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9th Biennial Employment Law Institute

Office of Continuing Legal Education at the University of Kentucky College of Law

UK CLE

9th Biennial

EMPLOYMENT LAW INSTITUTE

June 2004

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Presented by
OFFICE OF CONTINUING LEGAL EDUCATION
UNIVERSITY OF KENTUCKY COLLEGE OF LAW

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9TH BIENNIAL

EMPLOYMENT LAW INSTITUTE

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DISCRIMINATION UPDATE

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June 11, 2004

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EMPLOYMENT DISCRIMINATION UPDATE
2002-2004

SECTION A

Employment Discrimination Update
2002 - 2004

I. INTRODUCTION

II. U.S. SUPREME COURT AND SIXTH CIRCUIT DECISIONS

A. Title VII

1. *Desert Palace, Inc v. Costa*, 539 U.S. 90 (2003).

As a warehouse worker and heavy equipment operator, plaintiff Costa was the only woman in her job classification and in her local teamster's bargaining unit. Escalating difficulties with her coworkers led to disciplinary action against Costa. After Costa and fellow teamster Herbert Gerber came to blows, Caesar's Palace suspended Gerber, who had a clean employment record, but fired Costa, who did not.

Costa sued for sexual harassment and sex discrimination, claiming that her supervisor had stalked her, that she had been disciplined more harshly than men who had committed the same offense, that her supervisors "stacked" her disciplinary record against her, and that her supervisors used or tolerated sex-based slurs about her. The district court dismissed the sexual harassment claim, which was not an issue before the Supreme Court. As to the sex discrimination claim, the district court had instructed the jury that if Costa proved that sex was a motivating factor in her adverse work conditions but that Caesar's Palace also had lawful reasons for its actions, Costa could recover damages unless Caesar's Palace proved that it would have treated her similarly had gender played no role. Caesar's Palace appealed the award of damages Costa recovered at the trial court, won the first round, then lost before the Ninth Circuit en banc.

The Supreme Court concluded that the mixed motive instruction the trial court gave was proper, and that contrary to the position Caesar's Palace took, Costa did not have to present direct evidence in order to obtain a mixed motive instruction. The court stated:

> In order to obtain an instruction under § 2000(e)-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'

Id. at 95.

2. *Johnson v. The Kroger Company*, 319 F.3d 858 (6th Cir. 2003).

Johnson was a Kroger manager whose evaluations indicated that his work over the years had been satisfactory but not outstanding. Difficulty leading to litigation began in 1995 when Kroger transferred Johnson, who was black, to a community with hardly any African-American residents. Johnson initially protested the transfer because of the town's reputed racial intolerance, but later agreed to the transfer.

Both accolades and deficiencies marked Johnson's history at the new store. After assessing Johnson's performance and talking with others who had observed Johnson's performance, upper management decided to offer Johnson a different position better suited to his strengths as an employee. Johnson refused the new position. Three months later, Kroger terminated his employment.

The trial court granted summary judgment on Johnson's claims of racially motivated denial of training, failure to promote, retaliation, and hostile environment harassment, but the Sixth Circuit reversed, finding issues of fact. Of particular interest in this case is the appellate court's analysis of what constitutes direct evidence of discrimination. Johnson alleged that he had the following direct evidence of discrimination:

- His direct supervisor had questioned whether having an African-American manager in a nearly all white community would be good for business.
- His direct supervisor commented to others that he did not think Johnson was very capable.
- Upper management said Johnson lacked initiative.
- Upper management suggested that Johnson consider a different position because he did not have an analytical mind.

The court reiterated precedent defining direct evidence of discrimination as evidence that requires a fact finder to draw no inferences. All of the statements Johnson described as direct evidence, however, required an inferential step in order to draw the conclusion that racial animus motivated them. The court then engaged in a thorough and methodical discussion of the *McDonald-Douglas* framework, and the means by which a plaintiff can prove pretext.

3. *Carter v. University of Toledo,* 349 F.3d 269 (6th Cir. 2003).

Carter, an African-American professor, sued for race discrimination after the University of Toledo did not renew her appointment as a visiting

professor. She was not the only person whose appointment the university did not renew. Carter claimed that the university's provost had said that the interim Dean of the College of Education, under whom Carter had worked, was "trying to whitewash the College of Education faculty." She alleged the provost was struggling with the dean to appoint African-American professors but that the College of Education's decision makers were "a bunch of racists."

Ducking a knotty evidentiary question, the Court concluded that even if the hearsay rule did not bar these alleged comments from evidence, they were not direct evidence of race discrimination because the provost was not involved in the university's decision concerning Carter's teaching appointment. Without direct evidence of discrimination, Carter had to prove her case under the *McDonald-Douglas* model. In response to Carter's prima facie case of discrimination, the university had offered four legitimate, non-discriminatory reasons for its decision concerning Carter. Carter then attempted to prove pretext using the provost's above-referenced comments.

The trial court had found that the provost's alleged comments were admissible non-hearsay because they were admissions against interest, but that nevertheless, the remarks were too isolated to support a finding of pretext. The Sixth Circuit agreed, concluding that even though a person may not be a direct decision-maker, if he is a management-level employee with the ability to influence the decision-maker, his remarks may come into evidence. Here, the Court found that the provost's duty to oversee the university's affirmative action process was sufficient to link him to the decision in question. The court also found that a genuine issue of material fact existed as to whether the comments were too isolated to serve as evidence of pretext, and overturned the trial court's summary judgment for the university.

4. *Abbott v. Crown Motor Company*, 348 F.3d 537 (6th Cir. 2003).

Crown employed both Abbott, a white male, and Crump, a black male. Crump filed EEOC charges claiming that his supervisors had racially harassed him. When the company received service of the charge, one of the supervisors warned Crump to watch his back. Meanwhile, Abbott claimed that Crump had warned him about possible retaliation. Ultimately, Crown discharged one of the supervisors. Crump then resigned from Crown to take a better job at Coca Cola, and Crown fired Abbott, who sued for retaliation.

The Sixth Circuit set out the familiar elements for a prima facie case of retaliation, i.e. (1) protected activity; (2) defendant's knowledge of the protected activity; (3) adverse employment action; and (4) causal nexus between the protected activity and the adverse employment action,

followed by the three ways of showing pretext, i.e., that the employer's proffered legitimate, non-discriminatory reason (1) has no basis in fact, (2) did not actually motivate the adverse action, or (3) was insufficient to motivate the adverse action.

The Sixth Circuit then reversed the trial court's summary judgment for Crown, noting that Crump had testified that on Crump's last day of work, about a month before Abbott's discharge, one of the accused supervisors had told Crump that the supervisor would get back at the people who had supported Crump's charge of discrimination. In addition, Abbott testified that a few days after his termination, a co-worker had informed him that this same supervisor had said Abbott was fired because he "put his nose in other people's business." Moreover, this same supervisor gave Abbott a negative job reference, in violation of company policy. In these circumstances, the Sixth Circuit concluded that a factual issue existed concerning Abbott's retaliation claim.

5. *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629 (6th Cir. 2003)

Terry and David Goldmeier were Allstate Insurance agents. When Allstate announced that agents' offices must be open Friday evenings and Saturday mornings, the Orthodox Jewish Goldmeiers resigned. Although the Goldmeiers claimed constructive discharge because of the new policy, they resigned before it became effective and suffered no discipline or discharge on account of it. Before resigning, they had informed Allstate that the new policy imposed upon their religious beliefs and requested accommodations.

Allstate initially insisted that the policy would be uniformly enforced. Allstate suggested that the Goldmeiers hire other agents to staff the office on Fridays or Saturdays. The Goldmeiers rejected this option because their office expense allowance was limited and they did not want to entrust the office's performance to others. After the Goldmeiers resigned, Allstate offered to let them observe their Sabbath but work on Sundays instead. Although the Goldmeiers had previously suggested this alternative themselves, they now rejected it on the grounds that it came too late and was not in writing.

The court analyzed the case under Title VII and the parallel Ohio anti-discrimination statute. Setting out the standard for proving a prima facie case of religious discrimination, the court noted that an employee must (i) hold a sincere religious belief; (ii) inform his employer that his religious belief conflicts with condition of employment; and (iii) be discharged or disciplined for failing to comply. The court further referred to precedent establishing that an employer's refusal to accommodate employees who cannot work on particular days of the week because of their religious beliefs is religious discrimination.

The court then pointed out that Allstate had never required the Goldmeiers to work on their Sabbath; instead, it had suggested an alternative that they rejected. Comparing the case to precedent in which it had decided that while requiring an employee to use some vacation time to avoid work on religious holidays, requiring the employee to use all vacation time for this reason was not a reasonable accommodation, the court easily concluded that spending their entire office allowance from Allstate to hire additional help would adversely affect the Goldmeiers. The court stopped short, however, of concluding that the Goldmeiers were constructively discharged, and affirmed the district court's summary judgment because the Goldmeiers had suffered neither discipline nor discharge. The court emphasized that discipline or discharge is a critical element for prima facie case of discrimination. The court noted:

> Absent this requirement, a prima facie case would lie wherever there was a sincere conflict, and compensation would be due when, in addition, the employer does not immediately adopt a reasonable accommodation. What a successful religious discrimination claim would not require would be any actual employer action to the detriment of the employee. Employers who, while not offering a formal accommodation, deliberately turned a blind eye to employees' religiously motivated minor deviations from the letter of company policy -- not an unusual situation, one would imagine -- would suddenly find themselves liable as civil rights offenders.

Id. at 637-38. The court further elucidated that the issue of reasonable accommodation need not be analyzed until a plaintiff has established a prima facie case, and that it is undue hardship to require an employer to bear more than minimal cost to accommodate an employee's religious beliefs.

6. *Clayton v. Meijer, Inc.*, 281 F.3d 605 (6th Cir. 2002).

Meijer fired Clayton, a black truck driver, after Clayton had a serious accident following his failure to shut the truck's back doors and remove the dock plate upon driving away from the loading dock. As a result of Clayton's negligence, a sixty-six year old female dock worker, who was standing on the dock plate, fell four feet to the ground, broke her right knee, and could not return to work because of her injuries. In his race discrimination suit against Meijer, Clayton claimed that three white employees who had caused essentially the same kind of accident were not fired.

The Sixth Circuit examined precedent concerning what it means to be a "similarly situated" employee in order to show disparate treatment. The

court reiterated that the plaintiff and the employee with whom he seeks comparison must be similar in all relevant aspects, although exact correlation is not required. The court concluded that while all three of the white coworkers had admittedly pulled a rig away from a loading dock without closing the back doors and removing the dock plate, they were not similarly situated because their conduct did not injure anyone else. The court concluded that the severe injury to Clayton's coworker was a differentiating or mitigating circumstance serious enough to distinguish Clayton's conduct from that of his white peers.

7. *Zambetti v. Cuyahoga Community College and Clayton Harris*, 314 F.3d 249 (6th Cir. 2002).

Zambetti, a white part-time police officer at a community college, sued for reverse discrimination, contending that three full-time positions he wanted had gone to less qualified African-American applicants. The college had a collective bargaining agreement with a union to which Zambetti belonged. The agreement contained a seniority clause directing the college to give first preference to more senior employees. It was undisputed that the three African-Americans given full time positions had more seniority.

The trial court found that Zambetti had not established a prima facie case of reverse discrimination, but the appellate court reversed. The appellate court noted that Sixth Circuit precedent required a reverse discrimination plaintiff not only to make out his prima facie case, but also to show "background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority." The appellate court expressed concern that the "background circumstances" element placed an impermissibly heightened pleading standard upon victims of reverse discrimination, but did not specifically overrule precedent stating that the additional element exists. The appellate court also concluded that it did not need to address the plaintiff's interesting argument that the "same actor" inference should not apply in a failure to promote context.

B. Americans With Disabilities Act

1. *Raytheon Co. v. Hernandez*, 540 U.S. __, 124 S. Ct. 513 (2003).

Hernandez worked at Raytheon's predecessor, Hughes Missile Systems, for twenty-five years. After a 1991 drug test returned positive for cocaine, Hernandez explained that he had been drinking beer and using cocaine late the previous night. Because his condition nevertheless violated Raytheon's workplace conduct rules, the company accepted his resignation in lieu of discharge.

Two years later, Hernandez presented himself for rehire. His application included a reference from his pastor concerning his good conduct at church and a reference from an Alcoholics Anonymous counselor stating that he was in recovery. The application also disclosed that Hernandez had previously worked for Hughes. Based upon a review of Hernandez's file from his prior employment, Raytheon, a huge defense contractor, refused to rehire him because he had been terminated for workplace misconduct, i.e., appearing for work with impairing substances in his system.

Hernandez filed an ADA suit, claiming that the company had unlawfully rejected him because of his history of drug addiction, or, in the alternative, unlawfully regarded him as being a drug addict. Hernandez belatedly attempted to add a disparate impact claim to his disparate treatment claim. While both the trial court and the Ninth Circuit rejected the disparate impact claim as untimely, the Ninth Circuit nevertheless concluded that Raytheon's application of a neutral policy barring rehire of employees fired for workplace misconduct was not a legitimate, non-discriminatory reason for rejecting Hernandez's application. The Ninth Circuit concluded that such a blanket policy unlawfully screens out persons with a record of addiction, even though they may have been successfully rehabilitated.

The Supreme Court held that "the Court of Appeals erred by conflating the analytical frame work for disparate impact and disparate treatment claims," and that if the Ninth Circuit had correctly applied a disparate treatment analysis, "it would have been obliged to conclude that a neutral, no-rehire policy is, by definition, a legitimate, non-discriminatory reason under the ADA." It would then fall to Hernandez to prove pretext.

2. *Chevron USA, Inc. v Echazabal*, 536 U.S. 73 (2002).

Plaintiff Echazabal worked for maintenance contractors at Chevron's refinery. When he sought employment directly with Chevron, a pre-employment physical examination revealed hepatitis C. The job for which Echazabal applied involved contact with substances toxic to the liver. Chevron rescinded its job offer because the job would likely damage Echazabel's liver. Chevron then asked the maintenance contractor for which Echazabal worked to remove him from his current position at the refinery. In response to Echazabal's ADA claim, Chevron raised the "direct threat" defense, arguing that the ADA surely did not require it to take on the inevitable cost of Echazabal's health or perhaps his life, or to violate OSHA by knowingly hiring someone into a job that would certainly hurt him.

The ADA allows an employer or prospective employer to defend a charge of discrimination by showing that the allegedly discriminatory standard is job-related and consistent with business necessity. The employee must

"not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). The First, Fifth, and Eleventh Circuits, as well as EEOC regulations have extended the "direct threat" defense to cases involving persons who pose a direct threat to themselves. The Ninth Circuit, however, agreed with the Seventh Circuit in concluding that the direct threat defense did not apply to a person whose employment threatened only his own health, because to hold otherwise would be too paternalistic.

The Supreme Court reversed the Ninth Circuit, rejecting Echazabal's argument based upon *expressio unius exclusio alterius*, i.e., that since the EEOC's regulation refers to a direct threat to others, one may not read it to include a direct threat to the employee himself. The Court settled upon the statute's own more spacious definitional category of legitimate qualifications that are "job related and consistent with business necessity." In *dictum,* the Court suggested that the direct threat defense might be expanded to prevent harm to others outside the workplace, querying that otherwise "If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?"

3. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

In this case, a unanimous Supreme Court analyzed the proper standard for assessing whether someone is "substantially limited" in performing "major life activities," and therefore disabled. Ella Williams, an assembly line worker, developed carpal tunnel syndrome. Her position as a quality control inspector aggravated this condition, causing her to miss work and eventually leading to restrictions from work. When Toyota terminated Williams for poor attendance, she sued under the ADA.

The Supreme Court devoted significant attention to analyzing the terms "substantially limits" and "major life activities" as used in the ADA's definition of disability. The Court found that "substantially limits" excludes all impairments that interfere in only minor ways with performing manual tasks. "Major life activities include only those of central importance to most people's daily lives. The Court stressed that the ADA's bar is high, and that a plaintiff must demonstrate an impairment that prevents or severely restricts him from doing activities of central importance to most people's daily lives. The Court stressed that "substantially" and "major" must be strictly interpreted in order "to create a demanding standard for qualifying as disabled." This decision, like the court's decision in *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 487 (1999), showed the Court's continued recognition that Congress intended the ADA's protections to be narrower than they became during the decade of litigation following its enactment.

The *Williams* court disapproved of the Sixth Circuit's focus on Williams' inability to perform manual tasks at work and its simultaneous disinterest regarding similar inabilities in her daily life. The Supreme Court concluded that the Sixth Circuit's focus upon the manual tasks peculiar to Williams' position at Toyota, or any particular job, "are not necessarily important parts of most people's daily lives." Id. at 693. Thus, the court emphasized that the manual tasks that must be substantially limited are those that are an everyday portion of most people's daily lives if a person is to be ADA-protected.

4. *Hedrick v. Western Reserve Care System*, 355 F.3d 444 (6th Cir. 2004).

After recovering from surgery on a broken leg, Nurse Jo Ann Hedrick told her supervisor she doubted she could still work as a general duty staff nurse. A functional capacity evaluation confirmed Hedrick's reservations about her abilities. Specifically, she could not perform her former duties because of limitations in bending and lifting. Hedrick therefore asked to be placed upon the hospital's list of employees with have permanent work restrictions (dangerously known as "the ADA list"). The hospital tried to find suitable employment for persons on this list.

Hedrick was offered one alternative position, but refused it because of the salary. She refused a later offer of another alternative position because she did not feel she could physically do the job. She responded in the same way upon learning of four case manager vacancies in the Department of Medicine. She later accepted a temporary assignment as an admissions nurse. Meanwhile, Hedrick filed a failure to accommodate claim, upon which the court granted summary judgment in the hospital's favor.

On appeal, the court analyzed whether Hedrick had presented direct evidence of discrimination, noting that "the direct evidence and circumstantial evidence paths are mutually exclusive; a plaintiff need only prove one or the other, not both." *Hedrick* at 453 (citing *Kline v. Tennessee Valley Auth.*, 128 F.3d 337 (6th Cir. 1997). The court concluded that Nelson's supervisors' expressed concern that Hedrick's medical condition might not allow her to perform duties as a case manager did not constitute direct evidence of discrimination.

Significantly, the court also confirmed its prior position that an ADA plaintiff must establish that the action of which she is complaining occurred **solely** because of the disability. The court further concluded that a disabled employee who claims that she can perform a particular job with reasonable accommodation has the initial burden of proposing the accommodation and showing that it is objectively reasonable.

Moreover, while reasonable accommodation may include reassignment to a vacant available position, employers do not have to create new jobs for disabled employees, or displace other employees to accommodate them. The ADA requires only that an employer transfer an employee to a vacant available position comparable to the employee's prior position. Reasonable accommodation does not require promotion. Also, "although an employee is not required to accept an offer to accommodate, if an individual rejects a reasonable accommodation, the individual will no longer be considered a qualified individual with a disability." (citations omitted).

The Sixth Circuit affirmed the trial court's summary judgment for the hospital as to the ADA claim, then turned to Hedrick's age discrimination claim. Rejecting that claim as well, the court reiterated various prior holdings in concluding that "the isolated fact that a younger person eventually replaces an older employee is not enough to permit a rebuttable inference that the replacement was motivated by age discrimination", and that the plaintiff's "subjective view of her qualifications in relation to those of the other applicants, without more, cannot sustain a claim of discrimination." The court concluded with a strong reiteration of its prior holdings that a court is not "super-personnel board," that the business judgment rule is alive and well, and that the employer need only give an honest explanation of its behavior rather than making perfect decision in every instance.

5. *Cotter v. Ajilon Services, Inc.*, 287 F.3d 593 (6th Cir. 2002)

Cotter, who suffered from colitis, worked for Ajilon, a temporary service, for approximately four years. His working time was often interspersed with medical leave. The last time Cotter attempted to return from medical, leave, Ajilon's representative suggested that no work would be available until later. The representative promised to try to find work for Cotter, but asked him not to come to the office while the search continued. Soon thereafter, the temporary agency terminated Cotter for lack of work.

Affirming the trial court's summary judgment in the employer's favor on Cotter's ADA claim, the Sixth Circuit concluded after a succinct and well articulated discussion that Cotter's colitis did not "substantially limit" any major life activity, including Cotter's ability to work. The appellate court also approved the trial court's dismissal of Cotter's "regarded as" claim, quoting the court's statement from *Ross v. Campbell Soup Co.,* 237 F.3d 701 (6th Cir. 2001) that "proving that an employee is regarded as disabled in the major life activity of working takes a plaintiff to the farthest reaches of the ADA." *Ross*, at 709. In this context, the court further noted that Ajilon had attempted to market Cotter to a client until shortly before his termination, and that it had laid off thirty-one other employees during the relevant time period because it could not place them with clients.

6. *Mahon v. Crowell*, 295 F.3d 585 (6th Cir. 2002).

Mahon, a steamfitter for TVA, suffered back injuries then became depressed. After a complicated series of events at TVA, Mahon found himself in a position with severely restricted employment opportunities and, as a practical matter, a loss of his seniority. A few months later, he was downsized, and shortly after that, he sued TVA claiming disability discrimination, both because he was actually disabled, and because TVA regarded him as disabled.

Relying primarily upon *Toyota Motor Manufacturing, Kentucky., Inc. v. Williams*, 534 U.S. 184 (2002) and *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), the court concluded that while Mahon's back impairment caused him some distress and limited him in performing some activities, the record did not show that he was severely restricted in any of them. Mahon had admitted at deposition that despite his back impairment, he could still do household chores, including cleaning gutters and repairing plumbing, could walk a mile, and could work on his own car. Quoting *Williams*, the *Mahon* court pointed out that Congress did not intend the ADA to permit everyone who could not perform "some isolated, unimportant or particularly difficult manual task" to qualify for its protection.

The *Mahon* court also discussed what it means to be "substantially limited" in the major life activity of working. Citing *Sutton*, the court said:

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Mahon at 591 (citing *Sutton*, 527 U.S. at 492).

After concluding that Mahon was not actually disabled, the court turned its attention to his "regarded as" claim. To this claim, it applied the test articulated in *Sutton*:

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual non-

limiting impairment substantially limits one or more major life activities.

Mahon at 592 (citing *Sutton*, 527 U.S. at 489).

The court concluded that Mahon had not demonstrated that TVA held mistaken beliefs about him. To the contrary, rather than viewing Mahon through a lens of "myths, fears, or stereotypes", TVA followed the specific recommendations of his treating physician, which is exactly what the Supreme Court in *Williams* says an employer is supposed to do.

7. *Black v. Roadway Express, Inc.*, 297 F.3d 445 (6th Cir. 2002).

Black, a trucker, injured his knee and required several surgeries. In his ADA claim against Roadway, he claimed that the company refused to accommodate the restriction that he drive only trucks with cruise control. Basing its views upon a work release from Black's surgeon, Dr. Johnson, Roadway took the position that Black had no work restrictions, and thus, did not need any accommodations.

In analyzing whether Black was disabled under the ADA, the court noted an affidavit from Black claiming that his knee impairment limited him in a number of ways, including a constant limp and dysfunction of his knee if he attempted to walk far. However, at deposition, Black had testified that he could clean his house, do chores, take walks, shoot basketball, ride his motorcycle around town, and if provided with a truck with cruise control, do his job as a trucker -- a job involving tasks Black's affidavit claimed he could not do. The court also noted that an affidavit of Black's surgeon, Dr. Johnson, ran counter to Johnson's having returned Black to work with no restrictions in the first place.

The court then examined the affidavit and report of a vocational expert, Dr. Julian Nadolsky. According to Dr. Nadolsky, who relied primarily upon Dr. Johnson's affidavit, without cruise control, Black was totally disabled from employment as a truck driver and further, could not perform a great many other jobs. Citing *Doren v. Battlecreek Health Sys.*, 187 F.3d 595 (6th Cir. 1999), the court rejected Nadolsky's affidavit and report as conclusory because Nadolsky simply reviewed what Black said rather than performing any analysis of the number of trucking jobs or other jobs for which Black was disqualified. The Sixth Circuit found no genuine issue of material fact and upheld the trial court's summary judgment in Roadway's favor.

C. Age Discrimination in Employment Act

1. *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. __ , 2004 WL 329956 (Feb. 24, 2004).

   General Dynamics and the union representing its employees entered into a collective bargaining agreement under which the company would no longer continue to provide health benefits to employees who subsequently retired, unless the workers in question were currently at least fifty years old. Cline and others, who were in their forties, sued under the ADEA. Reversing a Sixth Circuit decision, the United States Supreme Court concluded that the ADEA did not prevent an employed from favoring older employees over younger ones.

   The gist of plaintiffs' argument was that "age" as the ADEA uses the term does not mean "old age" when teamed with the concept of discrimination. Plaintiffs reasoned that any adverse action in which age was a consideration would be impermissible. The Supreme Court disagreed, and bluntly rejected the EEOC's contrary interpretation. The high court noted noting that deference to an enforcement agency's interpretation is necessary only when applying traditional devices of judicial construction yields no clear sense of congressional content.

2. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

   After the defendant employer demoted the over-forty Swierkiewicz and then decided to "energize" Swierkiewicz's department by promoting a thirty-two year-old, Swierkiewicz became discontented and sent a memo to his superior describing his grievances and asking for a severance package. He received a call from his employer's general counsel, telling him he could resign without a severance package or be fired. Swierkiewicz refused to resign and was fired.

   Sorema succeeded in getting Swierkiewicz's complaint dismissed and having the Second Circuit affirm the dismissal on the basis of that circuit's settled precedent requiring an employment discrimination complaint to set out facts constituting a prima facie case. The Supreme Court struck down this heightened standard of pleading, pointing out that a short, plain statement of discrimination in the complaint was sufficient, that the precise requirements of a prima facie case may not be clear until discovery is completed and that FRCP 8 requires only that a complaint give the defendant fair notice of what the plaintiff is claiming and why.

3. *Rowan, et. al. v. Lockheed Martin Energy Systems, Inc.*, 2004 Fed. App. 0076P (6th Cir. March 11, 2004)

   Rowan and his co-plaintiff, Washington, worked at Lockheed's uranium enrichment plant in Tennessee. After being laid off during a reduction in

force, they sued for age discrimination but lost on summary judgment, which the Sixth Circuit upheld. The primary issue before the court was whether certain statements about age and retirement that management personnel had made were sufficient to raise an inference of age discrimination so as to defeat summary judgment.

The court concluded that the plaintiff's immediate supervisor having called them "old farts" on a "fairly regular basis" did not constitute direct evidence of age discrimination in this context, because the plaintiffs had not established that these age-based slurs played any role in the decision to select them for termination. Moreover, the supervisor was not a decision maker in connection with their discharges, so his statements were irrelevant. The court also discounted an alleged comment that upper management had made on a golf course some seven years before the plaintiffs' termination about bringing in "new blood." The court reasoned that this was a stray statement, made long before the terminations and thus not evidence of age bias in this instance.

On its way to upholding the trial court's summary judgment, the court reiterated that in "reduction in force" cases such as this one, a plaintiff must provide "additional direct circumstantial or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." The court also discussed what constitutes "direct evidence" of age discrimination, and summarized the intent of the ADA, which is to protect older workers from inaccurate stereotypes. The court also reiterated that age and years of service are "analytically distinct" and that the decision based upon years of service is not automatically an age-related decision.

4. *Shah v. Deaconess Hospital*, 355 F.3d 496 (6th Cir. 2004).

After a patient at Deaconess died following thyroid surgery, the hospital conducted a peer review of Shah's conduct in the case and eventually decided to revoke the hospital privileges he had held for over twenty years. Shah sued for age discrimination under the ADEA, and for national origin discrimination under Title VII. The trial court granted Deaconess a summary judgment, concluding that Shah had not made out a prima facie case. A question on appeal was whether Shah's hospital privileges made him a hospital employee.

The court reasoned that federal anti-discrimination statutes protect employees, but not independent contractors, and noted that three other federal circuits had held that where a doctor denied hospital privileges is an independent contractor, he does not have the anti-discrimination laws' protection. Applying a common-law agency test, the court concluded that Shah was an independent contractor. The court reasoned that since Shah treated his own patients and contracted freely with other hospitals,

Deaconess did not have the control over Shah that would be necessary to make him an employee.

5. *Brown v. Packaging Corporation of America*, 338 F.3d 586 (6th Cir. 2003).

After Brown had worked for Packaging for nearly forty years, the company promoted him to a non-union, temporary foreman's position. The plant manager who promoted Brown had the authority to make and did make this decision, but when he mentioned it to the company's vice president, the vice president said that Brown not only lacked leadership but had once been convicted of arson for burning down his own house. The company had fired Brown after the conviction, but rehired him when he threatened litigation. The vice president also told the plant manager about Brown's having violated the company's policy against sexual harassment by showing nude photographs of his wife to fellow employees. Dismayed, the plant manager met with Brown and withdrew the promotion. The plant manager told Brown he would remain a crew leader, but did not mention the specific information the vice president had shared. The plant manager chose an employee who was about forty years old for the temporary foreman's slot originally offered to Brown. Trial resulted in a verdict for the employer.

On appeal, Brown argued that he had presented direct evidence of discrimination through his own testimony that the company's area manager had told him he was not being promoted because the vice president wanted younger people. The court concluded that this was at most circumstantial evidence.

The court then turned its attention to the parties' dispute over the burdensome jury instructions the trial court had issued, describing in detail the complicated McDonald-Douglas test. Although Justice Nelson began the majority opinion by stating that unlike his colleagues on the panel he did not think McDonald-Douglas language belonged in jury instructions, he did not find that the verbose jury instructions constituted reversible error. The Sixth Circuit also concluded that the trial court was right to admit evidence of Brown's arson conviction because it was not offered solely to impeach credibility but also to demonstrate why Packaging Corp withdrew the promotion.

6. *Wexler v. White's Furniture, Inc.*, 317 F.3d 564 (6th Cir. 2003).

Whites, a furniture retailer, hired Wexler when he was fifty-five and promoted him to manager about two years later. Sales at the store Wexler managed declined significantly, so Whites demoted him to a non-managerial position. Wexler claimed that at the meeting in which Whites' corporate officers told him about his demotion, they made several adverse

references to his age. Wexler also claimed that when the company announced Wexler's successor, the company's president emphasized the successor's youth.

The district court granted Whites' summary judgment motion on Wexler's age discrimination claim, and the Sixth Circuit's initial panel affirmed. Upon petition for rehearing, however, the court en banc reversed in a five-three split that resulted in some heated prose in the clashing majority opinion and dissent.

The majority's opinion arguably weakens the business judgment rule by concluding that even if the soundness of an employer's business judgment is not to be questioned, factual controversy about the decision may call its veracity into question. The majority also downplays the "same actor" inference, saying it rejected "the idea that a mandatory inference must be applied in favor of a summary judgment movant whenever the claimant has been fired and hired by the same individual." The majority's opinion also seems to water down the "same group" inference, which arose in this case because the primary decision maker was older than Wexler.

Justice Krupansky's tart dissent furnishes a mini-treatise on the ADEA. Krupansky begins by rounding on Whites' evidence:

- Upper management told him he was being asked to step down because he was getting older.
- Upper management also told him at the demotion meeting that he didn't need the stress and aggravation of management problems.
- Another manager referred to Wexler's age and called him a grumpy old man.
- At the demotion meeting, a manager told Wexler the store was really going to be grinding its managers and making them do things he did not think Wexler would want to do.
- Upper management said the management job must be getting tiring for Wexler.
- When Wexler's successor was announced, upper management referred to the youth of Wexler's successor.

Krupansky notes, in capital letters, that Wexler had admitted the following:

- He never heard managers make anti-elderly comments.

- He knew of no other Whites employees who had been treated unfavorably because of age.

- He knew that upper management's practice had always been to employ good people regardless of age.

Moreover, at the pertinent time, most of Whites' workforce was over forty and nine of its workers were older than Wexler. A coworker of Wexler's, who was some twelve years older, had declined an offer to manage a new retail location for the company. Yet another Whites' employees worked until his voluntary retirement at age seventy-nine. To a person, all the witnesses described Whites as having a work atmosphere free of age bias.

Krupansky later thunders:

> Conceding *arguendo* that an employer's subjective dissatisfaction with the plaintiff's performance should not be considered with regard to the plaintiff's job qualifications at the prima facie stage, the defendant's proffer of 'performance dissatisfaction' remains a sufficient 'legitimate non-discriminatory reason' justifying an adverse employment action, which erases the presumption of discrimination created by the plaintiff's proof of his prima facie circumstantial case, and *which allegation the plaintiff must disprove. The circuit majority has conceded that much.* However, it has incorrectly concluded that fact question remains for trial concerning [proof of pretext in this case]...
>
> At the pretext stage, the jury may not simply elect to disbelieve the employer's proffered legitimate, non-discriminatory explanation; rather, the plaintiff's evidence must be sufficient to disprove it. (citations omitted).

Id. at 593-94. Krupansky concludes that Wexler could not possibly prove pretext. In a final barbed volley, the Justice states [t]he prescription which the circuit majority has engrafted upon the ADEA was unimagined by its framers. Krupansky goes on to predict dire consequences:

> Although a close scrutiny of the full potential implications of the circuit majority's decision, including the specter of a future Orwellian world of 'thought crime' proscriptions enforced by the 'thought police,' is frighteningly breathtaking in its sprawling dimensions, the more immediate ramification resides in the risk of the chilling effect that the court majority's new stricture will necessarily impose upon employers within this circuit's

> geographical boundaries. An honest assessment by, and open, free, and frank discussions among, business decision makers about the merits and demerits of employees who happen to be above age forty will be critically stifled, to the absurd point that a decision maker will be required either to avoid mention of the employee's age, or speak at his and his company's peril if he makes even a passing reference to the age of a worker who is manifestly suffering from some evidently age-related, performance inhibiting infirmity ranging anywhere from Alzheimer's disease to mild hearing loss. Stated differently, it appears that, because a majority of the judges of this circuit may consider age references in the employment context to be offensive, employers will now be subject to penalization for stating the obvious.

Id. at 595-96.

D. Family and Medical Leave Act

1. *Nevada Dept. of Human Resource v. Hibb,* 538 U.S. 721 (2003).

Hibbs, who worked for the Nevada Department of Human Resources, sought FMLA leave to care for his wife after a car accident. The department terminated him when he did not return after exhausting his FMLA leave. The district court granted summary judgment to the department on grounds that the Eleventh Amendment barred Hibbs's lawsuit. The Supreme Court affirmed the Ninth Circuit's reversal, holding that state employees may recover monetary damages in federal court for FMLA violations. The Supreme Court acknowledged that the Constitution does not provide for federal jurisdiction over suits against non-consenting states, but that Congress may abrogate such immunity by means of a clear statement. The court concluded that the FMLA was clear statement.

The opinion contains a thorough discussion of the FMLA's express purpose, which is to prevent gender discrimination where Title VII had failed to do so. The court distinguished its earlier decisions in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) and *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000), in which it had concluded that the Eleventh Amendment did bar federal age discrimination suits against state actors.

The court explained that under an equal protection analysis, age is not a standard requiring heightened review, so that the "rational basis" test is sufficient. Gender discrimination, however, merits heightened scrutiny. The Supreme Court's decision in *Hibbs* contains a good summary of the

FMLA's legislative history, as well as several strong paragraphs chronicling the long and frustrating history of limitations on women's employment opportunities.

2. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002).

In its first FMLA decision, the Supreme Court concluded that an EEOC regulation regarding notice was an impermissible extension of the FMLA.

Plaintiff Ragsdale requested medical leave after learning she had cancer. Wolverine's leave policy allowed employees of Ragsdale's standing up to seven months medical leave. Ragsdale could not return to work after seven months. Wolverine never notified her that any portion of her seven months' medical leave was FMLA-qualifying. Six days after her termination, Ragsdale requested FMLA leave. When Wolverine resisted, Ragsdale sued on the basis of an EEOC regulation that said that unless an employer prospectively designates FMLA leave, the employee never begins to exhaust her FMLA entitlement. An employee would, therefore, be entitled to twelve weeks of FMLA leave in addition to any leave that an employer failed to designate as FMLA-qualifying by giving appropriate notice to the employee.

The United States Court of Appeals for the Eight Circuit joined courts in the Eleventh, Fourth, Seventh, and Second Circuits in concluding that the Department of Labor's regulation on this point conflicted with Congress's intent for the FMLA. The Eighth Circuit's analysis in arriving at this conclusion focused on the FMLA's specific language, which revealed that the statute was not to disadvantage either the employee or the employer. The Eighth Circuit concluded that Congress meant to provide a minimum amount of leave for employees, not additional leave for employees. The United States Supreme Court affirmed the Eighth Circuit's decision. Note that this decision is contrary to the Sixth Circuit's decision in *Plant v. Norton Int'l, Inc.*, 212 F.3d 929 (6th Cir. 2000).

3. *Perry v. Jaguar of Troy,* 353 F.3d 510 (6th Cir. 2003).

Perry, an auto parts counter-person for Jaguar, sought FMLA leave to care for his thirteen-year-old son, Victor, who had been diagnosed with attention deficit disorder and attention deficit hyperactivity disorder. Although Victor did not function as well as other children at his grade level, he was able to dress and care for himself, ride the school bus, and attend special education classes. Outside school, Victor engaged in normal activities appropriate to his age, such as riding bikes, swimming, and playing with neighborhood children.

Before 2001, Victor's mother or other family members had looked after him during the summer, but work schedules then made this impossible.

Perry argued that Victor had to be constantly monitored, thus no affordable day care was available.

The employer initially granted Perry's request for leave, then notified him that the leave was not FMLA-qualifying. The trial court granted summary judgment, which the Sixth Circuit affirmed on the grounds that Perry had failed to demonstrate that his son was incapacitated. The Court noted that "[i]n order to have had a serious health condition, whether chronic or permanent, Victor must have been unavailable to work, attend school, or perform regular daily activities during the period of Perry's leave."

The Court rejected Perry's argument that his son was incapacitated because he could not perform daily activities as well as children without his special conditions or attend a regular day camp, and required extraordinary supervision. The Court concluded that the comparative amount of supervision a child needs does not by itself dispose of the question of whether a child can engage in regular daily activities, and further commented that Perry's own description of some of Victor's troublesome behavior (such as peeking into neighbor's windows, biking on the service drive of a freeway, and calling video game companies) indicated that he was not incapacitated.

4. *Arban v. West Pub. Corp.*, 345 F.3d 390 (6th Cir. 2003).

Arban, a salesman for West, had a long history of gastrointestinal disorders. After it came to light that Arban had misrepresented activity on a customer's account, Arban received a warning letter. Months later, the company counseled him concerning other policy violations that had allegedly occurred after Arban received the warning letter. In mid-December, the company decided to terminate Arban after the holidays. A week after the company had decided to terminate Arban, he and his supervisor went to visit a customer, and the supervisor gave a favorable evaluation of that one meeting. The supervisor insisted that he did not tell Arban that his deficiencies were cured or that he was back in good standing, but Arban testified that he came away with that impression, and believed he would not receive further discipline.

Two days after his field trip with his supervisor, Arban woke up with gastrointestinal problems, obtained medical treatment, and advised his employer's Human Resources representative that he needed time off. The Human Resources department placed him on medical leave. Arban then applied for long-term disability benefits. Shortly thereafter, West forced Arban to resign, ostensibly because of his previous misconduct.

A jury awarded Arban over $200,000, including costs and fees. The Court concluded that there was sufficient evidence to support the jury's verdict, pointing out that although an employer "has the discretion to fire an at-will

employee for poor performance, at trial Arban cast doubt upon both the timing of and the reasons for the decision to terminate him."

The Court also considered the interesting question of whether front pay is available under the FMLA. In light of some favorable precedent for this remedy, and no authorities to the contrary, the Court concluded that the FMLA does provide for front pay. Consistently with its prior decisions, the court concluded that whether front pay is to be awarded is a question of law, but the amount of the award is a question for the jury. In this case, the trial court found that an award of front pay was not appropriate because Arban had obtained similar but better-payment employment with Mathew Bender, and was over-mitigating his damages. The court noted that it is the plaintiff's responsibility when seeking front pay to provide all the essential data needed to calculate a reasonably certain award.

Finally, Arban challenged the district court's refusal to award him liquidated damages under the FMLA for West's alleged bad faith. The Sixth Circuit found the trial court's decision in this regard was an abuse of discretion, because it ran contrary to the jury's finding that West had acted in bad faith.

5. *Pharakhone v. Nissan North America Inc., et. al.*, 324 F.3d 405 2003 (6th Cir. 2003).

Nissan had a documented policy that said employees on leave could not work. Pharakhone, a production technician at a Nissan factory, claims he told Baggett, his supervisor, that in the months ahead he would be needing leave to look after his wife and their newborn, as well as to work in his wife's restaurant during her recovery. Baggett claimed Pharakhone never said anything to him about working in the restaurant while on leave. After the birth of Pharakhone's child, Baggett phoned him and discovered he was working at the restaurant. Pharakhone claimed that during this conversation with Baggett, he learned for the first time that employees on leave were not allowed to work. Nissan then sent Pharakhone a memorandum threatening termination. Ignoring the memorandum, Pharakhone continued working at the restaurant throughout his FMLA leave. When his leave was over, Nissan fired him.

The trial court granted Nissan summary judgment, which the appellate court affirmed. The court concluded that the factual disputes in the case were not material, and held that an employee who would have lost his job even if he had not taken FMLA leave did not have a cause of action under the FMLA when his employer refused to reinstate him.

In this decision, the court interpreted 29 U.S.C. § 825.312(h), which provides that an employer need not reinstate a person if application of a

uniformly enforced policy against working while on leave is the reason for refusal to reinstate.

E. USERRA (UNIFORMED SERVICES EMPLOYMENT REEMPLOYMENT RIGHTS ACT)

Curby v. Archon, 216 F.3d 549 (6th Cir. 2000).

Curby was an auxiliary police officer who worked part time. He late became a deputy marshal, which apparently convinced him that he was something of a cowboy. Instances of Curby's misconduct included shining his spotlight into a private residence because a friend had asked him to and operating his own car with expired license tags. After the city council removed him as deputy marshal, the police chief continued to use him as an auxiliary police officer. He then went on military leave for over two months. He continued working as an auxiliary police officer after he returned, but only to a very limited extent. This was enough, however, to annoy the city council, which pressured the police chief to remove him for the same reasons it had wanted him removed as a deputy marshal. The police chief therefore terminated Curby's employment as an auxiliary officer only to have the mayor extend it because he felt sorry for Curby.

Curby sued for a number of alleged wrongs, including violation of the Uniformed Services Employment and Reemployment Rights Act, 38 USC § 4311, which forbids discrimination against persons who have been active military service, and provides them with job protection. Curby made the ingenious but ultimately unsuccessful argument that under USERRA, he had an absolute right to reinstatement of employment after his military service, without having to prove that he was discriminated against because of his military service.

III. KENTUCKY DECISIONS

1. *Brooks v. Lexington-Fayette Urban Co. Housing Authority,* 2004 WL 102343 (Ky. Jan 22, 2004).

Brooks, whom the housing authority had hired as a clerk, sued after not receiving a managerial position for which she had twice applied. At trial, Brooks lost her race discrimination claims, but won her retaliation claim. The Supreme Court, divided as to practically every issue in the case, upheld this result. In doing so, the Supreme Court reversed the Court of Appeals' holding that the trial court should have directed a verdict in the Housing Authority's favor as to the retaliation claim.

Highlights of the Supreme Court's opinion include the following:

- Housing Authority Executive Director Austin Sims' inability to remember why he decided not to fill the contested managerial

position in 1987 was not fatal to the defense. Holding otherwise, concluded the court, "would place an intolerable burden on employers to document the reason for every employment decision as insurance against future lawsuits." The court held that if an employer cannot remember the actual reason for an employment decision, it may rely upon "normal business practices and exemplary reasons consistent with those practices" to articulate its legitimate, non-discriminatory reason for the employment action.

- In connection with the former point, the majority defended its decision to admit evidence of habit or custom in this context.
- In the context of a retaliation claim, material modification in duties and loss of prestige may amount to actionable adverse employment action. (Brooks testified that after she filed a complaint of discrimination, she was singled out and humiliated by having to ask her supervisor for permission every time she left her desk for any reason, and by having her break time reduced from fifteen to ten minutes). The court concluded that because "greater supervisory scrutiny carried an imputed diminished level of trust and marked an objective decrease in prestige it was more than a de minimus employment action." This was enough to get Brooks past a directed verdict on her retaliation claim.
- In analyzing Brooks' retaliation claim, the Supreme Court noted that the Housing Authority's decision-makers first learned of Brooks' discrimination complaint in July 1991, with the adverse actions complained of occurring in November 1991. The court says "This lapse of time was too long to create by itself an inference of causality." The court went on to find that requiring Brooks to ask permission every time she left her desk and the reducing her break time was sufficient evidence of causal connection.
- The court analyzed the after-acquired evidence doctrine. After Brooks sued, the Housing Authority discovered numerous inaccuracies in her resume. The trial court thus denied Brooks reinstatement and front pay, and refused to submit her constructive discharge claim to the jury. The Supreme Court decided that the trial court had made the right decision on this point, though for the wrong reasons.

2. *Robinson v. Back*, 2003 WL 21106539 (Ky. App., May 16, 2003).

Robinson sued the Greenup Superintendent of Schools for sex discrimination and for violating KERA because he refused to advance her application for a school principal's position to the site-based decision making council. Judge Nicholls of the Greenup Circuit Court entered summary judgment in the employer's favor. The Court of Appeals concluded that issues of material fact existed concerning

Robinson's gender discrimination claim. The trial court had relied upon the election of remedies doctrine to preclude her claim, because she had previously filed an EEOC charge that resulting in the issuance of a right to sue letter. Citing to its earlier decision in *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App., 2001, the court noted that despite the existence of *Vaezkoroni v. Domino's Pizza, Inc.*, 914 S.W.2d 341 (KY 1995), the plaintiff's limited pursuit of an EEOC charge did not constitute election of remedies in this case.

3. *Kentucky Dept. of Corrections v. McCullough*, 123 S.W. 3d 130 (Ky. 2003).

McCullough sued the Kentucky Department of Corrections and her supervisor claiming sex discrimination. Her lawsuit came after a difficult work history at North Point Training Center. In 1987, McCullough had filed an EEOC charge of sexual harassment, as a result of which the alleged harasser was demoted and forced to apologize, prison policy was changed to permit women to work in dormitory units, and McCullough became the first person to benefit from the policy change. Between 1987 and her filing of the lawsuit in 1995, however, McCullough was denied promotion twenty-six times, suggesting that her victory with the EEOC may have been Pyrrhic.

