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The Return of Strict Liability: When a Supervisor Creates a Hostile Work Environment by Sexually Harassing a Subordinate

by

Jack A. Raisner
Assistant Professor of
Business Law
St. John's University

Most employers, and many sexual harassment experts, would say that employers cannot be held absolutely liable for the sexually hostile work environments created by their supervisors. The Supreme Court of the United States, however, has never decided this issue. Rather, in 1986, it commenced a tug-of-war between employees and management that continues in federal courthouses to this day over what the standard of liability in such cases should be.

In *Meritor v. Vinson*¹ management and employees vied to get the better of a new area of the new rules governing sexual harassment liability, specifically, where a hostile work environment is created by a supervisor. The *Meritor* court acknowledged the existence of two forms of sexual harassment liability: (1) *quid pro quo*, which arises when the employer conditions tangible job benefits on the employee's submission to conduct of a sexual nature and adverse job consequences result from the employee's refusal to submit to the conduct,² and (2) hostile work environment harassment, which arises when sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.³ *Meritor* involved a hostile work environment claim. It was brought by a subordinate against her supervisor with whom she had shared a sexual relationship. The litigants, and the EEOC, as *amicus*, suggested three standards of liability to the *Meritor* court for possible

adoption. One was strict liability. Strict, or absolute, liability is based on the notion that a supervisor generally acts as an agent of the employer, for Title VII purposes, when making jobs decisions. The employer, delegating job decision-making authority to the supervisor, becomes directly liable for *quid pro quo* harassment "whether employer had notice of, or approved, the unlawful conduct."⁴ Pointing out that supervisors can abuse the employer's power to coercively harass in hostile work environment cases, as well as in *quid pro quo* cases, employees argued that the Court apply the same strict liability standard in both cases where a supervisor engages in sexual harassment.⁵

The second approach, favored by employers, had already been adopted by most courts in cases of hostile work environments that were created, not by supervisors, but by coworkers. In such cases, no expressly authorized power of the employer is used in the harassment. Therefore, instead of strict liability, a type of negligence liability was fashioned. Under that approach, an employer is held responsible for acts of sexual harassment where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate

corrective action.⁶ Employers desired this approach because it allowed them to be relieved of liability, even after the fact, by taking appropriate corrective action.

While the EEOC, in its 1980 Guidelines, had argued for a stricter, absolute standard for supervisor hostile work environment harassment, by 1986, it had arrived at a more centrist position. It presented the *Meritor* court with a third option. This approach also allowed employers to take prophylactic and remedial measures to relieve themselves of liability for harassment occurring without their knowledge. The inquiry posed in the EEOC's *amicus* brief in *Meritor* focused on: (1) whether the employer had adopted a policy against harassment and a set of procedures for handling sexual harassment grievances, (2) whether the victim had utilized these procedures, and (3) whether the procedures were reasonably responsive to the complaint.⁷ If so, the employer would be free of liability for supervisor-caused hostile environment harassment. Under this approach, employers cannot insulate themselves from liability simply by acting promptly; they must also have an effective grievance procedure system in place. Nevertheless, they can negate liability for harassment that has occurred, provided these conditions are met.⁸

Given these choices, the *Meritor* court picked none of the above. It declined "the parties' invitation to issue a definitive rule on employer liability."⁹ Instead, it

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effectively called for a tug-of-war, making subsequent litigants vie over the ultimate direction the liability standard would take.

The ground rules laid down by the *Meritor* plurality decision further blurred the battlelines. The Court rejected the view of the District of Columbia Court of Appeals below, that "employers are always automatically liable for sexual harassment by their supervisors."¹⁰ At the same time, the Court also appeared to reject the favored position of employers, that notice of the conduct is required before liability arises.¹¹ Moreover, it seemed to repudiate a position suggested by the Equal Employment Opportunity Commission in its brief, that employers who maintain grievance procedures be insulated when the employee fails to use it.¹²

Having rejected both polar extremes and the middle ground, the Court revealed the substantive law on which the parties would be concentrating their efforts in arguing the issue in future litigation. Agreeing with an assertion put forth by the EEOC, the Court stated that "Congress wanted courts to look to agency principles for guidance in this area."¹³ The somewhat arcane law of agency became the legal substance, or "rope," for litigants to grasp onto in the tug-of-war over harassment liability.

Perhaps anticipating that the unfamiliar particulars of agency law might lead to undesirable results if stretched too far, the *Meritor* court cautioned that agency principles "may not be transferable in all the particulars to Title VII."¹⁴ Faced with the Supreme Court's admonition that agency rules be applied, however, most courts have taken the instructions to heart, but the results have varied widely, as discussed below.

A. Respondeat Superior

The laws of agency are irrelevant, of course, where the employer personally engages in sexual harassment, whether it be *quid pro quo* or hostile environment harassment. Agency theory comes into play where the harassment comes about through the actions of an agent or employee of the employer. In such situations, the courts' touchstone for guidance in the laws of agency is the Restatement (Second) of Agency (1958) §§219-237(1958). The Restatement sets forth

concepts by which liability can be imputed to employers who do not directly participate in the sexual harassment. This most embracing theory is *respondeat superior*, or vicarious, or automatic liability.¹⁵ This form of liability only arises in the workplace and presupposes that the employee has acted within the scope of employment. Employers perennially contend that sexual harassment by a supervisor is *never* within the scope of employment of the supervisor. Supervisors, they argue, usually have not been given the authority to sexually harass, nor is sexual harassment "actuated by a purpose to serve the employer." Accordingly, they assert that sexual harassment always falls outside the scope of employment and never gives rise to strict liability under *respondeat superior*. Nevertheless, in *quid pro quo* harassment cases, the courts readily overcame this theoretic barrier to strict liability. As mentioned above, in *quid pro quo* cases, the supervisor explicitly uses his authority to make employment decisions in the course of the sexual harassment, by conditioning job benefits on submission to sexual advances. Since the supervisor's power to retaliate comes directly from the employer, direct, or strict liability is imputed back to the employer, under the *respondeat superior* theory, for the supervisors' abusive use of the employer's authority. Couching this in the terms of the Restatement, it can be said that if harassment was caused by the exercise of supervisory power, or the supervisor was "aided in accomplishing" the harassment by having authority over decisions affecting the victim, the responsibility for the conduct can be imputed to the employer.¹⁶ Today, virtually all courts apply this reasoning to impose strict liability in *quid pro quo* cases.

The question then is: can this same, strict, *respondeat superior* analysis also apply in hostile work environment cases? In hostile work environment cases, liability does not turn on the supervisor's decision-making capacity. Indeed, hostile work environments can be created independent of supervisory power. As one court has stated: "In a hostile environment case, the harasser is not explicitly raising the mantel of authority to cloak the plaintiff in an unwelcome atmosphere."¹⁷ Since the factual basis for hostile work

environment liability need not involve supervisory power, employers argued in *Meritor*, and the Supreme Court agreed, that *respondeat superior* liability is inappropriate in hostile environment cases, even when a supervisor is the harasser. *Respondeat superior* liability in hostile environment cases, accordingly, was repudiated by the lead opinion in the *Meritor* plurality, penned by then-Associate Justice Rehnquist. Although five justices pointed to agency principles, they specifically rejected *respondeat superior* as being one of them.¹⁸

Since *Meritor*, only some state courts and codes have adopted *respondeat superior* liability for a supervisor who creates a hostile work environment.¹⁹ Plaintiffs in federal court who have sought to impose a strict liability standard in such cases have been forced to look deeper into the Restatement for exemptions, or more accurately, substitutes for *respondeat superior*, in order to find a strict liability theory to point at their employers.

Beyond pure *respondeat superior*, Section 219(2) of the Restatement does offer three alternative theories of agency by which employees can argue that courts should impute employer liability, even where the supervisor has acted outside of the scope of employment. Restatement §219 provides, as follows:

- (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
 - (a) the master intended the conduct or the consequences, or
 - (b) the master was negligent or reckless, or
 - (c) the conduct violated a non-delegable duty of the master, or
 - (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing by the tort by the existence of the agency relation.

The sections which have figured most prominently in imputing employer liability in sexual harassment cases are

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Recent Developments in Employment and Labor Law

by

Roger Johns

Eastern New Mexico University

EMPLOYEE FREEDOM OF SPEECH

With its decision in *Connick v. Myers*, 75 L.Ed.2d 708 (1983), the Supreme Court enunciated a two tiered test for determining when speech by a government employee will be afforded First Amendment protection. To be protected, the speech must first, be on a matter of public concern, and, second, the employee's interest in the speech cannot be outweighed by the State's interest in promoting efficiency in the provision of the public services for which it is responsible. (*Connick*, at 142) With its recent decision, in *Waters v. Churchill*, 128 L.Ed.2d (1994), the Court resolves a split among the Circuits as to "whether the *Connick* test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said." (*Waters*, at 692) (See *Atcherson v. Siegenmann*, 605 F.2d 1058 (8th Cir. 1979); *Wulf v. Wichita*, 883 F.2d 842 (10th Cir. 1989); and, *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992).

The plaintiff in *Waters*, Cheryl Churchill, sued her former employer, the McDonough District Hospital, under 42 U.S.C. § 1983, for firing her in violation of her First Amendment rights. The gravamen of her complaint appears to have been that the *Connick* test should only be applied to factual conclusions reasonably arrived at by the employer, but that the employer, in this case, did not arrive at it factual conclusions as to what had been said, and the manner in which it was said, in a reasonable manner. The Court agreed with her, that the employer need not determine the facts of a particular case with scientific certainty, or even with the certainty commensurate with a trial conducted pursuant to formal rules of evidence, but the Court disagreed with her as to whether or not adequate factfinding had been conducted by the employer in this case. In its disposition of the case, the Court enunciated the standards by which a government employer's factfinding and conclusions will be measured, for constitutional fitness. First, the court observed that "the propriety of a proposed procedure must turn on the particular context in which

the question arises - on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase." (*Churchill*, at 697) The Court went on to state that "[i]t is necessary that the [employer] reach its conclusion about what was said in good faith" and that "employer decision-making will not be unduly burdened by having courts look to the facts as the employer reasonably found them to be." (*Id.* at 700-701).

In sum, the propriety of a government employer's factfinding procedures will be judged by the cost and the magnitude of the constitutional risks inherent in a given situation, and the conclusions reached on the basis of facts gathered by such a procedure must be reasonable and have been reached in good faith. Thus, it is a very real possibility, and one that the Court recognized, that government employees could suffer adverse employment decisions on the basis of erroneous factual determinations, but that if the employer's fact finding procedures are adequate to the risks involved and the conclusions are reasonable and reached in good faith, the decision will be legally unassailable.

RETROACTIVITY OF CIVIL RIGHTS ACT OF 1991

The United States Supreme Court handed down decisions in two cases, in which the retroactivity of the Civil Rights Act of 1991 (P.L. 102-166) was at issue. In *Landgraf v. USI Film Products*, ___ U.S. (1994), the Court decided that neither § 102(a)(1) of the Act (creating the right to recover compensatory and punitive damages for certain violations of Title VII) nor § 102(c)(1) (permitting either party to demand a jury trial if compensatory or punitive damages are sought) is retroactive. Similarly, in *Rivers v. Roadway Express, Inc.*, ___ U.S. ___ (1994), the Court held that § 101 of the Act (defining the term "make and enforce contracts" as it appears in § 1 of the Civil Rights Act of 1866 to include "making, performance, modifica-

tion, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship") is not retroactive. In both cases, the refusal to order retroactive application of the Act was premised on the Court's inability to determine clear Congressional intent that the Act be applied retroactively.

