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Message from the Chair

by Paulette Brown

Welcome to the 2015-2016 bar year! The Labor and Employment Law Section continues to be one of the best our state bar has to offer. We are well known for the quality of our continuing legal education programming and for producing the next generation of great labor and employment attorneys through the Sidney Reitman Employment Law American Inn of Court. We will continue in our fine tradition and enhance the great efforts of the leaders who have preceded me.

We will continue some of our great traditions, including hosting the third annual, wildly popular, Employment Roundtable, scheduled for Dec. 15, 2015. This program will be co-moderated by Keith Waldman and Stephanie Wilson, and will include both well-known speakers and some who may be unfamiliar to you. Bringing to you new names and new faces will be a common theme throughout the year. We want to encourage a more diverse group of labor and employment lawyers to be active in our section.

We strongly encourage members of our executive committee to bring to our meetings lawyers who are newer to the bar and who have expressed an interest in our practice area. We have strong leaders in our section, and some will be called upon to provide mentorship to our up-and-coming labor and employment attorneys.

Additionally, we are making a few requests of our committee chairs. As they consider programming for the year, we are asking that chairs ensure there is a wide range of diversity on panels, including women; lawyers of color; members of lesbian, gay, bisexual, transgender groups; the disabled and lawyers of all ages. We are also going to ensure that our programming is extremely relevant to our members, with some out-of-the-box thinking.

As always, we will be monitoring legislation and the docket, ensuring that our clients are complying with the 'ban the box law' and have an understanding of *Lippman v. Ethicon*, argued by our own section members.

Combining our traditional values and methodologies with creative innovation, we are guaranteed to have another successful year. I look forward to connecting with as many of you as possible. ■

Inside this issue

Message from the Editor

by Robert T. Szyba

The past several months have been filled with major developments in the areas of labor and employment law.

This issue's installment of the Director's Corner features comments by the regional director of the NLRB's Region 22, David E. Leach III. Arnold Shep Cohen follows with a discussion of the NLRB's departure from precedent in *Purple Communications, Inc.* as it relates to use of workplace email to engage in Section 7 concerted activity. Timothy D. Cedrone and Kerry E. Cahill take the NLRB's analysis from *Northwestern University & College Athletes Players Association* to explore how student athletes here in New Jersey would fare under the New Jersey Employer-Employee Relations Act.

Joan Parker, Ph.D., a recent recipient of the Peggy Browning Award, shares her acceptance speech from the Philadelphia Awards Reception, held on March 19, 2015. In turn, Michael J. Pecklers shares his experience from a recent trip to Cuba with the Section of Dispute Resolution of the American Bar Association.

Patrick R. Westerkamp discusses the trend in labor arbitrations of arbitrators being called upon to analyze external law, such as wage and hour claims under the Fair Labor Standards Act (FLSA). Peter F. Berk and Gillian A. Cooper follow with a discussion of the U.S. Supreme Court's decision in *Integrity Staffing Solutions, Inc. v. Busk*, dealing with the compensability of preliminary and postliminary activities under the FLSA.

The New Jersey Supreme Court's decision in *Aguas v. State of New Jersey* made headlines recently with the formal adoption of the *Faragher/Ellerth* defense for hostile work environment claims under the New Jersey Law Against Discrimination. Tedd J. Kochman and Ivan R. Novich walk us through the Court's analysis and the decision's guidance to employers, while Christopher P. Lenzo explains the decision's implications for New Jersey's employees.

In *Hargrove v. Sleepy's LLC*, the New Jersey Supreme Court determined that the so-called ABC test applies when assessing whether a worker is an employee under New Jersey's Wage Payment Law, as well as the Wage and Hour Law. M. Trevor Lyons and Caitlin Petry Cascino explain the Court's reasoning and its application for employers, while Neil H. Deutsch and Brittany L. Primavera look at the *Sleepy's* decision in relation to recent trends and other statutes, and make a case for broader application of the ABC test.

Aaron Taishoff shares his insight about a recent cutting-edge development in *Khazin v. TD Ameritrade Holding Corp.*, where the Third Circuit analyzed an important distinction under the Dodd-Frank Wall Street Reform and Consumer Protection Act pertaining to the arbitration of whistleblower claims. Dylan C. Dindial analyzes the implications of the Patient Safety Act's privilege of self-critical analysis.

This issue is filled with unique insights and analysis of major recent developments affecting labor and employment practitioners. We hope you enjoy! ■

Director's Corner

A Season of Change at the NLRB

by David E. Leach III

Change. It is a word that is famously connected to a political campaign. It is also a word that causes great consternation and fear in some, but is fervently wished for by others. I was confronted with the concept of change in a college epistemology class, where I first learned of Heraclitus, a Greek philosopher, who said, "Nothing is permanent, except change." As a result of a significant change at the Newark office of the National Labor Relations Board (NLRB), I now serve as regional director. I am thankful to Mike Lightner, who is a great friend of the New Jersey bar, for his many years of distinguished service and for the high standards he set for the office. I look forward to my association with all of the members of this highly regarded bar. I have worked closely with the New York bar during my tenure there, finding ways that would effectuate the National Labor Relations Act (NLRA) and resolve disputes quickly. That experience, I believe, has prepared me well for my current position.

The NLRB is no stranger to change, and we are witnessing its reexamination of some significant principles and practices. I would like to highlight a couple of cases where the NLRB has reshaped its thinking, as well as the new representation case rules.

The NLRB's post-deferral standard, established under *Speilberg/Olin,* has been reconsidered in *Babcock & Wilcox Construction Co.*[1] In 1955, under *Spielberg*, the board would defer to an arbitrator's award as a matter of discretion only where the arbitral proceedings were fair and regular, all parties had agreed to be bound, and the decision was not 'repugnant' to the purposes and policies of the NLRA. In 1984, in *Olin*, the board added that deferral was appropriate where the contractual issue was 'factually parallel' to the statutory issue and the arbitrator had been presented generally with facts relevant to resolving the issue, and the award was *not* 'clearly repugnant' to the NLRA. In *Babcock & Wilcox*, the general counsel (GC) urged the NLRB adopt a more demanding deferral standard in Section 8(a) (1) and (3) cases. The GC urged the NLRB defer only if: 1) the statutory right was either incorporated in the contract or presented to the arbitrator by the parties, and 2) the arbitrator had "correctly enunciated the applicable statutory principles and applied them in deciding the issue."

The NLRB declined to apply the GC's proposed standard, but decided it will now defer Section 8(a)(3) cases only if the proceedings have been fair and regular, the parties have agreed to be bound, and if the party urging deferral demonstrates that: 1) the arbitrator was explicitly authorized to decide the unfair labor practice (ULP) issue, either in the collective-bargaining agreement or by agreement of the parties in that case; 2) the arbitrator was presented with, and considered, the statutory issue, or was prevented from doing so by the party opposing deferral; and 3) NLRB law reasonably permits the award.

In February, GC Memo 15-02 was made public and is available on the NLRB's website.[2] It provides guidance on this new analytical framework.

The NLRB voted to amend its representation case rules effective April 14, 2015. As with the 2011 rules, there have been court challenges to the NLRB's authority to implement such changes. However, these rules are significantly different from the earlier rules, which had been withdrawn by the NLRB. These rules are more targeted to specifically identified abuses and, as such, they may well avoid the pitfalls that afflicted the last attempt at R-case changes.

Some of the major differences in the new rules are that electronic filing will be permissible and the petitioner must serve the petition on all parties at the time of filing. Within two days of the filing, the region will serve on the parties a notice of petition for election, which will include a description of the procedures and a statement of position form. On the day prior to the opening of the hearing, the opposing party will be

required to file its position form describing the unit issues it will raise and submit a list of employees and their classifications. The NLRB states it is looking for more transparency in the process and better communication. The NLRB will seek, absent unusually complex issues, to conduct the pre-election hearing on the eighth day after the filing of the petition. Written post-hearing briefs will be replaced by closing statements. The NLRB states it is looking to better fulfill its duty to protect employees' rights by fairly, accurately and expeditiously resolving questions of representation.

In *Purple Communications*, the NLRB overruled its 2007 *Register Guard* decision.[3] The employer maintained an electronic communications policy that prohibited employees from using the employer's email system to engage in activities on behalf of "organizations or persons with no professional or business affiliation with the Company" or send out uninvited email of a personal nature. The NLRB reversed the administrative law judge (ALJ), who had relied on *Register Guard*, and held that employees who had been granted access to an employer's email system for work have a "presumptive right" to use the email system to engage in protected activities regarding their terms and conditions of employment during non-work time. An employer may rebut this presumption only by demonstrating special circumstances that make a ban on non-business use of the system necessary to maintain production or discipline among its employees. The NLRB disagreed with the analysis in *Register Guard*, stating it undervalued the significance of communication as the cornerstone of Section 7 rights, while placing undue emphasis on employers' property rights. It noted email is an increasingly critical mode of communication in the workplace, stating the modern-day pervasiveness of email has rendered it a natural "gathering place" for employees to communicate with one another.

Notwithstanding all of this change, I expect you will not find any changes in the relationship between the bar and the staff at Region 22. As I have now just concluded my first year as regional director, I look forward to meeting those of you who I have not yet met. I truly appreciate the warm and generous welcome I have received from the bar, and look forward to many productive years working together. ■

David E. Leach III is the regional director, Region 22, of the National Labor Relations Board.

Endnotes

1. 361 N.L.R.B. No. 132 (Dec. 14, 2014).
2. Office of the General Counsel, N.L.R.B., Memorandum GC 15-02 (Feb. 10, 2015), *available at* https://www.nlrb.gov/reports-guidance/general-counsel-memos.
3. 361 N.L.R.B. No. 126 (Dec. 11, 2014).

The NLRB Holds Employees Can Use Workplace Email for Conducting Section 7 Concerted Activities

by Arnold Shep Cohen

In a significant departure from past precedent, the National Labor Relations Board (NLRB), in *Purple Communications, Inc.*,[1] ruled that employees who are given access to workplace email have a presumptive right to use this email for statutorily protected union organizing and other concerted workplace activities. Marking a clear path to the expansion of concerted activities, the decision has been greeted differently by unions and employers.

The NLRB reviewed an administrative law judge's finding that the company's electronic communications policy, which prohibited employees' non-business use of its email network, was lawful under the NLRB's 2007 holding in *Register Guard*.[2] In overruling *Register Guard*, the NLRB concluded that under Section 7 of the National Labor Relations Act (NLRA),[3] an employer that gives its employees access to its email system must presumptively permit the employees to use the email system for statutorily protected (union and non-union) communications during nonworking time. An employer can only rebut the presumption by showing that special circumstances make its restrictions necessary to maintain production and discipline.

The NLRB concluded *Register Guard* focused too much on an employer's property rights and too little on the importance of email as a means of workplace communication. It followed the reasoning of *Republic Aviation v. NLRB*,[4] where the U.S. Supreme Court found a presumption exists permitting union solicitation on the employer's premises during the employee's own time. Acknowledging that an email system differs from real property in significant respects, the NLRB still applied *Republic Aviation* and related precedent. It rejected arguments that *Republic Aviation*'s presumption should apply only if employees would otherwise be entirely deprived of their statutory right to communicate and that employees' alternative means of communication (such as by personal email or social media accounts) made the presumption inappropriate.

Factual Background

Since June 2012, Purple Communications maintained an employee handbook that contained its electronic communications policy. That policy stated:

> INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY
>
> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the [sic] Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only….
>
> Prohibited activities
>
> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
>
> ...
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
>
> ...
>
> 5. Sending uninvited email of a personal nature.

In the fall of 2012, the Communications Workers of America (CWA) filed NLRB election petitions to represent interpreters at Purple Communications. This result-

ed in elections at seven of the employer's call centers. CWA filed objections to the election results at two facilities, including an objection asserting the electronic communications policy interfered with the interpreters' freedom of choice in the election. It also filed an unfair labor practice charge regarding the policy.

The NLRB's Ruling

The NLRB first found that the *Register Guard* decision undervalued employees' core Section 7 right to communicate in the workplace about their terms and conditions of employment, while giving too much weight to employers' property rights. Second, it found the NLRB in *Register Guard* inexplicably failed to perceive the importance of email as a means by which employees engage in protected communications, an importance that has increased dramatically during the seven years since *Register Guard* issued. Finally, it found the *Register Guard* NLRB mistakenly placed more weight on the NLRB's equipment decisions than those precedent required. As a result, it overruled *Register Guard*'s, holding that under ordinary circumstances, even employees who have been given access to their employer's email system have no right to use it for Section 7 purposes.

The NLRB adopted a presumption that employees who have been given access to their employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about terms and conditions of employment, while on nonworking time. The exception is a showing by the employer of special circumstances that justify specific restrictions.

The NLRB, however, explained its decision was limited: It applies only to email, only to employees who use their employer's email system for work, and only to employees' nonworking time. Employers may still monitor email use for legitimate management reasons and notify employees they have no expectation of privacy when they use the email system.

The NLRB's Reasoning

The NLRB found in many workplaces email has effectively become a "natural gathering place," pervasively used for employee-to-employee conversations. Neither the fact that email exists in a virtual (rather than physical) space, nor the fact that it allows conversations to multiply and spread more quickly than face-to-face communication, reduces its centrality to employees' discussions, including their Section 7-protected discussions about terms and conditions of employment. If anything, said the NLRB, email's effectiveness as a mechanism for quickly sharing information and views *increases* its importance to employee Section 7 communication. It concluded this reflects a failure in *Register Guard* "to adapt the [NLRA] to the changing patterns of industrial life."

Email is a forum in which coworkers who "share common interests" will "seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees."[5]

Because the NLRB's decision applies only to employees who already have access to their employer's email system for work purposes, the right to use that system for Section 7 communications does not turn on the unavailability of traditional face-to-face discussion. Nor does it turn on the current availability of alternative communication options, such as using personal electronic devices and other electronic media, such as Facebook, Twitter, YouTube, blogging, or personal email accounts.

Special Circumstances

An employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice. An employer's interests will ordinarily establish special circumstances only to the extent that those interests are not similarly affected by employee email use, which the employer has authorized.

It was recognized that the types of circumstances that arise in the context of email systems may be different from those arising in the context of employees' conduct on their employer's real property. An assertion of special circumstances, then, will require the employer articulate the interest at issue and demonstrate how the interest supports the email use restrictions it imposed.

It is anticipated that it will be the rare case where special circumstances justify a total ban on non-work email use by employees. In more typical cases, where special circumstances do not justify a total ban, employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline.

The NLRB's decision does not prevent employers from continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability.

Conclusion

The NLRB's 2014 *Purple Communications* decision took the bold step of overruling its 2007 holding in *Register Guard*, that employees lacked a statutory right to use work email for communications that are protected by Section 7. The decision allows both union and non-union private sector workers to exercise their Section 7 right to engage in concerted activities in the workplace, in a manner that the NLRB never countenanced before. It acknowledged the intersection of Section 7 and modern digital communications. As a result, it constitutes a highly significant departure from past precedent, and rearranges the legal landscape for workers who want to communicate, or band together electronically, for their mutual benefit.

Arnold Shep Cohen is a partner at Oxfeld Cohen, PC in Newark.

Endnotes

1. 361 N.L.R.B. No. 126 (2014).
2. 351 N.L.R.B. 1110 (2007), enfd. in relevant part and remanded *sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).
3. 29 USC § 157, entitled "Right of employees as to organization, collective bargaining, etc." reads: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."
4. 324 U.S. 793 (1945).
5. *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978) (*quoting Gale Prods.*, 142 N.L.R.B. 1246, 1249 (1963)).

Rutgers v. Northwestern: Would Student-Athletes at New Jersey Public Colleges Be Able to Unionize?

by Timothy D. Cedrone and Kerry E. Cahill

One of the most noteworthy labor law cases of 2015 was *Northwestern University & College Athletes Players Association*.[1] In *Northwestern University*, the regional director for Region 13 of the National Labor Relations Board (NLRB) determined that grant-in-aid scholarship football players at Northwestern University are employees under Section 2(3) of the National Labor Relations Act (NLRA) and can, therefore, hold a unionization election. Upon review, the NLRB dismissed the petition and declined to assert jurisdiction in the case. The NLRB reasoned that it would not effectuate the policies of the NLRA to assert jurisdiction and that doing so would not serve to promote stability in labor relations. The regional director's decision was groundbreaking, as it was the first case at the state or federal level to hold that student-athletes were employees under applicable labor law.[2] While the debate about whether student-athletes should be considered employees for purposes of the NLRA continues, there has been less focus on the treatment of student-athletes under state collective bargaining laws. This article seeks to shed light on that issue and specifically address whether student-athletes at New Jersey public colleges, such as football players at Rutgers University, would be able to unionize under the Employer-Employee Relations Act (EERA).

