2008–09 U.S. Supreme Court Decisions Affecting Labor and Employment

By Seth H. Greenberg

The 2008-09 U.S. Supreme Court term featured some hotly contested labor and employment cases, particularly with regard to issues of discrimination and the enforceability of arbitration clauses. It also featured some notable decisions on retaliation and union service fees. The purpose of this article is to briefly summarize those decisions and, where appropriate, offer a preview of what is to come. As is always the case, readers should refer to the full text of the decision.

Discrimination

Ricci v. DeStefano (Vote: 5-4)[1] (Decided June 29, 2009)

On the last day of the term, the Court issued its decision in *Ricci v. DeStefano*. Here, the Court narrowly concluded that the City of New Haven violated Title VII when it tossed out and failed to certify the results of a civil service examination after white candidates outscored minority candidates.

In the winter of 2003, the New Haven Fire Department administered civil service examinations for promotion to Lieutenant and Captain. The tests had been designed and administered by a private company after performing in-depth job analyses. Assessors, who were superior in rank to the positions being tested, were hired at the approval of City officials. They were trained and taught how to score a candidate's responses consistently using checklists of desired criteria. Notably, two-thirds of the assessors were minorities.

Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 passed the examination—25 whites, six blacks, and three Hispanics. Eight lieutenant positions were vacant. Using the "rule of three," which operates almost identically to New York's "one in three rule," the top ten candidates were eligible for immediate promotion.[2] All ten were white.

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those who passed, 16 were white, three were black, and three were Hispanic. There were seven captain positions vacant. Of the nine candidates eligible for immediate promotion, seven were white and two were Hispanic; there were no black candidates eligible for immediate promotion.[3]

The City ultimately rejected the test results and failed to certify them because "too many whites and not enough minorities would be promoted were the lists to be certified."[4] In response, several white and one Hispanic firefighter sued, alleging the City's rejection of the results was discriminatory against white and non-black applicants who scored well on the examination.

The District Court granted summary judgment in favor of the City, finding it was proper to reject the results because of disparate impact discrimination. The Second Circuit affirmed.

On June 29, 2009, the Supreme Court reversed in a 5-4 opinion, decided along familiar ideological lines with Justice Anthony Kennedy siding with the Court's more conservative bloc. Writing for the majority, Justice Kennedy explained that the City's action was an express, race-based decision that violated Title VII as disparate treatment discrimination.

The City had been especially concerned with the likelihood that it would be sued under a disparate impact claim if the test results had been certified. But the Court concluded, "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."[5] In order to resolve any conflict between the disparate treatment and disparate impact provisions of Title VII, the Court adopted a "strong-basis-in-evidence" standard.[6] To justify its action, a municipality would have to have a strong basis in evidence that "the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision."[7] Although it may be proper to consider the racial make-up of the workforce and to seek input in the designing of a race neutral system of promotions, "once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."[8]

Justice Ruth Bader Ginsburg, writing for the dissent, would have upheld the decision of the City on the basis that it had a good faith belief its testing process was faulty and unfairly discriminatory toward minority candidates. Justice Ginsburg showed concern about the use of the "strong-basis-in-evidence" standard articulated by the majority, which appears to be a somewhat artificial criterion ripe for further litigation.

Recently confirmed Supreme Court Justice Sonia Sotomayor sat on the Second Circuit panel that had dismissed the firefighters' claims. However, it seems unlikely that her membership on the Court would have altered the result had the case been decided in the upcoming term since she replaces Justice David Souter, who had voted along with the more liberal bloc of justices and as part of the dissenting opinion.

An interesting follow-up to *Ricci* is *Lewis v. City of Chicago*,[9] which was just added to the Court's docket on September 30, 2009. In *Lewis*, eight black applicants passed a 1995 entry-level test to become firefighters but they were never selected. They argue that the test was flawed but additionally argue that the act of discrimination arises when actual hiring decisions are made, not when the results were announced. The Court must address which event starts the 300-day filing period for an EEOC charge.

Gross v. FBL Financial Services, Inc. **(Vote: 5-4)[10] (Decided June 18, 2009)**

An employee claiming disparate treatment under the Age Discrimination in Employment Act (ADEA) must establish, by a preponderance of evidence, that age was the "but for" cause of the challenged adverse employment action, says the Court in *Gross v. FBL Financial Services, Inc.*, another decision narrowly divided along the same ideological lines as *Ricci*.[11]

In 2003, at age of 54, Jack Gross was reassigned from claims administration director to the position of claims project coordinator. Although paid the same, many of his former duties and responsibilities were transferred to a newly created position—claims administration manager. Considering this a demotion, Gross sued, alleging that his reassignment violated the ADEA. At the close of trial, the district court instructed the jury to enter a verdict for Gross if he proved, by preponderance of the evidence, that his employer, FBL, demoted him and that his "age was a motivating factor" in demoting him. It further instructed the jury that Gross's age would qualify as a "'motivating factor,' if [it] played a part or a role in [FBL]'s decision to demote [Gross]." The jury was also instructed to return a verdict for FBL if it proved that it would have demoted Gross regardless of age.[12]

After the jury returned a verdict for Gross, FBL appealed, challenging the jury instructions. The Eighth Circuit reversed, holding that the jury had been incorrectly instructed under the standard established for "mixed-motives" cases. In *Price Waterhouse v. Hopkins*,[13] six members of the Court agreed that if a Title VII plaintiff shows that discrimination was a "motivating" or a "substantial" factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. In her concurring opinion in *Price Waterhouse*, Justice O'Connor found that to shift the burden of persuasion to the employer, the employee must present "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision."[14] The Eighth Circuit had essentially adopted O'Connor's opinion as controlling, finding that Gross was required to present "[d]irect evidence…sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." Since Gross admitted that he had not presented "direct evidence of discrimination," the Court of Appeals found the mixed-motives instruction was inappropriate. Rather, says the Eighth Circuit, Gross should have been held to the burden of persuasion applicable to typical, non-mixed-motives claims; that is, whether Gross had carried his burden of "proving that age was the determining factor in FBL's employment action."

The Supreme Court vacated the Eighth Circuit's decision. Writing for the majority, Justice Clarence Thomas opined that the burden of persuasion never shifts to the party defending an alleged mixed-motives discrimination claim brought under ADEA, even when there is some evidence that age was a motivating factor. It is this conclusion that is most interesting since the parties had never specifically put that inquiry before the Court. In footnote one, the Court explained, in relevant part: "Although the parties did not specifically frame the question to include this threshold inquiry, '[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.'"[15] In other words, practitioners beware!

Declining to apply the burden-shifting framework in Title VII claims to ADEA actions because they are materially different statutes, the Court explicitly rejects the Court's prior Title VII decisions on burden of proof. Focusing squarely on the test of the ADEA, the Court concludes that a "plaintiff bringing an ADEA disparate-treatment claim must prove, by preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."[16]

In his dissenting opinion, Justice John Paul Stevens finds the majority's "resurrection of the but-for causation standard is unwarranted."[17] He concludes that a mixed-motives jury instruction is proper in an ADEA case and that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction. Justice Stevens took the majority to task in its interpretation of judicial and legislative history. He explained that the "but-for" causation standard endorsed by the Court had originally been enunciated in Justice Kennedy's dissenting opinion in *Price Waterhouse,* a case construing identical language in Title VII. Both the Court and, later, Congress rejected the "but-for" standard. Stevens then unloads at the majority's decision: "Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking."[18]

The decision is a clear win for parties who must defend against age discrimination claims (not just employers but labor organizations too). Some believe that the issue of an ADEA mixed-motives case will be resurrected by legislation. This is so in light of the passage of the Ledbetter Act[19] and in light of increasing numbers of older workers. In fact, on or about the date this article was being submit-

ted, U.S. Senator Patrick Leahy, (D-VT), chair of the Senate Judiciary Committee, was set to join Senator Tom Harkin (D-IA), chair of the Health, Education, Labor & Pensions Committee, and Congressman George Miller (D-CA), chair of the House Education and Labor Committee, in introducing legislation that sought to overturn the *Gross* decision. Leahy's committee had recently held a hearing to examine the Court's pro-employer decisions, including the one in *Gross*.

***AT&T Corp. v. Hulteen* (Vote: 7-2)[20]**
(Decided May 18, 2009)

Employees who took pregnancy leave at AT&T prior to 1979 are not entitled to the same pension credits as employees who took disability leaves during the same period, says the Court. In *AT&T Corp. v. Hulteen*, the Court concluded that the provisions of the Pregnancy Discrimination Act (PDA) do not apply retroactively provided that an employer's pre-PDA plan was not adopted with discriminatory intent.[21]

In 1978, Congress passed the PDA. Prior to that, employers were free to deny service credits to employees who took pregnancy leave at rates different from other short-term disabilities. Under AT&T's old pension plan, employees on pregnancy leave did not receive the same service credit as employees on leave for other disabilities. The difference in treatment of pregnancy-related and other disability leave was lawful. After the PDA was passed, Congress amended Title VII, establishing that discrimination on basis of pregnancy was sex discrimination within the meaning of Title VII. AT&T modified its service credit calculations prospectively; however, it continued to calculate pre-PDA service under its pre-PDA rules.

AT&T employees sued AT&T, claiming that its calculation of pre-PDA service under pre-PDA rules violated the PDA. Both the district court and the Ninth Circuit agreed with the employees.

The Supreme Court reversed. Writing for the Court, Justice David Souter explained that the benefit calculation rule is a bona fide seniority system under § 703(h) of Title VII,[22] which insulates it from challenge. Accordingly, AT&T's method of calculation was proper. This decision is consistent with many prior Court rulings that apply new statutory rights prospectively.

Arbitration

***14 Penn Plaza, LLC v. Pyett* (Vote: 5-4)[23]**
(Decided April 1, 2009)

Where collective bargaining agreements contain a provision that "clearly and unmistakably" require union members to arbitrate individual statutory discrimination claims under the ADEA, such arbitration clauses are enforceable.[24] So says the Supreme Court in *14 Penn Plaza, LLC v. Pyett*. And in so deciding, the Court either took one giant step in overturning its 35-year-old decision in *Alexander v. Gardner-Denver Co*.[25] or, alternatively, it carved out a very narrow ruling that each case is to be decided on a fact-specific basis. In any event, this case is certainly one to follow and it should be interesting to see how the circuit courts implement the ruling.

In *14 Penn Plaza*, a multi-employer bargaining association and a union entered into a collective bargaining agreement which requires union members to submit all claims of employment discrimination to binding arbitration under the agreement's grievance and dispute resolution procedures. The provision specifically stated that all claims were subject to the contract's grievance and arbitration procedures "as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination."[26]

After some union workers were reassigned to new, undesirable jobs at different, undesirable locations, allegedly also resulting in a loss of income, grievances were filed on their behalf by the Union claiming age discrimination and other contractual violations. After the Union withdrew the age discrimination claims, the employees filed an ADEA complaint with the EEOC.

After being issued a right to sue letter, an ADEA suit was filed in federal court. The employer, 14 Penn Plaza, moved to compel arbitration. The Second Circuit denied the employer's motion, concluding that a union could not waive a litigant's right to a judicial forum under the ADEA even though an individual employee may do so for his own claims.

In yet another close decision, the Supreme Court reversed. "We hold," writes Justice Thomas, "that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[27] The majority noted that the parties had freely negotiated a term of the collective bargaining agreement to include the submission of employment discrimination claims to binding arbitration. Despite recognizing that the individual's right to be free of employment discrimination is a non-waivable substantive right, in the Court's view the choice of a forum to litigate the statutory discrimination claim is not one of the substantive statutory rights that cannot be waived.

In a strong dissent, Justice John Paul Stevens noted the decades-long Supreme Court law on arbitration and protested, "Today, the majority's preference for arbitration again leads it to disregard our precedent," adding that the majority was making policy choices not made by Congress.[28]

The Court's decision leaves much still unresolved. Although the Union in *14 Penn Plaza* declined to arbitrate the claims, it authorized individual employees to proceed to arbitration without the Union. Can a union block an

individual from pursuing its claim to arbitration? I guess only time will tell. Until then, unions should be careful when negotiating contract language that requires arbitration of statutory claims.

Retaliation

Crawford v. Metropolitan Government of Nashville (Vote: 9-0)[29] (Decided January 26, 2009)

Title VII forbids retaliation against employees who report gender or race discrimination in the workplace. This anti-retaliation provision contains two clauses, making it "an unlawful employment practice for an employer to discriminate against any of his employees…[1] because he has opposed any practice made an unlawful practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[30] The first clause is known as the "opposition clause" while the other is known as the "participation clause."

Vicky Crawford, a 30-year employee of the Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), was interviewed by Metro's human resources officer as part of an investigation in connection with allegations of sexual harassment by Metro School District's employee relations director. Crawford described several instances of sexually harassing behavior she experienced. Two other employees also reported being sexually harassed. When all three were fired, Crawford filed a charge with the EEOC, claiming retaliation.

The District Court granted Metro its motion for summary judgment, holding that Crawford "could not satisfy the opposition clause because she had not 'instigated or initiated any complaint,' but had 'merely answered questions by investigators in an already-pending internal investigation, initiated by someone else.'"[31] The District Court also found that Crawford's claim failed under the participation clause since there was no pending EEOC charge. Affirming the lower court's decision, the Sixth Circuit specifically found that the opposition clause "demands active, consistent 'opposing' activities to warrant… protection against retaliation.'"[32]

Clearly an easy decision for the Supreme Court, which unanimously reversed the Sixth Circuit and found that retaliation protection of the so-called opposition clause "extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation."[33] Justice Souter clearly explained that "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."[34] The Court declined to address whether Crawford's conduct was protected by the participation clause.

