie* case. *Schoenfeld* v. *Babbitt*, 168 F.3d 1257 (11th Cir. 1999).

2. The Seventh Circuit reversed a grant of summary judgment upholding a university dean's decision to leave a clinical psychology professor position vacant rather than accept the departmental recommendation to hire a male applicant. The district court concluded that the dean's preference to hire a woman was supported by a valid affirmative action goal of 68% female representation in the psychology department. The Circuit Court held that a triable issue existed, because the university denied that it had ever discriminated on the basis of gender and because nothing the AAP supported the dean's rationale that he rejected the departmental recommendation because it submitted one name rather than three for him to consider. The Court also strongly questioned the wisdom of affirmative action goals within small workgroups: "[The Dean] wanted to look at the Psychology Department in isolation, which no statistician would do, and to

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collapse the distribution by compelling every academic department to mimic the population from which it was hired. That would be as sure a sign of discrimination as is a lopsided or truncated distribution, and a plan to have every department duplicate the pool from which it is drawn cannot be sustained as a valid affirmative action plan." *Hill* v. *Ross*, No. 98-3942, 1999 U.S. App. LEXIS 13808 (7th Cir., June 23, 1999)

3. The Fourth Circuit reversed a grant of summary judgment in favor of a county employer, holding that the alleged statements of personnel director that recently selected African-American male and Hispanic male building maintenance workers were "minority affirmative action hires," and deemphasizing the hiree's assertedly better qualifications when considered against the backdrop of the county's policy statement constitute direct evidence of reverse discrimination. The County policy provided that "minority candidates who are qualified for a position, but not necessarily the best qualified, are strongly preferred for hire over non-minority candidates. *McGarry* v. *Bd. Of County Commissioners, County of Pitkin,* 79 FEP Cases 965 (10th Cir. 1999)

O. REEMPLOYMENT RIGHTS OF MILITARY RESERVISTS (Written by Robert Miller, Senior Counsel, Freddie Mac)

The rights of military reservists as set forth in the Uniform Services Employment and Reemployment Rights Act (USERRA), which will be relevant in the event employees who are military reservists are called to duty. There are many nuances in the statute, and to date, few courts have rendered decisions providing definitive guidance on its proper interpretation.

RE-EMPLOYMENT RIGHTS

A member of the reserves called to duty is entitled to re-employment upon his or her return, providing the following conditions are met:

- The employee or an appropriate officer of the uniformed service has given advance written or verbal notice of such service to the employer.
- The cumulative length of the absence and all other previous absences from the position with the employer by reason of military service has not exceeded five years. (Limited exceptions to this rule would permit the absence to exceed five years.)
- The employee reports to, or submits an application for re-employment to, the employer promptly after the completion of military service (what constitutes "promptly" varies according to the length of absence).

EXCEPTIONS

An employer is not required to re-employ a reservist if:

- The employer's circumstances have so changed as to make re-employment impossible or unreasonable. According to the House Report on the bill, this exception is only applicable "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran."
- The reservist has become disabled during the absence and his or her re-employment would cause an "undue hardship" on the employer.
- The employment from which the employee reservist leaves to serve in the military is for a brief, nonrecurrent period, and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

RE-EMPLOYMENT POSITIONS

Reservists are *not* just entitled to resume where they left off. In other words, reinstating reservists upon their return to the same position at the same pay as when they left for active duty may not be sufficient. Instead, reservists

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upon their return from active duty are entitled to *the position of employment in which they would have been employed if their employment had not been interrupted by active duty.* That means that an employee who would have been promoted had military leave not intervened must be placed in that higher position, unless he or she is not qualified to hold the position.

- If the employee reservist is not qualified to perform the duties of a position he or she would have been holding except for the military service, then the *employer has an obligation to make reasonable efforts to qualify the employee for the position.*
- If reasonable efforts fail to qualify the employee for the position he or she would have held but for military leave, the employer may reinstate the employee to the position held prior to taking military leave.
- In the event the employee is not qualified for either a position he or she would have held but for military leave, nor qualified for the position held prior to taking leave, then the employer must first attempt to place him or her in a position "which is the nearest approximation to a position" he or she would have held but for military leave, or, second, to the nearest approximation to the position he or she held prior to military service, with full seniority.

RIGHTS AND BENEFITS DURING ACTIVE DUTY SERVICE

An employee on active military duty is deemed to be on furlough or leave of absence from private employment. Accordingly, he or she is "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service."

BONUSES, LOAN PROGRAMS

For example, if the company's policy and practice in the past apparently has been to pay bonuses to persons on leaves of absence, it must pay bonuses to persons on military leaves of absence. In addition, if the company apparently suspends required payments under the computer loan purchase program for persons on leaves of absence, persons on military leaves of absence must be excused from making payments under the program until they resume active employment status with the company.

VACATION

With respect to vacation, a company may *not* require a reservist called to active military duty to use his or her vacation for any part of the leave. Instead, the statute specifically gives the reservist the option to use any vacation -- annual or other -- type of leave with pay that he or she may have accrued.

HEALTH BENEFITS

An employee called to active duty may elect to continue his or her health benefits for a maximum period of the lesser of 18 months beginning on the date on which the leave begins, or the day after the date on which the person fails to apply for or return to employment with the company. The company may require the employee to pay 102 percent of the cost associated with the continued coverage, unless the employee's absence is for less than 31 days.

PENSION BENEFITS

The company must treat the military leave of absence period as though the employee were in the continuous employment of the company. Therefore, the employer may *not* treat the military leave as a break in service, and must count that period of time for purposes of both vesting and benefit accrual.

Once the employee returns, the company also may have to make any matching contributions it would have made to the employee's 401(k) plan during his or her military leave of absence. Because the employer's contributions are tied to the employee's own contributions, the company would only have to make the matching contributions if "the re-employed serviceperson makes the required contribution to the plan." However, no interest or penalty may be

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charged on the employee's contribution, nor is the employer obligated to credit the employee's 401(k) with interest that would have been earned on such contribution.

A reservist on leave of absence to serve in the military also may be entitled to continue participation in the company's profit-sharing program. Representatives from Human Resources, Tax, and Legal should coordinate the logistics of administering this program for reservists on military leave, because it may not be possible for these employees to follow the company's normal procedures for enrolling in and exercising their stock purchases. Consequently, the company needs to consider alternative means for these individuals to exercise this benefit. Possibilities include having them sign a statement affirming their intention to enroll in and/or purchase stock under the plan or permitting a representative (*e.g.*, spouse or other relative) to act on their behalf.

RIGHTS AND BENEFITS UPON RETURN FROM ACTIVE DUTY SERVICE

A military reservist re-employed upon return from active duty is entitled to retain the seniority and other rights and benefits determined by seniority the employee had on the date he or she began military leave, *plus* the additional seniority and rights and benefits that such person would have received had he or she not taken military leave. This stipulation will affect, for example, vacation accrual. As the House of Representatives reporting on the bill, "[I]n determining how much vacation (length of vacation) a service member is entitled to in the years following reinstatement, all time away from work (period between leaving the job and entering military service, period of military service, and period between discharge or release from military service and re-employment) would be required to be considered under this section, together with the pre-military service period of employment." Likewise, a returning reservist would be entitled to any other benefits upon return that are determined by seniority, such as how much the company matches in the 401(k) plan.

A reservist returning from active military duty that exceeded 180 days may *not* be terminated except for cause for *one year* after re-employment. If military leave was less than 181 but more than 30 days, he or she may not be terminated for 180 days after re-employment, except for cause.

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NEW JERSEY EMPLOYMENT LAW UPDATE

SPRING 1999

by

ROBERT H. BERNSTEIN

Another year has passed and, not surprisingly, New Jersey's state and federal courts have issued a plethora of significant employment decisions.

In the past year we have seen our Supreme Court hold that employees may bring "reverse age discrimination" claims under the New Jersey Law Against Discrimination ("LAD"). The Appellate Division reversed summary judgment in favor of an employer in a hostile work environment "diabetic harassment" case where the plaintiff alleged two isolated "anti-diabetic" remarks by his supervisor. The United States District Court for the District of New Jersey held that, in determining whether a company employs 50 individuals for purposes of the New Jersey Family Leave Act, all employees, not just those located in New Jersey, are counted.

This is not to say that there have been no successes for employers in the past year. The Appellate Division has affirmed summary judgment in favor of an employer in a whistleblower case because the employee failed to identify a specific public policy violated by the complained of conduct. In another case, the Appellate Division vacated a jury verdict in favor of an employee in a whistleblower case because the only "victim" of the complained of conduct was the employer. The District of New Jersey recently enforced as "reasonable" a nationwide, one-year post-employment restrictive covenant.

In addition, just this month, the EEOC issued Enforcement Guidance respecting Vicarious Employer Liability for Unlawful Harassment by Supervisors. As many of you are

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aware, this Guidance is intended to elaborate upon the Supreme Court's landmark decisions from last summer in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton.

The following summarizes these and other developments in employment law in the past year.

I. NEW JERSEY LAW AGAINST DISCRIMINATION

A. HOSTILE WORK ENVIRONMENT HARASSMENT

Leonard v. Metropolitan Life Ins. Co., 318 N.J. Super. 337 (App. Div. 1999)

In this case, the Appellate Division reversed summary judgment entered in favor of the employer in a hostile environment handicap discrimination lawsuit brought by a diabetic employee. The Court ruled that two isolated derogatory comments allegedly made to plaintiff with no one else present were sufficient to support a cause of action under the LAD. In doing so, the Court stated, "[e]ven a single derogatory remark may be sufficiently severe to produce a hostile work environment." (emphasis added.)

Plaintiff's complaint was based upon only two incidents. In one, Leonard claimed he told his supervisor he would need to leave a meeting in time to have his lunch. According to Leonard, after the meeting his supervisor told him to "get your diabetic ass out of here before you die in my office." In the second incident, plaintiff arrived five minutes late for a training meeting because he stopped to eat lunch. After the meeting the supervisor purportedly reprimanded Leonard saying, "I don't give a f___ about you being a diabetic and having low blood sugar. . . . We're going to do things my way or we're not going to do them" and "f___ [you] being diabetic and having to stop for lunch." Plaintiff admitted that he was unaware of any reason he could not have brought food to the meeting and that on occasion he had brought beverages to meetings.

In finding that Leonard had stated a claim of hostile work environment handicap discrimination, the court noted, that the severity of the comments in issue in this case was

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underscored by the fact that they were said by the plaintiff's supervisor, and "plaintiff could not seek the redress that would otherwise be available to a victim of workplace harassment, namely resort to his own supervisor." The Court did not address, however, whether Metropolitan Life had a non-harassment policy with complaint procedures, or whether plaintiff had ever brought a complaint of harassment.

Heitzman v. Monmouth County, et al, (App. Div. May 11, 1999)

Plaintiff alleged two LAD hostile work environment claims—one because of his alleged handicap (sensitivity to second-hand smoke), and one because of his religion. Affirming summary judgment in favor of the employer, the Appellate Division held that sensitivity to second-hand smoke is not a handicap within the meaning of LAD, and that the alleged eight anti-Semitic remarks about which plaintiff complained were not sufficiently "severe or pervasive" to be actionable.

Some of the alleged comments were made by plaintiff's supervisor and included a reference to the Catskills as "the Jewish Alps," a reference to yarmulkes as "skullcaps" and a reference to the supervisor's girlfriend as a "Jew bitch." One of plaintiff's co-workers also said to plaintiff: "If Hitler was alive, he would make a lamp shade out of you." Plaintiff admittedly never complained about these comments.

The Appellate Division held that the employer could not be held liable for the remark of plaintiff's co-worker regarding Hitler because the employer neither knew nor should have known about it. Moreover, the Court held that the remarks of plaintiff's supervisor and those made in his presence were "merely offensive" and "teasing." Of significance for the Court was plaintiff's complete failure to complain about any of the comments.

Blakey v. Continental Airlines, Inc., et al., (App. Div. June 9, 1999)

Plaintiff, an airline pilot, alleged that certain fellow pilots made defamatory statements about her on a CompuServe computer forum, which was available solely to Continental flight

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crew members on their own time and at their own expense. Plaintiff sued her co-workers and Continental for defamation and hostile work environment sexual harassment. The trial court granted summary judgment, finding that Continental was not liable for the acts of plaintiff's co-workers.

Affirming summary judgment, the Appellate Division agreed that Continental could not be held liable for alleged defamatory statements made by plaintiff's co-workers on the computer forum because Continental did not require employees to use the forum and did not control the forum in any way. The Appellate Division also held that Continental could not be held liable under the LAD for alleged sexual statements made by plaintiff's co-workers on the forum because the forum was not a "workplace."

Santiago v. Anheuser-Busch, Inc., (App. Div. May 24, 1999)

Contrary to prevailing law, this unpublished decision suggests that the adoption and dissemination of anti-harassment policies, corporate anti-harassment training programs, prompt investigation of complaints and prompt remedial action may no longer alone ensure an effective defense to harassment claims brought under the LAD.

Here, the Appellate Division held that an employee can proceed with a sexual harassment claim merely because a first-level supervisor had not received formal anti-harassment training. The decision is further problematic because the employer immediately investigated the employee's complaint and thereafter took prompt remedial action by separating the supervisor from the employee. The Court nevertheless held that the absence of training for all supervisors created a factual issue concerning the level of care exercised by the employer in preventing workplace harassment.

B. AGE DISCRIMINATION

Bergen Commercial Bank v. Sisler, 157 N.J. 188 (1999)

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In this case, the New Jersey Supreme Court considered whether LAD's prohibition against discrimination on the basis of age protects employees who are terminated because they are too young. The Court ruled that "reverse age discrimination" violates LAD.

Plaintiff was offered a position as a vice-president of Bergen Commercial Bank. After the plaintiff accepted the position, the Bank's chairman learned that plaintiff was only 25 years old. One week after starting employment, plaintiff was told to resign his position, and when he refused to do so, he was ultimately terminated.

The Court noted that unlike ADEA, which explicitly provides that its protections are limited to individuals who are at least 40 years of age, LAD has no such limitation. Instead, LAD provides that all employees over age 18 are entitled to its protections. The Court, recognized, however, that while LAD does not prevent an age claim brought by a younger employee, this was not the primary purpose of the statute which was intended to address the more usual situation where an older worker is discriminated against in favor of a younger one. The Supreme Court, therefore, ruled that younger workers alleging age discrimination must conform his proofs to a heightened reverse discrimination formulation and must demonstrate background circumstances supporting the suspicion that the defendant is the unusual employer that discriminates against the majority. The Court emphasized, though, that employers may still base decisions on any number of reasons, including judgment and maturity.

Baker v. National State Bank, 312 N.J. Super. 268 (App. Div. 1998)

In this LAD age and sex discrimination case, the Appellate Division established an objective and less onerous test for a plaintiff to establish the second prong of his prima facie case, i.e., whether he is qualified for the position. A plaintiff may satisfy this prong by showing, for example, that he has adequate experience or that he was recognized by the employer for his work. Because plaintiffs had held their positions for ten years before being terminated, they were qualified for their positions. The Court held that defendant's claim that it terminated

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plaintiff for poor performance should have been considered at the second step of the burden-shifting analysis and not in connection with plaintiff's prima facie case.

C. DISABILITY DISCRIMINATION

Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998)

The Third Circuit held that the jury's finding that plaintiff did not have a "disability" within the meaning of the ADA was not inconsistent with finding that plaintiff was "handicapped" within meaning of LAD. In contrast to the ADA, the LAD definition of "handicapped" does not incorporate the requirement that the condition result in a substantial limitation on a major life activity. This lower standard under the statutory definition of "handicapped," as compared to the definition of "disability," negates any inconsistency in the jury's verdict with respect to the ADA and LAD claims. In addition, evidence supported the finding that plaintiff's back condition rendered him "handicapped" within meaning of LAD and thus warranted reasonable accommodation of transfer to day shift.

D. INDIVIDUAL LIABILITY

Hurley v. The Atlantic City Police Department, 174 F.3d 95 (3d Cir. 1999)

A female police sergeant brought a sex discrimination action against the police department, police chief, police captain, and male police sergeant under Title VII and LAD. Among other claims, plaintiff argues that supervisors may be individually liable for inaction—tolerance of sexual harassment, as employers under LAD.

A jury found that one of plaintiff's supervisors could be liable for aiding and abetting the employer in creating a hostile work environment. The plaintiff put forward evidence that this supervisor tolerated the harassing conduct by telling plaintiff to stop complaining, suggesting that she sleep with him, laughing at drawings and graffiti about her and demeaning her. On appeal, the Third Circuit held that supervisors may not be individually liable under LAD as

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"employers." However, the Court held that supervisors could be liable as "aiders and abettors" if they provide substantial assistance or encouragement to the employer's unlawful discriminatory conduct. The verdict against the supervisor was vacated and the case was remanded for a new trial because plaintiff was required to show that he substantially assisted the police department in its discrimination.

On the other hand, a second supervisor testified that he did nothing to stop the harassment, because the harassers knew better and he did not believe he could do anything about it. Because the instructions wrongly directed the jury to absolve this supervisor unless he took affirmative harassing acts, the Court vacated the verdict absolving him of liability.

Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998)

The Third Circuit also held that knowledge of the handicap and plaintiff's need for accommodation, combined with inaction, was not sufficient to impose individual "aiding and abetting" liability on the individual defendants under LAD. The court, based on limited available guidance, concluded that the New Jersey Supreme Court would follow the Restatement of Torts which provides that a person is liable from harm resulting to a third person from the conduct of another when he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself …" Mere involvement is not enough. Rather, aiding and abetting requires that an individual defendant knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to that conduct.

E. VICARIOUS EMPLOYER LIABILITY

Durham Life Ins. Co. v. Evans, 166 F.3d 139 (3d Cir. 1999)

This is one of the first cases interpreting the U.S. Supreme Court's decisions in Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998). Ellerth and Faragher held that an employer may avoid liability for a

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supervisor's sexual harassment if the supervisor does not take any tangible adverse employment action and the employer can establish a two-pronged affirmative defense: (1) proof that it took reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) proof that an employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm.

In Durham, the Third Circuit read Ellerth's and Faragher's definition of a tangible adverse employment action to include various acts which result in a decrease in earning potential and significant disruption in working conditions. The Court found that plaintiff's employer committed a tangible adverse employment action when the employer fired plaintiff's secretary (whom the employer promised to provide and who was necessary for plaintiff's work), removed plaintiff's files, which were necessary for her work, from her office, and gave plaintiff a greater share of less lucrative work than her male colleagues. Therefore, the Court found that the employer was liable for its supervisor's sexual harassment of the plaintiff.

F. INDEPENDENT CONTRACTORS

Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1998)

The Appellate Division held that LAD applies only to employees and not to independent contractors.

Here, a skating instructor brought a sexual harassment claim against a skating rink owner. The Court followed federal precedent and held that the LAD did not apply to workplace claims of independent contractors. (Note, however, that employers may be held liable for unlawful harassment of employees by third parties, e.g., customers, of which it has knowledge and which it fails to remedy.) The Court then dismissed plaintiff's complaint because, regardless of any test utilized, plaintiff could not be construed as an employee where she characterized herself as self-employed, recruited students herself, had control over what was taught to her students and was paid directly by her students.

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II. CONSCIENTIOUS EMPLOYEE PROTECTION ACT ("WHISTLEBLOWER ACT")

Higgins v. Pascack Valley Hospital, -- N.J. -- (June 10, 1999)

Plaintiff was an EMT who complained about two co-workers' alleged misconduct in performing their duties relating to emergency medical care, including purportedly stealing a patient's prescription medicine. The hospital investigated and found no evidence of misconduct. Afterward none of the hospital's other EMTs wanted to work with plaintiff and she was transferred to a different assignment.

Affirming a jury verdict in favor of plaintiff on her Conscientious Employee Protection Act ("CEPA") claim, the New Jersey Supreme Court held that CEPA prohibits employers from retaliating against employees who "blow the whistle" on co-workers, even if the employer is not complicit in the misconduct. The Court concluded that the Legislature did not intend to limit CEPA to employer conduct only.

Demas v. Nat. West. Bank, 313 N.J. Super. 47 (App. Div. 1998)

Plaintiff, a bank teller, alleged that she was terminated because she objected to a co-worker's conduct that violated bank policy. Affirming summary judgment in favor of the employer on plaintiff's CEPA claim, the Appellate Division held, contrary to Higgins, that plaintiff's objection to the alleged misconduct was not protected by CEPA because it was not conduct of the employer. However, the Appellate Division also held that plaintiff's claim failed as a matter of law because she failed to identify a specific statute, regulation or public policy violated by her co-worker's misconduct.

Roach v. TRW, Inc., 320 N.J. Super. 558 (App. Div. 1999)

Plaintiff claimed he was terminated (in a mass layoff) because he disclosed and objected to two co-workers' alleged improper financial interests in companies with whom TRW did business. Reversing and vacating a jury verdict for plaintiff on his CEPA claim, the Appellate

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Division held that CEPA did not protect plaintiff's disclosure and objections, and that the trial court should have granted TRW's summary judgment motion and motion for judgment as a matter of law during trial.