The Definition of 'Employee' under the EERA

The issue of whether New Jersey public school student-athletes can unionize is greatly affected by the definition of employee and case law interpreting that term. In New Jersey, solving the puzzle begins with analysis of the EERA. The EERA defines an employee, in pertinent part, as "any employee, and shall not be limited to the employees of a particular employer unless this act explicitly states otherwise."[3] In addition to several precise exemptions, the definition of employee also includes "any public employee, i.e., any person holding a position, by appointment or contract...except elected officials, members of boards and commissions, managerial executives and confidential employees."[4]

Over the years, the EERA's broad definition of employee has resulted in case law interpreting its meaning and scope. For example, in *New Jersey State Judiciary*,[5] the Communications Workers of America filed a representation petition seeking to add about 50 freelance court interpreters to the negotiations unit of employees of the New Jersey State Judiciary that it represented. The central issue before the Public Employment Relations Commission (PERC) was whether the freelance court interpreters were public employees under the EERA. *New Jersey State Judiciary* also distinguished between employees and public employees, comparing the EERA's definition to that of the NLRA, which states, "the term 'employee' shall include any employee...but shall not include any individual employed…having the status of an independent contractor."[6]

In resolving the issue, PERC adopted the 13-factor test articulated in *Community for Creative Non-Violence v. Reid*.[7] These factors, which arguably would be central to the determination of whether student-athletes could be considered employees, include: the hiring party's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools used; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of benefits; and the tax treatment of the hired party.[8]

In another relevant case, *Rutgers University*, the Association of Residence Counselors of Rutgers University

sought certification as the exclusive representative of a negotiations unit comprising all residence counselors employed by the Rutgers College dean of students.[9] The issue before PERC was whether the residence counselors were public employees within the meaning of the EERA or students not subject to the law. PERC ruled that the residence counselors were public employees, but "it would not effectuate the purposes of the [EERA] to grant the [r]esidence [c]ounselors...the right to collective negotiations pursuant to the [EERA]." PERC based its conclusion on evaluative factors taken from NLRB decisions, including the continuity of employment, the regularity of work, the hours of work, the relationship of the work performed to the needs of the employer, and whether the counselors' responsibilities as students took preference over their obligations as residence counselors.

In applying these factors, PERC agreed with the director of representation that "the totality of the circumstances indicates that the [r]esidence [c]ounselors do not possess sufficient interest in their employment relationship with Rutgers to warrant the right to collective negotiations under the [EERA]."[10] Despite this conclusion, PERC declined to adopt a *per se* rule that student-employees are ineligible for collective negotiations under the EERA and further noted the residence counselors, while not entitled to negotiating rights, were still "entitled to limited protections under the [EERA]."[11]

Examining the statute and these cases, it appears there is a plausible argument for student-athletes being deemed employees. Regarding the statutory definition, scholarship student-athletes could argue they hold the position of athlete pursuant to a contract in the form of a national letter of intent and a scholarship offer. This is what the players did in *Northwestern University*, and the regional director agreed, finding these two documents "serve[d] as an employment contract." Moreover, the residence counselors were recognized as public employees in *Rutgers University*, and so that case could support a similar result for student-athletes.

Nevertheless, the argument in favor of the student-athletes begins to deteriorate when considering the case law. Applying *New Jersey State Judiciary*, scholarship student-athletes arguably are compensated by their university in the form of scholarship money; must abide by the coach's rules and regulations concerning training and practice times; utilize school property for practice; and have a relationship akin to a term position for the duration of their time while they are studying at the university. However, the issue in *New Jersey State Judiciary* was whether the freelance court interpreters were employees or independent contractors. The case thus has limited, if any, applicability to student-athletes, for whom the issue would be whether they are employees or students. Applying *Rutgers University*, the responsibilities and characteristics of student-athletes may be more akin to students in general and not to university employees. Indeed, one could argue the relationship of the athletic services performed to the needs of a public college as an educational and research institution should be viewed as secondary to the school's concern for the academic obligations of the athletes as students. Similarly, many athletes participate in a single season for their sport, and using the rationale of *San Francisco Arts Institute*,[12] can be differentiated from university employees by the reduced time they are in season as employees. Finally, it seems likely that if the evidence were to show the student-athletes' responsibilities as students took preference over their obligations as athletes, a public college would have a strong public policy argument that the student-athletes should not be given the right to collective negotiations under the EERA, even if they are considered public employees.

The Influence of Northwestern University

In addition to the foregoing case law, the NLRB's decision in *Northwestern University* may be the most significant factor weighing against student-athletes at New Jersey public colleges if they attempt secure collective negotiations rights under the EERA. Adjudications under the NLRA frequently serve as a guide for interpretation of the EERA.[13] If student-athletes ever seek rights under the EERA, *Northwestern University* will be front and center in the parties' arguments. The NLRB's decision to not assert jurisdiction in *Northwestern University* very closely parallels PERC's decision in *Rutgers University* to dismiss the petition of the residence counselors. Indeed, in both cases, the NLRB and PERC determined that it would not effectuate the purposes of the respective statutes to rule in favor of the petitioner. Since PERC is often guided by the NLRB,[14] the *Northwestern University* ruling, when combined with PERC's previous decision in *Rutgers University*, strongly suggests that PERC would follow the NLRB's lead and dismiss the petition if student-athletes at New Jersey public colleges seeks rights under the EERA.

Could There Be a Legislative Solution?

At first glance, it may seem like the issue of student-athlete unionization under the EERA is an issue best left to PERC and the courts to decide. However, it is not outside the realm of possibility that the New Jersey Legislature could resolve the issue. In fact, in the time between the decisions of the regional director and the NLRB in *Northwestern University*, two states enacted legislation prohibiting student-athletes at public colleges from unionizing. In April 2014, the Ohio Legislature included a provision in state budgetary legislation that effectively prohibits student-athletes from being recognized as employees. Ohio Revised Code Section 3345.56 states, "Notwithstanding any provision of the Revised Code to the contrary, a student attending a state university...is not an employee of the state university based upon the student's participation in an athletic program offered by the state university." Accordingly, student-athletes at Ohio's 14 public colleges and universities cannot unionize under the Ohio Public Employees' Collective Bargaining Act.[15]

Similarly, on Dec. 30, 2014, Michigan Governor Rick Snyder signed Public Act 414 into law. That law amended the Michigan Public Employment Relations Act to specifically exclude from the definition of public employee any "student participating in intercollegiate athletics on behalf of a public university in this state." The obvious effect of the amendment is to prohibit student-athletes from engaging in activities permitted by the statute, such as forming labor organizations; engaging in concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; and negotiating or bargaining collectively with their public employers through representatives of their own choosing. Thus, student-athletes at Michigan's 15 public colleges may not unionize.

At the time of publication, there was no bill pending in the New Jersey Legislature that would amend the EERA to include or exclude student-athletes from the definition of employee. Nonetheless, the Ohio and Michigan statutes provide two examples the New Jersey Legislature could follow or ignore if it wants to settle this issue instead of leaving it to PERC and the courts.

Conclusion

While the proofs presented in any case will necessarily dictate the analysis of the issues, it appears that current PERC case law militates against a finding that student-athletes at public colleges in New Jersey would be afforded the right to collective negotiations under the EERA. The key to victory for a public college would be whether it could present sufficient evidence to convince PERC that the student-athletes are just that: students first and athletes second. Rutgers University found success on this front once before, having convinced PERC that its residence counselors were students first and employees second, and thus not entitled to collective negotiations rights under the EERA.[16] With the NLRB having ruled against the student-athletes in *Northwestern University*, Rutgers appears poised to win again if its student-athletes were to follow in the unsuccessful footsteps of their Big Ten brethren. ■

Timothy D. Cedrone practices labor and employment law with Apruzzese, McDermott, Mastro & Murphy and is an adjunct professor at Seton Hall University, where he teaches sports law. Kerry E. Cahill is an attorney with Florio, Perrucci, Steinhardt, & Fader and a former Division I student-athlete.

Endnotes

1. *Northwestern Univ. & Coll. Athletes Players Ass'n*, 362 N.L.R.B. 167 (2015).
2. *See* College Athletes as Employees: An Overflowing Quiver, 69 *U. Miami L. Rev.* 65, 89 (2014) (noting that, as of Fall 2014, "no state has yet held that college athletes can organize under [state collective bargaining] laws").
3. N.J.S.A. 34:13A-3(d).
4. *Id.*
5. P.E.R.C. No. 2003-88, 29 N.J.P.E.R. 254 (¶ 76 2003).
6. 29 U.S.C. § 152(3).
7. 490 U.S. 730 (1989).

8. *New Jersey State Judiciary*, P.E.R.C. No. 2003-88, 29 N.J.P.E.R. 254 (¶ 76 2003).
9. P.E.R.C. No. 82-55, 8 N.J.P.E.R. 28 (¶ 13012 1981).
10. The director of representation further noted that the "relationship of the work performed to the needs of the employer is secondary to the employer's concern for the academic obligations of the employees as students." *Rutgers Univ.*, No. RO-79-187, 7 N.J.P.E.R. 546, 549 (¶ 12243 1981).
11. *Rutgers Univ.*, *supra* note 9.
12. *San Francisco Art Institute*, 226 N.L.R.B. 1251 (1976).
13. *Rutgers Univ.*, *supra* note 9; *Matter of Hunterdon County Bd. of Chosen Freeholders*, 116 N.J. 322, 337 (1989).
14. *See, e.g.*, *Univ. of Med. & Dentistry of N.J.*, P.E.R.C. No. 2010-12, 35 N.J.P.E.R. 330, 333 n.6 (¶ 113 2009) (noting that PERC looks to the "experience, policies, and adjudications of the National Labor Relations Board as a guide to interpretation of the New Jersey statutory scheme").
15. Ohio Revised Code Section 3345.56 is a statute of general application and is not limited to only the Ohio Public Employees' Collective Bargaining Act.
16. *Rutgers Univ.*, *supra* note 9.

What Does It Mean to be Impartial?

by Joan Parker

(Editor's Note: The following is the speech the author presented on March 19, 2015, while accepting the Peggy Browning Award in Philadelphia, PA. It is reprinted here with permission.)

Receiving this prestigious award has caused me to do a lot of thinking about my career and the forces that have most influenced my professional life. In fact, I think of this occasion as a time for reflection, recollection, and reaffirmation. It is always gratifying to be honored by a worthy organization, but I am especially pleased that this recognition is coming from the Peggy Browning Fund, which, first and foremost, is dedicated to education. My entire career has been the result of a superior education, and, in fact, if it had not been for a wonderful high school teacher, as well as the great university I attended, I doubt that I would be standing here today.

Manny Kafka, my high school social studies teacher, first talked to me about industrial and labor relations. He was very active in the New York State Teachers Association, and he told me we were on the threshold of an explosion in the world of work, that public employees would soon gain the right to organize and collectively bargain over wages and working conditions, and that legislation was pending in several states, which would bring a new dimension to labor relations. He also predicted that women were going to demand better jobs and were going to be needed in leadership roles in both public employment and private industry. At the time, I did not know what he was talking about. But Mr. Kafka inspired me to do some reading about labor history and the National Labor Relations Act, and most importantly, to look into Cornell University and its School of Industrial and Labor Relations. I did, and the rest, as they say, is history.

I loved Cornell. With the exception of statistics, I enjoyed my courses and took a keen interest in conflict resolution, labor law, and organizational behavior. I was impressed with the use of different systems for the resolution of labor disputes and with the work of the peacemakers who helped labor and management resolve grievances and bargaining impasses.

At Cornell, I knew I was preparing to do something meaningful and rewarding. I stayed at the university for my graduate training, and at age 28, just a few years after earning my doctorate, I began teaching at the Institute of Management and Labor Relations at Rutgers and had the nerve to hang out a shingle as an arbitrator. My timing was excellent. I had been well trained, had gotten some great experience at the N.Y.C. Office of Collective Bargaining, and had extraordinary good luck. My practice grew quickly—largely because the labor-management community gave me the chance to work as a neutral despite the fact that I was young, female, and unseasoned.

It is now 35 years later, and I have been thinking about what I do as an arbitrator and mediator—the principles that guide me and how I have evolved as a neutral. In particular, I've asked myself what does it mean to be impartial?

When I first began practicing as an arbitrator, we were all basking in the glow of the *Steelworkers* trilogy,[1] those wonderful U.S. Supreme Court decisions, which arguably ushered in the golden age of labor arbitration. In my teaching today, I often have occasion to review Justice Douglas' opinions in those three landmark decisions, and I find that his words are as meaningful now as they were in 1960 when he described the grievance arbitration process and the role of the arbitrator. He wrote about the uniqueness of the collective bargaining agreement, which unlike other contracts, "is an effort to erect a system of industrial self-government"[2] and which, no matter how well drafted, has gaps and ambiguities that need to be filled in by reference to the practices of the parties and the customs in their industries. Arbitration, Douglas opined, is part and parcel of that system of private industrial self-government, and the labor arbitrator performs functions that go beyond that of a court. Her authority is not confined to the express provisions of the contract, but also derives from the law of the shop. Douglas believed that the arbitrator

was special and, he said, "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed."[3]

Well, all of this sounded wonderful. We neutrals were deified and ready to run around writing prescriptions for industrial justice. However, no sooner did we read these words than we also read what Justice Douglas had to say about the enforcement of arbitration awards. Yes, we were cloaked with a lot of authority, but he reminded us that we are confined to interpreting and applying the parties' agreement. While we may look for guidance from a variety of sources, our awards would be legitimate only so long as they drew their essence from the collective bargaining agreement. "When the arbitrator's words manifest an infidelity to this obligation, the courts have no choice but to refuse enforcement of the award."[4]

So that was the conundrum. We arbitrators were charged with the task of being astute contract readers but with a special mission to understand the law of the shop and the special role of the labor contract as a living, breathing, and sometimes even elastic document. How does one perform that role, respectful of what the parties write in their agreements but with an eye toward comprehending the realities of people's lives and the characteristics of their work environments?

An arbitrator's award must be grounded in the parties' agreement, but does that obligation preclude empathy and compassion? We are not supposed to interject our personal values into the hearing record, but arbitrators are humans, not robots. As was commented by Roberta Golick, a past president of the National Academy of Arbitrators, we do not walk into a hearing room and simply leave our cultural backgrounds, upbringings, values, and life experiences at the door.[5]

Nor should the concepts of neutrality and impartiality be confused with *indifference*. It is incorrect to suggest that arbitrators do not, or should not, care about the outcome of the cases they decide. In fact, sometimes our dislike of the outcome constitutes the hardest part of the decision making process. We are creatures of negotiated contracts, but we interpret those contracts, not only by applying standard principles of construction and interpretation, but by viewing them through a prism of our own life experiences.

Justice Benjamin Cardozo understood this concept when he gave a series of lectures at the Yale Law School in 1921. In discussing the nature of the legal process, he observed, "Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotion and habits and convictions which make the man, whether he be litigant or judge."[6]

Justice Cardozo knew that even judges are subject to emotions and prejudices that can affect what is supposed to be objective decision making. The answer is not to deny those subjective influences. Nor should we be expected to disclose them every time we arbitrate a dispute. But it is important to understand our feelings and to be able to differentiate between an emotional response to a dispute and the obligation to render a contractually correct award.

Rachmunis is a Yiddish word embodying concepts of sensitivity, compassion, love of man, and clemency. Bernard Katz, the well-known Philadelphia attorney who has had a lengthy career representing unions, has criticized arbitrators for increasingly ignoring what he calls the "rachmunis factor." He expressed his views some years ago in the AAA's *Northeast Quarterly* publication.[7] Essentially, Bernie stated that yesterday's arbitrator adopted a balanced approach when analyzing disciplinary cases, weighing the employer's need to maintain a productive, disciplined, orderly workplace against the totality of circumstances surrounding an employee's misconduct, including the nature of the offense, his seniority and prior record, his amenability to rehabilitation, and even the extent of his responsibilities toward a spouse and children. The arbitrator then mixed these considerations into a pot, which included a dose of the rachmunis factor, and reached the correct decision. Moreover, according to Bernie, if an arbitrator adhered to this method of analysis, in only the rarest of cases would a discharge be upheld.

Katz believes that in contrast to yesteryear's arbitrator, today's 'responsibility abdicating arbitrator' writes formulaic rulings devoid of either sympathy or empathy.

In Katz's words:

> Instead of being drawn from backgrounds reflective of the original arbitration concepts of justice and sensitivity, today's 'impartial' labor adjudicators often are better suited to count beans or total arithmetic columns. No great expertise is really required to determine if an

> employee is guilty of an act of misconduct. The real work of the arbitrator is in thereafter deciding whether and how the employer's needs may be served without sacrificing the employee's future.
>
> …The modern 'bean-counting' arbitrator often expresses remorse over the decision and blames it on structures imposed by the parties. It's time to end such moral abdication.[8]

As you may imagine, contrary to Bernie Katz's contention that arbitrators have become bean counters, I believe that today's arbitrators, not only have the authority, but regularly exercise that authority, to consider cases in their fullest sense—probably to the consternation of many of the management advocates who appear before them. In fact, many arbitrators today reject the notion that all disciplinary penalties imposed by an employer must be upheld unless there is compelling proof that the disciplinary action was arbitrary or capricious. As was stated by Rolf Valtin, another former president of the National Academy of Arbitrators, the arbitrary-capricious standard of review is "a thing of the past." The responsible arbitrator of today, particularly when evaluating disciplinary action, conducts a hearing *do novo* in which he feels not only entitled, but *compelled*, to provide his *own* judgment as to whether the end result is fair and just.[8]

Just like a true neutral, I guess that I fit somewhere between Katz and Valtin's views. The parties are always entitled to the benefit of their bargain without undue interference from an arbitrator hell bent on imposing her own brand of industrial justice. But in any given case, what at first may appear to be a gratuitous act of arbitral mercy may, in fact, be a ruling based on enlightened consideration and changing times. Just as we have toughened up on certain behaviors, such as intimidation, threats, and bullying, because we now recognize their harmful effect on employee safety and discipline, we also have adopted a more benign view of other conduct, like alcohol and drug addiction, which has been shown to often be beyond an individual's control. Likewise, the passage of time and accumulation of experience under particular policies and laws have also influenced our view of what is acceptable and unacceptable conduct. Arbitrators are not immune from these considerations, which reflect changing societal norms and advancements in education.

Which brings me back to where I started: education. At Cornell, and for that matter in high school, I had teachers who valued analytical reasoning and excellence in expression. Since the day I became an arbitrator, I have been thankful for the rigorous training I received in writing because, essentially, that is what I do for a living. The arduous tasks of digesting a case, analyzing the testimony and evidence presented, and reaching a decision all come together when I sit down to write. When I am compelled to accurately state the facts, recite the contentions of the parties, review contract language, and apply appropriate rules of contract construction—that is the time when I have to justify my conclusion and ask myself: Am I basing my award primarily on the record, or am I being unduly swayed by my feelings?