At the trial of McCullough's claim for sex discrimination and retaliation, the jury awarded her $120,000 in compensatory damages, with a matching sum in punitive damages. In response to post-trial motions, the court set aside the punitive damages award, but ordered North Point to promote McCullough to sergeant, and awarded her $50,000 in attorney's fees plus costs.

The Supreme Court upheld the jury verdict, except to conclude that KRS 344 does not allow for punitive damages in an employment discrimination context. The Supreme Court specifically stated that by enacting KRS 411.184 and KRS 411.186, the General Assembly intended to preempt the common law on punitive damages. The court went on to note that since passing those two statutes, the General Assembly had enacted a number of other statutes to expressly allow for punitive damages and their sections on remedies. Thus, if the general punitive damages statutes were intended to allow for punitive damages for all causes of action, then the specific inclusion of punitive damages as a remedy in other statutes would be redundant and unnecessary. Such a result would violate the "universal rule...that in construing statutes, it must be presumed that the legislature intended *something* by what it attempted to do." Since KRS 344 does not provide for punitive damages in the employment discrimination context but does provide for them in the context of housing discrimination, the General Assembly was likewise presumably intending to make a distinction.

The Supreme Court also held that absent a contractual provision authorizing the payment of interest, state agencies are not liable for post-judgment interest. In apparent response to the plaintiff's argument that she was entitled to post-judgment interest against the individual defendant, the court concluded that interest could not be awarded against him because the judgment was against him

in his official capacity.

4. *Jefferson County v. Zaring*, 91 S.W.3d 583 (Ky 2002).

Pursuant to a consent decree, the Jefferson County Police Department developed two promotion lists, a "white" list and a "black" list. For each promotion, one candidate was selected from the black list, and two from the white list. By the time the consent decree expired in 1989, the police department's minority members comprised eighteen percent of the total. After the consent decree expired, only one list of candidates was submitted. From the mid 90s forward, the police chief recommended thirty-five persons for promotion, from lists containing the names of thirty-four white males and one white female.

Noting these statistics, the Jefferson Fiscal Court directed the police merit board to examine the promotion system. Thereafter, an amended regulation was adopted, but one of its key elements was seniority. This was inherently disadvantageous to female and minority officers, who typically did not have enough seniority to qualify for the appropriate promotion lists.

While the Fiscal Court studied the regulation, promotions were frozen, and some sixteen vacancies in officers' ranks occurred. Plaintiffs Zaring and Hord were among fourteen Caucasians in a group of twenty-four sergeants who applied for seven vacancies for the position of lieutenant. When Zaring and Hord were not chosen as lieutenants, they claimed reverse discrimination.

Since this reverse discrimination case arose out of a situation involving an affirmative action plan, a slight variation on the usual analysis was required. Otherwise the prima facie case test would simply eliminate all reverse discrimination cases. This was a direct evidence case, since the police chief admitted that he had not chosen Zaring and Hord because they were white. Zaring and Hord thus met their prima facie burden simply by showing that they would have been promoted if they had not been white.

As its legitimate non-discriminatory reason for failing to promote Zaring and Hord, the Jefferson County Police Department asserted the validity of its affirmative action plan. Zaring and Hord, therefore, had the burden of showing that the affirmative action plan was not valid as the department claimed or that the department's rationale was pretextual. Noting that affirmative action plans are afforded a presumption of validity and that the plaintiff has the burden of proof, the Kentucky Supreme Court reversed the Court of Appeals, and reinstated the Jefferson Circuit Court's judgment NOV in favor of the police department.

Justice Johnstone dissented, stating "it is a disgrace that the majority chooses to sanction Chief Jones' race-based decision without any evidentiary foundation to support it." Justice Keller concurs in the result because he believed Zaring and Hord failed to prove they would have been promoted but for the intentional discrimination; however, Justice Keller believed that impermissible job

discrimination did occur, in that the police chief admitted that he had chosen candidates for promotion based upon the color of their skin rather than upon their qualifications.

5. *American General Life & Acc. Ins. Co. v. Hall*, 74 S.W.3d 688 (Ky. 2002).

Hall, one of five life insurance agents in American General's Hazard office, claimed that her immediate supervisor sexually harassed her every day for over a year by making explicit comments about their respective body parts, discussing his sex life and his sexual fantasies about Hall, brushing against her, and exposing himself to her. Soon after the episode of exhibitionism, Hall quit American General and sought psychological treatment for numerous and serious disorders.

Hall sued American General in Perry Circuit court in August 1994, and in October, sought workers' compensation benefits based upon the same events that underpinned her lawsuit in the Perry Circuit Court. By April 1996, an administrative law judge had awarded Hall workers compensation benefits exceeding $82,000 in value.

The Perry Circuit Court granted summary judgment to American General on the grounds that KRS 342.690(1) makes a claim for workers' compensation benefits the exclusive remedy for an employee who avails herself of it. Hall argued that because sexual harassment she had suffered resulted from negligence, the exclusivity provision did not apply to her. The Court of Appeals reversed, believing that the Supreme Court's decisions in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992) and *Hardaway Management Co. v. Southerland*, 977 S.W.2d 910 (Ky. 1998) undermined the exclusivity provision.

As the Supreme Court clarified, however, those cases simply hold that KRS 342.690 does not preclude someone who has suffered from discrimination from bringing a claim under the Kentucky Civil Rights Act, KRS Chapter 344. What KRS 342.690(1) does, however, is prevent a person who has accepted its benefits from having yet another cause of action under KRS Chapter 344 for the same occurrence. The Supreme Court reasoned that because the statute makes clear that its remedy is exclusive, a plaintiff who exercises her right to that remedy makes a knowing and voluntary waiver of any other remedy.

WAGE AND HOUR UPDATE

A Review And Comment On The Department Of Labor's Final Wage And Hour "White Collar" Exemption Regulations

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SECTION B

Wage and Hour Update

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A Review And Comment On The Department Of Labor's Final Wage And Hour "White Collar" Exemption Regulations

Introduction

Unless an employee is "exempt," the Fair Labor Standards Act ("FLSA") requires employers to pay minimum wage and overtime for hours worked over 40 at time and one half an employee's regular rate of pay. The FLSA contains several minimum wage and overtime exemptions, but employers most frequently rely upon the "white collar" exemptions. 29 U.S.C. 213 (a)(1). The white collar exemptions apply to all employees properly designated as being employed in a "bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . . ." White collar exemptions also include the special exemption for computer employees.

The FLSA identifies the white collar exemptions, but does not provide clear definitions for them. Accordingly, in applying the law, employers and courts have followed regulations issued by the United States Department of Labor ("DOL"). The DOL cannot possibly define every aspect of the exemptions with particularity, considering the diverse nature of workplaces and their particular jobs, with their multitudes of variations. Literally thousands of suits and claims have arisen out of these general terms, general regulations, and varied workplaces.

The DOL has not substantially revised its white collar regulations in more than fifty years. In what many considered long overdue, the DOL attempted to design its April 20, 2004 Final Regulations to address many employer concerns related to litigation, uncertainty, and the modern workplace. The regulations contain many positives for employers, but the DOL scaled back these positive strides considerably from their 2003 proposed regulations. On balance, political pressure resulted in the regulations being unfavorable in many respects for employers.

Under the former regulations and under the new regulations, a white collar exempt employee must meet a "duties" test and for most of the exemptions he/she must also be compensated by salary. The new regulations, in some cases, modify the duties tests and the salary tests. The presentation below will first cover the modified duties tests, followed by the modified salary test common to several of the white collar exemptions. This presentation focuses primarily on the differences between the new regulations and the former regulations. Every covered business will need to become familiar with the basic aspects of these new regulations.

Some Initial Clarifications

The DOL faced extraordinary political pressure during the proposed regulation phase of this process. In the final regulations, the DOL clarified at the outset, in §541.3, the following:

- blue collar workers who perform repetitive work with their hands, physical skill and energy will not be affected by the regulations; and
- police officers, detectives, emergency personnel, and a wide variety of public sector employees will continue to be non-exempt.

Executive Exemption

Under the former regulations, if an employer compensates its executive at a salary of over $250 a week (which includes just about every executive-type employee, and which was referred to as the "short test") the exemption applies if the employee has the primary duty of managing the enterprise or a recognized department or subdivision thereof. Primary duty generally means that the employee spends 50% or more of his/her time managing. The executive must also customarily or regularly direct the work of two or more other full-time employees.

The new regulations actually add an element for the employer to prove to use the executive exemption. In addition to the foregoing, an employer must now prove that the executive has the

authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change in status. §541.100 (a)(4). The key portion of this new requirement is that the executive is not exempt unless his/her recommendations as to employee status changes are generally given "particular weight." *Id.* In most situations, this new requirement will not place a new burden on employers. However, it will be necessary for employers to assure that executive recommendations play a meaningful role in outcomes, even if the executive "does not have authority to make the ultimate decisions as to the employee's change in status." §541.105.

The final regulations offer only one alternative to meeting the more formalized test under the executive exemption, down from three such alternatives in the proposed regulations. Where an executive owns at least 20% of the enterprise, and he/she is "actively engaged in its management," then the employee can be an exempt executive. This alternative essentially means that the "primary duty" and the "supervision of two or more employees" portions of the test can be bypassed for 20% owners.

The final regulations also define somewhat more flexibly that which will constitute a "primary duty," so as to permit exemptions to apply even if the executive spends less than 50% of his time on managing the enterprise. This more liberal application of the term applies to all of the white collar exemptions. In general, under the proposed regulation the term "primary duty" means the "principal, main, major or most important duty that the employee performs." A determination will be made based on all the facts of a particular case. Courts and investigators are to review the relative importance of the duties, the amount of time spent on them, the employee's freedom in performing them, and whether there are differences in compensation to the executive for performing

the executive duties. §541.700. Although the executive need not spend more than 50% of his/her time on exempt duties to be exempt, if the executive does indeed meet this threshold, then it appears that he will be exempt.

As you are computing the amount of time spent on "management of the enterprise," and the relative importance of them, focus on activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining production or sales records for use in supervision and control; appraising employees' productivity and efficiency; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning work; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; and providing for the safety of the employees or the property. §541.103. Keep in mind, however, that unless the executive owns 20% or more of the enterprise he/she still must customarily and regularly direct the work of two or more employees for the exemption to apply.

Administrative Exemption

Under the old regulations, the administrative exemption applied if the employer pays the employee a salary of $250 a week and he/she has a primary duty of performing office or non-manual work directly related to management policies or general business operations. To become exempt, the employee's primary duty must include "the exercise of discretion and independent judgment." This exemption has been the most difficult one to apply.

The DOL abandoned its proposed new standard that would have merely required the employee to hold "a position of responsibility" and opted to retain the old standard. Although the

DOL did attempt to clarify the old standard by providing new examples of exempt employees, this retreat from the proposed new standard was disappointing to the management community.

An administrative employee will be exempt under the duties test if his/her: primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and the primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. §541.200. Work directly related to the management or general business operations of the employer relates to "assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." §541.201. This includes "functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities." *Id.*

"Discretion and independent judgment with respect to matters of significance" involves the "comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." §541.202. The administrative employee must have the "authority to make an independent choice," even if the choice can be reviewed and reversed. §541.202 provides various factors to consider in determining whether an employee exercises discretion and independent judgment with respect to matters of significance, such as whether: the work affects business operations to a substantial degree; the matters have a substantial financial impact; the employee can deviate from established policies without approval; has authority to negotiate and bind the company on significant matters; or provides expert advice.

Examples of administrative employees include: insurance claims adjustors; employees in the financial services industry who gather and analyze information about customers; a team leader for a major project, *e.g.*, a closing or negotiation; an executive assistant who has been delegated authority on matters of significance; human resources managers; purchasing agents with authority to bind the company; and buyers who evaluate reports on pricing and set prices. However, public sector investigators, ordinary inspectors who perform specialized work along standardized lines, examiners or graders will generally be non-exempt. §541.203.

Professional Exemption

The professional exemption has always included both creative and learned professionals. Creative professionals include advanced fields of artistic endeavor, such as musicians and graphic artists. Under the old and regulations, the "learned professional" exemption will be most frequently applied. The substance of the professional exemption has not changed. Learned professionals include those employees who have as their "primary duty" consists of work "requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction," as distinguished from a general academic education or from training to perform routine tasks. §541.300. The DOL retained what was essentially the second part of the test - that the employee also must perform work that includes "the consistent exercise of discretion and judgment . . . ." §541.301.

In its final rule, the DOL expressly included language to permit full consideration of knowledge that may "also be acquired by an equivalent combination of intellectual instruction and work experience." The revised standard focuses on knowledge and how it is used, not necessarily on a four year, specialized degree. §541.301. However, the DOL has made clear its intent not to

change the professional exemption, both in its comments to the final rule and in testimony before Congress.

The DOL has set forth definitions consistent with current law for the learned professional exemption. The phrase "work requiring advanced knowledge" means knowledge that cannot be attained at the high school level. §541.301. The phrase "field of science or learning" distinguishes the learned professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning. *Id.* The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" generally restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. *Id.* The "best *prima facie* evidence that an employee meets this requirement is possession of the appropriate academic degree." *Id.*

Computer Employee Exemption

The DOL did not propose substantive changes for the computer employee exemption duties test. Congress recently addressed computer employees and clarified their exempt status. In general, computer employees, depending on their particular duties, can be exempt professionals, exempt administrators, or exempt executives. To be exempt, the computer employee must have a high level of skill and expertise, to be distinguished from those who repair computer hardware or employees in entry level positions that work with close supervision. §541.401. The exemption applies to: the application of systems analysis techniques and procedures to determine functional specifications; the design, development, documentation, analysis, creation, testing or modification of computer systems or programs or machine operating systems, or similar duties. §541.400.

Outside Salespeople

The DOL changed the outside sales employee exemption. Instead of focusing on whether an outside sales employee spends 20% or more of his/her time on non-outside sales duties, the new test would permit the employer to focus simply on whether the employee has outside sales as his/her primary duty. The employee must continue to be customarily and regularly engaged away from the employer's place of business in performing this primary duty. §541.500. Work performed incidental to and in conjunction with outside sales duties, such as planning, collections, and incidental deliveries will continue to be regarded as exempt outside sales work. *Id.* Of course, outside sales employees are not subject to the salary requirements discussed below.

Highly Compensated Employee Exemption

The DOL provided somewhat of a safe haven for employers where an employee receives a guarantee of at least $100,000 a year, up from $65,000 a year in the proposed regulations. §541.601. If the employee fails to reach $100,000 in compensation for the year, the employer may by the next pay period in the following year make up the difference. §541.601(b)(2). If the employee does not work the full year, the exemption can apply if the employer pays the employee a pro rata portion of the $100,000 based on the portion of the year the employee worked. §541.601(b)(3).

In addition to the minimum pay, this exemption has a modified, employer-friendly duties test. The employee must perform office or non-manual work and must perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. In other words, even if the employee does not meet the full duties test under these other exemptions, he/she can still be exempt if one or more exempt duties are performed. §541.601(a).

Changes To The Salary Test

The DOL has raised the minimum salary requirements and it has included employer-friendly changes to the consequences for salary mistakes. The new salary requirement is $455 a week, up from $425 a week in the proposed regulations. §541.600. Computer employees may be paid at this salary level or at $27.63 an hour or more. §541.400(a)(1). The test otherwise remains largely unchanged. In general, an employee must receive his/her salary without reductions for the amount of time the employee worked each week. The exceptions to the rule continue to include situations where and employee is absent for: a full day for personal reasons; a full day for sickness or disability, if the deduction is made pursuant to a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability; a portion of an initial or last week of employment; or an FMLA absence. §541.602(b). Deductions can also occur for penalties imposed in good faith for infractions of safety rules of major significance. *Id.*

Under the final rule, for the first time, an employer may make a deduction for a disciplinary suspension of a day or more related to workplace conduct rules. §541.602(5). Such suspensions must be imposed pursuant to a written policy applied uniformly to all workers. *Id.* Accordingly, expressly reserving the right to suspend without pay and having thorough workplace conduct rules will become perhaps even more important after the regulations become final.

The DOL made several favorable changes to the consequences of improper reductions. Clearly, an employer will lose its administrative, professional, and executive exemptions if it has a pattern and practice of not paying employees on a salary basis. §541.603(a). However, isolated or inadvertent improper deductions will not result in loss of the exemptions, if the employer reimburses the employees for such improper deductions. §541.603(c). *Id.* If a pattern and practice of not paying salaries occurs, then the employer loses the exemptions only during the time period in which

improper deductions were made, and only for employees in the same job classification working for the same managers responsible for the improper deductions. §541.603(b). Furthermore, if an employer has a written policy that prohibits improper pay deductions and publishes that policy, then reimburses employees for any improper deductions, the employer will not lose exemptions unless it willfully and repeatedly violates the policy or continues to make improper deductions after receiving employee complaints. §541.603(d). The DOL added that its salary rules are not to be "construed in an unduly technical manner so as to defeat the exemption." §541.603(e).

Conclusion

While this presentation has focused on the substance of the proposed changes, perhaps one of the most significant aspect of the changes from a lay person's perspective will be that the regulations have been re-organized and are much easier to review. The regulations are well-organized under clear headings. Thus, the regulations themselves can be used as a ready-reference tool as issues arise.

The most significant aspects of the changes from a substantive standpoint are as follows:

(1) unless an executive is a 20% business owner, then the employer will want to make sure that its executives have the authority to recommend outcomes on employee status and those recommendations must be given particular weight by upper level management;

(2) employees earning a guaranteed $100,000 a year or more will become exempt if they perform any white collar duties and they perform non-manual work;

(5) the new salary requirement is otherwise raised to $455 a week;

(6) proper policies prohibiting unlawful deductions and misconduct will be necessary for salary deductions for disciplinary suspensions and for safe havens from having one's employees re-classified as non-exempt; and

(7) absent gross abuse, employers who make occasional salary mistakes will be permitted to correct them without being exposed to substantial class action exposure for underpayment of overtime.

The regulations provide some immediate negatives for employers through increased executive requirements and increased salary amounts. They provide some potential future positives for employers through decreased litigation and the $100,000 exemption as time/salary increases march on and this exemption becomes more viable as a practical matter for employers.

INTRODUCTION

- Exemptions from federal minimum wage and overtime laws.
- "White Collar" Exemptions – last substantially revised over 50 years ago.

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Background and Problems Under The Old Regulations

- Employers were facing years of back pay liability because of unclear regulations.
- Class actions were being filed because one mistake could affect an entire class of workers.

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- The administrative exemption was difficult to apply.
- The professional exemption was not quite clear or flexible enough to adapt to the modern workplace.
- The law was challenging to apply, even for experienced HR professionals and labor attorneys.

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Basic Structure of the Exemptions

- Salary Test and A Duties Test Must Be Met
- Salary relates to what a person is essentially guaranteed every week if they work.
- Duties relate to what a person does, measured primarily against the three major white collar exemptions.

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Executive Exemption

- This was the easiest exemption to apply.
- In general, if an employee spends 50 percent or more of his/her time managing a department or a subdivision of a business, and customarily or regularly directs two or more employees, then he/she was exempt.
- The changes in the new executive exemption are basically negative for employers.

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The Negatives of The New Executive Exemption

- There is a new requirement.
- The executive must now have the authority to hire or fire or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change in status.
- The recommendations must generally be given weight. So the executive must now be in substance a supervisor, instead of merely directing work or scheduling.

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The Positives of The New Executive Exemption

- The new regulations flexibly define "primary duty," as it relates to all white collar exemptions.
- "Primary duty" means "principal, main, major or most important duty the employee performs.
- It will be based on the facts of a particular case. The relative importance of the duties, the time spent on them, an employee's freedom in performing them, and differences in compensation, are key

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- The new rules essentially mean that if an employee spends 50 percent of his/her time on management duties, then the exemption will apply. If not, then the exemption can still apply.

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Conclusions About The New Executive Exemption

- The easiest way to meet the exemption will still be the 50 percent test, and make sure your executives have the proper authority.
- When you are computing time spent managing, management duties include interviewing, selecting, training, setting and adjusting pay and hours, directing work, maintaining production and sales records for use in supervision and control, evaluating employees, handling employee complaints, disciplining, determining management techniques to be used, apportioning work, determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold, controlling the flow and distribution of materials or merchandise and supplies, and providing for the safety of

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The Administrative Exemption

- This exemption would have been somewhat easier to apply, but the DOL retreated from its proposal.
- The primary problem with the exemption is that the employee must have a primary duty that included the "exercise of discretion and independent judgment." This is the portion of the regulation that would have been changed.
- The primary duty must involve performing office or non-manual work directly relating to management policies or to general business operations.

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Key Definitions for The Administrative Exemption – Unchanged in The New Regulations

- Work directly related to management or general business operations relates to assisting with the running or servicing of the business, as opposed from working on a production line or selling a product.
- Discretion and independent judgment with respect to matters of significance involves the comparison and evaluation of possible courses of action, and acting or making a decision on a matter that affects the business operations to a substantial degree, involves expert advice, etc.

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Examples for The Administrative Exemption

- Insurance adjustors, financial advisors, team leaders on major projects, executive assistants with delegated authority and buyers.

- The exemption does not include public sector investigators, ordinary inspectors, examiners or graders.

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The Professional Exemption

- The professional exemption was probably the most rarely applied of the three major exemptions, and will continue to be the most rarely applied under the new regulations.
- There are creative and learned professions under the old and new regulations. Creative professionals work in advanced fields of artistic endeavor.
- Learned professionals most frequently apply in the business setting.

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- Their primary duty must consist of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education or from training to perform routine tasks.

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The DOL Did Not Actually Change The Professional Exemption

- Under the proposed regulations, the professional would no longer have needed to consistently exercise judgment and discretion.
- The professional may now acquire his/her knowledge "by an equivalent combination of intellectual instruction and work experience."
- This could shift some of the focus away from an advanced degree and towards actual knowledge and how it is used on the

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- Professionals still include lawyers, doctors, teachers, accountants, actuaries, engineers, architects, scientists, registered nurses, and pharmacists.

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Additional Professional Exemption Definitions

- Knowledge of an advanced type means knowledge that cannot be attained at the high school level.
- Field of science or learning distinguishes the learned professions from mechanical knowledge.

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- Customarily acquired by a prolonged course of specialized intellectual instruction generally still restricts the exemption of jobs where specialized academic training is a standard prerequisite for the job.
- The requirement of an advanced or specialized academic degree is still the best evidence to support the exemption.

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Computer Employee Exemption

- These employees can be, depending on the circumstances, professionals, administrators or executives.
- They can be exempt professionals only if they engage in advanced systems analysis techniques, system design, programming, or any combination of these duties. A high level of skill and expertise is required.

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Outside Salespeople Exemption

- Under the old rules, where an employee spent 20 percent or more of his/her time on non- outside sales duties, then he/she could not be exempt.
- Now the rule is simply that outside sales should be the primary duty of the employee.

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- The employee must still be customarily and regularly engaged away from the employer's place of business in performing this primary duty.
- Work incidental to outside sales calls, including planning, collections and incidental deliveries are outside sales work that can be used to meet the 50 percent test.

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Highly Compensated Employee Exemption

- If you pay an employee 100k a year, up from 65k a year, and the employee performs office or non-manual work that involves one or more of the exempt duties or responsibilities of an administrative, executive, or professional employee, then they can be exempt.

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- If you don't reach the 100k level for the year, you can make up the difference in the next pay period in the following year to make up the difference. For mid-year hires or terminations, the 100k level can be pro-rated.

- This is a safe haven for employers who have highly compensated employees who don't quite fit into the most common exemptions.

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The Salary Test

- Outside sales employees, lawyers and doctors do not need to be paid a salary.

- Computer employees may be paid at or above $27.63 an hour.

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- Owners/executives at 20 percent ownership who meet the test do not have to be paid a salary.
- For the other white collar exemptions, the standard salary test applies, with some changes to the amounts and consequences for mistakes.

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- The salary must be paid without reductions based on the amount of time the employee has worked each week, except for full day absences for personal reasons, full day absences for sickness or disability, if the deduction is made pursuant to a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by sickness or disability, a portion of an initial or last week of employment, an FMLA absence, or for infractions of safety rules of major significance.

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Changes To The Salary Test

- The new salary requirement is $455 a week, up from the proposed $425 a week.
- Deductions may occur for absences of a day or more for suspensions related to workplace conduct rules. The suspensions may be subject to a deduction if they occur pursuant to a written policy applied uniformly to all workers.

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- Isolated or inadvertent deductions will no longer result in lost exemptions.
- If an exemption is lost, then it will be lost only for employees in the same job classification working for the same managers responsible for the improper deductions.

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- If the employer has a written policy prohibiting improper pay deductions and publishes that policy, and then reimburses employees for improper deductions, the employer will not lose the exemption unless it willfully and repeatedly violates the policy and continues to make improper deductions after receiving employee complaints.

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- The new salary rules are not to be construed in an unduly technical manner so as to defeat exemptions.

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Conclusions and Recommendations

- This was to be a bold move by a more management-friendly administration, but political winds stood in the way.
- Make sure your executives have some real power.

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- There is perhaps less pressure to conduct time analyses under a 50 percent rule.
- You will want to revise your policies on suspensions and misconduct.

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- You will want a new policy on deductions from salaries for exempt employees.
- It may be time to correct some problems – a window of opportunity.

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TECHNOLOGY IN THE WORKPLACE AND ITS EFFECT ON EMPLOYMENT LAW

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SECTION C

TECHNOLOGY IN THE WORKPLACE AND ITS EFFECT ON EMPLOYMENT LAW

TECHNOLOGY IN THE WORKPLACE AND ITS EFFECT ON EMPLOYMENT LAW

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I. Cautionary Tales

- Personal Use Of Company Equipment Makes The Funny Papers
- Dean of Harvard Divinity School Resigns Because Of Computer Porn
- Disgruntled Workers Hack Company Computers
- Sexual Harassment Reaches Cyberspace
- "Welcome to the E-mail Combat Zone"

II. E-mail and Computer Technology

- More than half of U.S. companies engage in e-mail monitoring of employees
- 22% have terminated an employee for e-mail abuse
- 75% U.S. companies have written policies on e-mail, but less than half train employees on the policies
- 14% of companies have been ordered by Court or regulatory agency to produce employee e-mail (up 5% since 2001)
- One in 20 companies has defended a workplace lawsuit triggered by e-mail[1]

A. Why Monitor E-mail/Computer Use?

- In 2000, 82% of all employees admit sending/receiving personal e-mails on company computers
- 25% admit surfing the Internet at least one hour per day[2]
- Dow Chemical fired 50, disciplined 200 for widespread employee e-mailing of violent and pornographic material
- Xerox terminated 40 workers for inappropriate internet use
- New York Times fired 22 employees for sending offensive e-mail[3]

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[1] Statistics copywrited by American Management Association, "2003 E-Mail Rules, Policies and Practices Survey", www.amanet.org.
[2] AMA statistics.

B. Other Risks of Employee E-mail/Computer Use

- Blakey v. Continental Airlines, Inc., et al., New Jersey Supreme Court allows claim against employer for anonymous harassing messages posted on work-related electronic "bulletin board"
- Increased e-mail use for union organizing
- Internet allows wide-spread distribution of company trade secrets, confidential information
- E-mails are retrievable and discoverable in litigation

C. Strategies for Limiting Liability

1. Develop company policy on electronic communications

    - Advise employees there is no legitimate expectation of privacy
    - Advise that all e-mail and Internet use is subject to monitoring and search
    - Advise that deleted and stored e-mails and "bookmarks" are subject to monitoring and search
    - Establish internal controls for routine monitoring of electronic transmissions
    - Consider use of filters for incoming/outgoing e-mails
    - Don't forget company-owned laptops

2. Provide training for employees and supervisors on policies

    - Update training regularly
    - Provide written policy to new employees with signed acknowledgement

3. Cover electronic communications in your client's anti-harassment policies

4. Upon termination, disable employee's on-site and remote access to computer technology

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[3] Savage, Marcia, "Keeping Watch -- It's Not 1984, But Tools for Monitoring Employee Web Activity are Catching On, Solution Providers Say," CRN, 10/2/00 Issue 914, www.crn.com.

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5. Limit access to trade secrets and personnel files; use encrypted codes to prevent circulation

III. Visual Surveillance[4]

- Technology allows for "hidden cameras" to monitor employee activity and take the place of supervisors' observation
- Video cameras in public places permissible; may be subject to contract negotiations in union setting
- Employer may incur liability for surveillance in private places if no legitimate and significant business reason
- Beware of audio (see Section IV)

IV. Telephone and Voice Mail

A. Why Monitor Phone/Voice Mail?

- Technology allows widespread dissemination of voice mail messages, including harassing and threatening messages
- To increase productivity, efficiency, customer service

B. Wiretapping, Eavesdropping, and Monitoring of Telephone Conversations

- Subject to Title III, Omnibus Crime Control and Safe Streets Act/Electronic Communications Privacy Act prohibiting intentional interception of wire, oral or electronic communication and intentional use of mechanical or other device to intercept oral communications
- Employees have private right of action to recover actual or liquidated damages of $100 per day or $10,000, whichever is greater, plus punitive damages and attorney's fees
- Prohibits third party from recording a conversation between two or more parties when none of the parties to the conversation are aware of taping
- Exception under 18 USC §2510 when employer intercepts over telephone extension used by employer in the ordinary course of business
  - But see United States v. Murdock, 63 F.3d 1391 (6th Cir. 1995).
- KRS 526.010 defines eavesdropping as "means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the

[4] Bales, Richard A. & Hamilton, Richard O., Jr., "Workplace Investigations in Kentucky," Northern Kentucky Law Review, Vol. 27, No. 2 (citations omitted).

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consent of at least one party thereto via means of an electronic, mechanical, or other device." Intentional use of a device to eavesdrop is Class D felony.

C. Monitoring Telephone and Voice Mail

- Establish policy, train and disseminate
- Comply with federal and state law when conducting monitoring
- Disable on-site and remote access to company telephone and voice mail upon termination

V. **Employee Performance/Productivity Monitoring**[5]: Computers allow monitoring of time spent on a computer, keystrokes per timeframe, keystroke mistakes, customer service phone calls

- Allows employers to obtain quantifiable data on employee performance, as opposed to subjective evaluation
- Can improve efficiency and productivity
- While "Big Brother-ish," permissible when monitoring performed on company property of employees' job functions with legitimate business reasons

[5] See "Workplace Investigations in Kentucky," Northern Kentucky Law Review, *supra* pp. 261-63.

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TITLE VII JUMPS THE SHARK:

RELIGIOUS HARASSMENT AND THE SUPPRESSION OF CONSTITUTIONALLY PROTECTED SPEECH

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SECTION D

TITLE VII JUMPS THE SHARK: RELIGIOUS HARASSMENT AND THE SUPPRESSION OF CONSTITUTIONALLY PROTECTED SPEECH

David A. French[1]

1. What does it mean to "jump the shark?" According to the common cultural definition, the term (derived from a memorable episode of the television show "Happy Days") means that moment – whether in a television series, political campaign or public life – when the peak has been reached, when you know that from now on, there is nothing left but the long, slow slide into oblivion. Arguably, Title VII has reached that moment.

   1.1. Until recent years, Title VII appeared to have irresistible cultural and legal momentum. While racial, sexual and religious harassment had been outlawed for many years, workplace "harassment" as an independent cultural force exploded into the national consciousness in 1991, with Anita Hill's now-famous sexual harassment allegations against Clarence Thomas.

   1.2. In the words of one commentator, "legal filings grew exponentially after the attention given to the issue of sexual harassment during the Clarence Thomas-Anita Hill hearings. Government agencies quickly produced pamphlets that urged victims of sexual harassment to file complaints and often defined "hostile environment far more broadly than the law justified." *See* David E Bernstein, *Hostile Environment Law and the Threat to Freedom of Expression in the Workplace*, 30 OHIO N.U. L. REV. 1, 3 (2004).

   1.3. Yet throughout the explosive growth in hostile environment harassment claims there has always existed a latent defect in the law: as applied to particular situations, Title VII restricted speech and expression protected by the First Amendment of the United States Constitution.

   1.4. Astute defense lawyers first noticed this defect more than a decade ago and defended their employer clients by asserting a First Amendment defense – without success. *See, for example, Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).

   1.5. Throughout the 1990s, commentators from left and right began to debate whether the First Amendment limited the scope and application of Title VII. *See* Richard H. Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1; Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995); Suzanne Sangree, *Title VII Prohibitions Against Hostile Work Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); and

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[1] Mr. French is the author of *A Season for Justice: Defending the Rights of the Christian Home, Church and School* (Broadman & Holman, 2002) and of the Foundation for Individual Rights in Education's *Guide to Free Speech on Campus* (2004) and its *Guide to Religious Liberty on Campus* (2003).

Eugene Volokh, *What Speech Does "Hostile Work Environment" Law Restrict*, 85 GEO. L.J. 627 (1997).

1.6. While private employers were free to regulate workplace speech without constitutional implications, when the government compelled that restriction through state and federal statutes and regulations, the "state action problem" was resolved, and the Constitution applied.

1.7. Courts have echoed the commentators concerns by noting the obvious: "Where pure expression is involved," anti-discrimination law "veers into the territory of the First Amendment." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995). When anti-discrimination laws are "applied to . . . harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech." *Id.* At 596-597; see, also, *Saxe v. State College Area School Dist.*, 240 F.3d 200, 206-209 (3rd Cir. 2001) (Quoting *DeAngelis* and invalidating anti-harassment regulations in public high school on the grounds of overbreadth and vagueness).

1.8. While litigants continue to fail in their effort to erect a First Amendment shield around alleged harassing behavior (*See, e.g., Baty v. Willamette Indus.*, 985 F. Supp. 987 (D. Kan. 1997); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993); *Berman v. Wash. Times Corp.*, No. 92-2738, 1994 U.S. Dist. LEXIS 16476 (D.D.C. Sept. 23, 1994)) the defense will become increasingly viable because of the increase in religious harassment claims and the ever-widening breadth of state and local anti-discrimination statutes.

2. Why do religious harassment claims represent an opportunity to finally apply the First Amendment to anti-discrimination statutes? The reason relates not to the *theoretical* conflict between the First Amendment and the relevant statutes but instead to the *practical* application of the statutes to real-world workplace conflict.

2.1. Eugene Volokh accurately notes, "Religious harassment law is structurally almost identical to racial and sexual harassment law: both punish speech when it's 'severe or pervasive' enough to create a hostile, abusive or offensive work environment based on religion, race, or sex, for the plaintiff and for a reasonable person. And cases dealing with each body of law generally borrow heavily from each other. What's more, both religious harassment law and racial and sexual harassment law sometimes punish speech that's at the core of First Amendment protection, and sometimes punish speech that is constitutionally protected." Eugene Volokh, *Freedom of Speech, Religious Harassment Law, and Religious Accomodation*, 33 LOY. U. CHI. L.J. 57 (Fall, 2001).

2.2. The Sixth Circuit, in fact, applies an identical test to workplace harassment claims: "The elements and burden of proof are the same, regardless of the discrimination context in which the claim arises . . . In order to establish a prima facie case of hostile work environment based on either race or religion, [the plaintiff] must establish the following five elements: (1) He was a member of a protected class; (2) He was subjected to unwelcome racial and/or religious harassment; (3) The harassment was based on race or religion; (4) The

harassment had the effect of unreasonably interfering with [the plaintiff's] work performance by creating an intimidating, hostile or offensive work environment; and (5) The existence of employer liability." *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999).

2.3. Yet these similarities are somewhat superficial. While sexual harassment and racial harassment claims can be and most certainly are made in response to "offensive" speech that is also at the "core" of constitutional protection (such as offensive political statements in favor of the Ku Klux Klan or against workplace equality for women), the probability that harassment claims will restrict "core" speech is much higher in the religious harassment context.

2.3.1. A religious identity, unlike a racial or sexual identity is often idea or belief-driven. In other words, unlike sex or race, a person can belong to a protected religious class because of the beliefs that they hold – beliefs that are subject to change.

2.3.2. Further, because of the increasing conflict between Christian conservatives and the gay rights movement (especially over issues of education, marriage and children), employers are faced with the unpleasant prospect of clashes between two members of equally protected classes (if your employer is in a state or city with a statute that prohibits discrimination on the basis of sexual orientation). What is an employer to do if employee A argues that employee B's advocacy for gay marriage and gay adoption rights creates a hostile environment for employee A, and employee B argues that employee A's advocacy for the Federal Marriage Amendment and explanation of Biblical passages prohibiting homosexual sexual activity create a hostile environment for employee B?

2.3.3. If there is any doubt that religious harassment doctrine can suppress protected speech, consider the following examples:

2.3.3.1. *Brown Transp. Corp. v. Commonwealth*, 578 A.2d 555 (Pa. Commw. Ct. 1990) (holding that religiously themed newsletter articles and Bible verses on paychecks created a hostile work environment).

2.3.3.2. *Hilsman v. Runyon*, Appeal Nos. 01945686, 01950499, 1995 WL 217486 (E.E.O.C. Mar. 31, 1995)(concluding that a claim that an employer "permitted the daily broadcast of prayers over the public address system" over the span of a year was "sufficient to allege the existence of a hostile working environment predicated on religious discrimination")

2.3.3.3. *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995) (holding that an employer appropriately terminated plaintiff who refused to conceal a graphic anti-abortion button and that refusal to fire the plaintiff would place an undue hardship on the company by creating a hostile environment for the plaintiff's co-workers).

2.3.3.4. *In the Matter of Sapp's Realty*, No. 11-83 (BOLI 1985) (holding by Oregon Unemployment Commission that plaintiff had been religiously

harassed, not by derogatory comments, but instead by continual religious discussions with a Seventh-Day Adventist co-worker).

2.3.3.5. Employment law experts advise employers to take a hard-line stance against religious proselytizing. See Dean J. Schaner & Melissa M. Erlemeier, *When Faith and Work Collide: Defining Standards for Religious Harassment in the Workplace*, EMPLOYEE REL. L.J., Summer 1995 at 7, 26 ("repeated, unwanted 'preaching' episodes [by a Christian employee] that offend coworkers and adversely affect their working conditions" are a "bright line example" of religious harassment); Mark A. Spognardi & Staci L. Ketay, *In the Lion's Den: Religious Accomodation and Harassment in the Workplace*, EMPLOYEE REL. L.J., Spring 2000, at 7, 21 ("[A]n employer must be vigilant in guarding against the creation of a hostile environment as a result of the unsolicited and/or unwelcome proselytizing of religious employees.") These examples are cited in Eugene Volokh, *Freedom of Speech, Religious Harassment Law, and Religious Accommodation*, 33 LOY. U. CHI. L.J. 57, 60 fn 12 (2001).

2.3.4. No one can credibly argue that proselytizing or wearing religiously significant buttons or discussing religious morality or writing religiously-themed articles is not "core" speech or expression protected by the First Amendment. Nor – since the prohibitions in question are targeted specifically at religious expression – are they content and/or viewpoint-neutral time, place and manner regulations. In almost any other context, state regulation of this kind would be flatly unconstitutional.

2.3.5. While it may initially appear that an employer would be well-served by issuing a policy that either bans or dramatically restricts religiously-themed workplace conversations, in reality, such a ban would have both practical and legal problems.

2.3.5.1. First, because a ban strikes at the kind of speech and expression that is most dear to vast segments of the American population, it is effectively unenforceable.

2.3.5.1.1. Take, for example, the controversy over the recent hit movie *The Passion of the Christ*. It is safe to say that – for approximately a week – workplace conversations were dominated by discussions about the movie and about difficult and challenging issues surrounding the authenticity of Gospel accounts and historic anti-Semitism in the Catholic and protestant churches.

2.3.5.1.2. More significantly, the events of September 11, 2001, caused many Americans to examine the teachings of Islam for the first time and led to countless workplace discussions of the "religion of peace."

2.3.5.1.3. Disputes regarding gay rights and "diversity" inevitably lead to workplace discussions and conflict. In the last five years, I have counseled more than a dozen individuals who had religious objections to workplace diversity training programs – especially programs that advocated for greater legal protection for and societal acceptance of gay, lesbian, bisexual and transgendered individuals.

2.3.5.2. Second, such a ban may very well be illegal itself – an illegal failure to accommodate religious practice. The combination of Title VII's prohibition against religious harassment and its special protection for religious practice can place an employer in a nearly impossible predicament.

2.3.5.2.1. It is blackletter law that an employer has an obligation to accommodate employee religious practice so long as such accommodation does not result in undue hardship. As the Supreme Court has further explained in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) and *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), Title VII does not create an absolute requirement for employers to accommodate religious practices of their employees. Far from it, even a *de minimis* burden on an employer can be "undue" and any accommodation which causes an employer to incur financial cost has become virtually a *per se* undue burden.

2.3.5.2.2. While the burden may merely be *de minimis* to exempt an employer from his accommodation requirement, it still must be real. Mere theories or assumptions will not suffice. *See* Julia Spoor, *Go Tell It On the Mountain, But Keep It Out of the Office, Religious Harassment in the Workplace*, 31 VAL. U. L.REV. 971, 987 (Summer, 1997) and cases cited therein.

2.3.5.3. The requirement that an "undue hardship" be more than merely theoretical has resulted in a successful religious discrimination claim from the termination of a vocally religious employee. In *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), the plaintiff, a Christian, expressed his faith openly and frequently in the office. He hosted prayer meetings in his office, he encouraged prayer during departmental meetings, he displayed religious items in his office, and he frequently referred to Bible passages regarding his work ethic. His employer reprimanded the plaintiff and ordered him to remove all religious items from his office, including the Bible on his desk. The plaintiff was later fired.

2.3.5.3.1. The plaintiff sued, alleging religious discrimination. In response, the employer argued that the plaintiff's religious activities constituted an undue hardship because they had the potential to cause a division in the staff. Although the employer offered witnesses who testified to a separation on staff between

born-again Christians and others, these witnesses could not testify that the separation caused a disruption in the work environment. The plaintiff had been reprimanded out of a desire to *avoid* any such disruption. *Id.*, at 656-657.

2.3.5.3.2. Since the employer was unable to show any *actual* disruption at work, and the decision not to accommodate the employee's religious practices was made on the basis of speculation, the Court found for the employee and reversed the District Court's dismissal of the case. *Id.*

2.3.6. As a consequence of practical reality and legal doctrine, the excessively-cautious prophylactic remedies so favored by employment law specialists may not only be inapplicable to religious discourse at work, they may also actually expose the employer to liability for failure to accommodate religious practice.

3. Is there a practical solution to the constitutional and legal quandary of religious harassment and religious accommodation?

3.1. As a practical matter, any company policies that restrict religious expression should be tied to evidence of *actual* workplace disruption and *actual* workplace complaints.

3.2. By tying religious harassment problems to actual workplace disruption, employers can avoid liability for religious discrimination claims based on a failure to accommodate (such as the claim in *Brown v. Polk*). Moreover, employers will bow to the reality that employees will continue – despite prophylactic company policy – to discuss those issues that matter the most, regardless of their religious content.

3.3. The practical solution, however, does not solve the long-term legal dilemma: How does anti-discrimination law prevent genuine workplace abuse at the same time that it respects longstanding First Amendment doctrine that prevents government suppression of "core" speech?

3.4. Perhaps the answer lies in the Supreme Court's decision in *Virginia v. Black*, 123 S.Ct. 1536 (2003), a recent decision that – on its face – has absolutely nothing to do with employment discrimination.

3.4.1. In *Black*, the Court upheld a Virginia statute that criminalized cross burnings that were intended to "intimidate a person or group of persons." In upholding the statute, the Court held that the statute fell within an established category of unprotected speech – threats made with the "intent of placing the victim in fear of bodily harm or death." *Id.*, at 1548. The Court also noted that the prohibition was not aimed at a particular message, nor did it single out "specific disfavored topics." Instead, the Court found that cross-burning, as a matter of fact, was a "particularly virulent form of intimidation" with a "long and pernicious history of impending violence." *Id.*, at 1549.

3.4.2. The Court, however, refused to condone a provision of the statute that held that cross-burning was *prima facie* evidence of intent to intimidate. Id., at 1550. As a result, future convictions under the statute would require actual evidence of *intent* to "intimidate."

3.5. As one commentator notes, perhaps it is the question of intent that can salvage Title VII from overreach and from ultimate constitutional oblivion. *See generally*, Robert Austin Ruescher, *Saving Title VII: Using Intent to Distinguish Harassment From Expression*, 23 REV. LITIG. 349 (Spring, 2004). A court (and an employer, when determining whether an employee has violated an anti-harassment policy) should seek to determine whether an employee had an actual intent to harass and to create unacceptable working conditions for other employees or whether that employee was seeking – however imperfectly – to engage his or her colleagues in honest dialogue over admittedly sensitive topics. In professor Ruescher's words, "[I]mposing a limited intent requirement lets the First Amendment trump harassment when it should: in cases when the speech is meant to express a protected idea of political, social or religious importance. It leaves the bulk of Title VII speech where it belongs – in the category of low-value speech – so as not to imped Title VII's goal of promoting equality by eliminating employment discrimination."

3.6. This solution is not only constitutionally appropriate, it is culturally correct. It cannot be contradicted that this nation was founded, in part, by individuals who were seeking the freedom to express what they viewed as the most important part of themselves – their belief in God as they understood him. It would be tragic if, ultimately, that freedom was stifled at the workplace – the very place where many of us spend the majority of our adult lives – by the banality of litigation-avoidance policies. The intent inquiry may be more difficult to administer than blanket bans, but it alone can begin to harmonize the seemingly contradictory impulses of anti-discrimination law's quest for equality and the First Amendment's quest for freedom.

4. Why has Title VII "jumped the shark?" Because in its present incarnation it seeks to create career equality at the expense of fundamental constitutional and cultural values. As Americans become increasingly aware of government-imposed prohibitions against expression of the thoughts and ideas that are most precious to them, Title VII will steadily lose its legitimacy. But unlike the original shark, this shark can be unjumped. If courts and employers seek to do the hard work of determining intent rather than taking the easy path of oppressive prevention, then Title VII can have new life and new legitimacy as an instrument of fundamentally American values.

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Speech

*1 HOSTILE ENVIRONMENT LAW AND THE THREAT TO FREEDOM OF EXPRESSION IN THE WORKPLACE

David E. Bernstein [FNa1]

Jerold Mackenzie worked at Miller Brewing Company for nineteen years, eventually achieving executive status and a $95,000 salary. One day, he made the simple but career-ending mistake of recounting the previous night's episode of the sitcom Seinfeld to his co-worker Patricia Best. In the episode, Jerry Seinfeld cannot remember the name of the woman he is dating, but he does recall that she said kids teased her as a child because her name rhymes with a part of the female anatomy. Jerry and his friend George brainstorm, but the best guesses they can come up with are the unlikely "Mulva" and "Gipple." Jerry's girlfriend breaks up with him when she realizes he doesn't know her name. As she leaves him forever, Jerry finally remembers the elusive rhyming name and calls after her, "Delores!"

