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Message from the Chair

by Paulette Brown

Labor and employment law has consistently remained one of the hottest practice areas, with many law students and young lawyers seeking to become experts in this field. It's no small wonder. Our practice area affects the lives of everyday people and impacts everyone up to the highest echelons of international corporations. There is no escaping the impact of what labor and employment lawyers do every day.

While some of us have extraordinary opportunities to practice in non-traditional areas of employment law, deciding, for example, the implications of mergers of foreign companies and the ability to represent our clients headquartered in countries outside of the United States, most of us have no shortage of traditional opportunities to practice in areas that remain 'hot.' And with our ever-changing demographics, some of our traditional hot areas are expanding.

The laws against discrimination as they relate to sexual orientation, religion and disability are classic examples of how our area of practice is expanding. Likewise, violence and bullying have become particular areas of interests. Discrimination claims in all of these categories have risen exponentially over the past five years.

More specifically, we all know sexual orientation is not federally prohibited. However, laws in at least 21 states, including New Jersey's Law Against Discrimination, prohibit discrimination based upon sexual orientation and, in New Jersey, specifically, "gender identity or expression" and "affectional or sexual orientation" discrimination is protected in the same manner, for example, as race, nationality, ancestry and sex. Thus, we can expect to see many more of these cases for years to come.

Traditional claims relating to religious discrimination have risen more than 11 percent over the past several years and we are seeing more than 25,000 disability claims filed in a given year.

At the same time, non-traditional claims are also on the rise. As practitioners, we are now considering the impact of workplace violence and bullying. Almost 2 million workers are injured every year, much of it commencing with verbal bullying that then escalates into violence.

As advocates, we have a responsibility to represent our clients zealously in all of these areas. As leaders in the law, we also have a responsibility to be educators in the prevention of workplace discrimination. It's what we signed up to do. ■

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the Labor and Employment Law Quarterly or the New Jersey State Bar Association.

Message from the Editor

by Robert T. Szyba

The areas of labor and employment law are never dull, and the past few months have been no exception.

This issue of the *Labor & Employment Law Quarterly* features an analysis by Marshall B. Babson, Gena B. Usenheimer and Jade M. Gilstrap regarding developments in the National Labor Relations Board's definition of a joint-employer. Richard M. Schall then discusses his take on the reinvigoration of Section 7 rights under the National Labor Relations Act. Dean L. Burrell offers his analysis of the National Labor Relations Board's decisions in *Babcock* and *Wilcox*, and the developments concerning arbitral deferral standards.

Arbitration in the employment context is continually a hot topic, and this issue features a three-part series from three distinctly different perspectives. Joshua Knapp discusses the benefits of arbitration as a method of dispute resolution, offering the perspective of management. Andrew Dwyer advances a modest proposal from the perspective of employees. John Sands walks the line between both perspectives, offering the neutral's view, especially in light of recent case developments.

Dylan C. Dindial reviews the nuances of New Jersey's statewide ban the box legislation, the Opportunity to Compete Act. Andrew M. Moskowitz turns to recent cases, sharing his analysis of *Schiavo v. Marina District Development Co., LLC*, which addressed allegations of discrimination stemming from the BorgataBabes program and the Borgata Casino Hotel & Spa in Atlantic City.

New Jersey's whistleblowers made several appearances on the dockets, and Rachel London discusses the consequences and aftermath of the New Jersey Supreme Court's decision in *State v. Saavedra*. Claudia A. Reis discusses another important whistleblower case from the New Jersey Supreme Court, *Lippman v. Ethicon, Inc.*, addressing the statutory foundation rooted in the Conscientious Employee Protection Act that was at issue in the case. Kara A. MacKenzie analyzes a case from the Hudson County Superior Court, *Alpert v. Port Authority of New York and New Jersey*, pertaining to whistleblower protections under both New Jersey and New York law as they relate to employees of the bi-state agency.

Ty Hyderally and Luis Hansen dissect the Third Circuit's holding in *Bonkowski v. Oberg Industries, Inc.* and its impact on the scope of protections for employee hospital visits under the Family and Medical Leave Act.

This issue is bursting with analysis and insights into some of the major developments affecting the practice of labor and employment law. We hope you enjoy!

Tag, You're (Now) It: NLRB Changes the Game with Expansion to Definition of Joint-Employer

by Marshall B. Babson, Gena B. Usenheimer and Jade M. Gilstrap

After more than 30 years of applying a well-established joint-employer definition, the National Labor Relations Board (NLRB) has drastically changed the game by implementing a new, much broader standard, which will invite additional players to the collective bargaining table. The joint-employer concept recognizes that "two or more business entities are in fact separate, but that they share or codetermine those matters governing the essential terms and conditions of employment."[1] Until last year, the NLRB's joint-employer standard required that before an entity could be considered an employer, or a joint-employer, it had to first exercise "direct and immediate" control over the working conditions of the employees in question.[2] However, the NLRB's new joint-employer test encompasses employers who possess a right of control, exercised or not, over the terms and conditions of employment, who exercise control in a direct or indirect manner, or who are otherwise essential for meaningful collective bargaining.

It is the authors' view that this is an unwarranted and unprecedented change to the joint-employer standard, one that will have wide-ranging ramifications throughout the country, including, for example, increased potential liability for unfair labor practices not of the putative joint-employer's making, bargaining obligations with a union representing employees not directly employed, as well as unlimited exposure to secondary boycotts and other economic action against primary employers.

The NLRB's Former Standard Complied with the Common Law of Agency

Issues surrounding who is an 'employee' and who is an 'employer' are fundamental to the administration of the National Labor Relations Act (NLRA). The common law of agency provides the legal foundation for the NLRA by creating bargaining obligations for those deemed an employer and restricting secondary activity directed against entities who do not qualify as an employer. Congress directed in 1935, and again in 1947 via the Taft-Hartley amendments to the NLRA, that employee and employer status under the NLRA *must* be determined in accordance with the common law of agency.[3] Accordingly, before a separate business entity may be deemed a joint-employer with another, it must first be an employer of the employees in question, in accordance with the common law.

Congressional direction on this point has been explicit. First, in using the terms employee and employer in the NLRA without explanation of the terms' origins or bases, "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[4] Secondly, in 1947, Congress unambiguously directed that the NLRB is constrained by common law principles of agency when determining who is an employee and, consequently, who is an employer.[5] Among other changes, the 1947 Taft-Hartley amendments narrowed the definition of employee to exclude independent contractors. The amendment was designed to overrule the Supreme Court's earlier decision in *NLRB v. Hearst Publications, Inc.*,[6] which disregarded common law principles of agency to find that 'independent contractors' could be treated as employees under the NLRA.[7] Further, the House committee report accompanying the 1947 amendments harshly criticized the NLRB's then-recent decision in *Hearst*, noting the term employee:

> according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire...[and who] work for wages or salaries under *direct* supervision.
>
> It must be presumed that when Congress passed the Labor Act, it intended words it used

> [such as "employee"] to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up....It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished.[8]

Similarly, the 1947 amendments narrowed the definition of employer to only include persons who are "acting as an *agent* of an employer,"[9] rather than any individual "acting in the *interest* of any employer," as the statute previously read. This change, too, was designed to reinforce the applicability of agency law to the determination of who is an employer under the act.[10]

Under the former joint-employer analysis, the extent of an entity's control over the "essential terms and conditions of employment" turned on whether there was "a showing that the employer *meaningfully affects* matters concerning the employment relationship, such as hiring, firing, discipline, supervision and direction."[11] The "essential element [was] whether a putative joint-employer's control over employment matters [wa]s *direct* and *immediate*."[12] Under the former test, no single factor was dispositive as a matter of law in determining control, and the question of joint-employer status was assessed upon "the totality of the facts of the particular case."[13]

Despite this history and legal backdrop, in its Aug. 2015 decision in *Browning-Ferris Industries of California, Inc.* (*BFI*),[14] the NLRB adopted an exceedingly broad and unbounded test for joint-employer status, one that significantly departs from the former test and that is not bounded by the common law.

The NLRB's New Standard is Untethered to the Common Law of Agency

In its *BFI* decision, the NLRB adopted a far more expansive standard under which an entity is deemed an employer or a joint-employer if it "exercise[s] direct or indirect control over working conditions, ha[s] the unexercised potential to control working conditions, or where 'industrial realities' otherwise ma[k]e it essential to meaningful bargaining."[15] Although the NLRB majority attempts to shroud this new standard with a cloak of the "common law," this greatly expanded joint-employer standard is far broader than what the common law of agency permits. Significantly, this joint-employer standard cannot be squared with the language and legislative history of the NLRA, an act that is rooted in, and bounded by, the common law definition of employer and employee.

As a consequence of this broad, unbounded standard, a business could be deemed a joint-employer even though it freely contracts at arm's length only for the *ends* to be achieved at a given cost, not the *means* by which the ends are achieved and notwithstanding that it eschews any role in hiring, firing, directing employees or determining the terms and conditions of their employment. The new test may also force non-employer entities to participate in collective bargaining in circumstances where they have no control to set or negotiate terms and conditions of employment, and would have no authority to remedy unfair labor practices.

Although the majority seems to reject the General Counsel's insistence that "industrial realities" be considered in determining whether an entity is a joint-employer, this "rejection" appears to be in name only, as the majority's decision is seemingly grounded in industrial realities of the day, citing the realities of "today's economy" as the rationale for adopting the expanded standard.[16] Moreover, the majority expressly agrees with the General Counsel's position that the way "'separate entities have structured their commercial relationship' [*i.e.*, industrial realities] is relevant to the joint-employer inquiry."[17] Consequently, this new joint-employer standard may result in the implicit, if not explicit, consideration of "industrial realities," thereby exerting—in varying degrees—an 'indirect' influence over the terms and conditions of employment over the employees in question. Further, implementation of this test will likely require a lengthy, fact-intensive, and often subjective inquiry into not only the relationship between the putative joint-employers and the employees, but also the market relationship between the two purported employers. This may result in NLRB decisions turning, not on the common law of agency, but rather on a new analytical framework, one which would quickly devolve into an expensive and time-consuming war of economic experts involving a scrutiny of market forces, pricing structures, price elasticity, barriers to entry and alternatives to the subcontractor's services, all under the vague umbrella of "industrial realities" and "indirect control."

In the end, a putative employer's bargaining obligations under the NLRA will depend on an assessment of

industry and market forces, rather than on the direct, immediate control required to establish an employer-employee relationship under the common law. Congress has already rejected such an approach, both by demanding a common law agency analysis in determining employer status *and* also by specifically prohibiting the NLRB from employing any individuals for economic analysis or from resurrecting the now, long-defunct, Division of Economic Research.[18] The NLRB's early penchant for regulation based on economic analysis from 1935 to 1940 by the soon-to-be-discredited Division of Economic Research resulted in vigorous and outspoken opposition in Congress regularly from 1940 to 1947, when Congress once and for all capped its opposition to 'regulation by economic analysis' by specifically prohibiting it in the Taft-Hartley amendments.

Conclusion

The authors believe drastic change in the legal framework of joint-employer status both ignores congressional direction regarding agency principles and stifles innovation in the marketplace. Time and time again, Congress and the Supreme Court have instructed the NLRB not to deviate from the common law of agency in making determinations with respect to who is an employee and who is an employer under the NLRA, yet that is precisely what the new standard demands. Further, the authors believe, the new standard burdens companies that are not employers with bargaining obligations, enmeshes them in ever-widening industrial disputes, and deprives them of the protections against secondary activity afforded under the NLRA. It is for these reasons that the authors feel the modifications to the longstanding principles that are grounded in the NLRA's text are unwarranted and will have deleterious consequences that are both extensive and far reaching.

Marshall B. Babson is counsel at Seyfarth Shaw LLP and served as a member of the National Labor Relations Board from 1984 through 1988. On Feb. 5, 2015, he testified before the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP) regarding the joint-employer standard under consideration by the NLRB. Gena B. Usenheimer is a partner in Seyfarth Shaw's New York labor and employment department, where she assists employers in all aspects of employment-related matters. Jade M. Gilstrap is an associate in Seyfarth Shaw's New York labor and employment department and is a member of the firm's New Jersey practice group. The authors' views are not the views of Browning-Ferris Industries of California, Inc.

Endnotes

1. *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325 (1984); *TLI Inc.*, 271 N.L.R.B. 798, 803 (1984).
2. *Airborne Freight Co.*, 338 N.L.R.B. 597, 597 n.1 (2002) (noting the 'indirect control' test was "abandoned" two decades earlier).
3. *See, e.g.*, *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (the "obvious purpose of [the 1947] amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act").
4. *Town & Country Elec., Inc.*, 516 U.S. at 94 (*quoting Nationwide Mut. Ins. Co. v. Darden.*, 503 U.S. 318, 322-23 (1992), *in turn quoting Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)).
5. *See, e.g.*, H.R. Rep. No. 510, at 36, 80th Cong., 1st Sess. (1947); *United Ins. Co. of Am.*, 390 U.S. at 256.
6. 322 U.S. 111 (1944).
7. *See, e.g.*, 61 Stat. 137-38 (1947), 29 U.S.C. § 152(3).
8. H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947); *Allied Chem.*, 404 U.S. 157, 167 (1971) (*quoting the same report*).
9. 29 U.S.C. § 152(2) (emphasis added).
10. *See* H.R. Rep. No. 245, at 11, 80th Congress, 1st Sess. (1947) (observing the modified definition "makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions"); *see also* 93 Cong. Rec. 6654, at 6672 (1947) ("[n]ow[,] before the employer can be held responsible for a wrong to labor[,] the man who does the wrong must be specifically an agent or come within the technical definition of an agent").

11. *Laerco*, 269 N.L.R.B. at 325 (emphasis added); *TLI Inc.*, 271 N.L.R.B. at 798 (same).
12. *Airborne Freight*, 338 N.L.R.B. at 597 n.1.
13. *Southern California Gas Co.*, 302 N.L.R.B. 456, 461 (1991).
14. *Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. No. 186 (2015).
15. *Id.* at *19; *see also*, *Amicus* Brief of the General Counsel, Case No. 32-RC-109684 (June 26, 2014) at 2, 2-5, 16-17 (urging the adoption of a new joint employer test).
16. *Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. No. 186 at *10, 15.
17. *Id.* at *16 n.68 ("We decline to adopt [the industrial realities] test [proposed by the General Counsel] insofar as it might suggest that the applicable inquiry is based on 'industrial realities' rather than the common law. To be sure, however, we agree with the General Counsel that 'direct, indirect, and potential control over working conditions'—at least as we have explained those concepts here—are all relevant to the joint-employer inquiry. We also agree with the General Counsel that the 'way the separate entities have structured their commercial relationship' is relevant to the joint-employer inquiry.")
18. *See* 29 U.S.C. § 154(a); 93 Cong. Rec. 4136, at 4158 (1947).

An Over-Looked Exception to the Employment-at-Will Doctrine: The Right of Employees to Engage in Concerted Activities under the National Labor Relations Act

by Richard M. Schall

While the right of employees to engage in 'concerted activities' has been protected under the National Labor Relations Act since its passage by Congress in 1935, this right—set out in Section 7 of the act—is often thought to apply only to employees who seek to form a union or those already in a union. However, the Section 7 rights of employees to engage in "concerted activities"[1] is not so limited, and, recently, the National Labor Relations Board (NLRB) appears to be putting some real teeth into enforcement of this right on behalf of those employees who are otherwise at-will.[2] For practitioners who represent the at-will employees of the world (or the employers of at-will employees), it's time to pay attention to this development.

The NLRB's reinvigorated focus on the rights of employees to engage in protected concerted activity—even in the absence of any connection to union activity—was announced by the NLRB some three years ago, in the launch of a new web page describing "the rights of employees to act together for mutual aid and protection, even if they are not in a union." In that announcement, NLRB's chairman, Mark Gaston Pearce, called out the general lack of public awareness of these rights:

> A right only has value when people know it exists....We think the right to engage in protected concerted activity is *one of the best kept secrets* of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers (emphasis added).

On that web page, the NLRB described a number of cases it had recently handled, including those involving "a customer service representative who lost her job after discussing her wages with a coworker; an engineer at a vegetable packing plant fired after reporting safety concerns affecting other employees; a paramedic fired after posting work-related grievances on Facebook; and poultry workers fired after discussing their grievances with a newspaper reporter."[3]

There have been two cases of late—one a very modest one the author recently was able to quickly settle after NLRB intervention and one recently given front page attention by *The New York Times*—that make it clear that the NLRB is indeed serious about protecting the rights of employees, even in the absence of any union-related activity. Thus, practitioners in this field need to be alert to cases where an employee is disciplined or terminated for talking to, emailing, or discussing work-related matters with fellow employees, since such activity can constitute "protected concerted activity" under the National Labor Relations Act (NLRA).

The case the author was able to settle, where an employee was terminated after taking Family Medical Leave Act (FMLA) leave, was initially approached simply as an FMLA retaliation case, with suit filed in federal court. But, there was something else about the case that was disturbing: At the time the employer terminated this employee, the purported reason given for her termination was that she had been overheard by a supervisor loudly (and allegedly inappropriately) complaining to a fellow employee about what she felt was unfair scheduling that negatively affected both of them. The employer had previously warned her that if she had any complaints, she should take them directly to management and not "gossip" about them to her

fellow employees. This struck the author as a potential violation of Section 7 of the NLRA, and so an unfair labor practice charge was also filed with the NLRB. The NLRB representatives took an immediate interest in the case, first interviewing the client and then, based on the evidence they had collected, promptly filing a complaint against her employer and threatening to seek injunctive relief. The case then quickly settled—clearly much more so as a result of the NLRB's filing its complaint than from the FMLA case filing in federal court. This was a clear lesson for the author.