Professor Jean McKelvey at Cornell often instructed me to write for the loser. She noted that with some exceptions, most parties who win a case are happy with the result and are more focused on the bottom line than on the rationale used by the arbitrator to get there. But, obviously, the loser is not happy. Hence, the task is to write a decision that is intellectually honest, analytically defensible, and thoroughly understandable. If my decision reflects a fair and rigorous analysis and is well written, there is a chance that while the loser is not happy, he will understand how a reasonable arbitrator reached the result she did.

In my case, it all boils down to education and training by mentors who were real scholars and who also infused their teaching with energy, enthusiasm, and love of the subject matter. And, my learning continues even today. I know now that what I do involves not just the mechanical application of rules and law, but also intuition and commonsense—and sometimes even rachmunis. After arbitrating and mediating for over 35 years, I also bring humility to the processes of dispute resolution—gratitude to the parties who often retain my services, and empathy for working people—both employees and managers[9]—who accept and live with the decisions I write.

To the extent that the Peggy Browning Fund supports young adults interested in careers in labor law, public policy, conflict resolution, and industrial relations, it is performing a valuable function. Infusing law students with a respect for process and an appreciation of the world of work is an inspiring mission. Giving students the chance to obtain a strong education, and

participate in internships, so that they can contribute meaningfully to the working lives of citizens both in private and public employment makes the Peggy Browning Fund a wonderful organization and one whose honor I am proud to accept tonight. And, on that point, I am not neutral.

Joan Parker, Ph.D. is a nationally recognized arbitrator and mediator of labor and employment disputes, and is the founder and principal of her firm, Joan Parker ADR, which specializes in workplace investigations, fact-finding, and settlement counseling. She is a recent recipient of the Peggy Browning Award, which is presented annually to social justice champions who have distinguished themselves with passion and dedication to the rights and needs of workers and their families.

Endnotes

1. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).
2. *Id.* at 580-81.
3. *Id.*
4. 363 U.S. at 597.
5. Roberta Golick, *The Human Condition: Its Impact on Arbitral Thinking*, Arbitration 2012, Outside In: How the External Environment is Shaping Arbitration, Proceedings of the 65th Annual Meeting, Nat'l Acad. of Arbs., 13-23 (Nancy Kauffman and Matthew Franckiewicz, eds., 2012).
6. Benjamin N. Cardozo, The Nature of the Judicial Process, Lecture 4, New Haven, Yale Univ. Press, 1921, at 67.
7. Bernard Katz, The Rachmunis Factor, *Ne. Lab. Q.*, Am. Arb. Ass'n, Summer, 1996.
8. *Id.*
9. Rolf Valtin, *A Word to the Arbitrator in Training*, Arbitration in Practice, 1-6, ILR Press, Cornell Univ., (Arnold Zack, ed., 1984).

ADR in the Cuban Legal System

by Michael J. Pecklers

History was in the making from Nov. 9-14, 2014, when an inaugural delegation from the Section of Dispute Resolution (ADR Section) of the American Bar Association journeyed to Havana, Cuba, to participate in a course on the Cuban legal system.[1] These were neutrals from across the United States, including attorneys, law professors, and a certified public accountant, as well as a spouses' group. On Nov. 10, participants were welcomed by Professor Dorys Quintana Cruz, of the National Union of Cuban Jurists, who toasted the cultural exchange with fine Cuban rum. Cruz explained that her organization has 16,000 members and works with several bar associations in the United States, and others around the world, to develop educational programs.[2] They also participate in 10 international meetings per year. Remarks on behalf of the ADR Section were presented by past president and delegation chair, Bruce E. Meyerson, who expressed a feeling of unity with the association's lawyers, as well as a strong desire for a close academic relationship in the future.[3]

Legal Training

Later in the day, Professor Marta Fernandez provided an overview of Cuban legal training. Upon graduation from high school, Cuban students may elect to attend law school at the University of Havana free of charge.[4] The five-year course of study contains compulsory as well as elective subjects, with the same course content taught throughout the country. The curriculum includes eight different areas of the law, including mediation. On-the-job training of three to four weeks also takes place during the first four years of law school, as the faculty has agreements with governmental agencies, such as the prosecutor's office. Fernandez indicated that at present, there are 718 students involved in the study of law in Cuba. While the majority of them attend day classes, evening and weekend classes are also available.[5]

The faculty of the University of Havana are practicing attorneys and currently number 54 full-time and 50 part-time professors. Over 60 percent have a doctorate and 40 percent a Master of Law degree. Upon completing their course of study, Cuban law students have the option to undergo a final exam tailored as closely as possible to the actual practice of law. Although the student chooses the area in which he or she will be tested, Fernandez stated it is impossible to evaluate all the different areas that have been studied. The other choice available pertains to research, which means completing a dissertation.

Post-Graduation

Following graduation from law school, Cuban attorneys are required to enter government service for a period of three years. This may include, for example, working in the Ministry of Employment, Justice, or Social Service, with a list of available positions sent to the university faculty and subsequent appointments made based upon the student's academic ranking. At the conclusion of this three-year period, the attorney may remain in the position and is guaranteed the job. Alternatively, the job market may be entered directly. The private practice of law is not permitted, however, and at present the only other legal option once compulsory government service is satisfied is working for the trial lawyers' group.[6]

Ariel Montelon Ramos, the president of the National Center for the Professional Development of Legal Matters, explained they work in litigation and also train mediators. He recalled that before 1970 the practice of law was concentrated in the provincial capitals. With globalization, this evolved into a trial lawyers' examination that involves nine areas of law. The organization recently offered training for 70 provincial judges, who were taught by law professors. It additionally has a relationship with the Court of Arbitration, which includes 15 arbitration specialties and law professors and lawyers interpret international contracts; the Chamber of Commerce; and the Federation of Cuban Women. Ramos emphasized that the trial lawyers' group has no financial contact or relationship with the state.

The Relative Merits of Mediation Versus the Settling of Differences by Machete

Practitioners who have mediated employment and labor disputes are well aware that it is not unusual for pre-conceived notions, cultural differences and entrenched positions to act as a barrier to the successful resolution of a case. Cuba is no different, and Fernandez remarked that there is a saying among some of the Cuban people that "the Cuban people prefer to settle their differences at the end of a machete, rather than in mediation." That said, the use of mediation is widespread in commercial and family disputes, as it is in the United States.

Yamilla Gonzalez is a practicing attorney and professor of law at the University of Havana. Her specialty is in the area of family law. Gonzalez counseled that Cuban law regulates everything around matrimony and divorce, and said attorneys have been working for a while to make other changes to the law leading to a wider, more diverse society. Included would be the legal recognition of same-sex couples. Characterizing this as an important debate, emphasis was placed upon the need to have these rights guaranteed with codes updated.

Gonzalez noted that the area of conflict resolution/mediation allowed for a hearing between the two sides, with judges now performing the mediations. This judicial role is also utilized, for example, to decide who receives custody of a child. There is sometimes a team of mediators in family matters, which is consistent with the practice in the United States. Going forward, the mediators want to establish a framework or norm for their work, Gonzalez said, while recognizing that Cuba is currently in the process of undertaking legal modifications and updates. Judges in domestic violence cases may consider crimes that are serious, with two Argentinian judges presently training Cuban jurists on intervention techniques in these as well as human trafficking cases. Cuban mediators must currently undergo a certification course, and mediators from other countries have been invited to teach one or two of the modules. Gonzalez lamented there is not much financial support for the program, although some has been provided by the United Nations.[7]

Cuban Labor Unions

Anibal Melo Infante, secretary-general of the Workers Central Union of Cuba (CTC), works in foreign relations and addressed the delegation on Nov. 10, 2014, at the main office of the national union in Havana. Encompassing an entire city block and replete with ornate murals depicting the 1959 Cuban revolution, the CTC represents the 18 national unions in Cuba. The structure was built with contributions from the workers before the revolution, and currently one percent of their monthly salary goes in part toward supporting the maintenance of the facility. There are also 4,500 individuals who work professionally for the union, with every province of Cuba having a place of representation. Infante stressed there is no government financing available, with 95 percent of Cuban workers joining the union. This figure includes 70 percent of private employees.

The union is organized by the branches of the economy, and this year held its 20th conference. The difference between Cuba and the United States, according to Infante, is that there is only one labor organization in Cuba, which represents workers at the municipal, provincial, and national levels. All union officials are elected, and all 185 national officers progressed through the ranks of the grassroots organization. From Infante's perspective, small businesses do not need to be owned by the state, and the yellow school buses are now part of an independent cooperative. Therefore, the more the employees work the more money they make.[8]

Numerous modifications to Cuba's code of work were enacted by Parliament in Dec. 2013, based upon over 100,000 worker demands, which are currently being implemented. The collective worker agreement, which seeks labor justice then has to be implemented under it. Infante said that meetings with the workers were organized every month, which was a guarantee that any problem would reach the union. And while the Cuban constitution does not prohibit the right to strike, the union tries to get solutions to problems as soon as possible, he said.[9]

In a similar vein, unlike in the United States where the use of arbitration and other alternate dispute resolution processes is commonplace in both the private and the public sectors, such is not the case in the area of Cuban labor relations. Instead, the Cuban model of industrial democracy involves the concerted use of workers committees, whose members are generally drawn from the most senior ranks of the plant and are well respected. In fact, Infante said, the decisions that are made by them are not generally appealed. While the majority of the issues to come before the workers committees deal with contractual issues, removals may

additionally be addressed. Although binding arbitration is not permitted, an employee may appeal the removal in municipal court, with the ability to receive reinstatement and make-whole relief seen as a deterrent to unwarranted employment actions.

In closing, Infante provided an explanation of why the union was willing to hold these cultural exchanges, which could serve as a coda for the entire week our delegation spent in the beautiful city of Havana—"the Cuban workers recognize that the people of the United States are not our enemies." Similar sentiments were echoed by President Barack Obama roughly a month later, when on Dec. 17, 2014, he took action to normalize relations with Cuba after more than 50 years. ■

Michael J. Pecklers is the president of Pecklers ADR, LLC in North Bergen and a member of the National Academy of Arbitrators. *The author would like to thank the ABA ADR Section past president, Bruce E. Meyerson, for assisting with this article.*

Endnotes

1. The Cuban legal system is based upon two main sources: Spain as well as the law of other socialist countries. As such, the notion of precedent as we know it does not exist, with all three levels of the Judiciary—municipal, provincial and national—analyzing each dispute on a case-by-case basis. In total, Cuba's Judiciary employs 83,000 employees, with all judges elected. While 25 percent of the country belongs to the Communist party, no endorsements or other party affiliation appears on the ballot.
2. The University of Havana has educational exchange agreements with many universities in Spain, France, Italy, Norway, Ecuador, Argentina, and the United States. Collaboration on a family mediation course of study currently exists with Boston University.
3. At the conclusion of the week and after certificates were awarded, the ADR Section offered to bring one Cuban arbitrator and one mediator to the United States on a grant for training. Bruce Meyerson has advised that an arbitrator has responded and is interested in attending the ABA Conference in Chicago in June.
4. The University of Havana was founded with a faculty of law in 1728, and has a tradition of teaching international as well as public law. It is comprised of 14 different buildings spread across the island of Cuba.
5. Post-graduate studies leading to a Master of Law and Doctor of Law degree are available in the following areas: constitutional, civil, administrative, criminal, labor, social security, public and family law.
6. Attorney advertising is similarly prohibited in Cuba. *Pro bono* representation of indigent clients is made available only in penal cases. Trial lawyers who work for the National Center for the Professional Development of Legal Matters have their fees capped based upon the complexity of the case that is being handled. According to its president, Ariel Montelon Ramos, who addressed our group on Nov. 13, 2014, 65 percent of Cuban litigators are women. Anecdotal evidence suggests that government attorneys are paid roughly 800 pesos per month, while the trial attorneys and judges may be closer to 1,000 pesos. Judges may also have additional compensation in the form of a house or a car. The proximate result of Cuba's relatively relaxed emigration policies in recent years has been that many attorneys now come to the United States to practice.
7. In response to a question from the delegation as to whether family mediators in the Cuban legal system are paid, Gonzalez said they are volunteers. She went on to say that currently they had unofficial status, and were attempting to create a mediation service to have their fees established. Notice was also taken that the Cuban Court of Mediation has nine mediators and between 15-18 arbitrators.

8. In a growing attempt to encourage the private ownership of businesses, about five percent of Cuban restaurants or *paladars* are now privately owned. These are generally family-run enterprises in people's homes.
9. As an example of what he continually called the union's grassroots activism, Infante recalled an incident involving a worker in a metal factory, who had a negative opinion of the director of the facility. Anywhere else, they would have tried to fire the worker, he reasoned. In that case, however, the minister of labor came and heard the opinion of the worker and later actually removed the director.

Wage and Hour Grievance Arbitrations Under the FLSA

by Patrick R. Westerkamp

Arbitrators are increasingly being asked to consider external law when resolving grievances filed under collective agreements. This movement beyond the four corners of labor contracts includes wage and hour claims governed by the Fair Labor Standards Act (FLSA).[1] In granting this jurisdiction to grievance arbitrators, parties enter the murky waters separating external law from the 'internal law' of collective contracts.

Congressional and state legislative enactments were long kept separate from grievance arbitrations. Advocates, academics, and neutrals concurred that arbitrators must stay within the collective agreements they were hired to interpret. As instructed in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[2] their primary task was interpreting collective bargaining agreements (CBAs) in light of the persuasive precedent applied by generations of their peers (*i.e.*, the law of the shop).

In *Alexander v. Gardner-Denver*[3] the United States Supreme Court examined what happened when the law of the shop conflicted with the law of the land. It famously ruled that an African-American employee whose union lost his discharge case in arbitration could challenge the termination as racially motivated in a separate Title VII[4] action.

Seven years later, in *Barrentine v. Arkansas-Best Freight System Inc.*,[5] the Court held that FLSA statutory rights are separate from—and of a higher order than—promises in collective contracts. Writing for the majority, Justice William J. Brennan observed, "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums."[6]

Over the next 25 years, the federal courts gradually drew back from *Alexander*, as they slowly permitted non-represented employees to waive individual rights to a judicial forum in favor of arbitration.[7] In *14 Penn Plaza LLC, v. Pyett*,[8] the Court took the next step by enforcing a collective contract clause that authorized grievances charging discrimination to be arbitrated, without any later resort to litigation. This judicial determination was premised on clear, unmistakable, and specific arbitration language negotiated by a union on behalf of its members.

Labor arbitrators then had more leeway to resolve certain statutory claims flowing to them under collective agreements. *Barrentine*, however, remained good law. An arbitral award on a wage claim will not prevent the filing of a FLSA cause of action.[9]

By way of example, consider an unpublished grievance brought by represented workers at a nuclear power facility. They grieved that the station operator breached the labor agreement by compelling apprentices to study at home without compensation for their efforts. The employer answered that it was not obligated to pay for so-called 'homework' that it neither ordered, nor knew was being performed away from its training facility. When the labor organization lost in arbitration, it forwarded its entire grievance file to the Department of Labor's Wage and Hour Division. Although the employer eventually prevailed in the resulting litigation, the lengthy process generated significant legal fees.

Accordingly, labor and management should review the extent to which their grievance/arbitration procedures may open the door to statutory wage/hour issues. Parties who trust labor arbitrators to apply and interpret the FLSA might expressly grant them jurisdiction, using *14 Penn Plaza* as a drafting guide. Those who are less trusting parties can narrow jurisdiction by either broadly restricting arbitrators to the four corners of their CBA, or agreeing that the FLSA should be examined by arbitrators only if contract language—as interpreted in light of past practice—is ambiguous.

In fostering arbitral jurisdiction, it is helpful to remember that few labor arbitrators possess the skill and knowledge to rule on statutory interpretation questions. Parties, indeed, may want to appoint a cadre of qualified

neutrals for such cases. In selecting these persons, they might consider each prospect's legal training and experience; analytical ability; publications; years of neutral experience; membership in respected groups, such as the National Academy of Arbitrators; and reported decisions, especially on cases governed by the Federal Labor Relations Act (FLRA).[10] Under the latter statute, arbitrators must consider relevant laws, rules and/or regulations when fashioning grievance awards.[11]

A handful of labor contracts allow unions to pursue alleged FLSA statutory violations as if they were grievances. For example, "All terms of the Fair Labor Standards Act (FLSA) will be applied according to the Act. Any alleged violation may be grieved and arbitrated pursuant to Article VII of this Agreement." Complex issues are often hidden within such clauses, for example, burdens of proof and persuasion, classifications of covered employees, statutory exemptions, applicability to former employees, and remedies including liquated damages. Going down this road requires careful consideration.

More commonly, unions file wage/hour grievances under traditional CBA provisions governing topics such as schedules, applicable rates, blending of rates, wage inequalities, and overtime. This is not surprising. Collective contracts often provide richer benefits to the employees than are available under the FLSA, and its state counterparts. The common law of arbitration is indeed replete with awards addressing these claims as matters of contract.

When the CBA is unambiguous, labor arbitrators apply traditional rules of interpretation.[12] When contract language is muddled, or conflicting, arbitrators may resort to the FLSA for guidance. Recently, for example, arbitrator Gregory P. Szuter wrestled with a grievance challenging a change in time clock procedures.[13] In ruling, Szuter found the dispute touched both the FLSA's statutory overtime provisions and the contract's overtime clauses.[14]

In another mixed case,[15] arbitrator John C. Shearer heard a firefighter's grievance seeking overtime pay for an entire 12-hour, call-in assignment. The grievant's regular shift included a contractually guaranteed 16 hours, and an unpaid sleep period. If placed on duty during that sleep interval, he became eligible for time and a half for hours not spent resting.