Mackenzie related the details of this episode to Best, but she told Mackenzie she did not get the joke. To clarify the somewhat off-color punch line, Mackenzie gave her a copy of a dictionary page on which the word "clitoris" was highlighted. Best-who was apparently known to use salty language at work herself-complained to Miller Brewing officials of sexual harassment, and Miller Brewing fired Mackenzie for "unacceptable managerial performance." Mackenzie responded with a lawsuit alleging wrongful termination and other wrongs. At trial, Miller Brewing officials acknowledged that the direct cause of Mackenzie's termination was the Seinfeld incident and the ensuing fear of a sexual harassment lawsuit. The jury awarded Mackenzie $26.6 million, including $1.5 million in punitive damages against Best for *2 interfering with Mackenzie's employment relationship with Miller Brewing. The verdict was later overturned on appeal because Wisconsin law does not have a law banning "wrongful termination." [FN1]

Miller Brewing's firing of Mackenzie may seem like an absurd overreaction, but it was very much consistent with the counsel of employment law experts. They advise employers to enforce a zero-tolerance policy for any type of sex- related remarks by employees, especially those made by supervisors or executives like Mackenzie. Consultant Beau Crivello suggests, "A rule of thumb is that if you can't say it or do it in a house of worship or in front of children, then don't say it or do it at work." [FN2] The rather startling message from the experts is that speech generally protected from government sanction loses that protection the moment it enters the workplace. Frank Carillo, President of Executive Communications Group, warns that just because you hear something in the media "doesn't mean you can say it [at work]. The media has a certain license to say things that the average person can't." [FN3] Consultant Monica Ballard concurs: "'People think that if they hear something on TV or the radio, they can say it at work. But that, of course, is not the case.'" [FN4] Jerold Mackenzie, among others, would concur.

The roots of all of this censorship lie in the "hostile environment" component of anti-discrimination law. Beginning in the late 1970s, feminist legal scholars argued that the ban on employment discrimination against women should include a ban on sexual harassment. [FN5] Sexual harassment, they argued, includes the act of subjecting women to a "hostile work environment" by exposing them to offensive speech. The speech need not be directed at any individual woman to constitute harassment. For it to qualify as harassment of a woman co-worker, it is enough that the speech could reasonably be construed as hostile to women generally. Furthermore, the determination of whether a hostile environment existed does not depend on whether anyone intended to make any or all of their female co-workers feel unwelcome. An innocently offered comment can as easily be charged with creating a hostile environment as a deliberate slur or threat.

The feminists achieved a great victory when the Supreme Court held in 1986 that an illegal hostile work environment exists when "the workplace is *3 permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's

employment."' [FN6] Thousands of lawsuits of varying degrees of legal merit followed. Legal filings grew exponentially after the attention given to the issue of sexual harassment during the Clarence Thomas-Anita Hill hearings. Government agencies quickly produced pamphlets that urged victims of sexual harassment to file complaints and often defined "hostile environment" far more broadly than the law justified.

Many employers responded to the growth of hostile environment law by attempting to regulate the potentially offensive speech of their employees. [FN7] The result was an implicit, but nonetheless chilling, nationwide workplace speech code that banned any speech that could offend women. The Supreme Court, perhaps realizing that it had opened a veritable Pandora's box of litigation, has recently emphasized the commonsense notion that sporadic abusive language, gender-related jokes, and occasional teasing is not enough to meet the legal test for a hostile environment. [FN8] Prudent employers still feel compelled, however, to enforce speech guidelines that go well beyond what the letter of Supreme Court precedent requires.

There are several reasons for this caution. First, as four Supreme Court justices have noted in a related context, [FN9] the fuzzy guidance provided by hostile environment precedents simply does not give employers a clear indication of what they must do to remain within the confines of the law. For example, while a single offensive joke will not create liability, some courts have held that a pattern of jokes by different employees can create a hostile environment. [FN10] The safest route for employers, then, is to ban any banter with sexual connotations, lest the aggregation of speech by different employees constitutes a hostile environment. Better to be safe (if silent) than sorry.

Second, and relatedly, the severe and pervasive liability standard is sufficiently vague, good counsel sufficiently expensive, and trial judges and juries sufficiently unpredictable that employers feel compelled to settle even highly dubious claims to avoid the risks and costs of litigation. After all, juries ***4*** have awarded tens of thousands of dollars to plaintiffs in cases appellate courts later dismissed. [FN11] While clearly meritless claims rarely survive federal appellate review, no sensible attorney would advise his clients to depend on appellate courts-which can only overturn "clearly erroneous" jury verdicts-to save them from unjustified claims. This is especially true because fighting a claim to the appellate level can cost hundreds of thousands of dollars, with the costs disproportionately borne by the defendant. Victory may be sweet, but saving one's company six-digit sums by avoiding litigation entirely is even sweeter. Risk-averse employers will settle pending cases, and prevent future lawsuits by cracking down on potentially offensive speech.

Third, disgruntled employees or former employees can impose large costs on employers without going through the effort and expense of filing a lawsuit simply by complaining of harassment to the Equal Employment Opportunity Commission (EEOC). The EEOC is legally required to investigate every complaint of sex discrimination, no matter how weak or unconvincing a complaint seems. Even a trivial complaint can lead to a broad investigation of the underlying claim, costing the employer thousands of dollars in legal fees and lost time. And petty complaints are actually encouraged by official government pronouncements that propagate overly broad definitions of what constitutes illegal sexual harassment. For example, an official United States Department of Labor pamphlet stated that harassment included cases where a co-worker "made sexual jokes or said sexual things that you didn't like, so long as the jokes made it hard to work." [FN12] A very sensitive or very religious individual may find that any sex-oriented remarks make it hard to work. That individual is encouraged by government publications to complain of sexual harassment the first time a co-worker tells a dirty joke. The offended worker will likely lose, but not before her employer wastes resources in its defense.

Fourth, many states and localities have their own anti-discrimination laws with standards for hostile environment liability that are sometimes significantly broader than federal law's requirement of severe and pervasive harassment. For example, a New Jersey court held that under state law, employees who forwarded one list of crude jokes to their colleagues via e-mail had created an illegal "offensive work environment," even though this act would unlikely create liability under federal law. [FN13] Even if state and local law are no broader than federal law, employers are at a special disadvantage when a ***5*** hostile environment complaint is filed under state or local law because in that circumstance, unlike in the federal system, administrative tribunals often make the initial ruling on hostile environment claims. Because these administrative bodies are part of executive branch agencies charged specifically with enforcing the relevant anti-discrimination laws, they naturally tend to be more sympathetic to discrimination claims and less sensitive to free speech concerns than are federal courts, which have broader responsibilities and are part of the judicial branch of government.

Hostile environment law has spread well beyond the sex discrimination context with claims

successfully prosecuted for race, religion, and national origin harassment. One court, for example, found that publishing religious articles in a company newsletter and printing Christian-themed verses on company paychecks constituted "harassment" of a Jewish employee. [FN14] Another court found that an employee who hung in her cubicle pictures of the Ayatollah Khomeini and of Iranian protestors burning the American flag was guilty of national origin harassment against an Iranian American employee who happened to see the display. [FN15] Court rulings and EEOC guidelines suggest that religious harassment includes both a religious employee proselytizing a co-worker and a secular employee ridiculing a religious co- worker for the latter's beliefs. [FN16]

As in the sex discrimination context, a hostile environment claim for race discrimination and other types of workplace discrimination can arise even when the speech in question was not directed at the plaintiff. For example, the EEOC charged a company with national origin harassment after a Japanese American employee filed a complaint about the firm's advertising campaign. Some of the company's ads featured images of a samurai, a kabuki, and of sumo wrestling to represent the firm's Japanese competitors. The employee also charged that officials of the company called their Japanese competitors "Japs" and "slant- eyes." The case was eventually settled for an undisclosed amount. [FN17]

Standards for racial and ethnic harassment are, at least, as vague as they are in the sexual harassment context, which leads to unpredictable jury verdicts. Even highly questionable claims can result in large verdicts, giving employers strong incentives to heavily regulate workplace speech as a preventative measure.

***6** One especially meritless claim that led to a six-figure verdict involved Allen Fruge, a white Department of Energy (DOE) employee based in Texas. Fruge unwittingly spawned a harassment suit when he followed up a southeastern Texas training session with a bit of self-deprecating humor. He sent several of his colleagues, who had attended the session with him, gag certificates anointing each of them as an honorary "Coon Ass" [FN18]-usually spelled "coonass"-a mildly derogatory slang term for a Cajun. The certificate stated that "[y]ou are to sing, dance, and tell jokes and eat boudin, cracklins, gumbo, crawfish etouffe and just about anything else." The joke stemmed from the fact that southeastern Texas, the training session location, has a large Cajun population, including Fruge himself.

An African American recipient of a certificate, Sherry Reid, Chief of the Nuclear and Fossil Branch of the DOE in Washington, D.C., apparently missed the joke and complained to her supervisors that Fruge had called her a "coon." Fruge sent Reid a formal (and humble) letter of apology for the inadvertent offense, and explained what "Coon Ass" actually meant. Reid nevertheless remained convinced that "Coon Ass" was a racial pejorative, and demanded that Fruge be fired. DOE supervisors declined to fire Fruge, but they did send him to "diversity training." They also reminded Reid that the certificate had been meant as a joke, that Fruge had meant no offense, that "Coon Ass" is slang for Cajun, and that Fruge had sent the certificates to people of various races and ethnicities, so he clearly was not targeting African Americans. Reid nevertheless sued the DOE, claiming that she had been subjected to a racial epithet that had created a hostile environment, a situation made worse by the DOE's failure to fire Fruge.

Reid's case was seemingly frivolous. The linguistics expert that her attorney hired was unable to present evidence that "Coon Ass" meant anything but "Cajun," or that the phrase had any racist origins. And Reid presented no evidence that Fruge had any discriminatory intent when he sent the certificate to her. Moreover, even if "Coon Ass" had been a racial epithet, a single instance of being given a joke certificate, even one containing a racial epithet, by a non-supervisory colleague who works 1,200 miles away does not seem to remotely satisfy the legal requirement that harassment must be "severe and pervasive" for it to create hostile environment liability. Nevertheless, a federal district court allowed the case to go to trial, [FN19] and the jury awarded Reid $120,000, plus another $100,000 in attorney's fees. [FN20] The DOE settled the case before its appeal could be heard for a sum very close to the jury award.

***7** Even if a disgruntled worker decides not to take a case all the way to a jury, he can still impose costs on his boss or his ex-boss by alleging that he was subjected to a hostile environment, even if he has scant supporting evidence. For example, a gay man named John Dill put his former employer, CPA Referral, in a pickle when he filed a complaint of employment discrimination with the Seattle Human Rights Department (SHRD). Dill claimed that his ex-boss, Bryan Griggs, had created a "hostile work environment" for homosexuals in violation of a local anti-discrimination ordinance. According to Dill, Griggs' offensive behavior consisted of playing conservative and Christian radio shows that Dill felt conveyed an anti-gay message, posting a letter from a congresswoman in which

she endorsed the military's policy of excluding gays, and having a note on his desk reminding himself to lobby against allowing gays to adopt children. Dill acknowledged that Griggs did not know he was gay and that Dill never told Griggs that any of Griggs' actions offended or upset him.
Dill had been employed by CPA Referral the previous fall, but Griggs had laid him off when business slowed. Griggs allowed Dill to come back to work as a volunteer, promising him the first available paid job. Much to Griggs' surprise, Dill suddenly tendered his resignation in a letter stating that "I feel I must 'come out' and stop playing 'don't ask, don't tell.'" [FN21] In his letter, Dill explained that he was leaving CPA Referral for "a supportive environment." [FN22] He then filed his complaint, and the SHRD launched a full investigation of CPA Referral.
The befuddled Griggs told the SHRD that he listened to the conservative talk shows to make sure they played the advertising he had paid for, and that he posted many letters from politicians to encourage political participation among his employees. Another gay employee signed an affidavit swearing that he had never perceived any anti-gay animus in the workplace. There seemed to have been no evidence that Dill suffered anti-gay discrimination, and a cynic might surmise that Dill filed the complaint mainly to get revenge on Griggs for having fired him. Dill eventually withdrew his complaint, but only after Griggs had spent thousands of dollars on legal fees defending himself and his company. [FN23] If Dill's goal was to punish Griggs, he managed to achieve it even without being formally vindicated by a court.
Most hostile environment employment cases have focused on whether the behavior at issue crossed the line from merely annoying or offensive conduct ***8*** into conduct sufficiently severe and pervasive enough to meet the law's definition of creating a hostile environment. A few private employers, however, have unsuccessfully tried to claim First Amendment immunity from speech-based hostile environment claims.
The first reported hostile environment lawsuit in which the defendant invoked a free speech defense involved Lois Robinson, a welder at a Florida shipyard, who brought a case in federal court alleging that her employer, Jacksonville Shipyards, countenanced a hostile environment by permitting photos of nude and partially nude women to be displayed in various areas of her workplace. [FN24] She also complained about sexual and discriminatory remarks made in her presence about her and other women and about indecent and obscene graffiti directed at her. [FN25] Jacksonville Shipyards responded that the First Amendment protected at least some of this speech and asked the judge to prohibit Robinson from relying upon constitutionally protected speech to support her hostile environment claim.
The judge denied that the First Amendment protects workplace speech from employment discrimination law. [FN26] The judge then issued an incredibly broad injunction that banned from the Jacksonville Shipyards' workplace not only pornography, but also any "sexually suggestive" material. [FN27] Employees on lunch break could no longer read Cosmopolitan magazine or Danielle Steel novels, or listen to Eminem or Britney Spears on a Walkman.
The court found that the First Amendment did not protect the workplace speech at issue for several reasons, none of which are persuasive. First, the court asserted that the company was not expressing itself through the offensive expression of its employees. What the court failed to discern was that because the company was being held liable for the speech of its employees, the relevant question was whether the employees' speech was constitutionally protected. There is no doubt that the Constitution protects such speech from government regulation, even when the speech conflicts with a broader regulatory scheme like hostile environment law. [FN28] The court failed to recognize that employers may assert a First Amendment defense on behalf of their employees and may have their own First Amendment right to refuse to prohibit workplace speech. [FN29]
9 Next, the court opined that the nude pinups and expressions of hostility toward women in the shipyard were not protected speech, but were discriminatory conduct in the form of creation of a hostile work environment. Here, the court was correct insofar as it pointed out that speech can sometimes be considered conduct-for example, threats, intimidation, libel, and other forms of misconduct engaged in through speech do not receive First Amendment protection. Similarly, "quid pro quo" harassment (e.g., "sleep with me or else!") is not protected by the First Amendment. Arguably, the government may even regulate as action harassing speech targeted at a particular individual for discriminatory reasons. But merely labeling speech "discrimination," as the Robinson court did, does not make it discrimination. Posting a nonobscene pinup or expressing a politically incorrect opinion is protected outside the workplace, and the mere change in venue from the sidewalk to the office cannot convert such protected speech into unprotected discriminatory action. Given that most adults spend much of their time in the workplace and given that almost any speech

beyond the most banal is likely to offend someone, allowing the government to regulate any offensive speech that occurs in the workplace would invite an incredibly broad assault on the freedom of speech.

The Robinson court next contended that regulation of offensive workplace speech was a permissible regulation of the time, place, and manner of speech. The government can regulate these aspects of speech, such as restricting parades and protests to certain times of the day or limiting the volume of a megaphone in a residential area. But time, place, and manner restrictions can only be valid if they do not regulate speech based on the speaker's viewpoint. For example, a rule disallowing the use of megaphones during protests in residential neighborhoods may be valid, but a rule forbidding megaphones only when they are used to criticize affirmative action would be illicit viewpoint discrimination. Hostile environment law clearly discriminates based on viewpoint. [FN30] For example, hostile environment law potentially penalizes the expression of the viewpoint that "women are stupid and incapable of being physicists," but not that "women are brilliant and make excellent physicists." Therefore, hostile environment law cannot be considered an appropriate time, place, and manner regulation.

Finally, the court insisted that plaintiff Robinson was a "captive audience" in the shipyard and therefore the First Amendment did not protect speech that offended her. Yet, we are all at times captive to expression we find offensive in the sense that we must take action to avoid seeing or hearing it. Nevertheless, that speech is still constitutionally protected. Of course, avoiding some types of offensive speech is relatively easy while avoiding ***10** offensive workplace speech by finding new employment can be difficult and costly. But if courts accepted Robinson's view that the First Amendment does not protect offensive speech that is very difficult or costly to avoid, much of modern First Amendment law would need to be discarded. For example, contrary to Supreme Court precedent, strikers would not have the right to picket outside their workplace, and anti-abortion protestors would not have the right to assemble outside abortion clinics. [FN31] The Supreme Court has even protected the right of an individual to wear a jacket displaying the phrase "Fuck the Draft" inside a courthouse where many people who will see the profanity are truly a "captive audience" in that they are legally required to be there. [FN32] If offensive speech is thus protected when avoiding it would require committing a crime by refusing to show up in court when required, surely it must also be protected when avoiding it would only involve switching jobs. Even if the captive audience rationale could be used to justify speech restrictions in the workplace, any such restrictions would have to be viewpoint-neutral, which, as noted above, hostile environment law's restrictions are not.

Despite the seemingly fatal weaknesses in Robinson's First Amendment analysis, many other courts have relied on it in rejecting First Amendment defenses in hostile environment cases. [FN33] Most commonly in cases favorably citing Robinson, the plaintiff had been subjected to a pattern of severe individualized harassment, and the First Amendment defense applied only to a fraction of the behavior that allegedly created a hostile environment. However, nothing in Robinson limits its application to cases in which constitutionally protected expression is only a minor element. One court, in fact, cited Robinson favorably in a case where the plaintiff's sole allegation was that her opponents for a union position had circulated a satirical flyer during an election campaign. [FN34] The satire featured a picture of the plaintiff's head superimposed over an anonymous woman's naked body. This was tasteless, to be sure, but it was also political speech clearly protected by the First Amendment, as indicated by a landmark Supreme Court opinion protecting an even more offensive satire of Jerry Falwell that appeared in Hustler magazine. [FN35]

***11** Just as the injunction granted in Robinson created an unprecedented prior restraint (proactively censoring speech before it is spoken) on sexist speech, the California Supreme Court recently upheld an unprecedented prior restraint on racist speech. A jury had found that an Avis Rent-A-Car outlet had engaged in employment discrimination in part by allowing an employee to repeatedly utter racial epithets targeted at the Latino plaintiffs. Besides awarding damages, the trial court issued an injunction prohibiting Avis employees "from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of [Avis]." [FN36] An appellate court limited the injunction to the workplace and attempted to narrow the scope of the injunction via a proposed list of specific words that the district court could ban. Not satisfied that these modifications made the injunction comport with the First Amendment, Avis appealed again.

A 4-3 majority of the California Supreme Court upheld the appellate court's decision. The three dissenters argued that the injunction amounted to a prior restraint on constitutionally protected speech. They pointed out that U.S. Supreme Court precedent showed that prior restraints are not

allowed for speech that might, but won't necessarily, be illegal. The reason for this rule is that such restraints have a chilling effect on what could have been legal, protected speech. For example, a single future pejorative use of a racial epithet, although banned by the injunction, cannot be the severe and pervasive harassment required to create an illegal hostile work environment; in some contexts it might be severe, but a single comment cannot be "pervasive." For that matter, racial epithets can be uttered in contexts that do not evince hostility. For example, epithets could be mentioned during "diversity education" or could be used ironically, yet these uses of the epithets would be banned by the injunction's prior restraint. Justice Clarence Thomas urged his colleagues to hear Avis's appeal to the U. S. Supreme Court because of the "troubling free speech issues" raised by the case, [FN37] but he was not successful and the injunction stood.

The ultimate outcome of the battle between the First Amendment and the speech-regulating aspects of hostile environment law thus remains unresolved and will remain that way until the U. S. Supreme Court chooses to resolve the issue. No court has yet held directly that the First Amendment prohibits workplace speech from being the basis of Title VII liability if that speech would be protected in other contexts. However, four Supreme Court justices have suggested that hostile environment law sometimes violates the First ***12** Amendment, [FN38] and other federal courts have expressed alarm at hostile environment law's growing conflict with the freedom of speech. [FN39]

Federal courts have also been sympathetic to First Amendment objections to prophylactic measures ordered by state and local governments to avoid creating a hostile environment in the public sector workplace. For example, courts have held that prohibiting prisoners and on-duty firefighters from reading Playboy unconstitutionally restricts expression, despite claims that allowing these pornographic magazines to be read creates a hostile work environment for female prison guards and female firefighters. [FN40]

In the absence of definitive Supreme Court guidance, however, hostile environment law marches on. In February 2002, for example, Anchorage, Alaska, fearing lawsuits by female firefighters, banned from its firehouse not only Playboy and other pornographic magazines, but also the slightly racy men's magazine Maxim. [FN41] And the law continues to grow. The latest trend in this expansion is employees suing employers for not preventing hostile environments allegedly created by patrons. For example, the EEOC has declared that twelve Minneapolis librarians were subjected to a sexually hostile work environment when they were exposed to pornography accessed on the Internet by library patrons. If courts agree with the EEOC, all libraries, public and private, will need to ban Internet access to "offensive" sites or face hostile environment liability. [FN42]

There are signs that the public is growing impatient with the corrosive effect of hostile environment law on freedom of expression. One of the more amusing manifestations of this disquiet is an episode of the animated series South Park. After a visit from the "Sexual Harassment Panda," the children of South Park begin to sue each other for harassment over minor insults. Eventually, the children pursue deeper pockets: the school where these insults take place. The school is bankrupted, while Kyle's attorney father, who represents the plaintiffs, becomes wealthy. This leads to the following exchange:

Father: "You see, son, we live in a liberal democratic society. The Democrats [sic-it was a mostly Republican EEOC and Supreme Court] created sexual harassment law, which tells ***13** us what we can and cannot say in the workplace, and what we can and cannot do in the workplace."

Kyle: "But isn't that fascism?"

Father: "No, because we don't call it fascism."

[FNa1]. Professor, George Mason University School of Law. This essay is based on remarks presented in a lecture at Ohio Northern University on April 10, 2003, sponsored by the Faculty Enrichment Committee and the Federalist Society and is drawn from Chapter 2 of David E. Bernstein, You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws (2003). The Law and Economics Center at George Mason University School of Law provided helpful funding.

[FN1]. Mackenzie v. Miller Brewing Co., 623 N.W.2d 739, 750 (Wis. 2001).

[FN2]. Bernard J. Wolfson, Office Clinton Jokes Could Lead to Lawsuits, Orange County Reg. (Cal.), Oct. 5, 1998, at A1.

[FN3]. Kathleen M. Moore, Workers' Talk Dwells on Case, But Discreetly Sensitive Issue at Water Cooler, Bergen Rec., Feb. 2, 1998, at A6.

[FN4]. Yochi Dreazen, Talking Dirty; In Our Brazen Era of Monica and Viagra, What Subjects Should Be Off Limits at Work?, Fla. Times-Union, Aug 16, 1998, at F1.

[FN5]. The classic text is Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979).

[FN6]. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 67 (1986)).

[FN7]. See generally Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio St. L.J. 481, 539 (1991); Jonathan Rauch, Offices and Gentlemen, New Republic, June 23, 1997, at 22; Jeffrey Rosen, In Defense of Gender-Blindness, New Republic, June 29, 1998, at 29; Eugene Volokh, What Speech Does "Hostile Work Environment" Harassment Law Restrict?, 85 Geo. L.J. 627, 637 (1997).

[FN8]. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[FN9]. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 665, 682 (1999) (Kennedy, J., dissenting).

[FN10]. E.g., Cardin v. Via Tropical Fruits, Inc., No. 88-14201, 1993 U.S. Dist. LEXIS 16302, at *24-26 (S.D. Fla. July 9, 1993).

[FN11]. See, e.g., Black v. Zaring Homes, Inc., 104 F.3d 822, 823 (6th Cir. 1997) (reversing jury award of $250,000); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (reversing jury award of $25,000).

[FN12]. United States Dep't of Labor, Sexual Harassment: Know Your Rights (1994) (discussed in Volokh, supra note 7, at 633).

[FN13]. Olivant v. Dep't of Envtl. Prot., No. CSV 12695-95, 1999 WL 430770 (N.J. Admin. Ct. Apr. 12, 1999).

[FN14]. Brown Transp. Corp. v. Pa. Human Relations Comm'n, 578 A.2d 555, 562 (Pa. 1990).

[FN15]. Pakizegi v. First Nat'l Bank, 831 F. Supp. 901, 908-09 (D. Mass. 1993).

[FN16]. See Eugene Volokh, Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment, 17 Berkeley J. Emp. & Lab. L. 305 (1996).

[FN17]. Id. at 307-08 & n.11 (discussing Equal Employment Opportunity Comm'n v. Hyster Co., No. 88-930-DA (D. Or. Aug. 15, 1988)).

[FN18]. See Reid v. O'Leary, No. 96-401, 1996 U.S. Dist. LEXIS 10627 (D.D.C. July 15, 1996).

[FN19]. Id.

[FN20]. Interview with Gary Simpson, Attorney for Plaintiff (July 19, 2001).

[FN21]. John Carlson, When Political Correctness Becomes Political Coercion, Seattle Times, June 21, 1994, at B4.

[FN22]. Id.

[FN23]. Id.; Steve Miletich, Gay Man Claims Hostility at Work, Seattle Post-Intelligencer, June 21,

1994, at B4; Steve Miletich, Gay Man Withdraws His Complaint Against Company, Seattle Post-Intelligencer, July 7, 1994, at B2.

[FN24]. See Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1491- 93 (M.D. Fla. 1991).

[FN25]. See id. at 1498-1501.

[FN26]. Id. at 1535.

[FN27]. Id. at 1537-39.

[FN28]. See NLRB v. Local Union No. 3, 828 F.2d 936 (2d Cir. 1987); Hosp. & Serv. Employees Union, Local 399 v. NLRB, 743 F.2d 1417, 1428 (9th Cir. 1984).

[FN29]. NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969); Sheet Metal Workers Int'l Ass'n v. Burlington N.R.R. Co., 736 F.2d 1250, 1253 (8th Cir. 1984); Dow Chem. Co. v. NLRB, 660 F.2d 637, 644-45 (5th Cir. 1981); NLRB v. Douglas Div., 570 F.2d 742, 747 (8th Cir. 1978).

[FN30]. E.g., Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 20 (1986); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536 (1980).

[FN31]. Madsen v. Women's Health Center, 512 U.S. 753 (1994) (discussing the right to protest outside an abortion clinic).

[FN32]. Cohen v. California, 403 U.S. 15, 21 (1971).

[FN33]. E.g., Baty v. Willamette Indus., 985 F. Supp. 987 (D. Kan. 1997); Jenson v Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993); Berman v. Wash. Times Corp., No. 92-2738, 1994 U.S. Dist. LEXIS 16476, at * 4-6 (D.D.C. Sept. 23, 1994).

[FN34]. Bowman v. Heller, No. 90-3269, 1993 Mass. Super. LEXIS 242, at * 1 (Mass. Super. Ct. July 9, 1993) (unpublished disposition).

[FN35]. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[FN36]. Aguilar v. Avis Rent-A-Car Sys., 87 Cal. Rptr. 2d 132 (1999).

[FN37]. Avis Rent-A-Car Sys. v. Aguilar, 529 U.S. 1138, 1140 (2000) (Thomas, J., dissenting from denial of cert.).

[FN38]. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 665-67, 682-83, 1682, 1690 (1999) (Kennedy, J., dissenting).

[FN39]. E.g., DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596-97 (5th Cir. 1995).

[FN40]. Mauro v. Arpaio, 147 F.3d 1137, 1141 (9th Cir. 1998); Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1438, 1442 (C.D. Cal. 1994).

[FN41]. Anchorage Tells Fire Halls to Eliminate Risque Magazines, Juneau Empire Online (Feb. 18, 2002), at http://juneauempire.com/stories/021802/sta_ stbriefs.shtml.

[FN42]. See Eugene Volokh, Squeamish Librarians, available at http:// www.reason.com/hod/ev060401.html.

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AN UPDATE ON THE LAW OF WORKPLACE HARASSMENT

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SECTION E

AN UPDATE ON THE LAW OF WORKPLACE HARASSMENT

PREAMBLE

A colleague of mine, Wendy Bryant, a partner with Greenebaum Doll & McDonald, PLLC, has prepared the outline on this topic for several past Employment Law Institutes. The last time she prepared the update, in 2002, she covered, in depth, all relevant cases which had been decided for a time period beginning as early as 1998 and concluding with the early part of 2002. This Outline is not intended to be a restatement of that information, but rather an update of relevant cases since that time period.

INTRODUCTION

Workplace harassment has been, and remains, a heavily litigated subject matter. Although courts have begun to recognize national origin, racial, and religious-based harassment, the overwhelming majority of cases still concern sexual harassment.

In 1998, the United States Supreme Court adopted an entirely new analytical framework for harassment cases in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). Most of us practice in either the Kentucky state and/or federal court system and in the Sixth Circuit. This outline discusses the key cases which have been rendered in the last couple of years from the Sixth Circuit Court of Appeals and Kentucky federal and state courts as related to workplace harassment.

SEXUAL HARASSMENT CASES.

1. **Wiseman v. Whayne Supply Company, _____ F.3d _____, 2004 WL 62498 (W.D. Ky. Jan. 12, 2004).**

The Plaintiff in this case brought a claim of sexual harassment against her employer alleging that she was in a hostile work environment. Specifically, the Plaintiff made the following allegations:

A) Her manager picked at her, made her feel worthless and degraded;

B) Her immediate supervisor told her she could not go to training because she would not be accepted because she was a woman;

C) The men in her area were mean to her and talked down to her;

D) She was not invited to meetings;

E) Her manager called her a liar, would not speak to her at times, and told her she was incompetent; and

F) Her immediate supervisor was generally mean to her and told her there was no time to discuss the yearly performance standards.

There was also a big misunderstanding as to whether the Plaintiff resigned her job or the Company eliminated her position.

The Court found the following to be elements of a hostile work environment claim:

A) Employee is a member of a protected class;

B) Employee was subject to un-welcomed sexual harassment;

C) Harassment was based on employee's sex;

D) Harassment created a hostile work environment; and

E) Employer failed to take reasonable care to prevent and correct any sexually harassing behavior.

The Court cited at length from Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), and made the following points which would be relevant to any claim:

A) A hostile work environment occurs "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," id at 21;

B) The "totality" of the circumstances must be viewed when determining if the alleged actions were sufficiently severe or pervasive – Court looks at work environment as a whole, not just the individual acts of alleged hostility; and

C) Relevant Factors: frequency of conduct, severity, is it physically threatening or humiliating; or a mere offensive utterance and does it unreasonably interfere with an employee's work performance. Id. at 23.

The Court found that Plaintiff's claim was fatally flawed because she could not tie the "intimidation, ridicule and mistreatment" she felt to the fact she was a woman.

Quotes from the Court:

A) "None of Plaintiff's allegations actually specify any gender specific words, phrases, or connotations. The absence of such remarks or connotations creates a significant evidentiary problem for Plaintiff."

B) "Typically, harassing behavior must contain gender derogatory language to be actionable. Some evidence must suggest that the harassment is sexual in nature. One cannot assume that harassment is sexual."

C) "Title VII does not prohibit all verbal or physical harassment in the workplace but is directed only at discrimination because of sex. In Title VII actions it is important to distinguish between harassment and discriminatory harassment in order to ensure that Title VII does not become a general civility code."

D) "Men and women can both be ignorant, stupid, lazy and worthless. A trier of fact cannot infer that harassment emanated from an anti-woman bias merely because a man directed that harassment toward a woman."

Other Issues/Points In Case:

A) Court recognized that Title VII and the KCRA have similar purposes and it is common to look to the federal law and cases when construing KRS Chapter 344.

B) Even if hostile work environment had been established, there was no proof that the offender was Plaintiff's supervisor and liability could have been established only by showing the Company knew or should have known of the harassment and failed to implement prompt, appropriate and corrective action.

C) Even if the actions were deemed to be by Plaintiff's supervisor, no liability existed because the supervisor's "harassment" did not result in a tangible adverse employment action. Upon reporting the allegations, Plaintiff was not discharged, demoted or undesirably reassigned. Therefore, the affirmative defense is available to the Company because (1) it exercised reasonable care to prevent and correctly prompt any sexually harassing behavior, and (2) the Plaintiff failed to take advantage of the opportunities.

2. Akers v. Alvey, 338 F.3d 491 (6th Cir. 2003).

Cindy Akers was hired as a family services worker with the Kentucky Cabinet for Families & Children in July of 1997. In August 1998, Donald Alvey was promoted to be the supervisor of the office where she worked. Eighteen (18) days later, Akers made her first complaint of sexual harassment.

Akers claimed, in her lawsuit, that Alvey did the following:

1) Made lewd gestures with his tongue and hand while moaning;

2) Commented daily about Akers' physique;

3) Got close to Akers;

4) Attempted to look down Akers' blouse;

5) Questioned Akers about masturbation and about her sex life with her boyfriend;

6) Expressed in front of other employees that he would like to have sex with Akers;

7) Made comments to Akers about her co-workers' sexual histories and physiques;

8) Sent explicit e-mail messages; and

9) Described his last episode of oral sex in great detail.

Akers claimed Alvey engaged in thirty (30) acts of inappropriate conduct in a two and one half month period.

The Cabinet investigated, found the complaints to be unsubstantiated, but did remove Akers from Alvey's supervision by transferring her to another office. Akers claims she was never accepted in her new office due to the ongoing complaint against Alvey and resigned.

This case went to the 6th Circuit on an agreed order between the parties. The trial court permitted the Plaintiff's sexual harassment hostile work environment claim to go to a jury, but granted summary judgment on her other claims.

Court's Analysis.

1) The Sixth Circuit reversed the summary judgment on the tort of outrage claim, thereby allowing it to go to a jury. As such, this case presents an interesting factual scenario for those trying to get around the long line of cases summarily dismissing tort of outrage claims.

2) The Sixth Circuit discussed, at length, a claim of "retaliatory harassment." To establish a claim of retaliation, the Court stated Akers must prove:

   a) she engaged in activity protected by Title VII;

   b) the exercise of that protected right was known to the employer;

   c) the employer thereafter took an employment action adverse to the Plaintiff, or that the Plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and

   d) a causal connection existed between the protected activity and the adverse employment action or harassment.

The Court then discussed "retaliatory harassment." The issue was whether "Alvey's post-complaint harassment" was retaliatory. The post-complaint investigation lasted two weeks and during those two weeks, Akers alleged that Alvey retaliated against her by (1) refusing to speak to her, (2) instructing other employees not to associate with her, (3) withholding her mail and inter-office memoranda, and (4) criticizing the way she handled her cases.

The Court noted that "severe or pervasive supervisor harassment" following a sexual harassment complaint can constitute retaliation. The Court held:

A) this severe or pervasive test in the retaliation context is the same as in the sexual/racial discrimination contexts;

B) harassment must alter the conditions of the victim's employment and create an abusive working environment;

C) the test has an objective and subjective component: reasonable personal standard and the victim must subjectively regard the environment as hostile.

In this case, the Court held that a claim had not been sustained for retaliatory harassment, but found the call to be a close one based upon the facts. The Court noted that in an earlier case wherein a retaliatory harassment claim was stated, the facts involved more than "simple teasing, offhand comments and isolated incidents." In Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000), the supervisor called the plaintiff more than thirty (30) times for the sole purpose of harassing her, sat outside her office and stared in the window at her, and thew nails on her home driveway on more than one occasion. Id. at 793. That case was described by the Court as "egregious." The facts of this case were determined to fall somewhere between teasing and isolated incidents and egregious conduct which is redressable.

There was an interesting dissent in this case which is worth reading.

3. **American General Life & Accident Insurance Company v. Hall, 74 S.W.3d 688 (Ky. 2002).**

Plaintiff claimed that her supervisor subjected her on a daily basis to unwelcome, sexually explicit comments about their respective body parts, his sex life, and his sexual fantasies about her. Plaintiff also indicated her supervisor brushed up against her breasts and on one occasion, exposed his genitalia to her.

In addition to filing a lawsuit on sexual harassment hostile work environment, the plaintiff also filed an application for workers' compensation benefits based upon the same allegations as her sexual harassment claim. She was awarded thirty-eight (38) weeks of temporary total disability benefits ($15,805.72), and four hundred, twenty-five (425) weeks of permanent partial disability benefits ($66,291.50).

> *Court held that because the Plaintiff had pursued and accepted workers' compensation benefits, she was precluded from bringing a sexual harassment hostile work environment claim.

4. **Clark v. United Parcel Service, 286 F.Supp.2d 819 (W.D. Ky. 2003).**

Two female employees brought claims of sexual harassment hostile work environment. One employee alleged the occurrence of three incidents over two and one half years, while the other employee alleged seventeen incidents over a two year period.

Although the Court eventually held that the plaintiffs did not make out their claims, a large portion of the analysis was dedicated to the employer's affirmative defense. UPS had a reporting procedure, which neither plaintiff utilized, and upon hearing the complaints, did a prompt investigation and removed the harasser.

The Court held a "generalized" fear of retaliation for reporting a sexual harassment claim is not enough to excuse an employee from complying with the Company's policy on reporting.

The Court also held that the knowledge of low-level management personnel about harassing incidents cannot be attributed to the employer. The Court specifically noted that the knowledge of low-level supervisors who are not in a position to reprimand or terminate the wrongdoer will not be imputed to the company.

The Court also held that individual supervisors are not personally liable under KCRA.

5. Dauley v. Hops of Bowling Green, Ltd., 2003 WL 1340013 (Ky. App. 2003).

The plaintiff was a part-time server at Hops restaurant. When hired, she was given a copy of the restaurant's sexual harassment policy. The manager later received complaints from female employees that the plaintiff was acting toward them in a sexually-offensive manner. The manager first told Dauley he would have to let her go, then offered her an opportunity to return to work, pending an investigation. She refused and filed a breach of fiduciary duty and retaliatory discharge claim.

The Court, in an analysis of the wrongful discharge claim, specifically found that KRS 344.280(1) was intended to protect those making claims of sexual harassment, not those charge with committing the offense. As such, a wrongful discharge claim would not be sustained.

6. Grego v. Meijer, Inc., 239 F.Supp.2d 676 (W.D. Ky. 2002).

Plaintiff worked for two months with the company. During that time period, two co-workers allegedly sexually harassed her by doing the following:

1) making offensive sexual gestures and comments;

2) winking at her;

3) making kissing faces;

4) asking her out;

5) touching her shoulders and back;

6) telling her they would like to have sex with her;

7) telling her "I'd like you to ride me like a horse, or a bus . . . so you can have my baby"; and

8) blocking her way from exiting a freezer.

Other female employees also complained about the two employees.

The Court held that the standard for co-worker harassment had been met as there was proof she was in the protected class, unwelcome sexual harassment had occurred and the harassment was based on her sex. Even though the acts lasted only two months, they were deemed pervasive during the two months.

The Court also found that it was a jury issue as to whether the company had acted appropriately and promptly.

The Court also held punitive damages were available under the KCRA.

7. Kentucky Department of Corrections v. McCullough, 123 S.W.3d 130 (Ky. 2003).

The Court held that punitive damages are not available under KCRA, Section 344.450. Further, the Court held KRS 411.184 and 411.186 do not make such damages available.

NATIONAL ORIGIN HARASSMENT.

1. Simoudis v. Ford Motor Company, 29 Fed. Appx. 314, 2002 WL 193933 (6th Cir. 2002).

The Plaintiff is a Greek-American who claimed he was subjected to a hostile work environment as a result of being told jokes about homosexuals and Greeks, and because he was called offensive names referring to his Greek heritage.

The Court held that to prevail on a claim of national origin harassment, a plaintiff must show:

a) he was a member of a protected class;

b) he was subject to unwelcome harassment;

c) the harassment was based on his national origin;

d) the harassment had the purpose or effect of unreasonably interfering with his work performance or creating an intimidating, hostile or offensive work environment; and

e) the employer failed to take reasonable care to prevent and correct any harassing behavior.

Citing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

The Court spent some time discussing the Burlington and Faragher cases as related to employer liability and agency principles. The Court stated:

1) Employers are liable for hostile work environments created by supervisors:

2) Affirmative defenses are available to employers when no tangible adverse employment action has occurred; and

3) No affirmative defense is available if a supervisor's harassment culminates in a tangible employment action.

RACIAL HARASSMENT.

1. **Gibson v. The Finish Line, Inc. of Delaware, 261 F.Supp.2d 785, 91 Fair Empl. Prac. Cas. (BNA) 1629 (W.D. Ky. 2003).**

The Court adopted same test for racial hostile work environment as sexual hostile work environment:

Plaintiff must establish that (1) she was a member of a protected class, (2) she was subjected to unwelcome racial and/or religious harassment, (3) the harassment was based on race or religion, (4) the harassment had the effect of unreasonably interfering with the plaintiff's work performance by creating an intimidating, hostile or offensive work environment, and (5) the existence of employer liability.

The complaint arose because Plaintiff was discussing, in the workplace, her decision to convert from Baptist to a Black Muslim. Discussions were held about learning about the Nation of Islam. A co-worker later told other workers that the plaintiff was a racist and her religion was worse than the Ku Klux Klan. An altercation occurred at a later date which led to the termination of the Plaintiff.

The Court found no actionable hostile work environment because the plaintiff testified she did not subjectively regard the environment as abusive. In a deposition, she indicated she viewed her co-workers' comments as "silly," "immature," and "not that serious."

The Court allowed her retaliation claim to go to the jury.

2. **Johnson v. Box USA Group, Inc., 208 F.Supp.2d 737 (W.D. Ky. 2002).**

Plaintiff brought a racial hostile work environment claim based on two incidents:

1) Caucasian supervisor referred to him on one occasion as "boy"; and

2) Caucasian supervisor repeated a joke told by an African-American co-worker and said the words "ghetto kool Aid" in front of the Plaintiff.

Court ruled this was not enough to make out a hostile work environment claim.

3. **City of Louisville v. Lumpkins, 2003 WL 1232082 (Ky. App. 2003).**

This case centered around three African-American teenagers who obtained summer jobs as lifeguards. The alleged the following:

1) They were always assigned to predominantly African-American populated pools because their supervisor told them they would "fit in better;"

2) They were assigned the dirtiest cleaning jobs;

3) They were excluded from an after-hours party for staff;

4) They were frequently called "boy"; and

5) On August 11, 1997, they were called "niggers" by their supervisor.

The jury awarded each teenager $167,000 for embarrassment and humiliation. The City appealed.

The Court analyzed the situation as a racial hostile work environment claim and indicated that the totality of circumstances were to be reviewed, not individual acts of harassment and hostility. The Court did conclude, however, that a jury instruction was erroneous inasmuch as it did not contain an admonition that an insolated incident is insufficient to constitute a hostile work environment (unless extremely serious). The matter was remanded for a new trial.

ARBITRATION ISSUES IN EMPLOYMENT LAW

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SECTION F

ARBITRATION ISSUES IN EMPLOYMENT LAW

I. INTRODUCTION

The use of Alternative Dispute Resolution ("ADR") has became more widespread after the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer,* the Court held that an employee was compelled to arbitrate his age discrimination claims against his employer pursuant the arbitration clause contained in a securities registration agreement that he signed. Although *Gilmer* did not deal with the issue of arbitration agreements in general employment contracts, employers saw the decision as a green light to include such agreements in employment contracts.

In 2001, the Supreme Court addressed that issue in *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001), holding that the Federal Arbitration Act ("FAA") and its policy of favoring, encouraging and enforcing the resolution of disputes through arbitration, did indeed extend to arbitration of matters between most employers and employees (excluding only transportation workers engaged in "interstate commerce").

Moreover, the Supreme Court spoke again on the issue of arbitration in *EEOC v. Waffle House, Inc.*, 122 S.Ct. 754 (2002). In this case, the Supreme Court found that the EEOC could bring suit, seeking back pay, reinstatement, compensatory and punitive damages under the Americans with Disabilities Act on behalf of an employee against his employer - - ***even though*** the employee had signed, at the time he was hired, an agreement to arbitrate all employment disputes.

(The *Circuit City* and *Waffle House* decisions are discussed at greater length below.)

II. ARBITRATION

A. In the event that workplace disputes cannot be resolved through internal ADR programs or external mediation, employers can submit unresolved disputes to arbitration.

B. While an employer and an employee can in theory agree to submit to arbitration any given dispute, it is preferable to have an agreed, mandatory arbitration plan in advance.

C. When parties decide to arbitrate a dispute, they submit the dispute to an impartial arbitrator or panel of arbitrators for resolution. Unlike the process of mediation, an arbitrator makes a determination of the dispute and the determination is normally final and binding.

D. Even though an arbitrator's decision may be challenged in court, courts apply a highly deferential standard when reviewing an arbitrator's decision and generally uphold the award unless there has been fraud, corruption, procedural unfairness or the arbitrator has exceeded his authority.

III. CONSIDERING ARBITRATION

A. An employer should consider the following factors when it is deciding whether to require employees to arbitrate workplace disputes:

1. *Quantity of potential employment-related lawsuits*

If an employer historically has experienced, or expects in the future to experience, a high number of employment-related lawsuits, arbitrating those disputes instead of litigating them will likely result in lower expenditures of time and money.

2. *Protection of reputation for vigorously defending adverse claims*

Many employers prefer to litigate rather than settle disputes with its employees to convey the message that they will defend the integrity of their company against adverse claims. Arbitration is enough like litigation and unlike settlement to maintain an employer's reputation for not backing down to employees' grievances. Arbitration has the advantage of being generally less time consuming and expensive than litigation.

3. *Desire to avoid employee-friendly jurisdictions*

If the jurisdictions in which the employer is often sued are employee friendly, an employer may achieve more success by arbitrating employment-related disputes.

On the other hand, an employer who is likely to be sued in an employer-friendly jurisdiction may avoid a significant amount of the time and costs associated with litigation through frequent success on summary judgment.

4. *Effectiveness of arbitration given the culture and environment of the workplace*

An employer should be cognizant of how employees will perceive the use of arbitration to resolve workplace disputes. If employees do not trust dispute resolution processes outside of the court, they may be reluctant to agree to submit disputes to arbitration.