Union Fees

Locke v. Karass (Vote: 9-0)[35] (Decided January 21, 2009)

Whether a labor union may charge nonmembers a "service fee" was the question addressed by the Supreme Court in *Locke*. The Court upheld the right of unions to charge non-members a service fee for national litigation as long as the litigation does not concern political activities and as long as each other local of the national unit also contributes.[36]

More than 50 years ago, the Court found that payment of a "service fee" to a local union that acts as the exclusive bargaining agent of government employees, even where those employees disagree with and/or do not belong to the union, is permissible and does not violate the First Amendment.[37] Certain elements of that fee have also been addressed by the Court previously. For example, it upheld charging a fee for "administering a collective bargaining contract" as constitutional while forbidding charges for "political expenditures."[38]

Specific to *Locke*, the fee at issue is an "affiliation fee" that the local union pays to its national organization, a portion of which is used "to pay for litigation expenses incurred in large part on behalf of *other* local units."[39] The Court concluded that this charge is permissible of nonmembers as long as two elements are met. First, the subject matter of the litigation must be of a kind "that would be chargeable if the litigation were local, e.g., litigation appropriately related to collective bargaining rather than political activities." And second, "the litigation charge is reciprocal in nature, i.e., the contributing local reasonably expects other locals to contribute similarly to the national's resources used for costs of similar litigation on behalf of the contributing local if and when it takes place."[40]

Other Cases of Interest

Though not an employment case, *Ashcroft v. Iqbal*[41] makes it clear that the heightened pleading standards set forth in the Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*[42] apply to all civil actions, not simply antitrust cases, and that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[43]

In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*,[44] decided unanimously, the Court held that the administrator of an employee benefit plan, governed by ERISA, properly paid benefits to a decedent employee's former spouse, even though the spouse waived the right to benefits as of their divorce settlement. The Court explained that the beneficiary designation was never changed by the decedent after the divorce and that the ex-wife did not expressly disclaim benefits in accordance with the terms of the benefits plan. The lesson, of course, is that a divorcee must ensure that a "qualified domestic relations order" is filled out and that his benefi-

ciary designation card is amended as soon as a divorce is finalized. This used to be advice; it is now the law.

Looking Ahead to the 2009–10 Term

The Court began its 2009–10 term, the first with new Justice Sonia Sotomayor, on October 5, 2009. During the upcoming term, the Court will continue to hear arguments and address issues that affect labor and employment laws. It will decide *Lewis v. City of Chicago* (see *supra*). It is also being asked to decide, in *Mohawk Industries, Inc. v. Carpenter*,[45] whether an employer's attorney's investigation of an internal complaint is protected by the attorney-client privilege. Stay tuned as the Court now seems to be addressing employer and business interests on a regular basis.

Endnotes

1. No. 07-1428, 557 U.S. __ (2009). Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Scalia filed a concurring opinion, as did Justice Alito, in which Justices Scalia and Thomas joined. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens, Souter, and Breyer joined.
2. *Id.* at 5. The "rule of three" permits that the appointing authority may choose one of the top three candidates on the eligible list to fill a vacancy. If, for example, two vacancies exist, then the top four candidates would be considered for appointment.
3. *Id.* at 6.
4. *Id.* at 19, citing the District Court's decision, 554 F. Supp. 2d 142, 152.
5. *Id.* at 33.
6. *Id.* at 25.
7. *Id.* at 24.
8. *Id.* at 25.
9. 528 F.3d 488 (7th Cir. Ill. 2008), *cert. granted,* 2009 U.S. LEXIS 5149.
10. No. 08-441, 557 U.S. __ (2009). Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined. Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined. Justice Breyer also filed a dissenting opinion, in which Souter and Ginsburg joined.
11. *Id.* at 12.
12. *Id.* at 2.
13. 490 U.S. 228 (1989).
14. *Id.* at 265.
15. No. 08-441, 557 U.S. at 5, fn 1.
16. *Id.* at 12.
17. *Id.* at 8.
18. *Id.* (Stevens, J. dissenting), at 1. It would seem, therefore, that cries of so-called judicial activism are not limited to one side of the political aisle, but exists across the ideological spectrum.
19. The Ledbetter Act amended the Civil Rights Act of 1964 so that the 180-day statute of limitations for pay discrimination claims resets with each new paycheck. This Act was Congress' direct answer to the Court's 2007 ruling in *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), which held that the limitations period begins to run on the date pay is agreed upon, not the date of one's most recent paycheck.
20. No. 07-543, 556 U.S. __ (2009). Justice Souter delivered the opinion of the Court, in which all but Justices Ginsburg and Breyer joined. Justice Stevens filed a concurring opinion and Justice Ginsburg filed a dissenting opinion that was joined by Justice Breyer.
21. *Id.* at 1.
22. 42 U.S.C. § 2000e–2(h).
23. No. 07-581, 556 U.S. __ (2009). Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined. Justice Souter filed a dissenting opinion, which Justices Stevens, Ginsburg, and Breyer joined. Justice Stevens also filed a separate dissenting opinion.
24. *Id.* at 1, 25.
25. 415 U.S. 36 (1974).
26. No. 07-581, 556 U.S. at 2.
27. *Id.* at 25.
28. *Id.* (Stevens, J. dissenting) at 2. The majority asserts it reached its conclusions after an analysis of the statutory language and history of both the National Labor Relations Act and the ADEA. The dissent strongly disagreed with the majority's analysis of legislative history and statutory construction. Two strongly worded, convincing interpretations make for some interesting law going forward. It must be true, then, what Benjamin F. Fairless, the head of U.S. Steel Corp. from 1935 until 1953, said: "What five members of the Supreme Court say the law is may be something vastly different from what Congress intended the law to be."
29. No. 06-1595, 555 U.S. __ (2009). Justice Souter delivered the opinion of the Court, in which all but Justices Alito and Thomas joined. Justice Alito filed and opinion concurring in the judgment of the Court, in which Justice Thomas joined.
30. 42 U.S.C. § 2000e-3(a).
31. No. 06-1595, 555 U.S. at 2, 3.
32. *Id.* at 3.
33. *Id.* at 1.
34. *Id.* at 6.
35. No. 07-610, 555 U.S. __ (2009). Justice Breyer delivered the opinion for a unanimous Court. Justice Alito filed a concurring opinion, in which Chief Justice Roberts and Justice Scalia joined.
36. *Id.* at 2.
37. *Id.* at 1, citing, *e.g.*, *Railway Employees v. Hanson*, 351 U.S. 225 (1956); *Abood v. Detroit Bd of Ed.*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991).
38. *Id.*, citing, *e.g.*, E*llis v. Railway Clerks*, 466 U.S. 435 (1984) and *Machinists v. Street*, 367 U.S. 740 (1961).
39. *Id.* at 2.
40. *Id.*
41. No. 07-1015, 556 U.S. __ (2009), decided May 18, 2009. Justice Kennedy delivered the opinion for the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Souter dissented, in an opinion joined by Justices Stevens, Ginsburg, and Breyer. Justice Breyer also filed his own dissenting opinion.
42. 550 U.S. 544 (2007).
43. No. 07-1015, 556 U.S. at 29.
44. No. 07-636, 555 U.S. __ (2009), decided January 26, 2009. Justice Souter delivered the opinion for a unanimous Court.
45. No. 08-678. *Certiorari* was granted on January 26, 2009 and oral arguments were set for the first day of the new term to begin October 5, 2009. Lower court decision can be found at 541 F.3d 1048.

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The Federal and State Worker Adjustment and Retraining Notification Acts (WARN): Getting Back to Basics

By Stuart S. Waxman and Aron Z. Karabel

In these turbulent economic times, employers considering downsizing or restructuring their operations will face federal and state laws that impact how those objectives may be carried out. The Federal Worker Adjustment and Retraining Notification Act ("FWA") is one such law.

For more than 20 years under the FWA, large employers, have been required to provide advance notice to their employees of mass layoffs and dislocations (*see* 29 U.S.C. § 2101 *et seq*. and 20 C.F.R. Part 639). Not unlike other federal statutes, the FWA sets a "floor," leaving open the possibility for supplemental protection under state law.

Last year, the New York State legislature did just that by enacting the New York State Worker Adjustment and Retraining Notification Act ("SWA"). The SWA extends protection to employees who work for smaller employers, and requires those employers to provide additional notice of layoffs and dislocations beyond that required by the FWA (*see* New York State Labor Law § 860 *et seq*. and 12 N.Y.C.R.R Part 921 *et seq*.).

This article examines the requirements for employers under the FWA and the SWA, and will answer the following questions:

- Which employers are covered by both Acts?
- What is required of those covered employers?
- Which events trigger the notification requirements under both Acts?
- When is compliance with the statutory notification period not required under both Acts?

A chart which compares the requirements of the FWA and SWA appears on p. 22 in this issue.

(1) To Whom Does the FWA Apply?

The FWA applies to any business enterprise (for-profit or not-for-profit) that employs at least 100 employees. Part-time employees, whom the Act defines as individuals who work, on average, fewer than 20 hours per week, and individuals employed fewer than 6 of the 12 months prior to the required notice date, do not count toward the minimum employee threshold. The Act also applies to any business enterprise that employs at least 100 employees who work, in the aggregate, at least 4000 hours per week. Only in this instance are part-time employees considered "employees" for purpose of reaching the minimum hours per week threshold. Only straight time, and not overtime, is counted toward that threshold.

While many local governmental entities such as cities, towns and villages are not covered by the Act, certain public and quasi-public entities are covered. These covered public and quasi-public entities include housing authorities, hospitals, rail passenger services, and businesses that generate and distribute electric power.

"In these turbulent economic times, employers considering downsizing or restructuring their operations will face federal and state laws that impact how those objectives may be carried out."

(2) To Whom Does the SWA Apply?

Not unlike the FWA, the SWA also applies to business enterprises. The important distinction between the statutes is that the SWA covers more employers by reducing the minimum employee and hour thresholds set by the FWA. Businesses that employ at least 50 employees (exclusive of part-time workers) or businesses that employ at least 50 employees (inclusive of part-time workers) who work, in the aggregate, at least 2,000 hours per week are covered by the Act. Unlike the FWA, regularly earned overtime counts toward the minimum hours per week threshold.

The New York State Department of Labor's regulations resolve any question regarding whether public sector entities such as school districts, public authorities, and boards or commissions are exempt from the Act, by specifically referring to these entities as "non-covered" employers.

(3) What Does the FWA Require of Employers?

The FWA requires employers to provide a minimum of 60 days advance notice of a plant closing or mass layoff. Notice must be sent to each affected employee or his or her representative and the following entities:

- The State dislocated worker unit (in New York the employer must notify the Department of Labor, Division of Employment and Workforce Solutions); and
- The chief elected official of the local governmental unit where the closing or layoff is to occur (in New York it is the local Workforce Investment Board[s]).

Employers who fail to provide the required notice to affected employees or their representatives are liable for back pay and benefits for the period in which notice should have been given. Employers are not permitted to make a payment to employees in lieu of the required notice period. However, as a practical matter, the payment of wages or salaries and benefits for the entire notice period will effectively negate any relief sought by an employee.

(4) What Does the SWA Require of Employers?

The SWA increases the notice period provided under the FWA by requiring employers to provide a minimum of 90 days advance notice of a plant closing, mass layoff or relocation. It also requires covered employers to provide notice to both the affected employee and his or her representative.

(5) What Triggers the Notification Requirements Under the FWA?

Under the FWA, plant closings and mass layoffs trigger the notification requirements.

A "plant closing" is the shutdown of an employment site (or one or more facilities or operating units within the site), and the "employment loss" of 50 or more employees (excluding part-time workers) during any 30-day period. An "employment loss" includes (1) a discharge without cause; (2) a layoff of at least 6 months in duration; or (3) a reduction in hours of work of more than 50% in each month of any 6-month period.

A "mass layoff" is a reduction in force (not the result of a plant closing) which results in an "employment loss" at a single site of employment during any 30-day period for either (1) 50 or more employees (excluding part-time workers) if they make up at least 33% of the workforce; or (2) 500 or more employees (excluding part-time workers).

Employers who must decide whether their actions rise to the level of a plant closing or mass layoff must first determine whether an "employment loss" has occurred under the Act. An employment loss is either (1) a discharge without cause; (2) a layoff of at least 6 months in duration; or (3) a reduction in hours of work of more than 50% in each month of any 6-month period. There are, however, several exceptions to the general rule that the cessation of employment constitutes an employment loss.

First, employees who refuse to transfer to another employment site within a reasonable commuting distance from their previous work site and are subsequently affected by a plant closing or mass layoff are not entitled to notice. This same is true of employees who voluntarily accept transfers outside of a reasonable commuting distance within 30 days of a transfer request, plant closing or mass layoff, whichever occurs on a later date. Whether an employer is transferring an employee to a position within a "reasonable commuting distance" depends on the site's geographic accessibility, the quality of the commute (roads and available transportation) and the employee's travel time.

Second, employees who are discharged because of the completion of a defined project or undertaking are also not entitled to notice. An employer cannot, however, simply label an ongoing project temporary to evade the purposes of the Act.

(6) What Triggers the Notification Requirements Under the SWA?

Similar to the FWA, notification requirements under the SWA are triggered by plant closings and mass layoffs. They are also triggered by relocations of all or substantially all of an employer's business more than 50 miles from its original location.

The principal distinction between both Acts is the number of affected employees that trigger the notification requirements.

Under the SWA, a plant closing is the shutdown of an employment site in which at least 25 employees experience an employment loss. A shutdown of an employment site can include either the effective cessation of work performed by a unit or the temporary shutdown of a site which would result in a qualifying employment loss.

A mass layoff is a reduction in force which results in an "employment loss" at a single site of employment during any 30-day period for either (1) 25 or more employees (excluding part-time workers) if they make up at least 33% of the workforce; or (2) 250 or more employees (excluding part-time workers). Workers on temporary layoff or leave who an employer reasonably expects to recall must be counted.

(7) When Is Compliance With the Statutory Notification Period Not Required?