On the evening of the call-in, the grievant was credited with straight time, not premium pay, for hours within the regular shift's designed sleep period. The union argued, *inter alia*, that he was entitled to the premium since the call-in interrupted his off-duty hours. The employer countered that the explicit contractual rules triggering sleep time interruption were not met. Also, unless an employee's time was "disturbed," long past practice spoke against paying for activity during the sleep period. Shearer broke what he concluded was a tie by relying on a portion of the Code of Federal Regulations,[16] governing when sleeping will be considered as time working. Although arbitration, he wrote, is not the place for interpreting federal regulations,

> Where, as here, the language of the Agreement allows either [of the proffered] interpretation[s], and clearly only one is consistent with the law, it [*i.e.*, the law] must be regarded by the arbitrator as the proper interpretation.[17]

Arbitrators also may turn to the FLSA when the collective contract is silent. A common occurrence arises when management conducts a security check as employees are ending their workday. Whether to detect theft or forestall other criminal activity, the right to hold these searches has long been upheld in arbitration. The more controversial question is whether compensation is owing to impacted workers for 'cooling their heels' on the employer's property rather than clocking out. Most collective agreements do not speak to this question.

In *U.S. Marine Corps Supply Center*, arbitrator George King classically determined that "being detained by the authority of the employer for its purposes in protecting its property is 'time worked.'"[18] In the absence of contractual guidance, he and other arbitrators relied on Portal-to-Portal Act amendments to the FLSA, as long applied by the federal courts. Arbitrators thereunder generally concluded, "security searches and similar delays are compensable if the amount of time involved is not considered 'de minimis.'"[19] They viewed security searches as "integral and indispensable" to the employer's principal activities under the law. Profit margins are, after all, maintained by protecting inventory, property, and persons. Accordingly, the majority of grievance arbitrators had ruled that participating in security checks was compensable (often at overtime rates).[20] An exception arose only when the minutes spent were so brief they were of no consequence.

The Supreme Court's recent decision in *Integrity Staffing Solutions, Inc. v. Busk*[21] will make it more difficult for labor arbitrators, and lower federal courts, to use this logic. In this case, "warehouse workers who retrieved inventory and packaged it for shipment, [were directed] to undergo antitheft security screenings before leaving the warehouse each day."[22] The plaintiffs argued that time waiting for, and then undergoing, screening benefited the employer and were necessary parts of their primary job duties. The Ninth Circuit Court of Appeals agreed.[23] A unanimous U.S. Supreme Court disagreed.

Justice Clarence Thomas noted that activities are compensable if they must take place for jobs to be performed; for example, butchers sharpening their knives. Security screenings are not such activities. Integrity Staffing could have eliminated them "without impairing the employees' ability to complete their [picking and packing] work."[24]

Integrity Staffing is no doubt good news for employers, and not so good news for unions. For grievance arbitrators, it is one more sign that combining grievance resolution with statutory analysis is complicated.

When complex questions, especially those of first impression, exist, negotiating a mutually satisfactory settlement may be the best option. Wage and hour grievances often present these opportunities. As shown in *Martin v. Spring Break*, when unit members voluntarily and knowingly accept the benefits of a union-negotiated settlement their FLSA rights are legally validated.[25] AFGE Council 238 and the Environmental Protection Agency announced the largest settlement to date on Feb. 27, 2014. Over six years, they brokered a multi-million dollar resolution of a nationwide FLSA grievance.[26]

Parties who opt to settle need not go it alone. Unlike arbitration, where there is usually a winner and a loser, grievance mediation would permit them to craft a mutually acceptable resolution of their FLSA conflicts. With settlement rates ranging from 75 percent (FMCS) to 86 percent (Mediation Research and Education Project) grievance mediation facilitates mutually satisfactory settlements.

If settlement is unavailing, successfully arbitrating FLSA disputes in tandem with collective contracts requires sophisticated advocates, and equally sophisticated labor arbitrators. Practitioners should consider:

- Early and through analysis of all issues
- The interplay between contract and statutory law
- Framing the question (These are dangerous cases to leave issue formation to the arbitrator.)
- Tracking the burden of proof, which might change with multiple sub-issues
- Consecutive hearing dates
- Calling an expert witness for cases that turn on complex legal questions
- Bi-furcating liability from damages if punitives are demanded
- Filing post-hearing briefs
- Allowing more than the traditional 30 days to draft an opinion and award. ■

Patrick R. Westerkamp is a labor and employment arbitrator and mediator.

Endnotes

1. 29 U.S.C. § 201, *et seq.* This Depression Era statute, in part, was enacted because job scarcity resulted in employees being constrained to work longer hours. By increasing overtime costs, the law was designed to encourage employers to increase their straight-time workforces.
2. 363 U.S. 574, 579 (1960).
3. 415 U.S. 36, 55-56 (1974).
4. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*
5. 450 U.S. 728 (1981).
6. *Id.* at 745-46.
7. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20 (1991).
8. 556 U.S. 247 (2009).
9. *Albertson Inc. v. United Food & Commercial Workers*, 157 F.3d 758 (9th Cir.1998).

10. 5 C.F.R., Chapter XIV, §§ 2420-2472.
11. *See Johnson v. AFGE, Local 2384*, 15 F.L.R.A. 347, 350 (1984).
12. *See, e.g.*, *Miami-Dade Cty.*, 119 LA 901 (Smith, 2004); *Am. Enka Corp.*, 52 LA 882 (Pigors, 1969).
13. *Iowa Corr. Inst. for Women*, 132 LA 1748 (Szuter, 2014).
14. *Id.* at 1757.
15. *Mason & Hanger-Silas Mason Co., Inc.*, 75 LA 1038 (Shearer, 1980).
16. 29 C.F.R. §§ 785.20 & 785.22.
17. *Mason & Hanger-Silas Mason Co., Inc.*, 75 LA at 1040.
18. 65 LA 59 (King, 1975).
19. *Curtis Mathes Mfg. Co.*, 73 LA 103, 106 (Allen Jr., 1979).
20. *See In re Safeway Stores, Inc.*, 44 LA 1193, 1194-95 (Gentile, 1985) (overtime payable when a search delay departure by 35 minutes).
21. 574 U.S. __ (Dec. 9, 2014).
22. *Id.*
23. 713 F.3d 525 (2013).
24. *Id.*
25. *Martin v. Spring Break '83 Prods., L.L.C.*, 688 F.3d 247, 255 (5th Cir. 2012).
26. Press Release, Am. Fed'n of Gov't Emps., AFGE's EPA Council Reaches $35 Million Settlement in Overtime Complaint (Feb. 27, 2014), http://laborweb.afge.org/sites/EPA/L3911/index.cfm?action=article&articleID=89d79228-1bd6-4858-adce-11b30ff500b6.

Integrity Staffing Solutions, Inc. v. Busk: The Supreme Court Will Not Give Employees a Dime for Their Time Standing in Line

by Peter F. Berk and Gillian A. Cooper

On Dec. 9, 2014, the United States Supreme Court, in *Integrity Staffing Solutions, Inc. v. Busk,* unanimously held that the time employees spend waiting to undergo security screenings, and undergoing those security screenings, is not compensable under the Fair Labor Standards Act (FLSA).[1]

Statutory Background

Enacted in 1938, the FLSA established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek.[2] The FLSA, however, did not define 'work' or 'workweek,' and the Supreme Court ultimately applied expansive definitions of those terms.[3] That broad application triggered a flood of litigation.[4] Congress responded by enacting the Portal-to-Portal Act.[5] The Portal-to-Portal Act exempted employers from liability for compensation on two categories of work-related activities: 1) travel to and from the actual place of performance of the principal activity; and 2) activities that are preliminary to or postliminary to that principal activity.[6] The term 'principal activity or activities' means all activities that are an "integral and indispensable part of the principal activities."[7] The issue before the Court in *Integrity* was whether the exemption for activities that are preliminary to or postliminary to the principal activity applied to security screenings mandated by the employer.[8]

Case Background

The petitioner, Integrity Staffing Solutions, Inc., provided warehouse staffing to Amazon.com.[9] The respondents were hourly employees of Integrity.[10] As warehouse employees, they retrieved products from the shelves and packaged those products for delivery to Amazon customers.[11] Integrity required its employees to undergo a security screening before leaving the warehouse at the end of each day.[12] Employees were required to remove items such as wallets, keys, and belts from their persons and pass through metal detectors.[13]

The respondents filed a putative class action against Integrity alleging the employees were entitled to compensation under the FLSA for the time spent waiting to undergo and undergoing the security screenings, alleging the time amounted to roughly 25 minutes each day.[14] The respondents alleged the time could have been reduced by adding more security screeners or by staggering the termination of shifts.[15] The respondents contended the screenings were conducted solely to prevent employee theft and, therefore, for the benefit of Integrity.[16]

The Decisions Below

The district court dismissed the complaint for failure to state a claim, holding the security screenings were not compensable under the FLSA because they occurred after the regular work shift and, therefore, fell into a noncompensable category of postliminary activities.[17] The district court found the employees could state a claim for compensation if the screenings were integral and indispensable to the principal activities.[18] The United States Court of Appeals for the Ninth Circuit reversed, in part.[19] The court of appeals, accepting as true the allegation that the screenings were for the benefit of the employer, concluded that the screenings were necessary and, therefore, compensable.[20] The Ninth Circuit's ruling created a circuit split. The Second[21] and 11th[22] circuits had held time spent in security screenings is not subject to the FLSA because it is not integral and indispensable to employees' principal job activities.

The Supreme Court Decision

Justice Clarence Thomas delivered the opinion for the unanimous Court.[23] Justice Sonia Sotomayor filed a concurring opinion stressing the limited scope of the Court's ruling, in which Justice Elena Kagan joined.[24] The Court found the security screenings at issue are noncompensable, postliminary activities because they

were not the "principal activity or activities which the employee is employed to perform."[25]

Defining Preliminary and Postliminary Activities

The Court has "consistently interpreted the term principal activity or activities to embrace all activities which are an integral and indispensable part of the principal activities."[26] Using the *Oxford English Dictionary* definition, the Court defined integral as "belonging to or making up an integral whole; constituent, component; specifically necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage."[27] Indispensable is defined as a duty "that cannot be dispensed with, remitted, set aside, disregarded, or neglected."[28] Therefore, the Court found activities are integral and indispensable to principal activities "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[29]

Applying the Court's Definitions

Applying those definitions, the Court found that the screenings were not the principal activity the employees were employed to perform.[30] The Court found Integrity "did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment[.]"[31] The Court also determined the security screenings were not integral and indispensable to the employees' duties.[32] Integrity could have eliminated the screenings without impairing the employees' ability to complete their work.[33] The Court also found its approach to be consistent with the U.S. Department of Labor, which had found time spent by an employee would be compensable if he or she could not perform his or her principal activity without doing some other activity.[34] The Department of Labor explained that activities, "including checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks are preliminary or postliminary activities.[35]

Specifically, the Court found the court of appeals erred by "focusing on whether an employer *required* a particular activity. The integral and indispensable test is tied to the productive work that the employee is employed to perform."[36] Required activities are not automatically principal activities. The Court further found that whether the activity is for the benefit of the employer is similarly overbroad.[37] For example, the Court has held "noncompensable the time poultry-plant employees spent waiting to don protective gear because such waiting was two steps removed from the productive activity on the assembly line."[38]

The Court held that "an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[39] The Court found the time the employees spent waiting to undergo security screenings did not meet that specific criteria, and thus reversed the Ninth Circuit.[40]

Finally, regarding the petitioner's argument that Integrity could minimize the time spent waiting to undergo the security screenings to a *de minimis* amount, the Court found the possibility did not change the nature of the activity or its relationship to the principal activities.[41] The Court further stated those arguments would be better presented to the employer at the bargaining table, and not to a court.[42]

Implications for the Future

An employee's required security screening is a preliminary or postliminary activity that is not compensable under the FLSA. Moreover, the employer is not required to minimize the time spent by the employee undergoing the screening to comply with the FLSA. Rather, the Court focused on whether the required activity is actually integral and indispensable to the principal activity. A required activity is not, by default, a principal activity. Although a battery plant worker might be able to perform his or her principal activities without donning proper protective gear, he or she could not do so safely.[43] As Justice Sotomayor explained in her concurring opinion, the key inquiry is whether employees could skip the required activity altogether without affecting the "safety or effectiveness of their principal activities[.]"[44] While the decision was a big loss for workers challenging the security checks, the case does not create a blanket rule. Determining whether an employee's activity is integral and indispensable to the principal activity of the employee must still be evaluated on a case-by-case basis.

Peter F. Berk, counsel in the Genova Burns LLC Newark office, is a member of the employment law and litigation practice group. Gillian A. Cooper is an associate in the Genova Burns LLC Newark office, and is a member of the employment law and litigation and complex commercial litigation practice groups.

Endnotes

1. *Integrity Staffing Solutions, Inc v. Busk*, __ U.S. __, 135 S. Ct. 513, 190 L. Ed. 2d 410, 415 (2014); Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*
2. *Integrity Staffing*, 190 L. Ed. 2d at 416.
3. *Id.*
4. *Id.* at 416-17.
5. *Id.* at 417; Portal-to-Portal Act of 1947, 29 U.S.C. § 251, *et seq.*
6. *Integrity Staffing*, 190 L. Ed. 2d at 417.
7. *Id.*
8. *Id.*
9. *Id.* at 415.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 416.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Gorman v. Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007).
22. *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340 (11th Cir. 2007).
23. *Integrity Staffing*, 190 L. Ed. 2d at 415.
24. *Id.* at 420.
25. *Id.* at 415.
26. *Id.* at 417.
27. *Id.*
28. *Id.* at 418.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 419.
33. *Id.*
34. *Id.* at 418.
35. *Id.*
36. *Id.* at 419 (citations omitted).
37. *Id.*
38. *Id.* at 418 (citation and internal quotation marks omitted).
39. *Id.* at 420.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* (citation omitted).
44. *Id.*

Now It Is Official...The New Jersey Supreme Court Formally Adopts the *Faragher/Ellerth* Affirmative Defense for LAD Hostile Work Environment Claims

by Tedd J. Kochman and Ivan R. Novich

Unlike the surprise ending in a cinema thriller, New Jersey labor and employment law practitioners were likely not overwhelmingly shocked by the New Jersey Supreme Court's decision in *Aguas v. State of New Jersey*.[1] Indeed, by all accounts the Court's holding in *Aguas* was seemingly foreshadowed by several prior decisions issued by the Court involving the application of the *Faragher/Ellerth* affirmative defenses in certain New Jersey Law Against Discrimination (LAD) claims. Nonetheless, the Court's decision in *Aguas* is of key significance, being the first time the New Jersey Supreme Court has formally adopted the federal test, as long-endorsed by the United States Supreme Court. Specifically, in *Aguas*, the Court expressly held the *Faragher/Ellerth* affirmative defense was available to employers for hostile work environment claims brought under the LAD.[2] To reiterate, however, the Court's decision in *Aguas* was, in fact, consistent with its prior decisions in such cases as *Cavouti* and *Gaines*—where it supported the use of this affirmative defense in combating LAD harassment claims.[3] Fortunately, for employers within the state, the Court in *Aguas* took the full plunge by expressly holding it was adopting as the governing standard the test set forth by the United States Supreme Court in its *Faragher* and *Ellerth* decisions.

Another key aspect of the Court's *Aguas* decision that warrants attention by practitioners is that the Court distinguished between the different types of hostile work environment claims.[4] Relying on principles of agency law, the Court differentiated between sexual harassment claims brought directly against an employer for negligence or recklessness and those claims brought against an employer based on supervisory harassment under a theory of vicarious liability. In its decision, the Court also emphasized the importance of an employer's effectively enforced anti-discrimination/harassment policy in negating each of these different claims.[5] Thus, again making clear to employers the significance and importance of not simply having in place an anti-discrimination/harassment policy and procedure, but actually enforcing these workplace standards.

Factual and Procedural History of the Case

As with any analysis or summary of a key decision, the factual landscape and case chronology is of prime importance. By way of factual background, the plaintiff in *Aguas* was a female corrections officer who had worked for the New Jersey Department of Corrections (DOC) since 2004.[6] The DOC, in an effort to maintain a discrimination/harassment-free work environment had a written policy: 1) prohibiting discrimination and harassment; 2) establishing an internal complaint and investigative procedure; and 3) mandating that all DOC employees receive training on the policy.[7] The plaintiff acknowledged she had received a copy of the DOC anti-discrimination/harassment policy, but denied receiving training with respect to the policy.[8] However, contrary to her contention that she had never formally trained on the policy and its procedures, she had, nonetheless, previously instituted written complaints under the DOC's anti-discrimination policy against two female co-workers.[9]

The core aspects of the plaintiff's allegations were that two of her male supervisors subjected her to a sexually hostile work environment. In support of her hostile work environment claims under LAD, she claimed that on several occasions her area lieutenant allegedly made sexually inappropriate comments toward her and engaged in unwelcomed physical contact (including grinding his pelvis into her, massaging her shoulders, grabbing her arms and back, and bending her over a table).[10] During another alleged incident, one of the plaintiff's sergeants supposedly commented about her breasts after she set off the metal detector at work. He

then instructed a female officer to repeatedly pat-frisk her.[11] After the plaintiff verbally complained to her captain and acting chief, the DOC's Equal Employment Division (EED) investigated her verbal complaint and concluded the allegations were unsubstantiated.[12]

Unfortunately for the DOC, the plaintiff was less than willing to trust her fate to the EED and its investigation. As such, while the EED was in the process of its internal investigation, she opted to file suit and named the state of New Jersey as the sole defendant.[13] Notably, the plaintiff did not allege the defendant took any tangible employment action against her (*i.e.*, firing her, or imposing a demotion, pay loss, undesirable reassignment, etc.).[14] Obviously, as further explored below and in light of the *Faragher/Ellerth* affirmative defense, this aspect of the *Aguas* matter is quite significant.