IV. DRAFTING AN ARBITRATION PLAN: ESSENTIALS

A. As with any ADR program, an employer must ensure that its arbitration program will appear neutral and in fact operate fairly from a substantive and procedural standpoint. Some of the things that an employer should include in any arbitration plan to ensure its fairness are:[1]

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1 See National Rules for the Resolution of Employment Disputes (NRRED) and Due Process Protocol, discussed in Section VII, *infra*, for a more complete list of the provisions that should be included in an

1. *Bilateral policy*

   The policy should subject both the employee and the employer to arbitrate certain claims that they may have against each other.

2. *Division of costs associated with arbitration*

   Employers should ensure that arbitration is a financially viable method of conflict resolution for its employees. Therefore, the costs of the arbitration should be divided in a way that an employee does not have to pay an unreasonable amount, if any amount at all. The Sixth Circuit's decision in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (en banc) is discussed below.

3. *Procedure for selecting a neutral arbitrator and the forum for arbitration*[2]

   Employers are cautioned to include all the parties to the dispute in the process of selecting an arbitrator and the place where the arbitration is to be held. In addition, the parties should choose an arbitrator that is experienced and trained in dealing with the types of disputes that arise in the workplace.

4. *A list of the types of employees by job category that are subject to arbitrating their workplace disputes*

5. *A list of types of claims that may be arbitrated*

   Even though the list need not be exhaustive, it should provide the employee with an indication of the types of statutory and common law claims that may/must be arbitrated.

6. *Ensure the availability of the same remedies that would have been available to the employees had they litigated their claims*

7. *Clear notification to employees about their right to be represented at an arbitration hearing*

   The policy should allow employees to be represented by counsel at an arbitration hearing. In addition to promoting fairness concerns, employees should be encouraged to be represented by counsel because attorneys will often help the arbitration process to run more efficiently.

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arbitration policy to limit the potential that a court will find it unenforceable.

[2] In *Garrett v. Hooter-Toledo*, 295 F. Supp. 2d 774 (N.D. Ohio 2003), the court concluded that an arbitration provision that required the plaintiff to attend an arbitration in Louisville, Kentucky, when her home and place of work was Toledo, Ohio, imposed an unreasonable and unfair requirement on the employee. *See also Geiger v. Ryan's Family Steak Houses, Inc.,* 134 F. Supp. 2d (S.D. Ind. 2001) (administration of arbitration program by one dispute resolution company that was chosen by employer made arbitration agreement unconscionable).

8. *Ensure that employees are aware of and understand the plan*

To this end, an employer should include a separate signature page in the employment application or contract that specifically references and incorporates the arbitration program.

V. LEGAL DEVELOPMENTS IN ARBITRATION

A. *Circuit City* Case

As previously noted, the U.S. Supreme Court in *Gilmer* did not resolve the issue of whether mandatory arbitration clauses in employment contracts were enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"). In 2001, the Supreme Court resolved that issue in *Circuit City Stores, Inc. v. Adams,* 121 S.Ct. 1302 (2001).

The facts in Circuit City involved a sales counselor, Adams, with Circuit City Stores, Inc., who signed an employment application that explicitly stated that all claims that may arise out of his employment must be submitted to arbitration. The language of the application was clear about the types of claims that would be settled by arbitration and that the arbitrator's decision would be final and binding. After two years of employment with Circuit City, however, Adams filed an employment discrimination lawsuit against the company in court, asserting claims under California state laws. In response, Circuit City filed an action in federal district court under the FAA to compel Adams to arbitrate his claims pursuant to the arbitration clause in the employment application he had signed. The district court concluded that Adams was obligated to arbitrate his claims pursuant to the arbitration clause that he agreed to by signing the employment application.

Adams appealed the district court's decision and the Ninth Circuit Court of Appeals reversed the district court, holding that the scope of the FAA did not cover arbitration clauses in employment contracts. Therefore, the court concluded that Adams did not have to arbitrate his employment discrimination claims. Contrary to the conclusion of all the other federal Courts of Appeal that had dealt with this issue, the Ninth Circuit reasoned that the statutory language of the FAA excepted all contracts of employment from its reach.[3] Due to the Ninth Circuit's creation a circuit split on the issue, the Supreme Court agreed to resolve the debate.

The Supreme Court began with an explanation that the FAA was enacted in response to judicial hostility toward the enforcement of private arbitration agreements. From this, the Court reasoned that unless the FAA applied broadly, its purpose would be thwarted. The Court relied upon § 2

[3] The Sixth Circuit Court of Appeals had held that the FAA enforces arbitration agreements in employment contracts except for those directly involving transportation workers. *Asplundh Tree Co. v. Bates,* 71 F.3d 592 (6th Cir. 1995). See *Circuit City,* 121 S.Ct. at 1306-07 (citing all the Courts of Appeal that have decided this issue).

of the FAA for textual support of the statute's broad coverage, which states:

> [A] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract.

9 U.S.C. § 2. Despite the broad language in § 2, the Court recognized that the source of the debate over the FAA's coverage was in the exceptions listed in § 1. The relevant portion of § 1 of the FAA states that:

> nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1. In support of the argument that the FAA did not apply to employment contracts, Adams relied upon the phrase, "or any other class of workers engaged in interstate commerce." The Court, however, reasoned that this phrase is an explicit reference to the categories of "seamen" and "railroad employees" that precede it. According to the Court, the inclusion of the phrase that Adams relied upon simply refers to employment similar in nature to that of seamen and railroad workers - broadly, transportation workers.

The Court concluded that a broader reading of "any other . . . workers engaged in interstate commerce" would defeat the intent of § 2 of the FAA. The Court pointed out that when a court interprets provisions of a statute, it should interpret those provisions in light of the whole statute and the purpose behind it as evidenced by the text. Given these reasons, the Court held that the FAA enforced arbitration agreements in employment contracts except for those contracts affecting transportation workers.

B. An Application of *Circuit City*: Employers

In the short term, *Circuit City* provides employers with the confidence that valid mandatory arbitration agreements in general employment contracts are enforceable under the FAA. Therefore, employees who sign employment agreements that contain valid arbitration clauses will be obliged to arbitrate any employment law claims that are covered by the agreement.

While mandatory arbitration agreements are enforceable under the FAA, however, the validity of specific agreements may still be challenged based upon internal flaws. To avoid those types of challenges to mandatory arbitration agreements, employers must concern themselves with drafting a contract that has proper consideration and mutuality, and that is not unfairly weighted against the employee. To this end, there should be

provisions in the agreement that address issues like fee sharing, choosing a neutral arbitrator, appropriate remedies and bilateral applicability.

C. Recent Court Decisions

1. In *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (en banc), the Sixth Circuit addressed the appropriate standard courts should apply in determining whether a cost-splitting provision in an arbitration agreement undermines the purpose of federal anti-discrimination legislation. The court adopted a "case-by-case" approach that requires potential litigants to "be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum." Thus, "if the reviewing court finds that the cost-splitting provision would deter a substantial number of similarly situated potential litigants, it should refuse to enforce the cost-splitting provision in order to serve the underlying functions of the federal statute." The case-by-case analysis includes an assessment of: (1) the job description and socioeconomic background of potential litigants; (2) the average or typical arbitration costs; and (3) the costs of litigation as an alternative to arbitration.

2. In *Cooper v. MRM Investment Co.*, 2004 U.S. App. LEXIS 8622 (6th Cir. May 3, 2004), the Sixth Circuit reversed a district court decision denying the employer's motion to compel arbitration. The plaintiff worked as an assistant manager at a KFC and signed an "Arbitration of Employee Rights Agreement" that provided:

> Because of the delay and expense of the court systems, KFC and I agree to use confidential binding arbitration for any claims that arise between me and KFC, its related companies, and/or their current or former employees. Such claims would include any concerning compensation, employment (including, but not limited to any claims concerning sexual harassment), or termination of employment. Before arbitration, I agree: (i) first, to present any such claims in full written detail to KFC; (ii) next, to complete any KFC internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). In any arbitration, the then prevailing rules of the American Arbitration Association (and, to the extent not inconsistent, the then prevailing rules of the [FAA]) will apply.

The plaintiff alleged that she was forced to quit her job because of harassment. After the EEOC dismissed her charge, she filed suit in

federal court. The employer moved to compel arbitration. The district court, applying Tennessee contract law, concluded the agreement was unenforceable because: (1) it was a contract of adhesion; (2) the agreement was unconscionable; (3) the agreement was insufficiently bilateral; (4) the agreement was invalid under federal law because it did not make it clear the plaintiff was waiving her right to a jury trial; and (5) as a matter of policy, Title VII claims belong in court, not in arbitration. In addition, the district court concluded the agreement was unenforceable because it incorporated the AAA rules that would likely impose undue costs on the plaintiff that she would not have had to incur in court, rendering arbitration an inappropriate forum.

In reversing the district court's order, the Sixth Circuit concluded the arbitration agreement was not a contract of adhesion, was not unconscionable, and did not lack bilaterality under Tennessee law. In addition, the Sixth Circuit determined that an arbitration provision did not have to include a provision expressly waiving the employee's right to a jury trial in order to be enforceable. Moreover, the Sixth Circuit rejected the lower court's statement that Title VII claims belong in court rather than in arbitration under the Supreme Court's holding in *Gilmer*. The court, however, remanded for further findings regarding whether the likely arbitration costs under the AAA's rules prevailing on the date that the employer filed its motion to compel arbitration rendered the agreement invalid because the arbitration would have been prohibitively expensive to the plaintiff.

D. Enforceability of Arbitration Agreements in Collective Bargaining Agreements

In *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), the Supreme Court held that a union could not waive an employee's statutory rights in spite of a mandatory arbitration clause in a collective bargaining agreement ("CBA"). More recently, in *Wright v. Universal Maritime Service Corporation,* 525 U.S. 70 (1998), the Court readdressed the issue of the enforceability of a mandatory arbitration agreement in a CBA. The Court, however, was prevented from deciding the issue due to a successful challenge to the validity of the arbitration agreement itself.

In *Safrit v. Cone Mills Corp.,* 248 F.3d 306 (4th Cir. 2001), the Court of Appeals held that a provision in a CBA requiring arbitration of statutory claims was enforceable. The court relied upon language in *Wright,* which stated that an employee could be compelled to arbitrate statutory claims as long as the wavier of the employee's right to adjudicate such claims in a federal forum is done in a "clear and unmistakable" manner.[4]

[4] *Wright,* 525 U.S. at 80.

In light of the decisions briefly discussed above, employers should be aware that a court may allow an employee to assert his/her statutory claims in a judicial forum in spite of an arbitration agreement in a CBA. Regardless of whether a court will enforce an arbitration agreement in a CBA, however, an employer should make sure that the waiver of its employees' right to sue is "clear and unmistakable."[5]

E. EEOC's Authority to Bring Suit Against an Employer on Behalf of Employees - The *Waffle House* Decision

Prior to January 15, 2002, lower courts consistently ruled that the EEOC was not bound by an arbitration agreement in seeking injunctive relief (e.g., reinstatement), but the courts were split on the issue of the EEOC's authority to seek money damages on behalf of an employee who has signed an arbitration agreement.

On January 15, 2002, the Supreme Court addressed these issues in *EEOC v. Waffle House, Inc.,* 122 S.Ct. 754 (2002). The Court held that an agreement between employer and employee to arbitrate any employment-related dispute or claim did ***not*** bar the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific judicial relief on behalf of employee in an enforcement action under an Americans with Disabilities Act claim.

The facts of *Waffle House* are straightforward. Waffle House required that its employees must each sign an agreement requiring employment disputes to be settled by binding arbitration. After the Plaintiff, Eric Baker, suffered a seizure and was fired by Waffle House, he filed a timely discrimination charge with the EEOC.

The EEOC alleged that his discharge violated Title I of the Americans with Disabilities Act of 1990 (ADA). They subsequently filed an enforcement suit, to which the Plaintiff was not a party. The EEOC's suit against Waffle House alleged that the Company's employment practices, including Baker's discharge "because of his disability," violated the ADA and that the violation was intentional and done with malice or reckless indifference. The complaint requested injunctive relief to "eradicate the effects of [respondent's] past and present unlawful employment practices"; specific relief designed to make Baker whole, including backpay, reinstatement, and compensatory damages; and punitive damages for malicious and reckless conduct.

Waffle House petitioned under the Federal Arbitration Act (FAA) to stay the EEOC's suit and compel arbitration, or to dismiss the action, but the District Court denied relief. The Fourth Circuit concluded that:

1) the arbitration agreement between Baker and respondent did not foreclose the enforcement action because the EEOC

[5] *Wright,* 525 U.S. at 80.

was not a party to the contract, but had independent statutory authority to bring suit in any federal district court where venue was proper; and

2) the EEOC was not prevented from seeking victim-specific relief in court.

The Supreme Court granted certiorari to resolve this matter. The Supreme Court determined that an Agreement between employer and employee to arbitrate any employment-related dispute or claim did ***not*** bar the EEOC from pursuing victim-specific judicial relief on behalf of employee in an enforcement action under the ADA. The employee had not engaged in any conduct, such as seeking arbitration of his claim or entering into settlement negotiations with an employer, that might have the effect of limiting any relief that the EEOC might obtain in court.

The Court based its decision on the fact that the ADA directs the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964 when enforcing the ADA's prohibitions against employment discrimination on the basis of disability. Following the 1991 amendments to Title VII, the EEOC was given the authority to bring suit to enjoin an employer from engaging in unlawful employment practices, and to pursue reinstatement, backpay, and compensatory or punitive damages, in both Title VII and ADA actions. Thus, these statutes unambiguously authorize the EEOC to obtain the relief that it sought if it could prove its case against Waffle House.

The Court opined that "[n]either the statutes nor this Court's cases suggest that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies otherwise available," and that "[d]espite the FAA policy favoring arbitration agreements, nothing in the FAA authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement. The FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum."

VI. BEYOND ARBITRATION - INTERNAL ADR PROGRAMS

A. The programs described below are examples of internal, or "in-house," ADR programs that are suggested by the American Arbitration Association ("AAA").[6] The employer, however, is not limited to these suggestions.[7] It is important that any in-house ADR program that an employer chooses to implement has the agreement of its employees, will meet the needs

[6] *See* American Arbitration Association, *Resolving Employment Disputes: A Practical Guide* (2003).

[7] See Kirk Blackard, Assessing Workplace Conflict Resolution Options, Dispute Resolution J., Feb/April 2001, at 57 (extensively discusses internal ADR options).

identified within its workplace, and operates fairly. An employer may be creative in designing an ADR program as long as these concerns are reflected in its development and implementation.

Open Door Policies

With open door policies, a chain of command is established to deal with employees' reports of employment-related problems. The chain of command consists of various levels of employees who are trained to deal with sensitive issues that arise in the employment context, such as sexual harassment. Employees are made aware of these designated individuals and the employer's procedure for addressing an employee's complaint once it is made.

Ombudsmen ("Ombuds")

An ombuds is a neutral third party from within the company who is charged with the responsibility of investigating employment-related grievances brought by employees. Once a grievance has been investigated, an ombuds recommends a way to settle the grievance.

Peer Review

Peer review involves a panel of persons from within the company that work together to address the employment-related complaints of their peers.

Internal Mediation

A neutral third person from within the company, trained in mediation techniques, is assigned to help the parties to a workplace dispute discuss and resolve their differences to a mutually agreeable resolution.

B. Benefits of Implementing Internal ADR Programs

- Avoids timely and costly litigation: In-house ADR programs can resolve a vast majority of workplace disputes; thus, the need to resort to litigation is significantly decreased.

- Privacy: The potential for public exposure of alleged or actual workplace problems, information and practices is increased when an employment-related dispute is litigated. If disputes are submitted to in-house ADR programs, the likelihood of public exposure is reduced significantly (confidentiality can be a requirement of internal resolution).

- Addresses the specific needs of the company: Employment-related problems arise in many different forms and contexts. Contrary to external sources of dispute resolution such as litigation, in-house

ADR programs can be tailored to address the variety of workplace disputes that arise in a given employment setting.

- Early resolution of disputes: Early resolution can avoid the escalation of disputes that results in litigation and the problems associated with it, including high costs, emotional resistance to compromise, and public exposure.

C. Implementing an Internal ADR Program

- *Design*

  Employers should utilize legal counsel and/or agencies that work with employers to implement in-house ADR programs. For guidance, employment law practitioners and agencies like the AAA have models and examples of in-house ADR programs that have been used by other employers.

- *Training*

  Employers should properly train persons within the company who will help facilitate the ADR program. They should be trained to properly address the types of issues they will be confronted with when workplace disputes are presented to them.

- *Fairness*

  Proper implementation of and training for an in-house ADR program is essential to its appearance of neutrality and fair operation. If employees do not trust the ADR program, they will not agree to submit their grievances to it for resolution. An in-house ADR program obviously must be readily utilized to generate a reduction in employee lawsuits.

VII. EXTERNAL ADR PROGRAMS

If internal ADR programs have been exhausted without resolving a dispute, or an employer decides that its company experience or culture does not lend itself to an internal ADR program, employers should consider using external ADR programs like mediation and arbitration to resolve employment-related disputes.[8]

Courts have generally upheld the use of external mediation and arbitration as long as the programs are fair in appearance and operation. The Due Process Protocol and the National Rules for the Resolution of Employment Disputes

[8] See American Arbitration Association, Resolving Employment Disputes: A Practical Guide (2003). Another form of external ADR that has become more popular is fact-finding. Fact-finding is an investigative process where an impartial third person or team examines an employees complaints, investigates the complaint, and then issues a non-binding report on its findings. The report is presented to the parties to the dispute with the goal of helping the parties to see their dispute documented in an objective format.

("NRRED"), which were developed by the AAA and a host of representatives from organizations and agencies that provide, endorse, and/or use ADR programs, provide guidance for employers to ensure that their ADR programs comply with these fairness concerns.

Finally, employers should be aware that their advocates must prepare for mediation and arbitration hearings in similar fashion to trial preparation. For example, informal discovery should be conducted, a strategy should be developed, recent case law on the issue of dispute should be consulted, and document production may be required.

VIII. CONCLUSION

An employer should consider the issues listed below when contemplating whether to implement any ADR program, whether internal and/or external resources will be used to facilitate the process.

1. Costs

   Employment disputes constitute one of the largest sources of litigation in the courts today.[9] Litigation is generally expensive and the increase in employment-related disputes will only increase the costs associated with it. ADR is a less costly and time-consuming way to resolve workplace disputes.

2. Privacy

   Unlike the process of litigation, internal and external ADR programs are designed to resolve disputes privately. The private nature of ADR lessens the likelihood of an employer's reputation being tarnished through public knowledge of its workplace disputes.

3. Variety

   Not all employment disputes are alike; thus, the method of resolution for disputes should accommodate for these differences. The different forms of ADR offer the opportunity for an employer to be creative about the means by which it will attempt to resolve workplace disputes.

4. Potential for more grievances

   The lower costs, decrease in time, and informality of ADR when compared to litigation make it easier for employees to report workplace disputes. Therefore, more employees may be willing to seek remedy for workplace disputes. The increase in grievances, however, may not be as costly to an employer as a few resource-exhausting lawsuits.

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[9] See Deborah Billings, DOL Seeks to Expand Use of Mediators to Resolve Disputes under Employment Laws, Daily Labor Report, Jan. 2,2001, at AA-l.

5. Fairness (Real and Perceived)

Once an employer has decided to implement an ADR program, the program must appear and operate in a fair manner, ensuring that employees' due process rights are realized despite the fact that their grievances are pursued outside of the courts. Employers are encouraged to seek assistance from professionals with experience in ADR in the development of their ADR programs to ensure that their program complies with the law and are best suited to address the employment-related disputes that arise in their workplace.

ISSUES ARISING FROM THE TEMPORARY WORKFORCE

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SECTION G

ISSUES ARISING FROM THE TEMPORARY WORKFORCE

ISSUES ARISING FROM THE TEMPORARY WORKFORCE

The many current and evolving legal and policy issues relating to the very significant phenomenon of the use by American employers of "contingent" workers is well beyond the scope of a one-hour presentation. Many of these issues are emerging contemporaneous with other changes in the American workplace, brought on by global economic and business conditions. These issues promise to become increasingly significant in the immediate future.

Other issues, especially issues involving the implications of the classification of worker status under the various employment/benefits statutes are already presenting great challenges for employment law practitioners and our clients.

These "second tier" legal and policy issues, including the evolution of how the employer-employee relationship is characterized/defined, and, more particularly, the issues of definition of the terms "employer" and "employee," under various laws, as well as defining the myriad workplace relationships other than traditional "employer-employee," are becoming increasingly problematic for our clients. As we examine these issues, it becomes apparent that employers' demand for and utilization of the various types of contingent workers has far outpaced the development of legal theory and public policy in these areas, with the result being that significant "gray areas" exist, where employers can face substantial legal exposure. As these issues are considered, and as litigation begins to bring them into clear relief, attorneys are increasingly being called upon to advise clients in areas where the rules have not been fully developed. We will identify and discuss some of these areas today.

Finally, there is a "third tier" of issues, where the law is more established, but where industry standards may be not well-developed, and where our clients may have insufficient experience or expertise to protect themselves from a variety of legal exposures. We will focus on some of those issues today.

*** *** ***

The term "contingent workforce" applies to an area where even the process of identifying and defining the terms can be difficult and confusing. Specifically, the term "contingent worker," when referenced in the context of the modern American workplace, is a term that has come to be used loosely to refer to a number of work arrangements that differ from the traditional model of full-time, year-around employment with a single employer. The term has been used to refer to anyone from the clerical worker hired through a temp agency to fill an employer's short-term need, to the more "permanent" employee who chooses to work on a part-time basis due to his/her individual or family circumstances, or even to the retired executive who teaches a course at the local university or performs business consulting services as an independent contractor.

Perhaps more important than the variety of workforce relationships that may be referred to as "contingent" is the substantial and growing number of American workers who now may be identified as falling into this category, both in raw numbers and as a percentage of the total workforce. According to data from the U. S. Department of Labor's Bureau of Labor Statistics, and depending on the precise definition used, contingent workers currently make up nearly thirty per cent (30%) of the total U.S. workforce. This segment of the workforce is already very large and is growing; however, public policy and legal theory have not come close to keeping up with the phenomenon.

This reality promises to have a profound impact on American law, and on the American economy, in the years to come.

These larger policy issues are "the elephant in the room" in any discussion about the contingent workforce. However, while we will briefly identify some of these broader policy implications, the bulk of our time today will be spent considering a number of legal and policy issues relating to the contingent workforce that are with us today, including significant problems and legal exposures that are not being addressed effectively by our clients, sometimes with very negative consequences.

Who is the Contingent Worker ?

While the term "contingent worker," and thus the composition of what we call the "contingent workforce," has been used loosely, and has been subject to a variety of definitions, the following categories of workers are often among those included within its terms:

1. *Agency temporary workers (temps)*—workers from temporary employment agencies who work for client businesses for special projects, or to fill in for full time workers.
2. *Leased workers*—workers who work for leasing companies, who often handle clerical or administrative functions for businesses, such as payroll, human resources or benefits functions.
3. *Standard part-time workers*—workers paid on an hourly or salaried basis who regularly work less than 35 hours per week for a single employer.

4. *Contract company workers*—workers who work for and are on the payroll of companies that, as a routine part of their business, provide services to other businesses under contract, such as custodial, maintenance, security or computer maintenance or programming services.

5. *On-Call Workers*—workers called in to perform duties on an as-needed basis, such as workers supplied by union hiring halls or substitute teachers.

6. *Day Laborers*—Workers who are referred to work for any of a number of employers by waiting at a central location where employers pick them up and transport them to a work site, to work for the day.

7. *Self-employed Workers*—Workers who are self-employed, but have no independent contractor relationship with the individual for whom the services are performed, such as shop owners, physicians, and even us lawyers.

8. *Independent Contractors*—Workers who contract with businesses or individuals to provide a product or service, such as realtors and management consultants.

The Contingent Worker Explosion--the "Elephant in the Room"

On November 10, 1999, the U. S. Department of Labor's Advisory Council on Employee Welfare and Pension Benefit Plans issued its "Report of the Working Group on the Benefit Implications of the Growth of a Contingent Workforce." In this report, the Working Group presented its study of some of the important public policy issues that are

implicated by the dramatic increase in the use of contingent workers by American businesses. A primary issue addressed by the Report was the extent to which contingent workers are currently covered under employer-provided health and retirement benefit plans, and the implications of the rapid growth of the contingent workforce on the provision of those key benefits to American workers.

Specifically, the Work Group referenced a recent study, in which 2/3 of the responding employers indicated that they expected that organizations in their industry would increase their use of contingent workers during the next 5 years. In addition, the Work Group heard testimony regarding the explosive growth of one segment of the contingent worker industry—"professional employer organizations"— a 30% per-year increase for the preceding 5 years! These organizations, which allow companies to "outsource" such functions as payroll and human resources, represent a major segment of the contingent workforce, even though, for purposes of many employment laws, such as Title VII, these organizations are typically considered to be "joint employers" with the business that contracts for their services. The Work Group also heard testimony supporting the proposition that the intent, or at least the effect, of the use of contingent workers is to avoid providing benefits to those workers. Specifically, the report indicated that, on average, 62.4% of regular full-time employees participate in employer-provided pension plans. By contrast, only 2/3 as many employees of contract companies (41.8%), one-half as many on-call workers(30.1%), 1/3 as many regular part-time employees, and 1/12 as many temporary help agency employees (4.8%) participate in employer-provided pension plans.

Similar statistics were reported for employer-provided health plans. An average of 73.2% of regular full-time employees currently participate in employer-provided health plans. By comparison, only ¾ as many contract company workers (55%), 2/5 as many on-call workers (32.1%), ¼ as many part-time workers (17.1%), and 1/10 as many temporary help agency workers (7.4%) participate in employer-provided health plans.

A number of reasons were suggested for these disparities; however, significant testimony supported the conclusion that the effect of these statistics is that, in the near future, our country will be forced to find alternatives to our traditional employment-based system for delivering health and pension benefits. One phenomenon generated special interest and concern: the significant percentage of the contingent workers who obtain health and pension benefits through the employer-sponsored program of a spouse or other family member. To the extent that some employers avoid the cost of fringe benefits because they are available through their workers' spouses' policies, other employers are subsidizing those benefits, and our employment-based system of providing health insurance and retirement benefits is placed under additional stress. Given current trends, there will soon be a "tipping point," and the current system may no longer be viable.

These factors, when coupled with the already oppressive cost to our business clients of health and pension benefits, and with the significant number of Americans with no health or pension coverage, are raising legal and public policy issues that will have to be addressed in the near term, and few of the proposed solutions look promising.

Legal Issues Involving the Contingent Workforce.

While these "big picture" issues may present significant challenges, we are not being requested to advise clients on them on a daily basis. However, the "second tier" of issues arising from contingent workforce, i.e., the confusing and often conflicting questions of who is an "employer," who is an "employee," and what these classifications mean under various laws, are increasingly exposing our clients to significant risk. In the past, employers who utilized contingent workers were primarily concerned with the proper classification of those workers as common-law "employees" or as "independent contractors," and with whether that determination would hold up to regulatory scrutiny. If workers were mis-classified, the employer's liability was generally limited to negative consequences under tax or employment-related laws (Title VII, Workers Compensation, Unemployment Insurance). Today, however, the scope of classification issues and employers' potential exposure is increasing exponentially, as is the complexity and sophistication of the analyses employers are required to undertake. What has failed to keep pace with these developments, however, is clear guidance, the creation of legal "safe harbors," or effective approaches for ensuring proper classifications. As a result, our clients are often required to make decisions in these areas with little or no appreciation of the consequences of their actions, at their peril, and without any understanding that they may need to seek legal advice.

It is not surprising that our clients are confused. An array of federal, state and local employment laws address or regulate some aspect of the employer-employee relationship; however, the definition of the terms "employee" and "employer" can vary significantly from law to law. It can be said that, as a general rule, the various

employment statutes and regulations will not apply to independent contractors (as defined for purposes of the relevant statute) or to self-employed workers. However, the determination as to any worker's status may vary from law-to-law, and may be most difficult to determine.

With regard to each employment statute being considered, and consistent with that law's definitional/coverage schemes, employers are required to ask:

- who is an "employee"?
- who is the worker's "employer"?

No universal criteria exist that determine whether a worker is an employee or independent contractor; indeed, different statutes often apply different standards and definitions, which must each be considered and reconciled. Most such analyses however, ultimately come around to the application of one of two broad "tests":

- Common law test—focuses on the hiring party's right to control how the worker's duties are performed. Considerations often include whether the employer has the right to direct the manner of performance of the worker's services, whether the worker receives training and instruction from the employer, whether, in performing the services, the worker is capable of making a profit or risks incurring a loss, whether the employer or the worker supplies needed tools and equipment, and whether the payment for services is based on time or on the achievement of objectives. **[See, e.g., *Glenn v. Standard Oil Co.*, 148 F. 2d 51 (6th Cir.) (Ky. 1945); *Decker v. Glasscock Trucking* 397 S.W. 2nd 773 (Ky. 1965)].**

- "Economic realities" test—focuses on whether the worker is economically dependent on the hiring party or is in business for him/herself. For example, with regard to the application of this test to a determination of "employee" status under ERISA, courts look not to the common law conceptions of that relationship, but rather to the "economic reality" of the totality of the circumstances bearing on whether the worker is economically dependent on the alleged employer. **[See, e.g., *Baystate Alternative Staffing, Inc, et. al. v. Herman,* No. 98-1084 (1st Cir. 1999); citing *Aimable v. Long and Scott Farms,* 20 F. 3d 434, 439 (11th Cir. 1994); *Carnes v. Dept. of Econ. Security,* 435 S.W. 2d 758 (Ky. 1968)].**

In addition, and regardless of which of the two broad tests is applied, when more than one employer has legal responsibility for a worker, and employment by one employer is related to the employment by the other employer(s), a worker may be considered to have "joint" or "co-employers." In such circumstances, both employers may have legal responsibility for compliance with certain employment laws (and may, therefore, be jointly liable for any violation(s)).

Statutory Interpretations Impacting Contingent Workforce Status

Issues directly impacting the contingent workforce, primarily in the areas of defining the employer-employee relationship and what that means for coverage under the individual statutes, are currently the subjects of considerable conflict in the interpretation of numerous federal laws. For example:

Tax Status

The IRS has recently revised its long-standing criteria for determining whether a worker is an "employee" or "independent contractor". The new criteria represent a major departure from the "20 Common Law Factors" test used by the Service for several decades. The revised test is based on three criteria: a) Behavior Control; b) Financial Control, and c) Type of Relationship.

a) Behavior Control--the more control the employer has over the worker's behavior, the greater the chance the worker will be classified as an "employee." Questions to be considered include:

1. Does the employer have the right to direct and control how the worker performs the task(s) for which the worker is hired? (Generally, the more control exercised by the employer, the more likely the worker will be classified as an employee.)

2. Does the employer have the right to dictate or control how the work results are to be achieved? (The more the employer has the right to control the details of the worker's performance, the more likely the worker will be classified as an employee).

3. How much training or instruction does the employer provide the worker? (If the employer provides training on its operation, and how to perform specific job tasks in a specific manner, the worker will most likely be classified as an employee.)

b) Financial Control--Includes various factors indicating whether an employer has the right to control the business aspects of the worker's duties, including:

1. Reimbursement of business expenses;
2. Extent of worker's investment;

3. Extent to which worker makes services available to the relevant market;

4. How the business pays the worker; and

5. Extent to which the worker can realize a profit or loss (generally an independent contractor can make a profit/suffer a loss; an employee cannot).

c) Type of Relationship--a "catch-all" category (as provided by IRS Publication 15A). Includes factors that demonstrate the "type of relationship" between the parties, including:

1. Written contracts describing the relationship the parties intend to create;

2. Whether the employer provides the worker with employee-type benefits, such as insurance, pension plan, vacation or sick pay;

3. The expectation of permanency of the relationship—is the worker hired with the expectation that the relationship will continue indefinitely rather than for the duration of a specific project of time frame? (The IRS now identifies "how long the person plans to work with your company" as being "foremost" in its determination of independent contractor versus employee status).

4. The extent to which services performed by the worker are considered to be a key aspect of the employer's regular business. (The more important the worker's services are to the business, the more likely the employer will

have the right to control and direct the worker's activities, and the more likely that an employer-employee relationship will be found to exist.)

Under the new IRS criteria, a business that mistakenly treats a worker as an independent contractor (by, for example, not paying employment taxes to the IRS) may be held liable for past unpaid taxes (income, social security, welfare and others). More importantly, and as evidenced by a number of recent court cases, misclassification of workers' status can lead to substantial employer liability and worker recoveries, under a number of different theories.

Misclassification Cases

The contingent workplace movement has recently been "educated" on the potentially devastating consequences of worker misclassification in other areas, due to a landmark case that began with the IRS' finding of a misclassification for tax purposes. In ***Vizcaino v. Microsoft Corporation,* 120 F. 3d 1006 (9th Cir. 1997) (en banc),** *cert. denied, **118 S. Ct. 899 (1998),*** the IRS first determined that Microsoft had misclassified a group of workers as independent contractors, when in fact the workers met the common law definition of employees. The workers in question had worked for Microsoft from 1987-1990 as freelance proofreaders, software testers, production editors, formatters and indexers. They were told that, as independent contractors, they would be ineligible for benefits (i.e., paid vacation, sick leave, holiday pay, short-term disability insurance, group life and group health insurance, and participation in 401(k) and stock purchase plans). All signed "Microsoft Corporation Independent Contractor Copyright

Assignment and Non-Disclosure Agreements," in which they agreed that, as independent contractors, they were individually responsible for payment of their own taxes.

Microsoft did not challenge the IRS determination of common-law employee status. Rather, it restructured that particular group of workers, hiring some as employees, terminating others and requiring that they be placed through an agency. It then issued corrected W-2 forms and paid the employer's share of FICA taxes to the government.

Thereafter, the misclassified workers brought an ERISA action, taking the position that, as employees and throughout their employment, they should have been given the opportunity to participate in two (2) company-sponsored benefit plans. Microsoft initially refused the request internally, and the workers appealed to a plan committee set up to review coverage disputes. The plan committee agreed that the workers were not allowed to participate in the plan, based primarily on the fact that, at their time of hire, these workers had agreed that they were independent contractors, and had therefore waived any right they might otherwise have had to participate in the plans.

The District Court agreed with Microsoft's position, holding that the workers had contractually waived their rights to any company benefits. The workers then appealed that ruling, but only with respect to their claimed right to participate in the 401(k) plan and the stock purchase plan.

A panel of the Ninth Circuit reviewed the terms of the plan documents in question. For purposes of the appeal, Microsoft conceded that the workers were common-law employees, but argued that they were nonetheless ineligible for the contested benefits because they had been paid though accounts payable, and not through the company's regular payroll. The panel found the language in the plan documents to be

ambiguous with regard to eligibility under these circumstances, and therefore interpreted the language against the drafter (Microsoft). Accordingly, the panel concluded that the workers were employees who should have been allowed to participate in the 401-k plan. Applying state contract law principles, the panel reached the same conclusion with regard to the stock purchase plan benefit.

After the panel's decision was announced to considerable controversy, the Ninth Circuit reheard the case en banc. With regard to the 401-k plan, the court remanded the case to the plan administrator, but upheld the panel's decision with regard to the stock purchase plan. Cert. was denied by the Supreme Court, and the case ultimately settled for approximately $97 million in June, 2001.

Other high-profile worker misclassification cases have resulted in significant liability to employers. (e.g. ***Herner v. Time-Warner*** settled for $5.5 million in November, 2000; ***Clark v. King County*** settled for $18.6 million in June, 2000, and ***Logan v. King County*** settled for $24 million in December, 1997). As a result of these and other less well-publicized decisions, the proper classification of workers has now become a very big deal, one that implicates a number of areas of the law.

In addition, and to further confuse an already complex area, the various statutes where the classification of workers can be a critical issue contain different standards and definitions.

Worker Classification Issues Under ERISA

ERISA, administered by the U. S. Department of Labor, identifies a number of circumstances where workers may be permissibly excluded from employee benefits

programs. For example, an employer may exclude any employee who works less than 1000 hours in a relevant 12-month period. As a result, "temporary" employees who work 40 hours per week for less than a full six month period are mathematically eliminated. However, this is not an automatic exclusion, and employer's plans must contain appropriate language implementing intended exclusions or risk having to provide the benefits to temporary or part-time workers, as well as to independent contractors who are later determined to be common law employees. [**See, e.g., *Bronk v. Mountain States Tel. And Tel., Inc.*, 140 F. 3d 1335 (10th Cir. 1998)**, wherein the Court, in rejecting the claim of leased employees that ERISA mandated their inclusion because they met the common law definition of "employee," first noted that ERISA does not prohibit an employer from providing benefits to some employees but not to others so long as the exclusion is not based on age or length of service, and then held that, due to the specific exclusion in the plan in question, the workers were not entitled to any relief.]

ERISA does not provide a statutory listing of factors to be considered in determining "employee" versus "independent contractor" status. However, the U. S. Supreme Court provided such a test in ***Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992)**, wherein the Court identified 12 significant factors to be considered under ERISA as follows:

1. skill required;
2. source of tools and instrumentalities;
3. location where work performed;
4. duration of relationship of parties;
5. hiring party's right (or lack thereof) to assign additional projects;

6. hired party's discretion over when and how long to work;

7. method of payment;

8. hired party's role in hiring and paying assistants;

9. whether the work is part of hiring party's regular business;

10. whether the hired party is in business;

11. whether "employee benefits" are provided; and

12. the tax treatment of the hired party.

Under ERISA, the issue of misclassification can arise in a number of different contexts, and may lead to very costly tax and benefit liabilities. A number of courts have found independent contractor status, based on the agreement of the parties, and, therefore, have concluded that any claim for benefits had been waived. **[See, e.g.; *Barnhart v. New York Life Insurance,* 141 F. 3d 1310 (9th Cir. 1998)**—agreement between the parties indicated intent to form independent contractor relationship, coupled with fact that agent free to operate business and obtained income from other sources; ***Capital Cities/ABC v. Ratcliff,* 141 F. 3d 1405 (10th Cir. 1998),** *cert. denied,* **(1998)**—agreement acknowledged workers' status as independent contractors and waived any benefits under ERISA plans offered by employer. Even though IRS had found workers to be common law employees, court held plans not required to cover all employees, and employees had waived any rights they had to benefits.].

However, other courts have held that misclassified workers stated a cause of action for ERISA violations. **[See, e.g., *Daughtery v. Honeywell, Inc.,* 3 F. 3d 1488 (11th Cir. 1993)**—existence of an independent contractor agreement evidence of intent of parties only, and not controlling. Remanded to district court for finding on degree of

control and supervision.; ***Seaman v. Arvida Realty Sales*, 985 F. 2d 543 (11th Cir. 1993),** *cert. denied,* **114 S. Ct. 308 (1993)**—Section 510 of ERISA can be violated by reclassifying an employee to eliminate health and defined contribution plan benefits.; ***Holt v. Winpisinger*, 811 F. 2d 1532 (D. C. Cir. 1987)**—employee misclassified as an independent contractor.]

In addition to these private causes of action, the U. S. Department of Labor also has standing to sue on behalf of contingent workers whom it believes to have been denied benefits due to misclassification. For example, in November, 2000, the DOL and Time-Warner announced a $5.5 million settlement of charges that the company misclassified hundreds of employees as independent contractors or temporary workers, thus denying them benefits in violation of ERISA.

In order to avoid significant liability under ERISA, employers should:

1. Identify the employment relationship with each of its workers, using the 12-point test and focusing on the control issue.
2. Examine its employee benefit plans to determine which classifications of workers are and are not covered. [Many employers will discover that their plan documents, summary plan descriptions, insurance plans and agreements fail to adequately define the covered classes of employees, and/or do not include language sufficient to exclude the intended groups.]
3. Recognize that plans subject to ERISA are not required to cover every worker. Such plans must be maintained for the "exclusive benefit" of employees and their beneficiaries; therefore, true independent contractors and consultants cannot be offered coverage under such plans. In addition,

an employer is not required to cover all employees under its benefit plans (although the ability to limit coverage may be determined by application of certain nondiscrimination and minimum coverage tests).

Absent appropriate language included in carefully constructed plan documents, employers may face significant exposure. Employers do not want to discover problems with their plans for the first time when enforcement actions are filed. An appropriate role for legal counsel is to 1) educate clients as to these issues, and 2) review documents and conduct benefits audits to help bring plans in to compliance.

Worker Classification Issues Under the Fair Labor Standards Act (FLSA)

American business is fashioning complex, new business relationships in response to the development of a global economy, with its increased movement of capital and labor across borders and cultures. Developments such as subcontracting, out-sourcing, and the use of temporary and staffing firms are all responses to this phenomenon. The U. S. Commission on the Future of Worker-Management Relations (the Dunlop Commission) concluded its final report by stating:

> [C]ontingent [work] arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises serious social questions. This is particularly true because contingent workers are drawn disproportionately from the most vulnerable sectors of the workforce . . . . The expansion of contingent work has contributed to the increasing gap between high and low wage workers and to the increasing sense of insecurity among workers. (U.S. DOL, "Commission in the Future of Worker-Management Relative, Final Report").

These issues often implicate compliance with the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq,* which requires payment of the federal minimum wage and overtime

pay of time-and-one-half the regular hourly rate for all hours worked by non-exempt employees in any work week. Coverage by the FLSA requires a finding of an employer-employee relationship, and thus can implicate a number of issues applicable to the contingent workforce.

The relevant definitions contained in the FLSA are hardly "user-friendly", and have long resulted in problems in applying the statute to contingent workers. Specifically, an "employer" is defined under the FLSA as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203 (d). An "employee" is "any individual employed by an employer." 29 U.S.C. § 203 (e), and the term "employ" includes "to suffer or permit to work." 29 U.S.C. § 203 (g). While these definitions are not very helpful, Courts interpreting the FLSA have applied the "economic reality" test for guidance in these areas. ***Goldberg v. Whitaker House Corp.,* 366 U.S. 722 (1947); *Danneskjod v. Hausrath,* 87 F. 3d 37, 39 (2d Cir. 1996).** The "economic realities" test does not mirror the common-law test for employment status, and, when assessing whether the worker is an employee, the courts look to see whether, as a matter of economic reality, the worker is dependent on the employer. The FLSA mandates that the question of who is an employer and employee under the FLSA requires "a full inquiry into the true economic reality" of the relationship, based on "a particularized inquiry into the facts of each case." ***Rutherford Food Corp. v. McComb,* 331 U. S. 722 (1947)**—employee status under the FLSA depends not on isolated factors but on the circumstances of the whole activity. No one factor is dispositive and a totality of the circumstances must be considered. This requirement of a case-by-case evaluation,

based on the job content of the individual worker, can be onerous on any employer, and especially on the small employer.

In addition, the FLSA and its regulations specifically contemplate "co-employment" and "joint employment" status and relationships. DOL regulations provide that a joint employment relationship may exist where: 1) there is an arrangement between the employers to share the employee's services, 2) one employer is acting in the interest of another employer in relation to the employee, and 3) the employers may be "deemed to share control" of the employee. If such a relationship is found to exist, both employers may be liable to that employee under the wage and hour laws. As an example, the DOL's Wage and Hour Division specifically provides: "employees of a temporary help agency working on assignment in various business establishments are joint employees of both the agency and the business establishment in which they are employed."

A number of courts have applied these definitions and tests to determine "employee" versus "independent contractor" status under the FLSA, as well as to evaluate the existence of "joint employment," the result of such finding would be to make both firms liable for payment of wage and overtime liability. [**See, e.g., *Baystate Alternative Staffing, Inc. v. Herman,* No. 98-1084 (D.C. Mass. 1999),** citing favorably the "six-factor test commonly used to distinguish between independent contractors and employees in the context of the FLSA," and referencing the test set out in ***Martin v. Selker Bros., Inc.*, 949 F. 2d 1293 (3rd Cir. 1991)** i.e., - 1) the extent to which the services in question are an integral part of the employer's business; 2) the permanency of the relationship; 3) the amount of the alleged contractor's investment in the facilities and equipment; 4) the nature and degree of control by the principal; 5) the alleged contractor's opportunities for

profit and loss; and 6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise. With regard to the "joint employment" issue under the FLSA, the ***Baystate*** court identified "in particular" four (4) standards to be applied – i.e., whether the alleged employer: 1) had the power to hire and fire the employee; 2) supervised and controlled employee work schedules or conditions of employment; 3) determined the rate and method of payment; and 4) maintained employment records. (citing ***Bonnette v. California Health and Welfare Agency,*** **704 F. 2d 1465 (9th Cir. 1983)).**

Issues implicating control of the worker, and not the form of the agreement or what it is called by the parties, must be carefully examined in order to determine potential FLSA liability. Once again, counsel should educate clients on these issues, including conducting audits.

Worker Classification Issues Under Employment Discrimination Laws

Historically, issues specific to the contingent workforce have not played a major role in compliance with the various federal and state EEO laws. That is all rapidly changing, and many of these issues have now moved to the "front burner." For example, relating specifically to its enforcement of the Americans With Disabilities Act (ADA), the EEOC has recently declared that there is a "rampant" pattern of disability discrimination by staffing agencies across the country. The agency has responded by making temporary staffing firms a priority target for purposes of its ADA enforcement activities.

In addition, in 1997, the EEOC issued an Enforcement Guidance on the Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, said guidance being applicable to the agency's enforcement responsibilities under the ADA, ADEA, Title VII and the EPA. The Guidance explores four (4) major areas where issues frequently arise when contingent employees allege they have been discriminated against:

1. Worker Status/Classification: distinguishing employee and independent contractor.

The EEOC came up with its own 15-factor test to determine employee status. However, under the EEOC approach, the factors are not controlling; indeed, not all, or even a majority, of the factors must be met. Rather, according to the EEOC, the fact-finder is required to make the assessment based on all of the circumstances present in the relationship between the parties. The 15 factors are:

- ✓ The firm or client has the right to control when, where and how the worker performs the job;
- ✓ The work does not require a high level of skill or expertise
- ✓ The firm or client rather than the worker furnishes the tools, materials and equipment
- ✓ The work is performed on the premises of the firm or client
- ✓ There is a continuing relationship between the worker and the firm or client
- ✓ The firm/client sets the hours of work and duration of the job
- ✓ The worker is paid by the hour, week or month rather than for the agreed cost of performing a particular job
- ✓ The worker has no role in hiring and paying assistants

- ✓ The work performed by the worker is part of the regular business of the firm or client
- ✓ The firm or the client is itself in business
- ✓ The worker is not engaged in his or her own distinct occupation or business
- ✓ The firm or client provides the worker with benefits such as insurance, leave or worker's compensation
- ✓ The worker is considered an employee of the firm or the client for tax purposes (i.e., the entity withholds federal, state and Social Security taxes)
- ✓ The firm or client can discharge the worker
- ✓ The worker and the firm or client believe that they are creating an employer-employee relationship.