That lesson was shortly thereafter reinforced by a June 3, 2015, front page article in *The New York Times* reporting on an employee's win in a case tried to an NLRB administrative law judge—"Dalton School Ordered to Rehire Teacher Who Criticized His Bosses in Email." In that case, NLRB Judge Arthur J. Amchan found that the school had violated the teacher's Section 7 rights when it terminated him for having circulated an email to his fellow teachers discussing how badly school management had disrespected them, and proposing to his fellow teachers how they should approach management (forcefully) with their concerns.[4]

The concerns of David Brune, the teacher who took his case to the NLRB, and his fellow teachers in the school's theater department, arose in regard to the production of a school play and perceived interference in that production by the Dalton School management. As part of an ongoing discussion with his fellow teachers at the school, Brune sent a strongly worded email to them, encouraging them to demand an apology from school management. The content and flavor of that email can be gleaned from some of the excerpts below:

> I don't think we need grovel at the feet of the administration and beg for scraps, for thanks or appreciation....We are not petitioning for their sympathy or their understanding. We are seeking redress of grievances. We have been grievously wronged and we would like an apology, a direct sincere apology from all of them to all of us. [They should] [a]pologize for lying. Apologize for not allowing us to answer directly, face to face, the questions a member of the community *had about* certain aspects of the script. Apologize for not being able to trust us to be adults, to be teachers and to be committed professionals....Apologize for not being honest, forthright, upstanding, moral, considerate, much less intelligent or wise....Apologize for demonizing us, for making us the bad guys, for forcing us to toe the line or else. Apologize for the threats to our job if we didn't straighten up and fly right. What we need is a strong letter from all of us demanding an apology. If they refuse to address our grievances [sic] and hunker in the bunker on the 8th floor, then there is nothing we can do. Nothing.[5]

In his decision, Judge Amchan, after noting that to be covered by the protections of Section 7 of the NLRA, the employee must be "engaged in with or on the authority of other employees, and not [acting] solely by and on behalf of the employee himself," found that Brune was indeed acting to "enlist[] the support of fellow employees in mutual aid and protection" and had, therefore, been engaging in "concerted activity"—a ruling that appears soundly supported by NLRB case law.[6]

However, before finding that the termination was in violation of Section 8(a)(1) of the NLRA, the judge also had to reach the issue of whether Brune, despite having engaged in "concerted activity," had forfeited the protection of the NLRA as a result of the manner in which he had raised his concerns. Under NLRB law, if, in the course of engaging in concerted activity, an employee's language and conduct is so extreme, offensive and disruptive to the employer's operations, the employee can lose the protection afforded by the NLRA.[7] As can be seen by some of the language used in Brune's email, quoted above, he did not hold back in expressing his views about school management. Nonetheless, Judge Amchan found that Brune had not crossed the line, noting that he had not sent his email directly to management, but only to his fellow teachers, and had not made "any malicious or untrue statements of fact... did not use any obscenities...did not threaten [school] management," but had merely demanded an apology. Accordingly, the judge found that Brune had not forfeited the protections of the act.[8]

There are two other points of interest that can be learned from the Dalton School decision. First, language in an employee handbook that would restrict an employee's right to engage in concerted activity (*i.e.*, discuss concerns with fellow employees) or raise those concerns to management, will be found to be in

violation of Section 8(a)(1) of the NLRA. Apparently, in defense of its action in terminating Brune, the school had attempted to rely upon some of the provisions in its employee handbook. The judge rejected that defense, finding that, "[i]f Respondent contends that Brune's email violated the conditions set forth in its employee handbook, the relevant portions of the handbook violate Section 8(a)(1)."[9]

Second, Judge Amchan found that, as a result of the way the school had interrogated Brune about the email he had sent to his fellow teachers, it had further violated Section 8(a)(1). The judge found that, in summoning Brune to a meeting and questioning him, without first disclosing that it had received and read a copy of his email, the school had set a "trap" for him, which, in the judge's view, constituted an 8(a)(1) violation.

While the school retains the right to appeal Judge Amchan's decision to the NLRB itself, the author would estimate that, if it chooses to do so it will not succeed, as it seems the judge's decision is well-supported by existing NLRB law.

In sum, the NLRB is clearly taking very seriously the rights of non-unionized, otherwise at-will employees to engage in concerted activity. This is a development that can no longer be ignored. ■

Richard M. Schall is a founding member of Schall & Barasch LLC in Moorestown, a firm dedicated exclusively to protecting the rights of employees.

Endnotes:

1. Section 7 of the NLRA, 29 U.S.C. § 157, provides as follows:

   > 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 8(a)(3) [section 158(a)(3) of this title] (emphasis added).

2. Section 8(a)(1) of the NLRA, 29 U. S.C. § 158, makes it "an unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
3. *See* June 18, 2012 NLRB press announcement at http://www.nlrb.gov/news-outreach/news-story/nlrb-launches-webpage-describing-protected-concerted-activity.
4. A copy of the decision in this case, *Dalton School, Inc., d/b/a Dalton School and David Brune*, N.L.R.B. Case No. 2-CA-138611, can be found at the following link: http://bit.ly/1KLyQWo
5. *Dalton School, Inc., d/b/a Dalton School and David Brune*, N.L.R.B. Case No. 2-CA-138611 at p.4.
6. In reaching that conclusion, the judge relied upon the two leading NLRB decisions, *Meyers Indus., Inc. v. Prill*, 268 N.L.R.B. 493, 497 (1984) (Meyers I) ("[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."), and *Meyers Indus., Inc. v. Prill*, 281 N.L.R.B. 882, 887 (1986) (Meyers II) (concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.").
7. *See Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979).
8. *Dalton School*, at p. 9.
9. *Id.* at p. 10.

The New National Labor Relations Board Arbitral Deferral Standards

by Dean L. Burrell

Section 8(a)(3) of the National Labor Relations Act makes it an unfair labor practice for an employer to engage in discrimination regarding hire or tenure of employment to encourage or discourage union membership. These cases often arise where an employer is alleged to have retaliated against an employee engaged in union-related activity, such as a union shop steward filing grievances under the collective bargaining agreement or complaining about terms and conditions of employment.

The same facts underlying an alleged violation of Section 8(a)(3) may also give rise to a union claim under the collective bargaining agreement's grievance and arbitration procedure, that the discipline or discharge is not supported by just cause. The NLRB may be faced with the question of whether to defer the resolution of the unfair labor practice proceeding to a pending contractual arbitration hearing, defer to the resulting arbitration award, or defer to a private voluntary settlement of the just cause claim between the parties. In developing standards to decide when to defer in such instances the NLRB has endeavored to balance the goals of fostering arbitration and the voluntary resolution of disputes, while protecting employee rights to be free of retaliation for engaging in union activities.

A year ago, in *Babcock and Wilcox*,[1] the NLRB made significant changes in standards for deferring Section 8(a)(3) claims. Prior to *Babcock*, the NLRB's standard for deferring to cases in which an arbitration award has issued (post-arbitral deferral) was set forth in *Olin Corp.*, and considered whether: 1) all parties agreed to be bound by the arbitrator's decision; 2) the arbitration procedures were fair and regular; 3) the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and 4) the arbitrator's decision was not clearly repugnant to the purposes and policies of the act. The burden was on the party opposing deferral (typically the union or General Counsel) to prove the deferral criteria were *not* met.[2]

According to the NLRB in *Babcock*, the *Olin* standard amounted to a "conclusive" presumption that the arbitrator "adequately considered" the statutory issue if presented with facts relevant to both the alleged contract violation and the unfair labor practice. While theoretically rebuttable, because in arbitration there generally are no transcripts or written briefs it is virtually impossible to prove that the statutory issue was *not* considered. Therefore, because the General Counsel (who investigates and prosecutes unfair labor practice cases before the NLRB) is generally unable to prove that the statutory issues were *not* presented during arbitration, by deferring to such awards the NLRB had abdicated its obligation to ensure that employee rights are protected.[3]

While *Babcock* keeps the first two prongs of the existing standard (all parties agreed to be bound, and the procedures were fair and regular), the new test puts the burden on the party seeking deferral (generally the employer) to show: 1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; 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.[4]

The party seeking deferral can establish the arbitrator was 'explicitly' authorized to decide the statutory issue by showing that the specific statutory right was contained in the collective bargaining agreement, or alternatively the parties explicitly authorized the arbitrator to decide the issue. Under the new standard it will no longer suffice that the facts presented during the arbitration hearing are relevant to both the alleged contract violation and unfair labor practice. Now, the party encouraging deferral must establish that the arbitrator identified the unfair labor practice issue and at a minimum 'generally' explained why the facts presented do or do not support a violation.[5]

The dissent raises the concern that unions may withhold facts relevant to the unfair labor practice

(as distinguished from the contract breach) from arbitration, causing the unfair labor practice to not be addressed in the award, resulting in a NLRB refusal to defer. This strategy may allow the unfair labor practice to proceed separately before the NLRB, even should the union lose the just cause determination in arbitration. According to the plurality, the new standard will not encourage such conduct because the employer can raise the unfair labor practice allegation before the arbitrator, even where the union does not. Most importantly, the NLRB will consider whether NLRB law "reasonably" allows the award *in light of the evidence presented* during arbitration. Thus, the NLRB will conduct only a limited factual review of the award, eliminating the incentive to withhold evidence.[6]

The final prong of the new standard, that NLRB law must "reasonably permit the award," is a higher bar than the prior standard, whether the award was "clearly repugnant" or "palpably wrong." However, though the arbitrator may have reached a difference result than the NLRB, the award will not be disturbed if it constitutes "a reasonable application of the statutory principles governing Board decisions." The NLRB will not engage in a *de novo* review of the award, and will defer even where the arbitral remedy differs from NLRB policy, such as deducting unemployment compensation from back pay.[7]

The NLRB notes that retaliation under Section 7 and just cause under the contract are not the same, and unlawful retaliation can never constitute just cause for discipline. An arbitrator should understand this distinction and the award must reflect this knowledge. The NLRB will no longer assume, simply because the arbitrator denied the grievance by finding just cause for the discipline, that the unfair labor practice issue was also considered but the arbitrator found any evidence of unlawful motive unpersuasive. Rather to meet the new standard should the arbitrator find the discipline supported by just cause, the arbitrator must also consider and rule the discipline was not imposed in retaliation for the grievant's protected activity.[8]

The NLRB observes deferral is an affirmative defense. Accordingly, the new standard returns to the rule that the party seeking deferral has the burden of proof, observing that historically the NLRB's imposition of the burden on the party opposed to deferral was a policy determination to lend support to the arbitral process, which is no longer needed.[9]

The NLRB also applied its new standard to pre-arbitral deferral (*i.e.*, whether an existing Section 8(a) (3) charge can be deferred to the arbitration process before the arbitration hearing is held (the resulting award then being subject to the new rules)). Now, the arbitrator must be explicitly authorized to rule on the accompanying alleged unfair labor practice, either by the contract or the parties' express agreement. The NLRB reasoned that it will not defer to the arbitration *process* in a specific matter when it would not defer to the ensuing arbitration *award* that does not meet the new standard.[10]

The new post-arbitral deferral standard was also applied to voluntary settlement agreements between union and management reached through the grievance-arbitration process. The new test requires: 1) a showing that the parties intended to settle the unfair labor practice; 2) the unfair labor practice was addressed in the settlement agreement; and 3) NLRB law reasonably permits the settlement agreement.[11]

Again, for voluntary settlements the NLRB will not expect the statutory issues to be addressed in the same manner as an administrative law judge, nor will the NLRB engage in a *de novo* review of the agreement. Instead, the NLRB will now consider all circumstances surrounding a voluntary settlement under the *Independent Stave* test,[12] including: 1) whether the charging party, respondent and any of the alleged discriminates agreed to be bound; 2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation and the stage of the litigation; 3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the agreement; and 4) whether the respondent has a history of lawful conduct or has breached prior settlement agreements resolving unfair labor practice disputes.[13]

Typically a newly issued NLRB standard applies to all cases pending before the NLRB, regardless of their stage. However, here the NLRB concluded this would be unfair because the parties relied upon the now superseded *Olin* standard when negotiating existing collective bargaining agreements, including the manner of processing cases involving unfair labor practices through the grievance-arbitration procedure. Accordingly, where the current collective bargaining agreement permits arbitration of unfair labor practice issues or the parties have expressly authorized the arbitrator to consider the unfair labor practice, the NLRB will find that the parties agreed to

be bound, the first element of the new deferral standard. Applying the new standard in these circumstances is appropriate because it is not counter to the parties' expectations. Conversely, where such language does not exist the new standard shall not apply until the contract expires or the parties agree to present specific statutory issues to arbitration.[14]

General Counsel Memorandum (GC memo) 15-02 (Feb. 10, 2015) provides guidance to the parties and the regional offices of the NLRB in implementing *Babcock*. A consideration in the GC memo not raised in *Babcock* leaves to the regions' discretion whether to accept and defer to a possibly deficient remedy in an award, provided the region would accept that remedy in a unilateral NLRB settlement (where the union or alleged discriminate refuses to enter into the settlement preserving their right to appeal the settlement within the General Counsel's Office). In practice, some regions may be more cautious about agreeing to a unilateral settlement than a settlement entered into by both parties because of the appeal right, though such appeals are rarely granted, thus the General Counsel has implicitly created a higher standard.[15]

The GC memo instructs the regions to submit to the Division of Advice cases where the region would issue complaint because of an insufficient remedy in the arbitration award, *including cases where the award fails to provide a notice posting.* This is significant because notice postings are not discussed in the *Babcock* decision and generally not imposed as a remedy in arbitration awards.[16]

The General Counsel also added greater detail around whether to apply the prior *Olin* or new *Babcock* standard to deferral of an arbitration award, including: 1) the prior standard applies if the arbitration hearing occurred on or before the issuance of *Babcock*; 2) *Babcock* applies if the underlying contract from which the grievance arose was executed after the issuance of *Babcock*;[17] 3) where the relevant collective bargaining agreement was executed pre-*Babcock* but the arbitration hearing was post-*Babcock,* the applicable standard will be based on whether the arbitrator was explicitly authorized to decide the statutory issue. The General Counsel has also decided to apply *Olin* when the grievance arose under an expired pre-*Babcock* contract in the absence of explicit authorization to the arbitrator.[18]

Regarding pre-arbitral deferral, though not expressly stated by the NLRB in *Babcock* the General Counsel infers that the new standard applies only where the new post-arbitral standard would apply to the final award. Where the statutory right is not contained in the collective bargaining agreement the regions will request the parties authorize the arbitrator to decide the alleged statutory violation. Should one or both parties decline, the date of the collective bargaining agreement will determine whether deferral to an arbitration award would be reviewed under *Olin* or *Babcock*. Furthermore, if the contract was executed post-*Babcock* but does not authorize the statutory claim, the region will decline to defer and process the unfair labor practice charge unless the parties subsequently agree to authorize inclusion of the unfair labor practice in the arbitration hearing.[19]

While *Babcock* applies to Section 8(a)(3) charges, the General Counsel noted that *Babcock* did not change existing law where the NLRB will decline to defer to arbitration where an allegation is "inextricably related" or "closely intertwined" with other allegations that are not subject to deferral, or where deferral is not sought. Accordingly, the region should not defer Section 8(a)(5) allegations (the employer's failure to bargain in good faith) to arbitration that are closely related to a meritorious Section 8(a)(1) or (3) charge, which would be non-deferrable because the charge arose post-*Babcock* and the parties have declined to authorize arbitration of the Section 8(a)(1) or (3) allegation.[20]

Regarding deferral to grievance settlements, the General Counsel instructs the regions to accept the charging party's requested withdrawal of a charge with "arguable" merit when *Babcock* standards are met. Should the charging party not withdraw a merit charge post-settlement, or the alleged discriminatee objects to withdrawal, the Division of Advice will determine whether: 1) the parties intended the settlement to resolve the unfair labor practice claim; 2) whether the settlement addresses the claim; and 3) whether the settlement meets the four-part *Independent Stave* test outlined above.[21]

The General Counsel also inferred that deciding whether to apply the new standard prospectively or retroactively for settlement agreements will be based on: 1) whether the settlement agreement was signed pre- or post-*Babcock;* 2) *Babcock* prevails if the collective bargaining agreement underlying the grievance was executed post-*Babcock*; and 3) if the contract was pre-*Babcock* and the settlement is post-*Babcock* the new standard applies if the arbitrator was explicitly authorized to

decide the unfair labor practice either in the contract or by separate agreement.

As an affirmative defense the region's refusal to defer an unfair labor practice charge to arbitration can be raised during the unfair labor practice trial before the administrative law judge and is appealable to the NLRB. In *Columbia Memorial Hospital*, the administrative law judge cited *Babcock* for the proposition that as an affirmative defense the employer's attempt to raise deferral after the unfair labor practice trial had closed was untimely.[22] A handful of deferral cases have been decided since the issuance of *Babcock*. In each instance, the NLRB or administrative law judge decided deferral should be considered under the pre-*Babcock* standard.[23]

The long-term impact of *Babcock* remains to be seen. However, to ensure deferral the parties will have to decide whether to expressly incorporate Section 8(a)(3) rights in successor contracts, specifically that the employer not retaliate against employees engaged in union activity. Remedies will now be subject to heightened scrutiny. Because the parties' representatives, and even arbitrators, may not be attorneys, the requisite knowledge to address the increased focus on the application of NLRB law may be lacking, possibly resulting in the increased use of lawyers with accompanying higher costs.