In its answer, the state alleged as an affirmative defense that it took prompt and remedial action, and that it thoroughly investigated the plaintiff's complaint.[15] Following the close of discovery, the trial court granted the state's summary judgment motion. The trial court concluded that, though the plaintiff had established a *prima facie* case of sexual hostile work environment, summary judgment was warranted based on the state's affirmative defense.[16] The plaintiff appealed, but to no avail, as the Appellate Division affirmed the lower court's holding. Not to be procedurally deterred, the plaintiff then filed a petition for certification with the New Jersey Supreme Court, which the Court subsequently granted.[17]

Formal Adoption of *Faragher/Ellerth* by the New Jersey Supreme Court

Justice Anne M. Patterson served as the architect of the majority opinion in *Aguas*. In her written opinion, she sets forth the Court's analysis of various theories of employer liability under LAD for hostile work environment claims. In doing so, the Court analyzed its prior decision in *Lehmann* and the U.S. Supreme Court's past opinion in *Meritor.*[18] Both of these decisions are watershed decisions for hostile work environment claims.[19]

In *Aguas*, the Court noted that in *Lehmann* it declined to hold employers strictly liable for monetary damages for hostile work environment claims because the goal of anti-discrimination laws (both federal and state) is to prevent unlawful discrimination, harassment, or retaliation.[20] Thus, in the Court's view, holding employers strictly liable for hostile work environment claims in the absence of any tangible employment action by the employer against the plaintiff employee would, in a word, contravene this legislative purpose.[21] Beyond that, holding employers strictly liable for monetary damages for harassment claims regardless of the factual circumstances of the particular case would also discourage employers from implementing and enforcing meaningful anti-discrimination/harassment policies and internal complaint and investigative procedures.

The Key to the Court's Analysis in *Aguas* is Directly Linked to Agency Principles

Any proper review and absorption of the *Aguas* decision warrants one clear conclusion—the Court's focus upon the importance of agency principles in assessing employer liability. In fact, the *Aguas* case's emphasis upon agency considerations is wholly consistent with the Court's prior holding in *Lehmann* and the U.S. Supreme Court's decision in *Meritor*—and, by applying this standard, the Court would be, indeed, acting inconsistently if it held employers strictly liable for such claims.[22] As the Court in *Aguas* pointed out, agency principles "directly implicate an employer's policy, or its lack of a policy, against sexual harassment in the workplace."[23] In addition, the existence and enforcement of a policy charging supervisors with ensuring a harassment-free workplace raises fact-sensitive questions for determining supervisory hostile work environment and vicarious liability. To be more specific, the factual analysis required is: 1) whether a harassing supervisor purports to act or to speak on behalf of the principal; 2) whether there was reliance upon that supervisor's apparent authority; and 3) whether a harasser was aided in accomplishing the harassment by the existence of the agency relation.[24]

Consistent with the above, the positive legal news for employers defending NJLAD hostile work environment cases is that the *Aguas* Court refused to adopt a strict liability approach. Thus, rather than adopting a strict liability approach for hostile work environment claims, the Court, as was also done in *Lehmann*, reiterated and adopted a fact-sensitive approach based on the law of agency. The Court also was extremely clear that Section 219(2) of the Restatement (Second) of Agency was essential.[25] Section 219(2) sets forth the major exceptions to the general rule that an employer is not liable for the conduct of its employee that is beyond the scope of his or her employment.[26]

Separate and Distinct Claims of Employer Liability Under Sections 219(2)(b) and (d)

The Court in *Aguas* explained that the two most prominent claims under Section 219 are Section 219(2)(b) and (d) claims.[27] Though these claims are often pled together, as was the case in *Aguas,* they are analytically distinct under the law and should be separately examined and addressed.[28]

Under Section 219(2)(b), employers may be held directly liable for the conduct of their employees based on the employer's negligence or recklessness.[29] To prevail on such a claim, the plaintiff must prove the defendant employer failed to exercise due care with respect to sexual harassment in the workplace, that its breach of the duty of due care caused the plaintiff's harm, and that the plaintiff sustained damages.[30]

By contrast, a Section 219(d)(2) claim is based on a theory of vicarious liability, as opposed to direct liability.[31] Under Section 219(d)(2), an employee may assert the employer is vicariously liable for sexual harassment committed by its employee. However, in order to successfully do so the employee must establish that the sexual harasser purported to act on the employer's behalf (and there was reliance upon his or her apparent authority), or the harasser was aided in his or her misconduct by the existence of an agency relationship with his or her employer.[32]

The Court Emphasizes the Importance of an Employer's Anti-Discrimination/Harassment Policy

As the decision in *Aguas* makes clear, an employer's effectively enforced anti-discrimination/harassment policy is essential to combating Section 219(2)(b) and (d) claims. With respect to a negligence or recklessness hostile work environment claim under Section 219(2)(b), the employer's anti-discrimination/harassment policy is of acute importance and central to the determination of this claim.[33] Indeed, the Court "reaffirm[ed] that an employer's implementation and enforcement of an effective anti-harassment policy, or its failure to maintain such a policy, is a critical factor in determining negligence and recklessness claims under [Section] 219(2)(b)."[34] Further, in case employers simply were not paying attention, the Court went on to bolster this point by stating that "the existence of effective preventative mechanisms may provide evidence of due care on the part of the employer."[35] Though the absence or existence of such a policy does not automatically constitute negligence or the lack thereof, the efficacy of the employer's remedial program is highly pertinent to the employer's defense to a Section 219(2)(b) claim.[36] Without mincing words, the Court's *Aguas* decision makes the last point mentioned superlatively clear—as such, employers should be fully cognizant of their effective use and implementation of such anti-discrimination/harassment policies and procedures.

In its analysis, the Court also offered an assessment of vicarious liability claims based on a theory of supervisory sexual harassment under Section 219(2)(d). The *Aguas* Court held that the employer may be able to assert the affirmative defense to such claims in accordance with the U.S. Supreme Court's holdings in *Faragher* and *Ellerth*.[37] In other words, an employer will not be held vicariously liable for supervisory sexual harassment if it proves by a preponderance of the evidence: 1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; 2) that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"; and 3) that the employer has not taken an adverse tangible employment action against the plaintiff employee.[38]

Who is a Supervisor for Purposes of Hostile Work Environment Claims?

The Court in *Aguas* also addressed the definition of a supervisor for hostile work environment claims.[39] The Court held that the term 'supervisor' includes not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the plaintiff employee's daily work activities.[40] In so holding, the Court declined to adopt the narrower definition of supervisor prescribed by the U.S. Supreme Court in *Vance v. Ball State University*.[41] Rather, the Court adopted the more expansive definition of supervisor utilized by the U.S. Equal Employment Opportunity Commission.[42] Likely to the chagrin of employer onlookers, albeit not a dramatic surprise, the Court found that the broader definition of supervisor comports with its prior holding in *Lehmann*. In addition, it further supported its use of the more expansive definition by noting the importance in Section 219(2)(d) sexual harassment cases of a supervisor's authority to control the plaintiff employee's day-to-day working

environment. The Court explained that the more generous definition of supervisor furthers the paramount goal of the LAD, which they voiced as being the eradication of sexual harassment in the workplace.[43]

The Legal and Practical Takeaways From the *Aguas* Decision

As noted at the outset, while the Court's decision in *Aguas* is of vital importance for a host of reasons, its formal adoption of the federal affirmative defenses should not resonate as a curveball being thrown. In *Aguas*, the takeaway is that the Court eliminated any ambiguity that may have still existed regarding their views on certain available defenses in LAD hostile work environment cases. In addition, as if employers were not well aware of the need to maintain effective and comprehensive anti-discrimination/harassment policies and procedures in the workplace (and to ensure enforcement), the Court reiterated they are essential to the defense of LAD hostile work environment claims.

In addition to the above, the Court's clear refusal to apply strict liability for monetary damages in LAD hostile work environment cases must be thoroughly noted by employers and employees alike. Further, management and plaintiff-side attorneys would be well served to make sure they are intimately familiar with the law of agency, in particular Section 219(2) of the Restatement (Second) of Agency.

Finally, the *Aguas* decision allows for an indisputable understanding among employers as to the breadth of the definition of supervisor for LAD hostile work environment purposes. In short, the scope of this term will be viewed broadly by reviewing courts in the state. As such, employers must be wary of how that may (or may not) impact their defensive posture in and potential liability in LAD hostile work environment cases. ■

Tedd J. Kochman and Ivan R. Novich are both shareholders in the Newark office of the national labor and employment law firm of Littler Mendelson, P.C., and exclusively represent management in the handling and defense of all aspects of employment counseling, labor law, employment litigation, as well as a wide array of related areas involving employment matters.

Endnotes

1. *Aguas v. State*, 220 N.J. 494 (2015).
2. *Id.* at 523. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).
3. *Aguas*, 220 N.J. at 516-17; *Gaines v. Bellino*, 173 N.J. 301 (2002); *Cavouti v. N.J. Transit Corp.*, 161 N.J. 107 (1999).
4. *Aguas*, 220 N.J. at 512.
5. *Id.* at 512-13 and 515.
6. *Id.* at 502.
7. *Id.* at 500-01.
8. *Id.* at 502.
9. *Id.*
10. *Id.* at 502-04.
11. *Id.* at 504.
12. *Id.* at 505.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 506.
17. *Id.* at 506-07.
18. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

19. *Id.* at 510.
20. *Id.* at 519-20 & 523.
21. *Id.* at 520.
22. *Id.* at 515.
23. *Id.*
24. *Id.*
25. *Id.* at 511-13.
26. *Id.* at 511.
27. *Id.* at 512.
28. *Id.*
29. *Id.* at 512.
30. *Id.* at 513-14.
31. *Id.* at 512.
32. *Id.* at 514.
33. *Id.* at 512.
34. *Id.* at 499.
35. *Id.* at 513 (*quoting Gaines*, 173 N.J. at 314).
36. *Id.*
37. *Id.* at 499.
38. *Id.*
39. *Id.* at 500.
40. *Id.*
41. *Id.* at 528; *Vance v. Ball State Univ.*, __ U.S.__, __, 133 S. Ct. 2434, 2443, 186 L. Ed. 2d 565 (2013).
42. *Id.*
43. *Id.*

Commentary

Aguas v. State: The New Jersey Supreme Court's Abandonment of Hostile Work Environment Victims and a Recipe for Increased Litigation

by Christopher P. Lenzo

Until Feb. 11, 2015, employees experiencing a hostile work environment in New Jersey could rest assured that if they proved that their supervisors unlawfully harassed them, they would be able to obtain compensatory damages from their employers. However, on Feb. 11, in *Aguas v. State*,[1] the New Jersey Supreme Court reversed its landmark decision in *Lehmann v. Toys 'R' Us, Inc.*,[2] abandoning over two decades of Garden State jurisprudence providing workplace harassment victims with alternative methods of establishing employer liability for compensatory damages. *Aguas* replaced *Lehmann* with a cloak of immunity for employers. That reversal dramatically undercuts the deterrent effect of the New Jersey Law Against Discrimination (LAD), thereby exposing New Jersey employees to a greater risk of being subjected to supervisory harassment in the workplace. The Supreme Court's about-face will also increase litigation in hostile work environment cases, thereby escalating the parties' costs, lengthening the duration of such matters, and further burdening an already overburdened court system.

Employer Liability Under *Lehmann*

In *Lehmann*, the Court held that employer liability under the LAD for compensatory damages arising out of a hostile work environment could be established in many different ways, both direct and indirect:

> [E]mployer liability for supervisory hostile work environment…harassment shall be governed by agency principles.
>
> Section 219 of the *Restatement (Second) of Agency* outlines the liability of a master for the torts of a servant.
>
> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.
>
> Applying those principles, we declare that under § 219(1) an employer whose supervisory employee is acting within the scope of his or her employment will be liable for the supervisor's conduct in creating a hostile work environment. Moreover, even in the more common situation in which the supervisor is acting outside the scope of his or her employment, the employer will be liable in most cases for the supervisor's behavior under the exceptions set forth in § 219(2). For example, if an employer delegates the authority to control the work environment to a supervisor and that supervisor abuses that delegated authority, then vicarious liability under § 219(2)(d) will follow….
>
> Another basis for employer liability under agency law is negligence, as set forth in § 219(2)(b)....[C]ommon sense suggests that … harassment at the workplace is foreseeable, even where anti-harassment policies exist….
>
> In light of the known prevalence of… harassment, a plaintiff may show that an employer was negligent by its failure to have in

place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms….

Employer liability through agency law may also be found under § 219(2)(a) if the employer intended the conduct. If a plaintiff can show that an employer had actual knowledge of the harassment and did not promptly and effectively act to stop it, liability under that section may be appropriate. However, such conduct would also more clearly qualify as negligence or recklessness, thus triggering liability under § 219(2)(b).

….

Although an employer's liability for…harassment of which the employer knew or should have known can be seen to flow from agency law, it can also be understood as direct liability. When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser. "Effective" remedial measures are those reasonably calculated to end the harassment. The "reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in the harassment."

….

[Thus, a]n employer will be found vicariously liable if the supervisor acted within the scope of his or her employment. Moreover, even if the supervisor acted outside the scope of his or her employment, the employer will be vicariously liable if the employer contributed to the harm through its negligence, intent, or apparent authorization of the harassing conduct, or if the supervisor was aided in the commission of the harassment by the agency relationship. Thus, an employer can be held liable for compensatory damages stemming from a supervisor's creation of a hostile work environment if the employer grants the supervisor the authority to control the working environment and the supervisor abuses that authority to create a hostile work environment. An employer may also be held vicariously liable for compensatory damages for supervisory … harassment that occurs outside the scope of the supervisor's authority, if the employer had actual or constructive notice of the harassment, or even if the employer did not have actual or constructive notice, if the employer negligently or recklessly failed to have an explicit policy that bans … harassment and that provides an effective procedure for the prompt investigation and remediation of such claims.[3]

Thus, the *Lehmann* Court purposefully set up an analytical framework that provided harassment plaintiffs with several alternative means of establishing employer liability so "even in the more common situation in which the supervisor is acting outside the scope of his or her employment, the employer will be liable in most cases for the supervisor's behavior."[4] Under *Lehmann*, there was employer liability for compensatory damages in virtually every instance of supervisory harassment because employers delegate the authority to control the work environment to supervisors, so when a supervisor abused that delegated authority by unlawfully harassing an employee, the employer was vicariously liable. The employer's anti-harassment policy, training, and complaint mechanism posed no defense to vicarious liability based on the supervisor's abuse of delegated authority over the workplace. That defense only came into play under *Lehmann* if the sole basis for employer liability was the employer's alleged failure to institute effective anti-harassment policies, training, and complaint mechanisms.

The *Lehmann* approach to employer liability stood in stark contrast to the approach subsequently adopted by the United States Supreme Court in *Faragher v. City of Boca Raton*[5] and *Burlington Industries, Inc. v. Ellerth*.[6] The *Faragher* Court rejected the agency principles used by the *Lehmann* Court as a basis for employer liability, because "the risk of automatic liability [would be] high."[7] Instead, the United States Supreme Court created an affirmative defense to employer liability where: 1) the employer has exercised reasonable care to prevent and correct harassment, and 2) the employee has unreasonably failed to utilize the employer's preventative and corrective measures.

However, *Faragher* and *Ellerth* held that the affirmative defense did not apply if the harassment included a tangible adverse employment action, such as a firing, demotion, or the like. In contrast, the Supreme Court had not recognized a distinction between tangible and intangible employment actions, holding in *Lehmann* that "[t]he plaintiff's injury need be no more tangible or serious than that the conditions of employment have been altered and the work environment has become abusive"[8] and in *Taylor v. Metzger* that "evidence of specific, tangible adverse changes in the work environment is not required in order to state a LAD...harassment claim" because "a loss of a tangible job benefit is not necessary since the harassment itself affects the terms or conditions of employment."[9] More important, the *Lehmann* Court had explicitly rejected the requirement that a harassment plaintiff complain internally.[10] Finally, *Lehmann* specifically held that "the presence of [anti-harassment policies, training, and complaint] mechanisms [does not] demonstrate[] the absence of negligence" on the part of the employer.[11]

The foregoing distinctions between the New Jersey and federal approaches to employer liability for supervisory harassment explain why there are reported cases granting summary judgment to defendant employers on federal Title VII harassment claims while denying summary judgment to the same employers in the same cases on the same facts with regard to LAD harassment claims.[12] However, those days are now over because the New Jersey Supreme Court has abandoned its own well-reasoned analysis in *Lehmann* to replace it with the flawed framework of the United States Supreme Court in *Faragher* and *Ellerth*.

The *Aguas* Sea Change

Justice Barry T. Albin noted in dissent in *Aguas* that the New Jersey Supreme Court's adoption of the United States Supreme Court's *Faragher/Ellerth* defense in *Aguas* is a "sea change" in New Jersey employment law.[13] Now, instead of employers generally being liable for compensatory damages arising from supervisory harassment, they will generally be immune from such liability. That development does not advance the LAD's underlying public policy of eradicating the cancer of workplace discrimination. Quite to the contrary, it discourages employers from taking aggressive measures to penalize harassing supervisors. To paraphrase Mao Tse Tung, "justice comes out of the end of a gun."[14] The extremely sharp teeth with which the *Lehmann* Court armed the LAD by holding that "the employer will be liable in most cases for the supervisor's behavior" based on the supervisor's abuse of the employer's delegated authority is what led to the zero tolerance anti-harassment policies that currently prevail in New Jersey workplaces.[15] Most employers are for-profit entities. That means the only thing they understand is money. When they run a high risk of losing money, they take action to avoid that. Under *Lehmann*, employers knew that they would end up being held liable for any supervisory harassment, so they did not tolerate the faintest hint of such harassment. *Aguas* dramatically weakens that monetary incentive for employers to take aggressive action to root out workplace harassment.