In addition, the EEOC takes the position that, if both entities (the staffing firm and the client) both meet statutory minimum requirements, they are "joint-employers." Indeed, this may be the most typical status of contingent workers for purposes of EEOC compliance. **[But, See *Stewart v. Univ. of Louisville*, 65 S.W. 3d 536 (Ky. App. 2001)** – grad student receiving fellowship from university not an "employee" for purposes of anti-discrimination statute. Applied an "economic realities" test, and concluded that nearly all student's duties in connection with academic work rather than providing service to university.]

The EEOC's interpretation casts a very broad net, and greatly increases employees' potential liability in these cases, particularly with regard to the long reach of the "co-employer" rationale.

2. Who is the "employer"—once again, the EEOC considers the overall nature of the relationship to be more important than the terms of any agreement between the parties. Most often, the workplace location and control-related standards will result in a finding of at least co-employment status. Given this fact, the client will most often be jointly liable with the placement agency for a violation of the employment discrimination laws.

3. What About Independent Contractors and Non-Employees? EEOC's position is that, due to the broad remedial purposes of the EEO statutes, a company with enough employees to qualify as an employer under a particular statute can be liable for discriminating against an individual who is not its employee, or in some instances, for the discriminatory acts of non-employees. "Enforcement Guidance: application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms," December 3, 1997; ***Lockard v. Pizza Hut*, 74 EPD 45670 (10th Cir. 1998).**

4. Small Business Exemptions: "Counting Heads" for Coverage Purposes—Many state and federal EEO statutes exempt small businesses by limiting coverage to employers with a minimum number of employees. [e.g., ADA, Title VII—15 or more; ADEA—20 or more; FMLA—50 or more; KCRA—8 or more, etc.] When applying the "counting" requirements, EEOC takes the position that an employer must count every worker with whom it has an employment relationship. For example, a worker assigned to a business by a staffing agency may be listed on the agency's payroll. However, both the business client and the staffing agency must count the worker as an employee if joint-

employer classification criteria have been met. This position promises to make a real difference for many smaller employers that utilize contingent employees.

Once again, counsel should be assisting clients with audits of these issues, and, specifically, with reviews of contracts with temporary and staffing agencies. Clients need to understand that, in entering into these arrangements, they may be assuming substantial liability for the acts of their "co-employer," over which they may have little or no control.

Worker Classification Issues Under Immigration Law

Worker classification issues can also present significant issues, and create significant additional legal exposure, in the immigration area. For example, the federal Immigration Reform and Control Act (IRCA) requires that all employers with 3 or more employees verify that all employees are legally entitled to be employed in the United States. This requirement applies to "employees," but not to "independent contractors." In turn, INS regulations [8 CFR § 274a.1(j)] provide 8 factors to be considered by the INS in determining independent contractor status. Such factors include, but are not limited to whether the individual or entity:

- ✓ Supplies the tools or materials
- ✓ Makes services available to the general public
- ✓ Works for a number of clients at the same time
- ✓ Has an opportunity for profit or loss as a result of labor or services provided
- ✓ Invests in the facilities for work
- ✓ Directs the order or sequence in which the work is to be done
- ✓ Determines the hours during which the work is to be done.

The INS applies these standards on a case-by-case basis, presenting the opportunity for after-the-fact findings of misclassification. If, for example an employer wanted to avoid providing fringe benefits by making the foreign national an independent contractor, issuing a 1099, etc., the result could be the loss of immigration status, allegations of fraud against the employer/contractor, etc.

In addition to IRCA, an evolving immigration issue involves the recent efforts by business leaders to meet demands for certain highly skilled technical workers by lobbying Congress to increase quota limits for temporary H-1B Visas. However, worker classification issues may complicate this area as well. Specifically, H-1B visas raise issues because they permit foreign workers to enter the U.S. temporarily, usually to perform a particular assignment. Immigration law covers only workers who are determined to be "employees" under INS criteria, but that leaves it to the courts to determine coverage, on a case-by-case basis, which will typically involve a determination of "employee" or "independent contractor" status.

Worker Classification Issues Under HIPAA

The new HIPAA health care privacy rules also pose some legal risks when applied to the contingent workforce. HIPAA raises slightly different issues from the coverage issues presented by the employee/independent contractor dichotomy. For example, the HIPAA regulations replace the employee/independent contractor distinction with the new categories of "workforce member" and "business associate."

As in the other areas of statutory compliance, correct worker classification is the first step to effective HIPAA compliance. The second step is learning the process of

managing the workers who fall within each of the relevant groups. Determining the worker status question under HIPAA also depends on the degree of control the covered entity exerts over the worker. For example, a computer professional who works on-site as a contractor for an indefinite period of time is likely to be considered a "workforce member." However, a computer professional who works on site as a contractor for a week, on a single particular project, is likely to be considered a "business associate."

Unlike other laws applicable to the workplace, HIPAA covers all workers—both employees as traditionally defined and contingent workers. Penalties for non-compliance with HIPAA requirements range from $100 for a single violation to a $250,000 fine and up to 10 years in prison for disclosing protected personal health information (PHI) for personal gain or with the intent to cause malicious harm. In this environment, worker misclassification can result in significant legal exposure.

Privacy Compliance under HIPAA. Employers and plan administrators are required to control the use and disclosure of PHI to and by both "workforce members" and "business associates." For "workforce members," this obligation is satisfied by the employer's developing and implementing new workplace policies and procedures and training workforce members on HIPAA compliance. For "business associates," this obligation is accomplished by incorporating necessary provisions into business contracts to ensure compliance. In general, health sponsors and other "covered entities" will need to:

1. Identify health plans that are subject to HIPAA requirements.
2. Protect all PHI by keeping it separate from employment-related functions. This may mean a) designating an individual or department that does not make

employment-related decisions as a "designated entity" to maintain all PHI on a separate system, not accessible by others, and to use this alternative system to receive all PHI on behalf of the plan, or b) out-sourcing all PHI to a third party administrator.

3. Develop and implement compliance policies and procedures for workforce training , complaints, risk-management, record-keeping, sanctions, individual PHI notices and notice amendment procedures.
4. Amend the group health plan document and certify that it has been amended and that the plan sponsor agrees to the required restrictions and conditions.
5. Develop and implement procedures for handling individual requests for PHI use and disclosure restrictions, alternative methods and locations for PHI communications, PHI access, amendments to an individual's PHI, and accounting for PHI uses and disclosures.
6. Designate a privacy officer and contact person.

Training. "Workforce members" participate in training. "Business associates" do not. Employees are typically workforce members. However, independent contractors can be either "workforce members" or "business associates," depending on their duration of work for the employer and other factors.

Business Associate Agreements and Confidentiality Agreements. Temporary staffing agencies are typically business associates; as a result, staffing agencies and their temporary workers need to have HIPAA-compliant Business Associate Agreements to avoid potentially costly liability, which could arise if, for example, the staffing agency disclosed PHI. In addition, vendors can become "business associates," if they provide a

product or service that causes them to come into contact with PHI (e.g., certain soft-ware vendors).

Although not required by HIPAA, because of the mandate to protect PHI, employees and many business associates should also be required to sign confidentiality agreements.

Worker Classification Issues – Unemployment Insurance

The Kentucky Supreme Court has recently clarified the tests for determining "employee" versus "independent contractor" status for purposes of the Kentucky Unemployment Insurance statute (KRS Chapter 341). In ***Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc., et al.,*** 2000-SC-0884-DG (Ky. 2003), the Court, in concluding that local newspaper carriers were employees and not independent contractors, applied the factors identified at Restatement (Second) of Agency § 220(2).

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skills required in the particular occupation;

(e) whether the employer or the worker supplies the instrumentalities, tools and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant, and

(j) whether the principal is or is not in business.

The Court further held that none of the factors is determinative, that each case must be decided on its particular facts, and that, while important, the ability to control the work was no more important to the classification determination than the other factors.

The Court then concluded that substantial record evidence supported the conclusion of the Unemployment Insurance Commission that the newspaper carriers were "employees" and not "independent contractors," (reversing the decision of the Court of Appeals). **See also, *Litteral v. Comm. ex rel Unemployment Compensation Commission,* 228 S.W. 2d 37 (Ky. 1950).**

Advising Our Clients Today

While the legal and policy issues relating to the use of contingent workers are difficult, and promise to create future challenges in all of the areas discussed above, our clients are already being presented with a number of complex legal issues due to their current use of contingent workers. Often, these issues are either not being recognized or

are not being dealt with appropriately. Many first arise in the context of business clients negotiating with providers of contingent workers, starting with the contract documents establishing the relationship and defining the terms and conditions under which the parties will operate.

It may not be possible for employers to avoid legal exposure resulting from the various "contingent" staffing relationships, which may be complicated and, which may present issues that have not been considered and/or clarified by the courts. However, it is most important that employers carefully review all contracts creating relationships with contingent workers and worker providers, and that the respective rights and obligations of all parties be clearly set out. Form agreements, provided by the staffing agencies, should be carefully reviewed, and should seldom be signed as originally presented. Many of you have regular clients who utilize contingent workers, and who do not routinely have you review their agreements with staffing and temp. agencies. Clients often assume that the companies supplying contingent workers are knowledgeable and experienced, and/or that there is no real opportunity to negotiate for terms different from those offered in the provider's form agreements.

However, my experience has been that many businesses in the staffing industry are not versed on many of these legal issues, even though they may tout their services by proclaiming that our clients can insulate themselves from liability by allowing them to be the "employer" in the relationship. Even the more knowledgeable providers often utilize agreements that are heavily weighted in their favor, and against the interests of our clients, sometimes to the point of being unconscionable.

In light of the various legal issues identified above, a good starting point for employers and their counsel is to become much more pro-active in reviewing staffing and contingent worker agreements, to make certain that they contain balanced provisions that fairly allocate the legal risks between the parties, and that protect the interests of the client. Many of our clients do not appreciate the need to utilize our services for this purpose, and many of the agreements being used are seriously one-sided and/or legally defective. In light of the legal issues described above, the following are examples of issues that should be considered in reviewing contingent worker agreements:

1. Responsibility to recruit and hire

Consider the merits of including a provision making the staffing agency solely responsible for recruiting, hiring and "screening" to do the work. The client should supply job descriptions and other criteria, and otherwise provide a "framework" within which the agency agrees to operate. The agreement should thereafter reflect that the workers are hired by the agency, and not the company.

2. "Disclaimer" of employment status

Consider addressing the issue of whether the parties intend that workers will be the sole employees of the staffing agency, or of the business utilizing its services. While such a provision will not afford complete protection, in that the parties' designation will not be dispositive, it is most important that the intent of the parties in this regard be clearly set out in the agreement.

3. Responsibility for training

The agreement should indicate which party is to provide training. Of course, it is reasonable to assume that, if the staffing agency is to provide meaningful training, this

service will be factored into the cost of its services; however, such an allocation may well pay significant dividends in the future.

4. Responsibility for compensation and benefits

The Agreement should reflect which party has responsibility for computing wages, hours, and overtime hours, withholding and remitting taxes, and calculating and providing any benefits or leave time required at law or otherwise offered by the agency. This provision should be coordinated with the business' other contracts, insurance agreements, and benefits plans.

5. Disciplinary actions and termination

The agreement should indicate the procedure by which disciplinary action will be taken, and by which party. While the agreement may provide that any worker furnished by the agency agrees to adhere to the policies and procedures of the company, the agreement should also set out a procedure for the company to report worker violations to the staffing agency, which should agree, in turn, to take appropriate action. The agreement should provide that the company may request that a certain worker(s) not be returned; however, the responsibility for determining continued employment with the staffing agency should remain with that agency. Responsibility should also be allocated and procedures established for investigation of violations of policies such as allegations of sexual harassment, so that the appropriate investigations can be made, while the staffing agency can remain ultimately responsible for personnel actions regarding its employees.

6. On-site supervision

The parties should consider whether the staffing agency will provide an on-site supervisor(s), to direct the work of the workers it places at the business. Procedures for

the company to provide information and direction to the staffing agency supervisor can be set out in the agreement; however, the right to "control the work" is almost always a key issue for purposes of determining who is the employer, under any of the statutes discussed above, and it will be difficult for the parties to argue that the staffing agency is responsible for daily supervision of the worker if it has no presence on-site, and no real involvement in, or even sense of, how the business operates on a daily basis.

7. Representation of compliance with all employment laws

The agreement should contain a certification by the staffing agency that it is and will remain in complete compliance with all employment laws and regulations, and those representations should be identified as being "material" for purposes of the agreement. The provision should also recite that the agency will maintain an EEO policy, including a policy against harassment, and appropriate complaint and investigation procedures, throughout the term of the agreement. The company should consider requiring that the provider produce the policies at the time the agreement is entered into (for your review on behalf of the client), and at other times, when requested or when changes are made. (Example: policy on sexual harassment).

8. Indemnification

The agreement should address the issue of indemnification of each party for the acts of the other party for its defense of any employment claims involving workers supplied by the agency, and for any damages incurred as a result of any such claim(s).

9. Workers' compensation and unemployment insurance

The agreement should allocate which party has sole responsibility to make insurance payments for FICA, unemployment and workers' compensation. Levels of coverage and

carriers should be identified, along with provisions requiring consent of the business to change coverages or providers, as well as requiring notice to the business of any actual or threatened cancellation or other material change in circumstances.

10. Confidential and proprietary information

The agreement should protect confidential or trade secret information to which workers may have access, and workers placed by staffing agencies should be covered to the same extent as the company's own employees. This provision should address the issues of access to confidential information, freedom to search belongings or work areas, and other security procedures/precautions. The company should also consider the value of using confidentiality agreements for the agency and all workers referred to the company.

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Issues involving the contingent workforce are complex, and often lead to conflicting results. However, our clients should not allow this fact to become a rationalization for doing nothing to evaluate and limit exposure. While our efforts are not likely to eliminate all exposure in this complex and fast-changing area, an intentional approach to evaluating risks and responding with appropriate policies and practices, can go a long way towards protecting clients' interests.

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CLASS ACTIONS AND CLASS RELIEF: THE BASICS AND THE SPECIFICS FOR EMPLOYMENT LAW

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CLASS ACTIONS AND CLASS RELIEF: THE BASICS AND THE SPECIFICS FOR EMPLOYMENT LAW

INTRODUCTION

It is not a news flash that employers today face an increasingly perilous landscape. In addition to the significant challenges that flow from a confusing economic picture, employers are faced with more frequent and dangerous claims by current and former employees. Among the claims that give rise to the biggest financial risk are those involving a request for class relief. For obvious reasons, employers want to do everything possible to avoid class exposure.

This outline will include a discussion of the fundamental requirements of a class action and the principal issues faced by parties when litigating employment law class actions. It will also include a brief discussion of emerging employment law issues in the class context.

BACKGROUND

A party may pursue a class action only if: (1) the class is so numerous that joinder of all members is impracticable (often abbreviated as "numerosity"); (2) there are questions of law or fact common to the class (often abbreviated as "commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (often abbreviated as "typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class (often abbreviated as "fair and adequate representation").[1] If all of these requirements are satisfied, the court may certify a class if, in addition, the class representatives meet any one of the following requirements:[2]

(a) The prosecution of separate actions by or against individual members of the class would create a risk of:

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[1] FRCP 23(a). Because most class cases have been pursued in the federal courts, this outline principally focuses on class relief under federal law.

[2] These additional requirements are set forth in FRCP 23(b).

(i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) The court finds[3] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[4]

The party seeking class certification bears the burden of proof[5] and the class mechanism is not available merely because a lawyer designates a group of persons or entities as a "class" in the pleadings.[6] Although a hearing prior to the class determination is not required in every instance, " 'it may be necessary for

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[3] The matters pertinent to these findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. FRCP 23(b)(3).

[4] The Supreme Court has held that district courts must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met before certifying a class. General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).

[5] General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).

[6] Cash v. Swifton Land Corp., 434 F.2d 569, 571 (6th Cir. 1970).

the court to probe behind the pleadings before coming to rest on the certification question' "[7] As the Sixth Circuit has noted:

> Mere repetition of the language of Rule 23(a) is not sufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled. Maintainability may be determined by the court on the basis of the pleadings, if sufficient facts are set forth, but ordinarily the determination should be predicated on more information than the pleadings will provide . . . .The parties should be afforded an opportunity to present evidence on the maintainability of the class action.[8]

I. Rule 23 (a) requirements.

A. Numerosity.

As noted above, to satisfy FRCP 23(a), a party seeking class relief must demonstrate that the proposed class is so numerous that the joinder of all members is impracticable.[9] The test for numerosity is not precise and involves an examination of the specific facts of each case.[10] In determining whether joinder is impracticable, courts often will consider not only the size of the proposed class, but also "the class's geographical dispersion, the ability of claimants to bring individual suits, and whether the members' names are easily ascertainable."[11] Even so, when the class size is extremely large, the impracticability requirement

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[7] In re American Medical Sys., 75 F.3d 1069, 1079 (6th Cir. 1996) (quoting General Tel. Co. v. Falcon, 457 U.S. at 160 (1982)).

[8] Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974) (citation omitted).

[9] FRCP 23(a)(1).

[10] In re American Medical Sys., 75 F.3d 1069, 1079 (6th Cir. 1996).

[11] O'Neil v. Appeal, 165 F.R.D. 479, 489 (W.D. Mich. 1996).

is normally satisfied.[12] At least one court has concluded that fewer "than twenty-one [members] is inadequate, more than forty [is] adequate, with numbers between varying according to other factors.[13]

It is important to note that mere conclusory allegations that joinder is impracticable are not sufficient to satisfy the numerosity requirement.[14] Indeed, it is proper for a court to rule against class certification when the contentions concerning the size of the class are purely speculative.[15]

As with all of the requirements of class status, a claimant typically must establish the numerosity requirement by a preponderance of the evidence.[16]

B. Commonality.

A party seeking class status must prove that there are questions of law or fact common to the class.[17] Although a claimant can satisfy this requirement even if the claims are not identical, when the resolution of a common legal issue is dependent upon factual determinations that will be different for each purported class member, the courts have consistently refused to find that the commonality

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[12] In re American Medical Sys., 75 F.3d 1069, 1079 (6th Cir. 1996). See also Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613, 617 (S.D. Ohio 1996) ("Numerosity may be satisfied by numbers alone").

[13] Thomas County Branch of the N.A.A.C.P. v. City of Thomasville Sch. Dist., 187 F.R.D. 690, 696 (M.D. Ga. 1999) (quoting Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986)).

[14] See Liberty Lincoln Mercury v. Ford Mktg. Corp., 149 F.R.D. 65, 74 (D. N.J. 1993).

[15] Vigue v. Ives, 138 F.R.D. 6, 8, (D. Me. 1991).

[16] Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613, 618 (S.D. Ohio 1996).

[17] FRCP 23(a)(2).

requirement was satisfied.[18] Thus, where there is a finding that common issues do not predominate, certification is improper.[19]

The Sixth Circuit has noted that the "commonality requirement is interdependent with the impracticability of joinder requirement, and the 'tests together form the underlying conceptual basis supporting class actions' ".[20]

C. Typicality.

To meet the typicality requirement, the party seeking class status must establish that the claims or defenses of the representative party are typical of the claims or defenses of the class.[21] Stated otherwise, the class representative's interests must be aligned with those of the represented group so that "in pursuing his own claims, the named plaintiff will be advancing the interests of the class members."[22] This test is normally met as long as there is "a nexus between the class representatives' claims" and the common questions of fact or law concerning the class.[23] If there is a defense that is peculiar to the named plaintiff, class certification may be denied.[24]

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[18] See, e.g., Liberty Lincoln Mercury v. Ford Mktg. Corp., 149 F.R.D. 65, 76 (D.N.J. 1993). See also McCauley v. International Business Machines, 165 F.3d 1038, 1046-47 (6th Cir. 1999) (holding that to meet the commonality requirement, the allegations of misrepresentations upon which the class claims are based must "be uniform among class members . . . .")

[19] In re American Medical Sys., 75 F.3d 1069, 1085 (6th Cir. 1996) ("[T]he products are different, each plaintiff has a unique complaint, and each received different information and assurances from his treating physician").

[20] In re American Medical Sys., 75 F.3d 1069, 1080 (6th Cir. 1996) (quoting 1 Newberg on Class Action, § 3.10, at 3-47).

[21] FRCP 23(a)(3).

[22] In re American Medical Sys., 75 F.3d 1069, 1082 (6th Cir. 1996).

[23] Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 385 (D. Colo. 1993).

[24] Ballan v. Upjohn Co., 473 F.R.D. 473, 480 (W.D. Mich. 1994).

D. Adequacy of Representation.

In recognition of the importance of the selection of class counsel to the successful handling of a class action, the drafters of the recent amendments to Rule 23 prepared a new section concerning the appointment of class counsel. Rule 23 now explicitly says that "[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel."[25] That attorney must, of course, "fairly and adequately represent the interests of the class."[26] To that end, the court is required to consider in its appointment decision "the work counsel has done in identifying or investigating potential claims in the action", "counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action", "counsel's knowledge of the applicable law" and "the resources counsel will commit to representing the class"[27] and may consider any other "pertinent" matter.[28] Moreover, the court may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs."[29]

Amended Rule 23 also provides greater guidance concerning the procedure for appointment of class counsel. Specifically, the Rule says that the court may designate interim counsel to act on behalf of the putative class before

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[25] FRCP 23(g)(1)(A).

[26] FRCP 23(g)(1)(B).

[27] FRCP 23(g)(1)(C)(i).

[28] FRCP 23(g)(1)(C)(ii).

[29] FRCP 23(g)(1)(C)(iii).

determining whether to certify the action as a class action.[30] Further, when there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C).[31] Predictably, the Rule says that if more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.[32] The Rule also expressly authorizes the court to include provisions about the award of attorney fees or nontaxable costs in the order appointing class counsel.[33]

Whether representation is adequate is generally considered a question of fact based upon the circumstances of each case.[34] Before the amendment of Rule 23, courts generally found that for a representative to be deemed adequate he or she must have common interests with the unnamed members of the class and it must appear that the representative would vigorously prosecute the interests of the class through qualified counsel.[35] Applying these factors, courts before the amendment typically reviewed whether there was any antagonism between the interests of the named plaintiff and the other members of the class and also reviewed the experience and the ability of the attorneys for the class.[36] In

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[30] FRCP 23(g)(2)(A).

[31] FRCP 23(g)(2)(B).

[32] Id.

[33] FRCP 23 (g)(2)(C).

[34] Ballan v. Upjohn Co., 159 F.R.D. 473, 480 (W.D. Mich. 1994).

[35] In re American Medical Sys., 75 F.3d 1069, 1083 (6th Cir 1996).

[36] Ballan v. Upjohn Co., 159 F.R.D. 473, 482 (W.D. Mich. 1994).

addition, courts considered whether the class representative " 'posses[ed] the same interest and suffer[ed] the same injury' as the class members."[37] With respect to that point, it is generally recognized that a person will not be deemed an adequate class representative if he or she fails to establish the existence of a case or controversy.[38] Moreover, standing must exist both at the time the complaint is filed and at the time the class is certified.[39]

On a similar point, special mootness rules exist for class actions. Once a class is certified, "the mooting of the named plaintiff's claim does not moot the action" and "the court continues to have jurisdiction to hear the merits of the action if a controversy between any class member and the defendant exists."[40] On the other hand, where the named plaintiff's claim becomes moot before certification, dismissal of the action is required.[41]

II. Rule 23(b) Requirements.

As discussed above, a party seeking class relief may pursue a class action if he or she meets the Rule 23(a) "prerequisites" and, in addition, demonstrates the applicability of one of the three subparts of Rule 23(b).

A. Risks From Prosecution of Separate Actions.

Rule 23(b)(1) recognizes the propriety of a class action if the Rule 23(a) prerequisites are met and the prosecution of separate actions by or against

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[37] General Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982); James v. Jones, 148 F.R.D. 196, 201 (W.D. Ky. 1993).

[38] Coleman v. Cannon Oil Co., 141 F.R.D. 516, 523 (M.D. Ala. 1992).

[39] Brunet v. City of Columbus, 1 F.3d 390, 399 (6th Cir. 1993).

[40] Brunet v. City of Columbus, 1 F.3d 390, 399 (6th Cir. 1993).

[41] Id.

individual members of the class would create a risk of: (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards for the party opposing the class; or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. A judgment in a Rule 23(b)(1) case "shall" include and describe those whom the court finds to be members of the class.[42]

B. Conduct Giving Rise to Injunctive or Declaratory Relief.

Under Rule 23(b)(2), class relief will be deemed proper if the Rule 23(a) prerequisites are satisfied and the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

C. Predominance of Common Questions.

Class relief is appropriate under the last subpart of Rule 23(b) if the Rule 23(a) prerequisites are satisfied and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[43] The Rule specifically identifies the following list of factors that are "pertinent to the

[42] FRCP 23(c)(3). This same requirement applies to a judgment entered in a Rule 23(b)(2) class action.

[43] FRCP 23(b)(3).

findings": (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action.[44]

With respect to a FRCP 23(b)(3) class action, the court is required to direct to the members of the class the "best notice practicable under the circumstances", including individual notice to all members who can be identified through reasonable effort.[45] Such notice "shall" advise each member that: (a) the court will exclude the member from the class if the member so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.[46] Due process concerns mandate the opt-out mechanism.[47]

A judgment entered in a Rule 23(b)(3) case "shall" include and specify or describe those to whom the notice provided in the preceding paragraph was directed, and who have not requested exclusion, and whom the court finds to be members of the class.[48]

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[44] Id.

[45] FRCP 23(c)(2).

[46] Id.

[47] Becherer v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 193 F.3d 415, 425 (6th Cir. 1999).

[48] FRCP 23(c)(3).

Issues of damages in a Rule 23(b)(3) action may, where appropriate, be reserved for individual treatment, with the question of liability tried as a class action.[49] In complex cases where no single set of operative facts establishes liability, where no single proximate cause applies to each potential class members and to each defendant, and where individual issues outnumber common issues, however, the district court should question the appropriateness of a class action for resolving the controversy.[50]

III. Other Procedures.

A. Class Certification.

Rule 23 specifically provides that "[w]hen a person sues or is sued as a representative of a class, the court must – at an early practicable time – determine by order whether to certify the action as a class action."[51] Providing the court a measure of flexibility, the Rule also provides that "[a]n order under Rule 23 (c)(1) may be altered or amended before final judgment."[52] In the Sixth Circuit, there is an abuse of discretion standard for the review of a trial court's class action certification.[53] In addition, if the parties agree to class certification or if the opposing party does not contest the assertions of the party seeking class certification as to the existence of a prerequisite, the district court may conclude

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[49] Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613, 619 (S.D.Ohio 1996).

[50] Id.

[51] FRCP 23(c)(1)(A).

[52] FRCP 23(c)(1)(C).

[53] McCauley v. International Business Machines Corp., 165 F.3d 1038, 1046 (6th Cir. 1999).

that certification is proper or that the prerequisites are properly established without making a specific finding.[54]

B. Discrete Issues and Subclasses.

Rule 23 explicitly recognizes that an action may be brought or maintained as a class action with respect to particular issues.[55] Similarly, a class may be divided into subclasses and each subclass treated as a class.[56]

C. Orders in Conduct of Actions.

Rule 23 provides that a court in a class action may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.[57]

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[54] In re American Medical Sys., 75 F.3d 1069, 1079-80 (6th Cir. 1996).

[55] FRCP 23(c)(4).

[56] Id.

[57] FRCP 23(d).

D. Dismissal or Compromise.

Federal Rule 23(e) has been amended recently to set forth more specifically the process a court will follow when approving a proposed settlement, voluntary dismissal or compromise. The Rule specifically begins with the principle that "[t]he court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.[58] When presented with a proposed voluntary resolution, a court is required to direct notice "in a reasonable manner" to all class members who would be barred by the proposed resolution.[59] In addition, the court may approve a proposed voluntary resolution that would bind class members only after a hearing and on finding that the proposed resolution is "fair, reasonable, and adequate."[60] Similarly, if the action previously was certified as a class action under FRCP 23(b)(3), the Court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.[61]

The parties seeking a voluntary resolution of class claims must file a statement identifying any agreement made in connection with the proposed resolution.[62] Further, any class member may object to a proposed settlement,

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[58] FRCP 23(e)(1)(A).

[59] FRCP 23(e)(1)(B).

[60] FRCP 23(e)(1)(C).

[61] FRCP 23(e)(3).

[62] FRCP 23(e)(2).

voluntary dismissal or compromise that requires court approval under FRCP 23(e)(1)(A) and an objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.[63]

E. Appeals.

A court of appeals may, in its discretion, permit an appeal from an order of a district court granting or denying class action certification under the Rule if application is made to it within ten days after entry of the order.[64] An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[65]

F. Award of Attorney Fees.

In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties. As a matter of procedure, a claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of Rule 23(h), at a time set by the court.[66] Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.[67] A class member, or a party from whom payment is sought, may object

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[63] FRCP 23(e)(4).

[64] FRCP 23(f). It is noteworthy that there is no corresponding provision under Rule 23 of the Kentucky Rules of Civil Procedure.

[65] Id.

[66] FRCP 23(h)(1).

[67] Id.

to the motion[68] and the court may hold a hearing and must find the facts and state its conclusions of law on the motion.[69] The court is authorized to refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).[70]

IV. Emerging Class Issues in Employment Law.

A. Claims Regarding Employee Benefits.

Among the most prevalent class action claims in the employment law area are those regarding employee benefits. Such claims typically are pursued under the Federal Employee Retirement Income Security Act ("ERISA").[71] Class claims under ERISA may involve such issues as "nondisclosure, breach of duty, or nonforfeiture provisions."[72]

B. Discrimination Claims.

Employers today face an increasing risk of defending discrimination claims by groups of former, or even current, employees. In earlier cases under Title VII of the Civil Rights Act of 1964, many courts tended to be more lenient in finding compliance with Rule 23 than in other types of cases.[73] That tendency

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[68] FRCP 23(h)(2).

[69] FRCP 23(h)(3).

[70] FRCP 23(h)(4).

[71] 29 U.S.C. § 1001, et. seq.

[72] 5 James Wm. Moore, et al. Moore's Federal Practice § 23.23 [5][i] (3d ed. 2000).

[73] Lindemann & Grossman, Employment Discrimination Law, Vol. II at 1582 (3d ed. 1996).

ended after the United States Supreme Court emphasized that a Title VII class plaintiff must satisfy all of the requirements of Rule 23,[74] noting:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or facts are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.[75]

As a general proposition, disparate treatment discrimination claims are often not appropriate for class treatment because allegations of intentional discrimination often raise individual issues.[76] Stated another way, "[i]t is more difficult to find commonality and typicality in disparate treatment claims as opposed to disparate impact claims."[77] Among the problems with the pursuit of disparate treatment class claims is that the recovery of compensatory and punitive damages in Title VII cases "requires individualized and independent proof of injury to, and the means by which discrimination was inflicted upon, each class member."[78] As the United States Court of Appeals for the Fifth Circuit has noted:

> The plaintiffs' claims for compensatory and punitive damages must therefore focus almost entirely on facts and issues specific

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[74] East Texas Motor Freight System, Inc. v. Rodrigues, 431 U.S. 395 (1977).

[75] Id. at 405-06.

[76] Lindemann & Grossman, n. 55, supra, at 1593.

[77] Carter v. West Publishing Co., 79 FEP 1494, 1498 (D. Fla. 1999). See also Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 239 (W.D. Tex. 1999) ("Because disparate treatment claims are by their nature individual, the class treatment of these claims requires close scrutiny of the proposed class and claims.").

[78] Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998).

> to individuals rather than the class as a whole: what kind of discrimination was each plaintiff subjected to; how did it affect each plaintiff emotionally and physically, at work and at home; what medical treatment did each plaintiff receive and at what expense; and so on and so on. Under such circumstances, an action conducted nominally as a class action would 'degenerate in practice into multiple lawsuits separately tried.'[79]

A Title VII plaintiff bringing a disparate impact claim must identify a specific practice or specific practices as the cause of the alleged impact, unless the elements of the decision making process are not capable of separation for analysis.[80] Courts generally find the Rule 23(a) requirements met in disparate impact cases when the plaintiffs identify a particular test or other objective selection devise that created the disparate impact.[81]

C. Harassment Claims.

Although harassment claims more often than not involve allegations of individual harassment, there is precedent for class actions that arise from an alleged pervasive course of harassing conduct affecting a large number of persons.[82]

D. Wage and Hour Claims.

Wage and hour claims, like those asserted under ERISA, can give rise to significant exposure for relatively minor missteps. Under Federal Law,[83] there

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[79] Id.

[80] Lindemann & Grossman, n. 55, supra, at 1591.

[81] Id., 2000 cum. supp. at 881.

[82] See, e.g., Donnelly v. Glickman, 159 F.3d 405 (9th Cir. 1998).

[83] The Fair Labor Standards Act, 29 U.S.C. section 201, et seq. requires payment of minimum wages and overtime to employees covered by the Act.

are special rules concerning collective claims that, in contrast to those in Rule 23, require claimants to opt in to a potential class.[84] Oddly, the Kentucky Wage and Hour chapter, though based in significant part on the Fair Labor Standards Act, does not contain a similar "opt in" provision.[85]

[84] 29 U.S.C. § 216 ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

[85] See KRS 337.385 ("Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself or themselves.").

AN OVERVIEW OF THE EMPLOYMENT AT-WILL DOCTRINE IN KENTUCKY

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SECTION I

AN OVERVIEW OF
THE EMPLOYMENT AT-WILL DOCTRINE IN KENTUCKY

An Overview of the Employment At-Will Doctrine in Kentucky

Life is largely made up of relationships. One can argue that the employee/employer relationship is just as important in our every day lives as the relationship between parent and child and husband and wife. Many employees would join in the chorus of Johnny Paycheck's famous song "Take this job and shove it." Many employers have recently enjoyed " The Apprentice" which shows a person leaving each week after Donald Trump famously fires them. Anyway you look at it, the question of at-will employment is very important to employers and employees.

The number one question an attorney has to ask him or herself when presented with facts of a particular matter is "Do I have a cause of action?" In the employment law field this question inevitably turns on whether the employee is considered an "at-will employee." If so, the attorney must determine whether there is a valid exception to the at-will employment doctrine that can be utilized on his or her client's behalf.

Another question a practitioner may ask is whether there are enough employment law cases to sustain a practice. I submit that employment law is recession proof. During good economic times there are still human resource blunders that lead to wonderful cases. During bad economic times (as is largely the case at the present time) employees who get fired are much more emotional about losing their job because it is hard to find another one. They call an attorney to see if there is anything they can do about being fired for no apparent reason.

I hope to provide a brief sketch of the basics of the employment at-will doctrine in Kentucky. In no way is this presentation or material meant to be an exhaustive analysis of the

topic. Rather, it provides the relevant and current materials on particular topics dealing with at-will employment that an attorney then can extrapolate from there.

1. Employment At-Will: What is it?

An employment at-will contract is a contact of employment with no defined period for that employment. It is therefore terminable at any time by either the employer or the employee. Kentucky has generally recognized that an employer may discharge his at-will employee for good cause, for no cause or for a cause that some might view as morally indefensible. *Production Oil Co. v. Johnson*, Ky., 313 S.W.2d 411 (1958).

So can there ever be a time that an employee can sue an employer for his or her termination? Yes. There are two situations that exist where grounds for discharging an employee are so contrary to public policy as to be actionable absent explicit legislative statements prohibiting the discharge. First, if the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment. Second, when the reason for discharge is the employee's exercise of a right conferred by well established legislative enactment. *Dauley v. Hops of Bowling Green Limited*, 2003 WL 1340013 (Ky.App.) citing *Suchodolaski v. Michigan Consolidated Gas Co.*, 316 N.W.2d 710 (1981). Accordingly there have been common law as well as statutory exceptions made to the employment at-will doctrine. Each of these will be discussed below with correlating case examples.

2. Statutory Exceptions to the Employment At-Will Doctrine

There are three primary statutory provisions in the employment law field that give rise to causes of action for an employee against an employer. The first is a statutory prohibition against the employer from retaliating against the employee for applying for workers' compensation

benefits. KRS 342.197(1). The second is the Kentucky Whistle-Blower statute. KRS 61.102(1). Finally there is the prohibition against discrimination found in the Kentucky Civil Rights Act. KRS 344.010 *et. seq*. Each of these statutory basis will be explored further below.

a. Workers' Compensation Retaliation - KRS 342.197(1)

KRS 342.197(1) states that "no employee should be harassed or discharged or discriminated against in any manner what so ever for filing or pursuing any lawful claim under this chapter." The statute is actually written to codify the holding of *Firestone Textile Company Division v. Meadows*, Ky., 666 S.W.2d 730 (1983). There are two important aspects of the *Firestone* case. The first is the Court's acknowledgement that an employee can sue an employer for retaliating against him. The Court noted "the only effective way to prevent an employer from interfering with his employee's right to seek compensation is to recognize that the latter has a cause of action for retaliatory discharge when the discharge is motivated by the desire to punish the employee for seeking the benefits to which he is entitled to by law." *Id.* at 734. The second important development from the *Firestone* case is that it is a question of law for the Court to decide whether the reason for discharge is unlawful. *Id.* at 733.

In *First Property Management Corp. v. Zarebidaki*, Ky. , 867 S.W.2d 185 (1993), the Court determined whether the termination of the employee had to be solely because he filed for workers compensation benefits or whether the fact that the employee filed for workers compensation benefits was a substainual motivating factor in terminating the employee to sustain a cause of action. The Court held "that the employer is not free from liability simply because he offers proof he would have discharged the employee anyway,

even absent the lawful and permissible reason, so long that the jury believes the impermissible reason did in fact contribute to the discharge as one of the substantial motivating factors." *Id.* at 188.

Another important case for plaintiffs is *Pike County Coal Corp. v. Ratliff*, Ky.App., 37 S.W.3d 781 (2000). This case expanded the scope of KRS 342.197(3) to protect those who protect co-workers from retaliation. The plaintiff sued the employer on the theory that he was fired for his failure to persuade a co-worker from dropping a workers compensation claim. The Court dismissed the plaintiff's claim but agreed with the trial court that KRS 342.197(3) extended 342.197(1) protection beyond an injured employee. The court stated "clearly to insure the integrity of the underlying policies of the statute we would not hesitate to construe the "any individual" language to encompass any person who sought to protect his own rights to pursue a workers compensation claim as well any person who acted in support of another's pursuit or those rights and who suffered reprisals from the employer of the injured employee." *Id.* at 784.

b. The Kentucky Whistle-Blower Statute - KRS 61.102(1)

KRS 61.102(1) states that

> "no employer shall subject to reprisal or directly or indirectly use or threaten to use any official authority or influence in any matter what so ever which tends to discourage, restrain, depress, dissuade, detour, prevent, interfere with, coheres or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, a legislative research commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority, any facts or information

> relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule or orderanance of the United States, the Commonwealth of Kentucky or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or substantial and specific danger to public health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure, divulgence."

KRS 61.102(2) states that "no employer shall subject to reprisal or discriminate against or use any official authority or influence to cause reprisal or discrimination by others against any person who supports, aids or substantiates any employee who makes public any wrong doing set forth in subsection (1) of this section."

The most recent case dealing with the Kentucky Whistle-Blower Statute is *Commonwealth of Kentucky Department of Agriculture v. Vinson*, Ky., 30 S.W.3d 162 (2000). This case decided whether the statute was unconstitutionally vague, whether the plaintiffs were entitled to punitive damages, whether the plaintiff was entitled to a jury trial and when amendments to the statute took effect in regard to this particular matter. The Supreme Court of Kentucky held that the statute was not unconstitutionally vague, that the plaintiff was entitled to punitive damages, that the plaintiff was entitled to a trial by jury, and that the 1993 amendments to the statute (which were favorable to employees) would not be applied retroactively. As a result, the judgment was reversed and the case remanded for a new trial under the original version of the statute. However, this case shows that the statute has far reaching application.

C. The Kentucky Civil Rights Act - KRS 344.040

KRS 344.040(1) states "it is unlawful practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against an individual with

respect to the compensation, terms, conditions, or privileges of employment because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because a person is a qualified individual with a disability, or because an individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking."

A case that is cited by nearly every defendant in nearly every employment law case is *Grzyb v. Evans*, Ky., 700 S.W.2d 399 (1985). The Court held "the claim of sex discrimination would not qualify as providing the necessary underpinning for a wrongful discharge suit because the same statute that enunciates the public policy prohibiting employment discrimination because of "sex" also provides a structure for pursuing a claim for discriminatory acts and contradiction of its terms." *Id.* at 401. The Court went on to state "the same statute which would provide the necessary underpinning for a wrongful discharge suit where there is sufficient evidence to prove sex discrimination in employment practices also structures the remedy. The statute not only creates a public policy but preempts the field of its application." *Id.* Thus the defendant usually argues that the plaintiff is not entitled to bring a cause of action and instead is limited to administrative remedies.

However two cases have since clarified whether plaintiff can bring a wrongful discharge claim as indicated in the statute. The first is *Grego v. Meijer Inc.*, 187 F.Supp. 2d 689 (W.D.Ky. 2001). In that case the Court held that "absent the final determination by the administrative agency, therefore, the election of remedies provision of the Kentucky Civil Rights Act does not bar [plaintiff's] claim so long as it is no longer

pending with the KCHR." *Id.* at 693. The second case is *Young v. Hammond*, 2004 WL 867795 (Ky.). In this case, decided April 22, 2004, the court held that the when the plaintiff is notified by the EEOC that their file is being closed and informs her of her right to sue, the plaintiff is still entitled to bring a lawsuit in circuit court. *Id.* at *7.

3. Common law claims or case law claims.

There are a plethora of common law claims that are available to a plaintiff that may be considered exceptions to the at-will employment doctrine, like intentional infliction of emotional distress and negligent hiring and supervision of employees. I will only address several of the most litigated topics below.

a. Public Policy Exception

The *Firestone* case, referenced earlier, is a perfect example of a public policy exception to the employment at-will doctrine. The public policy exception was clearly defined by the *Grzyb* case also mentioned earlier. Of course the *Grzyb* decision was also further clarified by the *Dauley* decision mentioned at the very beginning of this paper.

There are four cases that show how narrow the Court construes public policy exceptions to the employment at-will doctrine. First, is *Boykins v. Housing Authority of Louisville*, Ky., 842 S.W.2d 527 (1992). In this case the plaintiff was employed as an executive secretary with the Housing Authority of Louisville and filed a lawsuit against the Housing Authority of Louisville as next fiend of her infant son alleging negligence. Approximately four months later she was fired from the Housing Authority. The plaintiff claimed that she was fired in retaliation for filing the suit as next fiend of her infant son. Although she was fired for a matter not related to her employment, she claimed that the

termination was in violation of the "open courts" provision of Section 14 of the Kentucky Constitution. The Court held that there was no "fundamental and well-defined public policy evidenced by existing law as required by *Firestone*. Nor does either exception outlined in *Grzyb* apply." *Id.* at 530.

The next case is *Nelson Steel Corp. v. McDaniel*, Ky., 898 S.W.2d 66 (1995). In this case the plaintiff filed two workers compensation claims with his prior employer before he began employment with the defendant, Nelson Steel Corp. When he was discharged he alleged that he was fired due to filing of prior workers compensation claims. The Court concluded "KRS 342.197(1) does not expand the cause of action for wrongful discharge for exercise of workers compensation rights beyond the retaliatory discharge situation." *Id.* at 69.

One of the more recent decisions regarding the public policy exception is *Barlow v. Martin-Brower Co.*, 202 F.3d 267 (6th Cir. Ky. 2000). The plaintiff alleged that he was wrongfully discharged because he refused to violate federal and state time and safety regulations. The federal district court dismissed plaintiff's claims finding that the administrative remedy available to plaintiff under the Surface Transportation Assistance Act ("STAA") was exclusive. The plaintiff contended that while the STAA may have precluded his claim for one count of his complaint it did not preclude his claim for wrongful termination and violation of well defined statutory provisions. However the Court held that "the public policy asserted was not defined as required by *Grzyb* by constitutional statutory provision. It is modified only by administrative regulation." *Id.*

at **2. Thus an administrative regulation is not considered a public policy exception to the employment at-will doctrine.

The most recent case concerning the public policy exception to the employment at-will doctrine is *Byrd v. Packaging Unlimited, Inc.*, 2004 WL 539125 (Ky.App.). In this case the plaintiff brought his lawsuit for wrongful discharge based upon the allegation that he was discharged by the defendant for refusing to violate a law in the course of his employment. Specifically the plaintiff alleged that he was dismissed based upon his refusal to violate the law against falsifying business records. The Court held that KRS 517.050, the statute with codifies the defense of falsifying business records, "falls squarely within the first exception to at-will employment identified *Grzyb*." *Id.* at *8. Thus a criminal statute can be the basis for an exception to the employment at-will doctrine.

Finally, the plaintiff in *Zumot v. Data Management Co.*, 2004 WL 405888 (Ky.App.) reported illegal business activities to others in his company. The Court held that plaintiff was a at-will employee and that "[plaintiff's] report of illegal activity to those other than public authorities is not protected activity under the public policy exception." *Id.* a *1.

b. Contract Claims

It is well established that contract provisions and other representations can form an exception to the employment at-will doctrine. In *Putnam v. Producers' Livestock Marketing Ass'n*, Ky.App., 75 S.W.2d 1075 (1934), the Court held that a letter from the employer to the employee providing for an annual salary was held to sufficiently disclose

the intention to employ the plaintiff for a definite period of time. Thus the resulting contract was not considered terminable at-will.

In *Shah v. American Synthetic Rubber Corp.*, Ky., 655 S.W.2d 489 (1993), the plaintiff alleged that the parties had agreed that after a ninety day probationary period he could only be fired for just cause. The Court made two important holdings. First, the Court stated "the parties may enter into a contract of employment terminable only pursuant to expressed terms-as "for cause"- by clearly stating their intention to do so, even though no other considerations than services to be preformed or promised, is expected by the employer, or preformed or promised by the employee." *Id.* at 492. Second, and maybe more importantly for plaintiffs, the Court stated "whether [plaintiff's] employment contract contained a "termination for cause only" covenant or whether he was fired in accordance with company policies and procedures for one or more of the many causes alleged by [defendant] cannot be resolved against him on [defendant's] Motion for Summary Judgment." *Id.* Thus under similar circumstances, whether the contract is considered a termination for cause or an at-will contract is a question for the jury to decide.