Whether *Babcock* has a chilling effect on voluntary settlements, the backbone of the grievance-arbitration procedure, is a significant question. While the cost of settlement may be a factor, employers often enter into a non-NLRB settlement with unions to avoid notice posting, the absence of which the General Counsel intimates may now be potentially problematic. Clearly, *Babcock* is a major decision that will impact collective bargaining and the processing of grievances. ■

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Endnotes

1. 361 N.L.R.B. No. 132 (Dec. 15, 2014).
2. 268 N.L.R.B. 573 (1984).
3. 361 N.L.R.B. No. 132, slip op. at 4-5.
4. *Id.* at 5.
5. *Id.* at 5-6.
6. *Id.* at 7.
7. *Id.* at 7-8.
8. *Id.* at 8-9.
9. *Id.* at 10.
10. *Id.* at 12-13.
11. *Id.* at 13.
12. 287 N.L.R.B. 740, 743 (1987).
13. *Id.* at n.37.
14. *Id.* at 13-14.
15. General Counsel Memorandum 15-02 (Feb. 10, 2015) at 8.
16. *Ibid.*
17. The General Counsel will also apply *Babcock* where the grievance arose under a contract that automatically renewed post-*Babcock* when the parties did not attempt to reopen negotiations; or a post-*Babcock* agreement to extend an expired contract for a specific term, unless that extension is temporary until a successor contract is completed. In that instance *Babcock* applies if the arbitrator was explicitly authorized to consider the unfair labor practice. *Id.* at n.41.
18. *Id.* at 9-10.
19. *Id.* at 10-12.
20. *Id.* at n.50.
21. *Id.* at 13.
22. 362 N.L.R.B. No. 154 (2015), slip op. at 4.
23. *Heartland Healthcare Center*, 362 N.L.R.B. No. 3 (2015); *Verizon New England Inc.*, 362 N.L.R.B. No. 24 (2015); *Babcock and Wilcox*, 363 No. 50 (2015); *Greymont PA, Inc.*, JD-74-14; *Howard Industries Inc.*, JD(ATL)-19-15; *Cooper Tire and Rubber Company*, JD-33-15; *King Scoopers, Inc.*, JD(SF)-44-15; *Good Samaritan Hospital*, JD(SF)-46-15; *North Memorial Health Care*, JD-49-15.

Point

All Parties Benefit from Arbitration of Employment Disputes

by Joshua E. Knapp

Why would an employee agree to arbitrate his or her claims? The answer, believe it or not, is fairly straightforward. Employers and employees agree to arbitration provisions because binding arbitration is an efficient, fair, and effective method to resolve employment disputes.

Both the employer and employee can benefit from the streamlined discovery process, greater confidentiality, and relatively quick resolution of claims by a decision-maker who has knowledge of the applicable law. Compared to the traditional judicial process, which typically delegates decision-making power to juries made up of random individuals, arbitrators have significant legal backgrounds. Arbitrators are more likely to focus on the merits of a particular issue than to be swayed by emotion or other irrelevant considerations. All parties should welcome the resulting increase in predictability of an arbitrator's decision.

Arbitration also provides employers and employees with a clear avenue for resolving workplace disputes. Instead of having to search for counsel willing to file a lawsuit on their behalf, employees can easily initiate arbitration themselves for any issue, large or small. The steps are often laid out in the arbitration agreement. Arbitration makes it easier, not more difficult, for an employee to pursue a complaint against his or her employer.

Maybe most important, arbitration tends to be much less expensive than litigating a claim in court. Parties to arbitration are generally not required to pay court costs, fees for numerous depositions and transcripts, expert witnesses, and the various other expenses required during the many months or even years of exhaustive litigation. When an employee prevails at arbitration, the award of monetary damages is generally subject to fewer reductions. As a result, the employee may receive a higher percentage to take home.

Attorneys who represent employees often argue that arbitration agreements are adhesion contracts, or are not in the employees' best interest. The claim goes that applicants and employees are forced to agree to arbitration provisions, and if they oppose these provisions they will either not be hired or will lose their jobs. While employees may feel some pressure to agree to arbitrate their claims, this pressure is no different than the pressure to agree to an employer's policy on vacation or retirement benefits. Arbitration is just one of the many considerations an employee should weigh when deciding whether to accept or continue employment.

Employees should also be aware that employers may modify arbitration agreements throughout their employment, which is often to the employees' benefit. Employers are permitted, if not encouraged, to adopt changes to their arbitration policies to respond to developments in the law. For example, in *Jaworski v. Ernst & Young U.S. LLP* the employer amended its arbitration procedures to provide greater, not fewer, protections for its employees in resolving employment-related disputes.[1] In *Jaworski*, a terminated employee challenged the validity of the employer's revised arbitration provision, which required all workplace disputes be resolved through the employer's extensive arbitration program. The employee ignored the arbitration agreement he previously entered into, and sought to have his employment claims resolved in court. In finding the employer's revised arbitration agreement to be valid and enforceable, the court noted the "wisdom of endowing employers with such flexibility."[2]

Despite the occasional challenge, a properly implemented arbitration provision is enforceable in the employment context. In *Morgan v. Raymours Furniture Company, Inc.*, a case decided earlier this year involving a poorly implemented attempt to impose an arbitration provision, the Appellate Division nevertheless re-affirmed that employees who agree to a clear and unambiguous arbitration agreement must arbitrate any

covered workplace claims.[3] The Court in *Morgan* recognized that an employee who executes a stand-alone arbitration agreement, versus one contained in an explicitly non-contractual employee handbook, would likely be bound to that agreement.[4]

So long as there are disputes between employers and their employees, arbitration will continue to be an effective option for the resolution of workplace issues. Employees and employers are encouraged to consider the benefits of agreeing to arbitrate their claims.

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Endnotes

1. 441 N.J. Super. 464, 467, 470 (App. Div. 2015).
2. *Jaworski, supra*, at 479.
3. 443 N.J. Super. 338, 343 (App. Div. 2016).
4. *Id.* at 344.

Counterpoint
Mandatory Arbitration for Employees: Some Modest Proposals for Reform

by Andrew Dwyer

Looming over the debate regarding mandatory arbitration is the United States Supreme Court's peculiar interpretation of the Federal Arbitration Act (FAA),[1] which has put the Court in the business of reviewing state laws (both legislative and judicial), applicable to ordinary contracts, to decide if the states have gone "too far" in adopting regulations "hostile" to arbitration. This had led some to conclude any change in the current state of the law can only occur at the federal level, via action by Congress. For example, the proposed Arbitration Fairness Act of 2015 would render pre-dispute arbitration agreements unenforceable as applied to employment, consumer, antitrust or civil rights disputes.[2] Another approach to eliminating federal control would be to amend the FAA so it no longer applied to those kinds of disputes, in which case the individual states could decide to what extent to allow pre-dispute arbitration agreements.

Instead of waiting for Congress to act, however, I submit there are several options to enact reforms at the state level, making arbitration more accessible, more effective and more equitable.

Make Arbitration Accessible to All Employees

Currently in New Jersey, there are only limited opportunities for alternative dispute resolution (ADR) for employment claims filed in court. Everyone on both sides of this debate agrees parties would benefit from greater options for resolving disputes without going to trial. I submit New Jersey Rule of Court 4:21A-1 and Federal L. Civ. R. 201.1(d) should both be amended to make statutory employment claims subject to compulsory, *non-binding* arbitration. This approach would not deny the parties their right to a jury trial. Either party could still seek a trial *de novo*. But it would force both parties to confront the potential strengths and weaknesses of their respective cases, and to consider the several benefits of a quicker, less expensive resolution of the case.

I would propose subjecting statutory employment claims to compulsory arbitration with some modifications to the rules for the employment claims. To have maximum effect, I would require the referral to arbitration to occur six months after the answer is filed, even though discovery is not complete. Likewise, if a trial *de novo* is requested, the parties would be allowed to complete discovery in the normal course, before being sent out to trial. Finally, the provisions for the award of fees and costs would have to conform to the substantive law implementing statutory fee-shifting provisions found in statutes like the Conscientious Employee Protection Act (CEPA) and the Law Against Discrimination (LAD).[3]

Professionalize Arbitration

A large percentage of the non-unionized workforce is covered by mandatory, pre-dispute arbitration programs, and until there is a significant shift in the law (such as adoption of the Arbitration Fairness Act), the percentage is likely to increase. It bears emphasis that the bare minimal requirements for compulsory arbitration for claims filed in the state and federal courts are immaterial. By definition, claims filed in court are not subject to mandatory, pre-dispute arbitration programs. For employees covered by employer-mandated arbitration programs, the only 'requirements' are the ones the employer elects to adopt.

We are, effectively, creating a completely privatized system of adjudication for employees. But the system, presently, is almost completely unregulated. Even proponents of arbitration should recognize there is something wrong when significant claims are being resolved by a system that has no controls, no oversight, and no checks and balances.

Most importantly, the entire mechanism of manda-

tory arbitration is predicated on employers stripping employees of rights and remedies based on the threat of unemployment. If arbitrations are really being used to restrict claims and remedies, then this has nothing to do with ADR, and everything to do with taking away employee rights. Substantively, arbitration should be required to provide all the same rights and remedies secured for employees by statute. Employees should have the same access to discovery, the same entitlement to relief (such as punitive damages and attorneys fees), and the same scope for their claims as provided by statute (for example, the same statute of limitations).

Furthermore, protections of procedural fairness should be enhanced. First, arbitrators should be required to be licensed and to meet minimal qualifications. I submit, at a minimum, we should impose the requirements mandated for American Arbitration Association employment arbitrators. The American Arbitration Association requires its arbitrators to have (among other things) at least 10 years' experience in employment law with 50 percent of the practice devoted to that field.[4] Likewise, employment arbitrators should be required to receive appropriate training, and to regularly take continuing legal education relevant to the employment field. And, arbitrators should be subject to ethics rules, similar to the Code of Judicial Conduct. Similarly, attorneys acting as arbitrators should be subject to sanctions under the Rules of Professional Conduct for misconduct associated with their role as arbitrators.

Second, New Jersey should adopt a reporting requirement similar to what now exists in California, covering both private arbitration companies and law firms.[5] If a large portion of cases are going to be resolved via arbitration—and if arbitration is indeed as wonderful as its proponents claim—there should be publicly available data showing the type of claims brought, the identity of the employer, how the claims were resolved, how long it took to process the claims, the amount of any award, and the identity of the arbitrator. This will help us test how arbitration and litigation compare in practice, in terms of fairness and efficiency.

In this respect, it will be important to build a database on the performance of arbitrators. Currently, if I want to know about a sitting judge, her entire track record is a few mouse clicks away on legal databases. But if I want to know about a potential arbitrator, I have to rely on my past experience or word of mouth. Once we have an easily accessible, publicly available database on how individual arbitrators resolve claims, employees and employers will be equally able to assess arbitrators. This will, hopefully, go a long way to reduce the 'repeat player' effect that favors employers.

Third, arbitrators should be required to be neutral, and the selection process for arbitrators should be governed by state law, not the whim of the employer. Once we mandate only state-licensed arbitrators can decide cases, we can insure a fair arbitrator selection process. It should not be enough that an arbitrator makes full disclosure of his or interest in the case. A non-neutral arbitrator should not be permitted to decide the case at all. The employer and employee should have equal input and control over the selection of the arbitrator.

Make Arbitration Equitable

Finally, New Jersey can and should act at the state level to protect the rights of employees, and to insure employers cannot just 'opt out' of their obligations to obey the law. I believe this can be done in a way that does not run afoul of the FAA.

At bottom, forcing employees to forfeit the right to a jury trial is no different than demanding they give up other rights or remedies under the law—such as subjecting them to truncated limitations periods, or placing caps on the size of their awards, or waiving certain legal protections entirely. The problem is, most employees feel they have no choice but to sign away their rights, because otherwise they will lose their jobs.

The solution to this problem is to provide that employees cannot be retaliated against for refusing to waive their statutory rights. While not a model of legislative drafting, the proposal I am making is more or less as follows:

- **Section 1.** No employer may refuse to hire, or terminate, or take any other adverse action with regard to the terms and conditions of employment for any employee or prospective employee, based on that individual's refusal to agree to any waiver of that individual's rights or remedies as an employee, under either state or federal law, or based on that individual's revocation of any such waiver, as provided by Section 3.
- **Section 2.** Any waiver of any employee's rights or remedies as an employee, under state or federal law, shall only be effective if it is in a writing, signed by

the employee, and only if the waiver contains the following language, prominently displayed: *"You are not required to sign this document. This is not a condition of employment. If you sign this document, you are giving up important rights and remedies that you are otherwise entitled to under the law. If you decide not to sign this document, we cannot refuse to hire you, we cannot fire you, and we cannot take any other action against you. If any action were taken against you for failing to sign this document, you would be able to sue us under New Jersey law for violating your rights. You should consult with an attorney before signing this document, so you will understand what rights you are giving up by signing."*

- **Section 3.** If an employee signs an effective waiver of that employee's rights or remedies under state or federal law, in accordance with Section 2, that employee may revoke the waiver at any time on 30 days' written notice to the employer.
- **Section 4.** The "rights or remedies under state or federal law," as used in this statute, include every right and remedy provided by the following statutes: [list every conceivable employment statute here].
- **Section 5.** Any employee aggrieved by a violation of this statute may bring a private right of action in any court of competent jurisdiction seeking economic damages, compensatory damages, punitive damages and injunctive relief. A prevailing plaintiff shall be entitled to an award of reasonable attorneys' fees and costs.

This proposed statute would insure agreements to arbitrate are genuinely voluntary, because employees would understand they would suffer no adverse consequences if they declined to waive their statutory rights, including the right to a jury trial.[6]

I submit this proposed legislation would not violate the FAA. The statute does not interfere with the enforcement of arbitration agreements, but merely provides employees will not suffer retaliation for refusing to sign arbitration agreements. Nor does the statute single out arbitration agreements for less favorable treatment. Instead, any type of waiver of statutory rights is subject to the same standard. Finally, the notice requirement is perfectly consistent with the FAA. As the New Jersey Supreme Court held:

> The requirement that a contractual provision be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right is not specific to arbitration provisions….
>
> Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law.[7]

The United States Supreme Court likewise agrees that "[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion--for example, requiring class-action-waiver provisions in adhesive agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms."[8]

The proposal I'm making will not prohibit predispute arbitration agreements for employment claims, but it will insure they will be fair agreements, because they will be the product of bargaining on a level playing field. This, in turn, will foster the development of fair arbitration programs beneficial to employers and employees alike. ■

Andrew Dwyer is a member of Dwyer & Barrett, LLC representing employees in labor and employment law matters.

Endnotes

1. 9 U.S.C. § 1 *et seq.*
2. S. 1133, 114th Cong. (2015).
3. *Cf., e.g., Best v. C&M Door Controls, Inc.*, 200 N.J. 348, 358-59 (2009) (limiting the use of offers of judgment in statutory fee-shifting cases).
4. *See* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003881.
5. Cal. Civ. Proc. Code § 1281.96.

6. There is a 1998 Law Division case holding it violated the LAD's anti-reprisal provision, N.J.S.A. 10:5-12(d), to fire an employee for refusing to sign an arbitration agreement. *Ackerman v. The Money Store*, 321 N.J. Super. 308, 317-18 (Law Div. 1998). The decision was never reviewed on appeal, and there is no subsequent New Jersey decision that either repudiates or adopts the holding in *Ackerman*.
7. *Atalese v. U.S. Legal Serv. Group, L.P.*, 219 N.J. 430, 443-44 (2014).
8. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347 n.6 (2011).

A Neutral Perspective
A Neutral's View of *Jaworski* and *Morgan*

by John E. Sands

As the designated "neutral" on this panel, I shall not address the policy dispute between my advocate colleagues over the appropriateness of employer-imposed agreements to arbitrate employment disputes that would otherwise be fodder for court litigation. Whether cases are substantively arbitrable is for a court to decide, and that issue involves two questions: Is there an enforceable agreement to arbitrate? And does it arguably cover the disputes' subject matter?

I accept what our colleague, Joshua Knapp, writes and what I understand to be the law as it is: employers may unilaterally impose such agreements as a condition of hire or continued employment if they are: (a) imposed in such a way the employees indicated their acceptance clearly and unmistakably, (b) not illusory in their substance, (c) not contrary to statutory or constitutional principles, and (d) not unconscionable. That's the current state of the law, and I accept cases where the "agreement" to arbitrate meets those standards. I shall instead focus on how the *Jaworski* and *Morgan* courts dealt with those issues.

I do so because I believe my job as arbitrator is to hear and decide cases that are properly within my arbitral jurisdiction. Two recent New Jersey Appellate Division opinions came to opposite conclusions concerning enforceability of the arbitration agreements. In *Jaworski*, the court rejected challenges to all four standards for enforcement of such agreements,[1] while in *Morgan* the court refused to enforce an arbitration program in an employee handbook that expressly disclaimed its creation of contractual obligations.[2] From my point of view, both courts did their jobs of determining substantive arbitrability; *Morgan* completely, and *Jaworski* incompletely. Here's why.

In *Jaworski*, the court did fulfill its duty—rightly or wrongly depending on whom you represent—as to the first three standards: clarity of waiver, mutuality of obligation, and statutory/constitutional muster. As to the fourth standard, conscionability of a cost-sharing provision that could sock claimants with substantial arbitrator fees, the court blew it by improperly leaving that question to the determination of an arbitrator.