There are only a few exceptions to the notice requirements of both Acts. First, companies that are actively seeking business or capital to avoid or postpone plant closings or mass layoffs and reasonably believe that complying with WARN will jeopardize those opportunities are exempt from the notice requirements. These business opportunities must be realistic and necessary for the company as a whole, and not just necessary to the financial viability of a single site.

Companies that experience mass layoffs or dislocations as a result of unforeseeable events are also exempt from the notice requirements. These types of events could include the unexpected loss of a principal client, the governmental closure of a site, or an unanticipated economic crisis.

Third, companies that experience mass layoffs or dislocations as a result of a natural disaster such as a flood, earthquake or fire are also exempt from WARN requirements.

To qualify for any of these exceptions, the affected company must demonstrate that it attempted to give as much notice as practicable both before and after the layoff or dislocation.

Finally, notice is not required to be provided by employers who replace employees engaged in strikes or lockouts in violation of the National Labor Relations Act.

Conclusion

As more employers consider whether to go out of business, relocate or consolidate, they will need to consider how the FWA and SWA will impact their decisions. Employers should reach out to their counsel to determine whether their actions are, in fact, covered by either Act. Employers should also review their collective bargaining agreements and policy manuals to determine if they provide for greater employee protection than what is provided for under the FWA and the SWA.

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APPENDIX

A Comparison of the Federal WARN Act and State WARN Act

Requirement	FWA	SWA
1. Minimum Employee and Hour Thresholds	Businesses w/ 100+ employees (excluding P-T employees) **and** business w/ 100+ employees working 4,000+ hrs/wk (including P-T employees)	Businesses w/ 50+ employees (excluding P-T employees) **and** business w/ 50+ employees working 2,000+ hrs/wk (including P-T employees)
2. Notice Period	Minimum of 60 days	Minimum of 90 days
3. Service of Notice	employee or representative Department of Labor Local Workforce Investment Boards	employee representative Department of Labor Local Workforce Investment Boards
4. Triggers for Notification Requirements	Plant Closing: shutdown of employment site **and** employment loss of 50+ employees (excluding P-T employees) Mass Layoff: employment loss at a single site in any 30-day period of (1) 50+ employees (33% of workforce) or (2) 500+ employees (excluding P-T employees)	Plant Closing: shutdown of employment site **and** employment loss of 25+ employees (excluding P-T employees) Mass Layoff: employment loss at a single site in any 30 day period of (1) 25+ employees (33% of workforce) or (2) 250+ employees (excluding P-T employees) Relocations: all or substantially all of business moving 50+ miles from original location

Emerging Trends in Class Action and Collective Action Lawsuits

By Evan J. Spelfogel

I. Introduction

Class action employment discrimination lawsuits and collective action wage and hour litigation have been accelerating exponentially over the past several years. Plaintiffs' attorneys see class and collective actions as a way to overcome the economic inefficiency of seeking to recover relatively small amounts on behalf of numerous arguably similarly situated claimants.

While class actions may be brought pursuant to Rule 23 of the Federal Rules of Civil Procedure to remedy violations of Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act, cases brought under the Fair Labor Standards Act ("FLSA"), the Equal Pay Act or the Age Discrimination in Employment Act must be brought as "collective actions" under Section 216(b) of the FLSA.

II. Class Actions Under Rule 23

Rule 23 provides that one or more members of a class may sue as representative parties on behalf of all, provided that there is (1) numerousity, (2) commonality, (3) typicality and (4) adequacy of representation. Fed. R. Civ. P. 23.

The class must be so numerous that joinder of all members is impractical. Courts have certified classes of under 20 members. *See Roger v. Electric Data Systems, Corp.*, 160 F.R.D. 532 (E.D.N.C. 1995), and have refused to certify classes with over 50 members. *See Kelly v. Norfolk and Western Railroad*, 584 F.2d 34 (4th Cir. 1978).

The courts look not only at the number of class members, but also at the location and dispersion of class members, nature of claims and other non-speculative factors. *See*, *e.g.*, *LeGrand v. New York City Transit Authority*, 1999 U.S. Dist. LEXIS 80202 (E.D.N.Y. 1999), dismissed in part and affirmed in part, 2000 U.S. App. LEXIS 894 (2d Cir. 2000).

Rule 23 also requires commonality and typicality of the plaintiffs' claims. In essence the class representative must have the same interests and suffer the same injury as class members. *Amchem Prods. V. Windsor*, 521 U.S. 591, 625-26 (1997); *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977).

Class members may be dismissed for lack of standing, even though they may have suffered the same injuries. In *Gerlich v. U.S. Dep't of Justice*, eight plaintiffs alleged they were denied positions with the U.S. Department of Justice based on their political leanings. The claims of five were dismissed because they had not yet reached the later stage of the hiring process when the alleged violations occurred. *Gerlich v. U.S. Dep't of Justice*, No. 08-1134, 2009 U.S. LEXIS 84796, at *42 (D.C. D.C. Sept. 16, 2009).

The fourth requirement of Rule 23 has two parts. The first is that the representative plaintiffs fairly and adequately represent class members and protect their interests. The second is that class counsel is qualified, experienced and able to represent the class in what typically becomes a very complex litigation.

In 1974, the U.S. Supreme Court held that neither the language nor history of Rule 23 gave a court the authority to inquire preliminarily into the merits of a suit when determining class certification. *Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178 (1974)*. Nevertheless, the Supreme Court held in 1982 that, in reviewing a motion to certify a class of employees and applicants alleging employment discrimination, there must be a "rigorous analysis" by the trial court showing that the prerequisites of Rule 23 have been satisfied. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *cited in Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 595 (2007); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). The *Falcon* court, however, did not define "rigorous analysis." As a result, the Circuits have had to define the term on their own.

Several Circuits have held that the courts may make a preliminary inquiry into the merits of the case for Rule 23 purposes. *See*, *e.g.*, *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009); *In re Hydrogen Peroxide Antitrust Litig.*, 552, F.3d 305, 320 (3d Cir. 2008); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001). Other Circuits, including the Third, Fourth and Fifth Circuits, have followed the *Szabo* decision. *See, e.g., Newton v. Merrill Lynch*, 259 F.3d 154, 166 (3d Cir. 2001); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 322–23 (5th Cir. 2005). *See also In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (ruling that each Rule 23 requirement must be met, even if the requirement overlaps with a merits issue). The Sixth Circuit has defined "rigorous analysis" to require "precise information about the incidents, people involved, motivations, and consequences regarding each of the named plaintiffs' claims." *Reeb v. Ohio Dep't of Rehabilitation and Correction*, 435 F.3d 639, 644-45 (6th Cir. 2006).

The courts often deny class certification notwithstanding evidence of discriminatory misconduct. This has more recently occurred where plaintiffs are unable to identify neutral practices or policies that form the basis of

their claims or where the putative class members work in many different facilities in different cities, under different management operating relatively autonomously. *See, e.g.*, *Lumpkin v. Coca-Cola Bottling Co., United, Inc.*, 216 F.R.D. 380, 383 (S.D. Miss. Mar. 31, 2003) (denying class certification for past, present, and future African-American employees); *Carson v. Giant Food, Inc.*, 2002 WL 246437 (D.M. 2002), *aff'd by Skipper v. Giant Food, Inc.*, 68 Fed. Appx. 393 (4th Cir. June 11, 2003), *cert. denied*, 540 U.S. 1074 (2003); *Vinson v. Seven Seventeen HB Phila. Corp.*, No.Civ.A. 00-6334, 2001 WL 1774073, at *1 (E.D. Pa. Oct. 31, 2001) (denying class certification to African-American workers at the Adams Mark Hotels); *contra Save-On Drugstores, Inc. v. Superior Court*, 96 P.3d 194, 199 (Cal. 2004) (reversing the judgment of the Court of Appeals to certify a class where a retail chain had common policy of treating all managers and assistant managers as exempt, but the proposed class action involved operations at 300 different stores with 1,400 managers, all of whom worked in a wide variety of types and sizes of stores and under locally autonomous management).

Similarly, courts have rejected class certification on commonality and typicality grounds where putative class members presented individualized promotion and compensation claims involving isolated and specific decisions by different supervisors in different locations. *See*, *e.g.*, *Cooper v. Southern Co.*, 205 F.R.D. 596 (N.D.Ga. 2001); *Reap v. Continental Casualty Co.*, 199 F.R.D. 536 (D.N.J. 2001) (refusing to certify class of older female employees alleging discriminatory treatment by different supervisors).

A New Jersey District Court denied class certification for Home Depot merchandising assistant store managers where plaintiff could not show that common questions of law and fact predominated and that a class action would be the superior method for trying the case. *Novak v. Home Depot U.S.A. Inc.*, No. 06-4841, 2009 U.S. Dist. LEXIS 76996, at *16 (D. N.J. Aug. 27, 2009). The proposed class would have consisted of similarly situated Home Depot employees in the state of New Jersey who were allegedly improperly classified as exempt and would, therefore, have been entitled to overtime pay under New Jersey law. In its opinion the court referred to a California state appellate court decision that denied class certification to Home Depot merchandising assistant store managers based on a multitude of job and policy differences in each store. *See Home Depot Overtime I*, 2006 WL 330169, *3 (Cal. App. Dep't Super. Ct. Feb. 2, 2006). The Novak court noted that actual daily duties of merchandisers and assistant store managers were "not nearly as uniform as their job description." Notable differences included store size and location, the number of merchandising assistant store managers in each store, and how many departments each merchandising assistant store manager supervised.

In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the court reiterated that where damages were not purely incidental, but needed to be determined on an individual basis, class certification was inappropriate. "Incidental damages," the court said, were damages that class members might automatically be entitled to, calculable by objective standards, not necessitating individual mini-trials. *See also Robertson v. Sikorsky Aircraft Corp.*, No. 379CV1216, 2000 WL 33381019 (D.Conn. 2001), where the district court denied plaintiffs' class certification because, in its view, there would be a need for over 100 separate trials of the claims of each class member to determine if each were individually discriminated against, and to determine what damages each should recover. Plaintiffs' request for punitive damages would also, the court said, necessitate individualized proof of harm against each class member.

III. Collective Actions Under the FLSA, ADEA and Equal Pay Act

Section 216(b) of the FLSA requires only that collective actions be brought on behalf of "similarly situated" employees. While some federal courts interpret this requirement to encompass the class action requirements of Rule 23, the majority hold that collective actions are not subject to Rule 23's strict requirements, particularly at the notice stage. *Compare*, *Bayles v. American Medical Response of Colorado*, 950 F. Supp. 1053 (D.Colo. 1996) (similarly situated encompasses the requirements of Rule 23); *with Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249 (S.D.N.Y. 1997), a case decided by then Judge, now Justice Sotomayor (collective actions are not subject to Rule 23's strict requirements).

IV. Other Major Differences Between Class and Collective Actions

Under Rule 23 the statute of limitations is tolled as to all putative class members upon the filing of the court complaint. In collective actions brought under the FLSA, however, the statute of limitations as to an individual claimant continues to run until that claimant has filed a consent to "opt-in." The "opt-in" requirement also is significant with respect to notices to putative class members. Under Rule 23(e) courts are generally required to give notice to all absent class members in order to dismiss or settle the litigation. Some courts have held that such notice must be provided even before class certification. *See*, *e.g.*, *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976); *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir. 1970), *cert. denied*, 398 U.S. 950 (1970). In collective actions, however, the court may dismiss or settle the case without notice to opt-in putative plaintiffs.

Moreover, in collective actions, the statute of limitations may have already run as to numerous putative class members before they receive notice that a litigation has been filed. In *U.S. Dept. of Labor v. SSC Corp.*, for example, by the time the Department of Labor had amended its complaint to add hundreds of additional putative class members, the two-year statute of limitations (and even the three-year extended period for willful violations) had run. (E.D.N.Y. 1998, not reported). Similarly, in *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303 (D. Colo. 1998)

defendants successfully resisted all efforts by plaintiffs' counsel to persuade the court to send preliminary notices to putative class members, and successfully resisted efforts to certify class and collective actions, until the statute of limitations had run as to all putative class members except for the initial three named plaintiffs. The *Tracy* court also noted that the company's facially lawful nationwide policy mandating overtime for all non-exempt employees after 40 hours of work was independently administered and enforced locally at hundreds of branch offices throughout the country for thousands of employees, by numerous branch, area and district managers in a wide variety of ways. Thus, the Court noted, the case was not amenable to class adjudication.

V. Practical Considerations

In deciding whether to bring class or collective actions, plaintiffs' attorneys must carefully weigh the advantages and disadvantages. On one hand, obtaining class or collective certification usually ensures a much larger potential recovery with significant legal fees. It can also leverage early and wide-ranging settlements. Plaintiffs' attorneys contemplating seeking class certification, however, must weigh the expense of prosecution, including having to make six-figure advances for experts, discovery and other related costs.

See Parris et al. v. Lowes Home Improvement Warehouse Inc., No. BC260702, (D. Cal. 2009, not reported) (approving $29.5 million settlement for alleged FLSA violation); *In re State Street Bank & Trust Co. ERISA Litigation*, No. 07-cv-08488-RJH-DFE (S.D. N.Y. 2009, not reported) (proposing preliminary settlement of $89.75 million for bank's allegedly breaching its ERISA fiduciary duty to plaintiff); *see also EEOC v. Allstate Ins. Co.*, No. 04-cv-01359 (E.D. Mo. 2009, not reported) (agreeing to settlement of $4.5 million with 90 former employees who alleged the company discriminated against them based on age. The settlement ended five years of litigation.).

Defense counsel should examine very closely those persons designated as class or collective representatives. Often the individuals named carry peculiar baggage. It is not unusual for those who have sought out legal representation to have been fired for significant cause, including theft, or drug- or alcohol-related misconduct, or to have past criminal records. Collateral litigation concerning these individuals can often distract from the focus of the litigation or lead to dismissal.