While this is probably the end of the saga on the retroactivity issue for the Civil Rights Act of 1991, these two cases leave many questions unanswered. For instance, in *Mozee v. American Commercial Marine Service*, 963 F.2d 929 (7th Cir. 1992), the issue of whether §§ 104 and 105 of the Act (pertaining to the business necessity defense for disparate impact cases) will go unresolved, because the petition for certiorari in that case was denied. The same issue, with regard to § 105 was also raised in *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), and the petition for certiorari was denied there, as well. Also, the retroactivity of § 106 (prohibiting the discriminatory use of test scores), § 107(a) (clarifying the availability of the mixed motive defense), and § 116 (affirming the validity of certain affirmative action remedies) will remain an unanswered question since the petition for certiorari was denied in *San Francisco Police Officers Association v. San Francisco*, ___ F.2d ___ (9th Cir. 1992), where those issues were raised.

Writs of certiorari were also applied for, but denied in *Holland v. First Virginia Bank*, (unpublished) (4th Cir. 1991), *Walker v. Frito-Lay*, (unpublished) (11th Cir. 1992), *Hamilton v. Komatsu-Dresser*, 964 F.2d 600 (7th Cir. 1992), *Wanguri v. Port of Houston*, (unpublished) (5th Cir. 1992), *Peterson v. Adventist Health System/Sunbelt, Inc.*, (unpublished) (5th Cir. 1992), *Baker v. Gulf+Western Industries, Inc.*, (unpublished) (11th Cir. 1992), *Luddington v. Indiana Bell*, 966 F.2d 225 (7th Cir. 1992), *Holt v. Michigan Dept. of Corrections*, 974 F.2d 771 (6th Cir. 1992), *McKnight v. General Motors*, (unpublished) (7th Cir. 1992), *Gersman v. Group Health Associates*, 975 F.2d 886 (D.C. Cir. 1992), and *Hicks v. Brown Group, Inc.*,

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982 F.2d 295 (8th Cir. 1992). The petition for certiorari was dismissed in *Kuhn v. Island Creek Coal Co.*, (unpublished) (6th Cir. 1992).

NEGLIGENT INFLICTION OF EMOTION DISTRESS

In a pair of cases, *Consolidated Rail Corp. v. Gottshall* and *Consolidated Rail Corp. v. Carlisle*, 512 U.S. __, 129 L.Ed.2d 427, 114 S.Ct. __ (1994), the Supreme Court held, for the first time, that claims for damages purely for negligent infliction of emotional distress can be brought under the Federal Employers Liability Act (FELA), and established the zone of danger test as the appropriated standard for "evaluating claims for negligent infliction of emotional distress that are brought under the Federal Employers' Liability Act." (*Gottshall*, at 435) (The cases were consolidated for purposes of the Court's opinion, and will be referred to, herein, as *Gottshall*.) In so doing, the Court examined and rejected the physical impact test and the relative bystander test, as inconsistent with the purposes of FELA. With this opinion, the Court has resolved a split among the Circuits on the issue of the appropriate standard for establishing a claim for negligent infliction of emotional distress, under FELA. (See *Ray v. Consolidated Rail Corp.*, 938 F.2d 704 (7th Cir. 1991); *Elliott v. Norfolk & Western R. Co.*, 910 F.2d 1224 (4th Cir. 1990); *Adams v. CSX Transp., Inc.*, 899 F.2d 536 (6th Cir. 1990); and, *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989))

James Gottshall sued Consolidated Rail Corp. (Conrail) for negligent infliction of emotional distress after having witnessed the death of a coworker, Richard Johns, who collapsed and died of heart failure on the jobsite, brought on by "the heat, humidity, and heavy exertion" of laying track. After Johns' death, but before the body was removed by the coroner, Gottshall and the other members of the crew were ordered back to work, where they labored for several hours within sight of the sheet covered body. Alan Carlisle sued Conrail for negligent infliction of emotional distress after he suffered a nervous breakdown in response to the added

responsibilities and longer, more erratic work hours associated with his promotion from train dispatcher to trainmaster. Carlisle won at trial, and the judgment was affirmed on appeal to the Third Circuit. At trial, Conrail won its motion for summary judgment, but, after an appeal, the Third Circuit reversed the summary judgment and remanded for trial. Conrail sought, and was granted writs for both the affirmation of Carlisle's claim and the remand for trial of Gottshall's claim. The Supreme Court reversed the appellate affirmation of Carlisle's trial victory, ruling that "Carlisle's work-stress-related claim plainly does not fall within the common law's conception of the zone of danger[.]" (*Gottshall*, at 449) With respect to Gottshall's claim, the Court remanded for trial with instructions to apply the zone of danger test in evaluating the claim.

PREEMPTION

In *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. __, 129 L.Ed.2d 203, 114 S.Ct. (1994), the U.S. Supreme Court, affirming the judgment of the Supreme Court of Hawaii, held that a state law claim of wrongful discharge is not preempted by the Railway Labor Act (45 U.S.C. § 153). In so doing, the Court applied the preemption standard developed in a line of cases under §301 of the Labor Management Relations Act (29 U.S.C § 185), to the question of "whether an aircraft mechanic who claims that he was discharged for refusing to certify the safety of a plane that he considered unsafe and for reporting his safety concerns to the Federal Aviation Commission may pursue available state law remedies for wrongful discharge, or whether he may seek redress only through the [Railway Labor Act's] arbitral mechanism." (129 L.Ed.2d at 208) Applying the standard developed under §301, as articulated in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 100 L.Ed.2d 410, 108 S.Ct. 1877 (1988) preemption occurs only if resolution of the state law claim requires interpretation of a collective bargaining agreement (CBA). Or, stated differently, if the rights involved exist independently of the collective bargaining agreement, preemption does not occur. The rights involved will be considered independent, even if they are defined by the CBA, so long as there is another source

for the rights, which is wholly external to the CBA. If there is an independent source for the rights at issue, the claim could be resolved by interpreting the independent source, and without interpreting the CBA.

In this case, the right involved was the right to not be wrongfully discharged. Norris, who was discharged for refusing to certify, as safe, a plane he believed to be unsafe, and for reporting his concerns to the FAA, sued his former employer in state court, claiming that his discharge was in retaliation for his refusal to certify the plane and for reporting the safety matter to the FAA. Norris claimed that this discharge was wrongful under, among other things, the Hawaii Whistleblower Protection Act (Haw. Rev. Stat. §§ 378-61 to 378-69). The airline contended that, since a determination of whether Norris was wrongfully discharged would require an interpretation of the CBA, and since the RLA required that all such matters be resolved under the arbitral mechanism set up by the RLA, Norris' state law claim was preempted. The airline's theory rested upon the assertion that since Norris' claim originated as a grievance, and since grievances are listed as a type of minor dispute subject to the RLA arbitral mechanism, the claim can only be settled by arbitration under the statute. The Court agreed with the airline that the term "grievance[.]" as it appears in 45 U.S.C. § 151a, includes "disputes involving the application or interpretation of a [collective bargaining agreement]" (129 L.Ed.2d at 212), but the Court did not agree that every dispute involving a determination of whether a worker performed his or her duties, as set forth in a CBA, required an interpretation of the CBA. The Court observed that, under *Lingle*, "purely factual questions' about an employee's conduct or an employer's conduct and motives do not 'requir[e] a court to interpret any term of a collective-bargaining agreement'" (*Norris* at 217, citing *Lingle*, 486 U.S. at 407), and that Norris' state law retaliatory discharge claim was just such a purely factual question. Since the Court found that no interpretation of the CBA would be necessary, it held that the RLA's arbitration provisions did not preempt the state law claim, under the Hawaii Whistleblower's Protection Act.

Weighing Discrimination Against the Overweight

Cook v. Rhode Island

by

Dr. Sharlene A. McEvoy
Fairfield University

Consider the following incidents:

*A five-foot seven-inch, three hundred twenty-seven pound security guard was fired by the Los Angeles Times although he was an excellent employee who had won the praise of his supervisors.

*A five-foot four-inch, three hundred five pound woman applied for a job with a Santa Cruz, California health food store and when she survived the screening process, she was told she was next in line for a position. Later, when she saw the same job advertised again, she called the company to say she was still interested. She was told that the company believed that she could not handle the position because of her weight.

*An obese bank employee sued her employer for doing nothing when a co-worker poked, pinched, and ridiculed her in the presence of customers, saying that fat people lie and stink.

These experiences are typical of those endured by some of the thirty-eight million obese Americans. Anti-fat bias is the last preserve of bigotry as overweight people are routinely ridiculed by employers, peers, and the media. While prejudice against racial, ethnic, and religious minorities, is proscribed by federal and state civil rights

acts, size discrimination still prevails.

A study of three hundred sixty-seven fat women and seventy-eight overweight men, by Esther Rothblum, a psychology professor at the University of Vermont, revealed a close correlation between weight and employment discrimination. Over 40% of the males and 60% of the females said that they had been denied promotions and raises. Significantly, the fatter the person, the more likely he or she was to be discriminated against.

What are the rights of an overweight person who has been dismissed from, or denied, employment? The answer is

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Proposed Editorial Policy and Information for Contributors

The *Employment and Labor Law Quarterly* is the official publication of the Employment and Labor Law Section of the Academy of Legal Studies in Business. The editorial mission of the *Quarterly* is to provide accurate and authoritative information and commentary on statutory, regulatory, and jurisprudential developments in employment and labor law, in a form which is practical and readily usable by managers, teachers, and researchers, and to encourage and facilitate research and writing about issues at the developing edge of labor and employment law.

In addition to publishing scholarly articles that serve this editorial mission, the *Quarterly* will also provide, three regular features in each issue: 1) The Research Center, 2) Recent Developments in Employment and Labor Law, and 3) Case Studies in Employment and Labor Law. The Research Center provides a survey of federal legislative developments, a comprehensive guide to the papers on employment and labor law presented at the national and regional conferences of the Academy of Legal Studies in Business, and a selected listing of scholarly journal

articles published in the field. The Recent Developments section provides commentary on selected developments in the field. The Case Studies section will present studies of liability-laden workplace situations for use in teaching employment and labor law. These case studies may be either actual workplace situations which have been sufficiently disguised to protect the interests of all parties involved, cases based on actual workplace situations, or completely fictitious situations. Since part of the mission of the *Quarterly* is to bridge the gap between research and practice, the intended audience is both management professionals and academicians in the field of employment and labor law.

The *Quarterly* actively solicits, for publication, articles dealing with issues of employment and labor law, but it is particularly interested in articles that discuss and analyze emerging developments, and that maintain a balance between theoretical considerations and practical application. Reviews of scholarly books in the field, case studies, and shorter works and abstracts are also actively solicited. Article length

manuscripts will be reviewed by members of the *Quarterly's* editorial board, and publication decisions will normally be made within two months. If you wish to have your submission reviewed, please so indicate, in your cover letter.

Manuscripts should be submitted to: Prof. Roger J. Johns, Editor in Chief, Employment and Labor Law Quarterly, College of Business, Eastern New Mexico University, Portales, New Mexico 88130.

For article length manuscripts, three copies, should be submitted. The title, author(s), and affiliation(s) should appear only on a detachable title page. The manuscripts must not contain any information indicative of the name(s) or affiliation(s) of the author(s). Footnotes should conform to the requirements set forth in *A Uniform System of Citation*, 15th Ed. Manuscripts should be typed (doubled-spaced) on 8½" by 11" paper. Tables or charts should be appended, with a notation in the text indicating where it should be placed.

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unclear under state and federal laws. but there were some positive developments in 1993. The Equal Employment Opportunity Commission (EEOC) declared, in an *amicus curiae* brief, in *Cook v. State of Rhode Island*, 10 F.3d 17 (1993), that people who have been extremely overweight for a long period of time qualify for federal protection.