Practical Consequences

Aguas ensures that hostile work environment cases will cost more money, use greater judicial resources, and take longer to be resolved. The focus will now be on the employer's historical approach to workplace harassment. Plaintiffs should seek discovery of *each and every prior internal harassment complaint* at the defendant employer. That is necessary to address the now-paramount issues of: 1) whether the employer's anti-harassment policies, training, and complaint mechanisms "exist in name only,"[16] and 2) in cases in which the employee did not utilize an employer complaint mechanism, whether the employee's choice not to do so was reasonable.

Global discovery regarding the employer's past responses to internal workplace harassment complaints will answer three crucial questions. First, does the employer's anti-harassment policy exist in name only because the employer always finds complaints to be unsubstantiated? Second, is the employer's complaint mechanism a paper tiger because the remedial measures that the employer takes constitute mere slaps on the wrist for harassers? Third, have prior complainants experienced retaliation, thus justifying a plaintiff's decision not to complain internally?

This discovery is going to be expensive and time-consuming, but it is now necessary in every hostile work environment action that does not involve a tangible adverse employment action.

Aguas is also going to force more plaintiffs to resort to expert witnesses. If a plaintiff has not used an employer complaint mechanism, plaintiff's counsel should give serious consideration to retaining a psychologist, sociolo-

gist, or similar professional to explain why vulnerable individuals who have been subjected to intimidating conduct by someone in a position of authority in a powerful institution do not feel comfortable complaining.

Conclusion

In short, *Aguas* undercuts the state's public policy against discrimination by making it less expensive for employers to tolerate supervisory harassment and more expensive for employees to establish employer liability for such harassment. That is a tremendous step backwards for the vast majority of citizens who work for a living.

Christopher P. Lenzo is a member of Lenzo & Reis, LLC in Morristown. He represents individual employees in employment law matters. Lenzo has been certified by the Supreme Court of New Jersey as a civil trial attorney. He served the New Jersey Supreme Court as a member of the Employment Law Subcommittee of the Court's Model Civil Jury Charge Committee for 12 years.

Endnotes

1. *Aguas v. State*, 220 N.J. 494 (2015).
2. *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993).
3. *Id.* at 619-24.
4. *Id.* at 619-20.
5. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
6. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).
7. *Faragher*, 524 U.S. at 804.
8. *Lehmann*, 132 N.J. at 610.
9. *Taylor v. Metzger*, 152 N.J. 490, 507 (1998) (internal quotations omitted).
10. *Lehmann*, 132 N.J. at 626 (rejecting Judge D'Annunzio's proposal in his concurring opinion below that harassment plaintiffs be required to complain internally).
11. *Id.* at 621.
12. *See, e.g.*, *Newsome v. Administrative Office of the Courts*, 103 F. Supp. 2d 807 (D.N.J. 2000), (dismissing sexual harassment plaintiff's Title VII claim based on *Faragher/Ellerth* defense, but refusing to dismiss LAD claim because of many other means by which plaintiff could establish employer liability under *Lehmann*).
13. *Aguas*, 220 N.J. at 540 (Albin, J., dissenting).
14. *See* Mao Tse-tung, "Problems of War and Strategy" Selected Works, Vol. II, 224 (Nov. 6, 1938), *available at*, https://www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2_12.htm.
15. *Lehmann*, 132 N.J. at 620.
16. *Aguas*, 220 N.J. at 522-23.

New Jersey Supreme Court Adopts the ABC Test for Determining an Individual's Employment Status Under the Wage Payment Law

by M. Trevor Lyons and Caitlin Petry Cascino

On Jan. 14, 2015, the New Jersey Supreme Court, in *Hargrove v. Sleepy's, LLC*,[1] considered a question of law certified and submitted by the United States Court of Appeals for the Third Circuit. The decision is significant because the Supreme Court addressed, for the first time, which test should be applied under New Jersey law to determine whether a plaintiff is an employee or an independent contractor for purposes of the Wage Payment Law (WPL)[2] and the Wage and Hour Law (WHL).[3] The Court concluded that the so-called ABC test governs whether a worker is an employee or an independent contractor for purposes of resolving a wage-payment or wage-and-hour claim brought under New Jersey law.[4]

The plaintiffs, Sam Hargrove, Andre Hall, and Marco Eusebio, delivered mattresses ordered by customers from the defendant Sleepy's, LLC.[5] The plaintiffs claim they suffered various financial and non-financial losses due to Sleepy's misclassifying them as independent contractors instead of employees and that the misclassification violates state wage laws.[6]

The plaintiffs and the defendant each brought cross motions for summary judgment before the United States District Court for the District of New Jersey on the issue of whether the plaintiffs are employees or independent contractors.[7] The district court held the plaintiffs are independent contractors, relying on the factors identified in *Nationwide Mutual v. Darden*.[8] As the district court explained, *Darden* set forth the following factors: skill; the source of the instrumentalities and tools; the location of the work; the duration of the relationship; whether the employer has the right to assign additional projects; the extent of the worker's discretion over when and how long to work; the method of payment; the worker's role in hiring and paying assistants; whether the work is part of the regular business of the employer; whether the employer is in business; the provision of benefits; and the tax treatment of the worker.[9]

The plaintiffs filed a notice of appeal.[10] After oral argument, the United States Court of Appeals for the Third Circuit filed a petition with the New Jersey Supreme Court seeking to certify a question of law pursuant to Rule 2:12A-1.[11] The court of appeals sought certification of the following question: "Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey [WPL] and the New Jersey [WHL]?"[12] The New Jersey Supreme Court granted the petition on July 10, 2013.[13]

The New Jersey Supreme Court held that courts should apply the ABC test to determine whether a worker is an independent contractor or an employee under the WPL and the WHL.[14] Under the ABC test, so called because it is a three-pronged test, an employer is required to presume the worker is an employee unless the employer can show that:

(A) the employer neither exercised control over the worker nor had the ability to exercise control in terms of the completion of the work;

(B) the services provided were either outside the usual course of business or performed outside of all the places of business of the enterprise; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession or business.[15]

An employer's failure to satisfy any one of the three criteria renders the worker an employee for wage payment and wage-and-hour purposes.[16]

The Court explained that the WPL and WHL similarly define the term 'employee.'[17] The WPL defines an employee as "any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees."[18] The WHL defines an employee as "any individual employed by an employer" and defines the term 'employ'

as "to suffer or to permit to work."[19] Although the term 'employee' is not defined identically in the two statutes, both laws utilize the phrase "suffer or permit to work."[20]

The Court noted the WHL regulations expressly indicate the ABC test will be used to determine whether an individual is an employee or an independent contractor.[21] However, the dispute in the case arises because the WPL and its regulations do not similarly indicate which standard should be used for making that determination under the WPL.[22] As *amicus curiae*, the New Jersey Department of Labor and Workforce Development (NJ DOL) advised that it has applied the ABC test for employment status determinations under the WPL.[23]

The plaintiffs urged the Court to apply either the ABC test or the economic realities test.[24] The economic realities test, which is used in Fair Labor Standards Act (FLSA) cases, is a totality-of-the-circumstances standard that considers whether, as a matter of economic reality, the individuals are dependent upon the business to which they render services.[25] The test focuses on six factors: 1) the employer's right to control the manner in which the work is to be performed; 2) the worker's opportunity for profit or loss depending upon his managerial skill; 3) the worker's investment in equipment or materials or his employment of helpers; 4) whether the services require a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service is an integral part of the employer's business.[26] The Court rejected the economic realities test because it contemplates a qualitative, rather than a quantitative, analysis of every case, which may yield a different result from case to case, and because it believed the ABC test provides more predictability and casts a wider net than the FLSA economic realities standard.[27]

The defendant urged the Court not to look to *D'Annunzio v. Prudential Insurance Co.*, which established a hybrid test as the test for evaluating an employment relationship in the context of the Conscientious Employee Protection Act (CEPA).[28] The hybrid test requires a court to consider 12 factors in determining a worker's status: 1) the employer's right to control the manner and means of the worker's performance; 2) whether the occupation is supervised or unsupervised; 3) skill; 4) who furnishes the equipment and workplace; 5) the length of time in which the individual has worked; 6) the method of payment; 7) the manner of termination of the work relationship; 8) whether there is annual leave; 9) whether the work is an integral part of the employer's business; 10) whether the worker receives retirement benefits; 11) whether the employer pays Social Security taxes; and 12) the parties' intention.[29] The Court rejected the hybrid test because it does not yield a predictable result.[30]

The defendant argued that the Court should apply the "right to control" test.[31] The right to control test is a common-law test derived from the Restatement (Second) of Agency.[32] It focuses on whether an individual's actions were so controlled by a superior as to render the individual an employee for purposes of the law.[33] The Court reasoned this test should not apply because the employment-status test should consider more than one factor, and the right to control test was designed for utilization in tort cases, which is not the legislative purpose of the WPL or WHL.[34]

Instead, the Court decided the ABC test should apply.[35] The Court reasoned the same standard should be utilized to determine the nature of an employment relationship under both the WPL and WHL because both statutes have similar language in their definitions of the terms employee and employ, and they address similar concerns.[36] Noting that the NJ DOL has been using the ABC test, the Court concluded the parties and *amici curiae* presented no good reason to depart from that practice.[37] The Court also supported the ABC test as providing a predictable result, because it requires each identified factor to be satisfied in order to permit classification as an independent contractor.[38] Accordingly, the Court reasoned the ABC test supports the legislative purpose of the WPL and WHL, which is to foster the provision of greater income security for workers.[39]

The *Sleepy's* decision implements an extraordinarily employee-friendly test for determining the employment status of individual workers under New Jersey's wage laws, and generally presumes a worker is an employee for wage purposes. It also creates the strong possibility that the same worker could potentially be considered an employee for state wage and hour purposes, while at the same time be considered an independent contractor for state discrimination law purposes. It could also lead to other unintended consequences impacting the scope and interpretations of other various statutes.

In light of this change, attorneys should take this opportunity to counsel their clients about worker classifications, to ensure they satisfy the new standard and either re-classify their workers as employees or

tailor their relationships in order to satisfy the ABC test. Attorneys should be sure to review documentation regarding the independent contractor's separate business entity, invoices for work performed, and written contracts that clearly describe the work duties and track the elements of the ABC test. ■

M. Trevor Lyons and Caitlin Petry Cascino practice in Connell Foley LLP's labor and employment law group on behalf of management.

Endnotes

1. *Hargrove v. Sleepy's LLC*, No. 072742, 2015 N.J. LEXIS 38 (Jan. 14, 2015).
2. N.J.S.A. 34:11-4.1 to -4.14. The WPL governs the time and mode of payment of wages due to employees.
3. N.J.S.A. 34:11-56a to -56a38. The WHL establishes the minimum wage and overtime rate for work in excess of forty hours in any week for certain employees.
4. *Sleepy's*, 2015 N.J. LEXIS 38, at *11.
5. *Ibid.*
6. *Ibid.*
7. *Hargrove v. Sleepy's LLC*, No. 10-1138, 2012 U.S. Dist. LEXIS 43949, at *1 (D.N.J. March 29, 2012).
8. *Id.* at *15; *see Nationwide Mut. v. Darden*, 503 U.S. 318 (1992).
9. *Id.* at *13-14.
10. *Hargrove v. Sleepy's, LLC*, No. 12-2540 & 12-2541, 2013 U.S. App. LEXIS 26204, at *1 (3d Cir. May 22, 2013).
11. *Id.* at *1-2.
12. *Id.* at *7.
13. *Sleepy's, LLC*, 214 N.J. 499 (2013).
14. *Sleepy's*, 2015 N.J. LEXIS 38, at *42-*43.
15. *Id.* at *25.
16. *Ibid.*
17. *Id.* at *36.
18. *Id.* at *22.
19. *Id.* at *25.
20. *Id.* at *36-37.
21. *Id.* at *24-25.
22. *Id.* at *27.
23. *Id.* at *23.
24. *Id.* at *27.
25. *Id.* at *33-34.
26. *Id.* at *34.
27. *Id.* at *40.
28. *Id.* at *27-28 (*citing D'Annunzio v. Prudential Ins. Co.*, 192 N.J. 110 (2007); N.J.S.A. 34:19-1 to -8).
29. *Id.* at *30.
30. *Id.* at *42.
31. *Id.* at *27-28.
32. *Id.* at *28.
33. *Ibid.*
34. *Id.* at *40.
35. *Id.* at *36.
36. *Id.* at *37.
37. *Id.* at *42-43.
38. *Id.* at *42.
39. *Id.* at *40.

Commentary

Sleepy's: At Long Last, a Potential Sweet Dream for Remedial Statute Uniformity?

by Neil H. Deutsch and Brittany L. Primavera

Earlier this year, the Supreme Court of New Jersey invited courts to utilize a more liberal approach in determining whether a plaintiff is considered an employee or an independent contractor in the context of remedial legislation. In *Hargrove v. Sleepy's LLC*, the Supreme Court held that the proper test in governing employment status determinations for wage-payment and wage-and-hour claims is the ABC test.[1] The Court rejected the more narrow right to control, hybrid, and economic realities tests, as they all fail to adequately protect income security for workers.[2] The basis for the Court's holding was grounded in furthering the remedial purpose behind both the New Jersey Wage Payment Law (WPL) and the New Jersey Wage and Hour Law (WHL). The Court noted that the WPL and WHL should be liberally construed to effectuate the purpose of "protect[ing] employees from unfair wages and excessive hours."[3]

The ABC test, derived from the New Jersey Unemployment Compensation Act,[4] can be considered the most liberal of standards for determining employment status by shifting the burden to the employer to prove the individual is *not* an employee. As such, the employer is required to make all three of the following showings: 1) that an individual was and is free from control or direction in their performance for the employer, 2) the service provided by the individual is outside the usual course of business of the service performed or that the service is performed outside the places of business of the enterprise, and 3) that the individual is "customarily engaged" in an independent occupation or profession.[5] If the employer fails to satisfy any of these criteria, the individual will be classified as an employee.[6]

Although the Supreme Court did not speak directly to the issue, *dicta* suggests the appropriate test in determining employment status for purposes of remedial statutes, such as the Law Against Discrimination (LAD), is the ABC test.[7] As a result, LAD plaintiffs may have a far easier time gaining protection in the future. The Court recognized that the LAD and the Conscientious Employee Protection Act (CEPA), "[s]eek to provide the broadest coverage to root out discrimination in the workplace and to protect individuals who speak out against workplace practices contrary to public interest."[8] Acknowledging the legislative purpose behind New Jersey's anti-discrimination and whistleblower statutes as remedial, the Court made a point to briefly distinguish the *D'Annunzio* test, the current test applied to determine employment status for LAD and CEPA cases, from the ABC test.[9]

While the *Sleepy's* Court recognized that the *D'Annunzio* test identified the three factors it deemed most critical to the employment status determination, the Appellate Division nonetheless adopted the 12-factor *Pukowsky* test in its entirety, thereby utilizing a totality-of-the-circumstances approach to the inquiry.[10] The Court went on to conclude that the better test in determining employment status, at least for purposes of the WPL and WHL, is the more predictable ABC test.[11] In sum, "…[p]ermitting an employee to know when, how, and how much he will be paid requires a test designed to yield a more predictable result than a totality-of-the-circumstances analysis that is by its nature case specific."[12]

The Effect of New Jersey's Remedial Legislation in the Workplace

Historically, New Jersey has been considered a pioneer in establishing worker protections and rights under the law.[13] The Legislature has been able to recognize the changing landscape and realities of the workplace and draft its remedial statutes accordingly.[14] In line with its intent to protect workers, New Jersey enacted

broad anti-discrimination and anti-retaliation statutes.[15] The LAD is unique, social legislation designed to afford broad protection to employees.[16] The LAD, as well as CEPA, were broadly drafted in order to secure the greatest amount of protections for workers, to further the public policy of eradicating discrimination in the workplace, and to encourage workers to blow the whistle on corrupt employer practices.[17]

The protections embodied within New Jersey's anti-discrimination and anti-retaliation statutes, and the scope of employer liability, far surpasses those found under federal law and in other states.[18] Illustrating this purpose is the Legislature's broad definition of the term 'employee.' In defining the term, the LAD states: "'Employee' does not include any individual employed in the domestic service of any person."[19] The definition for employer is equally as broad. Thus, the inclusive use of the term 'employee' is indicative of the Legislature's intent to encompass, as opposed to limit, the pool of workers classified as employees.

With the ever-increasing number of New Jersey workers being identified as non-standard employees, it has become critically important for courts to be mindful to set a clear and concise standard in determining workers' true status. Data compiled by the Bureau of Labor Statistics in 1995 shows that 93 percent of the American workforce was comprised of full- and part-time employees or "staff."[20] This labor statistic remained approximately the same until the mid-2000s when the labor force began to see a shift in direction with 15 percent of the workforce being classified as contingent labor (for example, freelancers, temporary workers, contractors, and specialists).[21] In 2006, the U.S. General Accountability Office reported that approximately 31 percent of the workforce was employed on a contingent basis.[22] This was the last comprehensive survey conducted by the government regarding the rise of this segment of the labor force.[23]

According to a more recent report prepared by the Freelancers Union and Elance-oDesk Inc., approximately 53 million Americans, or 34 percent, of the country's workforce qualify as contingent workers.[24] Moreover, over 80 percent of large corporations plan to utilize this contingency of workers in upcoming years.[25] These numbers are predicted to grow exponentially by the year 2020 in order to accommodate the current economic market.[26] The statistics indicate that with the percentage of contingent labor rising, enterprises must make every effort to incorporate these workers into their business model in a meaningful way. However, companies may seize the opportunity to profit from this contingent group of workers, allowing them to lower costs and leave workers without legal protections. Robert Reich, former secretary of labor, noted that perhaps an up-to-date, accurate employment census would better guide policymakers in addressing these issues.[27] Reich also observed that independent contractors, "don't have the workforce protections that have developed over the last 80 years. They are simply on their own."[28]

It is evident that policymakers did not foresee how the landscape of the labor force would change, warranting a new, modern employment model.[29] This lack of foresight encourages the unacceptable employer practice of labeling an individual as an independent contractor who is performing under the control of the employer and who is functionally integrated into the company's enterprise.

