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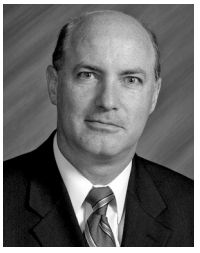
MESSAGE FROM THE CHAIR

by Domenick Carmagnola



Can anyone dispute that the Internet, social media, computers, smartphones, iPads, gadgets and the like have changed the practice of law? Whether you believe these items have made the practice better or worse, easier or harder, the practical reality is that they have changed how we do our jobs.

Email communications, electronic filing, Internet access in the courthouse, to name a few, have all helped create a different way of practicing law than we have ever known. The Labor and Employment Law Section and our members need to embrace these new technologies and advances and make use of what is available to us. As such, I am using this column to give you all some insight into one of the areas that our section is working on: namely, improving the section's presence on the NJSBA website and providing resources to our members.

If you have not done so yet, I strongly recommend that you go to the new and improved website that the NJSBA has created—www.njsba.com. It is an excellent website, and is full of terrific resources. When you visit the website, if it is your first visit to the new version, you will need to log in with a user name and password. The NJSBA sent out emails with instructions, but if you missed them, contact Member Services at 732-249-5000 for assistance. After you have successfully logged in, click on Community and accept the code of conduct, which governs online behavior in CommunityNET. Doing this will allow you to set your preferences, and will be your initial introduction into the CommunityNET portion of the website.

CommunityNET is the new connected community for NJSBA members. Everything you need to know about how this section of the website works is outlined in a convenient PowerPoint presentation prepared by Barbara Straczynski, director of new media and promotions. The PowerPoint presentation will show you how to navigate and utilize the many features of CommunityNET. It covers customizing personal settings, finding the Labor and Employment Law Section community, engaging in discussions in our section e-group and other sections you might have an interest in, sharing files, accessing the *Quarterly*, writing blogs and more.

You can find the Labor and Employment Section in CommunityNET as one of your Communities under Profile > My Communities. You will notice that there is already an extensive amount of information available. This includes: notice of upcoming events, current and past issues of the *New Jersey Labor and Employment Law Quarterly*, the section bylaws, a list of section members, past legislative positions taken by the section, and section news. Despite the presence of all of this information, we have only really scratched the surface of what we intend to accomplish and have available to our section members. In the coming weeks and months, we will update you on new developments and features that we add to our part of CommunityNET. It is an exciting time for our section, and

*See **Chair** on page 3*

CHAIR

Continued from page 1

we believe that this will be another terrific member benefit that we can add to help us advance our mission and provide further incentive for others to join this wonderful section.

In addition, it is likely that as we move forward with our endeavor to increase our web presence, future editions of the *Quarterly* will be coming to you electronically. We also hope to update you via postings about our Executive Committee meetings, seminars, and opportunities to get involved. A more aggressive undertaking will be determining how to use the community blogs section and adding links and resources for our members. Our section is what we make it, and our members have a history of support and involvement that is second to none, so there is no reason to think that this will not happen in short order and will not be a resounding success.

I hope you enjoy this edition of the *Quarterly*; another edition filled with timely and excellent articles that we have come to expect. This is a particularly exciting edition because of the collaboration with employment law students; another effort by our section to assist in getting new attorneys involved. It is also interesting to note that this edition has an article on social media; an example that these issues are now embedded in our practice and will not be going away anytime soon.

As always, please let me know if you have any suggestions for meetings, events, seminars, committees, and the like, or if you or someone you know would like to become more involved in the section. ■

EDITOR'S MESSAGE

by Anne Ciesla Bancroft

In the winter issue of the *Labor and Employment Law Quarterly*, we are pleased to start the year with our inaugural collaboration between attorney authors and employment law students from the Rutgers School of Law-Camden and the Earle Mack School of Law at Drexel University. Danielle Rementer and Steve Berlin advise why a performance improvement plan alone is not an adverse employment action. Adam Roseman, Ken Rosenberg, and Todd Palo provide a comprehensive overview of where the National Labor Relations Board stands on employee use of social media. Shazrae Mian and Denise Keyser update employers and employees on recent developments under the Occupational Safety and Health Act. Nobu Hiro and I address the intended and unintended changes to New Jersey wage and hour law.

This issue of the *Quarterly* also analyzes recent disparate impact cases. Ivan Mendez and Shane Kagan discuss the disparate impact of hiring requirements in recent discrimination and reverse discrimination decisions. In addition, Lia N. Brooks and Rich Rosenblatt explain the new New Jersey prohibition against discriminating in job postings on the basis of unemployment. Finally, Cheoma Smith warns employers of the heightened significance of administrative determinations in light of a court's consideration of the decision of the unemployment compensation tribunal in *Gibbs v. Caswell-Massey*.