The EEOC acted on behalf of Bonnie Cook, a five foot two inch, three hundred pound woman, who, in 1989, was denied a job as an attendant at a state school for the mentally retarded because of her weight. Ironically, she had held the job for five years, weighing about the same amount, and had an excellent work record. A jury awarded her \$100,000 in damages and the judge ordered her reinstated. The Rhode Island Department of Mental Health, Retardation, and Hospitals appealed arguing that obesity is not protected under the law because it is a condition caused by voluntary conduct and Cook could change if she chose. Rhode Island also claimed that her weight compromised her ability to evacuate patients in an emergency and put her at greater risk of developing heart disease, thus increasing the likelihood of a worker's compensation claim.

Cook proved that she was a victim of discrimination because of a handicap in violation of Section 504 of the Rehabilitation Act of 1973, by showing that she applied for a job in a federally funded program or activity, that she suffered from a cognizable disability, that she was qualified for the position and that she was not hired due to her disability.

The EEOC urged the Court of Appeals to consider obesity, just as it would many other conditions under the Americans With Disabilities Act (ADA) which became effective in 1992 and forbids discrimina-

tion against qualified individuals with disabilities. A "disability" is defined as a "physical or mental impairment that substantially limits one or more major life activities." Anyone with a record of such an impairment or anyone regarded as having such an impairment is disabled.

The EEOC conceded that while obesity is not what might be considered a "traditional" disability, since it is possible for an obese person to lose weight, it is, nevertheless, a chronic condition. Moreover, the EEOC declared that it is not necessary that a condition be involuntary or immutable to be covered. The agency's position was buttressed by the fact that in 1992, experts at a National Institute of Health conference stated that there is increasing physiological, biochemical, and genetic evidence that being overweight is not simply an issue of willpower, but a complex disorder of energy metabolism. Thus, in some cases, obesity is an immutable condition.

The Court rejected Rhode Island's argument that Cook was not protected by the law, because she could lose weight and rid herself of the disability whenever she chose. The court averred that there was credible evidence that metabolic dysfunction causing weight gain in the morbidly obese lingers even after weight loss. It found ample evidence that Cook was discriminated against either because her obesity limited her activities or because it was perceived as a disability, even though it did not limit her activities.

The *Cook* case involved "severe" obesity, which means that a person is one hundred, or more, pounds overweight. Neither the EEOC, nor the court, maintained that the protection of the law is limited to such cases, so the question remains of how overweight a person has to be to qualify under the law.

The *Cook* decision should chasten employers into examining their hiring practices to ensure that interviewers and supervisors do not perpetuate stereotypes about the overweight, ask impolitic questions, or make inappropriate comments. Companies should determine that office furniture is accessible to persons of size. In addition, businesses which have established "wellness" programs which provide financial incentives to employees who lose weight and make other lifestyle changes will have to be concerned about challenges to such plans. While companies are understandably desirous of keeping health care costs down, when a program exacts penalties from overweight workers or coerces participation, it may run afoul of the ADA.

While the EEOC's stance and the *Cook* decision offer a glimmer of hope for the amelioration of discrimination against the overweight, many cases are yet to be fought and won before such practices end. Currently, only Michigan has a law affording civil rights protection to people of size (the Elliot Larsen Civil Rights Act M.C.L.A. 37.2101, *et seq.*). Texas and New York have considered, but not passed, similar legislation. California offers only a patchwork of local ordinances. State courts have considered the issue in recent years with mixed results, rendering the overweight workers subject to the vagaries of interpretation of state handicap laws.

In his eloquent opinion, in *Cook*, Judge Selya wrote, "In a society that all too often confuses slim with beautiful or good, morbid obesity can present formidable barriers to employment." (10 F.3d. at 28 (1993)). Obesity should join race, religion, sex, age, and national origin as impermissible reasons for job bias. How a person works, not looks, should be the only criterion for employment.

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The *Richard D. Irwin Publishing Co.* has made a commitment, to the Employment and Labor Law Section, to underwrite a significant part of the cost of publishing this Newsletter, for the next two years. This additional funding will play an important part in the continued growth and development of the Newsletter. On behalf of the members of the Section, the editors of the Newsletter thank both the *Richard D. Irwin Publishing Co.*, for their vote of confidence in our endeavor, and Craig Beytien of *Irwin*, who was instrumental in arranging for this funding. The editors also thank *Eastern New Mexico University*, and its College of Business for providing the initial funding which has made the Newsletter, in its current form, a possibility.

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sections(2)(b) and (d), which set forth three alternative theories of employer liability. Two of them, "negligence" found in section(2)(b), and "apparent authority" found in section(2)(d), do not pose any threat of strict liability on the employer. The third, however, based on the clause "aided in accomplishing" in section(2)(d), does suggest direct liability, as was noted in the discussion of *quid pro quo* harassment, above.²⁰

B. Negligence

The negligence prong, found in the Restatement §219(2)(b), poses little threat of liability for the careful employer. Even before the Supreme Court in *Meritor* directed attention to the Restatement, the concept of negligence had been introduced in sexual harassment jurisprudence. In the case of employer liability for the sexual harassment between co-workers, courts, by 1987, had recognized a hybrid negligence/constructive knowledge theory. Under it, liability would be imposed if the employer had actual or constructive knowledge of the sexual harassment, but failed to take remedial action.²¹ This theory imposes a duty on the employer to take notice of sexual harassment that is reasonably conspicuous. Employer liability in this context has been defined as "failing to remedy or prevent a hostile or offensive work environment of which management level employees knew, or in the exercise of reasonable care, should have known."²² Beyond taking notice, it imposes a duty to take remedial action once the employer has knowledge. Failure of the employer to take such notice or remedial action violates the duty. The employer, therefore, is negligent or reckless when it fails to uphold either duty. The theory of negligence is virtually identical to the theories of coworker liability and the EEOC's proposed "lack of grievance procedure" liability that the *Meritor* court had addressed. Courts that wish to follow the Supreme Court's directions to use agency law principles, can import the same remedial approaches that were presented to the *Meritor* court, by harmonizing them with the negligence theory of Restatement §219(2)(b). These courts can essentially employ the same comfortable analysis advocated by the EEOC and employers to the *Meritor* court. Courts that apply the

Restatement no further than §219(2)(b) usually arrive at outcomes favorable to the employer, as illustrated by recent decisions in the Third and Sixth Circuits.

In *Bouton v. BMW of North America*,²³ a bilingual secretary claimed hostile work environment against her supervisor. In casting for the appropriate standard of liability, the Third Circuit surveyed the various policies underlying the various Restatement sections. It felt most comfortable with the negligence theory, in which scrutiny would focus on the employer's policies against sexual harassment and on whether the victim adequately notified the employer of the harassment. Finding the employer's policy in place, and the notification by the victim inadequate, the Court held that the complaint mechanism was well known to the plaintiff and further harassment was prevented in response to her first complaint. "By definition," held the Court, "there is no negligence." The Court relieved BMW of whatever harassment may have occurred by sustaining the award of summary judgement against the plaintiff.

Similarly, the Sixth Circuit in *Reed v. Delta Air Lines Inc.*,²⁴ was faced with an airline ticket agent who alleged that she was sexually assaulted by her supervisor, among other acts of a sexual nature. The Court relieved the employer of liability based on a finding that the employer did not have "real notice" of the supervisor's propensity for harassment, and on the fact that the employer took prompt remedial action after learning of the harassment. Under the guise of agency negligence theory, these courts, like most that essentially apply the coworker and grievance procedure tests, can easily reach a result favorable to the moderately vigilant employer.

The employee, therefore, is likely to lose the "tug-of-war" unless it can induce the court to apply the alternative liability standards found in the Restatement (Second) of Agency, specifically in the "apparent authority," and, more importantly, the "aided in accomplishing" clauses of section 219(2)(d).

C. Apparent Authority

Section 219(2)(d) of the Restatement (Second) of Agency ostensibly combines two grounds for liability into a single section. That section provides that a master

may be liable for the acts of a servant acting outside the scope of delegated authority if the servant "purported to act on behalf of the principal and there was reliance on that apparent authority, or if the servant was aided in accomplishing the tort by the existence of the agency relationship."²⁵

Some courts refuse to acknowledge this section at all. In *Spencer v. General Electric*,²⁶ for example, the Fourth Circuit mentioned this section, but refused to apply it in a case involving the rape of the victim. In *Reed v. Delta Airlines Inc.*, the Court, as mentioned above, balked at applying section 219(2)(d), and focused exclusively on the employer's complaint procedure.²⁷

Other courts acknowledge section 219(2)(d) but only for the part of it that imputes employer liability based on apparent authority. These courts either ignore or dismiss the second part of the section. By training their sights on apparent authority, these courts obviate employer liability because it is unlikely that a harasser will "purport to act on behalf of the employer by his inappropriate actions toward the plaintiff," as illustrated in *Hirschfield v. New Mexico Corrections Dept.*²⁸ There, a female typist in a prison alleged that she was actually harassed by the Captain of Security, who was not her direct supervisor. She invoked section 219(2)(d) by claiming that the harasser was "aided in accomplishing" the harassment by virtue of agency relationship. Instead of analyzing whether the conduct was facilitated by the harasser's powerful position, the court hastened to sweep the clause "aided in accomplishing" into the apparent authority part of the clause. Thus, it held that "[t]he second half of 219(2)(d) which reads 'or is aided in accomplishing the tort by the existence of the agency relations,' must be read in the context of what immediately precedes it." Since the Captain "did not purport to act on behalf of the institution by his inappropriate actions toward plaintiff," the court found section 219(2)(d) inapplicable and the employer not liable.

D. Does "aided in accomplishing," merely modify apparent authority?

As demonstrated in *Hirschfield*, many courts attempt to merge the "aided in accomplishing" clause of section 219(2)(d)

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into the concept of apparent authority, rather than recognizing it as a separate basis for liability. One court was apparently so concerned that the "aided in accomplishing" clause might be read on its own, it replaced the connective "or" in the Restatement with the word "and" in citing the section.²⁹ Another court strained to read the "aided in accomplishing" clause out of the Restatement altogether by making a declaration that obliquely revealed its recognition that the "aided in accomplishing" clause open the door to automatic liability. In *Doe v. NCR*,³⁰ an employee was raped on the job after-hours by her supervisor. There, the employee claimed that the supervisor was "aided in accomplishing" the harassment by the virtue of his job which allowed him entrance to the office and proximity to her. The district court, as in *Hirschfield*, interpreted the section as relating only to apparent authority. In support of this reading, it referred to Comment (e) on section 210(2) which speaks of section (d) as "includ[ing] primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant." Reading this respectively, the Court dismissed the plaintiff's claim that her supervisor bore liability for the employer by virtue of his proximity to her.

It may be surmised that courts narrow the focus of section(2)(d) to solely "apparent authority" because employers are more comfortable under that standard, and can more easily prevail. Plaintiffs rarely will be able to prove apparent authority. First, few harassers "purport" that they are acting on behalf of the employer when engaging in harassment. Victims will often have difficulty proving that they believed that the agent was authorized to engage in harassing conduct. Moreover, many courts have concluded that the same grievance procedures and remedial action that negate negligence liability also "divest" employers of apparent authority.³¹ Under the apparent authority theory, employers, once again, can be readily relieved of harassment liability if they have prevention and responsive mechanisms in place -- which divest apparent authority and destroy any imputed liability.³² In short, where the courts' focus is on the "apparent authority"

clause in section 219(2)(d), the employee is likely to be unable to impute liability to the employer.