Plaintiffs' class attorneys usually seek to name plaintiffs based upon the strengths of those individuals' claims; typicality and commonality with the claims of other putative class members; whether the named plaintiffs are similarly situated with other class members (in an FLSA collective action); whether they have any conflicts with other potential class representatives or class members (e.g., managers and assistant managers who, as in *Save-On*, were the very persons delegated the responsibility of enforcing the company's facially neutral compensation policies); and the individual class representative's demeanor and credibility.

The nature and scope of the putative class may also determine the outcome of the litigation. Courts have refused to certify a nationwide class even where practices appeared to be identical company-wide. *See*, *e.g.*, *Abram v. United Parcel Service of America, Inc.*, 200 F.R.D. 424 (E.D.Wisconsin 2001) (nationwide class not manageable); *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982); *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1976). And, in *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526 (N.D. Ala. 2001), the court refused to certify a smaller geographically compact class that included across-the-board claims, because of lack of typicality.

In most class and collective actions, plaintiffs' counsel has done a thorough pre-litigation investigation, fact-finding, statistical analysis, and evaluation of the case. Thus, if the court allows significant pre-certification discovery, and certifies a significant class or classes, management may be well advised to seek an early settlement, directly or through alternate dispute resolution.

Courts often bifurcate class action discrimination cases, pursuant to Federal Rules of Civil Procedure 42(b). *See, e.g., E.E.O.C. v. CRST Van Expedited, Inc.*, 257 F.R.D. 513 (N.D. Iowa 2008); *Butler v. Home Depot, Inc.*, No. C-94-4335, 1996 WL 421436, at *1 (N.D. Cal. Jan. 25, 1996); *Barefield v. Chevron, U.S.A., Inc.*, No. C 86-2427, 1988 WL 188433 (N.D. Cal. Dec. 6, 1988); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986).

In bifurcation, the issue of class liability is split from individual liability and damage claims of individual class members. Plaintiffs' counsel typically seek bifurcation also with respect to injunctive relief and punitive damages.

The 1991 amendments to the Civil Rights Act provide for jury trial on intentional discrimination claims (42 U.S.C. § 1981(a)(c)), and for compensatory and punitive damages with caps up to $300,000 for employers with over 500 employees (42 U.S.C. § 1981(a)(b)(3)). It has been held that the Seventh Amendment to the U.S. Constitution prohibits separate juries from re-examining factual issues when a court bifurcates a case. *See*, *e.g.*, *In re Paoli R.R. Yard PCB Litigation*, 113 F.3d 444, 452n.5 (3d Cir. 1997). Before jury trials became available for Title VII claims, courts routinely bifurcated pattern and practice class actions into a liability and remedial phase, with each phase being heard by a different judge. Without this, the action would not have been manageable. Arguably, to preserve class members' Seventh Amendment rights, a single jury would have to hear the liability and damage claims of all members of a proposed class in a Title VII or FLSA case. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

In collective actions under the FLSA, courts have taken a two-tier approach to authorizing notice to putative class members. Most courts apply a relatively light initial showing requirement to justify sending the notice. Plaintiff must make merely a sufficient showing indicating the existence of other similarly situated putative plaintiffs. Most courts permit some limited discovery in order for the plaintiff to make the required showing. *See*, *e.g.*, *Wyatt v. Pride Off Shore, Inc.*, Civ. A. No. 96-1998, 1996 WL 509654, at *1 (E.D. La. Sept. 6,1996); *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264 (D. Minn. 1991); *In re Food Lion, Inc.*, 151 F.3d 1029 (4th Cir. 1998); *Hoffman-LaRouche, Inc. v. Sperling*, 493 U.S. 165 (1989).

Generally, however, after a class has been notified and discovery has been at least partially completed, the courts require the plaintiffs establish, under a much more rigorous standard, that putative class members are similarly situated to be plaintiff representatives. Many courts vacate or deny class certification at this second stage. *See*, *e.g.*, *Thiessen v. General Elect. Capital Corp.*, 966 F. Supp. 1071 (D. Kan. 1998) *cert. granted,* 536 U.S. 934 (2002). The Tenth Circuit discussed the "single-filing" rule, which permits a plaintiff to "piggyback" on an EEOC charge filed by another, similarly situated person. *Thiessen v. General Elec. Capital Corp*., 267 F.3d 1095, 1110 (10th Cir. 2001), *aff'd*, No. 96 2410-JWL, 2002 WL 31571614, at *1 (D. Kan. Nov. *8, 2002). See, e.g., Jackson v. New York Tel. Co.*, 163 F.R.D. 429 (S.D.N.Y. 1995) ("the inquiry at the inception of the lawsuit is less stringent than the ultimate determination that the class is properly constituted); *Garner v. G.D. Searle Pharmaceuticals & Co.*, 802 F. Supp. 418 (M.D. Ala. 1991).

Sanctions for improper discovery tactics are available under Fed. R. Civ. P. Rule 11 in class action cases, even after denial or withdrawal of class certification motions. *See, e.g., Kraft Foods Global Inc.*, where class plaintiff alleged that the company had violated the FLSA by failing to pay overtime wages, and ERISA by not keeping accurate benefits records. Although plaintiff's counsel admitted that the class allegations lacked merit and entered into a dismissal agreement, counsel continued broad-based discovery. Kraft asked the court to impose costs and attorneys' fees as sanctions. (The matter is currently pending.) *Foucher et al. v. Kraft Foods Global Inc.*, No. 08-cv-14896 (E.D. Mich. 2009, not reported).

Further, courts have sanctioned plaintiff's counsel for contacting current and former employees of a company who are ineligible to join a class action suit. *Johnston v. Crossmark, Inc.*, No. 08-cv-01525 (D. N.J. 2009, not reported). In *Crossmark*, named plaintiff class representatives were enjoined from contacting present and past Crossmark employees through e-mail or other forms of communication, and required to produce a list of employees already contacted; plaintiff's attorney was also enjoined from representing any Crossmark employees who had been contacted, and was required to pay legal fees of Crossmark's attorneys for their work on opposition papers. *Johnston v. Crossmark, Inc.*, *supra*.

In 1998, Congress amended Rule 23 to provide for interlocutory appeals from a decision granting or denying class certification. Fed. R. Civ. P. 23(f). Such an appeal is discretionary with the appellate courts. Review is rarely granted for cases that do not fall within one of three categories: (i) there is a "death knell" situation for either plaintiff or defendant; (ii) there is an unsettled and fundamental issue of law; (iii) the decision below is manifestly erroneous. *See*, *e.g.*, *In re Lorazepam & Clorzepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) (a decision on class certification will be reversed only for abuse of discretion); *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991). *See also Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (denial of class action certification is a "death knell" because the small size of individual claims makes a non-class proceeding impractical, the grant of certification puts immense pressure on the defendant to settle, and review may facilitate development of the law). *See also Prado-Steiman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) (additional considerations: whether the case is suitable procedurally and whether future developments will increase or decrease the need for further appellate review).

Note, even after class certification has been denied, plaintiffs' counsel may make additional applications for certification at different stages of the litigation.

VI. Conclusion

Class action in employment discrimination cases and collective action in wage-and-hour cases will continue to play a significant role in employment litigation. Such litigation can be extremely time-consuming, invasive and expensive. Company-wide policies and practices should routinely be examined periodically, for compliance with legal requirements. This is particularly significant with respect to policies and practices that may have a disparate impact on a protected class, such as those concerning hiring and promotion, performance and evaluation systems, discipline and discharge procedures and the classification of employees as exempt or non-exempt under the wage-and-hour laws. While in our current litigious society it may be impossible to design, implement and maintain employment policies and practices immune from lawsuit, careful attention to many of these considerations and managerial training may reduce the risks and potential liabilities significantly.

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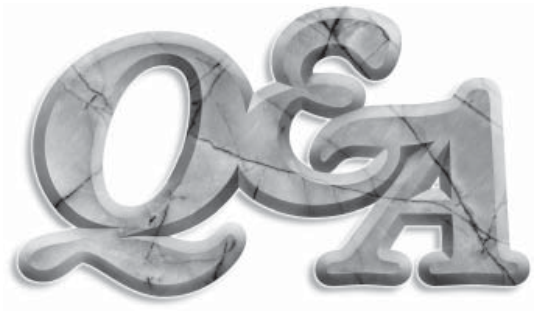
Ethics Matters



By John Gaal

Q I am representing a client in an employment law matter. Counsel for the other side has been difficult, at best, and I believe is not communicating important information to her client, including information which would expedite a reasonable settlement for all involved. My client is furious with me that we seem to be getting nowhere with opposing counsel and has insisted that I reach out directly to the opposing party. I have explained that I do not think I am permitted to do that. However, it occurs to me that if I lay out the information I want the opposing party to know in a letter addressed to my adversary and simply copy the opposing party on the letter, I should be okay. Can I do that?

A Few ethics questions are subject to easy answers. This one is the exception, and the answer is "no."

New York Rule of Professional Conduct 4.2[1] provides that

> [i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

This provision has been narrowly construed to mean exactly what it says: a lawyer may not communicate with another lawyer's client without that other lawyer's consent. The New York Court of Appeals has explained the purpose behind this rule as follows:

> The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact.

Niesig v. Team I, 76 N.Y. 2d 363, 370 (1990) (citations omitted). This "no contact" Rule also furthers the role of counsel as a "spokesperson, intermediary and buffer" on behalf of his client. In fact, this Rule is so literally applied that even when an opposing party initiates contact with counsel, that counsel may not continue the communication without that initiating party's lawyer's consent. See ABA Formal Opinion 95-396.

Simultaneous communication with opposing counsel and her client does not satisfy the requirement of securing opposing counsel's prior consent to the communication. The Committee on Professional and Judicial Ethics of The Association of the Bar of the City of New York ("Committee") recently addressed a nearly identical situation in Formal Opinion 2009-1. There, counsel sought to send a letter directly to an opposing party with a simultaneous copy to that party's lawyer. Not surprisingly, the Committee found that doing so ran afoul of the "no contact" Rule. As explained by the Committee, the "prior consent" language of the Rule means just that: "consent obtained in advance of the communication." Simultaneous communication with the opposing party satisfies neither the "prior" nor the "consent" requirements of the Rule. A similar conclusion was reached by the Court in *AIU Ins. Co. v. The Robert Plan Corp.*, 17 Misc. 3d 1104 (Sup. Ct., N.Y. Co. 2007), where plaintiff's counsel sent a letter to the directors of the defendant corporation with a copy to the company's counsel. *See also* ABA Formal Opinion 92-362 and Informal Opinion 1348.

Because of the strict application of this Rule, a lawyer should not communicate with a represented party without explicit consent from that party's attorney. Nonetheless, there are circumstances in which consent can be inferred from the circumstances. For example, in today's age of e-mail communications, it might be permissible to infer from opposing counsel's inclusion of her client on a "group e-mail" that a "reply to all"—including to the represented opposing party—has opposing counsel's consent, although that may not always be the case. NYC Formal Opinion 2009-1 addresses this issue as well, noting that whether consent can be inferred may depend on two important considerations: (1) how the group communication was initiated and (2) whether the communication arose in an adversarial context.

With respect to this first factor, if a lawyer invites a response to a group e-mail on which her client has been copied, it is reasonable to conclude that he has consented to a "reply to all" response that would simultaneously be sent to her client. Similarly, if a meeting of both counsel and their clients conclude with an understanding that a communication will subsequently be circulated to all in attendance at the meeting, unless an objection is raised, it is reasonable to conclude that counsel may send that later communication to all in attendance, including the represented opposing party.

With respect to the second factor, NYC Formal Opinion 2009-01 points out that clearer consent to direct communication may be required in an adversarial context, where the risk of prejudice and overreaching created by direct communication is greater. Thus, for example, where a lawyer threatens litigation in a letter (or e-mail)

to another party's counsel and "cc's" their own client on the letter, no one should reasonably conclude that that "cc" represents a consent for opposing counsel to directly communicate with that represented client, either alone or simultaneously with communication to opposing counsel.

In the end, the key question is whether, objectively, opposing counsel has reflected an intent to permit direct communication with his or her client.

Of course, even if consent can be inferred, it is not without some limits. Thus, when we are talking about an inferred consent to a "reply to all" response to an e-mail, that consent is necessarily limited to the subject matter of the initial message (unless clearly indicated to the contrary) and is not an open-ended invitation for direct communication. Similarly, such a consent would last for only a reasonable period of time. And consent, whether it is explicit or implicit, can always be revoked at any time.

So does all of this mean that where opposing counsel is insulating her client from needed information, you have no recourse, in order to protect the interests of your own client? Not exactly.

New York's Rule 4.2 also provides:

> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

This provision recognizes that not only is direct client-to-client communication permissible, but as a lawyer, you can counsel your client on that direct communication provided reasonable advance notice has been given to opposing counsel. So while, as a lawyer, you may not directly communicate with a represented party, you may advise your client to do so, and assist your client in doing so, provided advance notice is provided.

While this is not a perfect answer to the situation you posed, it does provide a means to proceed which can effectuate your client's interests and keep you in compliance with the Rules of Professional Conduct.

Endnote

1. Until this past April, New York lawyers were subject to New York's Code of Professional Responsibility. In April of 2009, the Code was replaced by the Rules of Professional Conduct. With respect to this issue—communication with represented persons—the provisions of the new Rules (Rule 4.2) and the provisions of the former Code (DR 7-104(A)) are virtually identical.

If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John Gaal at (315) 218-8288.

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Code of Conduct Toolkit: Drafting and Launching a Multinational Employer's Global Code of Conduct

By Donald C. Dowling, Jr.

According to the International Labour Organization, "corporate codes of conduct do not have any authorized definition.…[T]here is a great variance in the way these statements are drafted." Indeed, "code of conduct" is not a term of art, but is merely a label affixed to a range of corporate and non-governmental-organization policies.