The Appellate Division explained that the conduct of plaintiff's co-workers was not that of the employer within the meaning of CEPA because TRW was the only victim of the alleged misconduct. The Court explained: "We are persuaded that an employee's activities in conflict solely with the employer's interests cannot constitute an activity, policy or practice within the meaning of [CEPA]." Plaintiff has filed a petition for certification with the New Jersey Supreme Court.

III. FAMILY LEAVE

Callari v. Rehau Incorporated, 14 F.Supp.2d 620 (D.N.J. 1998)

Plaintiff sued his employer under New Jersey Family Leave Act ("FLA"). The Court reaffirmed the FLA regulations which provide that: an "employer" shall mean an employer as defined in the Act which employs 50 or more employees, whether they are employed in New Jersey or not.

Barone v. Leukemia Society of America, 42 F.Supp.2d 452 (D.N.J. 1998)

Relying primarily on federal regulations implementing the federal Family and Medical Leave Act, the District of New Jersey interpreted notice issues under the FLA. In Barone, the plaintiff used her accumulated sick time of 130 days to care for herself and her terminally ill husband. After her husband died, she advised her employer that she would return to work several weeks later. The employer terminated plaintiff for failing to return to work within ten days after the death of her husband, as required by company policy.

Plaintiff filed suit under the FLA. The Court held that an employee's leave of absence does not begin to count against his/her statutory leave entitlement until the employer designates

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the leave as FLA leave. Further, a company must notify an employee when she must return to work so that she would not lose her rights to reinstatement under the FLA.

In addition, because the employee provided notice of the date by which she would return to work, which exceeded the time allowed under company policy, and because the employer did not advise the employee of her obligation to return to work by a given date, the employer is equitably estopped from terminating the employee for failure to return to work.

IV. RESTRICTIVE COVENANTS/DUTY OF LOYALTY

IDT Corp. v. Kaplan, (D.N.J. May 21, 1999)

Plaintiff sued a former employee who signed a Non-Disclosure and Non-Competition Agreement at the time of hire for breach of that Agreement. The Agreement provided that plaintiff would not work for a competitor of IDT anywhere in the United States for one-year following termination of employment. After defendant resigned, he went to work for a competitor of plaintiff.

Concluding that defendant breached the Agreement by working for a competitor of his former employer, the Court considered the enforceability of the restriction on post-employment competition. The Court reaffirmed the settled and long-standing principle that Courts will enforce such restrictions if they are "reasonable in view of all the circumstances of the particular case," **and enforced the one-year restriction on nationwide employment with plaintiff's competitors.**

Cameco, Inc. v. Gedicke, 157 N.J. 504 (1999)

In this case, the New Jersey Supreme Court held that an employee should advise his employer of plans to establish an independent business before establishing a business that might conflict with that of his employer. The Court further held that failure to do so could subject the employee to damages for his breach of duty of loyalty.

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A determination of whether a breach of this duty has been committed and resultant damages depends on the egregiousness of the conduct. For instance, even slight assistance to a direct competitor of the employer could constitute a breach of the employee's duty of loyalty. However, in other circumstances, the assistance provided may be so unintended or so inconsequential, that no breach of the duty will result.

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EEOC ENFORCEMENT GUIDANCE ON EMPLOYER LIABILITY FOR SUPERVISORY HARASSMENT

On June 18, 1999, the Equal Employment Opportunity Commission ("EEOC") issued important guidelines respecting employers' vicarious liability for unlawful supervisory harassment under Title VII of the Civil Rights Act of 1964. The guidelines, titled Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, were issued in response to the United States Supreme Court's landmark decisions last summer in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton. According to the EEOC, two overriding principles from these decisions are the foundation for the standard of liability for supervisory harassment: (1) employers are responsible for the acts of their supervisors; and (2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm harassment can cause.

The guidelines first purport to reaffirm the liability standard set forth in Ellerth and Faragher, and expressly extends that standard to all types of unlawful harassment. The EEOC states that employer anti-harassment policies and complaint procedures should therefore address all forms of harassment.

In Ellerth and Faragher, the Supreme Court held that employers are automatically, or "vicariously," liable for supervisory sexual harassment if the harassment results in tangible employment action against the complaining employee. The Court further held that, if the complaining employee does not suffer any tangible employment action, the employer may avoid liability of the employer can prove that (a) it took reasonable steps to prevent and promptly correct the alleged harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities or otherwise failed to avoid harm.

The Ellerth and Faragher standard, and the EEOC guidelines, as their title suggests, applies only to liability for supervisory harassment. The EEOC defines the term "supervisor" as

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follows: an individual is the complaining employee's supervisor if (a) "the individual has authority to undertake or recommend tangible employment decisions affecting the employee" (e.g., hiring, firing, promoting, reassigning), or (b) "the individual has authority to direct the employee's daily work activities." In addition, the EEOC states that the supervisor in question need not have actual authority over the employee. Vicarious employer liability may attach if "the employee reasonably believed that the harasser had such power." Such circumstances may arise where chains of command are unclear.

Employers are automatically liable for supervisory harassment which culminates in a "tangible employment action." The EEOC attempts to explain "tangible employment action" in the guidelines, describing the characteristics of such action as bringing "the official power of the enterprise to bear on subordinates." Such action (1) requires an official act of the enterprise; (2) usually is documented in official records; (3) may be subject to review of higher levels of authority; and (4) often requires the formal approval of the enterprise and use of internal processes. The EEOC further states that tangible employment action "usually inflicts direct economic harm" and typically "can only be caused by a supervisor or other person acting with the authority of the company." The key is a significant change in employment status. Notably, according to the EEOC, the change need not be adverse to the employee. If a supervisor grants a tangible job benefit to an employee based on submission to unwelcome sexual demands, the employer may be held automatically liable.

Although employers may not avail themselves of the affirmative defense to supervisory harassment created in Ellerth and Faragher where the harassment results in tangible employment action, the employee must still establish that the employment action was taken because of an unlawful reason. If the employer produces evidence of a non-discriminatory reason for the tangible action, the employee must prove that the explanation "is a pretext to hide a discriminatory motive." If the tangible employment action "was based on a non-discriminatory

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motive," then the employer would have an opportunity to raise the affirmative defense to vicarious liability for the alleged supervisory harassment that preceded the tangible employment action.

The EEOC next discusses and attempts to explain the Ellerth and Faragher affirmative defense. According to the EEOC, the employer must prove both prongs of the affirmative defense to avoid liability. The guidelines state that if the employer exercises reasonable care to prevent and promptly correct alleged supervisory harassment, and the employee promptly complains of the alleged harassment, the employer is liable. The EEOC notes, however, that "[i]n most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability."

The EEOC next describes in great detail the respective duties of care established by the affirmative defense. As to employers, no single step will satisfy the duty to prevent and promptly correct harassment. Though not mandatory, the first step toward satisfying this duty is the establishment, dissemination and enforcement of an anti-harassment policy. The Guidelines explain in painstaking detail the characteristics of an effective policy and complaint procedure. The Guidelines also provide detailed examples of questions that should be asked during the investigation of a harassment complaint, and factors to consider in assessing credibility of witnesses.

The EEOC also describes measures to be taken to stop harassment and prevent its recurrence, such as oral or written reprimands, transfers, suspensions, and training or counseling of the harasser. The EEOC also lists measures which can correct the effects of harassment, including restoration of leave used because of the harassment, reinstatement and formal apologies.

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Beyond implementing an anti-harassment policy and complaint procedure, the guidelines state that employers must also instruct all supervisors and managers to report complaints to appropriate officials, to train them in identifying harassing behavior and to educate them regarding the company's policy and complaint procedure.

The EEOC also elaborates on the employee's duty to take advantage of preventive and corrective opportunities provided by the employer and to avoid harm. It is not enough for the employee to simply complain. The employee must cooperate in the investigation. If the employee fails to complain, to avoid liability, the employer must prove that the failure was unreasonable. Significantly, the EEOC states that an employee's failure to use the employer's complaint process is not dispositive. A prompt complaint to the EEOC or analogous state agency, or a union grievance, may satisfy the employee's duty to avoid harm.

Finally, the guidelines state that harassment by certain high-ranking executives subjects the employer to automatic liability regardless of "tangible employment action." Such executives are considered the employer's "proxy" or "alter ego." The EEOC lists as examples company presidents, owners, partners or corporate officers.

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LITIGATION CHALLENGES TO REDUCTIONS IN FORCE

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LITIGATION CHALLENGES TO REDUCTIONS-IN-FORCE

An employer's restructuring decision may take the form of a corporate merger, acquisition, reorganization, or reduction in force. No matter what form the restructuring takes, the decision is never simple – the legal, corporate, financial and human resources implications are numerous and often complex. Because of the multitude of issues involved, it is not surprising that labor and employment relations issues can be overlooked. Yet, the success of corporate restructuring often turns on the intangibles, such as employee productivity and litigation risks. The challenge is to avoid the pitfalls and minimize the issues that will demand a substantial amount of attention following the restructuring.

The following materials highlight some of the issues that may arise as a result of a restructuring. Of course, these topics are not an exhaustive analysis of all concerns that may arise either before or immediately after a corporate restructuring, merely an overview of the more common issues that may arise.

Termination of Employees and Employee Selection Criteria

Most corporate restructuring plans result, sooner or later, in the reduction of employment forces through some structured procedure. Reductions in force ("RIFs") generally are intended to increase the overall efficiency of companies, and not merely to reduce payroll expenses. Most RIFs commonly are composed of two phases, either spaced in time or operated concurrently. The first phase is generally a voluntary program, during which the company offers early retirement and provides additional incentives to induce early retirement to those employees who have minimal service with the company, except those whom the company determines are key employees. The second phase of the company's reduction is an involuntary termination plan, based upon position elimination and/or job performance evaluation. Oversight committees frequently are formed by management to ensure that each phase complies with company policy and applicable law.

The Voluntary Phase

A voluntary job-elimination program is much less likely to result in litigation than an involuntary program. Voluntary reductions generally include both early retirement and voluntary severance programs, providing benefits to all terminating employees. The key to avoiding litigation associated with these programs is ensuring that each employee's decision is truly voluntary.

Prior to taking any action, the company first should identify the number and types of positions to be eliminated. The initial voluntary phase then begins, and the company determines which employees will be eligible for the voluntary retirement or severance program (e.g., those employees with 15 or more years of service with the company.) The company may wish to exclude from the program employees who are considered to be "key" personnel. Further, if the number of surplus positions is greater than the number of eligible employees, the company may offer voluntary retirement or severance to all of its eligible employees. However, if the number of eligible employees exceeds the number of surplus positions, the company may offer the voluntary program to the eligible employees in order of seniority or on a first-come, first-served basis until the surplus goal is met or the eligible list is exhausted.

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This voluntary phase is designed to benefit the company's employees, particularly those of greatest tenure. First, those eligible for early retirement generally receive an additional sum of money in order to redress any penalty that might otherwise be assessed for election of early retirement under the company's retirement plan. Second, nonparticipating employees also benefit from this voluntary phase because those who opt for early retirement will eliminate or reduce the need for involuntary terminations. Although voluntary programs are less likely to lead to litigation than involuntary programs, there is nevertheless some risk of litigation. Companies must design voluntary reductions with great care to insure compliance with all statutory requirements.

The Involuntary Phase

In the event that all surplus positions are not eliminated in the voluntary phase, a company may find it necessary to proceed to the involuntary phase of its RIF. The employee selections during this involuntary phase should be based on objective, nondiscriminatory, verifiable criteria, such as job performance, seniority and the like. The company's oversight committee should review each involuntary termination to ensure that the reorganization is conducted in compliance with applicable law.

Given that involuntary termination plans may be challenged individually or on a class-wide basis, employers that decide to implement involuntary job-elimination programs also should develop plans that avoid adverse impact on members of protected groups, as well as that avoid charges of wrongful discharge. With respect to the latter, assuming that a terminated employee can make a colorable claim of discrimination or breach of contract, the most important point to remember is that the RIF must stem from significant economic considerations and must be a bona fide reduction. The need to cut costs should be clearly documented. Even more important, the jobs at issue truly must be eliminated. If the company decides to eliminate the position of assistant controller, for example, and terminates the incumbent, it should not hire someone a few months later to perform the duties that this individual was performing, even if it calls the job something else. To do so provides the basis for a claim that the initial job elimination was pretextual, designed to terminate an employee who otherwise could not have been properly terminated under the company's policies.

Many actions can be taken at the time of termination that will reduce the likelihood of litigation or increase the employer's chance of success at trial. An in-house and/or outplacement career counseling service, for example, can assist employees in their quest for new jobs and also may foster positive relations between the company and the severed employee. Offering severance to employees, even if in exchange for a release, can have a positive effect as well.

Prior to the institution of its involuntary plan, the company also should conduct a training program for supervisors in order to inform them of the mechanics of the company's reorganization plan. The company should alert its supervisors that they will be faced with questions from employees prior to or during the voluntary phase of the plan. These supervisors should be instructed with regard to the information that should be disseminated to company employees concerning the RIF and its effect on particular employees.

An employer should be aware that a claim of constructive discharge may be available to an employee who accepts early-retirement benefits as an alternative to termination. Courts are apt to construe such an acceptance as an unlawful constructive discharge where, for example, an

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employee presents the employee with a "take-it-or-leave-it" proposition, or threatens an employee with discharge or difficult working conditions.

The Age Discrimination in Employment Act and the Older Workers Benefit Protection Act

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. ("ADEA"), provides that it is unlawful for an employer to discharge any individual because of the individual's age. (The ADEA protects individuals who are over age 40. 29 U.S.C. §§ 623(f)(1), 631(a)). However, because of the concern that early-retirement incentive programs are not truly voluntary, and as a result of considerable lobbying efforts over several years, the Older Workers Benefit Protection Act ("OWBPA") was enacted. 29 U.S.C. §§ 621, 623, 626, 630. This legislation was designed largely to reverse the United States Supreme Court's decision in Public Employees Retirement System v. Betts, 492 U.S. 158 (1989), which held that the ADEA does not prohibit age discrimination in providing employee benefits except in rare situations. OWBPA sanctions the use of releases and waivers, provided that employers follow the specific requirements set out in the statute.

Under OWBPA, absent a showing that such distinctions are cost-justified, employers are not permitted to structure early retirement incentive programs to permit only those employees below a certain age to participate in or receive the benefits offered. It is, however, unclear whether an early-retirement plan that, on its face, does not violate the statute by excluding older workers, could nevertheless be found discriminatory because it is applied to a particular plant or department in which the average age is younger than the average age of the employer's total workforce. Arguably, this kind of disparate-impact claim could be made.

Withholding severance from employees who are already eligible for early or regular retirement may violate the ADEA. Indeed, some courts have ruled that economic considerations cannot be used to justify mandatory early retirement for persons otherwise eligible to receive pensions. Thus, an employer may wish to consider negotiating separation agreements in exchange for an employee's waiver of the right to bring any employment-related legal action against the company. This kind of agreement is particularly helpful in avoiding age discrimination litigation.

Severance packages, including but not limited to those which offer early-retirement incentives, must meet the benefit and release requirements established by the OWBPA in order to withstand an ADEA claim. These requirements must be met in all releases of ADEA claims, not just those signed in consideration of benefits received under an early-retirement incentive plan. The requirements are as follows:

1. The release must be part of an agreement, written in ordinary English, between employer and employee.

2. The release must specifically refer to claims arising under ADEA.

3. The release cannot apply to claims that arise after the date on which it is executed.

4. The release must be in exchange for something of value to which the employee would not otherwise be entitled.

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5. The employee must be advised in writing to consult with counsel before signing the release.

6. The employee must be given at least 21 days to consider whether to sign the release, or 45 days if the waiver is requested in connection with an exit interview or an employment-termination program offered to a group or class of employees.

7. The release must provide that the employee is given at least seven days within which to revoke the agreement, and the release will not become effective until the revocation period has expired.

With respect to the last requirement of the OWBPA, special rules apply to early-retirement incentive plans. While any individual employee who is asked to release rights or claims under ADEA must be given a minimum of 21 days to decide whether to do so, employers that seek the releases in connection with an early-retirement or exit incentive program are required to provide at least 45 days for deliberation by affected employees. Furthermore, at the beginning of the 45-day period, the employer must disclose in writing in ordinary English (1) the class or group of individuals covered by the program, (2) eligibility factors and time limits applicable to the program, and (3) the job titles and ages of all individuals eligible or selected for the program. It should also be noted that the law provides, in all cases, a period of seven days after the release is signed during which the employee may revoke it.

On June 5, 1998, the Equal Employment Opportunity Commission (EEOC) published its final regulations on the waiver provisions of the ADEA. 29 C.F.R. § 1625. The rules provide guidance, among other things, on the wording of waiver agreements, the consideration given for a waiver, appropriate revocation periods, informational requirements, and the burden of proof in disputes over the validity of the waiver. Although these regulations are not binding, they serve as persuasive authority and are given great deference by the courts. The EEOC's final regulations provide:

1. The guidelines apply to all waivers of ADEA rights and claims, irrespective of whether the employee is in the public or private sector, including employment in the federal government.

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2. Waiver agreements should be geared to the level of understanding of the individual or individuals eligible to participate. When drafting releases, employers should consider the comprehension and educational level of the typical participant.

3. The 21- or 45-day period begins to run from the date of the employer's final offer. Any material changes to the final waiver restart the 21- or 45-day time period. Any immaterial changes would not restart the time period. Employers and employees may agree that changes, material or not, will not restart the running of the 21- or 45-day period.

4. The 7-day revocation period cannot be shortened.

5. Employees may sign a waiver before the expiration of the 21- or 45-day period. This starts the running of the 7-day revocation period. An employee may sign before the expiration of the 21- or 45-day period, provided his or her decision was not induced by employer fraud, misrepresentation, threats to withdraw the offer prior to the termination of the 21- or 45-day period, or providing different conditions to workers who sign before the end of the 21- or 45-day period.

6. The use of age bands broader than one year (such as "age 20-30") does not satisfy the requirement to provide the ages of those eligible and ineligible for the program. The guidelines provide a fact-specific example of an appropriate method of presentation.

7. The release may not contain provisions that waive the right to file a charge of discrimination with the EEOC or other civil rights agency. The release cannot penalize, impose condition precedents, or other limitations that adversely affect an employee's right to file a charge or complaint with the EEOC or participate in an EEOC investigation or proceeding.

The Supreme Court has strictly construed OWBPA's mandates. In Oubre v. Entergy Operations, Inc., 118 S. Ct. 838 (1998), the Court held that the plaintiff had not waived her ADEA claim because the waiver did not comply with the OWBPA. The Court further ruled that the plaintiff's failure to tender back the monies she received for signing the release did not "ratify" the waiver and did not excuse the company's lack of compliance. In Oubre, the release was deficient because (1) it did not give the plaintiff enough time to consider the agreement (14 days instead of the required 21); (2) it did not give the plaintiff seven days to revoke the release after signing it; and (3) the release did not specifically refer to the waiver of the plaintiff's ADEA rights. Consequently, following Oubre, waivers failing to comply with OWBPA leave employers subject to ADEA claims and without recourse to recover the monies or benefits paid for the release.

A properly drafted release complying with all of the requirements of the OWBPA can provide significant protection for employers. In Astor v. International Business Machines Corp., 7 F.3d 533 (6th Cir. 1993), employees executed a waiver in exchange for increased retirement benefits. The waiver provided that any employee who violated the agreement and sued the company would be liable for the company's costs and expenses incurred in defending the lawsuit, including attorneys' fees. The court found the language of this waiver and release to be unambiguous and the OWBPA requirements to have been followed. The court thus awarded costs and defense attorneys' fees to the company.

The ADEA also makes it an unlawful employment practice for an employer to mandate the retirement of employees age 40 or older. Under the ADEA, therefore, a seniority system or

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employee benefit plan, including an early-retirement incentive plan, cannot require or permit the involuntary retirement of an individual age 40 or older, on the basis of age. 29 U.S.C. § 623(f)(2)(A). However, the OWBPA states that it is not unlawful for an employer to implement and abide by the terms of a bona fide seniority system or benefit plan "that is not intended to erode the purposes" of the statute. 29 U.S.C. §§ 623(f)(2)(A), (B). The Act provides several other exceptions to the general prohibitions that effectively permit involuntary retirement, including:

(1) a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. 29 U.S.C. § 623(f)(1);

(2) reasonable factors other than age. 29 U.S.C. § 623(f)(1); or

(3) a bona fide executive or high-level policy maker 65 years of age or older employed in either or both of these positions for two years immediately prior to retirement, and who is entitled to an immediate nonforfeitable annual retirement benefit equalling at least $44,000. 29 U.S.C. § 631(c).

PLANT CLOSING REQUIREMENTS

Many corporate restructuring plans result in the layoff of employees or the closing of one or more facilities. The Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. (hereinafter "WARN" or "Act"), requires covered employers[1] to give 60 days' advance written notice of any "plant closing" or "mass layoff."[2] Notice must be given to the affected employees (or their union representative) and designated state and local governmental officials.[3] Failure to provide this required notice can subject the employer to federal court litigation, back pay (including benefits) to each employee, and attorneys' fees to the plaintiffs. See 29 U.S.C. § 2104(a). Civil penalties also may be imposed.