E. "Aided in accomplishing" clause—on its own.

By contrast, several courts that have read the "aided in accomplishing" clause apart from apparent authority have opened a wide realm of direct employer liability in supervisor-created hostile environment cases. In *Rauh v. Coyne*,³³ for example, a hotel employee alleged that her supervisor was able to harass her only because he had a key allowing him to enter the locked room where she worked. On this basis, the D.C. district court found that the harassment was, under section 219(2)(d) "aided by the agency relationship." Applying this "proximity" or "access" interpretation to another case involving a rape, the outcome is likely to be different than it was in *Doe v. NCR*.³⁴ For example, in *Huitt v. Market Street Hotel Corp.*,³⁵ the plaintiff was a bartender who was raped on her first day of work by her supervisor when he drove her home. Her hostile work environment claim was essentially similar to that asserted in *Doe v. NCR*, only in *Huitt*, the plaintiff alleged that her supervisor has disallowed her use of the phone to find another ride home. Thus, the court found there was sufficient facts on which to sustain direct employer liability under section 219(2)(d): "accepting plaintiff's evidence, her superior was able to place himself in a position to drive plaintiff home by using his authority in order to make it more difficult for plaintiff to make other arrangements for a ride...[the supervisor] accomplished the alleged rape of plaintiff by using his authority to place plaintiff in the vulnerable position of having no ride home other than [the supervisor]."

Only a few courts have based "aided in accomplishing" liability on whether the supervisor had access to the subordinate to engage in the sexual harassment. Generally, the courts require something more than mere access. As the *Huitt* court noted, some invocation of supervisor authority to facilitate the harassment should be present, but the supervisor need not expressly threaten the subordinate by referring to the authority delegated.³⁶

An increasing number of courts look for some presence of supervisory authority in the harassment before applying the

"aided in accomplishing" clause as a basis of liability. When they do, their focus tends to land not on *where* the harassment takes place, or on the issue of *access*. Rather, these courts recognize that supervisors who have the inherent power of retaliation, may be facilitated by this inherent power when they harass the employee. While the supervisor may not be invoking this retaliatory power as explicitly as in *quid pro quo* harassment, due to its presence, the application of the "aided in accomplishing" clause may lead as naturally to strict liability in hostile environment cases as it does in *quid pro quo* cases.

The first major post-*Meritor* case to illustrate how hostile work environment strict liability can arise under the "aided in accomplishing" clause used an analysis that was nearly indistinguishable from a *quid pro quo* analysis. The Eleventh Circuit in *Sparks v. Pilot Freight Carriers, Inc.*³⁷ was confronted with a billing clerk whose superior, a terminal manager made sexual advances combined with remarks such as "you'd better be nice to me," and "your fate is in my hands." She rebuffed these gestures, never notified her company official, and was eventually fired. She claimed *quid pro quo* harassment in that she was fired in retaliation for her refusal to give in to his sexual demands. She also claimed hostile work environment harassment. The court conceded that the supervisor was not acting within the scope of his employment when allegedly harassing Sparks. Applying the section 219(2)(d) exceptions to *respondeat superior*, however, the Court emphasized the "aided in accomplishing" clause as a distinct basis for liability from apparent authority. The court noted that where the supervisor exercises actual decision-making authority over the subordinate's job, direct liability flows to the employer in the *quid pro quo* case. Adopting the same principle for hostile work environment cases, the Court observed that the terminal manager had actual and apparent authority to alter Spark's employment statutes—including authority to fire her. Since he repeatedly reminded Sparks that he could fire her, should she fail to comply with his advances, the court concluded that the company may have been directly liable to

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her under the "aided in accomplishing" clause.

The question raised by *Sparks* is: what kinds of managerial conduct, apart from repeated reminders of being fired, will suffice to trigger section 219(2)(d) liability? Can strict liability be imputed from the acts of non-supervisors who are still powerful figures in the organization and who can affect an employee's destiny? Can direct liability be imputed from the acts of a low-level supervisor who has been delegated little authority but who can affect some aspects of the victim's job conditions? What if the manager does not intend to use his authority, but the victim nevertheless perceives a threat of reprisal? Can it not be argued that even if such a supervisor has not relied on apparent authority, he would still have been aided by the existence of the agency relationship.

Perhaps the most sensitive, and realistic, analysis of how high level officers can wield their power to "aid" or facilitate sexual harassment, without explicit threats, was set forth by Chief Judge Myron H. Thompson of the Middle District Court of Alabama in *Sims v. Montgomery County Commission*.³⁸ In *Sims*, Butler, the county sheriff, asked a female dispatcher to join him in getting some coffee and cake. As they went into the coffee room, Butler approached the dispatcher, and in her words, "[h]e put his hands down my side and on my buttocks." She said nothing because she figured Butler had acted unintentionally. A few days later, however, Butler approached her again and asked her if the telephone number was listed. She told him that it was not. Butler then responded that his wife had been away and that if he had her number he would have telephoned her and they "could have gotten together." Although the dispatcher still showed no interest in him, Butler approached her again a day or two later and asked her for her telephone number; she did not respond. It was then that she realized that Butler had, indeed, intended to touch her intimately and she became very upset over his interest in her. Butler had already ignored her efforts to make known to him, indirectly and diplomatically, that his sexual advances were not welcome. Although Butler did not explicitly "raise the mantle of authority" in

carrying out his harassment, the court looked beneath the surface. It wrote that the dispatcher "was concerned that, if she confronted him and rejected him in direct terms, she might lose her job....The dispatcher considered consulting an attorney, but decided that any lawsuit would result in her word against Butler's and that it would be very unlikely that a judge or jury would believe her over a county sheriff. Despite her anguish, the dispatcher mustered enough courage to confront Sheriff Butler and tell him she was not interested in him. To her relief, Butler did not retaliate against her."

Many courts, upon considering these facts and finding no explicit invocation of supervisor authority, no retaliation, and indeed, an immediate cessation of the harassment, would not impute liability to the employer. The *Sims* court, however, recognized the subtle powerplay that undergirded the incident and articulated why the victim should be able to impute employer liability.

The *Sims* court was convinced that Sheriff Butler was fully aware that his sexual advances were not welcome. It was further convinced that Butler was "hopeful that the dispatcher would nonetheless be reluctant to reject him because of his authority over her." In other words, Butler knew that he was abusing his supervisory authority when he continued to force himself on her. Even though the dispatcher eventually rejected Butler, and Butler did not retaliate against her, the court believed that "a female office, out of a deep fear that she might lose the source of her livelihood, could very understandably have given in to him. The fact that the dispatcher in this instance did not capitulate and that Butler ultimately did not retaliate against her does not render Butler's conduct any less reprehensible and intolerable under Title VII."³⁹

Accordingly, the court found Butler's harassment within the confines of section 219(2)(d) of the Restatement in that he was aided in accomplishing his sexual harassment by his supervisory authority over the victim.⁴⁰ Under the *Sims* analysis, therefore, the "aided in accomplishing" feature of section 219 arises out of subtle factors, such as whether the harasser is hopeful that the victim will be reluctant to reject him because of his authority, and out of the victims' fear of reprisal, whether or not she gives in, or complains and stops the

harassment.

The most recent, and influential circuit-level court to adopt the "aided in accomplishing" clause to create a direct, or strict liability standard for hostile work environments created by supervisors is the Second Circuit. In *Karibian v. Columbia University*,⁴¹ Sharon Karibian worked in the telemarketing branch of the university's development office. Her supervisor, Mark Urban had authority to alter her work schedule and assignments and to give her promotions and raises. He had at least the apparent authority to fire Karibian. She alleged that when she wanted to discuss work-related matters, Urban would insist that they meet in bars to talk. He then urged her to meet in his apartment. Though Karibian initially rebuffed him, she ultimately yielded to pressure from Urban to enter into a sexual relationship. She claimed that he had coerced her into the relationship, which often involved violence, by telling her that she "owed him for all he was doing for her as her supervisor." She also claimed that "the conditions of her employment—including her raises, hours, autonomy, and flexibility—varied from time to time, depending on her responsiveness to Urban's demands. The district court dismissed Karibian's hostile work environment claim using basis co-worker liability analysis. The lower court found that Columbia provided a reasonable avenue for making complaints and stopped the misconduct promptly once it got notice of it.

On appeal Karibian, joined by the EEOC as *amicus curia*, contended that when a supervisor in the hostile work environment is the harasser, Restatement §219(2)(d) imputes direct liability to the employer. The Second Circuit agreed. The fact that Urban might have been making employment decisions based on Karibian's responses to his advances, the Court held, made it fair to hold the employer strictly or directly liable because "the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer."⁴²

Thus, the Second Circuit held, and the EEOC's position now appears to be, that where a supervisor capitalize[s] upon his actual or apparent authority over the subordinate's employment to force her to

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endure sexual harassment, the employer will be liable regardless of the absence of notice or the reasonableness of the employer's complaint procedures. The fact that the person engaged in the harassment has the authority, real or apparent, to make decisions affecting the economic status of the employee, leads to direct liability to the employer under section 219(2)(d)—the identical analysis that leads to direct liability in *quid pro quo* cases. As the Second Circuit concluded liable: "[i]t would be a jarring anomaly to hold that conduct which always renders an employer liable under a *quid pro quo* theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment."

While the Second Circuit did not require explicit threats of job retaliation for direct section 219(2)(d) liability to be imputed, the Circuit was quick to point out that "where a low-level supervisor does not rely on his supervisor authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by a co-worker—thus the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."⁴³

The open question after *Karibian*, therefore, is, at what level of supervisory capacity will direct, or strict, liability be triggered under section 219(2)(d)? As the *Sims* court noted: "a supervisor need not necessarily be high in the business structure, nor does he have to have the authority to hire, fire, or promote in order to be considered an agent whose conduct is bind-

ing on an employer under Restatement §219(2)(d)."⁴⁴ Must the supervisor explicitly condition job benefits on submission to the harassment, as in *quid pro quo* cases? Or, once the actual or apparent authority to affect job benefits is present, will the unspoken "hope" on the supervisor's part, that the victim will be reluctant to reject him, because of his authority, be enough as in *Sims*? For that matter, does the harasser even need to be the direct supervisor of the victim? Might not other high-powered individuals within the organization be "hopeful" that, by virtue of their positions, the victim will be reluctant to reject their abusive conduct. The plaintiff might argue that whenever there is an understandable fear that the harasser will use his or her authority to retaliate, no matter who the harasser is, direct liability applies under section 219(2)(d). We can expect to see imputed direct liability stretched further as the tug-of-war continues in hostile work environment litigation.

Conclusion

Judging by the Second Circuit and EEOC position staked out in *Karibian*, strict liability is now likely to be sought by plaintiffs in more cases of hostile work environment. Although the Supreme Court in *Meritor* rejected automatic liability in all supervisor-created hostile environment cases, it did not foreclose the possibility that such liability can obtain when agency principles are applied. By directing courts to these agency principles, the Court invited plaintiffs and courts to ask why strict liability should not be imputed whenever an ingredient of the harassment is a legitimate fear of retaliation based on the harasser's authorized power to affect job conditions—irrespective of whether the

conduct fits neatly into the *quid pro quo* or hostile work environment categories.

Faced with possible automatic liability for their supervisors' actions, employers who wish to keep a safe distance from liability must redouble their efforts to prevent harassment. This has always been the prime policy argument in favor of holding employers strictly liable for supervisor-created harassment. This standard may, at first, seem onerous. Employers may be displeased when courts no longer view their grievance procedures as an impregnable shield against pre-grievance liability. Nevertheless, employers will probably find that their grievance and remedial mechanisms are effective in avoiding liability costs under a strict liability standard as under the negligence or coworker liability approaches. In reality, most sexual harassment victims are not interested in bringing a long, arduous, and expensive lawsuit simply in order to stick employers with the pre-grievance harassment causes by their supervisors—under any theory! Their interests lie in stopping the harassment without retaliation. Therefore, there will always be an incentive for both employees and employers to use effective preventive and remedial procedures to resolve their problems instead of costly litigation. Sharon Karibian, for example, undoubtedly would not have brought her lawsuit if Columbia's complaint system had been effective. While these mechanisms may not extinguish sexual harassment liability completely under a strict liability theory, will obviate liability, for all practical purposes, when they are working well. Making sure these mechanisms work better, by making liability standards stricter, may, in the end, be worthwhile.