Most major multinationals, particularly those based in the U.S., seem to have issued a global conduct code that spells out certain rules applicable to their worldwide operations. These global codes of conduct vary substantially in both purpose and content. Moreover, the focus and content of these codes differs widely. But global codes of conduct do not always do what their issuers intend.

Many corporate policies called "codes of conduct" have little to do with employment relationships: There are professional-association antitrust compliance codes of conduct, environmental-protection codes of conduct, and advisory codes of conduct on topics like intellectual property and computer programming. These codes—while vital—are only loosely connected to global efforts at legal and ethical human resources compliance. Anchoring our code of conduct discussion in the international employment context, there are two very different types of codes to distinguish: *External supplier codes* chiefly protect employees working for a multinational's suppliers from so-called "sweatshop" conditions, whereas *internal ethics codes* chiefly impose compliance rules on a multinational's own employees across its worldwide workforces. In one sense, these two global codes of conduct are opposites: External supplier codes seek to *protect* employees who are not on the code issuer's payroll, while internal ethics codes seek to *restrict* (impose rules on) a code issuer's own employees. Some multinational codes of conduct try to combine these two types of document, but effectively combining them is difficult because both the goals and the intended audiences differ. As such, any multinational launching a global "code of conduct" should (1) first clarify which type of code it needs, then (2) determine what the code of conduct should say, and finally (3) implement the code properly across global operations. As such, part 1 of this article distinguishes the two types of codes of conduct, part 2 is a checklist of topics to address in an internal ("ethics") code of conduct, and part 3 addresses the steps in properly launching a multinational's internal code of conduct.

Part 1: Distinguishing the Two Types of Code of Conduct

The two types of employment-related global code of conduct are external supplier ("sweatshop") code of conduct and internal ("ethics") code of conduct. We address each in turn.

External Supplier ("Sweatshop") Codes of Conduct

In the U.S., global employers' supplier ("sweatshop") codes of conduct first got traction in the 1990s when American human rights activists championed them to promote worker rights in the developing world, teaming up with U.S. labor-union activists promoting job security for American workers. These activists continue to urge that multinationals selling Third World–sourced products to rich First World consumers police the labor conditions of the overseas workers making the products.

Supplier codes of conduct are external in that they seek to protect employees of multinationals' unaffiliated suppliers. An external code's text may also reach a multinational's own employees, but internal compliance is rarely a primary concern. External codes' terms almost always reach supplier employees worldwide—in developed and developing countries alike—but these codes implicitly focus on supplier employees in the developing world. Labor law violations, of course, occur everywhere, but domestic "sweatshops" are not seen as a pressing social issue in, say, Canada, Denmark or Japan.

External supplier codes tend to require a multinational's suppliers to meet the minimum basic labor protections set out in the code. Some codes offer specific lists of core labor protections, while others (increasingly) incorporate by reference International Labour Organization conventions, model industry code templates, or local employee-protection laws.

Multinationals usually impose these supplier codes as appendices to supply contracts or sourcing agreements with factories around the world. Some (largely unsuccessful) lawsuits filed in U.S. courts have sought to enforce global supplier codes for overseas workers on a third-party-beneficiary theory. Indeed, the lurking legal issue here is *privity-of-employment-contract*: Multinationals that order products from unaffiliated factories are mere customers. In the normal course of business, a customer has little information or say about a seller's work conditions. Legally (as opposed to economically), customers tend to be powerless to direct and monitor sellers' day-to-day human resources. How can a customer get access to a supplier's premises to monitor, let alone dictate, work conditions? Who monitors work conditions upstream, at materials suppliers that supply the factory?

The issuers of robust supplier codes of conduct tend to be multinationals that source low-cost manufactured tangible products from the developing world: Think of athletic shoe companies like Nike and Adidas, retailers like Wal-Mart and Target, clothes-makers like Liz Claiborne and Kathie Lee Gifford, and sports equipment and toy makers like Reebok and Mattel. In addition, some oil companies and some global manufacturing conglomerates (General Electric, for example) also impose tough supplier codes. However, supplier codes remain rare among luxury goods companies that source products from developed countries, and also rare among *services firms*.

Until now, the supplier code of conduct movement has targeted institutional buyers of tangible products, even though most of the social, compliance, public relations, and business-case arguments for a supplier code of conduct apply equally to suppliers of *services*. The next frontier, perhaps, will be imposing supplier codes on outsourced call centers and other low-wage back-office services operations in the developing world.

Internal ("Ethics") Codes of Conduct

Completely distinct from external supplier codes of conduct, but still within the context of international human resources, are internal ("ethics") codes of conduct. These are internal human resources policies by which multinationals use human-resources enforcement tools to impose sets of ethics rules and compliance standards on their subsidiaries' and affiliates' workforces worldwide—reining in employee misbehavior by sanctioning illegal, unethical, and inappropriate acts. The rest of this article focuses on these internal ("ethics") codes.

Successfully launching an internal code of conduct requires attention to two disparate issues: code *content* versus code *roll-out*:

- **Code Content:** Distinguish an internal code of conduct from an *employee handbook.* Employee handbooks tend to address quotidian aspects of human resources that mostly differ from country to country, and local topics that tend to be best relegated to local employee communications. A well-drafted global code of conduct, on the other hand, focuses on minimum base-line compliance rules that apply across borders. A good internal code also propagates corporate culture and fosters compliance with ethical standards tailored to specific needs of the issuing organization. Multinationals based in the U.S. tend to be particularly concerned that their internal codes address global rules on anti-discrimination/harassment, Sarbanes-Oxley, bribery, and adherence to data privacy, antitrust, and intellectual property standards, and that they meet U.S. federal sentencing guideline standards. Part 2 of this article is a checklist of topics that make up typical internal codes of conduct.
- **Code Roll-Out**: Completely separate from code content is the distinct issue of the *process* for launching an internal code. Because an international internal code of conduct is essentially a set of human resources policies that subject violators to discipline, every code needs to get implemented consistent with local-law restrictions against unilaterally imposing new, restrictive terms/conditions of employment. In rolling out any internal global code, be sure to address five key issues: (1) multiple versions, (2) dual employer, (3) consultation, (4) translation, (5) distribution/acknowledgement. Part 3 of this article addresses these five issues.

Part 2: Checklist of Topics to Address in an Internal ("Ethics") Code of Conduct

Drafting an internal global code of conduct that imposes ethics rules and compliance standards on employees across a multinational's worldwide subsidiaries raises the question of which topics to cover—and which to omit. A Google search for "code of conduct" yields dozens of sample codes, and the easy temptation is simply to copy some other multinational's code. The problem with the model-form approach, of course, is that each multinational's unique business operations give rise to special needs. A code of conduct should include only those topics which the issuing organization has an actual business case to regulate. The needs of government contractors differ from needs of publicly traded businesses, which differ from needs of non-profits, which differ from needs of organizations operating in the world's trouble spots. In addition, many provisions in a well-drafted code of conduct will inevitably reflect the issuer's specific

business sector—an oil company's code looks quite different from a bank's.

In short, someone else's code of conduct might make an interesting example, but a best practice for drafting an internal ethics code is to use a topic-by-topic checklist and craft a bespoke code that meets the issuing organization's particular business needs, without including anything extraneous. Consider whether to include these topics:

- **Introduction stating core values:** Internal codes of conduct usually open with a statement, often from the chief executive officer, explaining the organization's core values and the reasons it imposes a global code.
- **Statement of purpose and compliance philosophy:** Any multinational that imposes a global code of conduct will do so largely in an effort to comply with applicable laws. The vast majority of "applicable" laws are local laws imposed by the local host countries in which a multinational operates. On top of that, a multinational's headquarters country may impose a handful of legal mandates that extend internationally. Indeed, overseas compliance with the *U.S.* set of "extraterritorial" laws (FCPA, SOX, securities laws, international trade laws, discrimination laws, etc.) is what drives many U.S.-based multinationals to implement codes of conduct. The code-drafting issue here is that multinationals too often neglect to explain to overseas employees that certain headquarters-country laws really do reach abroad. Without this explanation, a U.S. multinational's overseas workers may doubt that they really have a legal obligation to follow *American* laws. But be careful to word any such compliance mandate carefully, to account for doctrines in some Eastern European and other countries that prohibit imposing foreign laws locally.
- **Discrimination/equal employment opportunity:** Some U.S. multinationals may transplant robust American anti-discrimination provisions (often labeled "equal employment opportunity") from U.S. handbooks straight into a global code of conduct. Prohibiting illegal discrimination across worldwide operations is, of course, a vital and legally mandated goal. But U.S.-based multinationals need to deconstruct their U.S.-drafted discrimination rules and rebuild them in a way that accounts for the global context. A key issue here is the code's listing of protected groups: While U.S. discrimination laws focus on protected groups, some other countries, like Belgium, impose an obligation of total equality, meaning no group can be singled out for affirmative action. Further, certain groups protected in the U.S. are not protected abroad, while many countries outside the U.S. impose their own unique protected categories. A catch-all clause (*"…or any other group protected by applicable law"*) may be ineffective, given the doctrine of interpretation by which included factors take precedence over omitted ones. One viable but less-than-ideal strategy is not to list protected groups at all, but rather to invoke "applicable law." A separate issue is accounting for the narrowness of the "extraterritorial effect" issue: U.S. discrimination laws reach abroad, but only to protect a tiny sub-set of most U.S. multinationals' overseas workforces—foreign-employed U.S. citizens. Too many global discrimination provisions seem to extend U.S. discrimination laws to everyone abroad.
- **Harassment:** Code of conduct harassment provisions lifted from U.S. handbooks fall short in jurisdictions (such as some in Europe) that impose a broad concept of so-called "moral harassment," "bullying," "mobbing," or "psycho-social harassment"—what used to be known stateside as *non-actionable* "equal-opportunity harassment" and what U.S. states are only now considering regulating as "abusive work environment." Too many U.S.-drafted international harassment provisions persist in defining "harassment" as unwelcome behavior *based on a victim's membership in a protected class*. But that definition is far too narrow for those jurisdictions that legislatively prohibit abusive workplace behavior unlinked to protected-group status: To be effective, of course, a harassment prohibition in a given jurisdiction must be broad enough to include all locally actionable harassment. A separate problem is that U.S.-drafted harassment provisions tend to impose too-heavy *co-worker dating restrictions*. In many countries these provisions, even if they merely require reporting a relationship, are offensive and virtually impossible to enforce.
- **Diversity:** U.S.-based multinationals sometimes include a diversity provision in their global codes of conduct, often lifted directly from the organization's domestic U.S. handbook or diversity communications. But any robust U.S.-style diversity program will need radical reinvention outside the U.S. Avoid a diversity provision in any globally applicable code of conduct unless the outside-U.S. diversity program, goals, and metrics have been painstakingly tailored for the international environment.
- **Conflicts of interest:** Many global codes contain provisions on employee conflicts of interest, such as prohibitions against contracting with relatives and against employing former government officials. Often these provisions also address moon-

lighting (employee holding a side job or position on board of directors at competitor or supplier). Be careful that any globally applicable conflicts provision is flexible enough for regions where family relationships play a vital part in everyday business, such as the Arab world and Latin America.

- **Bribery:** Local laws in probably every country prohibit bribing local government officials. In addition, extraterritorial laws in Organization for Economic Cooperation and Development (OECD) countries prohibit multinationals from bribing or making improper payments to *foreign* government officials. The U.S. law on this point, the Foreign Corrupt Practices Act, is a particularly robust and aggressively enforced statute that reaches accounting notations of certain payments. Multinationals—particularly those that sell to or need licenses from foreign governments—need tough code of conduct anti-bribery provisions. Indeed, the bribery/improper payments code provision will in many cases be among the most vital.
- **Business gifts to *non-government* contacts:** While U.S. FCPA law prohibits overseas bribery of, and improper payments to, *government officials*, a growing trend is for employers (and even some countries' laws) to prohibit "bribes" to *non-government* actors, such as payments to get business from customers, or gifts from suppliers. Global codes of conduct increasingly address this. Any such provision should be carefully thought through: A payment to procure business from a private company is in certain respects different from a bribe or improper payment to a government official.
- **Money laundering/financing terrorism:** Employers in the financial-services sector often impose code provisions that address money laundering and so-called "know your customer/client" rules. Codes also address compliance with U.S. executive orders and regulations meant to control financing of terrorism, such as so-called "list-scrubbing" obligations meant to prohibit payments to and from specific suspected terrorists—an issue particularly acute for non-profits.
- **Embargo/anti-boycott and foreign trade:** U.S. trade laws with extraterritorial effect prohibit doing business in certain black-listed countries, and prohibit complying with the Arab boycott of Israel. U.S.-based multinationals often impose code provisions on compliance with these laws, although some countries (particularly in Eastern Europe) prohibit requiring locals to follow foreign laws. As such, compliance with U.S. trade restrictions raises special issues in certain jurisdictions, which a code of conduct trade provision should address.
- **Antitrust/competition and non-collusion with competitors/trade practices:** Antitrust laws differ from country to country. Global codes of conduct often instruct employees not to engage in basic violations such as collusion and price-fixing, and codes often tell employees whom to ask for guidance on these matters.
- **Insider trading:** Publicly traded multinationals need global code of conduct provisions that ban insider trading in the company's own stock. Organizations such as professional services firms whose employees' jobs afford them access to insider information about publicly traded clients need client insider trading restrictions.
- **Audit/accounting fraud/substantive SOX compliance:** Sarbanes-Oxley-regulated multinationals are subject to audit/accounting rules that reach operations worldwide. Codes of conduct often impose SOX accounting and compliance standards worldwide, with an explanation of why compliance is vital. Indeed, as a best practice, even certain *non-SOX-regulated* multinationals include audit/accounting provisions in their codes.
- **U.S. federal sentencing guidelines**: Violations of some U.S. laws with extraterritorial effect can lead to a U.S. criminal conviction. Multinationals draft global code of conduct provisions cognizant of provisions in U.S. federal sentencing guidelines that offer affirmative credit for certain human resources policies meant to curtail illegal conduct. Of course, codes tend not to discuss sentencing guidelines explicitly; the drafting issue is imposing human resources rules and non-compliance sanctions robust enough to earn sentencing credit.
- **Data privacy/processing**: Data "protection" laws in the European Union, Argentina, Australia, Canada, Hong Kong, Japan, and elsewhere impose tough mandates on multinationals that run global human resources information systems. Multinationals' compliance initiatives should impose tight rules on employees who "process" personal data. Codes of conduct often set out these rules.
- **Monitoring communications and reserving right to search:** A best practice for a handbook issued domestically *within the United States* is to clarify that employees should not have expectations of privacy in employer-provided communications systems, by expressly reserving the employer's right to monitor employee e-mails, telephone calls, and the like—and sometimes also reserving a right to search offices, desks, lockers, even lunch boxes. American employers drafting global codes of conduct often try to extend an American-style right-

to-monitor/search provision globally. The problem is that data privacy laws outside the U.S. differ radically; the American approach of using an employee communication to defeat an "expectation of privacy" simply is not enough in many countries. But there is no "magic bullet" here. Global employee monitoring provisions need careful structuring to account for the employer's specific needs and the specific jurisdictions in play. And regardless of what monitoring rights a global code of conduct purports to reserve, in many jurisdictions employers will need legal advice before *invoking* any such purportedly reserved right.