The Department of Labor's implementing regulations recognize that it may be difficult to close a facility on the particular day that was selected 60 days in advance. Thus, the regulations permit the employer either to specify a separation schedule or to use a 14-day period during which the separations will occur. See 20 C.F.R. § 639.7(b). Companies may choose to use this latter 14-day "grace period" in which to implement the separations, but the notice must be provided 60 days prior to the beginning of that period.

The regulations also specify the contents of the notice that must be given. See 20 C.F.R. §§ 639.7(c), (d). From a litigation-avoidance and human relations standpoint, companies also may wish to consider sending personalized letters to each employee from the site manager,

[1] Employers that employ 100 or more full-time employees or 100 or more employees (including both full-time and part-time) who, in the aggregate, work at least 4,000 straight-time hours per week, are generally covered by the Act. 29 U.S.C. § 2101(a).

[2] The term "plant closing" is defined in the Act as a permanent or temporary shutdown of a "single site" if the shutdown results in an employment loss for any 30-day period at the single site of employment for 50 or more employees, including any part-time employees. 29 U.S.C. § 2101(a)(2). A "mass layoff", on the other hand, is a reduction in force that is not the result of a plant closing, but that results in an employment loss at the site during any 30-day period affecting either: (a) at least 33 percent of the full-time employees and at least 50 full-time employees, or; (b) at least 500 full-time employees. 29 U.S.C.§ 2101(a)(3).

[3] Notice is strictly defined by the Act and its regulations, which are discussed further below.

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explaining the reasons for the shutdown, as well as any plans for outplacement assistance and/or benefits, to supplement the required notice.

In order to satisfy WARN's service-of-notice requirement, the Act expressly approves mailing the notice to each employee's last known address, or including the notice with each employee's paycheck. 29 U.S.C. § 2107(b). Nevertheless, the regulations permit "[a]ny reasonable method of delivery … which is designed to ensure receipt of notice of at least 60 days before separation." 20 C.F.R. § 639.8.

WARN states that notice need not be given to temporary workers and independent contractors. With respect to temporary employees, the regulations specify, however, that such workers must understand at the time of their hire that their employment is temporary. The burden of proof in that regard lies with the employer. Moreover, despite the fact that workers may be hired to complete a specific contract or job, if a long-term relationship is contemplated, their employment may not be considered "temporary." 20 C.F.R. § 639.5(c). Furthermore, given the strict standards that some courts impose in order to establish independent contractor status, a company could find that its contractors are "employees" for purposes of WARN. To minimize the company's exposure to liability, we generally recommend companies consider giving all "temporary" employees and independent contractors the required WARN notice.

During the WARN 60-day period, the employer must continue paying the employees' wages and all benefits to which the employees would be entitled. Employers found to have violated WARN's notice requirement may be liable to the affected employees for, among other things, the wages and benefits under any employee benefit plan, including the cost of medical expenses incurred during the employment loss that would have been covered if employment loss had not occurred. 29 U.S.C. § 2104(a)(1). [4] In the case of an employee who otherwise could be covered by an employee or dependent health benefit plan, a catastrophic medical condition or event would result in significant liability to the employer.

Employment contracts must be reviewed to determine if they contain severance pay or other deferred compensation provisions. This is particularly significant under WARN, because the employer's liability cannot be offset by payments otherwise unconditionally owing from preexisting oral or written agreements, including unconditional severance payments to which the employees otherwise would be entitled.[5] Thus, if an employer fails to give the required 60-day notice, WARN's offset rules are such that affected employees may remain entitled to otherwise applicable severance payments under a current severance policy, plus payments due during the notice period. Provisions found in an employee handbook or a policy manual also may be construed as giving an employee the right to severance or other forms of compensation upon termination, over and above that required during the notice period. Thus, it is advisable to review the text of such manuals and handbooks, if any exist, to determine any possible obligation to which the company may be bound. This review should be undertaken prior to formulating any specific severance policy, because such obligations possibly could be applicable to all affected employees, not only those covered by individual employment contracts.

[4] The maximum period of liability is 60 days, and could be less depending upon the amount of notice given by the employer. For example, an employer that gave only 20 days' notice and did not qualify for an exemption or exception would face a 40-day liability period.

[5] Employers may <u>not</u> offset payments made to affected employees from other employers or from unemployment compensation benefits.

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UNION-MANAGEMENT IMPLICATIONS OF CORPORATE RESTRUCTURING

Any corporate restructuring of a business whose employees are represented by a union triggers legal obligations under federal labor law and contractual obligations under the existing collective bargaining agreements. If the restructuring decision involves the sale of part or all of an employer's operations, then the presence of a unionized workforce raises significant issues.

Purchaser's Obligations

Where a seller has a preexisting union contract, the purchaser may wish to continue the contract's favorable terms or, as an alternative, to avoid the contract's unfavorable terms. In some cases, the purchaser may wish to avoid union obligations altogether. Rules governing a purchaser's obligations under a contract differ substantially from a purchaser's obligations to bargain with the union; i.e., the legal duty to recognize and bargain with the union is substantially different from the legal obligation to abide by the preexisting contract.

Contractual Obligations

Under federal labor law, a "successor" employer has an obligation to recognize and to bargain in good faith with a union that represented the "predecessor's" employees, upon request. A successor company, however, is under no obligation to abide by the predecessor's union contract, and both the successor company and the union are free to negotiate new contract terms. In other words, under federal labor law, a purchaser may not be compelled to assume the obligations of a preexisting union contract. The purchaser's sole obligation (if it is a "successor") is to recognize and bargain with the seller's union, upon request.

Notably, however, while a purchaser is under no obligation to abide by the union contract of the seller, the seller remains bound by that contract even after the sale. In many cases, labor agreements contain restrictions on the right of an owner to sell or otherwise dispose of the business. Generally, such restrictions are included in the contract's "successor" clause, which requires any purchaser to assume the labor agreement or to hire all of the seller's workers. In appropriate cases, arbitrators have awarded damages against a seller for failing to comply with such a clause, sometimes amounting to hundreds of thousands of dollars. Alternatively, an arbitrator or court can prevent the restructuring transaction from going forward at all by issuing an injunction. For these reasons, whenever a merger or acquisition involves a unionized workforce, all parties to the transaction must become familiar with the terms of the existing bargaining agreement, particularly with any restrictions on the seller's right to sell the business.

The Duty To Bargain

The obligation to recognize and bargain with a union representing the previous employer's workers is not automatic under federal law. Only a "successor" employer has this responsibility, and not every acquiring company is deemed to be a "successor." A "successor" employer is one that is deemed to have substantially continued the seller's business and operations. In determining whether there is sufficient continuity to require the purchaser to bargain with the union, federal labor law considers factors such as: (i) the similarity of the two companies' business operations; (ii) continuity in the makeup of the union-represented employees; (iii) whether the same facility and workforce are used; (iv) the job functions performed by employees; (v) the similarity of conditions under which employees work; (vi) the supervisory structure of each company; (vii) whether the equipment and method of work is the same; (viii) the identity of customers; and (ix) the likeness of products produced and services performed. Of these factors, the most significant one concerns the continuity of the union

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workforce. Indeed, this single factor frequently has been accorded the most weight, and in many cases is deemed to be the "controlling" factor.

Where a majority of the seller's employees are employed by the purchaser, and the business is continued in substantially unchanged form, the purchaser has been held to be a "successor," with the obligation to recognize and bargain with the union upon request. However, a purchaser is not required to hire any of the seller's employees, and federal law generally does not prohibit a purchaser, for valid nondiscriminatory business reasons, from hiring off the street, from the local unemployment office, through referrals from outside agencies, or by transferring personnel from other offices. Significantly, however, when the purchaser hires a simple majority (fifty percent plus one) of its workforce from the seller's union workforce, that purchaser is deemed to be a "successor" employer (assuming the business has been continued in substantially unchanged form).

Notably, under recent case decisions, once a purchaser commits to hiring a majority of the workforce from the seller (which easily could occur in preliminary negotiations with the seller), the purchaser is prohibited by law from making any changes to the terms or conditions of the employees' employment, absent good-faith negotiations with the union.[6] Thus, such a commitment precludes the purchaser from changing any of the terms or conditions of employment. This can be a significant limitation on a purchaser's ability to manage the business and, indeed, anticipated labor cost savings ultimately may go unrealized.

This limitation can be avoided by conducting a thoughtful and attentive asset-purchase negotiation. Indeed, prior to making any commitment regarding the seller's employees, the purchaser may choose to establish whatever initial terms or conditions of employment it so wishes, reducing or changing compensation and fringe benefit packages, or any other economic term of employment. Provided these changes are made before employment offers are extended (and before the purchaser has committed to making such offers), the starting point for negotiations will be the new terms and conditions of employment, not the old contract terms — even if the purchaser eventually is obligated to bargain with the union representing the seller's employees.

Careful planning and negotiation with the seller therefore is essential. If, during negotiations with the seller, the purchaser makes a commitment to hire the seller's unionized workforce, then the purchaser may lose the right to change the terms or conditions of employment enjoyed at that time by the seller's employees. Thus, while the purchaser does not "assume" and is not bound by the bargaining agreement, it is bound to continue the terms or conditions of employment reflected in that bargaining agreement, absent negotiations leading either to an agreement with the union or a bona fide impasse. While this is a significant legal distinction, it may be of little practical difference to the purchaser, which has relied on anticipated labor cost savings in order to fund the acquisition.

Seller's Obligations

A seller also has obligations under federal labor law that cannot be ignored. As noted, the seller's contract with the union may contain restrictions on the seller's ability to dispose of its business. Obviously, these restrictions must be identified and addressed at an early stage in the purchase-sale negotiations. Otherwise, there is the risk that, at the eleventh hour, immediately prior to the closing of the transaction, the union may successfully obtain an injunction

[6] Such negotiations may result in a new agreement or impasse.

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prohibiting the transaction from going forward. Even if the union is unable to prevent the acquisition from going forward, the seller may be forced to pay significant monetary damages for its "breach of contract."

A well-recognized line of cases requires the seller, in some cases, to bargain with the union over the decision to sell its business ("decisional bargaining") and, in almost all other cases, to bargain with the union over the effects of the decision to sell the business ("impact bargaining").

"Decisional bargaining" contemplates notice by the seller to the union prior to the final implementation of the business decision: that is, at a time when the purchase-sale agreement remains somewhat conditional. Once notified, the union has the burden of seeking discussions with the seller. As a practical matter, unions infrequently seek to block or even to discuss the business decision itself. A union's chief interest is the continuing job security of its members, the continued representational rights of the union, and the continued viability of the bargaining agreement (with the associated dues payments to the union and fringe benefit contributions to any union funds).

Even if the union does not seek to bargain over the decision to sell the business, the seller is obligated to bargain with the union over the impact, or effects, of the transaction on the bargaining-unit employees. Such "impact bargaining" covers a variety of employment terms, including accrued vacation, holidays, insurance and fringe-benefit payments; preferential transfer, relocation or rehiring rights; and severance pay obligations. In some cases, the seller-employer is not obligated to bargain over certain items because the bargaining agreement already will have addressed these topics. Once again, the seller must be sure to observe all contractual limitations in a bargaining agreement and ensure timely notice to the union.

A "Successor" Employer's Liability

In addition to the obligation to recognize and bargain with the union, a purchaser also may be obligated to remedy the prior unlawful acts of the seller, including those that may result, or already have resulted, in litigation. This liability can be imposed on a wholly "innocent" purchaser.

Under certain circumstances, where the purchaser is a "successor" and has actual or constructive knowledge of the litigation, the purchaser may be obligated to remedy the seller's unfair labor practice, e.g., to rehire employees "unlawfully" terminated by a predecessor and pay them back pay. Often, this liability may not even be known to the purchaser's senior management. A short reference to then-pending litigation in an appendix attached to a long acquisition agreement could constitute "constructive knowledge" on the part of the purchaser. Imposition of this liability at the conclusion of an asset-purchase transaction (or years later) may come as a surprise to senior management and, if known prior to the transaction, might have caused senior management to reconsider the wisdom of the transaction.

Reorganization Limitations

While the limitations imposed by federal law and/or union contracts apply with most force in the context of a merger or acquisition, such limitations apply in the context of a pure "reorganization" as well. Union contracts, for example, often implicitly or explicitly restrict an employer's right to change employees' job assignments or schedules without advance notice or, in many cases, without the union's consent. Union contracts also may prohibit layoffs altogether or may require layoffs be made in order of seniority, regardless of the employees' abilities or job

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performance. Finally, a union contract may require severance, recall rights, retraining or outplacement services to affected employees.

Even if a union contract does not contain significant restrictions on a company's right to reorganize operations, principles of federal labor law nonetheless may prohibit an employer's ability to reorganize its business. Federal law, for example, generally prohibits an employer from changing the scope of the bargaining unit (those jobs covered by a union contract) absent a union's consent to such changes. Furthermore, an employer often is required to bargain over the effects of a corporate reorganization (order of layoff and recall, severance, and outplacement services, for example) and may be prohibited from implementing its reorganization plan, absent agreement with the union or bona fide impasse.

Given these limitations, an employer that has a unionized workforce may be required to alter its reorganization plan or take long-range advance measures to implement the plan.

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APPLICATION OF ADEA FOLLOWING A REDUCTION-IN-FORCE

Prima Facie Case and Burdens of Proof

In ADEA suits, courts continue to apply modified versions of the prima facie case and burden-of-proof standards established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a case decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. Generally, a plaintiff must show the following in a termination case to establish a prima facie case of age discrimination:

(1) plaintiff was in the protected class;[7]

(2) plaintiff met the applicable job qualifications;[8]

(3) plaintiff suffered an adverse employment decision; and

(4) the employer either sought to replace the plaintiff or did in fact replace the plaintiff with a person having similar qualifications.

With respect to the last element of a prima facie case, most courts, including most recently the Supreme Court, have held that, even if the individual who is replaced is in the protected age category, it will not necessarily defeat a prima facie case. See O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996) ("Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."); Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1372 (2d Cir. 1989) ("[W]here discrimination occurs within a protected group, e.g., where those in their fifties are discriminated against in favor of those in their forties, there is nothing to prevent a 55-year-old plaintiff from prevailing on a disparate treatment claim.") (emphasis in original).

Plaintiffs in ADEA cases need not prove that age was the employer's sole consideration. Courts have established varying standards and tests for proving violation of ADEA. See, e.g., Umpleby v. Potter & Brumfield, Inc., 69 F.3d 209 (7th Cir. 1995) (plaintiff must prove that age was a substantial factor in the adverse decision (the "but for" cause of the decision) and not merely one reason for the employer's action); Miller v. Cigna Corp., 47 F.3d 586 (3d Cir. 1995) (plaintiff need not show that age was the sole factor that led to adverse action, only that age played a role and had a determinative influence); Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d 100 (2d Cir. 1989) (plaintiff need only prove that age "made a difference" in the employer's decision); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 508 (2d Cir. 1994) (plaintiff need only prove that age was a "determination factor"); Overgard v. Cambridge Book Co., 858

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[7]Mere membership in the protected class does not permit an inference of age discrimination. Serben v. Inter-City Mfg. Co., 36 F.3d 765 (8th Cir. 1994).

[8]See, e.g., Dugan v. Martin Marietta Aerospace, 760 F.2d 397 (2d Cir. 1985) (plaintiff who had repeated absences failed to demonstrate that he was performing his job satisfactorily at the time of his discharge); Stein v. McGraw-Hill, Inc., 782 F. Supp. 207 (S.D.N.Y. 1992) (employee is required to show that he was qualified in the sense that he was doing his job well enough to rule out the possibility of termination due to inadequate job performance).

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F.2d 371 (7th Cir. 1988) (plaintiff needs to prove that age was a "determining factor" in the employer's decision).

Legitimate, Nondiscriminatory Reason: The Defendant's Burden

1. If the plaintiff is successful in establishing a prima facie case, the burden shifts to the defendant to articulate a "legitimate nondiscriminatory reason" for its actions. Burdine, 450 U.S. at 256.

2. In Williams v. Brooklyn Union Gas Co., 819 F. Supp. 214 (E.D.N.Y. 1993), the employer had discharged a 48-year-old employee with over 28 years of service. The court found that the employer had articulated a legitimate, nondiscriminatory reason for the employee's termination -- the structural reorganization of the plaintiff's department that necessitated cutbacks in staff.

3. An employer may hire, fire, demote or promote an employee on the basis of purely subjective reasons, even if such reasons are shortsighted or narrow-minded, as long as an improper motive is not the determinative factor in the decision. See Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992) (plaintiff, who asserted that the criteria defendant used in making the decision not to promote her to partnership in a law firm were flawed, failed to prove sex discrimination). Still, the subjectivity of decision making lends itself to the claim that bias was at work.

Pretext: The Plaintiff's Rebuttal

Even if the employer is able to articulate the legitimate basis for its decision, the applicant or employee has the opportunity to prove that the reasons advanced were merely a pretext for discrimination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Stacey v. Allied Stores Corp., 768 F.2d 402 (D.C. Cir. 1985). An ADEA plaintiff need not produce "smoking gun" evidence that age was the determinative factor in his discharge ("such as 'statements by the employer to the employee that [he] was being fired because of age' ") if the plaintiff advances "indirect" evidence that the employer's stated reasons for firing him were a pretext. Chipollini, 814 F.2d at 898 (citation omitted).

In St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court reaffirmed that a plaintiff in a "disparate treatment" employment discrimination suit bears the ultimate burden of proof. The Court made it clear that it granted certiorari in Hicks precisely because it wanted to eliminate the uncertainty that had developed as a result of certain lower court decisions as to the plaintiff's burden of proof in a Title VII action after the plaintiff had established "pretext." Id. at 515-16.

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Simply put, the Court in Hicks reaffirmed that a plaintiff cannot establish, merely through her own rebuttal evidence, that the employer's "proffered reason was not the true reason for the [challenged] employment decision" and, without more, expect to prevail. Id. at 507-08 (quoting Burdine, 450 U.S. at 256).

The Court emphasized that proving "pretext" was not enough; a Title VII plaintiff in a disparate treatment case must prove a further and quite different fact -- that he or she has been "the victim of intentional discrimination." Id. On this principle, the Court overturned the court of appeals' holding that the mere rejection of the employer's proffered reason compelled a judgment for the plaintiff.

Thus, in Hicks, the Supreme Court did not change the traditional framework of proving a Title VII case through either (a) direct evidence of discrimination, or (b) the more common method of establishing an inferential case of discrimination via the McDonnell Douglas framework with indirect proof of discriminatory intent. Hicks reiterates that, even if the defendant's clearly articulated reasons for its actions are not accepted, a court cannot find in favor of the plaintiff absent proof of her prima facie case and proof of an unlawful intent to discriminate.

However, a number of circuit courts have cited Hicks for the proposition that a plaintiff can always succeed in defeating summary judgment if it can be shown that there is an issue of material fact as to whether the employer's stated reason for its employment decision is the real reason. See e.g., Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996).

Exemptions

There are several exemptions or exceptions to ADEA's prohibitions.

Bona Fide OccupationalQualification ("BFOQ") Exemption

Under ADEA, 29 U.S.C. § 623(f)(1), it is not unlawful for an employer to use age as a bona fide occupational qualification ("BFOQ"). This exemption has been strictly interpreted and has been held to be extremely narrow. Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 (1985).

ADEA provides that an employer is not liable for taking an action based on an employee's or applicant's age if the age factor is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1).

Cases involving airline pilots and public safety officers[9] continue to present the main body of decisional authority as to the scope of the BFOQ defense. As defined in the seminal case of Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 (5th Cir. 1976), the BFOQ defense requires an examination of the "essence of [a] business operation" and whether an age-related requirement is necessary to the satisfactory performance of the job at issue. Moreover, in the pilot and public safety official area, the test requires an examination of whether the age qualification relates to the safe performance of the job at issue (and protection of the

[9] ADEA contains an exemption that allows the states and their political subdivisions to discriminate on the basis of age in the hiring or discharge of police officers and firefighters, under certain circumstances.

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public at large) and whether there exists any reasonable method of determining, on an individual basis, if one is or is not able to perform that job.

Differentials Based on Reasonable Factors Other than Age

It is not unlawful under ADEA, 29 U.S.C. § 623(f)(l), for an employer to make decisions based on reasonable factors other than age. One court has held that a "personality dispute" may be a reasonable factor other than age. Selsor v. Callaghan & Co., 609 F. Supp. 1003 (N.D. Ill. 1985). See also 29 C.F.R. § 1625.7. In Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982), the court refused to bar the employer's use of a subjective RIF procedure under which the manager "select[ed] those employees that [he] . . . would miss the least." Id. at 1321. The employees failed to offer proof of a discriminatory impact or intent underlying either the policy or its implementation. See also Bialas v. Greyhound Lines, Inc., 59 F.3d 759 (8th Cir. 1995) (finding that replacement of older, higher-paid workers with younger, lower-paid workers, does not in itself support an inference of age discrimination).