References

¹ Hostile work environment sexual harassment was declared a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106, S.Ct. 2399, 2404, 91 L.Ed. 2s 49 (1986). There, the Court defined hostile work environment harassment as occurring, when "[sexual] conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (quoting 29 C.F.R. § 1604.11(a)(3)). Moreover, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an

abusive working environment.'" 477 U.S. at 67, 106 S.Ct. at 2405 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

² *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987).

³ *Meritor v. Vinson*, 477 U.S. 57, 65.

⁴ *Id.* at 70.

⁵ In *Meritor*, the D.C. Circuit below, did not apply a strict liability standard in holding the employer liable for the harassment that took place when a voluntary affair went sour between the supervisor and subordinate.

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⁶ This approach was first outline in the EEOC 1980 Guidelines. 29 C.F.R. §1604.11(d) and received extensive judicial recognition. See, e.g., *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

⁷ Brief for US and EEOC as *Amici Curiae* 26 reprinted at 40 FEP. (BNA) §1828029 quoted in Larson, *Employment Discrimination*, §41A.64(c) n.25.

⁸ See, e.g., *Reed v. Delta Air Lines Inc.*, 1994 WL 56939 (Feb. 24, 1994), reh'g den. 19 F.3d 19 (6th Cir. 1994).

⁹ 477 U.S. at 72, 106 S.Ct. at 2408.

¹⁰ *Id.* That view appears to be supported by the definition of an "employer" in Title VII of the Civil Rights Act of 1964, as "any agent" of an employer, 42 U.S.C. §2000e(b). But raises the question of whether a supervisor, when engaging in sexual harassment, is acting as an agent.

¹¹ The Court noted that "absence of notice to an employer does not necessarily insulate that employer from liability." *Id.*

¹² The Court stated that the "mere existence of a grievance procedure and a policy against discrimination, coupled with [an employee's] failure to invoke that procedure must insulate [an employer] from liability." *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Restatement (Second) of Agency §219(1) (1958). Conduct is within scope of employment if it is "actuated, at least in part, by a purpose to serve the [employer]." *Id.* at §228. Conduct specifically forbidden by the employer may still be within the scope of employment based on such factors as: (1) whether it is common among employees; (2) the time, place, and purpose of the act; (3) whether the employer has "reason to expect" the act will be done; and (4) whether "the instrumentality by which the harm is done has been furnished" by the employer. *Id.* at §229.

¹⁶ Restatement (Second) of Agency §219(2)(d); see also, *Horn v. Duke Homes Inc. Div. of Windsor Mobile Homes*, 755 F.2d 599, 605 (7th Cir. 1985).

¹⁷ *Bourton v. BMW of North America, Inc.*--F.3d--, 1994 WL 248455 at *3 (3rd Cir. June 10, 1994).

¹⁸ The opinion joined by Chief Justice Burger, and Justices White, Powell, and O'Connor stated that employer liability is not automatic in hostile environment cases. 477 U.S. at 72.

¹⁹ California is one state that imposes such automatic liability. Cal. Code §12940(h); see, e.g., *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App.4th 397, 27 Cal. Rptr.2d 457 (Ct. App. 1994) (once jury found

employee's supervisor had harassed her, the court granted JNOV against the employer under a strict liability theory).

²⁰ *Infra* note 17.

²¹ See, e.g., *Field v. Horizon House, Inc.*, No. 86-4343 (E.D. Pa. 1987), cited in *Bouton v. BMW of North America*, *infra*, at note 23.

²² *Hirschfield*, 916 F.2d at 577, quoting *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989).

²³ 1994 WL 248455 (3rd Cir. June 10, 1994).

²⁴ *Reed v. Delta Air Lines, Inc.*, 1994 WL 56939 (Feb. 24, 1994), rehear'g den. 19 F.3d 19 (6th Cir. 1994).

²⁵ See, *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) citing, §§219(2), 235 Comment E; §§262, 265.

²⁶ 894 F.2d 651 (4th Cir. 1989).

²⁷ *Infra* note 24.

²⁸ 916 F.2d 572, 579 (10th Cir. 1990).

²⁹ In *Watts v. New York City Police Dept.*, 724 F.Supp. 99, 106 n.6 (S.D.N.Y. 1989) the court wrote: "[n]evertheless, if the conduct is accomplished by means furnished to the supervisor by his employer (such as the supervisor's influence or control over hiring, job performance evaluations, work assignments, or promotions), and the employer has not put in place strong policies and procedures that effectively belie the appearance of such authority, agency law will impute such conduct to notwithstanding the absence of notice." (emphasis added).

³⁰ *Doe v. National Cash Register, Inc.*, 1993 WL 537476 (N.D. Ill. Dec. 21, 1993).

³¹ *Young v. Mariner Corp.*, 56 Emp. Prac. Dec. Cas. 40814, 1991 WL 172927 (N.D. Ala. Apr. 23, 1991).

³² See, e.g., *Bouton v. BMW of North America*, supra note 18; see also, *Ridge v. HCA Health Services of Kansas, Inc.*, 1992 WL 363686 (D. Kan. Nov. 3, 1992).

³³ 744 F.Supp. 1186 (D.D.C. 1990).

³⁴ *Infra* note 30.

³⁵ 1993 WL 745744 (D.C. Kan. 1992).

³⁶ Citing *Lipsett v. University of Puerto Rico*, 864 F.2d 881 n.71 (1st Cir. 1988).

³⁷ 830 F.2d 1554 (11th Cir. 1987).

³⁸ 766 F.Supp. 1052 (M.D. Ala. 1990).

³⁹ *Id.* at 1071.

⁴⁰ *Id.* at 1075.

⁴¹ 14 F.3d 773 (2nd Cir. 1994), cert. den. 114 S.Ct. 2693 (1994).

⁴² *Id.* at 776, citing *Henson*, 682 F.2d at 910.

⁴³ *Id.*

⁴⁴ 766 F.Supp. at 1069.



Article Submission

If you would like to write an article for the Newsletter, or even a blurb which discusses your article, please send or fax it to Roger Johns, at College of Business, Station No. 49, Eastern New Mexico University, Portales, New Mexico 88130. Phone (505)562-2332. Fax (505)562-4331.

The Research Center

In an effort to develop a greater awareness of and access to legislative and scholarly developments in the field of employment and labor law, this section of the Newsletter provides listings and locations for the most recently published scholarly journal articles, conference papers and the most recently introduced federal legislation. It is the hope of the Editors of this Newsletter, that this information will inspire and facilitate research and writing in the area of employment and labor law.

CONFERENCE PAPERS

This Newsletter provides the only widely-distributed, comprehensive listing of the scholarly papers on employment and labor law presented at the meetings of the regional academies of legal studies in business.

The **North East Academy of Legal Studies in Business** held its annual meeting in Hempstead, New York, April 30 - May 1, 1994. The following papers dealing with employment and labor law issues were presented at the meeting:

The Legal Guidelines for Employer-Employee Committees after Electromation and Dupont, Bruce L. Haller, Dowling College
Whistleblowers Face Preemption: When the Purposes of Laws Conflict, John Houlihan, University of Southern Maine
Weight Discrimination: Is It a Barrier to Employment?, Diana D. Juettner, Mercy College and Anthony F. Libertella, Iona College

Harris v. Forklift Systems, Inc.: What Are the Standards in Hostile Environment Claims?, Eileen Kelly and Gwen Seaquist, Ithaca College

Violence in the Workplace: Are Employers Legally Responsible?, Susan Lynn Pollet, Mercy College

The following papers were presented at the annual meeting of the **North Atlantic Regional Business Law Association** at Stonehill College, April 23, 1994:

Constructive Discharge: Can the Employer Ever Win?, John Houlihan, University of Southern Maine

Using Data From Court Cases & Employee Surveys To Develop Sexual Harassment Policies, Toni Lester, Babson College

Weighty Matters: Cook v. State of Rhode Island Federal Protection for the Overweight, Dr. Sharlene A. McEvoy, Fairfield University

Employment Discrimination by Multinational Enterprises Operating in the United States: Seeking Sanctuary From Title VII in Treaties of Friendship, Commerce, and Navigation, Christine Neylon O'Brien, Boston College, and G. Madek, Bentley College

Employer Liability For Torts of Employees: The Developing Law of Negligent Hiring and Retention, David Twomey, Boston College

The following papers were presented at the annual meeting of the **Western Academy of Legal Studies in Business** at Asilomar, California, April 8-10, 1994:

The Employer's Burden Under the Americans With Disabilities Act, Thomas Brierton, University of the Pacific

Sexual Harassment Laws Present a Plethora of Perplexing Problems, Elizabeth R. Koller, University of the Pacific

Employer Defense Strategies in Discrimination Cases Involving Workers With HIV: Judicial Interpretations and Future Expectations, Jeffrey A. Mello, Golden Gate University

Prevalent Employer Discriminatory Behaviors Toward Employees With HIV and the Likely Impact of the Americans With Disabilities Act, Jeffrey A. Mello, Golden Gate University

The following papers were presented at the annual meeting of the **Mid Atlantic Academy of Legal Studies in Business** at The College of William and Mary, April 14-15, 1994:

Employer Liability for Hostile Environment Sexual Harassment Based on a Single Occurrence: Seeking Guidance From the Courts, Francis Achampong, Norfolk State University

Virginia Expands Public Policy Exception to Employment at Will, Douglas Brinckman, Radford College

Labor Law: Total Quality Management Teams in Jeopardy, Randall K. Hanson and Rebecca Porterfield, University of North Carolina at Wilmington

Research Center

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The following paper was presented at the annual meeting of the Pacific Northwest Academy of Legal Studies in Business at Salem, Oregon, April 22-23, 1994:

Equal Opportunity Harassment, Dr. Mary-Kathryn Zachary, West Georgia College

The following paper was presented at the annual meeting of the Pacific Southwest Academy of Legal Studies in Business at Long Beach, California, February 4-5, 1994:

Recent Changes to Employment Law in Ontario, J. Douglas Clarke, Toronto-Ryerson Polytechnic University

Federal Legislation

The following list highlights the employment and labor related legislation introduced in the 103rd Congress, since January 1, 1994. If you wish to learn more about bills listed here, the Library of Congress maintains an electronic bulletin board with all legislation introduced in every Congress since 1973. The data for the current Congress (the 103rd) is updated daily. Information on bills in the current Congress includes number, title, digest of the bill, sponsors/cosponsors, committee action and floor action. The bulletin can be accessed, over Internet, at the Telnet address: *locis.loc.gov*.