In *Jaworski* Ernst and Young's cost-sharing provision read,

> 2. *Arbitrator fees and other costs.* The parties' intent is for the Arbitrator fees and other costs of the arbitration, other than filing and administrative fees, to be shared equally to the extent permitted by law and the Arbitration Rules. However, the portion of the cost to be paid by an Employee will be adjusted to the extent, if any, necessary for the parties' agreement to arbitrate to be enforced.[3]

The problem, of course, is that a plaintiff will have to wait for an arbitrator's decision to determine whether he or she will have to shoulder half of a substantial bill. The fact that the American Arbitration Association's (AAA) Rules require employers to pay the entire arbitrator's fee in cases arising under employer-imposed plans doesn't help because the AAA simply will not administer such cases where the plan provides otherwise. And that uncertainty will dissuade many claimants from pressing their claims.[4]

The court, not an arbitrator, should have determined in the first instance that, to survive Jaworski's unconscionablity challenge to the arbitrability of his claim, Ernst and Young's plan must be read to require employer payment of the arbitrator's fees.[5] That's also what Chief Judge Harry T. Edwards of the D.C. Circuit Court of Appeals wrote in *Cole v. Burns International Security Services*:

> In sum, we hold that Cole could not be required to agree to arbitrate his public law

> claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses. In light of this holding, we find that the arbitration agreement in this case is valid and enforceable. We do so because we interpret the agreement as requiring Burns Security to pay all of the arbitrator's fees necessary for a full and fair resolution of Cole's statutory claims.[6]

To the concern expressed by some commentators "that it would be a perversion of the arbitration process to have the arbitrator paid by only one party to the dispute...," Edwards—himself a respected labor arbitrator before going on the bench—wrote, "We fail to appreciate the basis for this concern.... It is doubtful that arbitrators care about who pays them, so long as they are paid for their services,"[7] an observation with which, as an arbitrator, I heartily agree.

By contrast to *Jaworski*, the *Morgan* court did its job. It decided the substantive arbitrability issue completely, denying enforcement of an arbitration clause in an employee handbook—plaintiff had refused to sign a separate arbitration agreement—based on the handbook's express disclaimer that its "rules, regulations, procedures and benefits... are not promissory or contractual in nature...."[8] Whether or not you agree with the court, it decided the issue and eliminated any uncertainty about the litigation's ground rules.

Our colleague, Andrew Dwyer, proposes four interesting "Modest Proposals for Reform" of employer-imposed arbitration programs. First, to make arbitration accessible to all employees, he would make statutory employment claims subject to compulsory, non-binding arbitration before either party could demand trial *de novo* of the claims. Of course, this would be good for arbitrators; and a certain number of cases would settle based on the arbitrator's initial, impartial call. For what I suspect would be the majority of such matters, however, it would simply multiply the costs of litigating such claims.

Andrew's second set of proposals to "Professionalize Arbitration" bear more serious consideration. His proposal that arbitrators be required to be licensed and meet minimal qualifications including at least 10 years' experience in employment law with 50 percent of their practice devoted to that field does not faze me at all, probably because I have more than 40 years' experience with all my practice devoted to workplace issues. Up to this point, successful arbitrators have achieved what I call "market certification," multiple selections by attorney-adversaries who specialize in employment law. Whether formal licensing will produce more professional arbitrators is anyone's guess, but the devil will be in the details of what criteria will apply and who will apply them.

Andrew's next professionalization proposal is to require arbitrators to disclose to a public database all their prior cases, the claims and parties involved, how the claims were resolved, how long the process took, and the amount of any award. My major problem with this proposal is that, having been selected to arbitrate several thousand cases over my career, compliance for me would be impracticable if not impossible. That cavil goes away if the requirement were to be imposed prospectively, but I doubt that is what he desires. More to the point, it would do away with an important aspect of arbitration as a private system of conflict management— confidentiality.

In this connection Andrew touts his proposal as "hopefully go[ing] a long way to reduce the 'repeat player' effect that favors employers." I cannot let this pass without comment. In the first place, this "effect" is illusory. Sophisticated arbitrators know that both employer and plaintiff attorneys belong to organizations that maintain listservs to share comments about arbitrators and their awards. Any general perception of bias in either direction will torpedo that arbitrator's career. Arbitrators and competent counsel also know that the best outcome parties can hope for is a straight call and an intelligent decision. Chief Judge Edwards addressed this concern in *Cole*, above:

> Furthermore, there are several protections against the possibility of arbitrators systematically favoring employers because employers are the source of future business. For one thing, it is unlikely that such corruption would escape the scrutiny of plaintiffs' lawyers or appointing agencies like AAA. Corrupt arbitrators will not survive long in the business. In addition, wise employers and their representatives should see no benefit in currying the favor of corrupt arbitrators, because cause this will simply invite increased judicial review of arbitral judgments.

> Finally, if the arbitrators who are assigned to hear and decide statutory claims adhere to the professional and ethical standards set by arbitrators in the context of collective bargaining, there is little reason for concern.[9]

A more effective assurance of professionalism would be to adopt for employment arbitrators the AAA's requirement of its labor arbitrators that, for the prior five years, they not have represented either side as advocates.

Finally, I cannot fault Andrew's proposals to require arbitration programs to provide all the same rights and remedies secured for employees by statute and to make arbitration equitable by preventing employers from retaliating against employees who refuse to opt out of court enforcement of statutory rights. I understand the former to be the current state of law: employer-imposed arbitration programs that limit statutory remedies are unenforceable in most if not all jurisdictions. And, at least for class and collective actions, the NLRB has held arbitral restrictions of these to violate the National Labor Relations Act in *D.R. Horton, Inc.*[10] That ruling and its progeny, however, are subject to challenge in at least four circuits; and the United States Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion*[11] and *American Express Co. v. Italian Colors Restaurant*[12] have upheld such waivers against the Federal Arbitration Act (FAA) and state law challenges by 5-4 votes. How a newly constituted nine-member Court will deal with this issue is anyone's guess.

I end where I started. As an arbitrator, my views of employer-imposed arbitration programs are necessarily influenced by both a professional commitment to the fair and impartial determination of statutory claims as well as an honest consideration of self-interest. As my late colleague and friend, Professor David Feller, wrote in "Arbitration: The Days of Its Glory are Numbered,"[13] responding to increased judicial scrutiny of labor arbitrators' awards: "[A]lthough the golden age for arbitrators may continue, the Golden Age of Arbitration... will be ending."

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Endnotes

1. *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super. 464 (App. Div. 2015).
2. *Morgan v. Raymours Furniture Co., Inc.*, 443 N.J. Super. 338 (App. Div. 2016).
3. *Jaworski*, 441 N.J. Super. at 470.
4. A LAD case in which I was involved a few years ago illustrates the consequence of such uncertainty. The arbitration clause required the employer to front and pay an executive employee's attorney fees "unless the claim is held to be frivolous." The three-person arbitration panel declined, by a 2-1 vote (I was the "1"), to enforce that requirement at the outset, withholding determination of "frivolousness" until the end of the case. As a result, claimant withdrew his claim because he did not want to run the risk of responsibility for attorneys' fees, which would have been significant.
5. Indeed, subsequently, on June 14, 2016, the New Jersey Supreme Court ruled that arbitrability is for a court, not an arbitrator, to determine, unless the parties' delegation is clear and unambiguous. *Morgan v. Sanford Brown Institute*, No. A-31, 2016 N.J. LEXIS 563, at *9-10 (App. Div. Jun. 14, 2016).
6. *Cole v. Burns International Security Services*, 105 F.3d 1465, 1485 (D.C. Cir. 1997).
7. *Id.*
8. *Raymours*, 443 N.J. Super. at 342.
9. *Cole*, 105 F.3d at 1485.
10. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012).
11. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).
12. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).
13. 2 *Berkeley J. Emp. & Lab. L.* 97, 130 (1977).

Commentary

An Opportunity to Compete? How New Jersey's Ban the Box Legislation Falls Short of Providing Ex-Offenders with a Second Chance

by Dylan C. Dindial

Signed into law by Governor Chris Christie in Aug. 2014, and effective on March 1, 2015, New Jersey's Opportunity to Compete Act[1] (OTCA) governs the conduct of both private and public employers within the state's borders in an effort to "assist people with criminal records to reintegrate into the community, become productive members of the workforce, and to provide for their families and themselves."[2] New Jersey's statute is one of many recently enacted laws, executive orders, and administrative policies that "ban the box"[3] and prohibit potential employers from inquiring about applicants' criminal records during the early stages of the application process. Stemming from an increasing rate of background checks by employers,[4] combined with an increasing prison population,[5] the ban the box campaign seeks to enable applicants to be judged first on their qualifications for the position sought before the stigma associated with criminal records interferes with the job opportunity.[6]

Although Hawaii was the first state to enact such a statute, in 1998, the movement has gained steam in recent years. Since 2010, over 100 states, cities, and counties have enacted laws and adopted policies that provide protections to ex-offenders during the employment application process. In addition to state and local efforts, the White House and the United States' Equal Employment Opportunity Commission (EEOC) have both recognized the importance of ensuring that "Americans who paid their debt to society can earn their second chance."[7] In its 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions, the EEOC found that exclusions from employment due to applicants' criminal records have a disparate impact based on race and national origin and encouraged employers to eliminate, or at least narrowly tailor, such exclusionary policies so they are related to the applicants' fitness to perform the essential job requirements.[8] A survey of ban the box statutes nationwide reveals that many jurisdictions have heeded the EEOC's guidance and adopted statutes and policies that provide greater protection than simply banning the check boxes on applications in an effort to truly remove barriers to the employment of individuals with criminal histories.[9]

However, despite the EEOC guidance and the ability to examine and use other states' comprehensive and protective statutes as an example, the author believes New Jersey's ban the box statute falls far short of providing ex-offenders with a real opportunity to compete. Although the statute, discussed in detail below, delays inquiry into applicants' criminal records until after the "initial employment application process," it provides little further protection. In fact, the statute explicitly permits employers to refuse to hire an applicant for employment based upon the applicant's criminal record. Further, with the exception of expunged records, the OTCA fails to limit the use of criminal records in employment decisions or require individualized screenings prior to such use. Rather, the author believes the OTCA is merely a superficial attempt to achieve its stated objective of assisting people with criminal records to "become productive members of the workforce," and offers no real solution to the discriminatory results of criminal record exclusions.

The OTCA and Associated Regulations

The OTCA applies to all employers doing business or taking applications within New Jersey who have 15 or more employees,[10] regardless of whether those employees work in or outside of New Jersey.[11] Both interns and

apprentices (paid or unpaid) are considered employees for the purpose of calculating whether an employer is subject to the OTCA, but independent contractors are excluded.[12] Under the OTCA, an employer is defined broadly to include job placement and referral agencies among those who must comply with the statute's prohibitions, and considers them joint employers with the companies who control the day-to-day activities of the referred employees.[13] However, according to the regulations enacted on Dec. 7, 2015, temporary help service firms are considered the sole employer of the candidates and the client companies are not required to adhere to the restrictions of the OTCA for temps placed in their employ.[14]

An employer has violated the OTCA and is subject to administrative penalties when it "makes any oral or written inquiry to anyone" about an applicant's criminal record, either directly on the employment application or before the end of the initial employment application process.[15] Independent internet or public record searches for criminal record information during the initial employment application process are also prohibited by the OTCA.[16] However, the initial employment application process is narrowly defined as "the period beginning when an applicant for employment first makes an inquiry to the employer...and ending when an employer has conducted a first interview."[17] Although communications by email are not sufficient, the language of the OTCA appears to require little or nothing more than a brief introduction to satisfy the requirements for a "first interview," which is defined as "*any* live, direct contact by the employer with the applicant...to discuss the employment being sought or the applicant's qualifications."[18] Thus, according to the statute, the initial employment application process can actually conclude before the employer gathers any substantive information about the applicant's qualifications. Despite a complete prohibition of inquiries of any kind into an applicant's criminal record during the initial employment application process under the statute, after this minimal first interview is completed (or if the applicant voluntarily discloses his or her criminal history), the employer is permitted to delve into all aspects of the applicant's criminal history.

Where the OTCA Falls Short

New Jersey's ban the box statute provides little assistance to ex-offenders seeking employment as compared to other similar statutes and ordinances. Unlike the OTCA, many ban the box statutes enacted in states and cities across the country provide a far greater opportunity for ex-offenders to compete by delaying the inquiry until later in the application process, by limiting the type of criminal record information that can be inquired about and when and how that information can be used, and by providing notice and an opportunity to review to candidates excluded from a position due to their criminal records. While these more comprehensive statutes (discussed in detail below) do not prevent employers from excluding applicants based on their criminal records, they take meaningful steps toward ensuring that any such exclusions are rooted in business necessity and not the result of discriminatory animus or unjustified stigma.

Qualifications First: Delaying the Inquiry into Criminal Records

Unlike the OTCA, which merely prohibits inquiry until after some minimal contact with a potential employer, many ban the box laws require that employers refrain from inquiring about applicants' criminal records until much later in the application process. For example, New York City's Fair Chance Act prohibits employers from making any statements or inquiries about an applicant's criminal record until after the applicant receives a conditional offer of employment.[19] Conditional offers of employment are offers that can only be revoked in certain circumstances, including the results of a criminal background check.[20] Colorado, Hawaii, and New Mexico's ban the box legislation similarly require that applicants not be questioned about their criminal history until they are selected as finalists or receive conditional offers of employment for the position.[21] Other states, while not requiring a conditional offer of employment prior to inquiry, require employers to at least determine that applicants have met the minimum qualifications for the position.[22] In fact, even Newark, New Jersey's ban the box ordinance, enacted in 2012, prohibited inquiry "until after the applicant has been found otherwise qualified and received a conditional offer of employment."[23] However, the OTCA not only fails to provide ex-offenders with an opportunity to present their qualifications before being questioned about their criminal records, but also pre-empts the broader and more comprehensive assistance that Newark's ordinance provided to its formerly incarcerated citizens.[24]

Not All Crimes are Created Equal: Limitations on What Offenses Can be Inquired About

Pursuant to the OTCA, employers are not precluded from refusing to hire an applicant based on his or her criminal record, with the exception of records that have been expunged or erased through executive pardon.[25] This exception is recognition of the fact that not all crimes are created equal. However, unlike ban the box laws in other jurisdictions, the OTCA does not place any limitations on the types of offenses employers can question applicants about or how far back in an applicant's criminal record they can go. For example, New York City's Fair Chance Act limits employers' inquiries into applicants' criminal records to criminal convictions and pending criminal cases.[26] California, Colorado, Connecticut, Massachusetts, Minnesota, New Mexico, and Rhode Island also all prohibit the inquiry and consideration of arrests that did not result in convictions.[27] This is consistent with EEOC enforcement guidance, which highlights the fact that arrests do not establish that criminal conduct in fact occurred, and that arrest records are often incomplete (*i.e.*, no indication of final disposition) or inaccurate (*i.e.*, continued reporting of an arrest where the offense was expunged or sealed).[28]

In addition to limitations on the types of offenses, many jurisdictions place limitations on how far back an employer can inquire about or consider an applicant's criminal record. For example, Hawaii limits the consideration of all convictions to those that occurred within 10 years, and Massachusetts limits the consideration of misdemeanor convictions to those that occurred within five years.[29] California also places a limitation on the consideration of convictions that occurred more than seven years before the date of inquiry, but does so by prohibiting investigative consumer reporting agencies from furnishing reports containing such outdated convictions.[30]

Prior to its preemption by the OTCA, Newark's ban the box ordinance placed specific limitations on the types of offenses employers could inquire about, often with corresponding time limitations. For example, while arrests that did not result in convictions; records that had been erased, expunged or pardoned; and juvenile adjudications could never be a subject of inquiry for employers in Newark, pending criminal charges and convictions for murder, voluntary manslaughter, and sex offenses could be inquired into regardless of when the offense was committed.[31] However, under that ordinance, inquiry into indictable offense convictions and disorderly persons convictions or municipal ordinance violations were permitted for eight and five years following sentencing, respectively.[32]

In differentiating between types of offenses, Newark's ordinance takes into account the varying levels of seriousness of offenses, the opportunity for rehabilitation, as well as the genuine concerns of employers in hiring ex-offenders. However, by not similarly differentiating between types of offenses or placing time restrictions on employers, the OTCA thwarts the efforts of New Jersey's previously incarcerated citizens from ever truly becoming ex-offenders. As a result of the statute, their criminal records can follow them for the rest of their lives.

There's More to the Man than Meets the Eye: Limitations on the Use of Criminal Record Information

Ban the box statutes in many jurisdictions require that employers conduct individualized, job-related analyses of candidates before denying employment based on criminal records. Some statutes, like those in Colorado, Connecticut and Minnesota, require consideration of both the nature of the crime and its relation to the job sought, as well as factors related to candidates' rehabilitation and fitness.[33] Others, like Hawaii, New Mexico, and Virginia, simply require that any conviction upon which a denial of employment is based must directly relate to the particular employment.[34] The OTCA, however, does not place any such limitations on the consideration of criminal records. This is perhaps the most significant shortcoming of the OTCA, as jurisdictions that incorporate job-related screenings in their ban the box statutes recognize employers' legitimate concerns in hiring ex-offenders,[35] but address those concerns without closing the door on a second chance for individuals with criminal records.