Arguably, for purposes of remedial statutes aimed at serving the public interest such as the LAD and CEPA, the distinction between employee and independent contractor seems less important.[30] It makes little sense to interpret Section 12(l) of the LAD to protect one group of workers from certain adverse employment actions, including sexual harassment, while excluding another group. Unfortunately, these are the unintended consequences of this interpretation.

While the case law is sparse on this issue, the New Jersey Appellate Division in *Rubin v. Chilton Memorial Hospital*, provided some clarity. The Appellate Division agreed with the trial judge that the criteria set forth in *Pukowsky* should govern the determination of whether the plaintiff pathologists, who had a contract to operate the defendant hospital's pathology department, were considered employees for purposes of protection under subsection (a) of the LAD.[31] However, the Court agreed with the plaintiffs' alternative argument that if they were not considered employees under subsection (a) of the LAD, they qualified under subsection (l). N.J.S.A. 10:5-12(l) states in relevant part that it is unlawful:

> l. For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of race, creed, color, national origin, ancestry, age sex...of such other person....[32]

The Appellate Division held that while subsection (a) applied to employees, the conduct proscribed under subsection (l) is reserved for non-employee relationships, including that of independent contractors.[33]

The language of subsection (l) is not clear concerning adverse employment actions that do not relate to entering into or ending non-employee relationships. This provision, seemingly, was intended to cover circumstances surrounding refusal to deal with true independent contractors such as salespeople and one-time service providers (for example, plumbers, electricians, etc.). However, misclassified 1099 tax status workers are left without protection under the LAD in the event they are not promoted based on an unlawful characteristic, or if they are sexually harassed.[34]

The uniform application of the ABC test would remove any possible doubt regarding worker classification, and thus negate the need for clarification of the type of adverse employment action subsection (l) covers.[35] Applying the three criteria outlined under the ABC test, creates a difficult, well nigh impossible, burden for the employer to overcome in seeking to classify a worker as an independent contractor. For purposes of the LAD, with the application of the ABC test, subsection (l) would protect the specialized group of workers it intended to include.

Based on the recent trend in case law, had the Appellate Division heard *Rubin* after *Sleepy's* the analysis regarding the plaintiffs' employment classification may have been different. Under the more predictable ABC test, the facts of *Rubin* support the plaintiffs' argument that they should have been considered employees of the defendant hospital for the purpose of LAD protection.

The Recent Trend in Case Law in Interpreting New Jersey's Remedial Statutes in Light of the Modernized Workplace

The current standard adopted by the Court in determining employee status under both the LAD and CEPA is the *D'Annunzio* test. The *D'Annunzio* test is a hybrid of both the right to control test and the economic realities test derived from the criteria set forth in *Pukowsky v. Caruso*,[36] which relied on *Franz v. Raymond Eisenhardt & Sons*.[37] The *Franz* Court introduced this hybrid test by evaluating 12 factors to determine employment status. In implementing this 12-factor test, the Court recognized that employee status could exist in circumstances where the individual's work or services were integral to the employer's business, despite the individual's ability to work outside the scope of the employer's enterprise.[38]

Eight years later, the Appellate Division in *Pukowsky* was faced with a similar question in having to determine whether the plaintiff, a skating instructor, was an employee for the purpose of LAD protection.[39] After applying the somewhat involved 12-factor approach introduced in *Franz*, the court held that because the instructor taught her students in the defendant's skating rink but recruited the students herself and was paid directly by them, she was classified as an independent contractor.[40]

Finally, in *D'Annunzio*, when presented with the task of determining employment status for the purpose of CEPA protection, the Court stated that, "exclusive reliance on a traditional right-to-control test to identify who is an 'employee' does not necessarily result in the identification of all those workers that social legislation seeks to reach."[41] The Court then emphasized the importance of three of the 12 factors adopted in *Pukowsky/Franz* when faced with an employment status determination in the context of remedial legislation.[42] The factors include: "(1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue."[43]

Finally, the Supreme Court in *Sleepy's* recognized that because the WPL and WHL are remedial statutes, they should be, "construed liberally to effectuate its purpose."[44] To that end, the Court held that the appropriate test in determining whether an individual classifies as an employee should be the ABC test.[45] Consequently, the Court may have just placed employers in a checkmate.

Single-Test Theory

The *dicta* embedded in the Supreme Court's holding in *Sleepy's* has invited courts to consider applying the more liberal ABC test to additional remedial statutes such as the LAD and CEPA. The expansion will provide additional legal protections to a larger universe of workers while simultaneously reducing state and federal costs. The Court's holding reflects a movement to enforce the expansive definition of the term 'employee' and an inclination to shift the burden to the employer to demonstrate employee status. Consequently, employers need to take heed of this shifting legal landscape to

avoid potential misclassification and its attendant consequences not only in WPL and WHL cases, but LAD and CEPA cases as well. A single, uniform test to determine employment status will serve both employers and workers well;[46] this new, uniform approach will effectively address the modern economic paradigm of increased employer attempts to classify workers as independent contractors.

As discussed above, misclassification in the labor force has led to negative societal implications. Instead of forcing employers to untangle conflicting frameworks[47] in determining employment status, both public policy and employer/worker concerns are best served in the application of a single, uniform test for all remedial statutes.

Neil Deutsch is a founding partner of Deutsch Atkins, P.C. and has practiced employment law since 1989. Brittany L. Primavera is an associate with the law firm Deutsch Atkins P.C., in Hackensack, and the former law clerk for the Hon. Lisa A. Firko. She represents both employers and employees in a wide variety of employment matters.

Endnotes

1. *Hargrove v. Sleepy's LLC*, No. 072742, 2015 N.J. LEXIS 38, at *2-3 (Jan. 14, 2015).
2. *Id.* at *28-35.
3. *Id.* at *24 (*citing In re Raymour & Flanigan Furniture*, 405 N.J. Super. 367, 376 (App. Div. 2009) (*quoting Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 259 (3d Cir. 1999) (citations omitted).
4. N.J.S.A. 43:21-19(i)(6).
5. *Sleepy's*, 2015 N.J. LEXIS 38, at *25 (*citing* N.J.S.A 43:21-19(i)(6)).
6. *Id.*
7. *Id.* at *42.
8. *Id.* at *41.
9. *Id.* at *42.
10. *Id.*
11. *Id.* at *42-43.
12. *Id.* at *42.
13. Richard A. West Jr., No Plaintiff Left Behind: Liability for Workplace Discrimination and Retaliation in New Jersey, 28 *Seton Hall Legis. J.* 127 (2003).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* (*citing Cedeno v. Montclair State Univ.*, 750 A.2d 73, 75 (2000) ("Our courts have long recognized that the important public policies underlying the LAD and CEPA require these laws to be liberally construed"); *See also Goodman v. London Metals Exch., Inc.*, 86 N.J. 19, 30, 429 (1981), ("The Legislature has given the Law Against Discrimination a special niche in the legislative scheme").
18. West, *supra* note 13.
19. N.J.S.A. 10:5-5f.
20. Jeff Wald, What The Rise Of The Freelance Economy Really Means For Businesses, *Forbes*, (July 1, 2014, 7:37 AM), http://www.forbes.com/sites/waldleventhal/2014/07/01/a-modern-human-capital-talent-strategy-using-freelancers/.
21. *Id.*
22. Lauren Weber, One in Three U.S. Workers is a Freelancer, *The Wall Street Journal*, (Sept. 4, 2014, 9:45 AM EST), http://blogs.wsj.com/atwork/2014/09/04/one-in-three-u-s-workers-is-a-freelancer/.
23. *Id.*
24. *Id. See also* Intuit 2020 Research Series, *Twenty Trends that will Shape the Next Decade*, (Oct. 2010), http://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf (indicating that 25-30% of our country's workforce consists of contingent workers).

25. Intuit 2020 Research Series, *supra* note 24.
26. Wald, *supra* note 20.
27. Weber, *supra* note 22.
28. *Id.*
29. *Id.*
30. Brief of *Amicus Curiae* National Employment Lawyers Association/New Jersey at 10, *D'Annunzio v. Prudential Ins. Co.*, No. 107097 (N.J. Sept. 22, 2006).
31. *See* N.J.S.A. 10:5-12(a) (stating in relevant part: "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual...to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment").
32. *Rubin v. Chilton Mem'l Hosp.*, 359 N.J. Super. 105, 110 (App. Div. 2003) (*citing* N.J.S.A. 10:5-12(l)).
33. *Id.* at 111.
34. Issues involving workplace discrimination are not covered under subsection (l) of the LAD as this section only covers refusal to do business or contract with an individual.
35. To date, the position that *Rubin* is limited to its facts has not been asserted. Rather, *Rubin* has been interpreted to include all terminated independent contractors.
36. 312 N.J. Super. 171, 182-83 (App. Div. 1998).
37. 732 F. Supp. 521, 528 (D.N.J. 1990).
38. *Sleepy's*, 2015 N.J. LEXIS 38, at *30-31.
39. *Id.* at *31.
40. *Id.*
41. *Id.* (*quoting D'Annunzio*, 192 N.J. at 121).
42. *See id.* at *32.
43. *Sleepy's*, 2015 N.J. LEXIS 38, at *32-33 (*quoting D'Annunzio*, 192 N.J. at 122).
44. *See id.* at *24 (*citing N.J. Dep't of Labor v. Pepsi-Cola Co.*, 170 N.J. 59, 62 (2001)).
45. *See id.* at *42-43.
46. United States Department of Labor, *Commission on the Future of Worker-Management Relations*, § 5, ¶ 13, http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm#Table.
47. *Id.* at ¶ 9.

A Funny Thing Happened On the Way to the (Proper) Forum: Dodd-Frank Whistleblower Retaliation Claims May Be Arbitrated

by Aaron Taishoff

In *Khazin v. TD Ameritrade Holding Corp.*,[1] the Court of Appeals for the Third Circuit addressed an issue of first impression: namely, do the Dodd-Frank Act's whistleblower retaliation protection provisions prohibit the enforcement of pre-dispute arbitration clauses? The resounding answer was "no."

Legislative History

With the recent emphasis placed on reforming the financial system in the wake of several widespread regulatory and legal proceedings that took place beginning in the mid-2000s, Congress passed several new pieces of legislation to address, and hopefully prevent, any reoccurrence of such unlawful conduct. In July 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act,[2] which was officially described by Congress as "an Act to promote the financial stability of the United States by improving accountability and transparency in the financial system."[3]

Dodd-Frank is a lengthy and sweeping piece of legislation that serves several purposes. The act amended numerous pre-existing statutes, such as the Securities Exchange Act of 1934, the Investment Advisors Act of 1940 and the Sarbanes-Oxley Act (SOX), but also created entirely new regimes, such as the Office of the Investor Advocate and a whistleblower bounty program, to be administered by the U.S. Securities and Exchange Commission (SEC).[4] Additionally, Dodd-Frank explicitly prohibits retaliation against any individual who provides information in connection with securities laws violations, and the act creates a private right of action for recipients of any such retaliation.[5]

Procedural Background

In *Khazin*, Boris Khazin, a former investment oversight officer at Amerivest Investment Management, LLC, initiated an action against his former employer and its related entities (collectively, TD Ameritrade).[6] Khazin's complaint, filed in the U.S. District Court for the District of New Jersey,[7] alleged that Khazin was terminated by TD Ameritrade in 2012 in retaliation for his reporting of purported securities violations to his superiors.[8] Khazin's complaint contained one cause of action against TD Ameritrade—a violation of Dodd Frank's anti-retaliatory provisions.[9]

In response to the complaint and prior to filing an answer denying all of the complaint's allegations, TD Ameritrade pointed to an agreement that Khazin signed on his first day of employment, Oct. 26, 2006, which mandated that all disputes between the parties be arbitrated either before the Financial Industry Regulatory Authority (FINRA) or the American Arbitration Association (AAA).[10] Accordingly, TD Ameritrade sought to enforce this agreement and have the claims arbitrated, rather than litigated in federal civil court.[11]

The parties were unable to resolve the issue of the proper forum for Khazin's claims among themselves and, therefore, TD Ameritrade filed a motion to dismiss the complaint for failure to adequately plead a Dodd-Frank whistleblower retaliation claim, or, in the alternative, compel arbitration of Khazin's claim to AAA.[12] The defendants argued that Khazin did not qualify as a true whistleblower under Dodd-Frank because he did not report the suspected violations directly to the SEC.[13] In the alternative, the defendants argued the Dodd-Frank claim should be compelled to AAA to be arbitrated along with Khazin's prior causes of action for two specific reasons: 1) Dodd-Frank does not prohibit pre-dispute arbitration provisions, and 2) Dodd-Frank should not be given retroactive effect to nullify an agreement that was signed prior to Dodd-Frank's enactment.[14]

Khazin opposed the motion and cited to Dodd-Frank's amendments to SOX and the 1934 act, which state that pre-dispute arbitration provisions are unenforceable under those statutes.[15] Khazin further argued

that Congress's intent behind Dodd-Frank was to broaden the opportunities for a whistleblower to come forward with information and to encourage such behavior.[16] Khazin stated that enforcing the agreement's arbitration provision did not align with Congress's intent.[17]

The district judge denied the motion to dismiss, holding that the reporting of suspected securities laws violations internally is sufficient to qualify as a whistleblower under Dodd-Frank,[18] and granted the motion to compel the claim to AAA arbitration on the grounds that Dodd-Frank should not be given retroactive effect.[19]

Khazin appealed the decision to the Court of Appeals for the Third Circuit.[20] On appeal, the briefing centered on the issue of whether the district court erred in holding that Dodd-Frank should not to be given retroactive effect.[21] However, at oral argument a three-judge panel pressed both sides to address a separate, but related, issue: the distinction between Dodd-Frank's amendments to SOX and Dodd-Frank's protections against retaliation for whistleblowers.[22] At the panel's request, both sides submitted supplemental letter briefs on this specific issue.

In its opinion affirming the district court's decision, the Third Circuit thoroughly analyzed the relevant statutory texts and legislative history and held that Dodd-Frank amended the provisions of SOX to prohibit the enforcement of pre-dispute arbitration provisions for claims brought *pursuant to SOX*, but it did not do the same with respect to claims brought solely under Dodd-Frank.[23] The Third Circuit's opinion fell in line with the two other federal courts that previously addressed this exact issue: the district courts of the Southern District of New York in *Murray v. UBS Sec., LLC*[24] and the Central District of California in *Ruhe v. Masimo Corp.*[25]

The Differences Between Claims Brought Pursuant to SOX and Dodd-Frank

The distinction highlighted in *Khazin* is an important one for employers, employees and employment attorneys alike.

As referenced above, Dodd-Frank amended several pre-existing statutes and codified brand new programs and legislative schemes. Specifically, Section 992 of Dodd-Frank[26] added Section 21F to the 1934 act.[27] Section 21F includes a subparagraph that prohibits an employer from retaliating against employees performing a whistleblowing activity (for example, reporting suspected securities laws violations).[28] There is no mention of the word arbitration anywhere within Section 21F.[29]

Separately, Dodd-Frank amended SOX, specifically 18 U.S.C. § 1514A, by, among other things, adding subparagraph (e)(2): "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising *under this section*."[30] The *Khazin* court noted the private right of action pursuant to Dodd-Frank "is not located in the same title of the United States Code, let alone the same section" as the SOX private right of action.[31] Clearly, Congress intended for the phrase "under this section" to explicitly refer to claims brought pursuant to SOX, that is, 18 U.S.C. § 1514A, and *not* Dodd-Frank, or 15 U.S.C. § 78u-6.[32] Therefore, the express language of Dodd-Frank does not bar the enforcement of an arbitration agreement for employment-related disputes.[33]

Both SOX and Dodd-Frank enable an aggrieved whistleblower to bring a private action; however, such claims are substantively different with distinct definitions of prohibited conduct, statutes of limitations and remedies.[34] Accordingly, it should not be surprising that SOX and Dodd-Frank have separate standards for the enforcement of pre-dispute arbitration agreements.[35]

Further, the precedential decisions in *Ruhe*, *Murray*, and *Khazin* provide the basis for Dodd-Frank whistleblower claims to be arbitrated in JAMS,[36] FINRA[37] and AAA.[38] The arbitration process has several advantages over civil litigation, in that discovery is expedited and matters are typically resolved efficiently, with significantly lower costs incurred by all parties. Employers frequently insert a mandatory arbitration provision into employment agreements in order to provide a level of certainty and predictability with respect to employment matters.

Implications Going Forward

As Dodd-Frank is still a relevantly new piece of legislation, and federal courts continue to publish decisions interpreting its provisions, the statute is evolving. However, for matters adjudicated in New Jersey, Pennsylvania, or Delaware or those matters governed by the laws of these states, the *Khazin* decision presents a clear directive from the Third Circuit that claims brought pursuant to Dodd-Frank's anti-retaliation protection provisions may be arbitrated if the parties entered into an agreement with a mandatory pre-dispute arbitration provision. Attorneys representing employees or employers in connection with issues relating to Dodd-Frank's whistleblower provisions should diligently monitor this area of law and stay abreast of all new developments shaping this legal landscape. ■

Aaron Taishoff is a senior associate at Baritz & Colman LLP in its New York City office. The firm represents the defendants in the Khazin v. TD Ameritrade Holding Corp., et al. case and regularly represents corporate clients in employment-related matters.