House of Representatives

- H.RES.446* For purposes of issuing final guidelines under Title VII of the Civil Rights Act of 1964 relating to unlawful harassment in employment, the EEOC should exclude religion based harassment.
- H.CON.RES.203* Information regarding the conviction of child-related sex offenses should be available to employers.
- H.CON.RES.227* No person shall be required to comply with, participate in, or endorse any employee sensitivity training or education relating to homosexuality or cultural diversity as conditions relating to employment in the Federal civil service.
- H.R.3738* A bill to promote equitable pay practice and eliminate discrimination in the civil service.
- H.R.3801* Makes applicable to congressional employees any provisions of Federal law relating to employment, discrimination, health and safety, and information availability to the public.
- H.R.3949* Amends Fair Labor Standards Act of 1938 excluding firefighters or rescue squad members from coverage during period of volunteer service at a location they are not employed.
- H.R.3966* Amends the Fair Labor Standards Act of 1938 providing individuals with impaired vision or blindness not be covered by special certificates for employment of handicapped workers at a lower than minimum wage.
- H.R.4112* Prohibits reprisal against a member of the armed forces for making or preparing a communication alleging sexual harassment or unlawful discrimination against such a member.
- H.R.4150* Amends Fair Labor Standards Act of 1938 to apply overtime exemption to employees whose regular rate of pay exceeds one and one-half times the minimum wage and more than half of whose compensation represents commissions on goods and services.
- H.R.4303* A bill to amend the Fair Labor Standards Act of 1938 in the exemption from child labor provisions for minors between 16 and 18 years of age who engage in the operation of automobiles and trucks.
- H.R.4337* A bill to repeal the Displaced Workers Protection Act of 1994.
- H.R.4361* Federal Employees Family Friendly Leave Act amending Federal law to allow Federal employee use of sick leave to attend the medical needs of a family member.
- H.R.4444* Equity for Congress Act, making applicable to Congress stated Federal laws.
- H.R.4547* Amends the Fair Labor Standards Act of 1938 to exempt from minimum wage and overtime compensation provisions employees of educational enterprises recognized as independent school districts who exhibit specified criteria.
- H.R.4636* Employment Non-Discrimination Act of 1994-Prohibits employment discrimination on the basis of sexual orientation by covered entities, including employing authorities of Congress.
- H.R.4803* A bill to amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages based on sex, race, or national origin.
- H.R.4981* A bill to amend certain Federal civil rights statutes to prevent involuntary arbitration to claims arising from discrimination based on race, color, religion, sex, national origin, age, or disability.
- H.J.RES.345* Disapproves the Displaced Workers Protection Act of 1994.
- H.AMDT.832* An amendment to require the application to the Legislative Branch within 120 days of enactment of the bill the specified Acts.

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Senate

- S.RES.219* For purposes of issuing final regulations regarding religious harassment under Title VII of the Civil Rights Act of 1964, the EEOC should exclude such categories.
- S.1979* Sexual Harassment Prevention Act of 1994-Directs employers, including Federal and congressional, to post in conspicuous places a notice prepared or approved by the primary enforcement agency setting forth sexual harassment guidelines.
- S.1864* Harassment-Free Workplace Act-Unlawful for a respondent to engage in sexual harassment against an employee or job applicant. Prohibits retaliation against persons involved with alleged harassment charges.
- S.2012* Protection from Coercive Employment Agreements Act-Amends Civil Rights Act of 1964 to prohibit employers from requiring mandatory arbitration in employment discrimination claims.
- S.2051* A bill to amend the Fair Labor Standards Act of 1938 to exclude from the definition of employee firefighters and rescue squad workers who perform volunteer services and to allow an employer not to pay overtime compensation to the above mentioned performing volunteer services.
- S.2071* Congressional Accountability Act-Makes specified Federal statutes applicable to the offices and employees of the legislative branch of the Federal government.
- S.2238* Employment Non-Discrimination Act of 1994-Prohibits employment discrimination on the basis of sexual orientation.
- S.2327* A bill to amend the Civil Rights Act of 1964 to encourage mediation of charges filed under Title VII of such Act to decrease resort to the courts.
- S.2328* Federal Acquisition Labor Law Improvement Act of 1994-Amends the Davis-Bacon Act to provide for wage determinations based on the locality where the work is performed.
- S.2405* A bill to amend Federal civil rights statutes to prevent involuntary arbitration to claims involving employment discrimination.
- S.AMDT.1804* Express the sense of the Congress regarding the issuance under Title VII of the Civil Rights Act of 1964 of administrative guidelines applicable to religious harassment in employment.

Public Laws

The following legislation has been passed into public law since the most recent issue of this Newsletter.

H.R.1 Public Law: 103-3 (2/5/93)

Law Review Articles

The following is a partial listing of scholarly articles dealing with employment and labor law issues which have been published between January 1, 1994 and September 12, 1994. Future editions of the Employment and Labor Law Quarterly will provide listings of articles published since the date upon which the following list was compiled.

- Abrams, Douglas E., *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN.L.REV. 521-584 (Wntr 1994)
- Auray, Lori, *A Cost-Shifting Amendment to the Family and Medical Leave Act of 1993: How to Improve Upon a Good Thing*, 3 TEX. J.WOMEN&L. 403-416 (Spr 1994)
- Babb, James G., *The Use of After-Acquired Evidence as a Defense in Title VII Employment Discrimination Cases*, 30 HOUS.L.REV. 1945-1977 (Spr 1994)
- Bales, R., *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S.TEX.L.REV. 95-136 (Jan. 1994)
- Bankman, Joseph, *The Effect of Anti-Discrimination Provisions on Rank-and-File Compensation*, 72 WASH.U.L.Q. 597-618 (Sum 1994)
- Barton, Peter C., Weatherwax, Roy C., *Revenue Ruling 93-88 Expands Exclusion for Employee Discrimination Damages*, 25 TAX ADVISER 281 (May 1994)
- Bauer, Kristoff T., *Congress Finds the Key to Extraterritoriality?* 45 LAB.L.J. 417-432 (Jul 1994)
- Beck, Melisa M., *Fairness on the Field: Amending Title VII to Foster Greater Female Participation in Professional Sports*, 12 CARDOZA.&E.L.J. 241-280 (Spr 1994)

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- Becker, Mary, *Reproductive Hazards After Johnson Controls*, 31 HOUS.L.REV. 43-97 (1994)
- Berkenblit, Howard E., *Employment Discrimination Law: The Burden of Proof in Title VII Disparate Treatment Actions*, 35 B.C.L.REV. 472-484 (Mar. 1994)
- Betsey, Charles L., *Litigation of Employment Discrimination Under Title VII: The Case of African-American Women.*, 84 AM.ECON.REV. 98 (May 1994)
- Bloom, Marissa F., *Racist Defendant Freed by Lies?* 25 U. WEST L.A.L.REV. 271-296 (1994)
- Bowden, Ellen M., *Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense*, 27 COLUM.J.L.&SOC.PROBS. 225-267 (Wntr 1994)
- Brucoli, Andrea M., *Morbid Obesity as a Protected Disability or an Unprotected Voluntary Condition*, 28 GA.L.REV. 771-806 (Spr 1994)
- Burstein, Paul, Edwards, Mark Evan, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 LAW&SOC'YREV. 79-111 (Feb 1994)
- Cannings, Kathleen, Lazonick, William, *Equal Employment Opportunity and the "Managerial Woman" in Japan*, 33 INDUS.REL. 44-69 (Jan 1994)
- Casey, John M., *From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the American with Disabilities Act*, 17 U. PUGET SOUND L.REV. 381-416 (Wntr 1994)
- Clawson, Dan, *The Ninth Circuit Requires That Title VII Plaintiffs Prove the Adverse Effect of a Challenged English-Only Workplace Rule*, 17 U. PUGET SOUND L.REV. 473-502 (Wntr 1994)
- Clore, Lawrence, *Labor and Employment Law*, 25 TEX.TECH.L.REV. 749-771 (Spr 1994)
- Coukos, Pamela, *Civil Rights and Special Wrongs - The Amendment 2 Litigation*, 29 HARV.C.R.-C.L.L.REV. 581-598 (Sum 1994)
- Daly-Rooney, Rose, *Reconciling Conflicts Between the Americans with Disabilities Act and the National Labor Relations Act to Accommodate People with Disabilities*, 6 DEPAUL BUS.L.J. 387-416 (Spr-Sum 1994)
- de Metz, Richard, *What Price Equality? Equal Pensions for Equal Work*, 15 BUS.L.REV. 45 (Feb 1994)
- DeSario, Jack P., Slack, James D., *The ADA and Refusals to Provide Medical Care to Persons with HIV/AIDS*, 27 J.MARSHALL L.REV. 347-362 (Wntr 1994)
- Dunworth, Kimberly B., *Drawing the Line at Obesity?*, 24 GOLDEN GATE U.L.REV. 523-546 (Spr 1994)
- Ellis, Evelyn, *Recent Case Law of the Court of Justice on the Equal Treatment of Women and Men*, 31 COMMONMKT.L.REV. 43-75 (Feb 1994)
- Employment Discrimination: Recent Developments in the Supreme Court*, 10 TOURO L.REV. 525-540 (Wntr 1994)
- Employment Discrimination - Sexual Harassment - New Jersey Supreme Court Adopts a Gender-Specific Reasonableness Standard*, 107 HARV.L.REV. 955-960 (Feb 1994)
- Engels, Shari, *Problems of Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom*, 15 COMP.LAB.L.J. 340-370 (Spr 1994)
- Epstein, Richard A., *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U.L.REV. 1-23 (Jan 1994)
- Essary, Melissa A., *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP.L.REV. 385-445 (Jan 1994)
- Finkelstein, Michael O., Levin, Bruce, *Proportional Hazard Models for Age Discrimination Cases*, 34 JURIMETRICS J.L., SCI.&TECH. 153-171 (Wntr 1994)
- Franke, Janice R., *Defining the Parameters of Permissible State and Local Affirmative Action Programs*, 24 GOLDEN GATE U.L.REV. 387-421 (Spr 1994)
- Gallagher, Sean W., *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH.L.REV. 1256-1326 (Mar 1994)
- Giampetro-Meyer, Andrea, *Resurrecting Comparable Worth as a Remedy for Gender-Based Wage Discrimination*, 23 SW.U.L.REV. 225-251 (Wntr 1994)
- Goldstein, Richard, *The Comparison of Models in Discrimination Cases*, 34 JURIMETRICS J.L., SCI.&TECH. 215-234 (Wntr 1994)
- Greenlaw, Paul S., Kohl, John P., *Thirty Years of Civil Rights: The EPA/Title VII Sex-Based Wage Discrimination Controversy*, 45 LAB.L.J. 240-247 (Apr 1994)
- Greer, Christopher, *"Who, Me?": A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L.REV. 1835-1850 (Apr 1994)
- Gregory, Robert J., *There is Life in that Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After Hazen Paper Co. v. Biggins*, 11 HOFSTRA LAB.L.J. 391-427 (Spr 1994)