States that incorporate job-related limitations in their ban the box statutes not only provide more ex-offenders with an opportunity for employment, but also are consistent with the EEOC's enforcement guidance. The guidance states that any policies developed by employers that seek to exclude individuals from employment based on their criminal record should be narrowly tailored and related to the particular applicant's fitness to perform the essential job requirements.[36] In order to prevent disparate impact based on race and national

origin, the EEOC requires that employers conduct a two-step screening to determine whether an applicant's exclusion from employment under the policy is "job related and consistent with business necessity." The first step is a targeted screening considering at least the nature of the crime, the time elapsed since it was committed, and the nature of the job.[37] For those individuals identified by the screen, employers must conduct an individualized assessment into whether excluding that particular individual is job related and consistent with business necessity. As part of this individualized screening, the employer must inform the individual that he or she may be excluded because of past criminal conduct, provide the individual an opportunity to demonstrate that the exclusion does not properly apply to him or her, and consider additional evidence related to the facts of the offense and the individual's employment history, rehabilitation, and fitness for the particular position.[38]

New York City's Fair Chance Act precludes employers from withdrawing a conditional offer of employment unless it follows the "fair chance process," a job-related and individualized analysis very similar to the EEOC's enforcement guidance.[39] Under the fair chance process, a conditional offer of employment cannot be withdrawn unless the employer "draw[s] a direct relationship between the nature of the conduct that led to the applicant's criminal record and the prospective job... [or] show[s] that employing the applicant would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."[40] In making this analysis, employers must consider: 1) that New York public policy encourages the employment of people with criminal records, 2) the duties and responsibilities of the prospective job, 3) the bearing of the conviction history on the applicant's fitness or ability to perform those duties or responsibilities, 4) the time that has elapsed since the conduct underlying the conviction, 5) the age of the applicant at the time of the conduct, 6) the seriousness of the conviction history, 7) any information regarding rehabilitation or good conduct, and 8) the legitimate interest of the employer in seeking to protect property and the safety and welfare of specific individuals or the general public.[41] In addition to conducting this analysis, the fair chance process also mandates that employers disclose to applicants a written copy of any inquiry conducted into their criminal history, provide a written copy of the employer's Article 23-A analysis, and allow applicants an opportunity to review and respond.[42]

In 2013, over 10,000 formerly incarcerated New Jersey citizens returned to communities with a second chance at life.[43] However, because the OTCA lacks any individualized assessment or job-related limitation, potential employers can be blinded by the stigma of criminal records and never consider applicants' qualifications or the value they might bring to the position sought despite their past mistakes. As drafted, the OTCA limits the employment opportunities available to ex-offenders and, in doing so, harms the productivity, health, and safety of the communities they return home to.[44] If it is truly the purpose of the New Jersey Legislature to assist individuals with criminal records to reintegrate and become productive members of their communities, the author believes the state should follow the examples of cities and states both across the river and across the country that have enacted comprehensive ban the box legislation and that actually provide ex-offenders with a real opportunity to compete.

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Endnotes

1. N.J.S.A. 34:6B-11 to -19.
2. N.J.S.A. 34:6B-12(j).
3. Although the ban the box campaign originated to persuade employers to remove 'check boxes' that ask if applicants have a criminal record from employment applications, the resulting statutes, executive orders, and

administrative policies have largely adopted broader protections, delaying such inquiries until later stages in the employment application process.

4. N.J.S.A. 34:6B-12(b).
5. E. Ann Carson and Daniela Golinelli, Prisoners in 2012: Trends in Admissions and Releases, 1991-2012, Bureau of Justice Statistics, (Dec. 2013), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4842.
6. Ban the Box Campaign, http://bantheboxcampaign.org/?p=20#.VsOGrOZOJHc.
7. Aliyah Frumin, Activists Applaud Obama's Prison-to-Job Reforms, *MSNBC*, (Nov. 3, 2015 12:08 a.m.), http://www.msnbc.com/msnbc/activists-applaud-obamas-prison-job-reforms.
8. EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions, Sections V(A)(2) and VIII. April 25, 2012.
9. National Employment Law Project, Ban the Box Guide, December 2015.
10. N.J.S.A. 34:6B-13.
11. N.J.A.C. 12:68-1.2.
12. N.J.S.A. 34:6B-13. *See also* Response to Comment 8 of 2015 NJ REG TEXT 386831 (NS) (defining independent contractor using the ABC test set forth in N.J.S.A. 43:21-19(i)(6)).
13. N.J.S.A. 34:6B-13.
14. *Ibid.*
15. N.J.A.C. 12:68-1.3. Employers can inquire into an applicant's criminal history on the application or during the initial employment application process for positions in law enforcement, corrections, the Judiciary, homeland security, or emergency management or when a law, rule or regulation requires a background check, precludes an applicant with a criminal record from holding the position, or restricts an employer's ability to engage in the business using employees with criminal records. N.J.S.A. 34:6B-16(a). Similar exceptions are incorporated into many ban the box statutes nationwide.
16. Response to Comments 3 and 4 of 2015 NJ REG TEXT 386831 (NS).
17. N.J.S.A. 34:6B-13.
18. *Ibid.* (emphasis added).
19. N.Y.C. Local Law 63. The Fair Chance Act amends and incorporates these protections into the New York City Human Rights Law's prohibitions against discrimination. N.Y.C. Admin. Code § 8-107(10).
20. N.Y.C. Local Law 63, Legal Enforcement Guidance, Section II.
21. Col. Rev. Stat. Ann. § 24-5-101(3)(b); Hawaii Rev. Stat. § 378-2.5(d); 1978 N.M. Stat. Ann. § 28-2-3(A).
22. Cal. Lab. Code § 432.9; Conn. Gen. Stat. Ann. § 46a-80(b); 820 Ill. Comp. Stat. § 75/15(a); Minn. Stat. Ann. § 364.021(a); Neb. Rev. Stat. Ann. § 48-202(1); Vermont Executive Order 03-15 (April 21, 2015).
23. Newark Ordinance # 12-1630(III)(c).
24. N.J.S.A. 34:6B-17(b).
25. N.J.S.A. 34:6B-14(c).
26. N.Y.C. Local Law 63, Legal Enforcement Guidance, Section IV(B).
27. Cal. Lab. Code § 432.7(a); Col. Rev. Stat. Ann. § 24-5-101(3)(b)-(c); Conn. Gen. Stat. Ann. § 46a-80(e); Mass. Gen. Laws Ann. ch. 151B, § 4(9); Minn. Stat. Ann. § 364.02(5); 1978 N.M. Stat. Ann. § 28-2-3; 28 R.I. Gen. Laws Ann. § 28-5-7(7).
28. EEOC Enforcement Guidance, *supra* note 7, Section V(B)(2).
29. Hawaii Rev. Stat. § 378-2.5(c); Mass. Gen. Laws. Ann. ch. 151B, § 4(9). Both statutes exclude periods of incarceration when calculating years since the last conviction.
30. Cal. Civ. Code § 1786.18(a)(7).
31. Newark Ordinance # 12-1630(IV)(a)(iii), (b), and (d)(i)-(iii).
32. Newark Ordinance # 12-1630(IV)(a)(i) and (ii).
33. Col. Rev. Stat. Ann. § 24-5-101(4); Conn. Gen Stat. Ann. § 46s-80(c); Minn. Stat. Ann. § 364.03(2) and (3).
34. Hawaii Rev. Stat. § 378-2.5(a); 1978 N.M. Stat. Ann. § 28-2-4(A); Virginia Executive Order 41 (April 3, 2015).
35. EEOC Enforcement Guidance, *supra* note 7, Sections III(B) and V(B)(1). *See also El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244 (3d. Cir.2007).
36. EEOC Enforcement Guidance, *supra* note 7, Section VIII.
37. EEOC Enforcement Guidance, *supra* note 7, Section V(B)(5).

38. EEOC Enforcement Guidance, *supra* note 7, Section V(B)(9).
39. N.Y.C. Local Law 63, Legal Enforcement Guidance, Section IV(B).
40. N.Y.C. Local Law 63, Legal Enforcement Guidance, Section IV(C); N.Y. Correction Law 23-A § 753. The Fair Chance Act adopts this analysis from New York Correction Law 23-A and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107(10)(a), which prohibit any adverse employment actions based on prior convictions unless an employer can show direct relationship or unreasonable risk. Prior to its pre-emption by the OTCA, Newark's ban the box ordinance also required a detailed analysis of job-relatedness and rehabilitation before employers could make any adverse employment decision based on criminal history. New Jersey, however, does not have any similar statute and protections provided by Newark's ordinance were eliminated by the OTCA's explicit permission to employers to utilize criminal history in employment decisions.
41. N.Y. Correction Law 23-A § 753.
42. N.Y.C. Local Law 63, Legal Enforcement Guidance, Section V(A) and (B).
43. http://www.state.nj.us/corrections/pages/FAQ.html.
44. N.J.S.A. 34:6B-12(a); The White House, My Brother's Keeper Task Force Report to the President, p. 10, May 2014.

There are No Calories in Eye Candy: Appellate Division Approves BorgataBabes' Personal Appearance Standards Based on Weight and Appearance but Reverses Dismissal of Hostile Work Environment Claims

by Andrew M. Moskowitz

> *"They're beautiful. They're charming. And they're bringing drinks....Part fashion model, part beverage server, part charming host and hostess. All impossibly lovely....The memory of their warm, inviting, upbeat personalities will remain with you long after the vision has faded from your dreams. ARE YOU A BABE?"*
>
> —an excerpt from the Borgata's recruiting brochure for the BorgataBabes

In *Schiavo v. Marina District Development Co., LLC, d/b/a Borgata Casino Hotel & Spa*,[1] the Appellate Division found that a casino's adoption of "personal appearance standards" for a category of its employees called BorgataBabes, and its requirement that male and female "Babes" wear different "costumes," did not violate the New Jersey Law Against Discrimination (LAD). However, the court reversed the lower court's dismissal of the plaintiffs' hostile work environment claim. Specifically, the Appellate Division found that factual issues existed as to whether, in the course of enforcing the personal appearance standards, the employer had targeted gender-specific characteristics such as pregnancy or gender-related medical conditions.

Factual Background

The Appellate Division took pains to note that, in many respects, the fact pattern presented by the *Schiavo* case was *sui generis*. To that end, the court noted that the Borgata Casino Hotel & Spa was Atlantic City's first "Las Vegas-style resort," and created the BorgataBabes in seeking to differentiate itself from other Atlantic City casinos. All 21 plaintiffs were present or former female BorgataBabes.[2]

The BorgataBabe position was described as "[p]art fashion model, part beverage server, part charming host and hostess." More than 4,000 male and female individuals applied for the approximately 200 positions. The final candidates underwent two "rigorous" interviews and a 20-minute audition "in costume." Those individuals chosen for the final round of interviews were informed that "'[p]ersonal appearance in costume' was one evaluative criteria...."[3]

Borgata adopted "personal appearance standards" (known as the PAS), which required both male and female Babes to be physically fit, with "their weight proportionate to height, and [to] display a clean, healthy smile." The PAS required women "to have a natural hourglass shape" and men to have "a natural 'V' shape with broad shoulders and a slim waist." In Feb. 2005, the Borgata amended the PAS to provide that, in the absence of a medical reason, no BorgataBabe could increase his or her baseline weight, as established when hired, by more than seven percent. According to the Borgata, it "'selected the 7% standard because it reasonably approximated a change of one clothing size and because it was consistent with the scientific definition of a clinically significant weight gain.'"[4]

It was undisputed that, between Feb. 2005 and Dec. 2010, "686 female and 46 male associates were subject to the PAS, of which 25 women and no men were suspended for failure to comply with the weight standard." Of the 21 plaintiffs, nine were suspended for allegedly exceeding the seven percent weight gain limit.[5]

Legal Claims

The plaintiffs alleged that the Borgata had subjected them to unlawful gender stereotyping, disparate treatment and disparate impact, and sexual harassment in violation of the LAD. The lower court granted the defendant's motion for summary judgment dismissing the plaintiffs' complaint. The Appellate Division reversed the lower court's dismissal of the sexual harassment claims but otherwise affirmed the lower court's holding.[6]

Claim that the PAS or Differentiated Costumes Were Facially Discriminatory

The Appellate Division panel noted that the LAD specifically permits "an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards...."[7] The panel noted further that, as established by prior precedent under Title VII, "[w]hen an employer's 'reasonable workplace appearance, grooming and dress standards' comply with state or federal law prohibiting discrimination, even if they contain sex-specific language, the policies do not violate Title VII, and by extension, the LAD."[8] The court cited to a number of federal and out-of-state cases in which dress codes were upheld "as long as they, like other work rules, [we]re enforced evenhandedly between men and women, even though the specific requirements may differ."[9] Thus, for example, a court held that a casino that prohibited men but required women to wear makeup did not engage in discriminatory treatment in violation of Title VII.[10] Similarly, in another case, an airline's use of height and weight standards was deemed permissible because "there [was] no evidence in the record that [the airline] intended to deprive one sex of equal opportunity or treatment, or that the weight requirements were somehow applied in a discriminatory manner."[11] In contrast, in another case involving flight attendants, *Frank v. United Airlines, Inc.*, the court deemed such standards to be discriminatory because the plaintiffs demonstrated that the airline's weight requirement imposed different standards on men and women.[12]

In *Schiavo*, the court noted that, unlike in the *Frank* case, the PAS did not set a designated weight limit or use different standards for the weight of men and women. Instead, the PAS accepted an employee's baseline weight, imposed the same seven percent "above baseline weight" increase for men and women, and recognized pregnancy as an exception to enforcement. Accordingly, the Appellate Division found that the PAS was not facially discriminatory.[13]

With regard to the use of "differentiated costumes for male and female BorgataBabes," the court held that, because both male and female employees were required to wear a costume as a condition of employment, this requirement was also not discriminatory. Although the court acknowledged that the female BorgataBabes' costume was "form fitting" and "skimpy," it emphasized the difference between a BorgataBabe and a regular employee.[14] Unlike the real estate firm that required its lobby attendant "to wear a short, revealing outfit"[15] or the airline which claimed that its "male business travelers" preferred attractive, female flight attendants,[16] the Borgata had designated the BorgataBabes as performers who "appeared as the face of the casino outside the casino floor." BorgataBabes were afforded lower and more flexible hours than other Borgata employees, and they were provided "more beneficial earning opportunities and perquisites of employment not extended to defendant's other associates." The court, therefore, found that "[a]s a casino, defendant's entertainment business distinguishes this matter from other cases, as the costume may lend authenticity to the intended entertainment atmosphere."[17]

Disparate Impact

The Appellate Division devoted only two pages of its 56-page opinion to the disparate impact issue. Although the parties had stipulated that, over nearly a six-year period, 25 women but no men were suspended for failing to comply with the PAS's weight standard,[18] the Appellate Division made no mention of that fact in its discussion of disparate impact (although the court noted that the evidence demonstrated that "few men were reweighed and none were disciplined").

The court found the plaintiffs could not demonstrate a disparate enforcement of the PAS. The court dismissed as insufficient the plaintiffs' claims that they had "observed men 'who gained significant amounts of weight without being subject to a weigh-in [or the] subsequent requirement to come into conformance with the PAS.'" The court also rejected as inadequate the plaintiffs' claims that men did not have to wear the Borgata costume but instead could purchase their own pants, as well as the plaintiffs' testimony that they were told that male BorgataBabes were not weighed. The court found that "[t]estimony relating what some men said or a plaintiff's observation of what she considered a significant weight gain by a male," or plaintiffs' claims that some male associates had "big bellies," was not

competent proof. Accordingly, the court affirmed the dismissal of the plaintiffs' claims for disparate impact.[19]

Gender Stereotyping

As it did in the case of the plaintiffs' disparate impact claim, the court gave the plaintiffs' gender stereotyping claim short shrift. The court found no evidence that any gender stereotypes were "accompanied by a burden on one sex over the other or [we]re otherwise used to interfere with employment opportunities of the discriminated group." For this reason, the court affirmed the dismissal of this claim.[20]

Sexual Harassment/Hostile Work Environment Claim

The Appellate Division reversed the lower court's dismissal of the plaintiffs' hostile work environment claim. Specifically, the court found that there were material factual disputes regarding whether, in the course of enforcing the weight standard of the PAS, the defendant targeted a "gender specific characteristic such as pregnancy or a medical condition...."[21] Many of the cited examples involved harassment of the plaintiffs due to their pregnancy or upon their return from a maternity leave. The court found that, "but for the subjected plaintiffs' sex, they would not have been the object of the harassment."[22] Accordingly, it reinstated the plaintiffs' claims for hostile work environment.

Conclusion

The *Schiavo* opinion should provide some comfort to employers that apply reasonable workplace appearance, grooming, and dress standards. Even where such policies have gender-based differences, they are permissible provided they do not have a disparate impact on one gender. However, the *Schiavo* case makes clear that employers who use such policies to target one gender due to gender-specific characteristics may face liability for creating a hostile work environment. ■

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Endnotes

1. 442 N.J. Super. 346 (App. Div. 2015).
2. *Id.* at 357.
3. *Id.* at 360.
4. *Id.* at 362.
5. *Id.* at 364.
6. *Id.* at 387-92.
7. N.J.S.A. 10:5-12(p).
8. *Schiavo*, 442 N.J. Super. at 379.
9. *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 181 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986).
10. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111 (9th Cir. 2006).
11. *Delta Air Lines v. N.Y. State Div. of Human Rights*, 229 A.D.2d 132, 134 (1st Dept. 1996), *aff'd*, 689 N.E. 2d 898 (1997).
12. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000).
13. *Schiavo*, 442 N.J. Super. at 379–80.
14. *Id.* at 381.
15. *Equal Employment Opportunity Commission v. Sage Realty Corp.*, 507 F. Supp. 599, 602-04 (S.D.N.Y. 1981).
16. *Wilson v. S.W. Airlines Co.*, 517 F. Supp. 292, 302-03 (N.D. Tex. 1981).
17. *Schiavo*, 442 N.J. Super. at 382–83.
18. *Id.* at 363.
19. *Id.* at 383-85.
20. *Id.* at 386.
21. *Id.* at 387-88.
22. *Id.* at 388.