It should be noted that the holding in *Shah* has been refined on two occasions. First, in *Baker v. Kentucky State University*, 2002 WL 1792178 (6th Cir. Ky.) the plaintiff was hired as a police officer at Kentucky State University under a succession of one year contracts. When he was terminated the plaintiff filed suit and relied on the language in *Shah* to support his claim that a case such as his raising the issue of denial of predeprivation due process in the employment context is not appropriate for summary

judgment. The Court rejected this argument due to the fact that the plaintiff presented no evidence of an implied contract. *Id.* at **3. In the second case, *Bailey v. Floyd County Board of Education*, 106 F.3d 135 (6th Cir. Ky. 1996), plaintiff was fired from her position with the Head Start Program in Floyd County. She claimed the personnel manual for the high school that was modified after her employment began created a "for cause" exception to her at-will contract. The Court noted that the plaintiff actually drafted the policy and asserted in an introductory statement that the manual was not a change in employment status but a "guide and reference" and a collection of "ideas and principles". *Id.* at 143. The Court also noted that the manual indicated it did not apply to Bailey as a director of the head start program. *Id.* Thus the court held that the plaintiff was still an employee at-will.

In *Hunter v. Wehr Constructors, Inc.*, Ky.App., 875 S.W.2d 899 (1993) the plaintiff received a letter from the defendant which stated that "this project position will last a minimum of thirteen months". The plaintiff asserted that this created a contract for a thirteen month period. The defendant denied this and fired the plaintiff asserting that he was an at-will employee. Importantly the Court held "if there is more than one reasonable inference to be drawn from the May 18, 1990 letter the question should be submitted to the jury. In other words if the writing is ambiguous, the factual question of what the parties intended by it is for the jury." *Id.* at 901.

Another case involving a letter and an employee manual as the basis of plaintiff's claim that he is no longer an at-will employee is *Williams v. Webster Co. Coal*, 2003 WL 1240474 (Ky.App. 2003). The Court held that there was no clear expression in the letter

or the employee manual to change plaintiff's position as an at-will employee. Thus the mere existence of an employee manual or a letter from employer to employee regarding job conditions will not suffice to take the plaintiff out of the at-will category.

The most recent expression about contractual modifications to the employment at-will status can be found in *Landrum v. Lindsey Wilson College*, 2004 WL 362317 (Ky.App.). In this case the plaintiff was hired as a professor in the business department at Lindsey Wilson College. From 1992 to 1997, plaintiff was employed by the college under a series of one year contracts. In February, 1997 the college offered plaintiff a three year "rolling" employment contract. While the contract set forth a three year term it was renewable annually and the contract provided that it was subject to the terms and conditions set in the faculty handbook. The college fired Landrum and Landrum filed the lawsuit claiming wrongful termination. The Court held "where an employment contract sets forth a specific period of employment, an employer may not unilaterally alter the terms and conditions of the employment during that period." *Id.* at *3. The Court ultimately found for the defendant in this case because the contract in which the plaintiff signed containing a thirty day notification process had expired by the time the termination that gave rise to the lawsuit had taken place.

c. Written Modifications

The question of whether employee handbooks and policy manuals could provide an exception to the employment at-will doctrine was dealt with in *Nork v. Fetter Printing Company*, Ky.App., 738 S.W.2d 824 (1987). The plaintiff filed a claim for wrongful discharge against the defendants stating that the employee handbook issued by the

defendant for it's employees created a contract implied in fact and portions of the handbook prevented the defendant from discharging the plaintiff. The Court noted the following language appeared immediately above the plaintiff's signature on the application form: "it is further agreed that this contract may be terminated at-will by either the employee or the employer." *Id.* at 826. The Court denied plaintiff's claim stating that the handbook "contains policy compliancy statements which [defendant] management admittedly strove to follow, but this does not amount to an expression of an contractual agreement where the language is not contractual." *Id.*

An employee handbook without the language mentioned in the *Nork* case as mentioned above can serve as a basis to modify the employment at-will relationship. In *Norris v. Wilson Care Home Limited*, 1990 WL 393903 (Ky.App.) the Court noted "we cannot accept the position that an employer can draft a detailed handbook setting forth a probationary period, warning system, and different categories of offenses without some impact upon the employment relationship." *Id.* at *4. The Court went on to note "the inference above is that employment, after the ninety day probationary period, was not "at-will" but was permanent subject to discharge for cause." *Id.*

In *Hines v. Elf Atochem North America, Inc.*, 813 F.Supp. 550 (W.D.Ky., 1993) the Court found the plaintiff's at-will employment had been altered due to posted rules of conduct. The rules stated "our labor agreements have always explicitly recognized the company's right to discharge, suspend, or otherwise discipline for just cause." *Id.* at 552. The Court held "the posted rules of conduct could be construed as creating an implied contract between [plaintiff] and [defendant]. The intention to create a just cause

relationship is clear. The policy was posted and [plaintiff] read and relied on the language. There is no disclaimer or limiting language. There is some evidence that there was a modification to the employment at-will status. For this reason the Motion to Dismiss a claim for breach of an implied contract would be denied." *Id.* This case stands for the interesting proposition that as long as there is "some evidence" that there was a modification to the employment at-will status that a summary judgment motion would be precluded.

d. Oral Modifications

In *Audiovox Corp. v. Moody*, Ky.App., 737 S.W.2d 468 (1987) the plaintiff was told that if she came forward with information about her immediate supervisor she would not be discharged. After being unable to verify plaintiff's statements defendant fired plaintiff. The Court held that defendant's representations to plaintiff that they would not fire her created an oral modification to her at-will employment. The Court noted that "rather than perform what we assume to be an oral contract as it could have done by intervening to Appellee's rescue [defendant's] breached the contract." *Id.* at 470. This case stands for an important proposition for plaintiffs in that the existence of a contract is a question of fact for the jury to answer.

In a relatively famous case, *Hammond v. Heritage Communications, Inc.*, Ky.App., 756 S.W.2d 152 (1988) the plaintiff worked at a radio station and was encouraged by her supervisor to appear in Playboy magazine. After the pictures came out she was terminated. The Court of Appeals held that there was an issue of fact as to whether the parties had entered into an oral contract which modified the plaintiff's status

as an at-will employee. *Id.* at 154. The Court noted that "the records are undisputed that the appellants immediate supervisor . . . told her that she would not lose her job if her photograph were to appear in Playboy. This admission, together with the allegations set forth in the complaint, create an issue of fact as to whether an oral contract modifying appellants status as an at-will employee was entered into between the parties. Consequently if a jury finds that an oral contract did exist modifying her at-will status the appellate is entitled to introduce evidence proving that such a contract was breached and that she was damaged." *Id.*

It is important to note that the *Hammond* case turned on the assurances from plaintiff's immediate supervisor as to whether an oral employment contract was entered into. In *Wells v. Huish Detergents, Inc.*, 19 Fed.Appx. 168(6th Cir.Ky. 2001) the defendant actually placed language in the company handbook that stated that the defendant would not be bound by any unauthorized statements by employees. Further the defendant included language in it's handbook that modification to the employment relationship had to be facilitated by a written statement by the company president. In denying plaintiff's claim the Court held that the plaintiff "was fully aware that only the president of [defendant] not Anglin or any other manager had the authority to bind the company or modify his at-will employment status with the company." *Id.* at 176.

However, even if there is an oral agreement modifying an at-will status, should a plaintiff go beyond the scope of any oral agreement then he will be considered an at-will employee. This is the holding in *Buckholtz v. Dugan*, Ky.App. 977 S.W.2d 24 (1998).

In *Mayo v. Owen Healthcare Inc.*, 229 F.3d 1152 (6th Cir.Ky. 2000) plaintiff claimed that the defendant breached an oral contract of employment. The plaintiff claimed that his testimony alone created a genuine issue of material fact as to whether there was an oral employment contract. The Court affirmed the district court and noted "there was no evidence that the "benefits" discussed included a termination of for cause restriction and further there is no evidence that a termination for cause restriction was ever a benefit enjoyed with [defendant] and subject to continuation." *Id.* at **2.

The most recent case dealing with this issue is *Russell v. Jewish Hosp.*, 2004 WL 405973 (Ky.App., 2004). The plaintiff claimed she was wrongfully discharged because the defendant allegedly would have required her to perform procedures for which she was neither licensed or qualified. Plaintiff did not have an employment contract with the defendant. The Court pointed out that there was no specific training or license required to do the work the plaintiff was being asked to do. The Court further noted that there was no evidence in the record that anyone on behalf of the defendant ever asked the plaintiff to perform procedures requiring invasive procedures that was the basis of her objection. The Court held "in absence of any evidence that [plaintiff] was requested or instructed to violate the law she can not maintain a cause an action for wrongful discharge under the public policy exception to the employment at-will doctrine." *Id.* at *2.

e. Fraud, Misrepresentation & Estoppel

In *United Parcel Service Co. v. Rickert*, Ky. 996 S.W.2d 464 (1999) the plaintiff alleged that he was promised a job with UPS if he stayed on with the contract carrier Orion through a transition period. When UPS did not end up hiring the plaintiff he

brought suit alleging breach of contract, fraud and promissory estoppel. The Court held "sufficient evidence was produced to established a jury question regarding the alleged untrue statements of UPS causing the inaction and the resulting damages. There was evidence produced at trial that indicated the only reason UPS promised [plaintiff] a job was to induce him to fly its planes during the transition period." *Id.* at 469. Thus the oral promise of a further contract was held to be enough to sustain plaintiff's claim for fraud and promissory estoppel.

f. Obligation of Good Faith & Fair Dealing

Although an at-will employment contract carries with it an implied duty of good faith and fair dealing just as any other contract, the Courts in Kentucky have nonetheless held that an at-will employee could still be fired with or without cause. In *Wyant v. SCM Corp.*, Ky.App., 692 S.W.2d 814 (1985) the appellant argued that his seventeen year employment implied a duty of good faith and fair dealing upon the appellate. The Court stated, "the problem with the appellant's position is that terminable at-will employment in Kentucky may mean that at any time with or without cause." *Id.* at 816. However the Court did leave open the possibility that with the right facts the implied duty of good faith and fair dealing could apply. The Court stated "at any rate we do not think appellant demonstrated Appellee's bad faith to even a scintilla of reliable probable evidence." *Id.* Thus plaintiff could argue that if they demonstrate the defendant's bad faith that a viable claim could be brought and summary judgment precluded. Query how this claim may be brought in correlation with an intentional infliction of emotional distress claim similar to that in *Kroger v. Wellberger*, Ky., 920 S.W.2d 61 (1992).

g. Tortious Interference with Contract

The plaintiff in *Stanek v. Greco*, 323 F.3d 476 (6th Cir. MICH 2003) alleged that even though she was an at-will employee the defendant still tortuously interfered with her employment agreement. The Court held "virtuously all states, even those states that do not recognize certain exceptions to employment at-will, have permitted tort lawsuits in the employment termination context particularly the torts of fraud, deformation, and mental and emotional distress, invasion of privacy, and of course intentional interference with contract. Unlike the employment at-will exceptions these cases merely represent an application of existing and long standing tort law to the employment setting rather than a creation or further development of newer and unevenly accepted at-will exceptions." *Id.* at 479. Thus if an employer tortiously interferes with an employee's contract they could be held responsible.

4. Conclusion

In nearly every employment law case there will arise a question concerning at-will employment. It is the employment at-will doctrine that arguably screens an overwhelming majority of employment law cases that plaintiff's attorneys must consider and gives defendants a powerful argument during litigation. This presentation and corresponding material are meant to provide practitioners with current and relevant information to begin further research into the employment at-will doctrine as it applies to their particular case. A basic understanding of this doctrine is essential to the successful litigation of a case one way or the other.

DISCOVERY TOOLS AND TECHNIQUES IN AN EMPLOYMENT CASE

Plaintiff Perspective

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Covington, Kentucky

Defense Perspective

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SECTION J

DISCOVERY TOOLS AND TECHNIQUES IN AN EMPLOYMENT CASE

Plaintiff Perspective

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SECTION J(a)

DISCOVERY TOOLS AND TECHNIQUES IN AN EMPLOYMENT CASE

PLAINTIFF PERSPECTIVE

DISCOVERY TOOLS AND TECHNIQUES IN AN EMPLOYMENT CASE FROM THE PLAINTIFF'S PERSPECTIVE

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I. DISCOVERY: THE NECESSARY EVIL.

A. In employment cases, Plaintiffs and Defendants attorneys approach discovery from totally different perspectives to meet their respective goals.

B. Discovery is usually the least liked task of both parties' attorneys in the entire litigation process.

II. PRELIMINARY AND INFORMAL DISCOVERY BY PLAINTIFF'S COUNSEL WITH HIS OWN CLIENT.

A. Initial screening.

1. "Screening without screaming".

- Eliminate a client who has bad facts. Ensure that the potential client understands that any bad facts ***will*** be disclosed in the process of pursuing his case, and what the consequences of such disclosure may be.

- Clearly establish your client's goals in the initial consultation. The expressed goals can sometimes be quite amazing and unpredictable. Some persons just want their job back, and others want dignity, a sense of worth, and/or their good name back. If the client's goals can be met without litigation, the Plaintiff's attorney does the client a disservice to jump into litigation without pursuing other reasonable options.

- Stay clear of the disgruntled employee seeking only "revenge".

2. Obtain as much corroboration as possible prior to notifying the employer.

- Talk to former employees to corroborate, and with any other friends, neighbors, relatives, or other important potential witnesses.

- Consider the use of a private investigator

III. STRATEGIC USE OF FORMAL DISCOVERY TOOLS.

A. The scope of discovery is unique to every case, and a discovery plan should be designed up front.

B. Plaintiff's plan for the timing and the order of discovery is often directly contrary to Defendant's plan.

C. Plaintiff's general discovery interests:

1. Basic information on the Defendant Company, the Company players, and the environs.

   - To even the playing field regarding the context and scope of client's (former) employment environment. This includes taking 30.02(b) depositions and sending requests for production.

   - Discovery on the individual players in the case - finding out comments by the harasser and any admissions-against-interest by other prominent Company players (key managers, HR personnel).

2. Who made the job decisions about your client?

   - Primary decision maker.

   - Others who participated/provided information.

   - Meeting or committee

     - who, what, when, where, why, how?

     - notes, minutes, materials involved.

     - context and purpose of meeting.

3. Pretext.

   - Comparators.

4. Basis for Defendant's denials and affirmative defenses.

5. Identifications of key documents and location.

D. Defendants Interests:

1. What is your client going to say about his claim, and who/what will corroborate it?

- Plaintiff should answer Defendant's discovery completely.

E. The Discovery Plan: Plaintiff's most important role in discovery is "keeping your eye on the ball": your client's claim.

1. **Formulate an aggressive plan.** Generally, discovery may be obtained regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

2. **Implement your plan** as soon as permitted by procedural and court rules. Reflect early and often on how the case will best be presented on motions, such as summary judgment, and at trial.

3. **Work your plan, but don't let it work you.** Trial attorneys are trained to love the fight for the fight. **This is the red herring that defense attorneys throw in our path to keep us away from the true task at hand, finding the correct information and moving toward trial.** Rather, busy yourself with putting together the appropriate materials, checklists, and interrogating letters, placate yourself by sending threatening letters to compel and obtaining your share of return letters, but remember only some of them will culminate in an all-out war in the courtroom. When the fight become so ugly and progressively takes up an inappropriate amount of your time, take a step back and breathe so that you can refocus on the goals in your case.

4. **Have a protective order drafted** and be prepared to negotiate its terms with defense counsel so that the issue of confidentiality of documents does not delay discovery.

5. Develop methods to efficiently **organize** the volume of information produced, such as a document depository, coding and/or imaging documents, a system for retrieving "hot" documents, and a witness tracking system. Computerized databases are essential.

6. **Summarize key points of each deposition** immediately after. This is key in follow-up discovery and in conducting witness interviews, and preparing and defending pre-trial memorandums.

7. Stay civil. (See "duty to adversary" under our Rules of Professional Conduct).

IV. OTHER SPECIAL CONCERNS IN DISCOVERY.

A. Mental Exams.

1. First of all, for defense attorneys' purposes, it is not an "independent" medical exam, it is a Defendant's exam and Plaintiff's attorneys will continue to remind you of this.

2. Plaintiff's attorney is entitled to know what tests are to be given by the Defendant's expert before your client goes into the exam.

3. Sexual history/sexual orientation of Plaintiff.

B. Allegations of stolen "company documents".

1. Documents in possession of Plaintiff after termination should be returned to Employer/Defendant only if they are employer's property. Whether they are or are not alleged to be "company property", and whether your client does or does not return them on such basis, it is certainly acceptable for the Plaintiff to be permitted to retain a copy of the documents or, at the very least, a log of such documents.

C. "Electronic data" and "electronic media".

1. Keep current with new forms of discovery and, especially, with the various electronic systems and data keeping procedures that companies are utilizing.

DISCOVERY TOOLS AND TECHNIQUES IN AN EMPLOYMENT CASE

Defense Perspective

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SECTION J(b)

DISCOVERY TIPS AND TECHNIQUES: A DEFENSE PERSPECTIVE

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JUNE 12, 2004

DISCOVERY TOOLS AND TECHNIQUES IN AN EMPLOYMENT CASE

DEFENSE PERSPECTIVE

DISCOVERY TIPS AND TECHNIQUES: A DEFENSE PERSPECTIVE

I. INTRODUCTION

Defense counsel's principal goal in representing a client in an employment case should be achieving a favorable outcome as early as possible, preferably on motion for summary judgment, if not before. One of the best ways to achieve that goal is with well-focused, "smart" discovery.

Not all of the following suggestions can be used in every case, and this is certainly not an exhaustive list. It is the author's hope, however, that you will discover a few useful ideas which you can use to your clients' benefit in future cases.

II. INFORMAL FACT GATHERING

Discovery as described in the Kentucky and Federal Rules of Civil Procedure is a set of procedures designed to facilitate an exchange of information and documentation between the parties, and to make possible the taking of testimony from knowledgeable non-party witnesses. While this formal type of discovery is essential to almost any case, there are many other sources of useful information. Here are a few:

A. Documentation from your client:

Documents which will almost always be relevant to the defense of any employment case are the following:

1. The plaintiff's personnel file

2. The personnel file of any accused harasser or other alleged wrongdoer

3. Relevant investigative notes

4. Employee manuals and policies

5. Plaintiff's medical file

6. E-mails relating to the subject matter of the complaint

These and other relevant documents should be requested and reviewed at the commencement of the case.

B. Your Client's Employees

While documents will provide important background information, much more detail can be learned from discussions with decision-makers and others who were directly involved in the events giving rise to the Complaint. These people should be identified early on, and interviewed. It is a good idea to either take detailed notes of these interviews, or audio-tape them. In either case, the notes or tapes should be typed or transcribed soon thereafter, and, if possible converted into statements for signature by the employees.

C. Administrative Agencies.

If you have had no prior involvement in the matter which is the subject of the complaint, find out if there was a charge involving the same matter before the Equal Employment Opportunity Commission, the Kentucky Commission on Human Rights or the Lexington or Louisville Human Rights Commission. If so, make a Freedom

of Information Act or Kentucky Open Records Act request to obtain the entire administrative file.

If there was a claim for Unemployment Insurance benefits made by the plaintiff, request the entire file from the Unemployment Insurance Commission. Even if the employer believes it has all the papers that were filed in the proceeding, it may not. Often a claimant will send an unsolicited letter to the Commission containing what may turn out to be an important admission, and there are often notes of telephone conversations between the claimant/employee and the investigator. (You also want to know what oral and/or written representations *your client* may have made in the Unemployment forum). Depending on the type of case, State Workers Compensation files may exist, and may turn up relevant information.

D. Census Data.

Statistical information can be found, broken down by county, at www.census.gov. Such information may be useful, particularly in cases alleging race or national origin discrimination.

E. Consulting Experts.

FRCP 26(b)(4) and CR 26.02(4) protect from the normal rules of discovery experts employed in anticipation of litigation but not intended to be called as witnesses at trial.

F. The Internet.

Check your client's website. You can be sure Plaintiff's counsel will be scouring it for any potentially advantageous admissions. ("We are proud of our youthful and energetic workforce.")

Of course, turnabout is fair play: check to see if any relevant information involving the plaintiff or his witnesses can be found.

G. Criminal and/or Civil Background Checks.

For obvious reasons, you should know whether any party or essential witness to the case has a criminal record. Check not only the plaintiff and the plaintiff's witnesses, but yours as well.

III. FORMAL DISCOVERY

A. First Steps

In almost all cases, you will want to learn the plaintiff's "story" and commit him to it as early as possible. Exactly how you do this may vary from case to case. Here are some alternatives:

1. *Take the plaintiff's deposition as soon as possible.*

You should take the plaintiff's deposition before allowing any discovery to be taken of your client. There is nothing in the Kentucky or Federal Rules or Civil Procedure which establishes the defendant's "right" to take the plaintiff's deposition before being required to submit to its own. However, according to 6 Philipps, KENTUCKY PRACTICE § 26.04 (5th ed. p. 531), "[t]he custom and practice in most cases is to depose the plaintiff(s) followed by the depositions of the defendant(s)." It is

only logical that the plaintiff should be required to explain the background for her case before the defendant must give its version of the facts relating thereto.

The best way to avoid a dispute over this issue is to send a letter to the plaintiff's counsel along with the Answer to the Complaint asking for dates for the plaintiff's deposition. (If the Complaint is filed in federal court, or you are removing to federal court, the request must take into account the moratorium on discovery until the parties have conferred as required by FRCP 26(f). The letter may nevertheless reference the defendant's desire to take the plaintiff's deposition as soon as possible after the discovery period commences).

2. *Send an Initial Set of Interrogatories and/or Request for Production of Documents (to be followed by the Plaintiff's Deposition).*

Depending on the nature of the case and/or the clarity of the Complaint, some initial written discovery may be desirable. Since it is safe to assume that the plaintiff's counsel will be involved to a great extent in preparing Interrogatory Answers, it is usually better to seek information about the plaintiff's version of the facts (which may be quite different from the version set forth in the Complaint) by way of deposition. The same is true for the plaintiff's version of her injuries. Interrogatories can be very useful at the start of a case, however, for the following purposes:

- To determine the cause of action if it is not clear. The plaintiff herself will probably not be able to articulate a legal basis for her claim at deposition. Such information

is better sought through an Interrogatory (which will probably be answered by counsel).

- To find out details about the plaintiff's attempts to find work and places where he has actually worked since leaving your client's employ (where applicable). In framing this Interrogatory, ask where the plaintiff applied for work during the period of a year or more *before* he left your client's employ. You may find, to your and your client's surprise, that the plaintiff (who is claiming to have been damaged because of his termination) was actually *trying* to leave before he was terminated.
- To learn the identity and addresses of the plaintiff's health care providers over the last several years, and of any health care providers who have treated the plaintiff in connection with her claimed injuries.
- To obtain a HIPAA-compliant release for medical/psychological records.
- To find out who has knowledge of discoverable matters, and their location.
- To learn whether the Plaintiff intends to call any expert witnesses, and if so, discoverable information with regard thereto.

- To obtain information about the types and amounts of damages sought.
- To obtain diaries, journals and calendars for the relevant period.
- To obtain recent tax returns.
- To obtain copies of any documents Plaintiff has in her possession which arguably belong to the employer.
- To obtain any other documents which may be relevant to the Complaint.

Chances are good that your initial written discovery request may yield a lot of answers such as "Plaintiff cannot answer this Interrogatory at this time because discovery has not yet been completed." No problem. FRCP 26(e) and CR 26.05 require the supplementation of certain Interrogatories, even if supplementation is not specifically requested. Further, a plaintiff's failure to ever provide a timely answer to an Interrogatory asking for the amount of unliquidated damages can have a seriously negative effect on his case at trial: under *Fratzke v. Murphy*, 12 S.W. 3d 269 (Ky. 1999, *reh. denied* 2000) he may be prohibited from recovering any monetary relief at all.

3. *What if you receive a set of Interrogatories with the Complaint?*

Sometimes the plaintiff's counsel will send a set of contention Interrogatories (that is, Interrogatories essentially asking for the defendant's side of the story) with the Complaint, which would seem to upset the defendant's interest in learning the plaintiff's side of the story first. Remember, however, that CR 33.01(2) permits the

defendant a period of 45 days after service of summons within which to answer Interrogatories served with the Complaint, whereas the normal response time is 30 days. Therefore, if you serve your client's own contention Interrogatories within 14 days of receipt of the summons, the plaintiff's answers will be due before you client's. (Normally contention Interrogatories are not advisable since they are likely to be answered by counsel, but they may be called for in this particular instance). You may also be able to agree with the plaintiff's counsel that her client's deposition will be taken before your answers are expected.

B. Plaintiff's Deposition.

This is, in almost every case, the most important part of the discovery process. While one of the goals of taking the plaintiff's deposition is to learn the facts which support her claims, this should not be the primary focus of the deposition. Your primary goal should be that of laying the groundwork for your eventual motion for summary judgment. Toward this end, thorough planning and preparation are essential. Here are some steps you should take in preparing for the plaintiff's deposition:

1. Thoroughly review the facts as stated in the Complaint and compare these with any documents you have been provided and any information you have obtained from your client or other sources. Note discrepancies for investigation during the deposition.

2. Be sure that you are thoroughly familiar with the elements of the plaintiff's causes(s) of action and your client's affirmative defense(s). Some lawyers go so far as to prepare jury instructions at the start of the case, in order to focus the legal issues from the beginning. You should at least outline the elements of the plaintiff's *prima facie* case, and then consider, with respect to each element, what facts she must prove. Do the same with the elements of your client's defenses, and then explore the facts relating to these elements with the plaintiff during her deposition.

3. Outline the most convincing arguments for your eventual motion for summary judgment. What facts do you have already? What facts do you need to complete it?

4. Decide whether or not to videotape the deposition. This is particularly effective if you have reason to believe the plaintiff may not be entirely truthful.

5. Outline the deposition, making sure to include all relevant areas of inquiry. While there is no right or wrong way to organize a deposition, here are some thoughts:

   - Think in terms of topical "modules," with the goal of exhausting one module before going on to the next. This does not mean that, for strategic reasons, you will not come back to a topic which was theoretically exhausted.

It does help to insure, however, that important information will not be omitted. At the close of each module, commit the plaintiff to her testimony by asking, for example: "Is that everything that took place during the meeting with your supervisor on that date?"

- Plan to lead the plaintiff though a particular topic without relevant documents, listening carefully to her answers and making mental notes of any discrepancies between her testimony and the content of any written documentation. You may then decide to show her the documents during the deposition and ask for an explanation of the discrepancy, or may decide to save it for later.
- Plan to seek admissions directly related to the arguments you intend to make in your motion for summary judgment.
- Begin your outline with boilerplate instructions. (Obtain the plaintiff's agreement that she will let you know if she does not understand a question, that she understands that she may ask for a break at any time, that she will allow you to complete your questions before answering, that she will make oral responses, and that she is not on

medication which would affect her ability to understand or answer your questions.)

Here are some techniques to keep in mind as you take the plaintiff's deposition:

- Start slowly and build the plaintiff's comfort level.
- Ask open-ended questions to obtain information.
- Ask leading questions to obtain admissions.
- Have the plaintiff identify and verify any documentary evidence you intend to use on motion for summary judgment or at trial.
- Probe and explore the plaintiff's motivations and reasons for doing what she did and for feeling the way she does.
- Probe the basis for the plaintiff's statements of "fact." How does she know that John Smith harassed Jane Doe? Pin her down until it is clear that she has no source of knowledge other than inadmissible hearsay.
- Always ask: "Is that all?" when the plaintiff is listing events, people, etc., until you get an affirmative answer.
- Do not try to avoid the objection: "calls for a legal conclusion." If the objection is made as to an arguably factual issue, it may be just the ammunition you need when the plaintiff tries to set the issue up as a genuine

issue of "fact" to defeat to your motion for summary judgment.

- Do not hesitate to ask a question twice, particularly at entirely different points in the deposition, in order to see if the plaintiff's story is consistent. The plaintiff's attorney's "asked and answered" objection can be disregarded.
- At the end, ask the plaintiff if there is anything about her testimony that she wants to change.

C. Defending your Client's Representative's Deposition

As with everything else, preparation is key. Here are some suggestions:

1. Show the representative a video designed for witnesses who are unfamiliar with the deposition process.
2. Review with the witness common deposition traps: testifying to what the witness believes is probably true, as opposed to what he knows to be true; failing to listen carefully to the question; inadvertently divulging attorney/client privileged information, etc.
3. Carefully explain the plaintiff's case from a legal and factual standpoint.
4. Carefully explore any potential problem areas: does the witness have a criminal background? Are there any personal and arguably non-discoverable "secrets" the witness is hoping will not come up

during the deposition? These items should be explored before the deposition in order to research any legal issues, and determine whether any valid objections or privileges can be asserted.

D. Further Discovery.

1. *Additional Interrogatories/Requests for Admission*

These can be useful for following up on issues that were not sufficiently explored in deposition, or that need to be tied up for summary judgment or trial.

2. *Requests for Supplementation.*

You may request that the plaintiff supplement any previous discovery responses, including deposition testimony.

3. *Rule 35 Physical/Mental examination*

When the plaintiff puts his medical or psychological condition in controversy, you may move the court to order him to undergo a physical or psychological examination. In employment cases, plaintiffs often claim to have suffered severe psychological distress as a result of the events underlying their complaint. A psychological expert may be asked to determine the existence of any psychological disorder, the extent thereof, and whether other events in the plaintiff's past may have contributed to or caused any existing psychological disorder.

Remember that any correspondence, notes, etc. between you and the expert will probably be discoverable.

IV. OTHER ISSUES

A. Protective Orders.

FRCP 26(c) and CR 26.03 provide for the court to enter protective orders under certain circumstances. It is not unusual in employment cases for the defendant to be asked to produce certain documents which it has a legitimate interest in protecting from further disclosure: *e.g.*, the personnel files of employees other than the plaintiff, and trade secret or other proprietary information.

In most cases, opposing counsel will enter into an Agreed Protective Order, in exchange for production of the requested information. Such orders typically (1) permit the documents to be used by the parties, their counsel and assistants solely for the purpose of the litigation, (2) provide for the sealing of such documents when filed with the court, and (3) require that all produced copies be destroyed or returned to the defendant's counsel at the end of the case. A sample Agreed Protective Order is attached hereto.

B. Electronic Discovery.

Rule 34 permits a party to request and copy (among other things) "data compilations from which information can be obtained." The Advisory Committee Note to the 1970 amendment to the rule provides that the term "document" was intended to include electronic data compilations. Courts have made clear that all information available on electronic storage media is discoverable whether "active," or "deleted but recoverable." See, *e.g.*, *Gates Rubber Co., v. Bando Chemical Industries Ltd.*, 167 F.R.D. 90, 112 (D. Colo. 1996).

In employment cases, the type of electronic media most often sought is e-mail. E-mails are replacing handwritten memos and notes as the "smoking guns" of harassment and other employment cases. However, the scope of a request for electronic data does not begin and end with e-mail.

The potential breadth of a request for electronic data is extremely extensive. Consider, for example, a request for "all documents (including those in electronic form) constituting communication in any form between the plaintiff and any supervisor or manager of XYZ corporation." Such a request would necessarily require a search through each supervisor's and manager's paper files, and should arguably include as well a search of each such person's desktop computer hard drive, notebook computer hard drive, all floppy disks to which he or she might have transferred data, his or her PDA, pager, voice mail archives, etc.

As "e-discovery" increases, issues such as the following will undoubtedly continue to engender controversy in the future:

1. *Who must pay for the cost of retrieving and processing electronic files, particularly when costly restoration of backup media is involved?*

On July 24, 2003, the United States District Court for the Southern District of New York issued a significant decision regarding the issue of who must pay for the sometimes enormous cost of producing electronic data. In *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake* III), a case in which a former female employee of UBS Warburg alleged gender discrimination and retaliation under federal, state and city law, the defendant argued that the estimated cost of approximately

$300,000 to restore and produce e-mails from backup tapes should be borne by the plaintiff. Holding that the plaintiff would be required to share in the costs of restoration, the court nevertheless determined that the employer would be required to bear the bulk of the expense.

The court listed seven factors which should be considered in determining whether cost-shifting to the plaintiff is appropriate in a given case:

- The extent to which the request is specifically tailored to discover relevant information
- The availability of such information from other sources
- The total cost of production, compared to the amount in controversy
- The relative ability of each party to control costs and its incentive to do so
- The importance of the issues at stake in the litigation, and
- The relative benefits to the parties of obtaining the information.

Zubulake at 284. Note that the Court observed that cost-shifting is potentially appropriate only when *inaccessible* data (such as backup tapes intended solely for disaster recovery) is sought; when "active on-line or near-line data" is sought, cost-shifting should not be considered. *Id.*

2. *What is a party's duty to preserve electronic data?*

Four months after *Zubulake III, supra,* the Southern District of New York tackled the issue of a party's duty to preserve electronic data. *Zubulake IV* (*Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003)), grew out of the defendant's realization, during the process of restoring the tapes referenced in *Zubulake III*, that certain backup tapes were missing. Zubulake sought sanctions against UBS for its failure to preserve the missing data, including an "adverse inference" instruction (that is, an instruction to the jury that it could infer that the missing tapes contained information damaging to UBS' case).

The first question which the court sought to answer was *when* the obligation to preserve evidence arises. In this case, the first official notice the employer had of Zubulake's intention to commence litigation was her filing of an EEOC charge on August 16, 2001. According to the court, the duty to preserve evidence arose, *at the latest,* on that date. But, the court went on to determine that the obligation actually arose earlier, at the time that UBS "should have known that the evidence was relevant to future litigation." In this case, the evidence showed that almost everyone associated with Zubulake recognized the possibility that she might sue four months before she filed her EEOC charge. This earlier date, then, was the trigger date for preserving evidence.

The court next dealt with the issue of *what* the defendant must preserve, and held that anyone who anticipates being a party to a lawsuit "must not destroy unique, relevant evidence that might be useful to an adversary." Included would be relevant e-mails from and to key players. As to the form of electronic data to retain,

litigants may choose the medium to preserve, as long as all relevant documentation is retained in one form or another. Thus, all then-existing backup tapes for relevant personnel could be retained, and later-created documents preserved in a separate electronic file. That, combined with a mirror-image of the computer system, according to the court, creates a complete set of relevant documents. The court opined that there are a multitude of other ways to achieve the same result.

In any event, the court observed that once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and preserve all relevant documentation. As a general rule that hold does not apply to inaccessible backup tapes (those for disaster relief only), but does apply to tapes actively used for information retrieval.

In a case full of onerous implications for employers, there was one silver lining to the case. The court refused to grant the plaintiff's request for an adverse inference instruction, stating that such an instruction is an "extreme sanction" and "should not be given lightly." According to the court, a party seeking an adverse inference instruction based on spoliation of evidence must establish: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

The message of *Zubulake IV* is clear: Counsel should alert his client at the start of litigation (and before, if he is involved in the events leading to litigation) to be take immediate steps to preserve all relevant documentation, including electronic data which might one day be relevant to the plaintiff's claim. These steps should include a halt on the routine recycling and overwriting of backup tapes and on any routine purging of documents.

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO. _____

_____ PLAINTIFF

V.

_____ DEFENDANT

AGREED PROTECTIVE ORDER

WHEREAS, the proceedings in this action will involve the disclosure of confidential and proprietary documents and information by Defendant _____ ("Defendant"), and whereas Defendant, and Plaintiff,_____ ("Plaintiff") have agreed pursuant to CR 26 for a protective order relating to certain confidential documents and information which may be utilized in the litigation of the above-styled action,

IT IS HEREBY ORDERED:

1. As used herein "Confidential Material" means documents and any information contained within Defendant's personnel and other records relating to any former, current or future employee of Defendant other than Plaintiff. The term also applies to any such information which is revealed through the deposition or trial testimony of any party or witness to this civil action.

2. Confidential Material furnished by Defendant may be used by any person other than Defendant solely for the purpose of prosecuting or defending this action and not for any business, commercial or other purpose whatever.

3. All Confidential Material which is filed with the Court shall be filed in sealed envelopes or other appropriate sealed containers on which shall be endorsed the title of this action, an indication of the nature of the document, the word "CONFIDENTIAL" and a statement substantially in the following form:

> This envelope is sealed pursuant to Court Order and contains information designated confidential in this case by Defendant _____ and is not to be opened or the contents thereof to be displayed or revealed except by Order of the Court or pursuant to written consent by Defendant _____.

Said envelope or container shall not be opened without further order of the Court except by Qualified Persons who shall return the document to the Clerk in a sealed envelope or container. The Clerk of the Court is hereby directed to maintain such Confidential Documents in a separate portion of the Court files not available to the public.

5. Except with the prior written consent of Defendant, or pursuant to further order of the Court, Confidential Material may not be shown, disclosed, divulged, revealed, transmitted, described or otherwise communicated by the non-furnishing parties or attorneys for the non-furnishing parties to any person other than the following (hereinafter designated as "Qualified Persons"):

(a) Full-time employees of the attorneys representing such non-furnishing parties;

(b) Experts, consultants, accountants and other third parties expressly retained by counsel for the non-producing parties to assist in the preparation of this litigation for trial who are identified in advance in writing by counsel for the non-producing parties, with disclosure only to the extent necessary to assist in such preparation.

(c) Any person from whom testimony is taken in this action, except that such person may only be shown copies of Confidential Material during his testimony and in preparation therefor and may not be permitted to retain any Confidential Material following the conclusion of his testimony; and

(d) The Court, the jury and court reporters in this action.

Except upon Defendant's prior written consent, or pursuant to further order of the Court, Confidential Material may not be shown, disclosed, divulged, revealed, transmitted, described or otherwise communicated by the non-furnishing parties or attorneys for the non-furnishing parties to any person other than Qualified Persons.

6. The attorneys for any non-furnishing party may testify on, submit, refer to, quote from, paraphrase or otherwise utilize any Confidential Material in any testimony, transcript, brief or other document submitted or filed with the Court or any appellate court, provided that any such document is marked "CONFIDENTIAL" and treated in accordance with the provisions of this Order and filed under seal as set forth in paragraph 4 hereof. In the event that any Confidential Material is used in any court proceeding herein it shall not lose its confidential status through such use, and the parties shall take all steps reasonably required to protect its confidentiality during such use. Material shall be maintained anywhere except at the offices of counsel of record or their experts.

7. Nothing herein shall be construed or applied to affect the rights of any party to discovery under the Kentucky Rules of Civil Procedure or to assert any privilege or objection, or to prohibit any party from seeking such further provisions or relief as it deems necessary or desirable regarding this Order or the matter of confidentiality.

8. After the termination of this litigation, including all appeals, all Confidential Material shall be delivered or returned to Defendant.

ENTERED: _____, 2004.

_____

JUDGE, _____ CIRCUIT COURT

AGREED TO:

_____

COUNSEL FOR PLAINTIFF

_____

ATTORNEYS FOR DEFENDANT

COVENANTS NOT TO COMPETE
AND
CONFIDENTIALITY AGREEMENTS

George J. Miller
Mickey T. Webster
Wyatt, Tarrant & Combs
Lexington, Kentucky

SECTION K

COVENANTS NOT TO COMPETE AND CONFIDENTIALITY AGREEMENTS

COVENANTS NOT TO COMPETE AND CONFIDENTIALITY AGREEMENTS

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I. INITIAL CONSIDERATIONS

A. CHOICE OF LAW

1. Choice of Law is Critical in Enforcing Non-competition Covenants.

a. State laws vary dramatically on the enforceability of covenants not to compete. Some states, not including Kentucky, have statutes severely restricting enforcement. See, e.g., Okla. Stat. Ann. tit. 40, §217 (1980) (void unless made in connection with sale of business or dissolution of partnership); Colo. Rev. Stat. §8-2-13 (1973) (valid only in four limited circumstances). In other states, court decisions have the same effect. See Olliver/Pilcher Insurance v. Daniels, 715 P.2d 1218 (Ariz. 1986).

2. Kentucky Choice of Law Rules.

If you are litigating a noncompetition case in Kentucky, a Kentucky court most likely will apply Kentucky law. As a general rule in Kentucky, as long as it has personal jurisdiction, a Kentucky court will apply its own law. Kentucky's choice of law rules require the application of Kentucky law "unless there are overwhelming interests to the contrary." Blount v. Bartholomew, 714 F. Supp. 252, 255 (E.D. Ky. 1988) (quoting Harris Corp. v. Comair, Inc., 712 F.2d 1069, 1071 (6th Cir. 1983)), aff'd w/o op., 869 F.2d 1488 (6th Cir. 1989); see also Foster v. Leggett, Ky., 484 S.W.2d 827, 829 (1972) (Kentucky law "should not be displaced without valid reasons"). Kentucky "strongly favors the application of its own law whenever it can be justified." Grant v. Bill Walker Pontiac-GMC, Inc., 523 F.2d 1301 (6th Cir. 1975).

3. Choice of Law Clauses

Do not assume a choice of law clause governs. The Kentucky Supreme Court and Court of Appeals have held that they are free to ignore a contractual choice of law clause which provides that another state's law should govern. See Breeding v. Massachusetts Indemnity & Life Ins. Co., Ky., 633 S.W.2d 717, 719 (1982); Paine v. La Quinta Motor Inns, Inc., Ky. App., 736 S.W.2d 355, 357 (1987), overruled on other grounds, Oliver v. Schultz, Ky., 885 S.W.2d 699, 702 (1994). The Paine Court said: Kentucky courts are "egocentric" about choice of law. Id. The reverse is also true. When enforcing a Kentucky noncompete in another state, do not assume a foreign court will abide by a choice of law provision that calls for the use of Kentucky law.

B. PERSONAL JURISDICTION.

To increase the chances that a covenant not to compete will be interpreted with reference to Kentucky law, even if a choice of law provision selects another state's law, sue in Kentucky. But before initiating a lawsuit against a non-resident, an attorney should carefully review Kentucky's long-arm statute, KRS §454.210, to be sure the non-resident has enough contacts in Kentucky. In questionable cases, it may be best to sue out of state, since a dispute as to personal jurisdiction will almost certainly delay the granting of immediate injunctive relief and bog the litigation down in the minutae of personal jurisdiction. This can be a critical disadvantage since time is commonly of the essence in enforcing restrictive covenants.

II. ENFORCEABILITY OF RESTRICTIVE COVENANTS IN KENTUCKY

A. MAJORITY RULE.

1. Covenants Not to Compete Are Enforceable if Ancillary to a Valid Contract.

Most states, including Kentucky, will enforce reasonable covenants not to compete if they are ancillary to a valid and enforceable contract, such as a contract for the sale of a business, a lease, or a contract of employment. Restrictive covenants made independently of such transactions are void as against public policy. Johnson v. Stumbo, 277 Ky. 301, 126 S.W.2d 165 (1939).

2. Employment Agreements.

Courts are reluctant to enforce noncompete covenants made in connection with employment contracts, because it is difficult to distinguish between the employer's confidential information and the normal skills of the trade

learned by an employee, and preventing use of one may well inhibit or prevent use of the other. Courts have generally been more willing to uphold covenants to refrain from competition made in connection with sales of good will than those made in connection with contracts of employment. Restatement (Second) of Contracts §188 comment b (1981).

That said, there is ample case law supporting the enforcement of reasonable restrictive covenants against former employees. The Kentucky Court of Appeals has even written that "**the policy of this state is to enforce [reasonable covenants not to compete] unless very serious inequities would result.**" Lareau v. O'Nan, Ky., 355 S.W.2d 679, 681 (1962). Likewise, in the context of an insurance adjuster's one-year, 200-mile noncompete, the Court opined that such covenants are "**a valuable business tool.**" Hammons v. Big Sandy Claims Serv., Inc., Ky. App., 567 S.W.2d 313, 315 (1978).

B. WHEN IS A COVENANT REASONABLE?

1. Balancing Test.

In determining whether a covenant not to compete is "reasonable," courts balance several factors: the interest of the party seeking to enforce the covenant, the extent of the restrictions, the hardship imposed on the covenantor and any interest of the public.

> It has been held in Kentucky that an agreement in restraining of trade is reasonable if, on consideration of the subject matter, the nature of the business, the

> situation of the parties and the circumstances of the particular case, the restriction is such only as to afford fair protection to the interests of the covenantee and is not so large as to interfere with the public interests or impose undue hardship on the party restricted.

Ceresia v. Mitchell, Ky., 242 S.W.2d 359, 364 (1951).

C. LEGITIMATE INTEREST OF THE PARTY ENFORCING THE COVENANT.

A restrictive covenant is only enforceable if it protects a legitimate interest of the party seeking to enforce it. Crowell v. Woodruff, Ky., 245 S.W.2d 447 (1951). A restrictive covenant that is "more comprehensive than necessary to afford fair protection to the legitimate interest of the employer" may not be enforced. Id. Legitimate interests include:

1. Protecting confidential information and trade secrets.

As early as 1926, the Kentucky Court of Appeals held that an employer "has the right by contract to protect himself against the giving out of information concerning his business methods and trade secrets...." Thomas W. Briggs Co. v. Mason, 217 Ky. 269, 289 S.W. 295, 297 (1926).

2. Protecting the party's relationship with its clients.

Where the covenantor is in a position which includes client contact, covenants not to compete will usually be enforced. Bradford v. Billington, Ky., 299 S.W.2d 601, 604 (1957). On the other hand, covenants by employees with no access to clients or other confidential information are

suspect. See Crowell v. Woodruff, Ky., 245 S.W.2d 447, 450 (1951) (court refused to enforce one-year covenant where employee was not in contact with clients and "did not acquire knowledge of any trade secrets which might be made available to a competitor").

3. **Money and time spent in training employees.**

The Kentucky Court of Appeals has recognized that an employer has an interest in recouping its investment in training its employees. For example, the Court in Central Adjustment Bureau, Inc. v. Ingram Associates, Inc., Ky. App., 622 S.W.2d 681, 686 (1981), had this to say about a nationwide collection agency when holding that its noncompetition covenant was enforceable:

> CAB's business is highly specialized and competitive, and since clients sign no written contract they are free to change collectors almost overnight. Thus, covenants not to compete are about the only protection available to CAB to prevent employees from resigning and attempting to pirate away their clients after CAB has expended considerable time, effort, and money in training those employees in the collection business. Absent the training afforded by CAB, its employees would hardly be in a position to compete. Therefore, we are satisfied that CAB's covenants not to compete are a reasonable restriction affording CAB fair protection for its legitimate business interests.

Id. This sort of pro-employer language could easily be applied to any type of sales business where covenants not to compete are "about the only protection" for a company's relationship with its clients.

D. **SCOPE AND DURATION OF RESTRICTIONS.**

In determining the enforceability of a covenant not to compete, the scope of the geographic restriction and the time the restriction is in effect are crucial. The touchstone is "reasonableness."

1. **Unlimited covenants fail.**

A covenant unlimited as to area or time is unenforceable. Calhoun v. Everman, Ky., 242 S.W.2d 100 (1951).