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- Heen, Mary L., *An Alternative Approach to the Taxation of Employment Discrimination Recoveries Under Federal Civil Rights Statutes: Income From Human Capital, Realization, and Nonrecognition*, 72 N.C.L.REV. 549-618 (Mar 1994)
- Hervey, Tamara K., *Structural Discrimination Unrecognised*, 57 MOD.L.REV. 307-314 (Mar 1994)
- Hiegel, Adrienne L., *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM.L.REV. 1451-1493 (May 1994)
- Hofmeister, Edith M., *Women Need Not Apply: Discrimination and the Supreme Court's Intimate Association Test*, 28 U.S.F.L.REV. 1009-1077 (Sum 1994)
- Howard, William M., *The Decline and Fall of Statistical Evidence as Proof of Employment Discrimination*, 45 LAB.L.J. 208-220 (Apr 1994)
- Jackson, Brian F., Flaxman, Howard R., *Intermittent Leave and Reduced Leave Schedule: Traps for the Unwary Under the Family and Medical Leave Act*, 20 EMP.REL.L.J. 29-46 (Sum 1994)
- Paltell, Eric, *Intermittent Leave Under the Family and Medical Leave Act of 1993: Job Security for the Chronically Absent Employee?* 10 LAB.LAW. 1-17 (Wntr 1994)
- Douglas, Frederick L., *Collective Bargaining Under the Family and Medical Leave Act*, 45 LAB.L.J. 102-109 (Feb 1994)
- Ludwig, Steven K., *Complying with the Family and Medical Leave Act*, 10 CORP.COUNS.Q. 1-21 (Jan 1994)
- Dennis, Patricia Diaz, *The Glass Ceiling: A Zig-Zag Solution to a Shatterproof Problem*, 20 PEPP.L.REV. 1113-1123 (Apr 1993)
- Jacobs, Lesley A., *Equal Opportunity and Gender Disadvantage*, 7 CANADIANJ.L.&JURIS. 61-71 (Jan 1994)
- Johns, Roger J., *Proving Pretext and Willfulness in Age Discrimination Cases After Hazen Paper Company v. Biggens*, 45 LAB.L.J. 221-229 (Apr 1994)
- Johnson, Kathryn A., *Constructive Discharge and "Reasonable Accommodation." Under the Americans with Disabilities Act*, 65 U. COLO.L.REV. 175-191 (Wntr 1994)
- Khan, Anwar N.; Hohnen, Jacoba, *Workplace Sexual Harassment in Britain and Western Australia*, 23 J.COLL.NEG.PUB.SECTOR 137-150 (Spr 1994)
- Kralik, Stephanie L., *Civil Rights - The Scope of Title VII Protection for Employees Challenging English-Only Rules*, 67 TEMP. L.REV. 393-416 (Spr 1994)
- Landau, David A., *Employment Discrimination Against Lesbians and Gays: The Incomplete Legal Responses of the United States and the European Union*, 4 DUKEJ.COMP.&INT'LL. 335-361 (Spr 1994)
- Lee, Thomas W., *Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict*, 43 EMORYL.J. 325-356 (Wntr 1994)
- Lerblance, Penn, *Legal Redress for Disability Discrimination: Bob, Carol, Ted and Alice Encounter AIDS*, 24 GOLDENGATEU.L.REV. 307-356 (Spr 1994)
- Levy, Michael J., *Sex, Promotions, and Title VII: Why Sexual Favoritism is Not Sexual Discrimination*, 45 HASTINGSL.J. 667-696 (Mar 1994)
- Lipschultz, Jeremy Harris, *Craft v. Metromedia, Inc. and its Social-Legal Progeny*, 16 COMM.&L. 45-74 (Mar 1994)
- Long, B.L., *Psychiatric Diagnoses in Sexual Harassment Cases*, 22 BULL.AM.ACAD.PSYCHOL.L. 195-203 (Jun 1994)
- Machson, Robert A., Monteleone, Joseph P., *Insurance Coverage for Wrongful Employment Practices Claims Under Various Liability Policies*, 49 BUS.LAW. 689-714 (Feb 1994)
- Madden, Elizabeth A., *Minority-Owned Company's Word-of-Mouth Recruiting Not Disparate Treatment in Violation of Title VII*, 35 B.C.L.REV. 515-524 (Mar 1994)
- Maltby, Lewis L., Dushman, Bernard J., *Whose Life is it Anyway - Employer Control of Off-Duty Behavior*, 13 ST.LOUISU.PUB.L.REV. 645-659 (Wntr 1994)
- Martell, Kathryn; Sullivan, George, *Sexual Harassment: The Continuing Workplace Crisis*, 45 LAB.L.J. 195-207 (Apr 1994)
- Martinez, Theresa A., *Embracing the Outlaws: Deviance at the Intersection of Race, Class, and Gender*, 1994 UTAHL.REV. 193-207 (Wntr 1994)
- Mello, Jeffrey A., *Prevalent Employer Discriminatory Behaviors Toward Employees With HIV and the Likely Impact of the ADA*, 45 LAB.L.J. 323-337 (Jun 1994)
- Minihan, Michael J., *The Taxation of Damages Recovered in Title VII Discrimination Actions*, 13 PACEL.REV. 1043-1100 (Wntr 1994)
- Moosy, Robert J., Jr., *Health Care Prioritization and the ADA: The Oregon Plan 1991-1993*, 31 HOUS.L.REV. 265-322 (1994)
- Newbold, Lindsay A., *Application of the ADEA to Indian Tribes*, 46 WASH.U.J.URB.&CONTEMP.L. 381-390 (Sum 1994)

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- Pacer, Valerie J., *The Early Right-to-Sue Letter: Has the EEOC Exceeded its Authority?* 72 WASH. U. L. Q. 757-767 (Sum 1994)
- Patterson, Kathryn Frueh, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII?* 47 SMU L. REV. 425-448 (Jan-Feb 1994)
- Coil, James H., II, Rice, Charles M., *The Tip of the Iceberg: Early Trends in ADA Enforcement*, 19 EMP. REL. L. J. 485-506 (Spr 1994)
- Simson, Gary J., *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514-521 (Mar 1994)
- Ponte, Lucille M., *AIDS Anxiety in the Workplace: A Review of Labor Arbitration Awards*, 23 SW. U. L. REV. 253-283 (Wntr 1994)
- Pugsley, Mark W., *Nonsmoking Hiring Policies: Examining the Status of Smokers Under Title I of the Americans with Disabilities Act of 1990*, 43 DUKE L. J. 1089-1114 (Mar 1994)
- Ravitch, Frank S., *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZA L. REV. 1475-1522 (Mar 1994)
- Robinson, David A., *Discovery of the Plaintiff's Mental Health History in an Employment Discrimination Case*, 16 W. NEW ENG. L. REV. 55-77 (Wntr 1994)
- Robinson, Robert K., Fink, Ross L., Allen, Billie Morgan, *Unresolved Issues in Hostile Environment Claims of Sexual Harassment*, 45 LAB. L. J. 110-114 (Feb 1994)
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- Brant, Joanne C., *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L. Q. 275-321 (Wntr 1994)
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- Schaner, Dean J., *Romance in the Workplace: Should Employers Act as Chaperones?* 20 EMP. REL. L. J. 47-71 (Sum 1994)
- Simitis, Spiros, *Denationalizing Labour Law: The Case of Age Discrimination*, 15 COMP. LAB. L. J. 321-339 (Spr 1994)
- Sneirson, Amy M., *One of These Things is Not Like the Other: Proving Liability Under the Equal Pay Act and Title VII*, 72 WASH. U. L. Q. 783-795 (Sum 1994)
- Strasser, Mark, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L. Q. 323-403 (Wntr 1994)
- Suffredini, Brian R., *Racial Discrimination; Reductions-in-Force Do Not Absolve Employers from Title VII Liability*, 35 B. C. L. REV. 495-505 (Mar. 1994)
- Taylor, Kelli D., *The Civil Rights Act of 1991 and Retroactivity: Do Landgraf v. USI Film Products and Rivers v. Roadway Express, Inc. Signify a New Era of Restrictive Employment Discrimination Cases?* 17 AM. J. TRIAL ADVOC. 773-795 (Spr 1994)
- Thistle, W. Wayne, Donovan, Marie L., *The Requirements of Procedural Fairness in the Dismissal of Senior Educational Administrators*, 5 EDUC. & L. J. 335-351 (May 1994)
- Vassel, Ron A., *The Americans with Disabilities Act: The Cost, Uncertainty and Inefficiency*, 13 J. L. & COM. 397-411 (Spr 1994)
- Weinstein, Jason M., *No Harm, No Foul? The Use of After-Acquired Evidence in Title VII Employment-Discrimination Cases*, 62 GEO. WASH. L. REV. 280-317 (Jan 1994)
- West, Martha S., *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67-178 (Spr 1994)
- Whitis, Norma G., *The Title VII Shifting Burden Stays Put*, 25 LOY. U. CHI. L. J. 269-301 (Wntr 1994)
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The Case Against Front Pay Damages

by

John McGee

Southwest Texas State University

Successful plaintiffs under the Age Discrimination in Employment Act of 1976 (ADEA)¹ may recover lost pay from the date of termination until trial (back pay), plus the pay they would have received from the date of trial until retirement age (front pay). Front pay has been defined by one court as "a lump sum representing the discounted present value of the difference between the earnings an employee would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis inferior, employment."² Speculating on the amount an employee would have received in the future until some hypothetical retirement date has proven to be impractical and it is time to ask whether such damages are a legitimate compensatory component in age discrimination cases.

The concept of front pay does not appear in the Act itself. The remedies section simply says that civil actions may be brought "for such legal or equitable relief as will effectuate the purposes of this chapter," and "legal and equitable relief ... includes ... without limitation judgments compelling employment, reinstatement or promotion."³ Thus, Congress has stated its preference for reinstatement as the proper remedy in discrimination cases. The concept of allowing front pay, instead of reinstatement, first appeared in a 1984 law review article by Peter Janovsky, who made a persuasive argument for allowing recovery of front pay in order to make a plaintiff whole and carry out the intended purposes of the Act.⁴ As long as the "normal" retirement age was 65, as it was in 1984, the amount of front pay could be calculated with relative certainty. But in 1986 the ADEA was amended to prohibit mandatory retirement and to eliminate any reference to a "normal" retirement age.⁵ With the demise of a fixed retirement age, calculating the proper amount of front pay to award has become a game of chance with many, as yet, unanswered questions, such as, When should front pay be granted instead of reinstatement? How should front pay damages be calculated? Can the remaining work life of an employee be

accurately proved? Does the victim have a duty to mitigate front pay damages?

Reinstatement or Front Pay?

The courts often state the "rule" that reinstatement should suffice unless there are special factors involved which dictate a resort to front pay, described as a "special" remedy, warranted only by "egregious circumstances."⁶ Therefore, it could be expected that front pay would be available only in cases where reinstatement is impracticable or impossible, such as situations involving discord or antagonism between the parties that would render reinstatement ineffective. The trial court found just such a situation in *Walther v. Lone Star Gas Co.*⁷ and ordered front pay but the Fifth Circuit reversed and ordered reinstatement because the employer had testified that it considered the employee a qualified and competent employee capable of resuming work and there was little evidence of ill will between employer and employee. The Fifth Circuit said it could find nothing in the record to indicate that reinstatement was infeasible, other than a statement that the litigation was "protracted and necessarily vexing," and therefore front pay was not the appropriate remedy.⁸

Despite such precedents, the use of front pay has become widespread. Ordering reinstatement forces judges to supervise a coerced employment relationship; perhaps that is why it has been judged to be impracticable or inadequate where 1) there is discord and antagonism between the parties,⁹ 2) it is "reasonable" for the claimant to refuse an offer of reinstatement,¹⁰ and 3) the claimant is "nearing" the normal retirement age anyway.¹¹ Even plaintiffs who request reinstatement sometimes end up with front pay instead, the courts having found reinstatement "impracticable." The jury in *Price v. Marshall Erdman & Associates, Inc.*¹² awarded Price \$750,000 in front pay, but he wanted to be reinstated instead. The court refused to order reinstatement because of "mutual

dislike and defendants' continued opinion that plaintiff is incompetent," reasoning that "if the employee dislikes the idea of working for the employer or the employer dislikes the idea of having the employee work for him, reinstatement should not be ordered."¹³ Price was a salesman who spent much of his working time away from the office and so was not constantly rubbing shoulders with his enemies; nevertheless, the judge noted that "It is one thing to order the reinstatement of low-level employees performing routine tasks, or higher-level employees after the supervisors involved in the unlawful employment action have left the company or been transferred to another division, but to order reinstatement of a high-level employee performing discretionary functions into the division from which he was fired and which remains under the management of the person who fired him is a formula for continuous judicial intervention in the employment relation. If Price is reinstated, every time he is denied credit for a sale, or denied a raise or a bonus, or has a squabble with [his supervisor], he will be tempted to run to the district court."¹⁴

In *Lewis v. Federal Prison Industries, Inc.*,¹⁵ the court found it reasonable for Lewis to refuse reinstatement after a psychiatrist testified that Lewis experienced a "reactive depression" in response to the discriminatory acts that occurred at the company and that, although Lewis' health had improved since he left, his symptoms would return should he return there. There was also evidence that Lewis had only four years until the date of his mandatory retirement.¹⁶ In another case¹⁷, the plaintiff was awarded front pay because he was within eight years of retirement.