In the past, courts held that the savings in salary that can be realized by replacing an older worker with a younger, lower-paid worker is not a reasonable factor other than age. Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987). See also 29 C.F.R. § 1625.7(f) (a differentiation based on the average cost of employing older employees as a group is unlawful except with respect to 4 (f)(2) employee benefit plans). However, the Supreme Court in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), held that there is no claim for disparate treatment under ADEA when the factor motivating the employer is some feature other than the employee's age. Id. at 608. Thus, if the employer can divorce the means by which it is selecting employees for termination from an age-related standard, it will not violate ADEA. In Biggins, the Court ruled that an employer did not violate ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service rather than vesting as a result of his age. (The employer's action, however, was held to have violated the Employee Retirement Income Security Act.)

Bona Fide Seniority System or Employment Plan

In addition to damages for back and front pay, an ADEA plaintiff who proves that the employer's violation was "willful" is entitled to liquidated damages up to the amount of the back-pay award. Under ADEA, 29 U.S.C. § 623(f)(2), it is not unlawful for an employer to observe the terms of a bona fide seniority system or any bona fide employment plan, except that such a system or plan may not require or permit involuntary retirement or excuse the failure to hire an individual. The minimal requirements for a bona fide employment plan are (a) that it exist, and (b) that it pay substantial benefits. Before the Supreme Court's holding in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), many courts held that a reduction in a "bona fide employee benefit plan" must be justified by age-related cost factors (i.e., employers may reduce the value of the benefits provided to equalize costs for workers of all ages). See, e.g., EEOC v. Westinghouse Elec. Co., 725 F.2d 211 (3d Cir. 1983).

Bona Fide Executive Exemption

Although mandatory retirement is generally prohibited by the ADEA, a class of workers known as "bona fide executives" can be required to retired at age 65 under certain circumstances. Under ADEA, 29 U.S.C. § 631(c)(1), an employee who has attained 65 years of age and, who, for the 2-year period prior to retirement, was employed as a bona fide executive or in a policymaking position can be retired if the employee is entitled to an immediate non-forfeitable annual retirement benefit from pension, profit-sharing, savings or deferred

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compensation plan, or any combination of the employer's plans that equals at least $44,000. See Passer v. American Chem. Socy., 935 F.2d 322 (D.C. Cir. 1991)(head of division with 25 employees and $4million budget qualified); Whittlesey v. Union Carbide Corp., 742 f.2d 724 (2d Cir. 1984)(corporation's chief in-house labor counsel held not to be an executive or policy-maker within the exemption.)

Damages for Willful Violations

Until recently there had been varying definitions among the circuits regarding the meaning of "willful" under the ADEA. The Third Circuit, for example, would not impose liquidated damages unless the employer's conduct was "outrageous." See, e.g., Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 57-58 (3d Cir. 1989). The Tenth Circuit would not grant liquidated damages unless age was the "predominant" rather than simply a determinative factor. See, e.g., Spulak v. K-Mart Corp., 894 F.2d 1150, 1159 (10th Cir. 1990).

In Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), the Court reaffirmed the traditional "knowledge or reckless disregard" standard enunciated in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). Under the Thurston standard, liquidated damages under ADEA apply not only where the predicate ADEA violation is a formal, facially discriminatory policy, but also where it is an informal decision by the employer that was motivated by the employee's age. Once a "willful" violation is shown, said the Supreme Court in Biggins, the employee need not demonstrate additionally that the employer's conduct was outrageous or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision.

If an employer "incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed." 507 U.S. at 616 (citations omitted).

Courts ruling on the willfulness issue in ADEA cases after Biggins have generally continued to hold employees to a high standard of proof before they find an employer's act to be a willful violation. In Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950 (5th Cir. 1993), the court held that, despite the fact that the bank had consulted with an attorney regarding the termination of a protected-age employee, and therefore knew that ADEA was "in the picture," this without more did not show that the bank violated ADEA either knowingly or with reckless disregard. However, in Curtis v. Robern, Inc., 819 F. Supp. 451 (E.D. Pa. 1993), when a 61-year-old worker was laid off as part of a RIF in favor of a younger worker, the court held that the employer's action had risen to the level of a willful violation. In Curtis, the employer failed to follow the standard it created for itself in the company handbook for termination. The employer also backdated a statement supporting the layoff, and shaped documentary evidence in order to make it appear that the employer had complied with the ADEA.

Recent Developments that May ImpactUpon RIF Situations

Damages

Prior to June 1995, the practice in employment discrimination cases was to treat all or a portion of damages paid as nontaxable. The Supreme Court changed that practice in Commissioner of Internal Revenue v. Schleier, 515 U.S. 323 (1995). The Court held that an ADEA action is not a tort-like action and that neither the back pay nor liquidated damages involved arise from personal injury or sickness. The Court held, therefore, that both are taxable.

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Subsequent to Schleier, Congress further narrowed the extent to which any portion of damages in an employment discrimination case could be treated as nontaxable. The Small Business Job Protection Act of 1996 eliminated the Internal Revenue Code's tax exclusion for emotional distress damages, except to the extent that such emotional distress is attributable to a physical injury or illness or previously undeducted medical expenses incurred in treatment of the emotional distress.

In another Supreme Court case, the Court held that an employee discharged in violation of the ADEA is not barred from all relief when, after his discharge, his employer discovers evidence of wrongdoing that would have led to a lawful termination in any case. McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995). The Court concluded that although the employee was not entitled to front pay[10] or reinstatement, he was entitled to back pay from the time of the unlawful discharge to the date the misconduct was discovered.

Scope of Coverage
Minimum Number of Employees for Coverage

ADEA covers small employers who have 20 or more employees on each working day in each of at least 20 weeks per calendar year. 29 U.S.C. § 630(b). This is analogous to Title VII's requirement of at least 15 employees in at least 20 weeks.[11] 42 U.S.C. § 2000e(b). Recently, the Supreme Court in Walters v. Metropolitan Educ. Enterprises, Inc.,[12] adopted the "payroll method" to determine whether an employer met the threshold size for Title VII coverage.[13] Under this method, the Court looks at the number of employees maintained on an employer's payroll within a given week. If this number is at least 15 for Title VII for at least 20 weeks, the jurisdictional minimum is satisfied, regardless of whether or not every employee on the payroll shows up for work every day of the calendar week. The Court noted that this method is easier to determine if an employer meets the jurisdictional minimum, because all a court needs to know about an employee for a given year is whether the employee started or ended employment during the year. Thus, under the payroll method, an employee counts towards the statutory minimum for each working day after he or she is hired and before he or she leaves the employer.[14]

[10]In ADEA cases in general, the amount of a front-pay award is a jury question, but the propriety of front pay is a matter for the court. Wells v. New Cherokee Corp., 58 F.3d 233 (6th Cir. 1995).

[11]Because ADEA and Title VII have a common purpose, courts have relied upon cases interpreting a definition in one statute as persuasive when construing a similar definition in the other. Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 619 (7th Cir. 1993).

[12]117 S. Ct. 660 (1997).

[13]Although the Court did not address whether the payroll method applied to ADEA, arguably it may apply to ADEA since courts have looked at Title VII case law to interpret issues arising under ADEA. However, the procedural, remedial and enforcement provisions of ADEA are modeled after the Fair Labor Standards Act. See e.g., 29 U.S.C. § 626(b).

[14]117 S. Ct. 660. Under prior methods, some courts took the position that an employee could not be counted for purposes of determining whether an employee met the Title VII threshold size for coverage unless he or she was at the workplace or on paid leave on each day of the workweek. See, e.g., EEOC v. Garden and Assocs., Ltd., 956 F.2d 842 (8th Cir. 1992).

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Foreign Employment Situations

ADEA's coverage also extends beyond the shores of the United States. First, ADEA applies to a foreign corporation's operations within the United States. EEOC v. Kloster Cruise Ltd., 888 F. Supp. 147 (S.D. Fla. 1995). Second, ADEA applies to foreign employment situations when the employee is an American citizen and the employer is a U.S. corporation or subsidiary.[15] Denty v. SmithKline Beecham Corp., 907 F. Supp. 879 (E.D. Pa. 1995), aff'd, 109 F.3d 147 (3d Cir.), cert. denied, 118 S. Ct. 74 (1997). Hence, an American citizen working abroad for a company not controlled by an American company is not protected by ADEA. In Denty, the court denied an ADEA claim by a plaintiff who was employed in the United States by a U.S. subsidiary of a British corporation. The plaintiff had applied for foreign positions with the British parent company, but was rejected. The court held that the relevant worksite for ADEA purposes is the location of the position being sought, not where plaintiff was presently employed. Since the positions being sought were in England and Australia, and since the prospective employer was a British company, the court held that ADEA did not apply. Accordingly, the claim was not cognizable under ADEA.

Statute of Limitations

The Civil Rights Act of 1991 ("1991 Act") allows a plaintiff to bring suit within 90 days of the completion of administrative processing of an ADEA charge filed with the U.S. Equal Employment Opportunity Commission ("EEOC") or a state human rights agency.[16] This 90-day period applies even to claims that arose before the 1991 Act became law. Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886 (2d Cir. 1995). The court in Vernon reasoned that, unlike other provisions of the 1991 Act that were declared prospective only, the limitations period is purely procedural and does not affect any substantive rights. Accord St. Louis v. Texas Workers' Comp. Comm'n, 65 F.3d 43 (5th Cir. 1995), cert. denied, 116 S. Ct. 2563 (1996).

Other Issues

Mandatory Retirement of Employee Directors

In EEOC v. Johnson & Higgins, Inc., 887 F. Supp. 682 (S.D.N.Y. 1995), aff'd and remanded, 91 F.3d 1529 (2d Cir. 1996), cert. denied, 118 S. Ct. 47 (1997), the court found unlawful a policy requiring employees sitting on the corporation's board of directors to retire on reaching the age of 60 or 62. Because the policy not only forces a director to give up his directorship at the age of 60 or 62, but terminates his employment as well, it violates ADEA. Had the policy only required that an employee/director forfeit his directorship, it would not have violated ADEA. The requirement that the individual retire from his employment, however, did violate ADEA.

Rejection for Being "Overqualified"
Not Necessarily Age Discrimination

In EEOC v. Insurance Co. of N. America, 49 F.3d 1418 (9th Cir. 1995), the court found no pretext where an employer refused to interview an applicant with over 30

[15]However, a covered entity does not have to comply with ADEA if to do so would violate the laws of the country in which it operates. 29 U.S.C. § 623(f)(1).

[16]The 90-day limitations period for filing suit under ADEA is not suspended by requesting reconsideration of an EEOC determination of no probable cause. McCray v. Corry Mfg. Co., 61 F.3d 224 (3d Cir. 1995).

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years of experience because she was considered overqualified. The court found that, although rejection of an applicant on grounds of over qualification may be strongly correlated with advanced age, it does not mean that use of this criterion necessarily violates ADEA. However, the Second Circuit in Taggart v. Time Inc., 924 F.2d 43 (1991), held that an employer's proffered reason for not hiring an employee for a position because he was "overqualified" was a circumstance from which a reasonable juror could infer discriminatory animus. The Court stated that "[d]enying employment to an older job applicant because he or she has too much experience, training or education is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old."

THE APPLICATION OF TITLE VII AND THE CIVIL RIGHTS ACT OF 1866 ("SECTION 1981") TO RIFs

The plaintiff bears the burden of proof with regard to each claim of discrimination under Title VII and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (commonly referred to as "Section 1981").[17] Burdine, 450 U.S. 248; Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985); see Hollander v. Amer. Cyanamid Co., 895 F.2d 80, 83 (2d Cir. 1990). The burden of proof under Title VII's disparate treatment theory and under Section 1981 is the same. See, e.g., Jackson v. Ebasco Servs. Inc., 634 F. Supp. 1565 (S.D.N.Y. 1986); Dybczak v. Tuskegee Inst., 737 F.2d 1524 (11th Cir. 1984). Proof of discriminatory motive is of paramount importance. Burdine, 450 U.S. at 256; International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

In order to establish a prima facie case with respect to each allegedly discriminatory event, a plaintiff must first show that he or she suffered an adverse employment action. Next, the plaintiff must produce sufficient evidence so that the court can reasonably infer a causal connection between the plaintiff's race, national origin or sex, and the adverse action. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (prima facie case requires presentation of admissible evidence of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act' "). See Burdine, 450 U.S. at 253 (citing Furnco, 438 U.S. at 576).

In the event a plaintiff is able to establish a prima facie case of discrimination, the defendant need only articulate, by the introduction of admissible evidence, some legitimate, non-discriminatory reason for the employment decision. Burdine, 450 U.S. at 254; Furnco, 438 U.S. at 578; Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978). This burden of articulating a legitimate, nondiscriminatory reason for its action is not a burden of proof but rather one of production, and the employer is not required to prove the absence of a discriminatory motive in order to rebut a plaintiff's prima facie case. Burdine, 450 U.S. at 256; Sweeney, 439 U.S. at 24.

In those cases where the plaintiff has presented direct or statistical evidence of an employer's discriminatory actions or intent, the employer may not be permitted to rebut the

[17]Section 1981 provides, in pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." Section 1981 protects all individuals against discrimination on the basis of race, ethnicity and ancestry. See St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987). The Civil Rights Act of 1991 amended Section 1981 to provide that all persons have an equal right, regardless of race, to "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." As a result, any racial discrimination in the employment context is unlawful under Section 1981.

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plaintiff's prima facie case merely by stating some legitimate basis for its action. Rather, the employer may be required to demonstrate by a preponderance of evidence that it would have made the same decision even in the absence of a discriminatory motive. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding it proper to shift the burden of persuasion to the employer, in mixed-motive cases, where the plaintiff has shown direct evidence of discriminatory animus).[18] But, the Civil Rights Act of 1991 added a new § 703(m), 42 U.S.C.A. § 2000e-2(m) modifying Price Waterhouse by establishing that the plaintiff's proof of an illegitimate motivating factor does not merely shift the burden of proving no causation to the defendant, but actually establishes a violation, without regard to what the defendant can prove on rebuttal.

However, in non-mixed-motive cases, once the defendant articulates a legitimate, nondiscriminatory reason for its action, the plaintiff then bears the burden of proving that the reason proffered by the employer was false and a pretext for discrimination. Burdine, 450 U.S. at 253; McDonnell Douglas, 411 U.S. at 804. Thus, the ultimate burden of persuading the court that a defendant intentionally discriminated against a plaintiff remains at all times with the plaintiff. Burdine at 253.

Similar to ADEA, the federal courts have found that a significant downturn of business is a legitimate, nondiscriminatory reason for an employer's RIF in Title VII actions. See, e.g., Ligons v. Bechtel Power Corp., 625 F.2d 771, 773 (8th Cir. 1980) ("reduction-in-force"); Carlton v. Interfaith Medical Ctr., 612 F. Supp. 118, 122 (E.D.N.Y. 1985) ("mandated force reductions").

In Carlton, the plaintiff alleged discrimination on the basis of sex, race and age in violation of Title VII, Section 1981, and ADEA. The plaintiff, a black woman, was terminated as part of a sizable layoff of the defendant's workforce, mandated by the state of New York. Id. at 122. In effecting the reduction-in-force, the defendant restructured plaintiff's department by eliminating two "intermediate supervisory" positions and by creating a single "assistant manager" position. Id. Defendant transferred another employee to this position, asserting that the plaintiff had failed to prove her ability to perform in a supervisory position. According to the court, "[i]t is the perception of the decision maker, and not that of plaintiff herself, which is

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[18]In her concurrence in Price Waterhouse, Justice O'Connor offered guidance on the type of evidence needed to make out a "mixed-motives" case. She reasoned:

> Stray remarks in the workplace, while perhaps probative of [a discriminatory animus], cannot justify requiring the employer to prove that its [employment] decisions were based on legitimate criteria. Nor can statements by nondecision-makers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. . . . What is required is . . . direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring) (quoted in Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1994)). See also Ostrowski v. Atlantic Mutual Ins. Cos., 968 F.2d 171 (2d Cir. 1992) (purely statistical evidence does not warrant a charge; nor does evidence of plaintiff's qualifications, nor do stray remarks by people not involved in decision making process. However, "if plaintiff's nonstatistical evidence is directly tied to the forbidden animus, for example policy documents or statements of a person involved in the decisionmaking process[,] . . . that plaintiff is entitled to a burden-shifting instruction." Id. at 182.)

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relevant." Id. The court thus held that the defendant in Carlton successfully articulated a nondiscriminatory reason for the plaintiff's discharge. Id.

Therefore, with respect to the involuntary phase of its RIF, the company should attempt to ensure that the group of terminated employees is not disproportionately comprised of employees who are protected under ADEA or Title VII. To the extent that the oversight committee determines that a disproportionately high number of the least qualified employees are in these protected groups, or the least qualified incumbent employees in the most affected jobs are in these protected groups, the company will be able to rely on current case law, which essentially approves the use of a peer-analysis procedure to determine which employees would be discharged. Arnell v. Pan Am World Airways, Inc., 41 Empl. Prac. Dec. (CCH) ¶ 36,506 (S.D.N.Y. Oct. 7, 1986); Loughran v. Manhattan Life Ins. Co., No. 84 Civ. 6157, 1987 WL 10385 (S.D.N.Y. Apr. 24, 1987) (awarding summary judgment to employer who conducted peer-review analysis and determined that plaintiff, who was included in a RIF, was no longer fulfilling the functions of his job), aff'd mem., 838 F.2d 1203 (2d Cir. 1987)).

USE OF STATISTICS AND DISPARATE IMPACT ANALYSIS

An employer contemplating a large-scale layoff should create an oversight committee to define the group from which the layoffs are to come. The committee should consist of key, knowledgeable management employees from the human resources department and the operational departments likely to be affected by the layoff. The employer also should consult with the employer's attorneys at the earliest stages of planning a layoff for practical and legal advice, and to take advantage of the protection against disclosure of documents that may be available through the attorney-client privilege in potential litigation.

The company's oversight committee should identify those employees to be laid off, and perform a statistical analysis to determine whether there is going to be a statistically significant adverse impact against any protected group. The oversight committee should compile a study reflecting not only the ages of the persons who will be involuntarily terminated, but also the race and sex of those individuals. The committee then should study the demographics of the original workforce population and those selected for early retirement and voluntary severance, as well as the resulting demographics of those employees who are retained following both the voluntary and involuntary phases. All of the committee's work should be completed before any layoff decisions are made final.

Such statistical studies generally compare the effects of the layoff on minorities, women and persons over age 40. In addition to assessing possible exposure to age discrimination claims, the studies should separately analyze the effects of the layoff on persons who are within certain age "bands," e.g., ages 40 to 50, 51 to 60, and 61 and over. If there is a statistically significant adverse impact against any protected group or age subgroup, employers should review and reassess the program's criteria and its tentative results. If a suit is filed, the employer will have to prove that the standards it used to make selections for layoffs were justified by business necessity.

Attention to statistics is necessary because charges that job-elimination programs were discriminatory are frequently based on statistical evidence. In Blum v. Witco Chemical Corp., 829 F.2d 367 (3d Cir. 1987), for example, the company decided to consolidate its research and development program, closing a division in New Jersey. Of the 33 chemists involved, 16 were retained and reassigned to other locations, and 17 were terminated. Of the terminated chemists,

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three sued the company, alleging age discrimination. The chemists, aged 57, 58 and 60 years old at the time of their terminations, had been employed with the company from 9 to 18 years.

The evidence the plaintiffs produced in Blum was primarily statistical data that showed a significant disparity between the ages of those retained and those who were terminated. Additionally, they showed that within weeks of the terminations the company ran an advertisement for a chemist in its Brooklyn division, a position for which one of the terminated chemists had applied. He was rejected and the company hired a 25-year-old applicant instead. Thus, in addition to the statistical evidence, the plaintiffs had evidence that the reduction was not bona fide.

Since Witco, the United States Supreme Court has addressed the use of statistical evidence and has changed some of the previously accepted rules. In Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), the Supreme Court reversed a holding of the Ninth Circuit Court of Appeals that the plaintiffs, who were cannery workers, had made out a prima facie case of disparate impact discrimination. In so holding, the Ninth Circuit had relied solely on statistical evidence, which showed a high percentage of non-white workers in cannery jobs and a low percentage of such workers in non-cannery positions. According to the Supreme Court, the Ninth Circuit misconceived the role of statistics in employment discrimination cases.

The Supreme Court, citing Hazelwood School District v. United States, 433 U.S. 299 (1977), held that an imbalance in one segment of an employer's workforce does not, without more, establish a prima facie case of disparate impact with respect to other positions. In Hazelwood, the Court had held that the proper comparison would be between the percentage of incumbents in the positions at issue and the pool of qualified applicants from the relevant labor market. Reliance solely on a bottom-line statistical imbalance to prove discrimination would be improper. As a general rule, the Court held that a plaintiff also would have to "demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such showing is an integral part of the plaintiff's prima facie case in a disparate impact suit."

Also citing Hazelwood, a United States District Court in Connecticut ruled against the plaintiffs' statistical claims that only 3 out of 36 promotions went to persons over 55. In part, the court held that the statistics, standing alone, were meaningless in the absence of an expert's interpretation as to the extent to which the results -- listed in a package of tables prepared by the defendant -- differed from the results that would be expected had promotions been made on a random, case-by-case basis. Wingfield v. United Technologies Corp., 678 F. Supp. 973 (D. Conn. 1988).