2. **Geographical scope of restrictions.**

Area restrictions which include the area in which the covenantor worked are generally permissible. E.g., Hammons v. Big Sandy Claims Service, Inc., Ky. App., 567 S.W.2d 313 (1978) (200-mile covenant upheld); Davey Tree Expert Co. v. Ackelbein, 233 Ky. 115, 25 S.W.2d 62 (1930) (100 miles).

Nationwide covenant upheld. In Central Adjustment Bureau, Inc. v. Ingram Associates, Inc., Ky. App., 622 S.W.2d 681 (1981), the Kentucky Court of Appeals enforced a nationwide covenant against the former employee of a collection agency because the employer's business was nationwide.

3. **Time duration of restriction.**

The restriction should be no longer than necessary to protect the covenantee's legitimate interest, i.e., the length of time the covenantor could compete unfairly. Kentucky courts have upheld restrictions on employment as long as six years, Bradford v. Billington, Ky., 299 S.W.2d

601 (1957), though shorter limitations periods will generally be safer. See Lareau v. O'Nan, Ky., 355 S.W.2d 679 (1962) (five years); Stiles v. Reda, 312 Ky. 562, 228 S.W.2d 455 (1950) (two years); Hammons v. Big Sandy Claims Service, Inc., Ky. App. 567 S.W.2d 313 (1978) (one year).

Covenants in Contexts Other Than Employment. Much longer restrictions are often upheld in the context of restrictive covenants **in leases**, see, e.g., Porter v. Hospital Corporation of America, Ky. App., 696 S.W.2d 793 (1985) (ten years); Vaughan v. General Outdoor Advertising Co., 352 S.W.2d 562 (1961) (ten years), or **ancillary to the sale of a business**, see Ceresia v. Mitchell, Ky., 242 S.W.2d 359 (1951) (ten years); F.T. Gunther Grocery Co. v. Koll, 153 Ky. 446, 155 S.W. 1145 (1913) (covenant restricting seller from competing in city "so long as purchaser remains in business" upheld). The Kentucky Court of Appeals has even upheld a covenant restricting the purchaser of property from operating a theater there for **twenty-one years**. Ladd v. Pittsburgh Consolidation Coal Co., 309 Ky. 405, 217 S.W.2d 807 (1949).

E. MUST NOT IMPOSE UNDUE HARDSHIP ON THE EMPLOYEE.

When enforcement of a covenant would require an employee to change his or her occupation, courts may be reluctant to enforce it. Crowell v. Woodruff, 245 S.W.2d 447 (refusing enforcement where to do so "would deprive a man of middle age with a family of the right to pursue his lifetime trade..."). The Crowell case provides fodder for those defending employees, offering quotable language such as:

> A man's right to labor in any occupation in which he is fit to engage is a valuable right, which should not be taken from him, or limited, by injunction, except in a clear case showing the justice and necessity therefor.

Id. at 450.

F. PUBLIC INTEREST.

Although the Restatement (Second) of Contracts §188(1) (1981) and most courts profess a reluctance to enforce covenants not to compete which adversely impact the public, Kentucky courts have apparently never recognized such a case. *See* Johnson v. Stumbo 126 S.W.2d 165 (1938) (rejecting argument that enforcing covenant restricting a doctor who sold hospital to plaintiffs from opening a competing hospital was contrary to the public interest).

III. JUDICIAL MODIFICATION OF COVENANTS.

A. COVENANTS CAN BE ENFORCED TO THE EXTENT REASONABLE.

A court ordinarily will "blue pencil" an agreement, enforcing restrictive covenants to the extent it finds them to be reasonable. Hammons v. Big Sandy Claims Service, Inc., Ky. App., 567 S.W.2d 313 (1978); Ceresia v. Mitchell, Ky., 242 S.W.2d 359 (1951) (court confined scope of covenant to definite period of time, although agreement itself was silent on the matter).

However, there is at least one case that suggests that the absence of a geographic restriction, as opposed to a time restriction, cannot be cured by court modification. In Calhoun v. Everman, the Court observed, in dicta:

> The general rule is that contracts in restraint of trade are not enforceable where they are unlimited as to both time and space, or

> as to where they are unlimited as to space but limited as to time, but where such contracts are unlimited as to time but are confined to a reasonable territory they are enforceable.

242 S.W.2d at 102.

In defending the employee, an attorney may want to invoke the rule that contracts missing an essential term cannot be specifically enforced. Cases from several other states have refused to enforce or modify a restrictive covenant if it is missing an essential term, such as either a time or geographic restriction. See e.g., Cohen Realty, Inc. v. Marinick, 817 P.2d 747 (Okla. Ct. App. 1991) (judicial modification of an unenforceable covenant not possible if court must supply essential term); Lee O'Keefe Ins. Agency v. Ferega, 516 N.E.2d 1313, 1313 (Ill. App. 1987) (denying modification would "have been tantamount to drafting a new contract.").

A severability clause should be included in agreements to increase the likelihood of partial enforcement.

B. OVERLY BROAD COVENANTS MAY NOT BE ENFORCED AT ALL.

The Restatement (Second) of Contracts §184(b) (1981) states that unreasonable covenants will not be enforced unless the employer obtained the covenant "in good faith and in accordance with reasonable standards of fair dealing." Under this rule, a court will not enforce part of a covenant when the covenantee "has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy...." Id., comment b.

IV. SELECTED KENTUCKY CASES ON COVENANTS NOT TO COMPETE.

A. **Eigelbach v. Boone Loan & Investment Co.**, 216 Ky. 69, 287 S.W. 225 (1926) - Contract by general manager of loan and investment company not to engage in same line of business in same city for one year was enforceable. Contract applied to both voluntary and involuntary terminations.

B. **Davey Tree Expert Co. v. Ackelbein**, 233 Ky. 115, 25 S.W.2d 62 (1930) - Court enforces restrictive covenant restraining tree surgeon from working within 100 miles of office where he worked for one year. Contracts restricting freedom of employment are enforceable when reasonable, taking into account the interest of the employer, the employee and the public. Covenants not to compete can be modified and enforced to the extent reasonable.

C. **Johnson v. Stumbo**, 277 Ky. 301, 126 S.W.2d 165 (1939) - Sellers of hospital agreed not to own or operate a hospital in Floyd County for 10 years. Restraints of trade are judged by the rule of reason. Id. at 169. Upheld when they are necessary to afford fair protection to the legitimate interests of the covenantee and not so extensive as to interfere with the interests of the public. Id. Must be ancillary to a lawful contract. Id. The Court upheld enforcement of the agreement, concluding that it was not contrary to public policy. Court enjoined the operation of the new hospital even though it was just outside the county line.

D. **Stiles v. Reda**, 312 Ky. 562, 228 S.W.2d 455 (1950) - Court enforces covenant that required employee to pay employer $50 per week if he engaged in jewelry repair business for himself within two years after the termination of his contract. Court finds that this was a reasonable restraint. Since requiring employee not to engage in the business at all would have been enforceable, the instant covenant requiring the employee to pay for the privilege was valid. Fifty dollars a week was not a prohibited "penalty." A good case to use in enforcing a liquidated damages clause.

E. **Calhoun v. Everman**, Ky., 242 S.W.2d 100 (1951) - Alleged oral agreement not to enter into competition with employer's dry cleaning business was unenforceable. The alleged agreement contained no time or territory restriction. There was no consideration for the covenant, as the employer had the right to terminate employee at any time. "Contracts in restraint of employment ... are not favorites of the law." "The modern philosophy of the law is that a man may sell his services but not himself."

F. **Crowell v. Woodruff**, Ky., 245 S.W.2d 447 (1951) - Another dry cleaning case. Employer terminated employee four months after employee signed employment agreement containing covenant not to compete. Court concludes the contract lacked mutuality, as the employer "did not bind himself to continue Crowell in his employment longer than thirty days, yet the employee bound himself to surrender his life trade in his home community for a period of one year." Id. at 449. "A man's right

to labor in any occupation in which he is fit to engage is a valuable right, which should not be taken from him, or limited, by injunction, except in a clear case showing the justice and necessity therefor." Id. at 450.

G. **Webb v. Welcome Wagon, Inc.**, Ky., 255 S.W.2d 459 (1953) - Court enforces non-compete against hostess for Welcome Wagon for five years. Court states that if the company breached a material provision of the contract, it would not be entitled to injunction. Id. at 461. Because of the procedural posture of the case, the court does not decide the issue of first breach.

H. **Martin v. Ratliff Furniture Co.**, Ky., 264 S.W.2d 273 (1954) - Injunction against former business owner and general manager requiring him not to operate furniture business for five years in the county, upheld by Court. Covenants in the sales of business are uniformly upheld. Id. at 275. Although such agreements are strictly construed, they will not be interpreted at variance with the plain purpose of the parties. Id. at 276.

I. **Bradford v. Billington**, Ky., 299 S.W.2d 601 (1957) - Court enforces non-compete against physician barring practice of medicine for six months in the same county. Covenant in partnership agreement did not lack consideration simply because it was terminable without cause upon notice.

J. **Lareau v. O'Nan**, Ky., 355 S.W.2d 679 (1962) - Agreement prohibiting physician from engaging in practice of medicine in Henry County is enforced. Court distinguishes Crowell and Calhoun because the

employees in those cases had a "limited capacity to compete in the labor market." Id. at 680. "There is no basic public policy against such covenants, particularly when they involve professional services. In fact, the policy of this state is to enforce them unless very serious inequities would result." Id. at 681

K. **Hall v. Willard & Woolsey, P.S.C.**, Ky., 471 S.W.2d 316 (1971) - Enforcing noncompete against physician for one year within fifty miles of city where she formerly practiced. Physician quit within three weeks after her employment to set up competing practice. Follows Lareau. "While it certainly is arguable that competition is the life of trade, nevertheless, courts have upheld restrictive covenants where they are reasonable in scope and in purpose." Id. at 317.

L. **Louisville Cycle & Supply Co. v. Baach**, Ky., 535 S.W.2d 230 (1976) - Reversing trial court's refusal to enter injunction against competing former employee of cycle shop. The court skirts, but does not directly address, the issue of whether a noncompete lacks consideration because employment is at will.

M. **Hammons v. Big Sandy Claims Serv., Inc.**, Ky. App., 567 S.W.2d 313 (1978) - Court upholds injunction that barred insurance adjuster, for one year, from operating claim business within 200 miles of office where adjuster worked. Court refuses to enforce contract as written because it would have prohibited employee from competing within 200 miles of any

of employer's offices. When covenant is too broad, court may enforce it as modified to be reasonable. Employer had legitimate interest to protect — its good will with clients. Covenants not to compete are "a valuable business tool." Id. at 315.

N. **Orion Broadcasting, Inc. v. Forsythe**, 477 F. Supp. 198 (W.D. Ky. 1979) - Court declines to enforce one-year noncompete covenant against Melissa Forsythe. Television channel had terminated Forsythe allegedly because "female news anchors lose credibility with age." Court follows Calhoun, finds Forsythe "is not in a seller's market," and notes that to deprive her of her livelihood would be "an example of industrial peonage which has no place in today's society." Id. at 201.

O. **Central Adjustment Bureau, Inc. v. Ingram Associates, Inc.**, Ky. App., 622 S.W.2d 681 (1981) - Enforcing contract prohibiting competition with collection agency for two years within the entire U.S.. Covenant signed after beginning of employment is enforceable "provided the employer continues to employ the employee for an appreciable length of time after he signs the covenant, and the employee severs his relationship with his employer by voluntarily resigning." Id. at 685. Employer has interest because business is highly specialized and competitive and employer pours considerable time and money into training employees.

P. **Higdon Food Serv., Inc. v. Walker**, Ky., 641 S.W.2d 750 (1982) - Trial court enforced non-compete against former salesman and competing

company which he had joined. Court of Appeals reversed, concluding that because the covenant had been signed after the beginning of the employee's employment, there was no consideration. The Supreme Court reversed the Court of Appeals and held that the "rehiring" of the employee was sufficient consideration for the agreement. "The point is that [the employer] did not have to hire him — or keep him on — at all." Id. at 751.

Q. **White v. Sullivan**, Ky. App., 667 S.W.2d 385 (1983) - Enforces substantial monetary contempt judgment against a man who had assisted a former employee in violating his covenant not to compete with accounting firm. A good case to cite in pursuing those who "aid and abet" an employee in breaching a covenant not to compete.

R. **Daniel Boone Clinic, P.S.C. v. Dahhan**, Ky. App., 734 S.W.2d 488 (1987) - Court enforces provision of employment agreement against physician, which barred practice of medicine within fifty miles of clinic for eighteen months. Patients were not third party beneficiaries of physician's employment agreement. Court reverses trial court's refusal to award clinic $75,000 in liquidated damages.

V. STATUTORY CONSIDERATIONS

INTRODUCTION

In addition to the Uniform Trade Secrets Act, attorneys counseling clients about restricting competition by their employees should be aware of the restriction on the use of noncompetition covenants for particular classes of professionals, such as attorneys and physicians.

A. LAWYERS - MODEL RULE OF PROFESSIONAL CONDUCT 5.6.

Adopted in Kentucky as SCR 3.130-5.6, Rule 5.6 essentially rules out the use of noncompetition covenants to restrict the right to practice law. It provides:

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Comment

(1) An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

(2) Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

B. Health Care Providers - HB 250, KRS 311 [NOW REPEALED].

Prior to 1994, Kentucky courts apparently had no scruple about enforcing covenants not to compete against medical professionals. See Hall v. Willard & Woolsey, PSC, Ky., 471 S.W.2d 316 (1971) (restrictive covenant in which

physician agreed not to practice medicine within 50 miles for one year was enforceable). According to the Kentucky Court of Appeals, "There is no basic public policy against such covenants, particularly when they invoke professional services." Lareau v. O'Nan, Ky., 355 S.W.2d 679, 681 (1962).

HB 250 radically changed the law in Kentucky. This statute was adopted in 1994 in response to several well-publicized cases of towns who lost their only physician or specialist, when the doctor had to move his practice because he had signed a covenant not to compete. The statute provided:

> (1) It is the finding of the General Assembly that the American Medical Association and Kentucky Medical Association have determined that agreements between health care providers that allow or encourage the enforcement of contractual provisions by which one (1) health care provider agrees not to compete against another health care provider or group of health care providers for a period of time upon the severance of any relationship between the health care providers **is unethical**. It is further the finding of the General Assembly that these agreements serve to increase health care costs by creating a barrier in the physician and patient relationship which forces the patient to seek alternate care from another health care provider, even if the original treating provider remains in the community. It is therefore the finding of the General Assembly that these agreements are contrary to the public policy of the Commonwealth.
>
> (2) An agreement between health care providers that allows or encourages the enforcement of contractual provisions by which one (1) health care provider agrees not to compete against another health care provider or group of health care providers for a period of time upon the severance of any relationship between the health care providers **shall be void as against public policy and not enforceable if the period of time is for one (1) year or longer.**

The statute was short-lived. HB 250 went into effect in 1994 and was repealed in 1996. Still, agreements by health care providers not to compete for more than one year that were entered into from 1994 to 1996 arguably are void. Even if a physician signed a noncompete after the repeal of HB 250, the fact that the AMA and KMA have declared such agreements "unethical" may provide a strong public policy argument that such an agreement is against public policy and therefore unenforceable.

C. ECONOMIC ESPIONAGE ACT OF 1996.

1. Effective Date.

In October 1996, President Clinton signed the Economic Espionage Act, Pub. Law. 104-294, 18 U.S.C. §§1831-1839, into law. It became effective January 1, 1997.

2. Prohibited Activities.

Under the law, it is a federal crime to steal, remove, obtain by fraud or copy a trade secret for the economic benefit of someone other than its owners. It is also a crime to receive a trade secret if the recipient knows that the information has been obtained in a prohibited way.

3. Coverage.

The act covers trade secrets that are related to or included in a product that is produced or placed in interstate or foreign commerce.

4. Penalties.

Those convicted of trade secret misappropriation face fines of up to $250,000 for individuals or $5 million for corporations, jail terms of up to 10 years and possible forfeiture of property.

VI. DEFENDING THE EMPLOYEE'S INTERESTS

A. DEFENSES TO ACTIONS TO ENFORCE NON-COMPETES

In defending an employee against an action to enforce a restrictive covenant, an attorney should keep in mind that the most common form of relief — injunction — in these cases is equitable. Therefore, all those defenses to an equitable action apply. E.g., Daniel Boone Clinic, PSC v. Dahhan, Ky. App., 734 S.W.2d 488, 490 (1987). Similarly, lawsuits to enforce noncompetition clauses are based on contract and often turn on contract principles. Contract defenses, such as lack of consideration, also apply.

1. UNCLEAN HANDS.

The defense of unclean hands is widely used in restrictive covenant cases. Where an employer has breached its agreement with an employee, for example, the courts will not enforce a restrictive covenant against the employee. Webb v. Welcome Wagon, Inc., Ky., 255 S.W.2d 459 (1953); Crowell v. Woodruff, Ky., 245 S.W.2d 447, 450 (1951) (employer guilty of unclean hands where it discharged employee in 4-1/2 months).

2. FIRST BREACH.

Likewise, the contract doctrine of "first breach" applies. "The breach by an employer of a material provision of the contract of employment, such as failure to give notice of termination ... deprives him of the right to enjoin the employee's

breach of such a restrictive covenant." Crowell, 245 S.W.2d at 450. See also Webb v. Welcome Wagon, Ky., 255 S.W.2d 459 (1953).

3. LACK OF CONSIDERATION.

The covenantor may also claim that there was no consideration for the restrictive covenant.

(1) Covenant Entered into after Employment May Be Enforceable in Kentucky.

In Kentucky, a restrictive covenant entered into after an employment relationship begins is enforceable. Higdon Food Serv., Inc. v. Walker, Ky., 641 S.W.2d 750, 751 (1982) ("whatever may have been the employment arrangement before, it was succeeded and superseded by the contract.... The hiring itself (or rehiring, if one prefers that word) was sufficient consideration for the conditions agreed to by [the employee]"). See also Louisville Cycle & Supply Co. v. Baach, Ky., 535 S.W.2d 230 (1976) (covenant entered after employment was supported by consideration because new contract set a definite term of employment); Central Adjustment Bureau, Inc. v. Ingram Associates, Inc., Ky. App., 622 S.W.2d 681, 685 (1981) (holding that restrictive covenant entered into during employment relationship is enforceable, provided the employee severs his relationship with his employer by voluntarily resigning).

(2) Covenant Entered Into After Employment is Unenforceable in Some Jurisdictions.

Some states find no consideration for covenants entered into after employment begins and refuse to enforce them. See, e.g., Records Center,

Inc. v. Comprehensive Management, Inc., 525 A.2d 433 (Pa. Super. 1987).

(3) Terminated Employees.

One federal district court in Kentucky has opined in dicta that applying a non-compete covenant against an involuntarily terminated employee is an "example of industrial peonage which has no place in today's society." Orion Broadcasting, Inc. v. Forsythe, 477 F. Supp. 198, 201 (W.D. Ky. 1979). No published Kentucky opinion directly addresses the issue of whether a noncompete fails for lack of consideration because it is being enforced against a terminated employee. The court in Central Adjustment Bureau specifically declined to express an opinion on whether a restrictive covenant would be enforceable if the employer unilaterally and involuntarily terminated the employment. 622 S.W.2d at 681.

However, at least three reported Kentucky cases have enforced restrictive covenants against terminated employees without addressing the issue. Hammons v. Big Sandy Claims Serv., Inc., Ky. App., 567 S.W.2d 313, 315 (1978) (terminated claims adjuster); Lareau v. O'Nan, Ky., 355 S.W.2d 679 (1962); Stiles v. Reda, 312 Ky. 562, 228 S.W.2d 455 (1950). Other cases support the notion that an employer need not show it terminated an employee in "good faith" before the employer can enforce its non-compete. See Louisville Cycle & Supply Co. v. Baach, Ky., 535 S.W.2d 230 (1976) (although trial court refused to enforce non-compete covenant because employment was at will, court of appeals decided case

on different ground); Daniel Boone Clinic P.S.C. v. Dahhan, Ky. App., 734 S.W.2d 488 (1987) (termination includes non-renewal of contract); Bradford v. Billington, Ky., 299 S.W.2d 601 (1957) (non-compete in partnership agreement was not unenforceable simply because partnership agreement was terminable without cause); Eigelbach v. Boone Loan & Investment Co., 216 Ky. 69, 287 S.W. 225 (1926) (restrictive covenant applied to both terminations and voluntary quits).

One Indiana case directly holds that an employer should not be required to prove that it terminated an employee for "good cause" before it can enforce a valid restrictive covenant. Gomez v. Chua Medical Corp., 510 N.E.2d 191, 195 (Ind. App. 1987) ("Neither equity not the law will deny enforcement upon the basis that the employer must establish that a discharge was made in good faith, or for good cause.").

There are several cases in other jurisdictions holding to the contrary. See Showe-Time Video Rentals, Inc. v. Douglas, 727 S.W.2d 426 (Mo. Ct. App. 1987) (no enforcement where employer terminates employee without good cause); Wauswau Medical Center, S.C. v. Asplund, 514 N.W.2d 34 (Wis. Ct. App. 1994) (noncompete unenforceable where employee worked for only 45 days for employer); Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1984) (noncompete that applied after termination "for any reason." was unenforceable). This is a fertile area for litigation.

4. LACHES.

When a party neglects to assert its rights, that party's neglect can bar its right to seek equitable relief if the delay has caused injury or prejudice to the other party or the other party has changed its position. Gammill v. Bradley T, 879 F. Supp. 737 (W.D. Ky. 1995); Plaza Condominium Ass'n v. Wellington Corp., Ky., 920 S.W.2d 51 (1996); Crady v. Hubrich, 299 Ky. 461, 185 S.W.2d 949 (1949); Wisdom's Adm'r v. Sims, 284 Ky. 258, 144 S.W.2d 232 (1940).

5. INJUNCTIVE RELIEF

In Maupin v. Stansbury, Ky. App., 575 S.W. 2d 695, 699 (1978), the Court described temporary injunctive relief as follows:

> applications for temporary injunctive relief should be viewed on three levels. First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case are not to be addressed in CR 65.04 motions. Unless a trial court has abused its discretion in applying the above standards, we will not set aside its decision on a CR 65.07 review.

An attorney counseling employees should not overlook defenses to the availability of injunctive relief.

Injunction is "an extraordinary remedy and the sufficiency of evidence presented to the circuit court must be evaluated in the light of both substantive and equitable principles." Commonwealth v. Wilkinson, Ky., 828 S.W.2d 610, 612 (1992). The propriety of injunctive relief is "basically addressed to the sound discretion of

the trial court." Id. "A doubtful case should await trial on the merits because the temporary injunction often has the effect of enforcing a mere claim of right." Id.

1. **Immediate Injury.**

A party seeking injunctive relief must make a clear showing that this right is about to be immediately impaired. The movant "must demonstrate an urgent necessity for the injunction." Id. "To support an extraordinary remedy of injunction there must be shown a practically certain injury." Id. at 613.

2. **Irreparable Injury.**

The injury must be "irreparable". Maupin v. Stansbury, Ky. App., 575 S.W.2d 695, 698 (1978). The injury, by definition, should be one that cannot be compensated in damages. This is a fertile area for defending injunctive actions on restrictive covenants. If there is damage in the form of lost sales, argue that the action can and must proceed to the determination of the monetary value of those sales. The plaintiff then can be compensated by the legal remedy of damages.

6. **ENFORCEMENT OF COVENANT NOT TO COMPETE WOULD VIOLATE FEDERAL ANTITRUST LAWS.**

While this argument is sometimes made, reasonable covenants not to compete which have little or no impact upon interstate commerce or competition do not violate antitrust laws. See Frackowiak v. Farmers Insurance Co., 411 F. Supp. 1309 (D. Kan. 1976); Mendell v. Golden-Farley of Hopkinsville, Inc., Ky. App., 573 S.W.2d 346 (1978). However, there are a few cases indicating that it may be possible to state an antitrust claim in the context of covenants not to

compete. Compare American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975) (agreement precluding franchisees of motels from operating motels of competitor may present antitrust violation); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir. 1977), cert. denied, 434 U.S. 1035 (1978) (employee agreements not to compete are proper subjects for scrutiny under Sherman Act); with Bradford v. New York Times Co., 501 F.2d 51 (2d Cir. 1974) (where employee's agreement not to compete met rule of reason, it was not per se violation of Sherman Act); R.W. International, Inc. v. Borden Interamerica, Inc., 673 F. Supp. 654 (D.P.R. 1987) (complaint alleging antitrust violation in covenant not to compete failed to state a claim); Optivision, Inc. v. Syracuse Shopping Center Assoc., 472 F. Supp. 665 (N.D.N.Y. 1979) (agreement in shopping center lease prohibiting landlord from leasing to a business in competition with tenant did not have significant competitive impact); Genovese Drug Stores, Inc. v. Bercrose Assoc., 563 F. Supp. 1299 (D. Conn. 1983) (restrictive covenant in lease for drug store was not so plainly anticompetitive as to warrant application of per se rule of illegality), vacated, Genovese Drug Stores, Inc. v. Connecticut Packing Co., 732 F.2d 286 (2nd Cir. 1984)

VII. CONFIDENTIALITY AGREEMENTS, TRADE SECRETS AND INEVITABLE DISCLOSURE DOCTRINE

A. INTRODUCTION

1. Depending on the level of an employee's position, he or she may be subject to a common law duty of loyalty against breaches of confidence under Kentucky law. Confidentiality agreement have not been litigated in cases reported in Kentucky, but have similar contractual attributes to covenants not to compete. Confidentiality agreements eliminate any ambiguity as to which employees are subject to a duty of loyalty, a question which has not been squarely addressed by Kentucky courts. They can also serve to define protected information, and as evidence that an employer is attempting to protect trade secrets.

2. Application of the inevitable disclosure doctrine by a court has the effect of imposing a covenant not to compete on an employer/former employee relationship, even when such agreements do not exists. The doctrine applies to post-employment activities where it is found that employee will "inevitably disclose" confidential information because of the similarities between his or her current and former positions. While a majority of states have adopted this doctrine, it has not been addressed by Kentucky's courts.

B. Duty of Loyalty to Employer

1. Hoge v. Kentucky River Coal Co., Ky., 287 S.W. 2d 226 (1926) contains a broad statement of the duty of loyalty for agents, trustees and/or servants, or any similar employee who represents an employer's interests to the public. *See also* Stewart v. Kentucky Paving Co, Ky. App. 557 S.W. 2d (1977) (relying on Hoge to hold that company agent could not solicit paving business for own company while still employed by paving company).

2. No Contract?

a. Even in the absence of contractual requirements, where a secret is disclosed to defendant in confidence, a disclosure in breach of that confidence will result in liability to the person making the disclosure. Restatement (Third) Unfair Competition §41 (1995)

b. Thus, an employee who gains intimate knowledge of his employer's business is liable for disclosures of trade secrets even absent a contractual provision prohibiting disclosure. Zoecon Industries, Division of Zoecon Corp. v. American Stockman Tag Co., 713 F.2d 1174 (5th Cir. 1983); Restatement §42.

c. A corporate director or officer is also liable for disclosures of trade secrets acquired through his or her relationship with the corporation. Aero Drapery of Kentucky, Inc. v. Engdahl, Ky., 507 S.W.2d 166 (1974).

d. Negotiations can also create a confidential relationship, leading to liability for disclosing trade secrets learned during the negotiations. Digital Development Corp. v. International Memory Systems, 185 U.S.P.Q. 136 (S.D. Cal. 1973).Aero Drapery

3. Upper Echelon Employees

a. Steelvest v. Scansteel, Inc., Ky., 807 S.W. 2d 476 (1991) found that rules of honesty and fair dealing demand unselfish and undivided loyalty of president and general manager who incorporated competitor while still employed by Steelvest--"a direct corollary of this general principle of loyalty is that a corporation officer or higher-echelon employee is barred" from actively competition while still employed.

4. Low Level Employees

a. There is no Kentucky case law considering the duties owed by employees other than agents, officers or mid to upper-level managers. The level of an employee's position or degree of duties and/or management sufficient to trigger duty of loyalty is unclear under Kentucky law.

C. Confidentiality Agreements--

1. Definition and Purpose

a. A promise to hold employer's information in confidence; define protectable information; and promise to return such information

2. **Basic Considerations**

a. The same considerations regarding choice of law, jurisdiction and essential elements discussed above with regard to covenants not to compete control.

b. Kentucky lacks any meaningful authority with regard to the policy or enforcement of confidentiality agreements.

3. **Limitations**

a. Commonly available information, i.e., information that is "apparently available to many persons" and "relatively well-known principles in the ... field," cannot be transformed into a trade secret by a confidentiality agreement. Mid-States Enterprises, Inc. v. House, 403 S.W.2d at 50; Arthur Murray Dance Studios, Inc. v. Witter, 105 N.E. 2d 685, 710 (Ohio Ct. Common Pleas 1952). For that reason, such information should only be communicated to employees involved in its use, i.e., handled on a "need-to-know" basis.

D. **Trade Secrets**

1. **Policy.**

"The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law." Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974).

2. **Governing Law.**

The law of trade secrets changed in Kentucky on July 15, 1990, when the Uniform Trade Secrets Act (hereinafter "Uniform Act"), as enacted in Senate Bill 180 (1990), took effect. The Uniform Act is codified at KRS §365.880, et seq.

3. **Replaces Pre-existing Law if in Conflict with the Uniform Act.**

The Uniform Act replaced all conflicting tort, restitutionary or other law of Kentucky providing civil remedies for misappropriation of a trade secret, but did not affect contractual or criminal remedies. KRS §365.892(1) and KRS §365.892(2).

4. **Effective Date.**

a. The Uniform Act, as adopted in Kentucky, does not apply to misappropriation occurring prior to July 15, 1990, or, in the case of a continuing misappropriation that began prior to July 15, 1990, to the continuing misappropriation that occurs after July 15, 1990. KRS §365.900.

5. **States Enacting the Uniform Act.**

a. The Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws in 1979 and amended in 1985. It has been adopted in at least 42 jurisdictions: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana [I.C. 24-2-3-1 to 24-2-3-8], Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

6. While there are no reported Kentucky decisions under the Uniform Act, case law from other jurisdictions is persuasive authority.

7. **Definition.**

a. The Uniform Act defines "trade secret" as follows:

i. "'Trade secret' means information, including a formula, pattern, compilation, program, data, device, method, technique, or process, that:

> [a] Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> [b] Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."
>
> KRS §365.880(4).

8. **Statute Of Limitations.**

a. The Uniform Act establishes a three-year statute of limitations requiring that "[a]n action for misappropriation must be brought within three (3) years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." KRS §365.890. The Uniform Act rejects a "continuing wrong" approach to the statute of limitations, providing that "a continuing misappropriation constitutes a single claim." KRS §365.890.

9. **Proving The Existence Of A Trade Secret.**

a. A trade secret plaintiff must first prove the existence of a trade secret. Mid-States Enterprises, Inc. v. House, Ky., 403 S.W.2d 48 (1966). The new Restatement (Third) Unfair Competition §39 (1995) lists the following as some relevant factors in determining the existence of a trade secret.

b. Requirement of Value.

i. According to the Uniform Act, a trade secret "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." KRS §365.880(4)(a). The trade secret need not actually be in use by the plaintiff, under either the Uniform Act or the new Restatement.

c. Requirement of Secrecy.

i. The Uniform Act states that "readily ascertainable" information may not be protected and the comment to the Uniform Act says that that "[i]nformation is readily ascertainable if it is available in trade journals, reference books or published materials." Uniform Act §1 [KRS 365.880(4)(a)], comment. Cf., Amoco Production Co. v. Laird, 622 N.E. 2d 912, 919 (Ind. 1993) (where the duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense or effort, such information may be found not "readily ascertainable"); Thermofil, Inc. v. Fenelon, 13 U.S.P.Q. 2d 1404 (E.D. Mich. 1989) (where compositions of products could be readily ascertained through public literature or nomenclature of plaintiff, the compositions are not trade secrets).

d. Precautions to Maintain Secrecy.

i. "Reasonable" security precautions are required. E.I. DuPont de Nemours & Co. v. Christopher, 431 F.2d 1012, 1017 (5th Cir. 1970), cert. denied, 400 U.S. 1024 (1971), reh'g denied, 401 U.S. 967 (1971) ("Reasonable precautions against predatory eyes we may require, but an impenetrable fortress is an unreasonable requirement....") The Uniform Act requires "efforts that are reasonable under the circumstances to maintain its secrecy." KRS§365.880(4)(b).

ii. Entering into confidentiality agreement provides employee with notice of employer's interest in protecting trade secrets and provides proof of a measure of security.

10. **Improper Discovery & Liability**

a. Liability exists only when discovery of trade secret is unauthorized and where the discovery or use is improper. Restatement § 43, comment a ("a person who obtains a trade secret by proper means is free to use or disclose the information without liability").

b. Breach of Confidence (Duty of Loyalty) can form a basis of liability--see above.

c. Third Party Liability

i. Party who learns secret with notice (knows or has reason to know) of breach of confidence can be liable. KRS § 365.880(2)(a)

11. **Remedies**

a. Equitable--see above

b. Damages

i. Actual losses and unjust benefit or Defendant's gain recoverable, as long as not duplicative KRS § 365.884(1)

ii. Double Damages where willful and malicious misappropriation. KRS § 365.884(2).

iii. Attorneys fees recoverable where willful and malicious misappropriation. KRS § 365.886. Fees can be recovered from plaintiffs who make bad faith claims. Id.

E. **Inevitable Disclosure Doctrine**

1. **Pepsico, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995)** is the leading case on the inevitable disclosure doctrine.

a. Pepsico held that the inevitable disclosure doctrine can be used to enjoin for a reasonable period a former employee from working for a competitor, if the former employer shows that the employee cannot help but rely on the trade secrets of the former employer to perform his new duties. See id. at 1267. The court reasoned that unless the employee has "an uncanny ability to compartmentalize information" he would necessarily be relying on his knowledge of the trade secrets. See id. at 1269. But this showing requires more than the fact that an ex-employee has assumed a similar position at a competitor. See id. at 1269. In other words, the fact that a skilled employee is taking his skills elsewhere is insufficient to show inevitable disclosure. See id. at 1270.

b. A majority of U.S. states which have considered the issue have adopted some form of the doctrine of inevitable disclosure. Whyte v. Schlage Lock Co., 125 Cal. Rptr. 2d 277 (Cal. App. 4th 2002).

c. Other jurisdictions have refused to do so. Compare Lumex, Inc. v. Highsmith, 919 F.Supp. 624 (E.D. N.Y. 1996) (recognizing theory), with Whyte v. Schlage, 101 Cal. App. 4th 1443, 1458 (Cal. Ct. App. 2002) and Del Monte Fresh Produce Co. v. Dole Food Co., Inc., 145 F. Supp. 2d 1326, 1335 (S.D. Fla. 2001) (rejecting theory).

2. **Mere Possibility of Misuse is Not Sufficient to Invoke the Doctrine**

a. Pepsico distinguished its facts from an earlier decision of a federal court in Illinois which had dismissed an inevitable disclosure claim. Id. at 1268-70. In Teradyne, Inc. v. Clear Comm. Corp., 707 F. Supp. 353 (N.D. Ill. 1989), the court granted the defendants' motion to dismiss because the plaintiff failed to allege any facts showing that the defendants had threatened to use the plaintiff's trade secrets or to disavow their confidentiality agreements. See Teradyne, 707 F. Supp. at 356. An allegation that defendants *could* misuse plaintiff's trade secrets and that the plaintiff feared that this could happen was insufficient to plead a valid inevitable disclosure claim. Id. at 357. The district court observed that the law not only permits, but encourages employees to take the knowledge acquired in their previous employment to their new place of business. Id. at 356. Pepsico cited Teradyne favorably, stating that the decision and the Illinois Trade Secrets Act lead to the conclusion that a "plaintiff can prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to **rely** on the plaintiff's trade secrets." See Pepsico, 54 F.3d at 1269 (emphasis supplied).

b. In Strata Marketing, Inc. v. Murphy, 317 Ill. App. 3d 1054, 1069 (1st Dist. 2000), the Illinois appellate court read Pepsico narrowly by holding that a plaintiff was required to plead in the complaint facts stating that the defendant could not operate or function in his new position without relying on the former employer's trade secrets (Id. at 1071) and held that the plaintiff's complaint met this rigid standard. Id. But the court cautioned that a plaintiff's fear that a defendant would misuse confidential information is insufficient to support a claim based on inevitable disclosure. Id. at 1070.

3. **Presence of a restrictive covenant (not to compete; confidentiality agreement) is not required to invoke the doctrine**

a. The doctrine also has the effect of creating an after-the-fact covenant not to compete. But this is a protection about which the employer had never bargained with the employee nor paid consideration. This alters the employment relationship without the employee's consent. See Whyte, 101 Cal. App. 4th at 1462. And it runs counter to the public policy favoring employee mobility. See Bayer v. Roche, 72 F. Supp. 2d 1111, 1120 (N.D. Ca. 1999). As stated by the California Supreme Court:

> every individual possess as a form of property, the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer . . . provided such competition is fairly and legally conducted.

See Bayer, 72 F. Supp. 2d at 1120 (quoting Continental Car-Na-Var Corp. v. Moseley, 24 Cal. 2d 104 (1944)).

4. **Evidence of Bad Faith Probative**

a. Bad faith or predatory intent regarding former employer is a probative factor in the doctrine's application. PepsiCo, Inc., 54 F.3d at 1270-71.

5. **Injunctive Relief**

a. Some courts which have considered the issue have held that an employee may be enjoined from continuing employment with the new employer upon a showing that (1) the current and former employers are competitors, (2) the employee's responsibilities in the new position overlap with those in the prior position such that disclosure of confidential information is inevitable, and (3) the current employer has not taken sufficient, demonstrable steps to prevent misappropriation from occurring. *Merck & Co., Inc., v. Lyon,* 941 F. Supp. 1443, 1460 (M.D.N.C. 1996)(citing *PepsiCo, Inc.*, 54 F.3d at 1267).

6. **Absence of Kentucky Authority**

a. There is no case law in Kentucky adopting the inevitable disclosure doctrine.

b. However, KRS §365.882(1) of KUTSA, provides "Actual or threatened misappropriation may be enjoined." (Emphasis added).

c. The Seventh Circuit has specifically recognized that Kentucky law, even when an employee has signed a post-employment non-compete, does not sanction an injunction against an employee working for a competitor. In Vencor, Incorporated v. Webb, 33 F.3d 840 (7th Cir. 1994) affing 829 F. Supp. 244 (N.D. Ill. 1993), the Court upheld the district court's denial of a preliminary injunction which would have prevented Webb from working for a competitor. The post-employment restrictive covenant was governed by Kentucky law. 33 F.3d at 844-45. The district court relied on the following factors in deciding that enforcement of the covenant was not reasonable: (i) Webb took no confidential documents when he left Vencor, (ii) Webb denied using confidential information in his position with his new employer, and (iii) his new position involved different duties. 829 F. Supp. at 249.

d. Both the district court and the court of appeals held that the written covenant would not be enforced under Kentucky law against Webb because it would not be reasonable to do so. This was so even though Webb joined Vencor's competitor in contravention to the language of his agreement not to engage in a competitive business. If these limits apply when a court is asked to enforce a bargained-for non-compete, they certainly should apply to a former employer's attempt to enjoin the former employee from taking a new position with a competitor when there is no non-compete agreement.

ETHICS IN EMPLOYMENT LAW

Plaintiff's Perspective

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Defendant's Perspective

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Judicial Perspective

Hon. Jennifer B. Coffman
U.S. District Court, E.D. of Kentucky
Lexington, Kentucky

SECTION L

ETHICS IN EMPLOYMENT LAW

PART ONE: PLAINTIFF'S PERSPECTIVE

PART TWO: DEFENDANT'S PERSPECTIVE

PART THREE: JUDICIAL PERSPECTIVE

ETHICS IN EMPLOYMENT LAW
PLAINTIFF'S PERSPECTIVE

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I. The Ethics/Legal Problems Associated with Prospective Client's Removal of Materials and/or Recording Conversations in Preparation for an Employment Claim

A. Often a prospective client presents in your office who has been experiencing a course of conduct he/she deems discriminatory or which he/she believes is leading to termination. They may have already begun building their case or may be seeking your legal advice regarding any or all of the following:

1. Taking copies (or sometimes originals) of written materials from their employee personnel file or the files of co-employees;

2. Downloading information from company computers used by the employee, managers, or even officers;

3. Surreptitiously using tape recorders at disciplinary meetings where alleged discriminatory statements are made or in encounters where sexually provocative statements take place;

4. Recording telephone conversations.

B. Ethical considerations of the plaintiff attorney:

1. Under Rule 1.2(d) of the Kentucky Rules of Professional Conduct, a lawyer shall not counsel a client to engage nor shall he/she assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a

good faith effort to determine the validity, scope, meaning, or application of the law.

2. Similarly, a lawyer under Rule 1.16(a)(1) may decline to represent a client if the representation will result in violation of the Rules of Professional Conduct. Once employed, withdrawal is also permitted under Rule 1.16(b)(1) or (3) if the client engages in conduct the lawyer believes to be criminal or fraudulent as well as if the client pursues an objective the lawyer considers repugnant or imprudent.

C. To avoid ethical/legal problems, the plaintiff's lawyer better know applicable Kentucky and federal law or perform the requisite legal research before advising what if anything the employee may lawfully take from the employer or do in preparation for a possible civil action.

D. Important questions for the plaintiff lawyer to ask:

1. Does the employee have an Employment Agreement or is there a handbook in force which sets forth the company policy as to ownership and/or retention of company documents?

2. Does the employee have a separate Confidentiality Agreement which addresses company policy on the retention or use of information/documents?

3. Does the taking of company data, information/documents have implications that may get the plaintiff sued under the Kentucky Trade Secret Act, KRS 365.880-900?

4. On the issue of an employee accessing or taking computer information from the employer without consent, have you considered the potential criminal implications of KRS 434.853 which states:

434.853. Unlawful access in the fourth degree.

(1) A person is guilty of unlawful access in the fourth degree when he or she, without the effective consent of the owner, knowingly and willfully, directly or indirectly accesses, causes to be accessed, or attempts to access any computer software, computer program, data, computer, computer system, computer network, or any part thereof, which does not result in loss or damage.

(2) Unlawful access to a computer in the fourth degree is a Class B misdemeanor. (Effective July 15, 2002.)

5. You must also consider the potential for any civil or even criminal violation of the Computer Fraud and Abuse Act of 1986 and the Electronic Communications Privacy Act. See 18 U.S.C §2707.

6. Are there any invasion of privacy tort claim risks or other criminal considerations with use of tape recordings for meetings/encounters or is such activity permitted under KRS 526.010 pursuant to the definition of "eavesdrop?"

7. As to employee recording of telephone calls, have you considered the application of KRS Chapter 526 and 18 U.S.C. §2511 including any exceptions under those statutes which may allow the conduct to be deemed lawful because the person acting is a party to the communication. However, see Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998), where two Louisville lawyers became defendants concerning their knowledge and roles in a case involving their client, a divorced mother, secretly taping telephone calls between her former husband and their 14-year-old minor daughter she had custody of (on whose behalf the mother claimed she consented to the taping without telling the girl out of concern for her welfare). Also, see Sparshott v. Feld Entertainment Inc., 311 F.3d 425 (C.A.DC 2002); Smoot v. United Transp. Union, 246 F.3d 633 (6th Cir. 2001).

E. Other strategic alternatives for the plaintiff lawyer to consider to minimize ethical/legal problems when advising the employee:

If the employee prospective client has not already engaged in taking documents and/or computer information, and knows the materials exist which may be crucial to achieving a successful outcome in litigation, the following course of action may be helpful and less risky from both an ethical and legal standpoint:

1. Consider writing the employer's President, General Counsel, outside counsel, if known, (or all of them) identifying the computers which contain the required documentary evidence used by the specific individuals who were the decision makers for any discriminatory actions or unlawful termination. Instruct them to respond immediately in writing that they will agree to preserve all of those computers and all of their contents because of the materiality of the information to the employee's claim. You may also want to cite

Rule 3.4(a) to the lawyers concerning the consequences of alteration or destruction of the information or computers.

2. If there is no immediate response to such a letter, or if you know the employer plays "hard ball" and the request will be futile, you may consider instituting a civil action (using a Verified Complaint), to seek a temporary restraining order or preliminary injunctive relief from the Court to preserve the material and computers. If you wrote a letter first and received no response or a refusal to our request, attach a copy of the letter so the judge will get the immediate impression that the employer is wasting the Court's time by stonewalling a legitimate request.

3. Do not forget to seek a jury instruction on spoliation of evidence should any of the documents or computers critical to your client's case be deemed "missing" during discovery, especially if early written notice has been given of the importance of preserving those documents. Monsanto Co. v. Reed, Ky., 950 S.W.2d 811, 815 (1997).

4. If the case has the value to justify it, consider hiring a computer expert with the ability to retrieve allegedly deleted information from computers;

5. If the prospective client shows up in your office and has already taken written documents, downloaded computer information, or taped meetings and/or telephone calls, consider all of the legal ramifications very carefully before using the information in litigation. Also, consider whether it may be of potential benefit for settlement purposes to voluntarily disclose possession of any or all such information to the employer or its counsel.

II. Ethical Problems in Settlements Involving the Plaintiff Employee or Employees and Counsel

A. Many prospective clients who are employees seeking counsel in a wrongful termination or discrimination case will tell you when presenting their claims, "It's a matter of principle, and it's not about money." This is the rare employment client based upon my experience. Regardless, it should reinforce the need for plaintiff's counsel to make sure the attorney fee arrangement is both specifically documented by contract and fully understood by the client(s).

B. Normally the likelihood of an ethical conflict between attorney and client will arise less often in a wrongful termination case because it is unlikely that the employer will be paying your attorney fee as plaintiff's attorney. This is due to the fact there may be no statutory or common law basis for asserting an attorney fee claim against the employer as an element of plaintiff's damage.

C. In discrimination cases under Kentucky (KRS 344) and Title VII cases under federal law, as well as a myriad of other employment-related statutes under both Kentucky and federal law, there are provisions allowing plaintiff's attorney fees and costs to be recovered from the other side, which increases the likelihood of a potential ethical conflict.

D. Ethical considerations are often presented in settlement situations where the defendant employer's counsel seeks to involve simultaneous negotiation of plaintiff counsel's attorney fees and the amount payable to the plaintiff employee(s). Great care must be taken in these cases to avoid violating 1.7(b) and/or 1.8(g) of the Rules of the Kentucky Supreme Court.