Although the trial ordered reinstatement in *EEOC v. Century Broadcasting Corp.*,¹⁸ it was reversed because the judge had not given a sufficient "rationale" for withholding front pay. The case involved a radio station which had terminated all announcers over the age of forty. The trial court ordered that they be rehired but the

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Court of Appeals would not allow this because "reinstatement would disrupt the operation of the station and would displace announcers currently employed" and "station management does not have confidence [in] these announcers[.]"¹⁹

The case that best illustrates the willingness of the courts to substitute front pay for reinstatement is *Buckley v. Reynolds Metals Co.*²⁰ The judge ordered that Buckley be reinstated immediately to his old position or to a substantially equivalent position. However, after eight months of fruitless negotiations, the parties stipulated that Buckley would seek an award of front pay instead. The court agreed, concluding that reinstatement was impossible or impracticable because the parties said it was.

Calculating the Amount of Front Pay

Front pay awards are guided by consideration of factors such as the availability of employment opportunities, the period within which the employee by reasonable efforts could have been reemployed, the employee's work and life expectancy, discount tables to determine the present value of future damages, and other factors that are pertinent on all types of prospective damage awards.²¹ Some of this evidence, like the discount tables, is objective; but how is a judge or jury to know how long the plaintiff actually would have remained working at the job, whether he soon would have left for a different, perhaps better-paying job, or whether the plaintiff soon would have been dismissed for legitimate reasons?²² Often the source of such data, which is necessary to calculate a reasonably certain front pay award, is the plaintiff's testimony and that of his experts.

In *Forest Electric Corp. v. Murtha*²³ the employee testified that he was in excellent physical condition and enjoyed working with the people at Forest Electric so much that he would have worked until he was seventy-three to seventy-five years old. He also testified that he was earning \$49,406 per year at the time he was terminated, at age sixty-six. Based on this evidence, and on evidence of earning history and fringe benefits, and based on reasonable assumptions about increases in earnings due to economic conditions,

Murtha's expert economist declared that Murtha would have earned approximately \$377,000 in the period from his termination until age seventy-three, if he worked to that age. The expert stated that work life was a fact which varied too much from person to person to use general tables to estimate it.²⁴ The company countered with the testimony of a statistician rather than an economist. He testified that Murtha would probably have worked until age seventy, based on what the typical man who was working at age sixty-six would do. Assuming he retired at age seventy, Murtha's economic loss until retirement would have been \$69,713.²⁵ The jury accepted Murtha's expert and conclude that he would have worked to the age of seventy-one to seventy-three. The front pay award was \$200,000.

In *Doyme v. Union Electric Co.*²⁶ the employee testified that he planned to work until age seventy and that he had so informed Union Electric. One of Union Electric's own witnesses testified that prior to Doyme's termination he told another employee that he intended to work until age seventy. The jury awarded \$273,993 in front pay based on this testimony but the trial judge reduced the amount to \$19,610.66 after declaring that there was insufficient evidence to support the jury's finding that Doyme would have remained employed with Union Electric until age seventy and that the front pay award should be based on retirement at the age of 65.²⁷ The Court of Appeals sided with the jury and reinstated the \$273,993 award.²⁸

The longer a proposed front pay period the more speculative the damages become.²⁹ Awards have been allowed involving as much as four years between the trial date and the date when compulsory retirement could have been imposed,³⁰ but it is the total circumstances, not merely the length of time until retirement, that determines whether a particular award is too speculative. Mr. Buckley, for example, sought an award to cover a nine year period, which under other circumstances might exceed the limits of permissible speculation. However, Buckley had worked for Reynolds for more than twenty-five years when he was fired; he had nine years to work before retirement. There was no reason to reject his assertion that he intended to remain at Reynolds until he reached the regular

retirement age of sixty-five. It was also reasonable to assume that absent the illegal discharge, he would have been able to remain at Reynolds until he planned to retire. In view of his age, it was unlikely that Buckley would voluntarily switch jobs again or embark on a new career path. Finally, the industry where Buckley was employed provided relatively steady and dependable employment. Under these circumstances nine years did not seem unduly speculative.³¹

Awards that have been considered unduly speculative have arisen in situations where the discharged employee is only forty years old or so, or where the award might encompass ten years or more during which the employee, had not been unlawfully discharged but continued in his employment, might or might not get raises, reductions, fired or incapacitated.³² For example, the employees in *Rengers v. WCLR Radio Station*³³ requested nine years of front pay but the evidence indicated that in a fickle industry like radio, job security for disk jockeys is quite tenuous and so the court refused to speculate that they would have remained employed at the station until retirement. In *Price*,³⁴ the employee's expert witness estimated damages ranging from \$1.2 million if Price retired at the age of sixty-five to \$2.1 million if he retired at seventy-five but failed to discount each year's projected earnings loss by the probability that Price would have lived long enough to obtain those earnings. The court thought that since the probability was not one hundred percent the estimate of lost earnings should have been scaled down accordingly. The court decided a bigger problem was the expert's failure to take into account the high volatility of earnings: "The figures the expert projected may be the best possible estimate of . . . mean expected earnings had [the employee] remained with (the employer), but the variance around that mean must be considerable. Risk-averse persons—and most people are assumed to be risk-averse in their serious financial affairs—will pay a premium, often a large one, to avoid risk. . . [A] person who did not mind risk would not be willing to pay a loading charge—he would prefer to take his chances on the loss's occurring or not . . . The award in effect enabled (the employee) to exchange his risky

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expectations . . . for a risk-free asset having the same expected value but, assuming [the employee] is risk averse, a substantially higher utility."³⁵

Front pay awards will not be upheld if there is no evidence in the record to support the calculations. For example, in *Hybert v. Hearst*³⁶ the court had assumed that 1) the employee would continue to work at his present rate of productivity until the age of seventy-two (he was sixty-seven when the trial ended); 2) the employer would have continued to employ the employee in his last-held position until he retired at the age of seventy-two; and 3) that the employer would have continued to employ the employee at his last-held salary level for five more years until he retired at seventy-two.³⁷ Since there was no evidence to support any of these assumptions, the front pay award was reversed.

The Duty to Mitigate

To be entitled to an award of front pay a plaintiff must make reasonable attempts to mitigation. The employer can avoid liability by showing that there were suitable positions available and that the employee failed to use reasonable care in seeking them. For example, in *Leeds v. Sexson*³⁸ the employee was not entitled to an award of front pay because he failed to remain in the labor market and failed to diligently search for alternative work. The employee in *Rodgers v. Western-Southern Life Insurance Co.*³⁹ was not entitled to a front pay award because he declined an offer of reinstatement and failed to show that it would have been infeasible or inappropriate for him to return. The jury instructions in *Gries v. Zimmer, Inc.*⁴⁰ offer a concise statement of the duty to mitigate.

In that case, the judge told the jury that if the plaintiff "failed to make reasonable efforts to find a new job, you should subtract from his damages any amount that he could have earned in a new job after his discharge."⁴¹

The length of time an employee has to find comparable employment depends on the circumstances. In *Fite v. First Tennessee Production Credit Ass'n*,⁴² the employee postponed seeking other employment for a year in the expectation that he would be reinstated. When it became apparent that this would not happen, he vigorously sought other employment. Given these circumstances, the court gave him more than three years to find comparable employment.⁴³

Should Front Pay be Doubled?

The ADEA calls for the doubling of damages in cases of a willful violation. Should this doubling apply to front pay awards? In *Olitsky v. Spencer Gifts, Inc.*,⁴⁴ the employee argued that the court should have doubled the jury's award of \$400,000 front pay after finding that Spencer Gifts acted willfully and the Fifth Circuit agreed, stating that "to exclude front pay would make no sense, for an award of double damages might well fall short of compensation and thus contain no punitive component at all (in fact contain a negative punitive component). In such a case the plaintiff might be better off if the violation were adjudged not willful."⁴⁵

On the other hand, several courts have held that the doubling provision of ADEA does not apply to front pay awards.⁴⁶ These courts see front pay exclusively as an equitable award and, therefore, not subject to doubling. One court has even considered double back pay and front pay as

mutually exclusive.⁴⁷ Clearly, the availability of double damages is one of the circumstances that courts look at when deciding whether to award front pay at all. In *Lee v. Rapid City Area Sch. Dist.*⁴⁸ the court entered judgement for \$22,140 for back pay, \$39,664.85 for front pay, and \$10,000 for double damages, citing its "discretionary" authority regarding double damages while noting that the plaintiff had already received an award of front pay.⁴⁹

Summary and Conclusion

The phrase "without limitation" in the damages section of the ADEA invites federal courts to be imaginative in devising equitable remedies and front pay has been the result. Initially, front pay was said to be appropriate only when the other damages awarded did not fully compensate the plaintiff for his injuries. Subsequently, it has become the remedy of choice where reinstatement is not feasible because the employee has found another job, where it would require displacement of another worker, or where hostility would result if the employee returned. Front pay is being used to compensate employees until retirement even though the discrimination has ceased. This is a windfall, not restitution, says the *Lewis* dissent,⁵⁰ and it creates an incentive for the discharged employee to remain unemployed and for the employer to settle the case without addressing the possible age discrimination in the workplace. If front pay was not available, the employee would have little incentive to prosecute a frivolous claim.⁵¹ Given the difficulty in calculating the proper amount of front pay and the resulting speculative nature of the award it is time to consider the wisdom of the widespread use of this remedy.

References

¹ 29 U.S.C. secs. 621-34 (1988 ed., Supp. III).

² *Mcknight v. General Motors Corp.*, 908 F.2d 104, 116 (7th Cir. 1990) cert. denied 499 U.S. 919, 111 S.Ct. 1306, 113 L.Ed. 2d 241 (1991).

³ 29 U.S.C. sec. 626(b)(1988 ed., Supp. III).

⁴ Peter Janovsky, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 Fordham L. Rev. 579 (1984).

⁵ Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (October 31, 1986).

⁶ *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1449 (11th Cir.), cert. denied, 474 U.S. 1005, 106 S.Ct. 1005, 88 L.Ed.2d 457 (1985).

⁷ 952 F.2d 119 (5th Cir. 1992).

⁸ *Id.* at 126.

Letter from the Editor

With this first issue of the second volume, we officially enter our second year of publication. For those of you who have been with us from the beginning, you know that the publication continues to grow in size and expand in coverage. To reflect the shifting emphasis toward longer articles, the name of the publication has been changed, starting with this issue, to the *Employment and Labor Law Quarterly*. And, in keeping with this shift toward more scholarly fare, beginning with the next issue, Vol.2, No.2, the *Quarterly* will begin publishing reviewed articles. An editorial board has been assembled, in order to accomplish this. Of course we will always need more help, so if you are inclined in this direction, and would like to contribute your efforts to the growth of the publication, please call me at (505)562-2332, or drop me a note at College of Business, Eastern New Mexico University. A proposed Editorial Policy and Instructions for Contributors is included in

this issue, for your review and comment. Since this *Quarterly* is being produced to meet the needs of the Employment and Labor Law Section, as well as the teaching and legal professions in general, your input into the development of this policy and the instructions is essential, so please communicate with me in this regard.

Even though the *Quarterly* will be publishing longer, reviewed articles, we will also continue to publish shorter unreviewed pieces, as we have in the past, as well as announcements of events important to the Section. Let me emphasize, the *Quarterly* is still evolving, and the format and the nature of the materials published is not cut in stone. If you have ideas for new features, send them in, or call me. I would personally like to publish book reviews, and interviews with attorneys who have handled important cases for which appellate or U.S. Supreme Court opinions have been published. I welcome your reaction to this idea.

Developments on the *Quarterly*, in the Section, have been superb. Laura Pincus and Dawn Bennett-Alexander deserve our thanks and a great deal of applause for their foresight and energy in founding this Section. Thank you both. The size of the section and the volume of scholarly writings in this field are growing tremendously. Fully one fourth of the papers presented at the last two Annual Meetings were on employment or labor law topics, and the field continues to be well represented at the regional meetings as a quick perusal of the "Conference Papers" section of the Research Center will reveal. For all of you who contribute your time to the publication, or who have submitted materials for publication, thank you. We could not do this without you.

Roger Johns
Chair of the Section
Editor in Chief