In Lowe v. Commack Union Free School District, 886 F.2d 1364 (2d Cir. 1989), the Second Circuit held that statistics indicating that an employer's practices have a disparate impact on some identifiable subgroup in the over-40 age category cannot be probative of age discrimination. Two 52-year-old plaintiffs thus could not establish an ADEA violation by showing that a school district's hiring policies favored applicants in their 40s, who are within the protected class under ADEA, at the expense of candidates in their 50s, who were closer to retirement age.

In Krystof v. Hyatt Corp., 827 F. Supp. 490 (N.D. Ill. 1993), the court held that an employee's allegation that three of five managerial accounting employees terminated during a RIF were of protected age did not establish the employer's intent to discriminate, as prohibited

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by ADEA. Although a high percentage of terminated employees were in the protected group, the overall statistical sample was too small to support any inference of age discrimination.

As is true with respect to employment law generally, courts are reviewing statistical proofs very carefully. In Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209 (E.D. Pa. 1982), the court rejected the statistical proofs offered by both parties. The plaintiff's expert admitted that his definition of age was "slanted in favor of plaintiff," and the court ruled that this bias tended to color his ultimate findings. Conversely, the defendant's expert's definition of age was the exact opposite of plaintiff's, which also resulted in biased findings. Only one piece of statistical evidence appeared bias-free, and it was inconclusive.

Properly prepared, statistics still have a major role in suits involving claims of discrimination on the basis of age, race or sex. In Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983), for example, the court accepted as probative of age discrimination a statistical correlation between the tenured faculty and age. The plaintiff also demonstrated a positive statistical correlation between age and the higher salary levels the older and tenured members of the faculty received. These statistical proofs buttressed one faculty member's claim that he had been the victim of impermissible age discrimination in connection with a workforce consolidation.

Another court found certain statistical data insufficient, taken alone, to prove discrimination. But this evidence, in addition to other proof, nonetheless helped to tip the balance in an age discrimination case to the employee's benefit. Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982).

This was also the case in Witco, where the statistical evidence bolstered other evidence that the job eliminations were not bona fide and anecdotal evidence of a bias against older employees. Frequently, it is such anecdotal evidence that makes it difficult, if not impossible, for a defendant company to prevail on a summary judgment motion. Moreover, it is very difficult for a company to prevent supervisors or even co-employees from making remarks that later can be used as evidence of a discriminatory animus against older employees, women or minorities. Companies can take steps, however, to insulate the decision making in job eliminations from individual bias. Thus, immediate supervisors should not be given the sole responsibility of making decisions as to what jobs in their areas of responsibility will be eliminated. Their recommendations should constitute only one step in the decision-making process.

The question of whether ADEA extends to adverse impact claims has not yet been addressed squarely by the Supreme Court. In Hazen Paper Co. v. Biggins, 507 U.S. 604, three Justices (Kennedy, Chief Justice Rehnquist and Thomas), in a concurring opinion, stated that there are substantial arguments against carrying over Title VII's disparate impact analysis to ADEA. However, in Caron v. Scott Paper Co., 834 F. Supp. 33 (D. Me. 1993) a federal district court in Maine allowed former employees to proceed with their charge that a 1990 reduction-in-force had a disparate impact on older workers. The court held that, like Title VII, ADEA makes it illegal for employers to classify their employees in a way that would deprive or otherwise adversely affect their status. An employment practice may amount to discrimination even if not directed specifically at age. In Maresco v. Evans Chemetics, 964 F.2d 106 (2d Cir. 1992), the Second Circuit held that the disparate impact doctrine was applicable to cases under ADEA. See also Lumpkin v. Brown, 898 F. Supp. 1263 (N.D. Ill. 1995) (allowing federal ADEA plaintiffs to

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advance disparate impact theory). But see EEOC v. Sears, Roebuck & Co., 883 F. Supp. 211 (N.D. Ill. 1995) (refusing to extend disparate impact theory to ADEA claims).

Both the Seventh and Third Circuits have rejected disparate impact theory in ADEA cases. EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994); Martincic v. Urban Redevelopment Auth., 844 F. Supp. 1073 (W.D. Pa.), aff'd mem., 43 F.3d 1461 (3d Cir. 1994). In Parker, the court found that a refusal to hire based on "higher salary" as correlated with experience was insufficient to establish an ADEA claim. Citing Hazen's concurring opinion, the majority found Title VII disparate impact claims premised on different statutory language (although the dissenter thought this evidence established a prima facie case). Martincic focused on the fact that the Civil Rights Act of 1991 expressly provides for disparate impact analysis of race, color, religion, sex and national origin claims, but not for age claims. This was deemed an intentional statutory design showing the Congressional recognition that disparate impact analysis is inappropriate in ADEA cases.

CAUSES OF ACTION UNDER STATE LAW

Claims of Wrongful Discharge

Wrongful discharge claims are often raised by employees whose jobs have been eliminated as a result of a RIF. Whether such claims are viable depends upon the common law of the state in which the discharge occurs. To illustrate the types of wrongful discharge theories that may be raised by terminated employees, theories recognized by various state courts are set forth below.

In the past, the employer's right to fire employees who were not hired for a definite term or who were not covered by a collective bargaining agreement was curtailed only by certain legislative restrictions. Examples include laws prohibiting the discharge of employees for a statutorily recognized reason, such as unlawful discrimination against protected classes of employees (i.e., those of race, disability, national origin, and age). Recently, however, the trend in employment law is toward judicial creation of limitations on the right to terminate at will under contract or tort theories or some combination of the two.

Courts analyzing the employment relationship have used several different theories in support of decisions favoring the discharged employee. This is especially true where a court must determine whether a discharged employee has a valid claim for "wrongful discharge." Because the employment relationship typically is perceived as contractual in nature, many of these decisions have examined whether there exist any facts that suggest a term of employment for a specific duration. Other courts have implied certain terms and conditions that limit the unilateral right of an employer to discharge its employees. Courts have also examined the relationship between employer and employee with reference to tort theories of law. Both intentional and negligent tort theories have been used.

Contract Theories

Express and Implied Contracts

California has recognized a variety of contract-based exceptions to the at-will doctrine. In Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (en banc) the court recognized that implied-in-fact promises of continued employment could be found in:

> the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer

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reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.

Id. at 680, 769 P.2d at 387, 254 Cal. Rptr. at 225 (citations omitted).

California courts since Foley have continued to expand employee rights under implied and express contract theories. The California Supreme Court, in a unanimous decision, held that an employee may sue for wrongful demotion as breach of an implied contract. Scott v. Pacific Gas & Elec. Co., 11 Cal. 4th 454, 904 P.2d 834, 46 Cal. Rptr. 2d 427 (1995). The court held that there was conceptually no difference between a policy regarding demotions or discharges as an implied term of an employment contract. In Scott, two demoted employees won a verdict of $1.325 million for past and future lost earnings.

In Walker v. Blue Cross, 4 Cal. App. 4th 985, 6 Cal. Rptr. 2d 184 (1992), the California Court of Appeals held that a triable issue of material fact existed where an employee claimed that despite at-will language in the employee handbook there was an implied-in-fact agreement not to terminate except for good cause. The court noted that where the employment relationship had not been reduced to an integrated written agreement, signed by the employee, language in the handbook did not establish the nature of the relationship as a matter of law. Walker, 4 Cal. App. 4th at 992, 6 Cal. Rptr. 2d at 188.

In Cotran v. Rollins Hudig Hall Int'l., 17 Cal. -4th 93, 69 Cal. Rptr. 2d 900 (1998), the California Supreme Court clarified the jury's role in determine wrongful discharged cases based on implied agreements not to be terminated. The court held that it is the role of the employer to determine whether acts of just cause have occurred sanctifying the employee's termination. The role of jury is to determine whether the factual basis on which the employer's decision was made was reached honestly, after an appropriate investigation and for reasons that were not arbitrary or pretextual.

The New York courts have also recognized the implied contract theory under narrow circumstances. In Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982), the court held that an employer may be bound by obligations or promises contained in an employee handbook or personnel manual. However, Weiner states the sole judicial exception to the at-will rule in New York. Additionally, the effect of the Weiner decision itself has been progressively narrowed by the New York courts. In Wexler v. Newsweek, Inc., 109 A.D.2d 714, 487 N.Y.S.2d 330 (1st Dep't 1985), the court described Weiner as a unique case having limited applicability. The limited applicability of Weiner has been demonstrated by recent case law. In Manning v. Norton Co., 189 A.D.2d 971, 592 N.Y.S.2d 154 (3d Dep't 1993), an employee with 25 years of service was terminated at the age of 46. Noting that post-Weiner plaintiffs had not fared well, the court stated that no enforceable contract could be found either in the provisions of the personnel guide, which contained a general layoff policy, or in the alleged oral assurances that a job would be available after implementation of the RIF. In De Petris v. Union Settlement Ass'n, 86 N.Y.2d 406, 657 N.E.2d 269, 633 N.Y.S.2d 274 (1995), New York's highest court held that no claim existed where an employee was discharged without the written reasons or pre-termination warnings required by the personnel policy manual.

Note, however, that a United States District Court recently concluded, on a motion for judgment as a matter of law, that an employer's clearly expressed at-will disclaimers

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could be undercut by other written representations. In Criado v. ITT Corp., 8 Indiv. Empl. Rts. Cas. (BNA) 1267 (S.D.N.Y. Aug. 16, 1993), the employer had disclaimers in its handbook regarding the at-will status of employment. However, a Corporate Code of Conduct and a letter from the president of the company encouraged employees to report suspected illegal or unethical conduct, and stated that such reporting would be without penalty. After the plaintiff had reported suspect conduct, certain oral assurances were made to him by those involved. The court held that the jury was entitled to conclude that the employer expressly modified the plaintiff's at-will employment status by its written and oral communications to him.

Implied Covenant of Good Faith and Fair Dealing

Only a minority of state courts have held that the employment relationship includes an implied covenant of "good faith and fair dealing." Most state courts have specifically rejected the doctrine as applied to employment contracts. However, in the states where the covenant of good faith and fair dealing is recognized as a viable cause of action, employers should take it into account when considering any RIF.

Idaho has recognized an implied-in-law covenant of good faith and fair dealing in all contracts. In Metcalf v. Intermountain Gas Co., 116 Idaho 622, 778 P.2d 744 (1989), modified sub. nom. Sorensen v. Comm Tek, Inc., 118 Idaho 664, 799 P.2d 70 (1990), the Idaho Supreme Court held that a breach of the covenant is a breach of contract and not a tort. Under Idaho law, the covenant prohibits "[a]ny action by either party which violates, nullifies or significantly impairs any benefit of the employment contract." Id. at 627, 788 P.2d at 749. The Idaho Supreme Court limited the effect of Metcalf in Ostrander v. Farm Bureau Mutual Ins. Co., 123 Idaho 650, 851 P.2d 946 (1993), by refusing to apply the covenant of good faith and fair dealing to independent contractors.

In Magnan v. Anaconda Industries, Inc., 193 Conn. 558, 479 A.2d 781 (1984), the Connecticut Supreme Court addressed an "at-will" plaintiff's allegation that Anaconda breached an implied covenant of good faith and fair dealing in discharging him without good cause. The court rejected the plaintiff's contention that a discharge without good cause gives rise to a breach of an implied covenant of good faith and fair dealing. The court indicated, however, that it might recognize such a cause of action where there was "overreaching" on the part of the employer, i.e., where an employee is deprived of compensation or benefits related to the employee's past service. A lower court later relied upon Magnan in refusing to dismiss a claim for breach of an implied covenant by an employee who claimed his employer discharged him to avoid paying a bonus and accrued benefits. See Cook v. Alexander & Alexander, 40 Conn. Supp. 246, 488 A.2d 1295 (1985); Okon v. Medical Mktg. Group, Inc., No. Cv. 93 30-60-32-S, 1994 WL 463659 (Conn. Super. Aug. 18, 1994) (finding that complaints alleging employment termination to avoid paying stock-option compensation stated cause of action for wrongful termination).

In Carbone v. Atlantic Richfield Co., 204 Conn. 460, 528 A.2d 1137 (1987), the Connecticut Supreme Court expressly limited application of the implied covenant of good faith and fair dealing only to those situations in which the reason for the discharge is a violation by the employer of a clearly defined public policy mandate, taking the employee out of an employment-at-will status. See also Battista v. United Illuminating Co., 10 Conn. App. 486, 523 A.2d 1356, certific'n denied, 204 Conn. 803, 525 A.2d 1352 (1987).

Nevada is one of few states that recognizes a tort cause of action for breach of the implied covenants of good faith and fair dealing in employment contracts. In K Mart Corp. v.

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Ponsock, 103 Nev. 39, 732 P.2d 1364 (1987) (abrogated on the ground that ERISA preempts state-law wrongful-discharge claims in Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)), a forklift operator was terminated six months before his pension was to vest fully, ostensibly for painting the battery cover of his forklift. The Nevada Supreme Court held that it would recognize a cause of action for bad-faith discharge, but suggested it might limit its holding to the fact-specific instance of a termination in bad faith by a large nationwide employer for the purpose of defeating an employee's contractual benefits. Ponsock, 103 Nev. at 48, 732 P.2d at 1370.

The effect of Ponsock has been severely limited by subsequent decisions in Nevada. In Beales v. Hillhaven, Inc., 108 Nev. 96, 825 P.2d 212 (1992), the Nevada Supreme Court upheld the lower court's dismissal of an employee's claim of bad-faith discharge, and noted that it had restricted that tort to those "rare and exceptional cases [where] the duty is of such a nature as to give rise to tort liability." Id. at 100, 825 P.2d at 215 (citation omitted).

Tort Theories

Violation of Public Policy

California courts were among the earliest to recognize a public policy exception to the employment-at-will doctrine. In 1959, a California appellate court held that an employee could not be terminated for refusing to give false testimony before a legislative committee. Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

California has continued to recognize a broad public-policy exemption to the at-will doctrine. However, several cases have identified some limits to the exception. California courts have recently reiterated the long-standing rule that a claim that an employee who has been discharged for reasons that "arguably" violate the National Labor Relations Act (the "NLRA") falls within the exclusive jurisdiction of the National Labor Relations Board under the "Garmon Preemption" doctrine enunciated in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). See, e.g., Balog v. LRJV, Inc., 204 Cal. App. 3d 1295, 250 Cal. Rptr. 766 (1988) (a court cannot award damages to or provide any remedy for supervisory employees if the sole reason for discharge was one "arguably" violative of the NLRA).

The California Supreme Court addressed the public policy cause of action issue in Foley v. Interactive Data Corp. The Foley court limited plaintiffs to claims where the public policy in question is "firmly established, fundamental . . . substantial." Foley, 47 Cal. 3d at 671, 765 P.2d at 380, 254 Cal. Rptr. at 218 (citations omitted). Additionally, the policy must benefit the public generally, rather than a mere private interest. This last requirement, however, has been loosely interpreted by the courts. See Collier v. Superior Court, 228 Cal. App. 3d 1117, 279 Cal. Rptr. 453 (1991) (record company executive who was terminated after calling a kickback scheme to the attention of his superiors stated public policy cause of action).

Connecticut courts have ruled that at-will employees may turn to tort remedies when an employer's actions violate public policy. Connecticut recognizes an exception to the state's general rule of employment-at-will where a former employee can prove a "demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy." See Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 475, 427 A.2d 385, 386-87 (1980). In Sheets, the plaintiff alleged that he had been fired in retaliation for his efforts to compel compliance with applicable state laws regulating labeling and licensing. The court did not decide whether the public policy violation at issue had to be related to a constitutional or legislative provision.

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The Connecticut Supreme Court in Morris v. Hartford Courant Co., 200 Conn. 676, 513 A.2d 66 (1986), ruled that an employer's failure to investigate thoroughly charges of misappropriation of funds by an employee before firing him did not violate public policy. The court held that public policy exceptions extend only to policies based on statutory, constitutional or specific judicially mandated public policy judgments. See also Seery v. Yale-New Haven Hosp., 17 Conn. App. 532, 554 A.2d 757 (1989).

In Ryan v. Watson Enterprises, 16 Conn. L. Trib. 7 (Feb. 12, 1990), an employee alleged wrongful discharge because he was not issued stock to which he was entitled. The court held that this action violated public policy as codified in Connecticut General Statutes Sections 31-71c and 31-71e. These statutes recognize a public policy violation for the unlawful withholding of wages by an employer.

In Cook v. Alexander & Alexander, 40 Conn. Supp. 246, 488 A.2d 1295 (1985), a Connecticut Superior Court held that the state's payment-of-wage law expressed a public policy against the unlawful withholding of an employee's wages, and it allowed an employee to proceed with his complaint that he was wrongfully discharged in order to avoid paying him a bonus and vested benefits.

The Virginia Supreme Court recognized a broad public policy claim in Lockhart v. Commonwealth Educ. Sys. Corp., 247 Va. 98, 439 S.E.2d 328 (1994). In a decision that represented a significant departure from prior court opinions, the court reinstated the claims of two employees who alleged they were wrongfully discharged because of race and sex discrimination. One plaintiff alleged she was terminated after she refused to participate in her employer's allegedly racially discriminatory practices. The other plaintiff alleged she was fired when she complained of the company president's sexual advances. The court noted that it strongly adheres to the employment-at-will doctrine. However, it created an exception for "discharges which violate . . . the policy underlying existing laws designed to protect the . . . personal freedoms . . . of the people in general." The court stated that race and sex discrimination violate Virginia's public policy and, therefore, fall within the public policy exception. The dissent noted that the public policy upon which the majority relied -- as expressed in the Virginia Human Rights Act -- specifically denied creation of a private cause of action.

The enormous potential impact of Lockhart, however, was limited by the Virginia General Assembly. On May 5, 1995, the General Assembly enacted Senate Bill 95-1025, which amended the Virginia Human Rights Act and essentially overruled Lockhart. In Senate Bill 95-1025, the General Assembly indicated that actions based on the public policies reflected in the Virginia Human Rights Act were limited to the procedures and remedies available under federal and state civil rights statutes. The General Assembly, however, did preserve a limited cause of action for wrongful discharge in violation of public policy against employers with more than five but fewer than fifteen employees. Remedies for violations of this new statutory claim were limited to a maximum of 12 months' back pay, inclusive of attorneys' fees. Reinstatement and compensatory and punitive damages are not available.

Many state courts have continued to resist creating a judicial public policy exception to at-will employment, while calling for action by the state legislature. In New York, for example, the court dismissed an at-will employee's cause of action for abusive discharge based on a violation of public policy. The plaintiff alleged that he was discharged in retaliation

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for revealing illegal account manipulation and accounting improprieties. While the court noted a trend in other jurisdictions, it declined to modify the traditional at-will employment rule. The court maintained that the legislative branch was better suited to explore and resolve issues of tort liability for violations of public policy. Murphy v. Amer. Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983); accord De Petris v. Union Settlement Ass'n, 86 N.Y.2d 406, 657 N.E.2d 269, 633 N.Y.S.2d 274 (1995).

Employers should review offer letters, policy manual language, and language which may appear in some other writing addressing discharge, as well as the individual contracts they have entered into, to determine the potential scope of their liability when terminating certain individuals prior to implementing a RIF. All other terminations should be carefully reviewed with an eye towards limiting potential claims of public policy violations.

PLANT-CLOSING NOTIFICATION

The WARN Act

The Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101, et seq. ("WARN" or the "Act"), requires covered employers[19] to provide their employees or their employees' collective bargaining representatives, if any, and certain state and local government officials, with written notice 60 days in advance of implementing a "plant-closing" or a "mass layoff."[20] Failure to provide the notice required by WARN can subject the employer to a potential award of damages to each affected employee for back pay and benefits for up to 60 days, as well as liability for attorneys' fees incurred in the litigation. See 29 U.S.C. § 2104(a). Civil penalties may also be imposed.

The Department of Labor's regulations that implement the Act recognize that it may be difficult for an employer to effect the site closing on the particular day that was selected 60 days in advance. Thus, the regulations permit the employer to either specify a specific separation schedule or use a 14-day period during which the separation will occur. See 20 C.F.R. § 639.7(b). Companies may choose to use the 14-day "grace period" in which to implement the separation, but the notice must be provided 60 days prior to the beginning of that period.

The regulations specify the required contents of the notice that must be given to each affected employee, the state and the local government representative.[21] See 20 C.F.R. §§ 639.7(c), (d). The notice to employees represents the minimum required by law. (From a human

[19]Employers who employ 100 or more full-time employees or 100 or more employees (including both full-time and part-time) who, in the aggregate, work at least 4,000 straight-time hours per week, are generally covered by the Act. 29 U.S.C. § 2101(a).

[20]WARN defines the term "plant-closing" as a permanent or temporary shutdown of a "single site" of employment or one or more "facilities or operating units within a single site of employment" if the shutdown results in an employment loss within any 30-day period at the single site of employment for 50 or more employees, including any part-time employees. 29 U.S.C. § 2101(a)(2). A "mass layoff," on the other hand, is defined as a reduction-in-force that is not the result of a plant-closing, but which results in an employment loss at the site during any 30-day period affecting either: (a) at least 33 percent of the full-time employees and at least 50 full-time employees or (b) at least 500 full-time employees. 29 U.S.C. § 2101(a)(3).