- **Environmental protection:** Some global codes of conduct contain provisions requiring employees to comply with local environmental laws, and some codes require complying with the more protective of local law, U.S. law, or global standards.

- **Intellectual property**: Some global codes contain intellectual property provisions instructing employees to respect others' copyrights, such as in photocopying or e-mailing copyrighted materials or copying software.

- **Restrictive covenants and trade secrets:** Global codes of conduct often purport to impose on worldwide workforces restrictive-covenant-like prohibitions—confidentiality, post-termination non-compete and non-solicitation of employees/customers restrictions. But a code of conduct is an impotent medium to impose these. Restrictive-covenant-type rules often need to appear in an employee's signed contract, and enforceability rules differ widely by country, with some countries requiring extra consideration, making a global approach totally infeasible. As such, restrictive covenant topics are best left out of a code of conduct (other than perhaps a short statement of the employer's commitment to enforce any employee-signed covenants). This said, though, a *confidentiality* provision can be appropriate, as can a general statement on the importance of complying with applicable trade secrets laws.

- **Safety in the workplace and pandemic response:** Most every country has workplace safety laws broadly analogous to U.S. OSHA. While no code of conduct can replicate all applicable safety rules, many codes contain provisions requiring compliance with applicable safety rules and imposing accident reporting procedures. Some multinationals impose more complex global safety frameworks that include, for example, pandemic response protocols. These require special attention to additional issues.

- **Drug-free workplace/substance abuse:** U.S. employers seem inclined to take a "zero-tolerance" approach to illegal drugs and alcohol in the workplace, even refusing to hire employees whose positive drug-test results offer no evidence of work-time impairment, or firing good performers whose test results demonstrate use of illegal drugs. Outside the U.S., however, workplace drug testing can as a practical matter be virtually impossible. Further, some drugs illegal in the U.S. are legal elsewhere, and as such are inappropriate to prohibit using off-hours. Even zero-tolerance workplace *alcohol* policies can seem impractical and puritanical in countries where company cafeterias and vending machines serve beer and wine and where alcohol is ubiquitous at business lunches. Rethink any U.S.-drafted drug/alcohol policy for the global context. Run a draft of any proposed global drug/alcohol provision by local human resources overseas, to check whether the mandate is realistic.

- **Media contact:** Multinationals are constantly the subject of business press media stories. Some global codes of conduct contain provisions instructing affiliates' employees worldwide on press relations and fielding media inquires.

- **Compliance with company rules and cooperation in investigation:** A code of conduct might have a provision requiring employees to follow company rules set out elsewhere, such as in local human resources polices and handbooks, or such as reimbursement procedures, clocking-in rules, safety protocols, and the like. Some codes also affirmatively require employees to cooperate in employer internal investigations. While these cooperation clauses may seem unobjectionable as written, in many countries they may be unenforceable (in that local laws may not support discipline imposed for non-cooperation), even where the code of conduct expressly required cooperation.

- **Sanctions clauses:** U.S.-drafted codes often contain clauses exposing employees who violate any provision in a code to discipline, up to discharge. Outside the U.S., however, saying conduct is subject to a sanction does not necessarily make it so: Local laws on good-cause discipline may prohibit employer sanctions even for some violations of rules set out in a code. Also, outside the U.S., mandated disciplinary procedures often apply. Draft any sanctions clause cognizant of the limits on disciplinary restrictions outside of the U.S. employment-at-will environment.

- **Complaints system/whistleblowing hotlines:** Sarbanes-Oxley requires imposing "anonymous" whistleblower hotline "procedures." These days, even many non-SOX-regulated multinationals impose global reporting procedures, often outsourcing hotlines to outside providers. But employee

hotlines are heavily regulated in the European Union. Any code of conduct provision outlining global reporting procedures needs careful strategy. See the article on the point (by this author) at 42 *The Int'l Lawyer* 1 (2008).

- **Acknowledgment:** Many global codes of conduct end with an acknowledgement page for employees to sign, acknowledging their agreement to follow the code. But global employee acknowledgements raise a number of logistical problems—and they can actually backfire, giving ammunition to non-signers who violate the code. Consider any acknowledgement procedure carefully. See the discussion of this topic in Part 3.

A well-drafted internal ("ethics") code of conduct contains a tailored provision on those of the above topics for which there is a business case, and omits topics that the code issuer need not address. Good global codes *steer clear of* provisions on those everyday human resources topics that are more appropriately relegated to the local level, which in many cases include provisions on such topics as: testing/monitoring, breaks, vacation, holidays, overtime, payroll, work hours, smoke-free workplace, performance evaluations, employee benefits, and severance pay/procedure.

Part 3: Steps in Properly Launching a Multinational's Internal Code of Conduct

When a multinational's headquarters launches a global code of conduct, often the only question seems to be: "*What's our code going to say?*" But that question (addressed above in part 2) merely gets the code-implementation process started. Once an internal ("ethics") code of conduct has been drafted, the question immediately becomes: "*How are we going to impose this global code of conduct on our employees overseas?*"

Too many global codes of conduct in place today were implemented without accounting for the vital logistical issues related to launching new human resources policies outside the United States. As such, many codes are subject to attack, and could give rise to liabilities. A best practice is to go back, check and correct any oversights. There are five key logistical steps to take before launching a global code of conduct:

1. **Multiple versions:** U.S.-based multinationals rolling out global codes of conduct should decide whether: to use one global code worldwide; to create a "rest-of-the-world" version separate from the "U.S." version; *or* to spin off distinct local codes for each affected country. There are pros and cons to each approach:
   - **One global version:** A single global code of conduct creates a uniform policy and is of course simplest. However, code provisions appropriate for U.S. employees may need to be modified or reworded for use elsewhere.
   - **Two versions:** Many U.S.-based multinationals roll out a U.S. code of conduct plus a separate "rest-of-the-world" version; this strategy accounts for issues from a non-U.S. perspective, but neglects specific local-country issues.
   - **Local versions:** Every country's laws are unique. Tailoring an aligned local code of conduct for each country that accounts for local law and human resources policy, as well as for headquarters issues, should be the most effective strategy. But many versions of one code of conduct can get unwieldy—and expensive.
2. **Dual employer:** Most U.S.-based multinationals' overseas employees work for locally incorporated subsidiaries or affiliates. To extend a headquarters code of conduct directly to employees of foreign affiliates raises the "dual employer" problem. By imposing rules directly on local foreign workers, the U.S. headquarters may become a co-employer with the local subsidiary, jointly liable for employment claims. In Latin America, U.S. multinationals regularly face these claims. A related problem is that a parent entity that imposes a global code directly on subsidiaries abroad arguably starts transacting business locally, possibly making it a "permanent establishment" subject to corporate registration and tax-filing obligations. A best practice to avoid these problems is for headquarters to impose the conduct code on foreign affiliate entities only; each affiliate, in turn, imposes the code on its own employees. This approach also cuts off the technical argument where an overseas employee disciplined for violating a headquarters conduct code claims the code is inapplicable because the local employer entity failed to implement it in the first place (or else failed to take account of rules as to how validly to introduce a local human resources policy).
3. **Consultation:** Outside the U.S., employee representative groups such as "works councils," trade union committees, and health-and-safety committees are common. Laws impose a requirement analogous to the U.S. labor-law concept of "mandatory subject of bargaining": an employer cannot change workplace rules until after it sits down and discusses the proposal with affected employee representatives. This doctrine implicates codes of conduct, because by definition codes impose mandates on employee "conduct." Unfortunately, outside the U.S. employee representatives can be skeptical of U.S. codes of conduct. Therefore, a multinational headquarters launching a code of conduct needs to involve overseas management

and local foreign management-side labor liaisons. Give foreign local labor liaisons a "heads-up" that a code of conduct will be coming, and discuss consultation strategy and timing.

4. **Translation:** In Belgium, Chile, France, Poland, Portugal, Quebec, Turkey, much of Central America and elsewhere, local laws require that work rules (including rules in a code of conduct) be communicated in the local language. In these places, an English-language code will not only be unenforceable, it can cost money: recently a major U.S. multinational that distributed English-language papers to French workers was forced to pay a $689,920 fine. Further, even in those countries that do not impose these local-language laws, local courts are reluctant to enforce English-language policies. Translations buttress enforceability.

5. **Distribution/acknowledgement:** Multinationals need strategies for: how to distribute a code of conduct to overseas employees; how to train on the code overseas; and how to adapt the code to local offerings (in Japan and Korea, for example, it will be necessary to amend the local work rules to reflect new code prohibitions). Also, multinationals need to develop some way to prove each employee actually received the code, so as to allow enforcement against those claiming never to have seen it, and so as to establish a defense against U.S. Foreign Corrupt Practices Act and Sarbanes-Oxley enforcement actions. The common U.S. approach here is to have employees sign *acknowledgements*. But an acknowledgement mandate raises logistical problems abroad:

    - In Continental Europe and elsewhere, employee acknowledgments often are not binding; signed consents are often presumed coerced, due to inequality of bargaining power.
    - A 100 percent return rate on acknowledgements may be impossible outside the U.S., where codes of conduct often meet with skepticism. Abroad, expect some employees either to refuse to sign, or passively to neglect to sign even after repeated reminders. But away from the U.S. employment-at-will environment there is no "good cause" to discipline an employee who openly refuses or quietly neglects to sign. How, then, to handle non-signers?
    - Non-signers raise an "Achilles' heel" problem: If they later violate the code, they will argue they were exempt because they never signed. That is, they can point to their coworkers' signed acknowledgements to argue that the code of conduct reaches only employees who acknowledged it.
    - Human resources teams often have document-management problems: Years after the signing, it can sometimes prove maddeningly difficult to locate the signed code of conduct acknowledgement of a given employee in a remote overseas office who now, all of a sudden, needs to be disciplined for violating the code.

As an alternative to acknowledgements, local HR representatives might distribute the conduct code personally (or in training sessions). Then HR representatives themselves could sign forms stating the date and circumstances of transmission to each employee.

Conclusion

Codes of conduct have become virtually ubiquitous among multinational employers. Any multinational launching, or revamping, a global employment-context code of conduct should first distinguish whether it needs an external supplier ("sweatshop") code of conduct, or a very different internal ("ethics") code of conduct. As to drafting an internal code, a multinational should avoid copying a form from some other employer. Instead, tailor a code to the issuer's own cross-border business needs, using a checklist of possible topics and omitting inherently local matters better relegated to local employee communications. Once the code is drafted, the focus needs to turn to a legally compliant global *launch*. Follow the necessary steps to ensure the code becomes enforceable in all applicable countries.

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Weight Discrimination: Adding Weight as a Protected Class Under Title VII

By Pooja Kothari

I. Introduction

Fattism: The last frontier of employment discrimination.[1] With an increasingly overweight population in a country that places extraordinary value on being thin, it is no surprise that overweight Americans are facing discrimination in their employment. Subtle (and not so subtle) discrimination exists against overweight applicants along with an animus against overweight employees.[2] For the last 45 years, we have been trying to dispel stereotypes in employment through Title VII. We started with the neediest, most fundamental groups that were being blatantly discriminated against. It is now time to add another group that is widely discriminated against and deserves Title VII protection.

As yet, there is no federal law that protects overweight Americans from employment discrimination. Overweight, female plaintiffs have sued under Title VII using sex to link their claim to Title VII. [3] However, using sex as a proxy for overweight women does not get to the crux of weight-based discrimination. Moreover, neither the Rehabilitation Act nor the ADA adequately addresses or remedies weight-based discrimination. The ADA can be successfully used only if plaintiffs show their fatness impedes a major life activity or that the employer perceives them as having such an impairment. The ADA may be more effective for obese individuals; however, overweight individuals would be hard-pressed to show that being fifteen to thirty pounds overweight impedes a major life activity or that the employer believes that their fatness impairs them. In reality, the employers are likely discriminating based on stereotypes of overweight individuals, not because they believe the applicant cannot perform the job successfully. Overweight employees or applicants may not be obese and even if they are obese they should not have to tailor their case to the ADA definition of disability in order to get federal protection against discrimination. Accordingly, this article limits its scope to overweight or obese plaintiffs who do not fit the disability definition.