Rule 1.7. Conflict of interest: general rule.

* * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is

undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.8. Conflict of interest: prohibited transactions.

* * *

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

1. For example, employer may seek to generously settle the claim(s) of employee(s) conditioned upon a waiver or large reduction of the claim for attorney fees; (such an approach does not appear to violate the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. See Evans v. Jeff D., 475 U.S. 717, 737-738 (1986).

2. Counsel for the employer may offer to pay all of the attorney fees without question as to the reasonableness of amount in return for concessions by employee(s) as to the amount of recoverable damages, benefits, or withdrawal of a request for permanent injunctive relief to change an unlawful employment practice, etc.

3. The potential conflict between plaintiff employee(s) and their attorney can be exacerbated when the documented attorney fee incurred for which payment is sought may be higher than the settlement amount offered or the damages awarded the employee at trial. There can also be a problem when there is a threatened appeal by the losing employer presented with a combined offer of settlement for less than the verdict plus attorney fee the Court would be requested to award. See for example, Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992), where the attorney fee was $150,662.85 and the verdict was $100,000; Abrams v. Lightolier, Inc., 50 F.3d 1204 (3rd Cir. 1995), where the attorney fee request was $546,000 and damages awarded were $474,000.

4. Where plaintiff's counsel evaluates or accepts a Rule 68 Offer of Judgment, make sure there is no ambiguity as to how much is damages for the employee(s) versus how much is cost

reimbursement and attorney's fees. This is essential to avoid a serious potential ethical conflict. Another option is to require the Rule 68 offer to state only how much is damages for the employee(s) and reference in it that the cost and attorney fee amount will in addition be determined by the Court. Failing to use precise language in the Rule 68 Offer of Judgment may have disastrous ethical and legal consequences for the plaintiff's side (or the defense side). There are multiple reported cases which allow attorney fees to subsequently be awarded after plaintiff has become the prevailing party by accepting the Rule 68 offer. Defendant's counsel may have contemplated that the amount offered included attorney fees, but did not specify this in clear language. See Lyte v. Sara Lee Corp., 950 F.2d 101, 104-105 (2nd Cir. 1991). Numerous cases also exist where the Court has voided the Rule 68 offer because of its ambiguous language concerning whether attorney fees were included in the amount. Radecki v. Amoco Oil Co., 858 F.2d 397, 403 (8th Cir. 1988). If the settlement breaks down due to problems with a Rule 68 offer and plaintiff ultimately does not prevail at trial, there could be adverse ethical and legal consequences for plaintiff's attorney.

E. Considerations for the plaintiff attorney to reduce the ethical and legal risks

1. Create a special civil contract (as opposed to using the boilerplate type) for employment cases where you as the plaintiff's attorney realize from the beginning that a potential conflict may exist because attorney fees are a recoverable element of damage in the client's case. Use very clear (i.e., non-legalese) language. Include, if need be, a written example of how an ethical conflict could arise in settlement or even after a successful verdict if an appeal is threatened combined with a reduced settlement offer meant to include damages, costs, and attorney fees. Fully explain these risks, if need be in a letter addendum to the contract, and have the client acknowledge receiving and understanding the explanation.

2. If you are not sure if the proposed settlement by the defendant employer poses an ethical conflict, seek an informal opinion from other impartial plaintiff's counsel with experience in evaluating ethical issues associated with employment cases. Consider selecting an attorney that may have gained experience in ethical issues from service as a member of the Professional Responsibility Committee. In rare circumstances, a formal Ethics Opinion can even be sought.

3. If you think your client does not understand the settlement proposal after thorough explanation related to the allocation of fees versus damages, urge the client to obtain a second opinion from another attorney they select to discuss the fairness and reasonableness of the proposed basis for settlement.

4. Detail all of the actions in writing every step of the way as soon as there is the first hint of a potential ethical dispute between the client and attorney.

5. If all of the above fail, do not hesitate to seek early assistance from the Court on deciding allocation of damages to the employee versus attorney fees should a potential ethical conflict arise.

F. Special ethical considerations for the attorney where the representation involves two or more employees:

1. All of the above points under Section E apply where there are multiple employee plaintiffs, however, in addition, group representation of employees requires a need for extra attention to avoid ethical conflicts. As Rule 1.7(b)(2) indicates, ". . . When representation of multiple clients in a single matter is undertaken, the

consultation shall include explanation of the implications of the common representation and the advantages and risks involved." Further, under Rule 1.8(g) it states, "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of the clients unless each client consents after consultation, including disclosure of the existence and nature of the claims involved and of the participation of each person in the settlement.

2. For example, with a group of female employees that seek to retain you as counsel in a sexual harassment claim where a manager has taken different improper actions toward each potential plaintiff, the attorney must explain from the outset that the claims may have different values for settlement purposes. Make sure this is acknowledged in writing by all of the clients along with a procedure to be followed in the event a global settlement is offered by the employer (i.e., split the proceeds equally "all for one and one for all," which some term "The Three Musketeers Approach," agree to let the judge decide the value of each claim, allow the group to decide the value of each claim if it can be done unanimously without counsel playing a decision-making role and without hostility). This conflict should be less problematic where economic damages that can be quantified such as back pay is the major element of damage. When unliquidated damages that are difficult to quantify for elements such as humiliation or embarrassment come in to play, fair valuation becomes much more difficult and it increases the need for the Court to set the amounts.

3. Planning how to try and prevent the potential conflict before an attorney agrees to represent multiple plaintiff employees is critical. This is because a combined settlement offer by the employer may be advanced to purposely divide the plaintiff group from each other and/or from their counsel which could adversely affect achieving a favorable result. Even worse, if there is a failed settlement it may undermine presentation of the group's claims at trial because an individual client's goal could then override the group's mission. I term a reverse Three Musketeers approach which can be summed up as "All for one and that one is me.". (Although it was not an employment case, the recently settled sexual abuse case against the Louisville Archdiocese presented many of the divisive ethical and legal issues discussed here. Many members in the class of plaintiffs disagreed concerning how much their individual claims were worth. Some of the plaintiffs and their individual attorneys also disagreed

concerning the amount of attorney fees the lead attorney for the class should be awarded out of the $25,000,000 global settlement which was offered. The issues were ultimately resolved by the trial judge as to the lead attorney fee and by appointment of an experienced outside attorney to recommend to the Court how members of the plaintiff class should be compensated for their respective claims.)

LEGAL ETHICS IN HARASSMENT INVESTIGATIONS

I. The unique role of an employment defense attorney
   A. Unlike most litigation or corporate counsel, employment lawyers seldom practice law exclusively inside **or** outside the courtroom.
   B. The practice of employment law is often split
      1. A process of counseling (prospectively advising clients on compliance with the law)
      2. A process of advocacy (retrospective argument that one's client has previously complied with the law).
   C. This creates a problem in the context of all discrimination claims, particularly sexual and other forms of harassment.

II. A typical harassment case for an employment defense lawyer
   A. The role of counselor usually comes first.
      1. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), advised employers to implement comprehensive anti-harassment policies and enforce them effectively.
      2. The first duty as counselor is to draft employment policies designed to prevent and correct sexual and other forms of harassment.
   B. Eventually, most clients will receive complaints under their anti-harassment policies.
      1. Often followed by a telephone call to the attorney, in which the client seeks advice on how to proceed.
      2. Still in the role of counselor, advising the client on how best to comply with the law and minimize the client's liability.
      3. In the case of hostile environment claims, the employer is advised to conduct a thorough investigation of the allegations contained in the complaint.
   C. The investigation
      1. Client often asks employment counsel, the people who are most familiar with the requirements of an effective investigation, to perform it.
      2. Counsel has expertise in the law, and expertise in the operation of the employers' specific anti-harassment policy.
      3. The process
         a. Investigator decides whom to interview, and what questions to ask.
         b. Reach a conclusion on the veracity of the allegations
         c. Recommend a course of conduct for the employer
   D. The litigation
      1. The role as advocate begins
         a. Receipt of an EEOC charge or KCHR complaint
         b. Receipt of a complaint
      2. Lawyer's role changes
         a. Arguing the employer's position
         b. Focus is retrospective – no longer prospective.

3. Substance of the argument
   a. Client possessed adequate procedures for preventing harassment.
      (1) Did the employer have a policy?
      (2) The lawyer probably wrote it.
   b. Employer took sufficient steps to remedy the harassment once it occurred.
      (1) The essential element of this proof is often a demonstration that the employer undertook a thorough investigation.
      (2) The employer conducted the investigation that now forms an element of the client's defense.

III. Creation of the Problem
   A. Attorney must demonstrate the adequacy of the client's anti-harassment policy, which was drafted by that attorney.
   B. Attorney must demonstrate that the client thoroughly investigated the employee's allegations of harassment, though the attorney was the very one conducting the investigation on behalf of the employer.
   C. Attorney becomes both advocate and witness on behalf of the client.

IV. The Three Ethical Problems.
   A. Client has an interest in preserving the attorney/client privilege protecting the communications made during the counseling stage.
      1. However, the adequacy of the employer's anti-harassment policies are a substantive issue in the litigation.
         a. Can the privilege be maintained?
         b. Should it be?
      2. The employer's implementation of the policies is also an issue
         a. Can the privilege be maintained?
         b. Should it be?
   B. Potential conflict of interest.
      1. Can attorney serve as a witness for client?
      2. If possible, is it even advisable?
   C. Malpractice.
      1. Dual role of counselor and advocate creates a problem.
      2. If the client loses the case because of the inadequacy of the investigation or policy, what liability does that create for the attorney?

V. Attorney/client privilege.
   A. We must first decide whether the allegedly privileged information is even relevant, since irrelevant information is not discoverable under Fed.R.Civ.P. 26.
      1. At least one employer has tried to argue that the investigation is actually **irrelevant** to a *Faragher/Ellerth* defense.
      2. *Payton v. N.J. Turnpike Authority*, 73 FEP Cases 1149 (N.J. 1997).

a. The employer argued that the **process** of investigation is irrelevant, and only the **outcome** of the investigation matters to the employer's affirmative defense.
b. Where the harassment stops because the harasser is effectively disciplined, the means by which the discipline came about (the attorney's investigation) is arguably irrelevant.
c. The lawyer's testimony about the investigation would therefore also be irrelevant, and the privilege and ethical issues would be moot.
d. The New Jersey Supreme Court rejected this argument. Reasoning that "justice delayed is justice denied," the court held that an investigation that reaches the correct result but which also allows the harassment to continue during a prolonged period is ineffective under *Faragher* and *Ellerth*.

3. The employment lawyer's participation in the process is likely to be relevant to the case, even if the investigation resulted in the correct outcome.

B. Since the process of the investigation is relevant, the next issue is whether or not the plaintiff/employee can overcome the attorney/client privilege.

1. Assume, for purposes of analysis, that the privilege actually attaches to the investigation.
a. This is not a foregone conclusion
b. Unless the investigation was undertaken in anticipation of litigation or can be classified as the provision of "legal advice," the attorney/client privilege is inapplicable.
c. *Scott v. Avondale Industries, et al.*, 2003 U.S. Dist. Lexis 6696, 91 FEP Cases 1442 (E.D. La. 2003).
(1) Court held that documents created by a company's human resources investigator (who was not an attorney) were not protected by the work product privilege
(2) They were created in the ordinary course of business, and not in anticipation of litigation.
d. Simple enforcement of company policy or a desire to comply with a legal duty is also insufficient motive to trigger the protection of the privilege. *See Payton, supra.*
e. Clearly, the Courts will limit the circumstances under which an investigation is deemed to be undertaken "in anticipation of litigation."
(1) The existence of an allegation of harassment is not enough by itself.
(2) An employment attorney cannot preserve the privilege simply by instructing the employer's human resources department to prevent litigation by following the harassment policy and investigating every allegation.

f. There may still be a work-product privilege which the attorney can assert when the attorney instructs the employer to conduct an investigation.

2. If the privilege attaches, employers must decide whether they can assert it and still adequately defend their case.
   a. Few courts have addressed this issue, but those that have issued opinions force employers to choose between the privilege and defending the discrimination charges.
      (1) *McIntyre v. Main Street*, 84 FEP Cases 1032 (N.D. Cal. 2000) (an employer may not rely on an outside investigation as an affirmative defense where the employer asserted that the investigation was privileged)
      (2) *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 69 FEP Cases 1603 (D. N.J. 1996) (holding that defendant's use of its attorney's investigation of sexual harassment allegations as a defense waived the attorney/client privilege)
      (3) *Brownell v. Roadway Package System, Inc.*, 185 F.R.D. 19, 24-25 (S.D. N.Y. 1999) (if the employer had raised the defense of adequate investigation and response to a complaint of discrimination, it would waive the attorney-client privilege with respect to communications between counsel and client pertaining to that investigation)
3. Even if the attorney's actions during the investigation of the harassment allegation are privileged, the privilege may be meaningless.
   a. If the only effective defense to the employee's claim involves proof of an effective investigation of the harassment allegations, a waiver of the privilege is in the client's best interest.
   b. Maintenance of the privilege is squarely at odds with the obligation to serve as an effective advocate for the client.
4. If the client is truly not liable for the harassment because the investigation was adequate, the only way to prove the client's innocence may be to waive the attorney/client privilege.
5. Beware: simply by raising the *Faragher/Ellerth* affirmative defense, the employer may have unintentionally **already** waived the privilege. *See Payton, supra.*

C. Implications to a waiver of the privilege
1. The next time an employee accuses the client of harassment, the client will no doubt remember the previous experience.
2. At the counseling stage of the second harassment allegation, the client is likely to be far more guarded in what is said, knowing that future litigation may require waiver of the attorney/client privilege.
3. This reluctance defeats the very purpose of the privilege: to foster open and honest communication between attorney and client.
4. By waiving the privilege in one harassment case, the attorney may irreparably damage the ability to represent the client in future cases.

VI. Conflict of Interest.

A. Attorney as witness.

1. The defense of the harassment allegations requires proof of two elements
   a. The employer had adequate anti-harassment policies with adequate training on those policies, and
   b. Those policies were effectively enforced.
2. Strangely, the attorney may be the best witness that the employer has met each of these elements of the *Faragher/Ellerth* defense.
   a. The employer often wrote the policies that are now under fire
   b. Attorney is likely to be the most qualified person to testify to the scope and intended effect of the policies.
   c. Having conducted the inquiry into the harassment allegations, the attorney is also uniquely qualified to testify as to the effectiveness of the investigation.

B. Is the dual role of witness and advocate acceptable?

1. Model Rule 3.7 of the ABA Model Rules of Professional Conduct

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

2. Rule strictly limits the circumstances under which an attorney can be both an advocate and a witness for a client.

c. The practice is prohibited, unless
   a. the issue is uncontested,
   b. the testimony relates to the nature and value of legal services rendered in the case, or
   c. disqualification would be a substantial hardship for the client.

VII. Malpractice.

A. Increased risk of malpractice claims where attorney is the one conducting the investigations into discrimination charges.

B. If the attorney conducts the investigation, and the employer loses the subsequent discrimination claim because the jury determined that the investigation was inadequate, what liability exists?

OFFICERS, THE COMPANY, AND EMPLOYEES: SHOULD EACH HAVE SEPARATE COUNSEL?

I. Can defense attorneys undertake joint representation of the company and an employee of the company?

A. ABA Model Rules of Professional Conduct

1. *Rule 1.7- Conflict of Interest: Current Clients*

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

2. What is informed consent?

a. Attorneys should communicate the following:

(1) The conflicts that may arise between the two parties;

(2) The ethical standards that may prohibit a lawyer from representing a client when there is a conflict.

(3) The possibility of restricting their claims if they agree not to take conflicting positions.

(4) The costs and disruption involved if they should have to get separate counsel down the line.

(5) In the event of a conflict between the parties, counsel can withdraw from representing one party and continue to represent the other.

(6) That the attorney/client privilege does not apply to the parties jointly represented and the attorney may disclose information given by one party to the other party.

b. Communication should be in writing with client's signature

c. Informed consent often takes the form of a joint defense agreement. They typically include:
   (1) An acknowledgement of common interests,
   (2) An agreement to share information (even privileged),
   (3) Recognition of possible conflicts, and
   (4) Conditions for withdrawal.

B. ABA Model Code of Professional Responsibility
   1. Ethical Canon 5-15
      a. *If a lawyer is required to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepts such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.*

II. So it can be done.....but should it be done?
   A. Advantages
      1. Legal
         a. Minimizes attorney fees by preventing duplicative preparation
         b. Provides for legal strategies that may not be otherwise available
         c. Lawyer is able to plan a joint defense
         d. Presents a united front to a jury
         e. Easy access to all the needed facts
         f. Facilitates better communication between the defendant employee and defendant employer.
      2. Business
         a. Emphasizes the corporate culture of supporting managers who are wrongly accused.
         b. Gives managers a sense of security and confidence in their decisions.
      3. Economic
         a. Parties pay for one lawyer instead of two
         b. Especially helpful if one party is picking up the tab for both
   B. Disadvantages
      1. Strategic clashes
      2. Less than forthcoming employee-defendants can undermine the defense of the employer
      3. Restricted attorney/client privilege

C. Special case – Sexual Harassment

1. When harassment culminates in a "tangible employment action" (*Faragher v. Boca Raton*, 524 U.S. 775 (1998)).
   a. This is typically a *quid pro quo* case.
   b. The position of the employer and the supervisor are generally aligned.
   c. Especially true when both argue that the conduct did not occur.
   d. Joint defense agreements are easier to accomplish here.
2. When the harassment does not culminate into a "tangible employment action" (*Burlington Ind., Inc. v. Ellerth*, 524 U.S. 742 (1998)).
   a. This is typically a hostile environment case.
   b. The interests of the supervisor and the employer will often be at odds.
   c. Especially true when the employer argues that the supervisor engaged in the conduct, but the employer took prompt remedial action to remedy the conduct or that the employee failed to use available reporting procedures.
   d. Joint defense agreements are less likely to be appropriate here.

D. Special Case – no individual liability for the supervisor

1. Under Title VII and KRS Chapter 344, only employers, not individuals, can be liable for discrimination or harassment (though there is individual liability for retaliation).
2. Representing the individual supervisor only for the purposes of a Rule 12(b)(6) motion is unlikely to raise a conflict.
3. The aforementioned problems may arise if the 12(b)(6) motion is unsuccessful.

III. How does joint representation affect the attorney/client privilege?

A. Attorney/client privilege of the corporation

1. Disclosure of an employer's confidential information to a current employee may not constitute a "disclosure to a third party," and may not be a waiver of the corporation's attorney/client privilege.
2. *Upjohn v. United States*, 449 U.S. 383 (1981), held that communications between corporate counsel and an employee of the corporation are privileged when:
   (1) The communications were made at the direction of corporate superiors to obtain legal advice from counsel, and
   (2) The communications concerned matters within the scope of the employee's duties and the employee was aware they being questioned so the corporation could obtain legal advice.

B. The Joint Defense privilege

1. Protects communications that are part of an ongoing and joint effort to establish a common defense strategy. (*Travelers Cas. & Sur.Co. v. Excess Ins. Co.*, 197 F.R.D. 601(S.D. Ohio 2000)).
2. Protects comments made by one defendant in front of a co-defendant and communications made between defendants.

3. Applies when:
   a. The communications were made in the course of a joint defense effort;
   b. The communications were designed to further the effort.
   c. The privilege was not waived.

IV. How does joint representation affect trial?
   A. Inconsistent verdicts
   B. Danger that jury will find in favor of the supervisor but still find against the employer, or vice versa.
      1. In this situation, the losing defendant will want to appeal and the winning defendant will not.
      2. The winning defendant may have to return to trial.
      3. Can the defendant/employer seek indemnity or contribution if the employee wins a verdict?
         a. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000).
         b. Outpatient clinic granted privileges to a doctor named Salazar.
         c. The clinic employed an assistant for Salazar, who accused him of hostile environment sexual harassment under KRS Chapter 344.
         d. The clinic filed a third-party indemnity claim against Salazar.
         e. Kentucky Supreme Court upheld the clinic's right to seek indemnity
            (1) The clinic and Salazar were not *in pari delicto*.
            (2) The clinic was liable only because of the acts of Salazar.
         f. The fact that Salazar could not be individually liable for the harassment was of no consequence.
         g. This result would be impossible under Title VII, because there is no federal common law right to indemnity.
         h. Salazar was probably an independent contractor.
            (1) The case may turn out differently if he were an employee.
            (2) Acts of an employee **are** the acts of the employer, so indemnity for acts of employees may not be possible.

ETHICS IN EMPLOYMENT LAW
THE COURT'S PERSPECTIVE

I. Employment Discrimination Class Actions

A. Communications

1. Solicitation of non-represented potential class members

a. Model Rule of Professional Conduct 7.3: Direct Contact with Prospective Clients -- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.
(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

b. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). The EEOC and Gulf Oil reached a conciliation agreement wherein Gulf agreed to cease discriminatory practices, instate an affirmative action program, and provide backpay to alleged victims based on a formula. Class action based on separate discrimination charges involving allegations that Gulf Oil discriminated on the basis of race was filed subsequently, seeking to vindicate the rights of many people receiving

settlement offers from Gulf. Gulf sought to limit parties and counsel from communicating with potential class members. The court entered an order banning all communications between parties and their counsel and actual or potential class members without prior approval of the court. A divided panel of the 5th Circuit upheld the district court order finding no violation of Fed. R. Civ. P. 23 or prior restraint on speech in violation of the First Amendment. An en banc rehearing was granted and the 5th Circuit reversed the panel decision, finding the district court order was a prior restraint and violated the First Amendment. The Supreme Court granted *certiorari* to determined the scope of the district court's power to limit communications between named plaintiffs and their counsel to prospective class members.

(1) Fed. R. Civ. P. 23 requires the court to exercise control over a class action and enter appropriate orders narrowly tailored to prevent abuse while balancing the potential interference with the rights of the parties.

(2) The district court's order was too broad and contained no factual findings, legal argument, or record for appellate review.

(3) The court also noted ". . . we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression." *Id.* at 104.

c. Courts often state that class actions are particularly susceptible to abuse. Three often-mentioned abuses recognized in *Gulf Oil* are:

(1) the susceptibility of nonparty class members to solicitation amounting to barratry;

(2) the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding; and

(3) unapproved communications to class members that misrepresent the status or effect of the pending action.

d. *Williams v. U.S. District Court*, 658 F.2d 430 (6th Cir. 1981). The named plaintiff in the class action brought suit against his employer on behalf of former and present employees for racial discrimination. A Local Rule prohibited communication between parties and counsel to potential class members without consent of the court (the Local Rule was patterned after the same *Manual for Complex Litigation* model order after which the district court in *Gulf Oil*

patterned its order). The Local Rule was designed to prevent attorney solicitation of clients, funds, and fee agreements. The 6th Circuit, citing Gulf Oil, found that the Local Rule and the district court's order were invalid because they unduly frustrated the policies underlying Fed. R. Civ. P. 23. Further, the district court exceeded its rulemaking authority as the Local Rule was inconsistent with the Federal Rules of Civil Procedure.

e. *Shapero v. Ky Bar Assn.*, 108 S. Ct. 1916 (1988). A Kentucky attorney sought to solicit clients known to have pending foreclosure actions against them through the mail via a letter stating: "It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor to *STOP* and give you more time to pay them. You may call my office anytime from 8:30 a.m. to 5:00 p.m. for *FREE* information on how you can keep your home. Call *NOW,* don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is *FREE,* there is *NO* charge for calling." Kentucky Supreme Court Rule 3.135 (b) (i) and Model Rule 7.3 banned targeted, direct-mail advertising. The Supreme Court ruled that such a ban violated the First and Fourteenth Amendments. (See current version of Model Rule 7.3 *supra*).

2. When are class members represented?

a. *Resnick v. American Dental Ass'n.*, 95 F.R.D. 372 (N.D.Ill 1982). This class action charged the ADA with unlawful employment practices which discriminated against women. The plaintiff sought a protective order barring defendant's counsel from communicating with unnamed class members. The order was granted because once class certification occurred, unnamed class members were represented by counsel, and the Code of Professional Responsibility provides that a lawyer shall not contact an opposing party known to be represented by counsel without opposing counsel's permission. Unnamed class members are represented by counsel once the class has been certified. In a footnote, the court states that until class certification, unnamed class members are not represented.

b. *Parks v. Eastwood Ins. Services, Inc.*, 235 F. Supp. 2d 1082 (C.D.Cal. 2002). In this representative action for unpaid wages and overtime under the Fair Labor Standards Act ("FLSA"), the court held that a defendant employer may communicate with prospective plaintiff employees who have

not yet opted in, as long as the communication does not undermine the court's own notice to prospective plaintiffs. (See 29 U.S.C. § 216 (b) and explanation *infra*, under "Age Discrimination.") The court stated that opposing counsel may communicate with potential class members in a Rule 23 class action until the class has been certified, at which point the class members are deemed represented, and compared the class action scenario to the representative action before the court.

3. EEOC as Plaintiff
   a. The EEOC is not the victims' representative and cases brought by the EEOC do not have to be certified under Fed. R. Civ. P. 23. Nonetheless, cases brought by the EEOC can produce monetary remedies for injured parties. While an action brought by the EEOC is not technically a class action, class-action terms are used by the courts for convenience and brevity.
   b. *Williams v. U.S.*, 665 F. Supp. 1466 (D. Ore. 1987). When the EEOC brings actions under its own name, it seeks to vindicate the rights of aggrieved individuals as well as the public interest. The EEOC's interests may not always coincide with specific victims, which is why individuals may intervene. The EEOC does not establish an attorney-client relationship with "class members." Furthermore, the EEOC does not owe a duty to the potential claimants and cannot be found negligent in treatment of them.
   c. *Bauman v. Jacobs Suchard, Inc.*, 136 F.R.D. 460 (N.D. Ill. 1990). Communications between EEOC attorneys and potential claimants are privileged because the EEOC acts as *de facto* attorney for the claimants.
   d. *EEOC v. Mitsubishi Motors*, 102 F.3d 869 (7th Cir. 1996). The EEOC commenced an action on behalf of current and former female employees at Mitsubishi. Each side sent notice to the "class members." The EEOC's notice advised the class members that they were not obligated to communicate with Mitsubishi about any aspect of the case. Mitsubishi objected, claiming that the notice would cause employees not to report harassment and discrimination to its Human Resources department, subjecting Mitsubishi to further liability. The district court ordered the EEOC to send a second notice telling the class members that the first notice should not be read to suggest that complaints should not be sent to the HR department, the EEOC or the court, at the employee's option. The court also ordered that each side give the other, and the court, ten days' notice prior to

making any other unprivileged communications with the class to prevent any further misleading remarks. The EEOC appealed the order. The 7th Circuit held that while the court's order may have been construed as a restraint on free speech if Mitsubishi complained, the EEOC, as a part of the Executive Branch, does not have rights under the First Amendment.

B. Age Discrimination

1. Representative actions under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, differ from class actions under Title VII because they are governed not by Fed. R. Civ. P. 23, but by the FLSA, 29 U.S.C. § 216 (b), incorporated in the ADEA by 29 U.S.C. § 626 (b).
   a. The FLSA requires that an individual may become a party plaintiff only by filing a consent with the court.
2. *Hoffmann-La Roche, Inc. v. Sperling*, 110 S. Ct. 482 (1989). In this age discrimination representative action, the Supreme Court held that a district court could implement 29 U.S.C. § 626 (b) by facilitating notice to potential ADEA plaintiffs. The district court ordered the defendant to disclose the names and addresses of all discharged employees and authorized the plaintiffs to send a court-approved consent form and a notice indicating that the court authorized the consent but had taken no position on the merits of the case. The Supreme Court did not address the content of the district court's order.

C. Settlement

1. A class action may not be dismissed or compromised until the court independently approves the settlement agreement. Fed. R. Civ. Pro. 23 (e).
2. Judicial Consent Required
   a. In determining whether to approve a settlement, courts consider whether the agreement favors named plaintiffs; strength of the plaintiffs' case compared to the amount or type of settlement offer; whether the agreement is consistent with the public interest; the likely complexity, length, and expense of litigation; the number of objectors to the agreement; and the judgment of experienced counsel for the parties. Ronald M. Green, Practising Law Institute, *Settling Employment Litigation* (1986).
   b. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978). Class action settlements are more susceptible to abuse than pure adversarial adjudications. Lawyers' interests may diverge from the class, and individual class members' interests may diverge. Certain interests may be wrongfully compromised or "sold out"without drawing the

court's attention. The court must determine whether the proposed settlement is fair, adequate, and reasonable and not the product of collusion between the parties.

c. *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985). Class action brought by minority firefighters to address alleged racial discrimination in promotion practices. The plaintiffs sought relief including an affirmative hiring and promotion program to eliminate the effects of past discriminatory practices. Local 93 intervened, complaining that any promotions criteria other than competence denies promotions to those most capable and denies the city of the best firefighting possible. The plaintiffs and defendant agreed to a consent decree containing affirmative action language, and the intervenors objected. The court adopted the consent decree, finding that the affirmative action provisions were not unreasonable in light of the long pattern of discrimination proven in the case. The intervenors appealed, asserting that the consent decree unlawfully infringes on the rights of non-minority firefighters. The court determined that the affirmative action plan within the consent decree was fair and reasonable to non-minorities that might be affected by it, and was not prohibited by 42 U.S.C. § 2000 e - 2 (h) or -5(g).

3. A proposed settlement which provided backpay, damages, and attorneys' fees for the plaintiff representative, but provided only injunctive relief for the unnamed class members, was found to be abusive of the class action procedure. *Muñoz v. Arizona State University*, 80 F.R.D. 670 (D.C. Ariz. 1978).

4. Courts have refused to approve settlements that have large disparities in benefit allocations. For example, a district court's approval of a settlement agreement awarding $10,000 and a promotion to one named plaintiff, $500 to another named plaintiff, $47,000 in attorney fees was reversed. The remaining class members received only an agreement from the employer to treat the class members equally and an opportunity to bring their individual claims before the Magistrate Judge. *Franks v. Kroger Co.*, 649 F.2d 1216 (6th Cir. 1981).

II. Witnesses

A. General Rules

1. Model Rule 1.2(d), Kentucky Supreme Court Rule ("SCR") 3.130(1.2)(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.")

2. Model Rule 3.3(a)(3), SCR 3.130(3.3)(a)(3) (prohibiting lawyer from "knowingly... offer [ing] evidence that the lawyer knows to be

false...." and requiring lawyer to take remedial measures)

3. Model Rule 3.4(b), SCR 3.130(3.4)(b) (lawyer "shall not... falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law....")
4. Model Rule 8.4(c), SCR 3.130(8.3)(c) ("It is professional misconduct for a lawyer to... engage in conduct involving dishonesty, fraud, deceit or misrepresentation.")
5. Model Code DR 7-102(A)(6) (lawyer must not "[p]articipate in the creation of preservation of evidence when he knows or it is obvious that the evidence is false.")

B. Permissible Preparation

1. Common forms of preparation: discussing witness's perception and possible testimony; reviewing documents and other evidence with witness; explaining how law applies; reviewing factual context; discussing role of witness and courtroom demeanor; discussing probable lines of cross-examination; rehearsal. Richard Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 4-5 (1995) (citing RESTATEMENT OF THE LAW GOVERNING LAWYERS § 176 cmt. b (Preliminary Draft No. 10, 1994)); Liisa Renee Salmi, Note, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 135, 140 (1999) (citing Wydick).
2. Reasons for allowing preparation
   a. Legitimate reasons for statements to witness: investigating facts; finding out what witness perceived; determining likely accuracy of witness's perception (conditions, memory, etc.); refreshing memory; testing ability to communicate recollections accurately; testing truthfulness; discovering credibility issues; discovering bias, influence by others; preparing witness for courtroom environment; telling to listen to questions carefully, not guess, not volunteer, etc.; instructing on appearance. Wydick at 16-18.
   b. Courts have noted the importance of witness preparation
      (1) *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 502 F.Supp. 1092, 1097 (C.D.Cal. 1980)(noting necessity of refreshing memory because often years will have passed since events occurred)
      (2) *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979) (preparation, such as explaining law, reviewing questions and answers, and putting witness at ease, to produce most effective testimony "is the mark of a good trial lawyer" and "promotes a more efficient administration of justice and saves court time").
      (3) *State v. Earp*, 571 A.2d 1227, 1235-36 (Md. 1990)

(noting prudence of reviewing facts known by witness, and recommending attire, and refreshing recollection)

(4) *Hamdi & Ibrahim Mango Co. v. Fire Ass'n of Philadelphia*, 20 F.R.D. 181, 183-84 (S.D.N.Y., 1957)("[W]ithout some previous preparation to refresh his memory in such cases, [a witness's] testimony would be nearly or quite valueless.").

C. Dangers of Preparation

1. Generally

a. Conflicting interests: permitting partisan case development to flesh out the relevant facts v. impairing fact-finding. Wydick at 15.

b. General rule: don't put words in witness's mouth.

(1) *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979) ("Nothing improper has occurred so long as the attorney is preparing the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth and not false or perjured testimony.")

(2) *State v. Earp*, 571 A.2d 1227, 1235-36 (Md. 1990) ("[I]n the interviews with and examination of witnesses, out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses.") (quoting *State v. Papa*, 32 R.I. 453, 80 A. 12, 15 (1911)). The court notes that the line between preparation and impermissible influencing is sometimes "fine and difficult to discern."

c. Malleability of memory

(1) Witness's original perception colored by "temperament, biases, expectations, and past knowledge." Witness perceives only parts of event, fills perception gap by inference. Wydick at 9.

(2) Perception gap makes witness suggestible. E.g.: use of "smashed" instead of "hit" when asking witness about car accident increased perceived speed of car and made witnesses twice as likely to report non-existent broken glass on ground. Salmi at 166-70 (citing Monroe H. Freedman, *Counseling the Client: Refreshing Recollection or Prompting Perjury?*, LITIG., Spring 1976, at 45); Wydick at 9-10.

(3) Over time, "I don't remember a knife" may turn into "He didn't have a knife." Wydick at 11.

(4) New material introduced by lawyer tends to be incorporated into testimony, sometimes in place of original perception. Wydick at 10.

2. Types of Impermissible Coaching
   a. Grade One
      (1) Grade one coaching- "where the lawyer knowingly and overtly induces a witness to testify to something the lawyer knows is false." Wydick at 3-4.
      (2) "'Knowingly,' 'Known,' 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Model Rules Terminology section; SCR Terminology section.
   b. Grade Two
      (1) Wink and nudge
         (a) Grade two coaching- "where the lawyer knowingly but covertly induces a witness to testify to something the lawyer knows is false." Wydick at 3-4.
         (b) Plausible deniability because not explicitly asking witness to lie, just suggesting reasons to lie or implying that a lie would be desirable .Wydick at 25-37
         (c) E.g.: Lecture scene from "Anatomy of a Murder" where Jimmy Stewart tells client permissible defenses for murder and leaves him to think about his story.
         (d) E.g.: Employee witness says, "I think Employer may have said X." Attorney says, "You say 'you think;' so that means that you don't know?" where said in a way that suggests that original answer was a bad one. Wydick at 33
         (e) E.g.: Attorney asks, "Did E say X at the meeting?" Witness says, "I think so." Witness is sure of testimony but B gave different version of events. Attorney says, "B told me that E actually said X at the tea shop after the meeting. Does that refresh your memory?" Whether unethical depends on intent of lawyer. Wydick at 36-37.
      (2) Manipulating unwitting witness
   c. Clearly Unethical Conduct (suborning perjury)
      (1) Encouraging witness to make untrue statements. Salmi at 148-50.
      (2) Instructing a witness to claim lack of memory or

knowledge when witness does not want to answer. Salmi at 150-52 (noting tendency to use "I don't know"when not sure, when memory unclear, when nervous, when truth is trouble).

(a) *United States v. Barnhart*, 889 F.2d 1374, 1376-77, 1380 (5th Cir. 1989)(finding sufficient evidence of perjury in case where defendant would "get dumb" to avoid answering questions, would claim not to recall).

(b) *Sheriff, Clark County v. Hecht*, 710 P.2d 728, 729 (Nev. 1985) (per curiam) (where attorney tells client to claim not to remember when asked about prior conviction on cross-examination).

(3) Implying the acceptability of false testimony (such as by suggesting that ends are more important than means). Salmi at 151.

(4) Encouraging evasion. Salmi at 151-54.

(a) *Schmidt v. Ford Motor Co.*, 112 F.R.D. 216, 221 (D.Colo. 1986)(dealing with evasive answers and concealment of evidence).

(b) *In re Complaint as to the Conduct of A.*, 554 P.2d 479 (Or. 1976) (where attorney told witness not to volunteer information and not in his interest to broach certain topic).

d. Grade Three

(1) Grade three- "where the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer's conversation with the witness nevertheless alters the witness's story." Wydick at 3-4.

(2) Dangerous conduct:

(a) Refreshing recollection (particularly prior to hearing witness's version)- risks implanting memory or causing intentional conformance. Salmi at 144-47, 157-59.

(b) Giving overly restrictive instructions not to volunteer information- suggests use of evasion ("prisoner of war" instruction). Salmi at 144-47.

(c) Telling witness what facts to report (only close to permissible where clarifying wording). Salmi at 144-47.

(d) Suggesting word choice- can affect not only clarity, accuracy, and emotional impact (e.g., removing jargon, not using prefatory language,

not improperly using legal terms) but substantive meaning as well; danger that suggestions will alter witness's perception, change the true meaning, or lead witness to leave things out. Salmi at 160-63.

i) Some courts not concerned about word choice suggestions because of availability of cross-examination to uncover. See *State v. Blakeney*, 408 A.2d 636, 643 (Vt. 1979)(not concerned about change from "could" breathe to "could not," creating "substantial risk of death," after recess and consultation with attorney); *Haworth v. State*, 840 P.2d 912, 917 (Wyo. 1992) (noting that "use of the word "cut" [rather than stabbed] was *de minimis* considering the nature and amount of the other evidence in the case describing the fight").

(e) Suggesting demeanor– suggesting confidence can create problems where witness is uncertain but is told to seem certain– misrepresents perception; jury strongly swayed by witness's confidence; question is whether change will cause jury to draw erroneous conclusions. Salmi at 163-65.

(f) Explaining legal effect of answers (lecture on the law)– potential for both suggesting how to answer and giving motive to dissemble. Salmi at 144-47, 154-57 (citing Tim Wyatt, *Law Firm's Memo in Asbestos Lawsuit Sparks Ethics Debate: Baron & Budd Founder Says Papers to Prepare Witnesses are Appropriate*, DALLAS MORNING NEWS, Sept. 28, 1997, at A1).

(g) Repeated Rehearsals– helpful for witness who will be particularly nervous when testifying but danger that the filling in of gaps and preparation for cross-examination questions will lead to less than the full truth; rehearsal very suggestive because of repetition; also making witnesses more confident may cause jury to give too much weight to uncertain witness or proper weight to nervous witness. Salmi at 165-66 (citing John S. Applegate,

Witness Preparation, 68 TEX. L. REV. 277, 299 (1989)).

3. Effectiveness of Cross-examination
   a. Some courts have suggested that cross-examination may cure distorting effects of coaching. Salmi at 142.
      (1) *Hamdi & Ibrahim Mango Co. v. Fire Ass'n of Philadelphia*, 20 F.R.D. 181, 183-84 (S.D.N.Y., 1957) (but noting that preparation may be used to put witness on guard to questions that will be asked on cross and to craft answers that will suppress the truth).
      (2) *Geders v. United States*, 425 U.S. 80, 89-90 (1975)(noting that skillful cross-examination could create a record of coaching for use in closing argument); *State v. Blakeney*, 408 A.2d 636, 643 (Vt. 1979) (quoting *Geders*).
      (3) *State v. McCormick*, 259 S.E.2d 880, 882-83 (N.C. 1979) (improper coaching a matter to be explored on cross-examination).
   b. But cross-examination may not be sufficient where it fails to uncover preparation or extent of preparation, especially where attorney's coaching has been incorporated into the witness's memory or the witness has been instructed not to mention the preparation session. Salmi at 142-43 (citing Bob Van Voris, *Client Memo Embarasses Dallas Firm: Baron & Budd Coaching of Witnesses Called Improper*, NAT'L L.J., Oct. 13, 1997, at A30).

D. How to Avoid Impermissible Coaching
   1. Questions for attorney to ask self: 1) Will question or statement overtly tell witness to testify to something I know is false? 2) Will question or statement send covert message to witness that I want him to testify to something I know is false? 3) Is there a legitimate reason for the question or statement? 4) Am I making the question or statement in the way least likely to harm the quality of the testimony? Wydick at 38-39.
   2. In tea shop example, could have asked about what happened after meeting in series of questions without specifically pointing out tea shop or manner in which said- would have caused witness to arrive at what was said at tea shop on his own. Wydick at 40-41.
   3. Non-Suggestive Interviewing: Don't just ask leading questions, show documents spelling it out, tell witness what others have said, or lecture the witness about the consequences of particular testimony. Instead:
      a. Recall first, then recognition (ask to state all details witness can remember (high accuracy), then fill in blanks by asking

specific questions about details (less accurate but more facts));

b. Ask neutral questions since the memory is sensitive ("Did you see the thin man in the blue suit?" more suggestive than "Did you see a thin man in a blue suit?" which does not presuppose his existence);

c. Ordering of questions (people remember things in different ways, some chronologically, some by characters or events--may be able to tap into memory in different ways to get more details before resorting to suggestion). Wydick at 42-44.

4. Cognitive Interview: 1) Reinstate context (ask witness to put himself back in the same position); 2) tell everything, regardless of perceived relevance (allowing full, open-ended narration before asking probing questions to flesh out details); 3) recall event in different orders; 4) change perspectives. Wydick at 45-46.

5. Additional things to keep in mind:

a. Start out by admonishing witness to tell the truth; sets the stage for ethical preparation by establishing that attorney is seeking the whole truth. Salmi at 141 and n.26 (citing James M. Altman, *Witness Preparation Conflicts*, LITIG., Fall 1995, at 38, 39).

b. Be aware of the malleability of memory and be careful of word choice (broken glass example), order of questions, incorporating new (unrecalled) details into questions, repetition, perception gaps. Salmi at 166-70.

c. Reduce interview to writing to limit later distortion. Salmi at 170-74.

d. Tell witness to admit to lack of knowledge where appropriate

E. What to Do About Perjury

1. Model Rule 3.3(a)(3), SCR 3.130(3.3)(a)(3) ("A lawyer shall not knowingly . . . [o]ffer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.").

2. Rule 3.3 requires attorney to inform court of perjury by client during trial or deposition if client will not rectify injury, even if it involves revealing a client's confidence. Henry Hecht, *Deposition Perjury by Your Own Witness: How to Prevent It, Deal With It, and Survive It*, 11 No. 5 INSIDE LITIG. 7, 8 (1997).

3. How to Prevent:

a. During preparation, warn witness to tell the truth and of consequences of lying. Hecht at 8.

b. During deposition, if client straying dangerously close,

(1) First, decide whether ambiguity in question may be causing confusion. If so, object if there is a legitimate reason to do so; this may result in a clearer

rephrasing or signal the witness of counsel's concerns. Hecht at 8.

(2) Else, after the offending answer, seek a break to confer with client and ask why answer differs from version in preparation – this allows counsel to determine if there is a reason for the change and whether perjury is likely occurring. Hecht at 8.

(3) If client persists in perjurious testimony, lawyer should warn of consequences, including lawyer's duty to inform court, withdraw, and/or disaffirm the evidence. Hecht at 8.

(4) If client still persists, should suspend deposition before additional perjury occurs (prevents further damage and leaves open possibility of further discussion with client). Hecht at 8.

(5) If rectification necessary, can have witness correct testimony at resumption of deposition or clarify record after resumption by questioning after direct examination. Hecht at 8.

(6) If counsel learns of perjury after the deposition is over, counsel should take steps that will least invade confidentiality; first talk to client and urge to rectify immediately. Hecht at 8.

(a) Client may rectify by recanting before testimony 1) substantially influences proceeding or 2) it becomes apparent that falsity would have been exposed anyway; see 18 U.S.C. § 1623(d). Note that recanting before getting caught suggests good faith. Hecht at 9.

(b) Counsel can offer an additional deposition of the client or make changes to transcript to correct misstatements. Hecht at 9.

(7) If client refuses to rectify, lawyer must take steps to prevent fraud, such as disclosing, withdrawing, and/or disaffirming. Must withdraw, but still with duty to disclose; withdrawal and disaffirmance may be another option. Hecht at 9.

c. Many of the same principles apply to testimony at trial.

4. Sanctions for Perjury

a. Rule 37(a) motion to compel in response to incomplete or evasive disclosure, treated as failure to disclose, possibly having to pay reasonable attorney's fees for motion; Rule 37(c)(1) sanctions for failure to correct error in deposition testimony of expert as required by Rule 26(e)(1). Hecht at 9.

(1) *United States v. Shaffer Equipment Co.*, 158 F.R.D. 80, 87 (S.D.W.V. 1994)(sanctioning attorneys who failed to reveal what they knew of expert's perjury under Rule 26(e); also noting inherent authority to punish attorneys for litigation abuses).

(2) Rule 37(c)(1) sanctions include being prevented from offering evidence (mandatory if no substantial justification), reasonable attorney's fees and expenses, informing jury of failure to disclose. See also Rule 37(b)(2) (where party fails to comply with court order, allowing order that designated facts be taken as established, striking of defenses or claims, dismissing of claims, default judgment). Hecht at 9-10.

b. For witness– impeachment, loss of credibility, contempt; for client– tainting judgment, alienating judge. Hecht at 10.

c. For lawyer– loss of reputation, financial loss from loss of suit, possible suit by client claiming suborning of perjury, possible suit by other party. Hecht at 10.

(1) *Blain v. Doctor's Company*, 222 Cal.App.3d 1048, 1063 (Cal.App. 1990)(dismissing suit by perjurious client because of unclean hands); *but see Feld & Sons v. Pechner, Dorfman, Wolfee, Rounick, and Cabot, et al.*, 458 A.2d 545 (Pa. Super. 1983)(barring compensatory and punitive damages under *in pari delicto* but allowing contract suit to recover attorney's fees).

(2) *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71-72 (2d Cir. 1990)(allowing suit in equity based on fraud to relieve plaintiffs from settlement where defendants had failed to disclose requested documents to plaintiffs during litigation).

d. More importantly, the attorney might be subject to formal disciplinary proceedings. Hecht at 10.

(1) *Committee on Professional Ethics v. Crary*, 245 N.W.2d 298, 307 (Iowa 1976) (unethical for lawyer to knowingly permit client to commit perjury or to resume two days later without correcting).

F. Secondary Sources Available

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8. Richard Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995).
9. Fred Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001 (1999).