Endnotes

1. 773 F.3d 488 (3d Cir. 2014).
2. Public Law 111-203, 124 Stat. 1376 (2010).
3. *Id.*
4. *Id.*
5. Presently, an on-going debate exists within the U.S. federal court system regarding whether an individual is required to provide information regarding potential securities laws violations directly to the SEC in order to qualify for the anti-retaliatory protections afforded to whistleblowers, as defined by Dodd-Frank. *Cf. Asadi v. G.E. Energy*, 720 F.3d 620 (5th Cir. 2013); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013) *with Murray v. UBS Sec., LLC*, No. 12-cv-5914(JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Verfuerth v. Orion Energy Systems, Inc.*, No. 14-cv-352(WCG), 2014 WL 5682514 (Nov. 4, 2014).
6. *Khazin*, 773 F.3d at 489.
7. Khazin initially filed a complaint against TD Ameritrade in the New Jersey Superior Court, Hudson County, and alleged several causes of action including, but not limited to, a violation of Dodd-Frank, a violation of the New Jersey Conscientious Employee Protection Act (CEPA), wrongful termination and defamation. *Khazin v. TD Ameritrade Holding Corp.*, No. 13-cv-4149(SDW), 2014 WL 940703, *2 (D.N.J. March 11, 2014). The presiding judge dismissed Khazin's Dodd-Frank cause of action, without prejudice, on the basis that federal courts have exclusive jurisdiction over Dodd-Frank claims, and compelled the remaining causes of action for arbitration before AAA. *Id.*
8. *Id.* at *1.
9. *Id.* at *2.
10. *Id.* at *7.
11. *Id.* at *6-7.
12. *Id.*
13. *Id.* at *4.
14. *Id.* at *7.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at *4-6.
19. *Id.* at *7-8.
20. *Khazin*, 773 F.3d at 489.
21. *Id.* at 490-1.
22. *Id.* at 491.
23. *Id.* at 492-3.
24. No. 12-cv-5914(KPF), 2014 WL 285093 (S.D.N.Y. Jan. 27, 2014).
25. No. 11-cv-00734(JCG), 2011 WL 4442790 (C.D. Cal. Sept. 16, 2011).
26. 15 U.S.C. § 78u-6.
27. *Id.*
28. 15 U.S.C. § 78u-6(h).
29. *Id.*
30. 18 U.S.C. 1514A(e)(2) (emphasis added).
31. *Khazin*, 773 F.3d at 492.
32. *Khazin*, 773 F.3d at 492-3; *Murray*, 2014 WL 285093, at *11.
33. *Khazin*, 773 F.3d at 492.
34. SOX requires claims to be brought directly before the U.S Department of Labor, via the Occupational Safety & Health Administration (OSHA), while Dodd-Frank has no exhaustion requirement, SOX's statute of limitations is shorter than that proscribed by Dodd-Frank and a SOX whistleblower may "obtain back pay, with interest" while a Dodd-Frank whistleblower may be "entitled to 2 times the amount of back pay otherwise owed to the individual, plus interest." *Khazin*, 773 F.3d at 491.
35. *Khazin*, 773 F.3d at 493 ("The fact that Congress did not append an anti-arbitration provision to the Dodd–Frank cause of action while contemporaneously adding such provisions elsewhere suggests, however, that the omission was deliberate.")
36. *Ruhe*, 2011 WL 4442790, at *5.
37. *Murray*, 2014 WL 285093, at *9.
38. *Khazin*, 773 F.3d at 495.

Going to Bat Against the Patient Safety Act's Privilege of Self-Critical Analysis

by Dylan C. Dindial

Imagine a large, dark room filled with doctors, from the first row to the nosebleed seats. A lone doctor stands in front of his seated peers and explains an error he made in treating a patient. The doctor receives feedback and, together with his peers, discusses what could have been done differently and what changes will be made in the future to prevent harm to patients. The Patient Safety Act[1] (PSA) seeks, in part, to establish this open dialogue among members of the medical community, while at the same time offering some protection by cloaking this self-critical analysis in a privilege of confidentiality. Under the PSA, any documents, materials, or information developed as part of this reflective process are not discoverable or admissible in a civil, criminal, or administrative proceeding.[2] As patients, practitioners want their doctors to work together to provide the best treatment possible. However, as employment litigators, the PSA can be problematic by blocking discovery of legitimate nondiscriminatory reasons as confidential and providing a shield for hospitals to discriminate against employees.

So again, imagine a young, doctor entering a practitioner's office and describing the rampant racial discrimination he experienced at the hands of his supervisors. He was the top of his class in medical school and conducted research with a world-renowned surgeon. However, when he began working at the hospital, comments about his race were whispered between doctors and the more-desirable assignments were given to his peers. Starting a few months before he was terminated, he was called before the patient safety committee numerous times and was ultimately terminated for "too many errors." During the consult, he was distressed; he had never heard of any other doctors being forced to appear before the committee for such minor errors and doesn't understand how any aspect of his treatment of patients warranted his termination. In order to prove pretext, the practitioner will need to know what happened at those committee meetings, but under the PSA this information may remain unattainable.

Strike One: The Statute

The act requires all healthcare facilities to develop a patient safety committee and patient safety plan to monitor and facilitate the mandatory reporting of serious preventable adverse events (those that result in death, disability, or loss of a body part or function) to the Department of Human Services (DHS).[3] The act also encourages the voluntary disclosure and analysis of preventable events (those that occur because of an error or system failure), adverse events (negative consequence of care resulting in injury or illness), and near misses (those that could have resulted in an adverse event).[4] The patient safety plan must include "a process for teams of facility staff, which teams are comprised of personnel who are representative of the facility's various disciplines and have appropriate competencies, to conduct analyses of near-misses, with particular attention to serious preventable adverse events and adverse events."[5]

More specific requirements of the PSA are set forth in the New Jersey Administrative Code, Section 8:43E-10.1 to -10.11.[6] For example, Section 8:43E-10.6 defines serious preventable adverse events and the processes by which those events must be reported to DHS. Sections 8:43E-10.4 and 8:43E-10.5 discuss the requirements for a patient safety plan and the composition and responsibilities of a patient safety committee. A patient safety plan must designate processes for reporting preventable adverse events, reducing the probability of their occurrence, and monitoring changes recommended by the patient safety committee.[7] In addition, a patient safety committee is responsible for developing and reviewing the patient safety plan and must consist of a chairperson, a physician medical director, a chief nursing executive and other members based on the relevance of their job and experience to the conduct under investigation.[8] It cannot constitute a subcommittee of another committee, must meet at least quarterly, and minutes must be kept for all meetings.[9]

In addition to specifying requirements for the patient safety plan, the act also protects healthcare facilities from mandatory disclosure (including both the discovery process and trial) of "[a]ny documents, materials, or information developed by [them] as part of a process of self-critical analysis pursuant to" the act.[10] However, this privilege of confidentiality is subject to limitations. Subsection (h) states that:

> the provisions of this act shall not be construed to increase or decrease, in any way, the availability, discoverability, admissibility, or use of any such documents, materials, or information if obtained from any source or context other than those specified in this act.[11]

Christy v. Salem: A Legislative Curveball

Just prior to the enactment of the PSA in Feb. 2004, the Appellate Division issued a decision in *Christy v. Salem*.[12] In *Christy*, the Appellate Division examined the current state of the privilege of self-critical analysis. Most significantly, the court discussed *Payton v. New Jersey Turnpike Authority*,[13] where the New Jersey Supreme Court declined to adopt a full privilege of self-critical analysis,[14] instead requiring a case-by-case balancing test.[15] This balancing test weighed the interest in confidentiality with the interest in disclosure to determine if documents were protected by the privilege. In conducting this balancing test, the *Payton* court distinguished between cases that balance a private interest in disclosure with a public interest in confidentiality (such as medical malpractice and wrongful death claims) from those that balance a public interest in disclosure with a public interest in confidentiality.[16] The court held that employment discrimination cases fall within the latter category because of the state's strong interest in the eradication of discriminatory treatment in employment and the importance of discovery in furtherance of that goal.[17] In employment discrimination cases, the court found that the "interests in disclosure are strong enough, in their reflection of important public policies, to outweigh...confidentiality concerns under most, if not all, circumstances."[18]

Unlike the *Payton* court, the Appellate Division in *Christy* was faced with a private interest in disclosure when a plaintiff in a medical malpractice action sought disclosure of a peer review committee report. The court noted the distinction between private and public interests in *Payton* and found the "plaintiff's interest in disclosure [in this case did] not have the strong reflection of important public policies to outweigh confidentiality concerns under most, if not all, circumstances."[19] With this principle in mind, the *Christy* court conducted the *Payton* balancing test and held that the purely factual material in the peer committee review report was always discoverable,[20] but opinions, analysis, and findings of fact ("evaluative and deliberative") were not subject to discovery.[21]

A Late Inning Substitution: Subsection (k) and the Legislature's Citation to *Christy*

In response to *Christy*, the Assembly Health and Human Services Committee (the Assembly) amended the PSA to include subsection (k). Subsection (k) provides that

> [n]othing in this act shall be construed to increase or decrease the discoverability, in accordance with *Christy v. Salem*, of any documents, materials or information if obtained from any source or context other than those specified in this act.[22]

However, in its statement to the Senate before the final vote on the act, the Assembly merely quoted the amended language without providing any additional insight or notes about their intent in including this language.[23] The reference to *Christy* in the language of the statute resulted in significant confusion about the discoverability of peer review committee documents and whether the Court's decision in *Christy v. Salem* was still valid law after the enactment of the PSA.[24]

The Appellate Division decided the issue of the impact *Christy* has on the PSA's confidentiality provisions in *Applegrad v. Bentolila*.[25] In coming to its decision, the Appellate Division interpreted the Legislature's intent and found that, while the inclusion of a legal citation to *Christy* was "unusual," it was merely "an eleventh-hour attempt by the legislators to deal with the brand new case law."[26] According to the court, the Legislature's use of the word "information" in the language of the PSA's confidentiality provisions is evidence that it meant to protect from disclosure both facts and interpretations developed during the PSA process. Thus, under the PSA, *all* material is absolutely privileged and the factual/evaluative and deliberative distinction in the *Christy* holding does not apply.[27]

Instead, the *Applegrad* court focused on the phrase "if obtained from any source or context other than those specified in this act" to explain the legislative intent behind subsection (k). The court held that documents:

> exclusively created in compliance with the PSA and its associated regulations, and not created for some other statutory licensure purpose are absolutely privileged from disclosure under the PSA…However, if the specified procedures of the PSA and the related regulations have not been observed, or if the documents have been generated for additional non-PSA purposes, then the PSA's absolute privilege does not apply. Instead, other legal principles govern, such as those expressed in *Christy*, depending on the kind of document involved.[28]

As a result, under *Applegrad* confidentiality turns on an exclusivity test where courts are required to determine whether a document was developed solely under the procedures set forth in the PSA or whether it was obtained from other sources or contexts.[29] Those documents, materials, and information developed exclusively under and in compliance with the PSA are absolutely privileged from disclosure, regardless of whether they are factual or evaluative and deliberative. Materials created for an alternative statutory purpose or by procedures that fail to comply with the PSA, on the other hand, receive only the confidentiality outlined by *Christy* and other applicable law.[30]

On Sept. 29, 2014, the New Jersey Supreme Court affirmed the Appellate Division's interpretation of the law with respect to confidentiality protections provided by the PSA.[31] According to the Court, the statutory privilege provided by the PSA and associated regulations (specifically, Section 8:43E-10.9 of the New Jersey Administrative Code) "applies only to documents created exclusively during self-critical analysis conducted during one of three specific processes: the operations of the patient or resident safety committee pursuant to *N.J.A.C.* § 8:43E-10.4, the components of a patient or resident safety plan as prescribed by *N.J.A.C.* § 8:43E-10.5, or reporting to regulators under *N.J.A.C.* § 8:43E-10.6."[32] The Court found that "medical and administrative professionals are on notice of the exact procedures that they must follow in order to ensure the confidentiality of information pursuant to the PSA."[33]

Getting on Base: What's Discoverable?

After the Supreme Court's decision in *Applegrad*, the law with respect to confidentiality under the PSA is clearer: PSA peer review documents are privileged. However, there are some *caveats* to this confidentiality. First, the PSA does not insulate the underlying facts relating to patient error, if those facts can be learned from an independent source.[34] In other words, the mere fact that a statement was present in a document "developed by a health care facility as part of a process of self-critical analysis" pursuant to this act does not bar its discoverability if the statement is contained in a document that is otherwise discoverable.

Second, and most importantly, the healthcare facility must strictly comply with the requirements of the PSA in order to retain the absolute privilege.[35] Merely labeling hospital personnel or procedures as 'PSA' is not sufficient to trigger the privilege.[36] Only the actual functions of the individuals and procedures involved is relevant to judicial review of whether a document is protected by the PSA. Thus, if the patient safety committee is not comprised of personnel who are representative of the facility's various disciplines and have appropriate competencies as required by subsection (b)(3), or if the PSA chair does not follow the procedures outlined in Section 8:43E-10.4 and Section 8:43E-10.5 of the New Jersey Administrative Code, or if the facility fails to follow the rules for reporting occurrences to DHS pursuant to subsections (c) and (d), PSA documents might be discoverable.[37]

In those cases where the creation of documents does not comply with the language of the PSA or the documents are obtained from a context other than the PSA, the privilege does not attach and a case-by-case analysis of whether the item should be disclosed must be conducted pursuant to *Christy v. Salem* and *Payton v. New Jersey Turnpike Authority.*

When reading *Christy* and *Payton* together in the employment law context, peer review documents of either a factual or evaluative and deliberative nature would likely be discoverable. This is because when balancing the public interest of confidentiality with the public interest in eradicating discrimination, the interest in disclosure will almost always outweigh the interest in confidentiality, allowing the documents to be discovered.[38] Thus, it is important for employment litigators to request information about a facility's PSA committee, plan, and other peer review processes in their interrogatories, document requests and/or depositions in order to

determine whether peer review committee documents were developed under and in compliance with the PSA. If not, they are likely discoverable under *Payton v. New Jersey Turnpike Auth.*

Dylan C. Dindial is an associate at Green Savits, LLC in Florham Park. She represents employees wrongfully terminated or otherwise injured by their employers.

Endnotes

1. N.J.S.A. 26:2H-12.23 to -12.25.
2. N.J.S.A. 26H-12.25(f)(1), (g)(1).
3. N.J.S.A. 26:2H-12.25(c)-(d).
4. N.J.S.A. 26:2H-12.25(e).
5. N.J.S.A. 26:2H-12.25(b)(3).
6. N.J.A.C. 8:43E-10.1 to -10.11.
7. N.J.A.C. 8:43E-10.5.
8. N.J.A.C. 8:43E-10.4.
9. N.J.A.C. 8:43E-10.4.
10. N.J.S.A. 26H-12.25(f)(1), (g)(1).
11. N.J.S.A. 26:2H-12.25(h).
12. *Christy v. Salem*, 366 N.J. Super. 535 (2004).
13. *Payton v. N.J. Tpk. Auth.*, 148 N.J. 524 (1997).
14. The self-critical analysis privilege is accepted in numerous jurisdictions and exempts from disclosure the deliberative and evaluative components of confidential materials to encourage candor and efforts to prevent future problems. *Id.* at 544.
15. *Id.* at 545-47.
16. *Id.* at 541-42.
17. *Ibid.* (citing to *Dixon v. Rutgers*, 110 N.J. 432, 451 (1988)).
18. *Id.* at 548.
19. *Christy*, 366 N.J. Super. at 541 (internal quotations omitted).
20. *Id.* at 543.
21. *Id.* at 544-45.
22. N.J.S.A. 26:2H-12.25(k).
23. Assembly Health & Human Servs. Comm., Statement to Senate Comm. Substitute for S.557, S.557, 211th Leg. (N.J. 2004).
24. *See Kowalski v. Palav*, L-4433-99, 2010 WL 4107751 (App. Div. Aug. 25, 2010), *Applegrad v. Bentolila*, L-0908-08, 2011 WL 13700 (App. Div. Jan 5, 2011), and *Muenken v. Toner*, L-591-06, 2011 WL 2694431 (App. Div. July 13, 2011) reflecting the varying decisions of the Appellate Division with respect to the PSA and its impact on *Christy v. Salem*.
25. *Applegrad v. Bentolila*, 428 N.J. Super. 115 (2012).
26. *Id.* at 144-47.
27. *Id.* at 147-48.
28. *Id.* at 122.
29. *Id.* at 148. Healthcare facilities have numerous methods of reviewing their practices and incidents that occur within the facility, including continuous quality improvement programs created pursuant to N.J.A.C. 8:43G-27.1 to -27.6, risk management assessments, and root cause analyses encouraged by the Joint Commission, a national accreditation body. *Applegrad*, 428 N.J. Super. 115, 130-33. If the "documents, materials or information" are obtained from one of these sources, they are not subject to protection from disclosure under the PSA. However, it is important to note, the utilization review process created under N.J.A.C. 8:43G-27.1 to -27.6 is subject to a separate confidentiality provision under N.J.S.A. 2A:84A-22.8.
30. *Applegrad*, 428 N.J. Super. at 147.
31. *Applegrad v. Bentolila*, 219 N.J. 449 (2014).
32. *Applegrad*, 219 N.J. at 468.
33. *Ibid.*
34. *Applegrad*, 428 N.J. Super. at 149.
35. *Id.* at 149.
36. *Id.* at 150.
37. *Applegrad*, 219 N.J. at 468.
38. *Payton*, 148 N.J. at 548.