[21]Draft notices to employees or the collective bargaining representative, state dislocation units, or the governor and local government officials, which are in conformance with WARN requirements, are available from the firm.

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relations standpoint, you may wish to consider a personalized letter to each employee from the site manager explaining the reasons necessitating the shutdown, as well as any plans for outplacement assistance, etc., to supplement the required notice.)

WARN expressly approves mailing the notice to the employee's last known address or including it with the employee's paycheck. 29 U.S.C. § 2107(b). Nevertheless, the regulations permit "[a]ny reasonable method of delivery which is designed to ensure receipt of notice" at least 60 days before separation. 20 C.F.R. § 639.8.

The Act exempts from its notice requirements temporary workers and independent contractors. Temporary workers who are not employees of the employer but who are employed by a temporary employment agency are expressly exempt under the regulations because they "have a separate employment relationship with another employer and are paid by that other employer . . . ." 20 C.F.R. § 639.3(e). Temporary employees who are directly employed by the employer are exempt only if they were hired with the express understanding that their employment is limited to a specific period of time or the duration of a project or assignment. Id. At § 639.5(c). The burden of proof in regard to an employee's status as "temporary" lies with the employer. Moreover, despite the fact that workers may be hired to complete a specific contract or job, if a long-term relationship is contemplated, their employment may not be considered "temporary." 20 C.F.R. § 639.5(c). To minimize the company's exposure to liability, we would recommend that "temporary" employees be given the required WARN notice at the same time as other affected employees.

During the 60-day period in which the WARN notice is in effect, the employer is obligated under WARN to continue paying wages and to continue all benefits to which the employee is otherwise entitled. Employers found to be in violation of WARN may be liable to the affected employees for, among other things, benefits under an employee benefit plan, including the costs of medical expenses incurred during the employment loss that would have been covered if employment loss had not occurred. 29 U.S.C. § 2104(a)(1).[22]

Employment contracts need to be read to determine if they contain severance pay or other deferred-compensation provisions. This is particularly significant under WARN, because the employer's liability may be offset by payments otherwise unconditionally owing from pre-existing oral or written agreements, including unconditional severance payments to which the employees otherwise would be entitled.[23] These offset provisions offer the potential that, if an employer fails to give the required 60-day notice to affected employees, such employees may remain entitled to otherwise applicable severance payments under a current severance policy in addition to any notice permitted by the statute. Provisions found in an employee handbook or a policy manual also may be construed as giving an employee the right to severance or other forms of compensation upon termination. Thus, one would be well advised to review the text of such manuals and handbooks, if any exist, prior to the site-closing, to determine any possible obligation that the company may have thereunder. This review should be undertaken prior to

[22]The maximum period of liability is 60 days and could be less depending upon the amount of notice given by the employer. For example, an employer that gave only 20 days' notice and did not qualify for an exemption or exception would face a 40-day liability period.

[23]Employers may not offset payments made to former employees from other employers or from unemployment compensation benefits.

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formulating any specific severance policy, because such obligations possibly could be applicable to all affected employees, not only those covered by individual employment contracts.

Plant Relocation or Closing - State or Local Laws

Many states and municipalities have enacted plant-closing legislation. In some cases, these laws place greater restrictions upon the employer by mandating a longer notice-period than does the federal law. This is of particular importance in light of the fact that WARN's notification period runs concurrently with any other period of notification required by contract or any state or municipal law.

In Connecticut, for example, employers are required upon the relocation[24] or closing of a covered establishment[25] in the state to pay in full for the continuation of existing group health insurance for each affected employee and his or her dependents, if covered by the group policy, from the date of relocation or closing for a period of 120 days, or until such time as the employee becomes eligible for other group coverage. Conn. Gen. Stat. § 31-51o (1997). Entitlement under this section shall not apply to employees who choose to continue their employment with the employer at a new location of the facility. Further, contractual agreements arrived at through a collective bargaining process shall supersede the requirements of this section.

In addition, chief executives of any business employing 25 or more employees within the state of Connecticut are required to mail or deliver to its retirees, who are presently receiving health or life insurance benefits, notice of its intention to sell the business at least 35 days in advance of the intended sale. The notice must provide the status of the retirees' health and life insurance benefits upon such sale and a copy of the notice shall also be mailed or delivered to the Labor Commissioner.

COBRA

Federal COBRA Requirements

Under federal law[26] all employees and their qualified beneficiaries covered under an employer's group health plan may elect to continue their coverage under the plan if their coverage would otherwise end because of certain events (referred to as "qualifying events"). Those events include, but are not limited to, the employee's voluntary or involuntary termination of employment (except for gross misconduct) or a reduction in hours of employment.

When a RIF occurs and an employee is terminated, the employer must notify the plan administrator of the qualifying event. The plan administrator must then notify qualified

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[24]"Relocation" means the removal of all or a substantial portion of the industrial or commercial operations in covered establishments "to a location outside the State of Connecticut." Conn. Gen. Stat. § 31-51n(5).

[25]Covered establishment is defined as "any industrial, commercial or business facility which employs, or has employed at any time in the preceding 12-month period, 100 or more persons." Conn. Gen. Stat. § 31-51n(1).

[26]The Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), 26 U.S.C. §§ 4980B, et seq.

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beneficiaries[27] of their rights to elect coverage. After the qualifying event, qualified beneficiaries (including terminated employees) will have at least 60 days to elect continuation coverage. If coverage is elected, the plan may require the payment of a premium of no more than 102% of the cost to the plan for coverage of similarly situated individuals. If the qualifying event is an employee's termination of employment, the maximum continuation period is 18 months from the termination. Special rules and periods apply in bankruptcy situations and for certain disabled individuals.[28] The maximum periods may be shortened for a number of reasons, including:

(1) termination of <u>all</u> of the employers' group health plans without establishment of a successor plan;

(2) a qualified beneficiary's failure to pay any required premium payment in a timely manner;

(3) a qualified beneficiary's becoming covered under another employer's group health plan (as an employee or otherwise) that does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary; or

(4) an individual's entitlement to Medicare benefits.

A plant-closing will result in termination of employment for some employees and reduction in hours for others, which typically results in a loss of health coverage to the employees. If the employer offers no health benefits plan as a result of the plant-closing, no right-to-continuation coverage will exist for the terminated employees. But if the employer maintains other health benefit plans (e.g., for other plants or divisions), it must offer continuation coverage to the terminated employees. Where the employer is a subsidiary whose parent company owns at least 80% of its stock, the employer must offer continuation coverage to its employees, at the employee's expense, under any remaining group health plan maintained by the parent company for its "similarly situated" active employees. <u>See</u> Proposed Treas. Reg. § 1.162-26. The level of coverage must be substantially equivalent to that level of benefits in effect prior to the closing. Any reduction or elimination of coverage in anticipation of a RIF or plant-closing is disregarded in determining the type of coverage that must be made available to the affected employees and their qualified beneficiaries. Thus, if employees lose one type of coverage immediately prior to a closing, they may be eligible to choose that type of continuation coverage after the closing.

Medical Coverage ContinuationUnder State Laws

Many states have enacted their own medical continuation laws. In Connecticut, for example, when an employer's group plan is terminated for any reason, including a RIF, the employee has the right to continue coverage for himself or herself and his or her eligible

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[27]The term "qualified beneficiary" means, with respect to a covered employee under a group health plan, any other individual who, on the day before the qualifying event, is a beneficiary (including spouse and dependent child). <u>Id.</u> at § 4980B(g)(1)(A).

[28]COBRA provides for continuation coverage of up to 29 months in the cases of employees who were disabled under the Social Security law at the date of the qualifying event.

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dependents with the employer's group plan. Continuation of coverage entitlements are generally available for up to 104 weeks (or, in certain cases, up to 156 weeks) or until the employee becomes eligible to participate under another group plan, whichever occurs first. The employer must inform employees in writing of their right to continue medical insurance coverage within 10 days after the employee's eligibility to participate in the group plan otherwise terminates. The employee must make an election to continue coverage within 30 days of termination of coverage, and must pay the employer up to 102% of the required premiums. At the end of the continuation period, the individual has the option of converting from group to individual coverage. Conn. Gen. Stat. § 38a-538.

If, after timely receipt of the premium payment from the former employee, the employer fails to make payment to the insurer, the employer shall be liable for benefits to the same extent as the insurer would have been liable had coverage not been terminated. In addition, the Connecticut Supreme Court has ruled that an employer breached its common-law duty of good faith and fair dealing by refusing to accommodate a terminated employee's desire to continue coverage under the group plan. Buckman v. People Express, Inc., 205 Conn. 166, 530 A.2d 596 (1987). The court in Buckman ruled that the employer's common-law duty is separate and distinct from its statutory obligations. Therefore, the company's failure to accommodate an employee's desire to continue benefits does not eliminate an employee's independent causes of action, including emotional distress and breach of contract, based on the employer's breach of its common-law duty of good faith.

New York has a similar law, which provides that employees may continue as members of their employers' group health plans for up to six (6) months in the event of termination.

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ERISA

Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S C. § 1140, prohibits discrimination against an individual in connection with his or her entitlement to pension benefits. The issue may arise in the context of a RIF when an individual claims that he or she was included in a reduction-in-force or was terminated for reasons related to either vesting in a pension program or approaching eligibility for a higher level of benefits.

In order to establish a Section 510 violation, the plaintiff must prove that the employer was motivated, at least in part, by a specific intent to interfere with an individual's rights under ERISA. The burdens and order of proof under Section 510 are similar to those described above under both ADEA and Title VII. First, the plaintiff must establish a prima facie case of unlawful termination. This is done with proof that the individual had the opportunity to attain rights in a covered benefits plan, that the individual was qualified for his or her position, and that the nature of the discharge gives rise to an inference that it was effected to deprive the individual of the rights at issue.

Once a prima facie case has been established, the burden of presenting evidence shifts to the employer, who must articulate a legitimate, nondiscriminatory reason for its discharge of the plaintiff. Assuming the employer has set forth a legitimate, nondiscriminatory reason by presenting enough evidence to demonstrate that it acted without regard for the employee's pension eligibility or interests, the burden returns to the plaintiff to prove that the employer's reasons for its actions were to defeat the employee's rights to certain benefits. As one court noted, however, there is no recovery under ERISA "where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment." Mere proof that the individual would have been entitled to greater benefits but for the early termination is not enough.

The facts surrounding a RIF generally suggest that the employer is not motivated by concerns related to ERISA or the eligibility of employees for vesting or increased benefits. Nevertheless, an employer should consider whether certain employees may be close to vesting when implementing a reduction and take necessary steps, when possible, to protect the rights of such employees in order to avoid potential Section 510 actions. If, for example, an employee was terminated several weeks or months short of a significant anniversary date with the company and thus did not qualify for increased pension benefits, the employee might be able to articulate a prima facie case of discrimination under Section 510. To illustrate, about 3,500 employees of Continental Can Corporation received a $415 million payout as part of a settlement of their ERISA-based claims that the company plotted to lay them off before their pensions vested. [1991] 3 Daily Lab. Rep. (BNA) A-3 (Jan. 4, 1991).

PAYMENT OF WAGES AND BENEFITS UNDER STATE LAWS

Many states have enacted laws providing for the payment of wages or earned benefits to employees at or shortly after termination. In Connecticut, for example, employees who resign from their employment must be paid their "wages"[29] due in full by the following scheduled pay period, either through the formal payment channels or by mail (preferably certified mail). In contrast, employees who are discharged as a result of a RIF in Connecticut must be paid in full

[29] "Wages" are defined as "[c]ompensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation." Id. at § 31-71a(3).

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not later than the next business day following the termination. When an employer fails to timely pay an employee wages, such employee may recover in a civil action twice the full amount of such wages, with costs and attorneys' fees. Conn. Gen. Stat. § 31-72 (1997). Any agreement between the employer and employee for payment of wages other than as specified in Section 31-72 shall be no defense to such action. In addition, any employer, officer, agent or other person authorized by the employer to pay wages who violates any provision of Sections 31-71a, et seq., may be fined not less than $500 or more than $5,000, or imprisoned for up to five (5) years, or both, for each offense. Id. at § 31-71g.

In any case, when a dispute occurs over wages, the employer must pay, at a minimum, the amount it concedes it owes the employee. Acceptance by the employee of such an amount is not a release on the balance, and any written release an employee may sign as a condition of payment is considered void. Id. at § 31-71d.

In addition, under Section 31-76k, paid vacations are included within the term "accrued fringe benefits," and must be paid upon an employee's termination in the form of wages. Employees in Connecticut have the right to accrued vacation benefits and all other accrued fringe benefits, if the employer has a policy of making such payments or if such payments are provided for in a collective bargaining agreement. These entitlements must be paid upon termination. Id. at § 31-76k.

Under New York law, terminated employees must be paid wages due no later than by the next regularly scheduled pay period. N.Y. Lab. Law § 191(3) (McKinney 1986). Additionally, all wage and benefit supplements due the employee in accordance with the employer's agreement with the employee (e.g., vacation, separation pay, etc.) must be paid no later than thirty (30) days following termination. Id. at § 198-c. Failure to timely pay such wage and benefit supplements is considered a misdemeanor.

MODEL EMPLOYMENT TERMINATION ACT

The National Conference of Commissioners of Uniform State Laws has adopted a Model Employee Termination Act ("META"), which would modify the common-law principle of employment-at-will as it exists in most states. See [1991] 156 Daily Lab. Rep (BNA) A-A, D-1, et seq. (August 13, 1991).

Under META, employees would be protected from discharge from employment without "good cause," and employers would benefit by avoiding trials on a variety of tort and contract theories. The bill also contains provisions regarding arbitration and a two-year cap on front-pay recovery for employees. The National Conference of Commissioners, which drafts and proposes uniform laws for consideration by the 50 states and the District of Columbia, worked and held hearings on META for several years. Although the Conference's works are advisory only, it does enjoy some influence among state legislators. For this reason, and especially because of the provisions concerning contract and tort theories and damages, META has stirred considerable controversy. See [1990] 43 Daily Lab. Rep. (BNA) A-2, A-G (Mar. 5, 1990).

Montana is the first state to have adopted a wrongful-discharge statute. See Mont. Code Ann. §§ 39-2-901, et seq. The statute is similar in many respects to META. The Montana statute is an attempt to balance the business community's concern that tort damages in employment cases had gotten out of control, against the concerns of advocates of greater employee rights in wrongful discharge cases. The legislation limits recovery to lost wages, less any possible mitigation, id. at § 39-2-905(1), except where the employer engaged in actual fraud

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or malice in the discharge of the employee. In that case, if proved by clear and convincing evidence, punitive damages are available. Id. at § 39-2-905(2).

CONCLUSION

With careful planning, employers can implement RIFs in order to cut costs, and manage the risks of litigation. Voluntary early retirement incentive plans and voluntary severance programs are sound vehicles for cost-cutting, but they clearly require substantial time for both planning and implementation. This is particularly true because of the relatively long waiting period required under OWBPA after presentation of the plan to affected employees. With careful planning, however, the prescribed notice period can be set to run concurrently with a WARN notice period, when the latter is required.

The risk of litigation arising from involuntary job elimination plans is, of course, greater, and may be managed effectively by taking the appropriate steps to prevent adverse impact on protected classes of employees and by ensuring that the decision-making process is thoroughly reviewed or handled entirely by management above the level of direct supervisors.

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PREVENTATIVE GOAL STATEMENTS

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GOAL: INCREASE PROACTIVE AND PREVENTATIVE WORK AND PROVIDE COMPLIANCE PROGRAMS IN EMPLOYMENT AND LABOR LAW AREAS FOR OPERATING COMPANIES.

HOW TO ACHIEVE:

1. Work closely with all Operating Companies and get involved at early planning stages for new programs and strategies.

2. Work closely with Compensation and EEO/AAP to perform monthly wage and hour audit reviews.

3. Work closely with EEO/AAP to perform quarterly glass ceiling type reviews.

4. Review status of all posting requirements on a quarterly basis to ensure compliance.

5. Work closely with the Compensation Department and Human Resources professionals to identify the Department of Labor Wage and hour exempt status and rationale for such status. Education Operating Companies on related risks and liabilities. Work closely with the Operating Companies to change status or increase potential defenses.

6. Use pre-arbitration guidelines for arbitration review.

7. Implement Maintaining Effective Employee Relations program nationally.

8. Increase training in all areas of Labor and Employment Law for Human Resources professionals. Keep Human Resources professionals aware of new legal developments.

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GOAL: IMPROVE COLLABORATION AND COORDINATION OF SIMILAR ISSUES AMONG SEPARATE OPERATING COMPANIES.

HOW TO ACHIEVE:

1. Circulate a list of court and administrative cases including EEO, Wage and Hour, NLRB, OSHA, Arbitrations, information on collective bargaining negotiations, new employee programs – e.g., forms for Hourly Incentive Program, and major issues on a monthly basis.

2. Hold joint quarterly HR HQ and field meetings to review major issues and discuss important legal developments.

3. Have a legal representative attend the CPO meetings.

4. Have a legal representative attend each of the Operating Company's and Corporate's Field and HQ HR meetings.

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GOAL: REDUCE SEXUAL HARASSMENT COMPLAINTS.

WHY SELECTED:

The heightened awareness of sexual harassment due to President Clinton and the recent Supreme Court cases will increase.

HOW TO ACHIEVE:

1. Increase training of entire work force through one-on-one training, group training and computer training programs.

2. Recirculate the policy and guidelines on a semi-annual basis, requiring execution of acknowledgment forms.

3. Ensure Human Resources professionals are trained in investigating and responding to sexual harassment complaints.

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GOAL: MINIMIZE RISK OF EXTERNAL OR GOVERNMENTAL CHALLENGES TO THE STATUS OF INDEPENDENT CONTRACTORS/CONSULTANTS V. EMPLOYEE.

WHY SELECTED:

The Courts and IRS continue to increase the liability of corporations if they misclassify Independent Contractors.

HOW TO ACHIEVE:

1. Identify independent contractors/consultants who may be misclassified throughout all Operating Companies.

2. Work closely with the Operating Companies to change their status or increase potential defenses if their status remains the same.

3. Educate Operating Companies on related risks and liabilities.

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CORRECTIVE ACTION PLAN

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CORRECTIVE ACTION PLAN

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Final Warning
Corrective Action Plan

As you know, in __________, 19____, I gave you a 90-day Corrective Action Plan. Therein, I explained that your performance as a __________________ was completely unsatisfactory. I identified six major problem areas with recommendations as to how to improve. Despite this Corrective Action Plan, your performance has continued to deteriorate and remains at a "Deficient" level, as explained more fully in your Performance Appraisal.

This is a Final Warning Corrective Action Plan. It is formulated in a final effort to assist you in remedying your serious performance deficiencies. It identified specific ways to improve your performance. If you fail to make significant improvements within three months, your employment will be terminated.

1. **Performance Deficiency**

Fails to provide managerial leadership.

You do not provide the leadership required to run projects. You do not pull the functional groups together for which you are responsible. Thus, you create conflicts among the groups. For example, when implementing the _____________ project, you did not have the functional groups on the same time line. As a result, the project was delayed for two weeks, and the groups were unable to reach agreement and the project lost efficiency. You are not proactive and do not maintain a comprehensive project plan. You require constant supervision to accomplish tasks. You do not call meetings to review and resolve issues. You wait until issues explode rather than perform preventative planning. In addition, you have been unable to even make presentations to Senior Management which forced another to take over the presentation in the middle of it. Another example of your deficient leadership is that many clients have complained that you do not maintain control of meetings, you fail to properly delegate work and do nothing to gain group consensus, generate ideas or direct your groups to achieve implementation.

Corrective Action

Effective immediately, you must:

- Develop and maintain an up to date project plan including work components, timeline, responsibility assignment, budget, actions made, decisions taken, status pending, next steps and dates, significant communications and related notes. The plan must remain up to date and available for review by team members and clients and must be submitted to me for review weekly – on every Friday.

- Effectively manage projects without direct supervision.

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- Demonstrate responsibility for moving the project forward – don't just assume issues will resolve themselves or that the project will move forward on its own.

- Demonstrate follow through by planning, executing and communicating meaningful activities to drive the project forward daily. Document activities in daily Planner which must be available for review.

- Assume a proactive leadership role in meetings by identifying key meeting issues in advance.

- Lead meeting direction and participate fully throughout the entire meeting.

- Coordinate the functional groups to assure coordination consensus on issues and timely interaction to achieve project goals

- Demonstrate in-depth knowledge of projects that you are managing.

2. Performance Deficiency

Fails to control cost, scope and schedule of projects.