This paper proposes adding weight to Title VII as a protected class. Part two of this paper links the sociological and scientific research behind the weight-gain epidemic to employment discrimination. Part three discusses why the ADA is an inadequate remedy to weight discrimination. Part four discusses the state laws that have added weight to their anti-discrimination laws. Part five explains why weight should be added to Title VII. Part six explores what a hypothetical plaintiff's claim looks like under the proposed legislation. Part seven discusses counterarguments to adding weight to Title VII, and part eight concludes.

II. Sociological Research

Two-thirds of the adult population and half of the children in the United States are overweight or obese.[4] As the media glorifies thin models, actors, and newscasters, the evident bias against overweight people has grown stronger in American culture. Some say that weight can be controlled, and those who are overweight should take the initiative to lose weight through a disciplined diet and exercise regime. Others say that numerous factors are at play in managing weight, that weight is not that easy to control, and that overweight individuals should not be faulted for not having a trim, thin frame as their genetically lucky counterparts. Our culture places a premium on thinness and a disdain on overweight people, thus creating incongruous and false stereotypes of fat people that are out of sync with reality with our super-sized lifestyle.[5] Overweight employees may be viewed as "lazy," "less competent," "lacking in self-discipline," "less conscientious" and "slower" than their non-overweight counterparts.[6] These negative stereotypes can factor into an employer's decision to hire or promote an overweight applicant or employee.

Numerous studies and law review articles have addressed the growing issue of weight discrimination.[7] Econometric analyses on the wages earned between overweight employees versus their thinner counterpart reveal wage discrimination against overweight or obese employees.[8] The economics literature on wage disparity shows "significant wage penalties" against overweight women.[9] Obese or overweight employees may earn less than their non-overweight counterparts because employers may be deducting the cost of health coverage from the salary of an overweight employee.[10] One study found that insured obese employees earn $1.70 an hour less than insured, non-obese employees, while uninsured obese employees earn 40 cents an hour less than uninsured non-obese employees.[11] Another study found that overweight employees earn up to six percent less than "normal" weight employees in comparable positions.[12] None of these articles, however, address remedies for weight-based discrimination in employment through Title VII.

How else do we know these biases exist? Aside from sociological surveys, another way to measure one's preference for thin people and bias against fat people is through the Implicit Association Test (IAT).[13] The IAT

examines what words our mind naturally pairs with certain images. The test begins by asking the participant to sort words with a positive connotation and a negative connotation into one pile labeled "good' and another pile labeled "bad," as quickly as possible. For example, one would place words such as "glorious" and "happy" into the "good" pile, while words like "evil" and "horrible" would be placed into the "bad" pile. Next, participants are asked to sort images of obese or thin individuals in accordance with their description: "fat" or "thin." Next, the test pairs the word "good" with "thin" and the word "bad" with "fat." Again, participants are shown a series of images and directed to sort them into the "thin + good" pile or the "fat + bad" pile. The words are then switched so that the categories read "fat + good" and "thin + bad." Another series of obese and thin images is shown. The results of the IAT depend on the speed at which the participant can sort the images into the correct pile. The test results reveal the degree to which the participant has an automatic preference for thin people. The degrees range from "little to no preference" to "strong."[14] If the participant responded faster to placing the skinny image into the "thin + good" pile than placing the obese image into the "fat + good" pile, the test interprets that the participant has an automatic preference for thin people.[15] The creator of the IAT, Harvard psychologist Mahzarin Banaji, says that the IAT "measures the thumbprint of the culture on our minds."[16]

III. The Rehabilitation Act and the ADA Are Insufficient Remedies

The Rehabilitation Act of 1973 mandated all federal departments, agencies and instrumentalities to provide to applicants or employees with disabilities adequate "hiring, placement, and advancement opportunities."[17] The Americans with Disabilities Act of 1990 (ADA) applied the same mandate to all employers subject to Title VII.[18] The ADA states:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an individual in regard to job application procedures, the hiring, advancement, or discharge of employees, compensation, training or other terms, conditions and privileges of employment.[19]

"A qualified individual with a disability" is defined as "an individual with a disability who…can perform the essential functions of the employment position that such individual holds or desires."[20] A disability, under the ADA, is defined as "a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment."[21] Plaintiffs who sue under the ADA must show that their obesity substantially limits a major life activity or that the employer perceives that it does. The code of federal regulations defines "major life activity" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[22] Substantially limits means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[23]

The regulations also state the factors that should be considered in determining whether a disability affects a major life activity:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.[24]

In *Cook v. State of Rhode Island*, Bonnie Cook sued her employer for failing to hire her based on her obesity.[25] In 1988, Ms. Cook applied for a position she had occupied several years prior at the Department of Mental Health, Retardation and Hospitals (MHRH). A routine physical examination revealed that Ms. Cook stood 5'2" tall and weighed over 320 pounds.[26] Based on her morbid obesity MHRH refused to hire her, stating that her morbid obesity prevented her from being able to aid patients in the case of emergency.[27] Ms. Cook sued MHRH using the Rehabilitation Act because MHRH was a department under the State of Rhode Island. To state a claim under 29 U.S.C. § 794(a), a claimant must show by a preponderance of the evidence that (1) she applied for a position in a federally funded program; (2) she suffered from a disability as defined by the Rehabilitation Act; (3) she was qualified for the position; and (4) she was not hired because of her disability.[28] Ms. Cook argued that she was not disabled but in fact fully capable of performing the job.[29] She argued that MHRH *perceived* her as disabled and wrongfully based their refusal to hire on that perception.[30] The Court held in favor of Ms. Cook. The regulations to the Rehabilitation Act, similar to the ADA, cover applicants or employees who are "regarded as having an impairment."[31]

The limitation in overweight individuals using the Rehabilitation Act or the ADA as an avenue for a remedy

is that the plaintiff must mold his or her actual physical condition to meet the impairment definitions under the respective Acts. These Acts provide no relief for fat but not obese applicants or employees since it is unlikely that an employer will *perceive* an overweight applicant or employee as not able to perform a major life activity of "walking, seeing, hearing, speaking, breathing, learning, and working."[32] Such major life activities are not typically impeded by an extra 15 to 30 pounds. The Americans with Disabilities Act is an insufficient remedy to protect overweight employees or applicants from weight discrimination.

Congress recently amended the ADA to restore Congress's original intent of 1990 Act.[33] One impetus for the amendments was *Sutton v. United Airline*, a case in which the Supreme Court stated that if there are mitigating measures that ameliorate the plaintiff's disability, such as "medicines, or assistive or prosthetic devices," the plaintiff does not qualify as having an impairment under the ADA definition.[34] The Court stated, "[t]o be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limit' a major life activity."[35] A major life activity is redefined as:

> caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working…[it] also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[36]

The new ADA amendments also reject the narrowed scope the Supreme Court presented in *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*. In *Williams*, the Supreme Court found that the plaintiff's disability did not fall under the ADA because her carpel tunnel syndrome did not impede her from performing tasks of "central importance to most people's daily lives."[37] The ADA amendments of 2008 sought also to overrule this holding. The new amendments state that a person's "impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability."[38] Since these amendments take effect January 1, 2009 there is no precedent under which to analyze ADA cases involving obesity as a disability.[39]

IV. States and Counties That Prohibit Discrimination Based on Weight

Michigan, the District of Columbia, San Francisco and Santa Cruz are the only jurisdictions in the United States that have enacted some type of provision prohibiting discrimination based on an applicant's or employee's weight or personal appearance.[40] Michigan enacted the Elliott-Larsen Civil Rights Act in 1977.[41] This Act provides:

> (1) An employer shall not do any of the following: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, **weight**, or marital status.[42] (emphasis added)

Michigan's application of the Elliott Larsen Civil Rights Act tracks the burden-shifting analysis used in federal employment discrimination law, including the *McDonnell-Douglas* framework.[43] To make out a *prima facie* case, the plaintiff must show "(1) that he is a member of a statutorily protected class; (2) that he was qualified for the job; (3) that he was discharged from the job; and (4) that he was replaced by someone outside the protected group."[44] If the plaintiff satisfies these elements, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action. If the defendant satisfies its burden, the burden shifts back to the plaintiff to show that the legitimate, non-discriminatory reason is a pretext for discrimination.[45] The plaintiff need not show that the illegal motive was the sole reason for the adverse employment action, only that the illegal motive "made a difference in determining whether the plaintiff was discharged or not hired."[46] There are several ways to show pretext:

> (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. The soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext.[47]

There have been few cases resulting from the enactment of the Elliott-Larsen Civil Rights Act.

In *Ross v. Beaumont Hospital*, the Court articulated the burden of proof for weight-discrimination cases as whether the plaintiff's weight was a determining factor or but-for cause of her discharge.[48] The Court held that a reasonable jury could find that plaintiff's weight was a determining factor in the discharge of the plaintiff-physician because the plaintiff's letter of suspension cited her obesity as one of the reasons of her suspension.[49] The Court found also that weight was not a BFOQ on part of the hospital because the same doctors who criticized that the plaintiff's effectiveness in the operating room

was hindered by her obesity, continued to work with her.[50] Moreover, other physicians testified that a person's weight does not necessarily interfere with the ability to reach a patient's wounds.[51]

In *Lamoria v. Health Care Retirement Corp.*, Barbara Lamoria sued her employer under the Elliott Larsen Civil Rights Act for weight and age discrimination as well as for handicap discrimination under Michigan's Handicappers' Civil Rights Act.[52] Lamoria worked as a nurse for 20 years at the defendant's retirement home.[53] At the time of her employment Lamoria was 5' 7" tall and weighed 240 pounds.[54] At the time of her discharge, Lamoria was not working due to a knee injury she sustained at work.[55] The trial court granted summary judgment to the defendant stating that Lamoria had failed to make out a *prima facie* case under the *McDonnell-Douglas* framework.[56] The trial court reasoned that since Lamoria could not work at the time of her discharge because of her knee injury, she was not qualified for the position.[57] The Michigan Appellate Court reversed the trial court's holding, stating that Lamoria's showing of direct evidence of a weight-based animus obviated the use of the *McDonnell-Douglas* framework and thus warranted a jury trial.[58] The Court noted that Lamoria's discharge would not have occurred but for her weight.[59] Lamoria presented evidence that the Administrator of the retirement home made disparaging comments about Lamoria's weight including implying that the employer intended to terminate overweight employees.[60] Since Lamoria presented direct evidence that the Administrator of the retirement home fired or forced to resign three employees, all of whom were overweight, "Lamoria's weight was a decisive factor in defendant's decision to discharge Lamoria."[61]

The *Lamoria* Court pointed out that just as racial slurs indicate hostility toward that race, derogatory remarks about a person's weight indicate hostility toward overweight people. The Court did not equate racial discrimination with weight discrimination, only the standard of inferring hostility to the protected class.[62] The Court also cautioned that analysis of comments that are alleged to amount to weight discrimination should be viewed in context, considering the possibility that defendant may have made the weight comment out of concern for the plaintiff, not in derision.[63]

In *Figgins v. Advance America Cash Advance Centers of Michigan, Inc.*, one of Figgins's claims against her employer was for weight discrimination.[64] The Court held that a reasonable jury could find a weight-based animus against Figgins because of the nature of the defendant's comments.[65] For example, defendant commented directly to Figgins or to others about Figgins saying, "Did you make sure that you got diet pop?" "Didn't she have enough to eat?" and telling Figgins at least 12 times, "You should watch what you're eating."[66] The Court thus found direct evidence of hostility against Figgins based on an "illegal motive."[67]

In 1977, the District of Columbia also enacted a statute under its Human Rights Law prohibiting discrimination against a person based on their personal appearance.[68] The law states:

> It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, **personal appearance**, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.[69] (emphasis added)

The law defines personal appearance in part as "bodily condition."[70] Bodily condition may be interpreted to include weight. In one case, a plaintiff sued his health insurance provider because it refused to pre-approve gastric bypass for the morbidly obese plaintiff. Plaintiff sued under the personal appearance protected class of the District of Columbia statute.[71] The Court held that the plaintiff failed to make a *prima facie* case because the plaintiff did not present comparative evidence showing that others received covered gastric bypass surgery who were not morbidly obese.[72] There are few published cases using the D.C. statute suing on the basis of personal appearance. It is unclear as to why this statute is not utilized as often as it could be.