The Whistleblower's Dilemma: The Aftermath of *Saavedra*

by Rachel London

In a decision issued on June 23, 2015, the Supreme Court of New Jersey held that an employee who takes confidential files from an employer to support discrimination and retaliation claims may be indicted for theft. Many believed the Court's decision in *Quinlan v. Curtiss-Wright Corp.*,[1] which held that taking from employers documents for use in litigation could constitute "protected activity" under a "totality of the circumstances" test, suggested that the criminal indictment against plaintiff Ivonne Saavedra, a former school board employee who took confidential files to support her claims under the New Jersey Law Against Discrimination (LAD) and the Conscientious Employee Protection Act (CEPA), would be dismissed. In *State v. Saavedra*,[2] however, the Court rejected the argument that *Quinlan* prohibited the prosecution of an alleged whistleblower for various crimes, including theft, arising from the taking of confidential employer files. The Court left open the possibility that, at trial, the employee could assert that she had a "claim of right" to the documents as part of her defense. Because of this decision, New Jersey employees may face criminal charges for removing company documents for use in civil suits against their employers. However, the potential chilling effects of the Court's ruling remain to be seen.

Summary of Facts

Ivonne Saavedra was employed by the North Bergen Board of Education as a clerk for over 10 years. As a clerk, she had access to student records and other confidential documents, the handling of which is governed by multiple federal and state privacy laws.[3] In Nov. 2009, while she was still employed, Saavedra filed a lawsuit against the board alleging she had been discriminated and retaliated against in violation of the LAD, CEPA, and numerous other laws.

In response to discovery requests, Saavedra produced 367 confidential student records, which she had removed from board offices. According to the board, at least 69 of the documents were originals. The board notified the county prosecutor's office of Saavedra's actions. In April 2012, more than two and a half years after Saavedra filed her civil complaint, a grand jury issued an indictment and charged her with committing the crimes of official misconduct and theft.[4] The prosecutor did not expressly inform the grand jury that Saavedra removed the documents for use in her civil suit against the board. Saavedra then voluntarily dismissed her civil lawsuit and moved to dismiss the indictment. After the trial court denied Saavedra's motion to dismiss the indictment and the Appellate Division upheld the denial, the matter was heard by the New Jersey Supreme Court.[5]

The New Jersey Supreme Court's Decision

Before the Supreme Court, Saavedra argued that the Court's decision in *Quinlan* barred an indictment because the public documents at issue were taken for use in employment discrimination litigation. The Supreme Court disagreed, holding that the trial court properly denied Saavedra's motion to dismiss. Rejecting Saavedra's reliance on *Quinlan* in support of her argument that the indictment contravened public policy, the Court distinguished its holding in *Quinlan* from Saavedra's facts. Specifically, the Court noted that *Quinlan* answered the question of whether an employee's act of taking an employer's documents for use in a discrimination claim constituted protected activity for purposes of a retaliation claim. The Court in *Quinlan* established a "totality of the circumstances approach," identifying a balancing test for determining whether an employer has taken retaliatory adverse employment action against an employee based on the employee's unauthorized copying or taking of company documents.

In rejecting Saavedra's reliance on *Quinlan*, the Court explained that its prior ruling "did not endorse self-help as an alternative to the legal process in employment

discrimination litigation."[6] The Court noted that while the *Quinlan* decision "acknowledged an employee's duty to safeguard confidential information that he or she gains through the employment relationship and to refrain from sharing that information with third parties," its holding made clear "that the employer's interest must be balanced against the employee's right to be free from unlawful discrimination."[7] The Court further stated that *Quinlan* did not "bar prosecutions arising from an employee's removal of documents from an employer's files for use in a discrimination case, or otherwise address any issue of criminal law." The Court went on to stress that plaintiffs can obtain documents through the discovery process—including by using standard discovery tools such as document requests, interrogatories, depositions, and motions to compel and, in appropriate cases, pre-litigation orders to preserve evidence.[8]

The Decision's Implications on Employment Litigation Discovery Implications

The *Saavedra* decision contains language and conclusions that may have broad implications on employment litigation. In many ways, however, the reach of the decision may be limited by the case's unique facts. *Saavedra* was unique in that the documents at issue included student educational and medical records that were protected by federal and state privacy laws, while, in contrast, most employment records do not rise to that level of sensitivity. The impact of the *Saavedra* decision is further narrowed by the fact that the plaintiff was a public employee. However, while the indictment for official misconduct would only apply to public employees, the theft count could apply to private employees as well.

Although the Court perhaps intended to maintain a narrow application of this decision, the likelihood remains that the implications of *Saavedra* will be broad. The Court's notation that "nothing in Quinlan states or implies that the anti-discrimination policy of the NJLAD immunizes from prosecution an employee who takes his or her employer's documents for use in a discrimination case,"[9] suggests that any employer could press charges against an employee for 'stealing' company documents used in connection with a discrimination or retaliation case, even if those documents are used by the employee only in connection with a lawsuit. This idea is particularly troubling to the plaintiffs' bar.

The broad language of the decision not only poses criminal consequences for plaintiffs, but also affects plaintiffs' ability to engage in 'self help' by circumventing the civil discovery process. The Supreme Court reasoned that the discovery process is available to plaintiffs, so plaintiffs need not engage in self help to support their discrimination claims and subject themselves to criminal prosecution. In reaching that conclusion, the Court emphasized that plaintiffs are not permitted to circumvent court discovery rules by removing documents themselves simply because they have a LAD claim. The Court reasoned that the discovery process pursuant to Rule 4:10-2(a) affords plaintiffs a fair opportunity to seek documents in support of their cases.[10] Moreover, it is the role of the Court to make important decisions regarding the discoverability of documents. The Court explained that, "had she chosen to invoke it, the discovery process prescribed by our court rules would have afforded to [Saavedra] a fair opportunity to seek documents in support of her case."[11]

Moreover, if plaintiffs truly fear the employer will destroy the documents necessary to support their claims, the Court reasoned that plaintiffs have many tools at their disposal to preserve their right to discovery of the documents such as a verified petition seeking to preserve evidence.[12] Finally, if an employer destroys or commits spoliation of evidence, plaintiffs may seek an array of sanctions.[13]

Implications for Employees

Whether the Supreme Court's decision in *Saavedra* has a chilling effect on employment litigation in New Jersey remains to be seen, but as Justice Barry Albin expressed in his dissent, the decision offers little guidance to employees. As Justice Albin noted, "it may be possible that an employee taking confidential documents from an employer's files to pursue a LAD claim will win a multi-million dollar discrimination lawsuit but serve time in prison for committing a crime."[14] While it may seem farfetched that employers will actually seek prosecution, and that prosecutors would pursue the charges, it is feasible that the strategy of potential plaintiffs may need to be modified.

Further, Justice Albin cautioned that "[t]he law should not place whistleblowers in a position where they are playing Russian roulette with their careers or their liberty."[15] In light of the decision, employees may find themselves in the position of weighing filing a civil lawsuit for discrimination, which could have merit and bring them justice, against facing possible criminal

indictment (and jail time) for taking documents in support of their claim. The chilling effect on employment litigation for fear of being prosecuted is a likely result of the *Saavedra* decision.

The only silver lining is that the Court pointed out that an employee still may assert a "claim of right" defense or "other justification based on New Jersey's policy against employment discrimination" at trial.[16] Thus, the employee will still be able to assert that his or her taking of the employer's documents was justified. And there, the Court suggested, guidance from the *Quinlan* decision may assist the trial court in balancing the particular facts to determine whether there is merit to this defense. Nevertheless, the decision will, at the very least, make employees think twice before taking their employer's documents.

More practically, if an employee is still working for the employer when he or she decides to file a lawsuit, he or she may be best advised, in light of *Saavedra,* to take note of relevant identifying information of documents, such as their dates, content, senders, recipients, and location. This way, documents can ultimately and specifically be requested in discovery. The decision will also likely discourage plaintiffs' attorneys from encouraging such conduct and from using these documents in litigation for fear their clients will be prosecuted. Employees' attorneys face many difficult ethical dilemmas in light of *Saavedra*, as it is common for employees to take documents before ever coming to an attorney. By the time the attorney is aware of the documents' existence, they have already been removed and the attorney must now determine whether the client's possession of the documents constitutes a crime. The effects of *Saavedra* on plaintiffs' employment litigation may be far-reaching and impact plaintiffs' attorneys on a daily basis.

Implications for Employers

Although the Court limited what appeared to be *Quinlan's* leniency toward employees who take employers' documents for discrimination lawsuits, the primary problem for employers under *Quinlan* remains: They run the risk of increased civil liability for firing or disciplining employees who take personnel records without authorization, because in most instances, there is no real way to predict how a court will rule on the balancing test months later while defending against the employee's lawsuit.

To avoid any potential liability for retaliation, employers should first consult counsel before acting against an employee suspected of taking documents, especially if that employee has raised allegations of discrimination or objected to employer conduct as unlawful. Then, New Jersey employers should review their policies regarding the unauthorized use and taking of company documents. Without having the appropriate policies and procedures in place, employers will find little solace in the Court's holding in *Saavedra*. As the Supreme Court of New Jersey has observed, a "clearly identified" policy on confidentiality puts employees on notice of prohibitions against the unauthorized taking of confidential records.[17]

Employers should also test the adequacy of safeguards for preventing unauthorized access to, and removal of, both physical and digital confidential documents. After reviewing their policies and putting the appropriate safeguards in place, employers should publicize, in their employee handbooks and other appropriate policy documents, their intent to refer all suspected theft or other misappropriation of company documents (including personnel documents) to law enforcement authorities. Employers should remain cautious, however, that the *Saavedra* opinion does not change *Quinlan*'s holding that taking adverse action against an employee for taking or using confidential documents in support of a discrimination case can constitute unlawful retaliation.

Conclusion

While it remains to be seen how *Saavedra* will ultimately impact employment and whistleblower litigation, the decision gives both employers and employees reason to pause before acting.

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Endnotes

1. 204 N.J. 239 (2010).
2. *State v. Saavedra*, 2015 N.J. LEXIS 641, No. A-68-13, 073793, at *71 (N.J. June 23, 2015).
3. Including, but not limited to, the federal Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C.A. § 1232g, as well as the state pupil records statute, N.J.S.A. 18A:36-19, and implementing regulations codified at N.J.A.C. 6A:32-7.1 to 7.8.
4. The grand jury indicted Ivonne Saavedra for second-degree official misconduct, N.J.S.A. 2C:30–2a. A second-degree crime carries a presumption of imprisonment. N.J.S.A. 2C:44–1d. Thus, Saavedra faces a five- to 10-year term of imprisonment if convicted of this crime. *Id.*
5. *State v. Saavedra*, 433 N.J. Super. 501 (App. Div. 2013).
6. *Saavedra*, 2015 N.J. LEXIS 641 at *50.
7. *Id.* at *52.
8. *Id.* at *50 ("Thus, our court rules provided defendant the opportunity to obtain from the board relevant documents in support of her civil claim, subject to procedural safeguards and judicial oversight.").
9. *Id.* at *54.
10. *Id.* at *47.
11. *Id.* at *47.
12. *Id.* at *47-48.
13. *Id.* at *48.
14. *Id.* at *70-71 (Albin, J., dissenting).
15. *Id.* at *70.
16. *Id.* at *12.
17. *Id.* at *52.

The Legislature Meant What It Said and Said What It Meant: All Employees are Entitled to CEPA Protection—100 Percent

by Claudia A. Reis

Members on both sides of the employment bar waited with bated breath while the Supreme Court of New Jersey resolved the hotly debated issue of whether there exists a job duties exception to the Conscientious Employee Protection Act (CEPA) that excludes from the act's protections those employees who blow the whistle on matters within the scope of their job duties. In *Lippman v. Ethicon, Inc.*, the Court not only made clear that no such exception exists but also emphasized that watchdog employees, those who blow the whistle on conduct that falls within the scope of their job duties, are held to the same standard as any other class of whistleblowing employees.[1]

Plaintiff Lippman, in his roles as vice president of medical affairs and a member of internal review boards for defendant Ethicon, Inc., was responsible, in part, for providing medical and clinical expertise and opinions in the evaluation of health and safety risks of products.[2] The plaintiff's employment was terminated after he lodged numerous objections to the proposed or continued sale and distribution of certain medical products and devices he believed were unsafe.[3] While the defendants alleged he was terminated because he had an inappropriate relationship with a subordinate, they admitted the subordinate never reported directly to the plaintiff, no other employee had been disciplined in any manner for having a consensual romantic relationship with an alleged subordinate, and there was no company policy prohibiting such a relationship.[4]

Relying upon *dicta* in *Massarano v. New Jersey Transit,*[5] the trial court granted the defendants' motion for summary judgment. Specifically, the court found that "because plaintiff admitted 'it was his job to bring forth issues regarding the safety of drugs and products,' he 'failed to show that he performed a whistle-blowing activity' protected by CEPA." On appeal, the Appellate Division rejected the lower court's narrow interpretation of protected whistleblowing conduct and found its "construction of the statute to be inconsistent with the broad remedial purposes of CEPA." Importantly, the Appellate Division "noted especially that watchdog employees are the most vulnerable to retaliation because they are 'uniquely positioned to know where the problem areas are and to speak out when corporate profits are put ahead of consumer safety.'"[6] Nonetheless, the Appellate Division altered the *prima facie* paradigm for establishing liability under CEPA for those watchdog employees by creating an additional hurdle not found anywhere in the act's statutory language. That additional hurdle purported to bar watchdog employees from the protections afforded by CEPA unless they:

> advocated compliance with the relevant legal standards to the employer or to those designated by the employer with the authority and responsibility to comply. *To be clear, this second element requires a plaintiff to show that he or she either (a) pursued and exhausted all internal means of securing compliance; or (b) refused to participate in the objectionable conduct.*[7]

The court granted the parties' petition and cross-petition for certification. In support of their petition, the defendants contended that plaintiff Lippman could not have objected within the meaning of CEPA because all of his whistleblowing activities were part and parcel of his job duties.[8] More specifically, the defendants argued that the "objects to" clause must logically mean that CEPA's protections are extended only to "employee activity that goes beyond the scope of the employee's job responsibilities" because employees "cannot...object[] or refuse[] to participate in the very activity, policy or practice that [they are] helping to formulate on behalf of the organization."[9] The defendants also took the position

that the holding in *Massarano* and its progeny prevented the plaintiff from invoking CEPA's protections.

As a last ditch effort, the defendants asserted a policy argument contending the Appellate Division's decision created a class of employees that would be insulated from any adverse actions and, as such, the holding would "interfere with employers' ability to make lawful and justifiable personnel decisions about watchdog employees who make erroneous or overly conservative judgments."[10]

In opposition thereto, the plaintiff relied heavily on the plain language of CEPA, which extends protections to all employees and does not include a job duties exception.[11] The plaintiff also contended that the Appellate Division's decision did not run afoul of *Massarano* because the focus of that holding was on whether the employer violated a clear mandate of public policy or acted with retaliatory animus rather than any job duties exception. Lastly, the plaintiff contended that a job duties exception "would weaken CEPA because watchdog employees would have no legal protections, thus eliminating the curb against 'the corporate evils CEPA was intended to prevent.'"[12] In support of his own petition, the plaintiff contended the Appellate Division erred in creating an additional burden for watchdog employees for which no support could be found in the plain language of the statute.[13]

The Court began its analysis with a review of the statutory language and recognized that the statutory definition of employee included "*any* individual" and did not contain "any restriction to discrete classes of employees."[14] Reviewing the statutory language defining protected activity to determine whether an exemption for whistleblowing performed in the regular course of duties existed, the Court rejected the defendants' argument that the terms "object" and "refuse to participate in" "implicitly indicate...that an employee must act outside of his or her prescribed duties to engage in protected whistleblowing activity."[15] Instead, the Court relied upon the plain meanings of the words and found that they were neither ambiguous nor suggestive of a requirement that employees only be afforded protection when acting outside the scope of their normal job duties. Indeed, the Court found that "[i]t would be wholly incongruent to strain the normal definition of 'object' into some implicit requirement that limits a class of employee to whistleblower protection only for actions taken outside of normal job duties." Similarly, the Court noted that the statutory language at issue simply did not include any requirement that the refusal to participate or objection be outside of employees' job duties to be worthy of statutory protections.[16]

In further support of its holding, the Court pointed to evidence of the Legislature's intent to extend CEPA's protections to those acting within the scope of their job duties. For example, the "refus[al] to participate" language implies that CEPA must protect those acting within the scope of their job duties, as only employees who act in that capacity would be in a position to refuse to participate in objectionable employer conduct. The protections for licensed healthcare providers similarly lead to the conclusion that CEPA's protections are intended to extend to employees acting within the scope of their job duties, because physicians are the most likely parties to object to or refuse to participate in conduct that they reasonably believe "'constitutes improper quality of patient care.'"[17] Ultimately, the Court concluded that "examination of the Act's text, structure, and remedial nature provides compelling evidence against finding a legislative intent to exclude watchdog employees from CEPA protection,"[18] and cautioned against "engraft[ing] language that the Legislature has not chosen to include in a statute."[19]

After concluding that there was simply no support for construing the statutory language to include a job duties exception, the Court found that a review of binding, relevant precedent led to the same conclusion. As an initial matter, the Court noted that the holding of the *Massarano* decision was that the plaintiff in that case was not retaliated against for engaging in protected conduct. As such, the creation of a job duties exception in reliance of that holding was simply misplaced. Further, the Court reviewed judicial precedent rejecting a job duties exception. One such case was *Mehlman v. Mobil Oil Corp.*, in which the protections of CEPA were extended to the toxicologist responsible for providing toxicologic and regulatory advice who blew the whistle on high benzene content of gasoline. The other case relied upon was *Estate of Roach*, where the manager responsible for implementing the Code of Conduct Program was also extended the protections of CEPA after he reported violations of that code of conduct.[20]

Upon concluding that neither statutory language nor case law supports the existence of a job duties exception, the Court addressed the Appellate Division's creation of an additional burden for watchdog employ-

ees attempting to establish a *prima facie* case of a CEPA violation.[21] In that regard, the Court simply noted that the Appellate Division "added to the burden required for watchdog employees to secure CEPA protection... by including an obligation nowhere found in the statutory language," and reiterated its caution against courts "rewrit[ing] plainly worded statutes."[22]

The take-away from *Lippman* is that, like the plaintiffs' employment bar has thought all along, CEPA's protections extend to all employees. To that end, *Lippman* is not groundbreaking. What the author views as incredible, however, is that there was ever a need for the *Lippman* decision—that the need arose to state the obvious. But make no mistake about it, this author believes that the need did indeed exist as there were a series of lower court decisions in which individuals who would have otherwise been entitled to the protections of CEPA were denied those protections because courts read into a remedial statute an exception that simply did not exist. So perhaps the lesson to be learned from this case is that the need sometimes exists to get back to the basics, and, to that end, *Lippman* will long stand for the proposition that the Legislature meant what it said and it said what it meant. All employees are entitled to CEPA protection—100 percent.