You are not always aware of cost issues because you do not actively monitor and remain involved as costs develop. Not only do you fail to monitor it, you do not even delegate the responsibility. As a result, there is no oversight. At a critical period of the project, you did not adequately schedule key components even though you had detailed support from an outside engineering firm. The coordination of the installation dates of the major processing equipment and electrical connections were incorrect. As a result, the initial installation was further delayed and substantial overtime costs were incurred. In addition, you fail to demonstrate to your manager an in-depth, up to date knowledge of costs, control and purchase orders. In fact, you still lack adequate knowledge regarding the project on which you have worked for over a year. When I met with you in the Spring to review the project progress and costs, you advised me that the project was already over budget when, in fact, it was not.

Corrective Action

Effective immediately, you must:

- Maintain detailed knowledge of the cost control systems and schedules of all assigned projects

- Need to clearly understand and communicate scope, cost and schedule requirements to team members and management.

- Demonstrate the ability to listen to the ideas generated by team members, drive and delegate the evaluation of the ideas and come to a conclusion on that issue.

- Provide cost status of major items to the project team on a timely basis.

3. Performance Deficiency

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Fails to demonstrate communication and motivation skills.

You do not communicate and motivate the team. You either dictate a decision without any further exploration or let others drive the decision. You are unable to strike the necessary balance. As evidenced by email messages on which I am copied, there always appears to be a significant and recurring amount of discord and bickering over project expectations on your projects. You fail to adjust your expectations based on team feedback. You tell them what to do but don't listen to their input or cooperatively work out solutions that include consideration for their concerns. In addition, you do not communicate an understanding of cost and project status in a clear and concise manner. You fail to update either me or the Bakery in an adequate manner. You take a very lackadaisical approach.

Corrective Action

Effective immediately, you must:

- Resolve routine issues within job scope and seek guidance from manager only when significant scope, delays or major costs deviations are likely to occur.
- Consistently and proactively obtain input from project team members.
- Make timely decisions with consensus and alignment from the project team.
- Communicate actively and regularly with the team to appraise them of project status, issues, constraints, successes, etc. Maintain record of client and team communications.
- Clearly communicate expectations to the project team and follow-up in a positive manner to build teamwork.
- Get involved with the project success and quality of outcome by providing constant effective communication to key clients.
- Initiate and stimulate discussion and participation by team members, seeking cooperative solutions and bring issues to appropriate closure for action.

4. Performance Deficiency

Fails to provide periodic project reviews and reports.

Your reports, minutes of meetings, agendas and punch lists are not consistently prepared on time. In addition, they are generally inadequate and not properly updated. Sometimes they are not complete and require reworking to be acceptable. When constantly prodded, you attempt to bring this work in line. Without specific direction or deadlines, you do not create the necessary documents comprehensively on your own.

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Corrective Action

Effective immediately, you must:

- Report and update accurate and comprehensive budget/cost information to the team and to management.
- Follow the PEG's, providing documentation as needed.
- Project comprehensive agendas for project meetings.
- Submit minutes of job meetings to team members and management promptly.
- Provide consistent and regular feedback to the team on project status.
- Keep the punch list current and review with functional groups to insure timely completion of items.
- Provide weekly and monthly reports that are timely, accurate and comprehensive.

5. **Performance Deficiency**

Fails to attain customer satisfaction.

The internal clients have repeatedly expressed dissatisfaction with your work and there are internal clients who have specifically advised me that they will not accept you back in their bakery as project manager due to dissatisfaction with work you have done in the past.

They have clearly expressed their concerns that you just don't get the job done or perform any adequate follow-up. A project manager must be able to work in any plant in the system. Most complaints stem from the fact that you don't follow up on work unless you are continually pushed. You are inconsistent at driving team performance and don't consistently demonstrate active leadership.

Also, you don't demonstrate consistently a sense of urgency to your clients. You procrastinate then demonstrate urgency right before a deadline is due. This destroys your credibility with clients and team members. You attempt to avoid conflict. Even though I sent you to a conflict resolution class, you haven't improved in this area at all. You refused to acknowledge or recognize that you have a problem in this area. You do not strive for an optimum solution. Often, if you disagree with a client, you simply tell them no and cause friction with them. You reject ideas so that you can limit the amount of work to be done.

Corrective Action

Effective immediately, you must:

- Develop an action plan to restore damaged relationships with key clients – demonstrate that your presence on a project adds value from the perspective of the

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client. The action plan must be presented to me by _______ and must be implemented effectively to restore credibility.

- Manage team confrontational issues and resolve them in a constructive, positive manner.

- Listen to team and bakery input, utilize their information in a positive manner to drive the project forward; adjust plans or explain why plans cannot be adjusted because of the scope, budget or timeline of the project.

- Establish a positive, credible working relationship, as perceived by the customer.

- Demonstrate effective listening skills in resolving project issues in a positive manner.

Conclusion

I will evaluate your progress on a monthly basis. We will meet and discuss your progress on a bi-weekly basis. If you fail to improve your performance to an acceptable level, your employment will be terminated.

ARBITRATION PREPARATION GUIDELINES

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INTEROFFICE MEMO

To: Personnel Managers

From:

Date:

Re: Arbitration Preparation Guidelines

Our ability to obtain favorable decisions in Arbitration Awards, through the efforts of our Legal Department, is well documented. As well, we have learned through experience that the most direct route to a successful arbitration begins with thorough preparation.

However, we believe that our assistant to the Legal Department can further be strengthened through a consistent, orderly and concise investigation of the facts surrounding all grievances submitted for arbitration.

As you know, the initial investigation of the facts by Field Personnel is critical in the establishment of a solid case. To this end, we are implementing new guidelines in the form of a "Position Summary Report" which will serve as a narrative brief and ***MUST ACCOMPANY ALL FUTURE GRIEVANCES SUBMITTED FOR ARBITRATION***.

The contents of the report should include pertinent information which is to be presented in the format provided in the attached outline. The report should be forwarded to the Area Employee Relations Manager responsible for your location.

There is no substitute for thorough preparation and this point cannot be overstated. Your assistance with these new procedural requirements will insure that we are providing the best possible support necessary to sustain a successful arbitration record.

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ARBITRATION

POSITION SUMMARY REPORT

I. INTRODUCTION

A. Name of Grievant(s).
B. Date Grievance(s) was filed.
C. Bargaining unit Representing Grievant(s).
D. Biographical Data of Grievant(s).
- Date of Hire
- Date of Birth
- EEO Classification
- Current Job Classification
- Current Wage Rate
- Department

II. GRIEVANCE SUMMARY STATEMENT

A. Briefly summarize the issue(s) of contention in a concise statement.
B. A chronological summary of all relevant facts and mitigating circumstances contributing to the grievance(s).
C. Indicate relevant contractual language, side agreement(s), established practice(s), Company rule(s), etc., being challenged.
D. If appropriate, estimate the Company's potential economic liability (i.e., backpay, overtime pay, etc), and/or operational liability (i.e., restrictive work practices).

III. POSITION STATEMENTS

A. A concise summary of the grievant's (Union's) arguments, evidence and witness statements presented in previous steps of the grievance procedure.

B. A concise summary of Management's response(s), evidence and witness statements presented in previous steps of the grievance procedure.

IV. RECOMMENDATIONS

A. A brief, logical summary of local management's position and objective reasoning for believing the Company's arguments will prevail in arbitration.

B. If appropriate, any alternatives available which Local management feels may resolve the dispute prior to formal arbitration.

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V. **DOCUMENTATION**

A. A copy of the grievance(s), the parties answers at each step and any attachments thereto.

B. A copy of any contract language, side letter, minutes, letters of understanding, posted rules, correspondence with the Union, similar grievances, etc., applicable to the instant grievance(s).

C. A copy of any witness statements, preferably signed and dated, sustaining management's position.

D. For grievances involving discipline and discharge, a copy of all relevant personnel folder documents including, but not limited to:

- Attendance Records
- Grievant's prior disciplinary action documents (i.e., 101-U's).
- A review of disciplinary cases for similar offenses plant wide to determine consistence, uniformity and non-discriminatory treatment.

E. A copy of any EEO or Unfair Labor Practice charges pending at your location which may impact the instant grievance(s).

F. If appropriate, any photographs, diagrams or physical evidence of the area where the incident(s) occurred.

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ATTORNEY-CLIENT PRIVILEGE
AND
WORK PRODUCT DOCTRINE

GUIDE FOR PERSONNEL PROFESSIONALS

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THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

Prepared by:

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INTRODUCTION

When a company's Personnel Department becomes involved in both internal investigations and Civil and Administrative Proceedings directed against them, it is vital that they ensure that the results of these internal investigations and the preparation of documentation or analyses remain protected from disclosure through either the subpoena process or "discovery" procedures involved in litigation. To do so, they must ensure that the attorney-client privilege and work-product privileges are properly and routinely invoked. In order to properly protect the privileges, the privileges must be considered and documented during each step of the investigative process – i.e., during the planning, implementation, and reporting stages of an investigation. Indeed, through invoking the attorney-client privilege, we can properly and ethically create certain protections when they otherwise might not exist. Absent this planning, we may conduct a thorough and comprehensive investigation, but then be compelled to turn the fruits of that investigation over to adverse parties.

In order to assist in preserving the attorney-client and work-product privileges while conducting an internal investigation, this memorandum first summarizes briefly general principles governing the privileges; and then, proposes twelve rules to follow in conducting an internal investigation. Indeed, strict adherence to the twelve rules will not guarantee that adverse parties will be prevented from access to underlying facts because facts themselves are not protected by the privileges. Strict adherence will, however, insure that the products of an investigation, including all resulting analyses and recommendations, do not create a road map from which adversaries can pursue actions against the corporation using the corporation's own investigation.

DEFINING THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege protects in essence confidential communications between an attorney and client for the purpose of securing or rendering legal advice. This privilege is designed to encourage full and frank communication between attorneys and their clients. This privilege runs both to and from the attorney – i.e., it not only protects the furnishing of professional legal advice by the attorney but also the furnishing of information to the attorney to enable him/her to give a sound and informed opinion. Although the attorney-client privilege protects against disclosure of confidential attorney-client communications, it does not protect against disclosure of the underlying facts. Accordingly, a client may not refuse to disclose relevant facts simply because they were incorporated into a communication with an attorney.

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ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT WITH IN-HOUSE COUNSEL

UPJOHN v. UNITED STATES

The leading Supreme Court case defining the scope of the attorney-client privilege in the corporate contest is Upjohn v. United States, 449 U.S. 383 (1981). A full examination of Upjohn, is thus critical to an understanding of the attorney-client privilege in the corporate context.

In Upjohn, independent accountants conducting an audit for one of Upjohn's foreign subsidiaries discovered "questionable payments" to foreign government officials. After consulting with the Chair of the Board and outside counsel, Upjohn's General Counsel initiated an internal investigation of the payments by the foreign subsidiary. As part of the investigation, the in-house attorneys prepared a letter containing a questionnaire which they sent to all foreign, general and area managers. A statement of policy accompanying the questionnaire clearly indicated the investigation's legal implications. The questionnaire sought detailed information concerning payments made by Upjohn or any of its subsidiaries to any employee or official of a foreign government. The managers answering the questionnaire were instructed to send the responses directly to Upjohn's General Counsel and were informed that the internal investigation was completely confidential.

Upjohn subsequently submitted information to the Securities and Exchange Commission and to the Internal Revenue Service ("IRS") disclosing the questionable payments. The IRS initiated an investigation. As part of the investigation, the IRS issued a summons demanding production of all files concerning the internal investigation. Upjohn declined to produce the documents on the grounds that they were protected by the attorney-client privilege and consisted of attorney work-product prepared in anticipation of litigation.

The Upjohn Court held that the questionnaires answered by the managers were protected from disclosure by the attorney-client privilege. The courts then made clear how to invoke the attorney-client privilege in the corporate context as follows:

> (1) the communication must be made for the purpose of securing legal advice, (2) the employee making the communication must do so at the direction of his[her] corporate superior; (3) the superior must make the request so that the corporation could secure legal advice; (4) the subject matter of the communication must be within the scope of the employee's corporate duties; and (5) the communication must not be disseminated beyond those persons who, because of the corporate structure, need to know its contents.

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WORK-PRODUCT PRIVILEGE

The work-product privilege is similar to the attorney-client privilege in some respects but distinct in others. The work-product privilege provides the attorney with a zone of privacy so that he or she can prepare a client's case to the fullest extent possible, free from exposure to an adversary. To this end, the privilege protects from disclosure materials prepared by an attorney in anticipation of litigation.

Work-product protection covers an attorney's legal strategy, intended lines of proof, evaluation of the strengths and weaknesses of the case, and inference drawn from interviews of witnesses. Such mental impressions and beliefs are protected whether in the form of notes, memoranda or correspondence.

TWELVE RULES TO PRESERVE THE

PRIVILEGE DURING THE INTERNAL INVESTIGATION

1. STAMP EACH DOCUMENT GENERATED IN THE INVESTIGATION "PRIVILEGED AND CONFIDENTIAL: ATTORNEY'S WORK PRODUCT."

Each document generated during the course of the investigation should be stamped in the manner set forth above. The documents to be stamped include notes, interview documents, and internal factual and legal memoranda. Stamping each document is critical to preserving the privileges because if the proprietary of the invocation of the privileges is ultimately litigation, the court will likely conduct an in camera review. A judge reviewing documents stamped privileged must recognize at the outset that he or she is dealing with a situation not simply where an attorney in litigation states that the documents are privileged, but one in which the persons creating the documents believed, at the time of their creation, that they were privileged. The belief of the author of the document is important since one of the elements of the attorney-client privilege is an expectation of confidentiality. Although this process of stamping documents, standing alone, does not conclusively establish the privilege, it does go far toward conditioning the judge to uphold the privilege.

2. IN-HOUSE CORPORATE COUNSEL SHOLD REQUEST FORMAL AUTHORIZATION TO CONDUCT AN INTERNAL INVESTIGATION.

Prior to the commencement of the investigation, in-house corporate counsel should request from management formal authorization to conduct an investigation. The request should set forth each of the elements of the privileges as set forth in Upjohn in the context of the factual circumstances present in the particular case. For example, the request should state that the purpose of the investigation is to render legal advice to the corporation; and that, to that end, confidential communications between the attorney and client are required. It should further set forth, in detail, all the potential litigations that in-house corporate counsel anticipates – i.e., civil, criminal, subpoena compliance, etc. A sample request for authorization to conduct an internal investigation is attached as Exhibit 1.

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The documentation of a request for authorization to conduct an investigation as set forth above will further condition the judge ultimately deciding whether the fruits of an investigation are privileged: It will demonstrate that prior to the generation of a single document in the investigation, the parties performing the investigation, corporate management and counsel, all believed that the fruits of the investigation would be privileged. It further demonstrates that the requirements for invocation of the privileges actually did exist.

3. CORPORATE MANAGEMENT SHOULD FORMALLY AUTHORIZE THE INTERNAL INVESTIGATION.

Corporate management should formally authorize the internal investigation. The authorization should reference the request authorization to conduct an internal investigation and should request that all communications be kept in confidence. A sample of authorization for an internal investigation is annexed as Exhibit 2.

4. AN ATTORNEY MUST COORDINATE THE INVESTIGATIONS.

The attorney-client privilege protects against disclosure of confidential attorney-client communications, but does not protect against disclosure of any other communications for any other purpose. Likewise, the work-product privilege protects against disclosure of material prepared in anticipation of litigation. Thus, the presence of an attorney coordinating the investigation is essential to preservation of both the attorney-client and work-product privileges.

The mere presence of an attorney coordinating the investigation, however, does not ensure attorney-client and work-product protection – i.e., the attorney-client privilege does not protect against disclosure of advice given by the attorney in a non-legal capacity. However, the corporation's ultimate use of information obtained during an internal investigation for business purposes will constitute evidence of the corporation's original intent in conducting the investigation and case doubt on the corporation's contention that the information was gathered for the purpose of receiving legal advice. Where materials are intended to serve both a legal and business purpose, moreover, they should set forth clearly the legal purpose for which they were prepared.

5. THOSE INVOLVED IN THE INVESTIGATION MUST MAINTAIN A SEPARATE FILE FOR THE INTERNAL INVESTIGATION.

In order to preserve the privileges, a separate file must be maintained for the investigation. Only those involved in the investigation should be given access to the file. All persons involved in the investigation should be given an instruction sheet setting forth the requirement to maintain all documents pertaining to the investigation in the file and setting forth the above-mentioned elements of the privileges. The instruction sheet should make explicit the requirement of confidentiality, of stamping document, etc.

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6. WHERE OUTSIDE COUNSEL IS RETAINED TO CONDUCT AN INVESTIGATION, IN-HOUSE CORPORATE COUNSEL SHOULD FORMALLY AUTHORIZE THE INVESTIGATION.

The retention letter for outside counsel should set forth the elements of the attorney-client and work-product privileges as should the request for authorization to conduct an investigation.

7. MANAGEMENT SHOULD FORMALLY DIRECT EMPLOYEES TO COOPERATE WITH IN-HOUSE CORPORATE COUNSEL'S INVESTIGATION.

As noted above, Upjohn suggests that the attorney-client privilege will be preserved in the internal investigation if, among other things, an employee communicating information does so at the direction of his or her corporate superior. Accordingly, to further document the existence of the privileges during the course of the investigation, management should formally direct employees who will be contacted to cooperate in the investigation. A sample memorandum directing employees to cooperate in an investigation is annexed as Exhibit 3.

8. MAKE ALL WITNESS STATEMENTS OPINION WORK-PRODUCT.

The manner in which to create protection of interviews requires an understanding of the distinction between ordinary work-product and opinion work-product. Ordinary work product contains documents and things prepared in anticipation of litigation. Thus, a verbatim statement of a witness will likely constitute ordinary work-product. Opinion work-product, on the other hand, contains mental impressions, conclusions, opinions or legal theories of an attorney. Thus, opinion work-product includes an attorney's legal strategy, intended lines of proof, evaluation of the strengths and weaknesses of the case, and the inference drawn from interviews of witnesses.

The disclosure of ordinary work-product is typically conditioned upon a showing of substantial need and undue hardship. Opinion work-product, however, is afforded special protection and requires that the parties seeking discovery shall show extraordinary justification to pierce the privilege. Indeed, some courts have held that opinion work-product is accorded "almost absolute protection from discovery because any slight factual content that such items may have are generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's mental processes and in ensuring that each side relies on his own wit in preparing their respective cases." Still, other courts have held that opinion work-product based on oral statements from witnesses have absolute protection from disclosure.[30] Finally, the

[30] The materials constituting an attorney's mental impressions and thus opinion work –product have also been broadly interpreted. For example, the selection and compilation of documents by counsel constituted opinion work-product; and personal recollections, notes, memoranda pertaining to conversations with witnesses constituted opinion work-product.

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interview memorandum should be stamped in the manner set forth above and should contain a summary of the aforementioned elements of the privileges.

9. ANY REPORTS SUMMARIZING THE RESULTS OF AN INTERNAL INVESTIGATION MUST REFERENCE EACH OF THE ELEMENTS OF THE PRIVILEGES.

Any report summarizing the results of an internal investigation must reference the initial request for authorization to conduct the internal investigation. The report should also set forth the elements of confidentiality. The report should not simply summarize the results of the investigation but should contain legal advice, recommendations, legal opinions and analyses.

10. IN-HOUSE CORPORATE COUNSEL SHOULD FORMALLY CREATE A CONFIDENTIAL RELATIONSHIP WITH ANY CONSULTANT OR INVESTIGATOR HIRED TO ASSIST IN THE INVESITGATION.

Internal investigations may require the retention of consultants to assist in the analysis of information. Courts have long held that the attorney-client privilege extends to communications to agents, consultants and subordinates of an attorney working to assist the attorney in rendering legal advice. Accordingly, where an outside consultant is hired by an attorney to perform work in preparation for a litigation, the communications between the attorney and consultant are privileged insofar as they relate confidential communications of the client.

To the extent consultants are required to assist in the investigation, extreme care must be taken to document the existence of the privileges. Such consultants should be hired directly by in-house corporate counsel. Both outside and in-house consultants should report directly to the in-house corporate counsel.

11. VOLUNTARY DISCLOSURE OF THE RESULTS OF AN INVESTIGATIONS WILL LIKELY CONSTITUTE A WAIVER OF THE PRIVILEGE.

The Company may wish to disclose the materials gathered during an internal investigation to various government agencies or other entities due to certain advantages perceived from such disclosure. Disclosure of a privileged communication to a third party, however, will eviscerate at least the attorney-client privilege and, in all likelihood, the work-product privilege as well.

The attorney-client privilege may be waived by any voluntary disclosure of the confidential communication to a third party. Thus, disclosure to a government agency constitutes a waiver of the privilege. Further, disclosure of an internal investigation report to a corporation's auditors and underwriters constitutes a waiver of the privilege.

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As to the scope of a waiver, several courts have held that voluntary disclosure of a privileged communication to a third party waives the attorney-client privilege not only as to the disclosed communication, but also as to all other communications on the same subject matter. Accordingly, if a party reveals part of a privileged communication, it must disclose the remainder.

To the extent disclosure is made, it should be documented that the material turned over constitutes confidential work-product and that its disclosure is conditioned upon its nondisclosure to others. Although such a statement may afford some protection, there is a substantial risk that any disclosure may constitute a complete waiver of the privilege.