In the city of Santa Cruz, the local government enacted a similar statute to the District of Columbia, in 1992. The Santa Cruz ordinance states:

> It is the intent of the city council, in enacting this chapter, to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, **weight** or physical characteristic.[73] (emphasis added)

The ordinance allows employers to consider personal appearance of an applicant if personal appearance is "relevant to the job performance."[74] Proponents of the ordinance argue that the "best qualified person" should be hired, not the one who is pleasing to the eye.[75] Critics of the ordinance ask why should they, as employers, be forced to hire someone "with fourteen earrings in their

ears and their nose—and who knows where else—and spiky green hair and smells like skunk?"[76] There are no published cases of citizens of Santa Cruz suing his or her employer for weight discrimination under this ordinance. One reason for the dearth of litigation in Santa Cruz may be that part of the ordinance required complaints to be submitted for mediation before legal action was taken.[77]

V. Why Weight Should Be Added to Title VII

Title VII states, in relevant part:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.…[78]

The sociological and scientific research described in part two demonstrates the existence of fattism among employer's and shows the need legal protection. The purpose of Title VII was to break down racial, religious and sex stereotypes. Stereotypes of fat people historically have been socially permitted to perpetuate and subscribe to. But why should any type of discrimination in employment be allowed when the perpetuated stereotype does not relate to the job qualification? It is time to protect overweight individuals who are discriminated against because employers don't think they are pleasing to the eye, believe that they lack discipline or are unmotivated. Up until now, plaintiffs must link weight claims to one of the current protected classes to get the attention of the courts. For example, in *Independent Union of Flight Attendants v. Pan American World Airways, Inc*., the Court held that the PanAm's weight policy was not administered equally between male and female flight attendants, and upheld the Union's sex discrimination claim.[79] The Airline's weight policy used the MetLife weight tables and required that male flight attendants not exceed the weight guidelines under the "large-frame" category, while limiting the female flight attendants to the "medium-frame" weight requirements.[80] Moreover, female flight attendants were required to undergo weight checks if they appeared overweight, which specified:

> "unsatisfactory appearance characteristics" are "[d]isproportionate weight or flabbiness in the areas of the chin, upper arms, waistline, hips, thighs, or legs/ankles." A "snug, ill-fitting uniform" was also graded unsatisfactory. The flight attendant's supervisor rated the following check list items either "satisfactory" or "unsatisfactory": uniform fit, figure/physique proportion, chin, upper arms, waistline, thighs/hips, and legs/ankles.[81]

The Court further stated that:

> The application of the appearance checks was, by definition, subjective. In addition, the Appearance Checks evaluated female flight attendants based on criteria which were not listed as requirements for job performance. Finally, the use of the check list perpetuated a sexual stereotype of slim-bodied women.[82]

The Court held that there was no relationship between the MetLife weight tables and the duties of flight attendants.[83] The Court further held thinness was not reasonably necessary to the duties of a flight attendant and thus was not a bona fide occupational qualification.[84] Here, the Union successfully argued discrimination; however, it was confined by Title VII and only was able to win through the sex discrimination link. Had PanAm required both male and female flight attendants to comply with the medium-frame weight tables, there would be no discrimination suit notwithstanding the Court's own admission that there was no relationship between the weight tables and the duties of the flight attendants. The facts in *Pan American* get to the heart of why weight should be added to Title VII. Similarly in *Air Line Pilots Association, International v. Western Air Lines*, the Court held that the weight requirements did not discriminate on the basis of sex because "how much one weighs is an aspect of one's personal appearance that generally is subject to one's own control."[85] Western Air Lines had suspended or discharged female flight attendants for weighing more than the maximum weight allowed under the Airline's weight policy.[86] It is cases like these that would directly benefit from Title VII protection if weight were added. It is plaintiffs exactly like flight attendants who need and deserve Title VII protection because being overweight is not relevant to the job duties of a flight attendant. Weight, of course, comes in to play when a flight attendant's obesity interferes with his or her ability to effectively and efficiently perform his or her duties in case of emergency. Passenger safety is the utmost importance, and to assure that flight attendants can perform emergency procedures, they can undergo physical fitness tests every year to verify that they are still capable of these duties even if they have gained weight. Physical fitness tests should be the standard of determining whether a flight attendant is qualified for her job, not an arbitrary height/weight chart.

Adding weight to the protected classes of Title VII would grant an effective and appropriate remedy to overweight employees and applicants who are discriminated against because of their overweight appearance. As the social stigma of being fat persists while the numbers of overweight individuals in this country are increasing,

it is imperative to construct a protection for overweight individuals that may have been unforeseen decades ago. External appearance should not dictate whether an individual is qualified for the job. As a California court eloquently stated:

> In our society we too often form opinions of people on the basis of skin color, religion, national origin, style of dress, hair length, and other superficial features. That tendency to stereotype people is at the root of some of the social ills that afflict the country, and in adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth.[87]

Similarly, overweight applicants should be protected from employers who judge applicants on their personal appearance, vis-à-vis weight, instead of their ability to perform the job well. Federal law should follow in the footsteps of Michigan, the District of Columbia, San Francisco and Santa Cruz. Adding weight to Title VII, instead of personal appearance, would sufficiently tailor the statute to the purpose of combating the stigma while offering overweight individuals the equal and fair opportunity to be hired.

Plaintiffs bringing weight-discrimination lawsuits would likely find success using direct evidence, such as the *Lamoria* case in Michigan. Although plaintiffs should be able to use the *McDonnell-Douglas* framework, it is not the ideal legal framework for weight-based discrimination claims because of the difficulty of proving that circumstances gave rise to an inference of discrimination. It is easier to show the employer's hostility toward overweight applicants or employees through their conduct or statements.

The bona fide occupational qualification defense (BFOQ) provided in Title VII is available as a defense against gender, religion and national origin claims.[88] Title VII allows defendants to base their hiring decisions on religion, sex or national origin in cases where there is a BFOQ that is "reasonably necessary to the normal operation of that particular business or enterprise."[89] The BFOQ defense should extend also to weight-discrimination claims. There are jobs whose operations function on employee's body weight, such as modeling and acting, where an individual's image is almost the sole qualification for hiring. In *Dothard v. Rawlinson*, the correctional facility required prison guards to be at least 5'2" tall and weigh at least 120 pounds.[90] The plaintiff-appellant argued that height and weight requirements for prison guards disproportionately discriminated against women.[91] Supreme Court upheld Dothard's bona fide occupational qualification defense, stating, "the likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel."[92] It is reasonable to imagine minimum-weight standards being a bona fide occupational defense, and for maximum weight standards also being a BFOQ for jobs such as firefighter, police officer, and other public safety occupations. However, the height/weight requirement, as depicted in the airline cases, should not determine the BFOQ, but rather physical fitness tests. If an individual cannot perform the job duty, he or she should not be hired. The following example toes the line of weight-based discrimination and a BFOQ.

If weight were added to Title VII, the statute would state:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin **or weight.**

VI. The Hypothetical Plaintiff

Our hypothetical plaintiff stands 5'9," is male and weighs 200 pounds. His body mass index (BMI) is 28.3, which according to the BMI index categorizes him as overweight.[93] According to his doctor, he is overweight and would be healthier at a maximum weight of 165 pounds. Our plaintiff clearly appears to be overweight. His muscles are not defined and his waist is not exactly trim. However, he is passionate about exercise, learning about nutrition and fitness and has become a certified personal fitness trainer. He applies to work at a gym as a personal fitness trainer. According to his certification, he is qualified for this position at the gym, yet the gym refuses to hire our plaintiff. The hiring coordinator mentions to our plaintiff that clients need to be inspired by their personal trainer to lose weight and that our plaintiff simply is not inspirational because he is fat. Our plaintiff finds out that the personal fitness trainers the gym did hire are all trim, lean men and women who look like they are at an average weight or less than average weight.

Under *Lamoria* and *Beaumont*, the gym's behavior probably constitutes direct evidence of weight-based discrimination since the employer told our client that he cannot hire him because his appearance would not inspire confidence in clients. Here, there were no disparaging comments like *Lamoria* or *Figgins* and there is no obvious animus against overweight applicants but certainly there is a bias against fat trainers and a preference for trim and muscular-looking trainers.

Having established a *prima facie* case through direct evidence of the gym's bias against fat trainers, let's say

that the gym puts forth two BFOQ defenses. A personal fitness trainer must have a BMI of 25 or lower in order to be hired because such an individual will (1) be able to safely guide and spot his or her clients; and (2) inspire its clients to lose weight.

It is unlikely that the gym would be successful with the first BFOQ, that a BMI of 25 or under is reasonably necessary to the operation of the gym in order to safely spot and guide clients. If the plaintiff was not fit enough to safely spot a client, he likely would not have received his certification, *unless* the gym can show that the plaintiff was within the weight requirement when he received his certification and gained weight after receiving certification that would make him incapable of performing the job duties. In reality, most sports club Web sites do not mention that personal fitness trainers must maintain a certain weight, only that personal fitness trainers maintain current certification.[94] In fact, the skills required to apply for personal fitness trainer positions focus mainly on congeniality and ability to market the gym to clients.

As for the second BFOQ, that personal trainers need to be an inspiration to their clients, this defense should also fail. The gym's goal is to foster a trust between the clientele and their personal fitness trainer, but if the trainer looks overweight and thus unhealthy, the clients may not trust that the trainer actually has knowledge of and practices healthy nutrition and fitness. The gym's marketability and financial sustainability depend on its personal trainers bringing in new clients and inspiring them to continue exercising at the gym. As the law stands now, courts give considerable latitude to employers with regard to the personal appearance of their employees.[95] However, if weight were added to Title VII as a protected class, a BFOQ of customer preference for a muscular-looking personal trainer should not be valid. If customers preferred thinner personal trainers, they are free to shop around for them. As long as our hypothetical plaintiff is qualified for the job, his weight should not factor into the hiring decision.

VII. Counterarguments

Critics of this proposal to add weight to Title VII have several arguments to oppose this legislation. First, arguably, Title VII was supposed to protect immutable characteristics. The employer in *Cook v. Rhode Island* argued that weight was not immutable and thus the plaintiff's obesity was not an impairment because an obese person is able to lose weight and rid herself of the disability.[96]

This argument carried over to the Title VII arena fails because anti-discrimination law protects groups who do not exhibit immutable characteristics. Marital status and religion are two protected classes that are mutable. People add religion to their life, delete it, or convert to other religions. Just because people *can* change religion, we do not expect them to change it for their employment. The same goes for marital status. Similarly, the idea that overweight individuals *can* reduce their weight should be irrelevant to the discussion of weight-based employment discrimination.

Second, critics may argue that adding weight to Title VII would open the floodgates to litigation, allowing any plaintiff five pounds overweight to 50 pounds overweight to sue their employer for terminating or refusing to hire him or her. How many pounds overweight would a court consider actually overweight? Whose standards do we use to determine someone is overweight? How many pounds overweight does plaintiff become obese? Does an obese plaintiff have the same right to sue under Title VII as a non-obese, overweight plaintiff? Will all the obese plaintiffs who do not fit into the ADA boxes now sue under Title VII? Should any external limitations be placed on Title VII to prevent a mass of new litigation?

This argument fails as well. As shown by our hypothetical plaintiff, a claimant wins by showing the adverse employment action was based on weight, not that the plaintiff actually was overweight. The purpose of the proposed legislation is to break down the stereotypes of overweight individuals that prevent applicants from being hired. Practically speaking, adding Title VII will benefit those individuals who are obviously overweight, where there is direct evidence of a discriminatory, weight-based animus against the applicant.

Third, critics may ask what is this proposed legislation really getting at? Is it the employer's perception of overweight individuals or is it the employer's preference on personal appearance? Is weight simply a proxy for personal appearance, and if so, then adding personal appearance to Title VII would truly open the floodgates to litigation.

The answer is that adding weight to Title VII touches on one facet of appearance discrimination without opening all doors to physical appearance discrimination, like the Santa Cruz ordinance. Although there is merit to enacting legislation to prohibit discrimination based on an individual's unattractiveness, the stereotypes attached to overweight individuals is far more pervasive in a country where 66.3% of adults over 20 years of age are overweight or obese.[97] Limiting this proposed legislation on weight, instead of the all-inclusive personal appearance, creates a cohesive protected class. Overweight individuals are a protected class that encompasses a readily definable group, just like the other protected classes, which makes this legislation more pragmatic and likely to be considered by Congress.[98]

VII. Conclusion

In order to combat the ever-growing stigma against overweight people that overweight persons are "lazy," "lacking self-discipline," "slower," and "less competent," weight should be added to Title VII. Sociological and

scientific research consistently shows that overweight employees earn less than their thinner counterparts. Knowing that discrimination exists against a sizable population, the Congress must act to combat such rampant discrimination. States must also come together and send a message to the federal government that weight discrimination exists and deserves state and federal protections. Considering the few cases brought under the Michigan, Washington D.C., and Santa Cruz laws, it is unlikely that adding weight to Title VII would open the floodgates to litigation.

Endnotes

1. *Weighty Matters*, San Francisco Chronicle, July 31, 2007, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/07/31/EDN6R9SA31.DTL, (stating "Obese people are one of the last groups left in America that many of us feel safe laughing at—and, apparently, discriminating against").
2. Yale University Rudd Center for Food Policy and Obesity http://www.yaleruddcenter.org/what/bias/ topics_weight_ref.html. *See also* http://www.cdc.gov/nchs/fastats/overwt.htm; http://www.obesity.org/information/weight_bias.asp. For anecdotal stories on individuals discriminated against because of their weight or by employers who prefer to discriminate against overweight employees *see Westgate Resorts CEO: I'll Fire Fat People Because It's Legal*, http://www.bigfatblog.com/westgate-resorts-ceo-ill-fire-fat-people-because-its-legal (Nov. 10, 2007); Tahmincioglu, Eve, *Fat Chance: It's not easy for obese workers*, http://www.msnbc.msn.com/id/16755130/ (Jan. 26, 2007).
3. Lempert, D., Women's Increasing Wage Penalties from Being Overweight and Obese, U.S. Bureau of Labor Statistics, December 2007. *See also Marks v. Nat'l Commc'n Ass'n*, 72 F. Supp. 2d 322 (S.D.N.Y. 1999).
4. Yale University Rudd Center for Food Policy and Obesity, *supra* note 2.
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86. *Id*. at *3.
87. *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357 (D.C. Cal., 1972). In *Donohue*, the plaintiff brought a sex discrimination claim against his former employer for discharging him based on the length of his hair. Donohue argued that because women were allowed to wear their hair long, men should be allowed as well unless employer could put forth a BFOQ.
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95. In *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985). The Eighth Circuit held that the news-anchor plaintiff was not subject to discrimination under Title VII when her employer took her off the air because the viewer surveys showed low ratings critical of her personal appearance. Because personal appearance is not a protected class under Title VII, Craft brought her claim under the theory that the employer was using sex stereotypes that disadvantaged women more than men. The *Craft* Court stated, "Courts have recognized that the appearance of a company's employees may contribute greatly to the company's image and success with the public and thus that a reasonable dress or grooming code is a proper management prerogative.…Evidence showed a particular concern with appearance in television; the district court stated that reasonable appearance requirements were 'obviously critical' to KMBC's economic well-being; and even Craft admitted she recognized that television was a visual medium and that on-air personnel would need to wear appropriate clothes and makeup."
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This article won second place in the 2009 Emmanuel L. Stein law student writing contest, sponsored by NYSBA's Labor and Employment Law Section. Pooja Kothari is a student at Brooklyn Law School.

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