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Endnotes:

1. 222 N.J. 362 (2015).
2. *Id.* at 367-68.
3. *Id.* at 368.
4. *Id.* at 369.
5. 400 N.J. Super. 474 (App. Div. 2008).
6. *Lippman*, 222 N.J. at 370 (*quoting Lippman v. Ethicon*, 432 N.J. Super. 378, 406-07 (App. Div. 2013)).
7. *Id.* at 371 (*quoting Lippman*, 432 N.J. Super. at 462).
8. *Id.* at 373.
9. *Id.* at 372 (internal quotations omitted).
10. *Id.* at 373-74.
11. *Id.* at 374.
12. *Id.* at 374-75.
13. *Id.* at 375-76.
14. *Id.* at 381.
15. *Id.* at 382.
16. *Id.* at 383.
17. *Id.* at 383-84 (*quoting* N.J.S.A. 34:19-3(c)(1)).
18. *Id.* at 384.
19. *Id.* at 381.
20. *Id.* at 386-87.
21. *Id.* at 387-88.
22. *Id.* at 388.

New Jersey's Law Division Rules the Port Authority is Immune from Suit Under the Conscientious Employee Protection Act

by Kara A. MacKenzie

On May 8, 2015, Hudson County Superior Court Judge Lisa Rose, in *Alpert v. Port Authority of New York and New Jersey*,[1] dismissed on summary judgment a claim brought by an employee of the Port Authority of New York and New Jersey under New Jersey's whistleblower law, the Conscientious Employee Protection Act (CEPA).[2] This decision is significant because Judge Rose confirmed what most New Jersey employment lawyers already suspected: New Jersey state courts would rule that the Port Authority is immune from CEPA suits brought by its current and former employees.[3]

The plaintiff, Jay Alpert, was a Port Authority employee who worked in its Office of Emergency Management in Jersey City.[4] Alpert was terminated in Sept. 2012, five months after he complained to David Wildstein, then-director of interstate projects, that Police Captain John Ferrigno had taken photographs of police promotional examinations and was conducting private training classes for prospective candidates.[5]

Following his termination, Alpert filed a whistleblower suit alleging that the Port Authority and Michael Fedorko, his supervisor, retaliated against him in violation of CEPA and *Pierce v. Ortho Pharmaceutical Corp.*,[6] which creates a common law cause of action for wrongful discharge in violation of public policy.[7]

The matter came before the court on the defendants' motion for summary judgment, which the court granted, holding that, as a single-state statute, CEPA is not applicable to the Port Authority, as a bi-lateral agency, or to its employee, Michael Fedorko.[8]

The court started by explaining that the Port Authority is not an agency of a single state, but rather a public corporate instrumentality of both New York and New Jersey.[9] Created in 1921 by compact between New York and Jersey, to which Congress consented, the Port Authority was originally afforded immunity from suit.[10] The compact was amended in 1951 to provide for "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise."[11] Nevertheless, the court explained, as a bi-state agency, the Port Authority is not subject to the unilateral control of either state.[12] Otherwise, the court reasoned, the purpose for which the bi-state agency was formed would be destroyed, and it would "lead to discord."[13]

Citing *Ballinger v. Delaware River Port Authority*,[14] the court explained that a bi-state agency such as the Port Authority may be subject to single-state legislation only if: 1) the compact explicitly provides for unilateral state action; 2) both states have complimentary or parallel legislation (so the application of a single-state statute would not be deemed a unilateral act); or 3) the bi-state agency impliedly consented to a single-state's jurisdiction.[15]

The court ruled that none of the three exceptions were present here. Alpert conceded at the outset that the Port Authority's compact does not explicitly provide for unilateral state action.[16] Although not addressed in the court's decision, the 1951 amended compact's generalized consent requires "the concurrence of the State of New York."[17]

As to the second exception, the court held that New York's whistleblower statute, N.Y. Labor Law § 740 (NYWS), was not substantially similar, complimentary or parallel to CEPA.[18] The court did concede that CEPA and the NYWS both apply to public and private employers,[19] and that both have a one-year statute of limitations.[20] Despite these similarities, the court found "significant differences" between CEPA and the NYWS as to scope, damages and the right to trial by jury.[21] As to scope, the court ruled that CEPA encompasses a wider range of activities than the NYWS. Specifically, CEPA only requires an employee to have a "reasonable

belief" that the employer violated a law, rule, regulation or public policy, not that the employer actually did commit a violation.[22] Under the NYWS, a showing of an actual violation is required.[23] In addition, the NYWS requires an employee to report a "substantial and specific danger to the public health or safety,"[24] whereas CEPA protects employees who report *any* "illegal or unethical work-place activities."[25] As to remedies, the Court explained that CEPA allows an employee to recover punitive damages whereas the NYWS does not.[26] Finally, CEPA affords an employee the right to a trial by jury whereas the NYWS does not.[27] In light of these distinctions in scope, damages and right to trial by jury, the court concluded that the whistleblower laws are not substantially similar, complimentary or parallel so that the application of CEPA would be a unilateral act; therefore, the Port Authority is not subject to CEPA on this "complimentary or parallel" legislation basis.[28]

Third, the court considered whether the Port Authority impliedly consented to the exercise of single-state jurisdiction, and found that it did not. The court made it clear that implied consent may only be found when the bi-state agency voluntarily cooperates with New Jersey in the exercise of jurisdiction or agrees to meet the requirements of CEPA. The court flatly rejected Alpert's argument that the Port Authority impliedly consented to single-state legislation via the 1951 amended compact. Instead, the court determined that the 1951 amended compact's consent to suit does not state specifically that the Port Authority agrees to meet the requirements of CEPA; rather, it recognizes that the Port Authority will be subject to legislation by either state only "when both states concur that the legislation will apply."[29] It bears further noting that, although not addressed by the court, CEPA does not contain any express language stating that it is applicable to the Port Authority. Given the dearth of evidence showing a concurrence between New Jersey and New York that CEPA applies to the Port Authority, the court ruled that it is not subject to suit under CEPA via an implied consent theory.[30]

Finally, the court cursorily dismissed with prejudice Alpert's common law wrongful discharge cause of action brought under *Pierce v. Ortho Pharmaceutical Corp.* The court explained that, unlike New Jersey, New York does not recognize a common law cause of action for wrongful termination of an employee-at-will.[31] Accordingly, Alpert could not advance a common law claim of retaliation, and the court did not reach the question of whether his termination violated a clear mandate of public policy.[32]

Conclusion

Employment practitioners seeking to sue the Port Authority for retaliation must proceed with caution. Although the *Alpert* opinion is unpublished, and therefore shall not "constitute precedent or be binding,"[33] it may nevertheless constitute secondary authority and be cited to any court.[34] The *Alpert* decision, moreover, relies heavily on the reasoning of the published decision of *Ballinger v. Delaware River Port Auth.*, in which the Supreme Court affirmed the Appellate Division's ruling that CEPA does not apply to another bi-state agency, the Delaware River Port Authority (DRPA), whose compact is substantially similar to the Port Authority's compact.[35] Because Alpert did not appeal the Law Division's decision, Judge Rose's ruling is now the most definitive state court statement on the applicability of CEPA to the Port Authority, and two federal courts have reached the same conclusion.[36]

As a result, Port Authority whistleblowers have very little state law protection against retaliation (or any other improper employment practices remedied by state law).[37] Instead, Port Authority whistleblowers may only look to the anti-retaliation provisions contained in federal statutes, such as Title VII,[38] the Age Discrimination in Employment Act (ADEA),[39] the Americans with Disabilities Act (ADA)[40] or the Fair Labor Standards Act (FLSA).[41]

Practitioners should be aware that not only must one comply with any federal prerequisites to filing suit, such as timely filing a claim with the Equal Employment Opportunity Commission (EEOC), but one must also comply with the Port Authority's own jurisdictional requirements. Specifically, N.J.S.A. 32:1-163 requires that a notice of claim be served at least 60 days before any suit is filed.[42] Failure to comply with the notice requirement withdraws the Port Authority's consent to suit, and thus deprives the court of subject matter jurisdiction.[43] Any action prosecuted against the Port Authority must also be commenced within one year after the cause of action accrued.[44]

If the employee's whistleblowing does not fit squarely within the federal anti-retaliation statutes, the employee's only recourse may be to file an internal complaint under the Port Authority's Whistleblower Protection (WP) Policy, newly enacted in March 2015.[45] The WP policy, however, is not nearly as broad as CEPA and only

protects a current Port Authority employee who reports conduct he or she knows or reasonably believes to involve corruption, criminal activity, conflict of interest, gross mismanagement, gross waste of funds or abuse of authority. The Port Authority's inspector general is tasked with investigating complaints of retaliation and reporting his or her findings and recommendations, if any, to the Governance and Ethics Committee and the executive director, who will forward his or her recommendation for any remedial action to be taken to the Governance and Ethics Committee, which, in turn, will recommend such action, if any, to the Board of Commissioners.[46] The WP policy, however, is not statutory, does not provide for a private cause of action or for any judicial oversight, and would not protect a former employee, such as Jay Alpert, whose employment is terminated following a whistleblowing complaint.

In the wake of the Bridgegate scandal involving the allegedly politically motivated closure of local access lanes to the George Washington Bridge, lawmakers on both sides of the Hudson River have drafted legislative proposals to reform operations at the bi-state agency, including providing whistleblower protections.[47] Given the decision in *Alpert*, to fully protect Port Authority whistleblowers, New York and New Jersey would now need to concurrently adopt the same whistleblowing legislation, amend their compacts to provide for unilateral state action and/or concurrently amend their whistleblower statutes to expressly apply to the Port Authority. Unless and until that happens, employment law practitioners must heed the decision in *Alpert*.

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Endnotes

1. *Alpert v. Port Auth. of N.Y. & N.J.*, 442 N.J. Super. 146, 149 (Law Div. 2015).
2. N.J.S.A. 34:19-1, *et seq.*
3. In unreported decisions, two federal courts had already reached the same conclusion. *Lassalle v. Port Auth. of N.Y. & N.J.*, No. 12-cv-2532, 2013 U.S. Dist. LEXIS 164133, *49-50 (D.N.J. Nov. 19, 2013) (dismissing the plaintiff's CEPA claim on the ground that it is not actionable against the Port Authority as a bi-state entity); *Goodman v. Port Auth. of N.Y. & N.J.*, 10-cv-8352, 2013 U.S. Dist. LEXIS 134921, *26 (S.D.N.Y. Sept. 20, 2013) (same).
4. *Alpert*, 442 N.J. Super. at 149.
5. *Id.*
6. 84 N.J. 59 (1980).
7. *Alpert*, 442 N.J. Super. at 148.
8. *Id.* at 148-49.
9. *Id.* at 149.
10. *Id.*
11. The 1951 Amended Compact, N.J.S.A. 32:1-157, provides in pertinent part:

    > *Upon the concurrence of the State of New York*…, the States of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof...(Emphasis added). Through concurrent legislation, New York likewise consented to suits against the Port Authority N.Y. Unconsol. Law § 7101 *et seq.*

12. *Alpert*, 442 N.J. Super. at 149 (*citing Bunk v. Port Auth. of N.Y. & N.J.*, 144 N.J. 176, 184 (1996)).
13. *Id.* at 149-50 (*quoting Bell v. Bell*, 83 N.J. 417, 424 (1980)).
14. 311 N.J. Super. 317, 324 (App. Div. 1998), *aff'd*, 172 N.J. 586 (2002).
15. *Alpert*, 442 N.J. Super. at 149 (*quoting Ballinger v. Delaware River Port Auth.*, 311 N.J. Super. 317, 324 (App. Div. 1998), *aff'd*, 172 N.J. 586 (2002)).
16. *Id.* at 150-52.

17. N.J.S.A. 32:1-157, *supra*, n.9. Moreover, the 1921 compact between New York and New Jersey that created the Port Authority provides that "[t]he port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state *concurred in* by the legislature of the other." N.J.S.A. 32:1-8 (emphasis added) (codifying the compact); N.Y. Unconsol. Law § 6408 (same).
18. *Alpert*, 442 N.J. Super. at 150-51.
19. *Id.* at 150 (*citing* N.J.S.A. 34:19-2; N.Y. Labor Law § 740(1)(b)).
20. *Id.* (*citing* N.J.S.A. 34:19-5; N.Y. Labor Law § 740(4)(a)).
21. *Id.*
22. *Id.* (*citing Dzwonar v. McDevitt*, 177 N.J. 451, 461 (2003)).
23. *Id.* at 150 (*citing Bordell v. General Electric Co.*, 208 A.D.2d 219, 221, 622 N.Y.S.2d 1001 (3d Dept. 1995)).
24. *Id.* at *5. *Compare* N.Y. Labor Law § 740(2)(a) ("An employer shall not take any retaliatory personnel action against an employee because such employee...discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety"), *with* N.J.S.A. 34:19-3("A employer shall not take any retaliatory action against an employee because the employee...[d]iscloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer...that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law").
25. *See Higgins v. Pascack Valley Hosp.*, 158 N.J. 404, 417 (1999) (*quoting Barratt v. Cushman & Wakefield of New Jersey, Inc.*, 144 N.J. 120, 127 (1996)).
26. *Alpert*, 442 N.J. Super. at 151 (*citing Granser v. Box Tree South Ltd.*, 164 Misc. 191, 202, 623 N.Y.S.2d 977 (N.Y. Sup. Ct., N.Y. County 1994) (holding that punitive damages are not available under NYWS)).
27. *Id.* (comparing N.J.S.A. 34:19-5 with N.Y. Labor Law § 740(5)). *See also Scaduto v. Restaurant Assoc. Industries, Inc.*, 180 A.D.2d 458, 459, 579 N.Y.S.2d 381 (1st Dept. 1992) (holding that a trial by jury is not available under NYWS because N.Y. Labor Law § 740(5) explicitly states that "*a court may order*" the available relief) (emphasis added).
28. *Alpert*, 442 N.J. Super. at 151. Note that federal courts have cast doubt on the complimentary and parallel standard and have endorsed instead the "express intent standard," meaning that single-state legislation will not apply to a bi-state agency unless the legislation contains an express statement that it applies to the bi-state agency. *International Union of Operating Engineers, Local 542 v. Delaware Joint Toll Bridge Comm.*, 311 F.3d 273, 280 (3d Cir. 2002) ("the New Jersey complementary or parallel standard appears to be based on a misinterpretation of compact law"). *See also Spence-Parker v. Del. River & Bay Auth.*, 616 F. Supp. 2d 509, 519 (D.N.J. 2009) (dismissing the plaintiff's CEPA claim in the absence of an express statement in CEPA that it applied to the DRBA).
29. *Alpert*, 442 N.J. Super. at 151-52.
30. *Id.*
31. *Id.* at 153 (*citing Hassan v. Marriott Corp.*, 243 A.D.2d 406, 407, 663 N.Y.S.2d 558 (1st Dept. 1997)).
32. *Id.*
33. R. 1:36-3.
34. Certainly, there exist grounds for the brave practitioner to challenge the *Alpert* decision on the "complimentary or parallel" legislation grounds. The Supreme Court has not required that the state statutes be identical, only that they be "substantially similar" to merit application to a bi-state agency. *See, e.g., Int'l Union of Operating Eng'rs, Local 68* v. *Del. River & Bay Auth.*, 147 N.J. 433, 447 (1997) (finding substantially similar laws concerning collective bargaining negotiations in New Jersey and Delaware to be effective modification of compact requiring defendant DRBA to negotiate collectively with employees), *cert. denied*, 522 U.S. 861 (1997). The *Alpert* court ignored many other similarities between CEPA and the NYWS beyond their application and statutes of limitations. For example, their purposes are similar. CEPA protects employees who report illegal or unethical work-place activities. *Higgins v. Pascack Valley Hosp.*, 158 N.J. 404, 417 (1999). Likewise, the NYWS "protect[s] public and private sector employees who disclose violations of law, rule or regulation which present a substantial

danger to public health or safety by prohibiting certain types of retaliatory action by their employers." *Remba v. Fed'n Emp't & Guidance Serv.*, 149 A.D.2d 131, 134, 545 N.Y.S.2d 140, 142 (1st Dept. 1989), *aff'd*, 76 N.Y.2d 801 (1990). Both statutes provide for a private cause of action for the complaining employee. *Compare* N.J.S.A. 34:19-5, *with* N.Y. Labor Law § 740(4)(a). The definitions of 'employee,' 'public body,' and 'retaliatory action' are identical in both statutes while the definition of 'supervisor' is nearly identical. *Compare* N.J.S.A. 34:19-2, *with* N.Y. Labor Law § 740(1). Likewise, other than punitive damages and the provision for a fine, the remedies under CEPA and the NYWS are identical. *Compare* N.J.S.A. 34:19-5, *with* N.Y. Labor Law § 740(5). Although the scope of protected activity under CEPA is broader than under the NYWS, the NYWS must be read in conjunction with Labor Law Section 741, which protects health care workers who disclose or threaten to disclose, or object to or refuse to participate in any activity of the employer which the employee, in good faith, reasonably believes constitutes improper quality of patient care. N.Y. Labor Law § 741(2)(a)-(b). This provision of Labor Law Section 741 is nearly identical to the protections for health care workers in CEPA, including the 'reasonable belief' requirement, making the statutes considerably more similar than the *Alpert* court considered. Both statutes also provide for a court award of fees and costs to the employer if the employee's action was "without basis in law or fact." N.J.S.A. 34:19-6; N.Y. Labor Law § 740(6). Finally, both statutes contain a waiver provision. N.J.S.A. 34:19-8; N.Y. Labor Law § 740(7). Enactment of the Port Authority's Whistleblower Protection Policy, discussed *infra*, also evidences some agreement between the states that Port Authority whistleblowers are entitled to protection.