12. IN-HOUSE CORPORATE COUNSEL SHOULD ADVISE EMPLOYEES THAT HE/SHE REPRESENTS THE CORPORATION AND NOT THE INDIVIDUAL EMPLOYEE.

In order to ensure preservation of the privileges for the corporation, in-house corporate counsel should advise employees providing information that they represent the corporation and not the individual employee. As noted above, the corporation may choose at times to waive the privileges. The corporation's wishes would be frustrated if the employee could assert the privileges and prevent the corporation from waiving them. Likewise, the corporation may desire to preserve the privileges while an individual employee seeks to waive them. Preservation of the maximum flexibility for the corporation in asserting or waiving the privileges requires clear advice to employees that the attorney represents the corporation.

In the corporate context, the attorney-client privilege may normally be waived only by corporate management's collective decision and not by individual officers, directors or employees. This is so because the corporation is the client for the purpose of the privilege.

Accordingly, a corporate official (or other employee) may not prevent a corporation from waiving its privilege in connection with that official's discussions with counsel about corporate matters. Further, displaced corporate officers may not assert the privilege over current managers even respecting statements the displaced officers made to counsel when they controlled the corporation. Finally, the corporation may assert the attorney-client privilege over the objection of employees who were parties to the privileged communications. If, however, an individual consulted in-house corporate counsel for personal advice, a conflict might arise conferring upon the employee the right to invoke or waive the privilege.

CONCLUSION

As demonstrated above, we have at our disposal important protections that will provide management with the ability to gather information necessary to make decisions without providing adversaries with ammunition to use against the corporation. Although the attorney-client and work-product privileges do not protect against disclosure of relevant facts, they can be used to deny adversaries or government agencies a free ride by using the corporation's own investigation against itself. Proper precautions must be taken, however, in order to ensure maximum protection.

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EXHIBIT 1

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EXHIBIT 1

REQUEST FOR AUTHORIZATION
TO CONDUCT AN INTERNAL INVESTIGATION

Dear "Corporate Manager":

We have [uncovered evidence of (describe in detail)] or [received a subpoena for records relating to (describe in detail)]. There may be civil litigation involving (set out possible litigations). Litigation could arise over enforcement of the subpoenas, and the privileges which the corporation or the officials of employees may assert.

Corporate officers and employees possess much of the information necessary to formulate legal advice for the corporation as to these matters. Such officers and employees acquired the information as a result of their corporate duties.

In order to properly advise you, I am requesting authorization to conduct a thorough internal investigation to determine the potential violations of state and/or federal law, by officers and employees of the corporation and the corporation itself, and their effect, if any, on the legal obligations and duties of the corporation, and their potential for civil, criminal or administrative proceedings, investigations of any kind, civil litigation, including ____________________.

As part of the legal advice rendered, I will interview plant or branch managers and upper management to obtain the required information. We will communicate with officers and employees as to matters within the scope of the employee's corporate duties. All persons interviewed will be told that the investigation is for the purpose of rendering legal advice to the corporation. They will be told that their conversations will be held in strict confidence.

My report and legal advice to you, as a result of the investigation, will be kept in strict confidence and will be related directly to you so that you can share it with only those necessary to make a management decision and no others.

Sincerely,

"In-House Corporate Counsel"

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EXHIBIT 2

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AUTHORIZATION FOR AN INTERNAL INVESTIGATION

Dear "In-House Corporate Counsel":

I have received your letter dated _______________. You are authorized to conduct an investigation to advise us of the potential civil and criminal liability of __________________ and its officers and employees.

We are requesting that all communications between your staff, corporate officers and employees and this office be kept in strict confidence. Your communications on this subject will not be disseminated outside our management group. We await your legal advice.

Sincerely,

"Corporate Manager"

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EXHIBIT 3

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MEMORANDUM TO EMPLOYEES ADVISING THEM OF INVESTIGATION

TO: Appropriate Employees – Limited Circulation Only

FROM: "In-House Corporate Counsel:

The corporation has received [a subpoena requesting certain corporate records] or [uncovered information respecting (describe)]. The inquiry relates to allegations that this corporation (describe). It is the Company's policy and practice to comply with all state and federal laws and regulations.

In order to obtain legal advice concerning the scope of these problems, if any, and the Company's legal obligations with respect thereto, _________________ has authorized me to advise the Company on the legal ramifications of the investigation. I am authorized to conduct an internal investigation to gather information to aid me in rendering legal advice.

Because you may have valuable information which you possess as a result of your corporate activities, members of my office or ______ Personnel Department may interview you. You are to cooperate fully with them. They will be contacting you shortly. You are to keep the information that you impart to them confidential and discuss it with no one else.

This office represents the Company and not you personally. However, your communications on this subject will remain confidential and will be disclosed only to corporate management and other legal counsel, and will not be disclosed outside the Company.

You may also be contacted for interviews by investigators or other representatives of state or federal agencies. If you are interviewed, you have the right to have an attorney represent you at such an interview. In order to preserve your personal rights, and because the Company desires to be advised of the status of any investigation into its activities, the Company requests that you notify in-house corporate counsel prior to any such interview, so that arrangements can be made for your representation and so that the Company may be properly represented in the interview as well.

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A Synposis:

EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION

On March 1, 1999, the Equal Employment Opportunity Commission ("EEOC") issued its long-awaited Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act ("Guidance"). The 67-page document, under development for almost a year, addresses a range of reasonable accommodation issues, the highlights of which are discussed below.

I. Employer/Employee Obligations

The provision of a reasonable accommodation is one of the fundamental requirements of the ADA. See 29 C.F.R. § 1630.9 (unlawful for employer not to make reasonable accommodation for known physical or mental disabilities). Fundamentally, the Guidance notes that any request for accommodation must contain both an enumerated medical condition and a request for change. The guidance contemplates three categories of reasonable accommodations:

1) modifications or adjustments to the job application process (e.g., providing interpreters or written materials in alternative formats);

2) modifications or adjustments to the work environment (making the workplace accessible or job restructuring); or

3) modifications or adjustments to equal benefits and privileges of employment (assuring employees with disabilities access to employer-provided training).

In general, the request for accommodation, which may come at any time during the application process or employment period, must come from the employee, (or, under certain

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circumstances, a family member or health professional).[31] An employer is not required to be clairvoyant. Only where an employee has a mental impairment which might impact his or her ability to request an accommodation, would it be incumbent upon an employer to raise the issue. See Bultemeyer v. Ft. Wayne Community Schs., 100 F.3d 1281, 1285 (7th Cir. 1996). On the other hand, an accommodation request need not be written, and need not cite the statute or even use the words "reasonable accommodation." Guidance at 8, n.17.

Once presented with an accommodation request, an employer should timely engage the employee in an informal, interactive process to clarify what the individual needs and to determine an appropriate accommodation. Guidance at 11, citing 29 C.F.R. § 1630.2(o)(3), 29 C.F.R. pt. 1630 App. §§ 1630.2(o), 1630.9. As to the substance of the accommodation, it is not required that an employer provide the accommodation of the employee's choice; it is only required that the accommodation provided be effective. Guidance at 17-18. Moreover, prior to providing any accommodation, an employer may require documentation of a) the employee's disability, and b) the appropriateness of the requested accommodation.[32] If documentation from an employee's healthcare provider is inadequate, an employer may request that the employee be examined by a healthcare provider of the employer's choosing, after first giving the employee the opportunity to have his/her healthcare provider supply the missing information. Guidance at 15. (The examination must be job-related and consistent with business necessity and the employer must pay for any examination by a physician of its choosing.)

II. How to Measure "Reasonable"

The sole criterion for determining the reasonableness of a given accommodation, according to the EEOC, is its effectiveness. Any allegations regarding cost or other problems with an accommodation must be presented by the employer in the context of its defense that the

[31] Although this review generally references employees, an employer's reasonable accommodation obligations apply equally to job applicants.

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accommodation constitutes an undue hardship. Guidance at 5-6. EEOC regards a cost-benefit analysis as inapplicable. Guidance at 58-59. However, a number of court decisions differ with the EEOC on this point, and have held that the reasonableness of a given accommodation may be determined through a cost-benefit analysis. See, e.g., Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995); Borkowski v. Vallet Cent. Sch. Dist., 63 F.3d 131 (2nd Cir. 1995). In any event, if the benefit of a given accommodation is greatly outweighed by its cost, or its substantial adverse impact on operations, the accommodation is less likely to be required under ADA. See, e.g., Balls v. AT&T, 28 F. Supp. 2d 970 (E.D. Pa. 1998) (evidence that voice-activated technology requested by plaintiff as accommodation in lieu of typing would cost $12 million, held to constitute undue hardship on employer).

III. Relationship to "Essential Function"

An accommodation is not required if providing it serves to relieve the employee of an essential function of the position. Thus, says the Guidance, if a printing press operator is to be on the job in the morning when the morning paper is printed, the specific hours worked constitute an essential function of the position which need not be restructured even if requested as an accommodation. Guidance at 32-33. In this vein, the Guidance contends that attendance itself is not an essential job function, since essential job functions are limited to "duties to be performed." Guidance at 33, n.61, citing 29 C.F.R. § 1630.2(n)(1). However, the EEOC position has been almost universally rejected by the courts, which have held that employees who consistently fail to appear at work, or those who appear on a continuously erratic basis, are not qualified because they fail to meet the essential job function of attendance. See, e.g., Waggoner v. Olin Corp., 169 F.3d 481 (7th Cir. 1999); Nesser v. Trans World Airlines, Inc., 160 F.3d 442 (8th Cir. 1998); Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209 (4th Cir. 1994).

[32] Documentation of a disability may be required unless its existence is readily apparent, such as an employee who

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IV. Reassignment/Work at Home as Reasonable Accommodations

The Guidance also notes that reassignment to a vacant position for which the employee is qualified is a form of reasonable accommodation, even if the employee is no longer qualified to perform his or her original job. Guidance at 37. The EEOC position is in accordance with the position of the majority of federal courts. See, e.g., Smith v. Midland Brake, Inc., 1999 U.S. App. LEXIS 13185 (10th Cir. June 14, 1999) (en banc); Gaul v. Lucent Technologies, Inc., 134 F.3d 576 (3rd Cir. 1998); Williams v. Channel Master Satellite Systems, 101 F.3d 346 (4th Cir. 1996). But see Foreman v. Babcock & Wilcox, 117 F.3d 800 (5th Cir. 1997) (finding no obligation under ADA to reassign), cert. denied, 118 S. Ct. 1050 (1998).
According to Peggy Mastrioanni, EEOC Associate Legal Counsel, the employee must be qualified for the vacancy but need not necessarily be the most qualified person for the job. Therefore, the EEOC believes that the employee gets the vacancy position if he or she is qualified for it, not just that the employee is allowed to compete for the vacancy.

The Guidance also suggests that permitting an individual to work at home may be a reasonable accommodation, if the accommodation would be effective and would not cause an undue hardship. The document notes that certain positions – cashier, food server – obviously could only be performed at the workplace, while other jobs – proofreader or telemarketer – might be appropriate for work at the employee's home. The Guidance does acknowledge that employer concerns regarding adequacy of supervision may be relevant to the reasonableness of the accommodation. Guidance at 46-47.

In fact, courts have been particularly sensitive to employer supervisory concerns, and less likely in general to regard work at home as a reasonable accommodation. See, e.g., Hypes

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uses a wheelchair.

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v. First Commerce Corp., 134 F.3d 721 (5th Cir. 1998) (where plaintiff was team member and had to deal with confidential documents which could not be removed from the office, presence at job site was necessary); Vande Zande, supra (work at home unreasonably impinges on employer's supervisory rights and need for cooperative efforts); Whillock v. Delta Airlines, 926 F. Supp. 1555 (N.D. Ga. 1995) (work at home unreasonable), aff'd, 86 F.3d 1171 (11th Cir. 1996); Stanley v. Lester M. Prange, Inc., 25 F. Supp. 2d 581 (E.D. Pa. 1998) (same). But see Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997) (criticizing Vande Zande per se rule against work at home where plaintiff's immediate supervisor had found it reasonable).

V. Other Accommodation Issues

The Guidance also addresses whether an employer may be required to:

- allow a modified or part time schedule (yes)
- consider FMLA eligibility contemporaneous with the ADA request (yes)
- provide additional accommodation (yes)
- retain pertinent employment records (yes)
- provide accessible training programs, EAP's, credit unions, cafeterias, lounges, gymnasiums auditoriums, transportation, parties (yes)

CONCLUSION

Viewed in conjunction with relevant judicial opinions, the Guidance provides valuable parameters for employers faced with accommodation requests from employees. While it is essential from a liability standpoint that an employer engage the employee in the interactive process noted in the Guidance, employers should be cognizant of the fact that even the EEOC acknowledges that employers retain substantial rights with regard to medical documentation of

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disabilities, choice of accommodation, and the impact of the proposed accommodation on the employer's business.

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June 4, 1999

ALERT
to
CLIENTS AND FRIENDS

NEW JERSEY APPELLATE COURT REQUIRES JURY TRIAL IN SEX HARASSMENT CASE BECAUSE EMPLOYER DID NOT TRAIN FRONT-LINE SUPERVISORS ABOUT ANTI-HARASSMENT POLICIES

In yet another disturbing development for employers, the Appellate Division has again lowered the bar for plaintiffs alleging hostile work environment discrimination under the New Jersey Law Against Discrimination (LAD). Contrary to prevailing law, this new decision suggests that the adoption and dissemination of anti-harassment policies, corporate anti-harassment training programs, prompt investigation of complaints and prompt remedial action may no longer alone ensure an effective defense to harassment claims brought under the LAD.

Last week, the New Jersey Appellate Division held in Santiago v. Anheuser-Busch, Inc. that an employee can proceed with a sexual harassment claim merely because a first level supervisor had not received formal anti-harassment training. The decision is further problematic because the employer immediately investigated the employee's complaint and thereafter took prompt remedial action by separating the supervisor from the employee. The Court nevertheless held that the absence of training for all supervisors created a factual issue concerning the level of care exercised by the employer in preventing workplace harassment.

In Santiago, an assembly line worker alleged that her supervisor engaged in offensive conduct. The employer had an explicit and widely disseminated anti-harassment policy that the employee invoked, and had provided anti-harassment training to some of its supervisors. The company promptly investigated the employee's complaint and moved plaintiff to another line crew with a different supervisor.

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The trial court dismissed plaintiff's case against the employer at the close of the evidence. The Appellate Division reversed, holding that the employer's response to the complaint did not conclusively prove that it had exercised due care to prevent harassment. The Court acknowledged the existence of an anti-harassment policy, a corporate training program for certain supervisors, a mechanism for handling complaints, and a history of terminating supervisors who engaged in harassing conduct. This level of commitment would appear to have satisfied the requirements articulated by the United States Supreme Court in Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth. However, in an apparent shift away from reliance upon federal case law for guidance, the Appellate Division did not cite these decisions. Rather, the Court held that the "lapse of training of line supervisors raises a genuine issue of fact concerning the employer's due care" in its efforts to prevent workplace harassment.

Although this decision remains unpublished, and its precedential effect is uncertain, New Jersey employers should diligently provide workplace harassment training and education for their employees, including all supervisors, covering sexual harassment, as well as harassment based on race, physical and mental disability, ethnicity and religion. This type of training, coupled with well-publicized, effective complaint procedures, is essential for employers to preserve their defenses to harassment claims.

We will be discussing this case, as well as other recent developments in New Jersey law, at our annual client briefing on June 30 at the Newark Club. In the meantime, if you have any questions or concerns, or if we may be of any assistance respecting the issues raised in this Alert, please call us.

This article is provided for informational purposes only and is not intended and should not be construed to constitute legal advice. If you have any questions pertaining to the issues raised in this article or if the firm may be of assistance to you, please let us know.

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March 8, 1999

ALERT
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CLIENTS AND FRIENDS

NEW JERSEY COURTS SIGNIFICANTLY EXPAND THE SCOPE OF THE LAW AGAINST DISCRIMINATION

Two recent New Jersey state court decisions have extended the already broad protection afforded employees under the Law Against Discrimination (LAD), expanding dramatically the liability minefield already existing for employers doing business in New Jersey. In one case, the New Jersey Supreme Court held that a twenty-five year old could sue for age discrimination, claiming that his employer thought he was too young for a high level position. In another opinion, the Appellate Division ruled that two alleged comments by a low level supervisor concerning an employee's diabetes were sufficient to subject an employer to a jury trial (and potentially limitless damages) for a hostile work environment claim. These decisions further illustrate the necessity of mandatory programs ensuring that all employees are trained concerning inappropriate comments in the workplace, and that employment policies are completely neutral with respect to age and other protected statuses.

In Bergen Commercial Bank v. Sisler, the New Jersey Supreme Court held that the LAD's prohibition against discrimination on the basis of age protects adult employees of every age, and not merely older workers. It therefore reversed summary judgment, and reinstated a claim by a twenty-five year old that his employer discriminated against him because he was perceived as being too young. The Sisler Court recognized, however, that although the LAD does not foreclose an age discrimination action by a younger employee, this is not the primary intent of the statute. Accordingly, the Court held that a younger employee must "conform his proofs to a heightened 'reverse-discrimination' formulation" and must show "background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority."

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Although permitting younger workers to bring age discrimination claims under LAD, the Sisler Court emphasized that employers may still base decisions on any number of reasons, including those that may be related to age, such as judgment and maturity.

The same week that the Sisler Court expanded the protection of LAD to include younger employees, the Appellate Division in Leonard v. Metropolitan Life Insurance Co. expanded the definition of a "hostile work environment" to include "handicap harassment" based solely on two disparaging comments by a low level supervisor about an employee's diabetes.

Plaintiff alleged that, on one occasion, his supervisor belittled his stated need to eat lunch, and then told him "get your diabetic ass out of here before you die in my office." In the second incident, plaintiff alleged that he was five minutes late for a meeting because, contrary to his supervisor's instructions, he stopped at his girlfriend's house for lunch after making a sales call. After the meeting, the supervisor purportedly reprimanded plaintiff saying, "I don't give a f___ about you being a diabetic and having low blood sugar. . . . We're going to do things my way or we're not going to do them" and "f___ [you] being diabetic and having to stop for lunch." Plaintiff admitted that he was unaware of any reason he could not have brought food to the meeting and that on occasion he had brought beverages to meetings.

The Appellate Division reversed the trial court's grant of summary judgment in favor of the employer, holding that a jury could find that a "reasonable diabetic" could perceive the workplace as "hostile" based solely on these two alleged comments by his immediate supervisor. This holding is a dramatic expansion of the New Jersey Supreme Court's decision last year in Taylor v. Metzger. There, the Court held that, although a single utterance will not usually form the basis for finding that a "hostile work environment" was created, the situation presented in Taylor was exceptional. First, the alleged harasser was not a mere supervisor but the Sheriff of Burlington County, the highest ranking law enforcement officer in the county. The Sheriff allegedly hurled a racial epithet directly at plaintiff, in front of another supervisory employee. As the Court explained, "Racial epithets are regarded as especially egregious and capable of engendering a severe impact." Further, as the harasser was a high ranking official and the comment was made with another supervisor present, plaintiff had no one to whom she could effectively complain.

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None of these aggravating factors was present in Leonard. The Leonard decision thus suggests a willingness by the Appellate Division to allow cases to proceed to trial whenever an employee claims that he has been the target of even just one or two offensive comments on the basis of any protected category, including handicap, gender, age, national origin or religion.

In short, the decisions in Sisler and Leonard make it more important than ever for New Jersey employers to review their policies and procedures. Both federal and New Jersey courts have cautioned employers that they should have sex harassment training and education for their employees, and well-publicized, effective complaint procedures. As a result of these two recent decisions, employers should expand such training to cover all forms of discrimination.

Employers should accordingly:

- Ensure that forms, policies and procedures are age neutral, and do not discriminate against younger employees.
- Provide effective and continuing training to employees and managers regarding appropriate speech and conduct in the workplace concerning all protected classifications. Training should not be limited to sex harassment.
- Review employment applications to ensure that they are age neutral and do not discriminate against employees based upon age (including youth).
- Review job descriptions and postings to ensure that requirements regarding years of experience are reasonable and are not intended to discriminate against younger employees.
- In addition to avoiding phrases that may be construed as reflecting a bias against older workers, employers should avoid "buzz words" that may reflect an "anti-youth" bias, such as "wet behind the ears," "kid," "baby," and the like.
- Avoid statements or decisions during the interview process based upon a perception that the candidate is too young for a position.
- Remind employees and managers that the company does not tolerate discriminatory comments of any kind.
- Ensure that anti-discrimination policies provide an effective complaint procedure for employees who believe that they have been subjected to any type of harassing or discriminatory comments or conduct.

We will be discussing these cases, as well as other recent developments in New Jersey law, at our annual client briefing in May. In the meantime, if you have any questions or

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concerns, or if we may be of any assistance respecting the issues raised in this Alert, please feel free to contact Robert Bernstein, Maxine Neuhauser, Carmine Iannaccone or Mark Lurie at (973) 642-1900.

This article is provided for informational purposes only and is not intended and should not be construed to constitute legal advice. If you have any questions pertaining to the issues raised in this article or if the firm may be of assistance to you, please let us know.

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