35. The DRPA's compact states that the DRPA "shall also have such additional powers as may hereafter be delegated or imposed upon it from time to time by the action of either State concurred in by legislation of the other." *Ballinger*, 172 N.J. at 596, *quoting* N.J.S.A. 32:3-5; Pa. Stat. Ann. tit. 36 § 3503, art. IV(q). There, the Supreme Court refused to apply CEPA to the DRPA because the two whistleblower laws at issue (New Jersey's and Pennsylvania's) were dissimilar in scope, filing period, damages, and the right to trial by jury. *Ballinger*, 172 N.J. at 602. The Supreme Court, however, held that, because New Jersey and Pennsylvania recognized a common law claim for wrongful discharge, the plaintiff could sue the DPRA and its employees under the common law. *Id.* at 607-08.
36. *See supra* n.2.
37. For example, federal courts have also ruled that the New Jersey Law Against Discrimination (LAD) also does not apply to the Port Authority. *Hip (Heightened Independence & Progress), Inc. v. Port Auth.*, 693 F. 3d 345 (3d Cir. 2012) (bi-state compact that created Port Authority did not permit unilateral application to the Port Authority of the LAD because New York and New Jersey had relinquished all control over the Port Authority unless otherwise stated in the compact, N.J.S.A. 32:1-8); *Evans v. Port Auth.*, 192 F. Supp. 2d 247, 281-82 (S.D.N.Y. 2002) (antidiscrimination laws of New York and New Jersey do not apply to Port Authority because it is an agency created by an interstate compact); *King v. Port Auth.*, 909 F. Supp. 938, 943 (D.N.J. 1995) (holding that LAD does not apply to Port Authority), *aff'd*, 106 F.3d 385, 943-46 (3d Cir. 1996).
38. Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a).
39. Section 4(d) of the ADEA, 29 U.S.C. § 623(d).
40. Section 503(a) of the ADA, 42 U.S.C. § 12203(a).
41. 29 U.S.C. § 215(a)(3).
42. *See Brown v. Port Auth. Police Superior Officers Ass'n*, 283 N.J. Super. 122, 134-35 (App. Div. 1995) (employees' claims against Port Authority for monetary damages based on a labor dispute were properly dismissed due to employee's failure to comply with the 60-day notice requirement contained in N.J.S.A. 32:1-163); *Santiago v. N.Y. & N.J. Port Auth.*, 429 N.J. Super. 150, 159-60 (App. Div. 2012) (employee's claims against Port Authority for wrongful termination under CEPA, LAD and New Jersey Civil Rights Act properly dismissed based on lack of subject matter jurisdiction because employee failed to comply with the 60-day notice provisions of N.J.S.A. 32:1-163), *certif. denied*, 214 N.J. 175 (2013). Unlike a statute of limitations, this requirement is jurisdictional. *Santiago*, 429 N.J. Super. at 159.
43. *Id.* at 159.

44. The complete text of N.J.S.A. 32:1-163 is as follows:

> The foregoing consent [to suit] is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefore shall have accrued, and upon the further condition that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this act, a notice of claim shall have been served upon the Port Authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced.

45. Minutes of the Meeting of the Port Authority of New York and New Jersey held, March 19, 2015, at 2 Montgomery Street, City of Jersey City, County of Hudson, State of New Jersey, http://www.panynj.gov/corporate-information/pdf/PA-Minutes-3-19-15.pdf.
46. *Id.*
47. *See, e.g.*, Michael Booth, *Port Authority Chair Urges Passage of Latest Reform Measure*, N.J.L.J. (June 22, 2015).

Bonkowski v. Oberg Industries, Inc.: The Third Circuit Defines What Constitutes an Overnight Stay at a Medical Facility Pursuant to the FMLA

by Ty Hyderally and Luis Hansen

In a matter of first impression, in *Bonkowski v. Oberg Industries, Inc.*,[1] the Third Circuit recently considered what constitutes an employee's overnight stay at a hospital for purposes of protection under the Family Medical Leave Act (FMLA). In doing so, the court adopted a narrow rule that could significantly reduce the amount of employees that fall under the scope of the act.

Pursuant to the FMLA, "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" if that employee is unable to work "because of a serious health condition."[2] The act's statutory language and the Department of Labor's (DOL) FMLA regulations define serious health condition in two ways: "a serious health condition" is "an illness, injury, impairment or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."[3] Regarding the first prong of this definition, the DOL regulations define inpatient care as "an overnight stay in a hospital, hospice, or residential medical care facility[.]"[4]

Yet, neither the statutory text of the FMLA nor the DOL define the term "overnight stay." Faced with a peculiar set of facts, the Third Circuit defined the term by adopting a bright-line rule: "an overnight stay means a stay...for a substantial period of time from one calendar day to the next calendar day as measured by the individual's time of admission and his or her time of discharge."[5] Though the court explained it did not have to define the term "substantial period of time" in order to resolve the matter presented before it, the court stated, "a minimum of eight hours would seem to be an appropriate period of time."[6] Consequently, the Third Circuit held the FMLA did not protect the employee in *Bonkowski*, who had spent almost 14 hours in the hospital, because the hospital had admitted and discharged him on the same calendar day.

Case Background

The plaintiff-appellant in *Bonkowski*, Jeffery Bonkowski, worked for Oberg Industries as a wirecut operator and machinist.[7] He had a number of health-related issues, including heart problems and diabetes.[8] On Nov. 14, 2011, during a meeting with his supervisors, he began to experience shortness of breath, chest pain, and dizziness.[9] His supervisors cut the meeting short and gave him permission to leave work.[10] He went home at 5:18 p.m., where he "unsuccessfully tried to slow down his heartbeat and catch his breath."[11] His wife took him to the hospital at approximately 11 p.m.[12]

Although Bonkowski arrived at the hospital before midnight on Nov. 14, he was not officially admitted as a patient until a few minutes after midnight, on Nov. 15.[13] He was discharged that same day, after spending almost 14 hours in the hospital undergoing testing and receiving treatment.[14] Oberg fired Bonkowski on Nov. 16, because "he had walked off the job on November 14, 2011[.]"[15]

District Court Decision

Bonkowski brought FMLA retaliation and interference claims against his employer in the District Court for the Western District of Pennsylvania.[16] He asserted he qualified for FMLA protection pursuant to the first prong of the act's definition of a serious health condition, because his illness required an overnight stay at the hospital.[17]

The district court, however, granted summary judgment in the employer's favor.[18] It held Bonkowski did not have a serious health condition entitling him to protection under the FMLA, because he did not satisfy the DOL's regulatory definition of inpatient care as

"an overnight stay in a hospital, hospice, or residential medical facility."[19] In doing so, it largely relied on dictionary definitions of the words "overnight" and "night," since the DOL's regulations did not explain what constituted an overnight stay.[20] As a result, the district court concluded the term meant, staying in a medical facility from sunset on one calendar day to sunrise on the next.[21] Thus, the court held that Bonkowski did not qualify for FMLA protection, because he arrived at the hospital sometime after 11 p.m., and it admitted him shortly after midnight.[22]

The Majority's Holding and Reasoning

Bonkowski appealed to the Third Circuit. He argued that whether he had a serious health condition was a question of fact that should go to the jury,[23] and that "a reasonable juror could find that he stayed overnight at a hospital," "given the totality of the circumstances."[24] On the other hand, Oberg argued, even if the appellate court disagreed with the district court's sunset to sunrise definition, the appellate court should define overnight stay as a stay from one calendar-day to the next.[25] Thus, the Third Circuit reviewed three possible definitions of overnight stay: 1) the district court's sunset to sunrise definition, 2) Bonkowski's "totality of the circumstances" definition, and 3) Oberg's calendar day definition.[26] Though the court upheld the lower court's grant of summary judgment in Oberg's favor, it rejected the sunset to sunrise definition.[27] Instead, it adopted the employer's definition, but with the added *caveat* that the stay must be for a substantial amount of time.[28]

In its reasoning, the majority opinion first rejected the district court's sunset to sunrise rule as excessively narrow.[29] It explained that outcomes based on that standard varied too much depending on the time of year and geography, which could lead to odd or absurd results.[30] As an example, the majority compared the sunset and sunrise times in different parts of the country at the same time of the year.[31] It argued that a plaintiff in Alaska would only have to be hospitalized for a very short period of time in order to qualify for FMLA protection, while a plaintiff elsewhere in the country would have to be hospitalized for a much longer period.[32] The court also pointed out that the district court relied on incomplete definitions of the terms "overnight" and "night," and on an overly narrow reading of the DOL regulations.[33]

The court then rejected Bonkowski's totality of the circumstances definition, because it was legally incorrect.[34] According to the majority, whether Bonkowski had a serious health condition depended on the lower court's interpretation of the FMLA. The court explained that such analysis is a question of law that it must address, and not a question of fact.[35] Though Bonkowski did not argue the court could define overnight stay by establishing a multi-factor test, the majority opinion acknowledged it had the authority to do so.[36] Still, the court rejected this approach because it "would make it more difficult for both employers and employees to predict whether a specific set of circumstances rises to the level of 'an overnight stay'...and lead to additional litigation in the future with possibly inconsistent results."[37]

Instead, the majority adopted a 'calendar day plus a substantial period of time' standard.[38] It reasoned this rule could be applied objectively and equally among different plaintiffs, could reduce the uncertainty and amount of litigation, and would be in keeping with the purpose of the FMLA, since "an individual who was admitted and discharged by a hospital on the same day appears to have...a 'short term condition[] for which treatment and recovery are very brief...[and] would be covered by even the most modest of employer sick leave policies.'"[39]

Bonkowski argued this calendar-day standard would lead to the "absurd result" of excluding an employee from FMLA protection in situations when the employee arrives at the hospital early in the evening, but is formally admitted a minute after midnight on the next day.[40] In response, the majority relied on the Second Circuit's reasoning in *Landers v. Leavitt*.[41] The *Landers* court defined the term "inpatient," in the context of Medicare litigation,[42] by excluding the time patients spent in the emergency room.[43] In reaching this holding, the Second Circuit deferred to the Centers for Medicare and Medicaid Services (CMS), the federal agency in charge of Medicare, and how it defined inpatient.[44] According to the *Landers* court, CMS did not believe time spent in an emergency room prior to formal admission would, by itself, identify the severity of the individual's condition.[45] Thus, the *Landers* court held that a person becomes an inpatient when the hospital admits him or her, not when that person arrives at the ER.[46] The Third Circuit adopted this reasoning,[47] particularly persuaded by CMS's argument in *Landers*, that "the fact that an individual is sitting in an emergency or waiting room does not neces-

sarily indicate that his or her condition constitutes more than a short-term medical problem that would generally be covered by the employer's sick leave policy."[48]

Judge Fuentes's Dissent

The dissent argued the majority's approach was "impractical, produce[d] inequitable results, and [was] contrary to the remedial purpose of the FMLA."[49] Seemingly unpersuaded by the majority's reliance on *Landers*, the dissent asserted the majority's rule "truncate[ed] coverage and constru[ed] exceptions broadly."[50] Moreover, the dissent argued the majority's bright line rule ignored the "multitude of factors impacting time of admission and the realities of our health care system."[51] In support, the dissent pointed to the fact that wait times at hospitals vary depending on geography; the type of medical insurance the employee has, if any; the time of day, week, or year when the employee seeks treatment; traffic on any given day; and the type of transportation an employee uses to get to the hospital.[52]

The dissent proposed a multi-factor standard as an alternative. Some suggested factors included: 1) the time at which the sick employee is formally admitted to the hospital and time at which he or she is discharged; 2) whether part of the time the employee spends in the hospital is during the traditional night hours; 3) whether the employee was assigned to a room; 4) the severity of the medical issue presented; 5) whether extensive tests were conducted; and, 6) whether the hospital classified the employee as inpatient or outpatient.[53] According to the dissent, these factors would allow courts to consider a broad range of evidence in order to determine whether an employee is entitled to FMLA relief.[54] It also argued the majority overstated concerns that applying a multi-factor standard would lead to uncertainty in the law and an increase in litigation, because there were "seldom matters of factual dispute" in these types of situations.[55]

Conclusion

The majority's rule in *Bonkowski* could have a significant effect on whether an employee's late-night emergency room visit qualifies for FMLA leave. The Third Circuit's holding is clear: If a sick employee is admitted and discharged from the hospital on the same day, that employee did not have an overnight stay in a medical care facility. Thus, that employee would not qualify for FMLA protection pursuant to the first prong of the FMLA's definition of serious health condition. Still, it is important to note that an employee might still be covered by the act under the second prong, which defines serious health condition as "an illness, injury, impairment or physical or mental condition that involves...(B) continuing treatment by a health care provider."[56]

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Endnotes:

1. 787 F.3d 190 (3d Cir. 2015).
2. 29 U.S.C. § 2612(a)(1)(D).
3. *Id.* at § 2611(11); 29 C.F.R. § 825.113(a).
4. 29 C.F.R. § 825.114.
5. *Bonkowski*, 787 F.3d at 199.
6. *Id.* at 210.
7. *Id.* at 192.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 192-93.
14. *Id.* at 193.
15. *Id.*
16. *See id.* at 192, 193.
17. *Id.* at 193.
18. *Id.*
19. *Id.*
20. *Id.* at 193-94.
21. *Id.* at 194.
22. *Id.*
23. *Id.* at 199, 203.
24. *Id.* at 203.
25. *Id.* at 199.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 201.
30. *Id.* at 201-02.

31. *Id.*
32. *Id.* at 202.
33. *Id.* at 200-01.
34. *Id.* at 203.
35. *Id.*
36. *Id.* at 204 (*citing Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 418 (3d Cir. 2012) ("a court could interpret a particular statutory or regulatory provision as establishing some sort of multi-factor standard under which the fact finder determines whether a particular set of circumstances meets this standard.")).
37. *Id.* at 205.
38. *Id.* at 210.
39. *Id.* at 209.
40. *Id.* at 210.
41. 545 F.3d 98 (2d Cir. 2009). *Bonkowski*, 787 F.3d at 206-07.
42. The *Bonkowski* majority argued that *Landers* was instructive for purpose of defining overnight stay, even though *Landers* was a Medicare case, because the Medicare and FMLA schemes both incorporate the same basic notion of inpatient care.
43. *Bonkowski*, 787 F.3d at 206-07.
44. *Id.* at 207.
45. *Id.*
46. *Id.*
47. In addition to relying on *Landers*, the majority justified its bright-line rule by stating that even if an employee fails under the substantial health condition prong, sick employees "may still be able to establish that the illness, injury, impairment, or physical condition at issue involves 'continuing treatment by a heath care provider' pursuant to 29 U.S.C. § 2611(11)(B) and 29 C.F.R. § 825.113 and 825.115." *Id.* at 209.
48. *Id.* at 208.
49. *Id.* at 211.
50. *Id.* at 211-12 ("Denying FMLA protection to an employee who enters the hospital one day and remains there much of the day, totaling close to nineteen hours, is, in effect, truncating coverage and construing exceptions broadly. This denial is simply inconsistent with the remedial purpose of the FMLA.").
51. *Id.* at 212.
52. *Id.* at 212-13.
53. *Id.* at 214.
54. *Id.*
55. *Id.*
56. 29 U.S.C. § 2611(11)(B).