The editors of the *Quarterly* especially thank Pam Jenoff, Esquire, clinical assistant professor at the Rutgers School of Law-Camden, for her assistance with this issue, and the law students and their attorney co-authors for their excellent contributions and collaborative effort. ■

IT COULD BE WORSE

PERFORMANCE IMPROVEMENT PLAN IS NOT AN ADVERSE EMPLOYMENT ACTION

by Steven M. Berlin and student co-author Danielle Rementer

On July 22, 2011, the Third Circuit in *Reynolds v. Department of the Army*[1] held that placing an employee on a performance improvement plan (PIP), absent accompanying changes to pay, benefits, or employment status, is not an adverse employment action. The Third Circuit's holding is in line with recent decisions from other circuit courts considering the same issue. While *Reynolds* is an Age Discrimination in Employment Act of 1967 (ADEA) case,[2] the ruling is also consistent with the way courts have interpreted the adverse employment action requirement for claims based on Title VII of the Civil Rights Act of 1964[3] and the New Jersey Law Against Discrimination (LAD).[4]

Factual Background

In Jan. 2004, Raymond Reynolds, a longtime employee of the federal government, transferred to an engineering position with the U.S. Army in the On-The-Move Testbed section of the Communications-Electronics Research, Development, and Engineering Center, located in Fort Monmouth. His supervisor was Norma Kornwebel, director/deputy director of the Testbed.

According to Kornwebel, Reynolds did not take his job at the Testbed seriously; he improperly delegated responsibilities to others; and he failed to comply with directives. Reynolds generally disputed Kornwebel's assertions of poor job performance, and instead claimed that, since starting with the Testbed, Kornwebel treated him dismissively and failed to present him with a job description or position objectives.

Kornwebel indicated Reynolds failed to meet two out of his seven job objectives in his Aug. 2004 evaluation. She then put him on a PIP when she met with him to discuss the evaluation. Under the PIP, Reynolds was given 90 days to either bring his performance to an acceptable level or face the possibility of reassignment, demotion, or termination.

On Nov. 4, 2004, the day after he received the PIP, Reynolds applied for two early retirement incentive programs: voluntary early retirement authority (VERA) and voluntary separation incentive pay (VSIP).

The next month, Reynolds submitted a complaint to the Equal Employment Opportunity Commission alleging age discrimination. Reynolds was 51 at the time. Subsequently, Reynolds was offered a 90-day extension on his PIP, but was denied an extension to accept VERA/VSIP benefits, for which he had been approved. Reynolds declined the PIP extension, but alleges he would have accepted the extension and remained working at the Testbed had he also received an extension for electing VERA/VSIP. Ultimately, Reynolds elected to take his early retirement option through VERA/VSIP.

Reynolds filed his lawsuit against the Department of the Army in the District of New Jersey in June 2008, alleging he was the victim of age discrimination and retaliation during his employment with the Testbed, suffered a hostile work environment, and was constructively discharged. The Army moved for summary judgment on Sept. 29, 2009.

District Court Decision

After reviewing the sufficiency of Reynolds' claim under the *McDonnell Douglas* framework,[5] requiring that a plaintiff must plead and prove he suffered an adverse employment action as a result of the alleged wrongful conduct,[6] the district court granted the Army's motion for summary judgment. Having determined that the mere placement of Reynolds on the PIP did not constitute an adverse employment action, the court ruled that Reynolds failed to make out a *prima facie* case for both age discrimination and retaliation.[7]

Quoting *Burlington Industries v. Ellerth*, the court recognized that an adverse employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits."[8] Following federal precedent, the court held that a PIP alone cannot constitute an adverse employment action absent changes to pay, benefits or employment status.[9]

Reynolds argued that his placement on the PIP, together with other assertions that he was subjected to a hostile work environment and he was constructively discharged, supported a claim that he suffered an adverse action. Having concluded, however, that Reynolds failed to satisfy his burden as to the hostile work environment and constructive discharge claims, the court rejected the argument that the PIP by itself was sufficient evidence of adverse action.

Third Circuit Decision

On appeal, the Third Circuit agreed with the district court. In a concise, three-and-a-half-page opinion, the appeals court concluded that, absent accompanying changes to pay, benefits, or employment status, a performance improvement plan is not an adverse employment action.[10]

The appeals court first agreed the district court correctly applied the *McDonnell Douglas* burden-shifting framework in assessing the claim, as the plaintiff relied solely on indirect evidence. Next, the court agreed with the district court that a showing of an adverse employment action was necessary to establish a *prima facie* case of discrimination.

The Third Circuit noted that the Army's conduct that had the most potential to satisfy the adverse employment action standard was the placement of Reynolds on the PIP. Nevertheless, the Third Circuit saw no reason to deviate from its sister courts of appeal, and held that a PIP is not an adverse employment action absent accompanying changes to pay, benefits, or employment status.[11]

Illustrating its ruling, the Third Circuit then went on to discuss the significant differences between a PIP and the types of employment actions that have qualified as adverse. For example, unlike a change in employment status, the court explained that a PIP communicated to an employee ways in which that employee could better perform his or her existing duties. Justifying its ruling, the Third Circuit suggested that a likely consequence of allowing suits to proceed on the basis of a PIP alone "would be more naked claims of discrimination and greater frustration for employers seeking to improve employees' performance."[12]

Accordingly, the court concluded that because Reynolds failed to demonstrate his PIP was accompanied by an adverse change in the conditions of his employment, the district court appropriately dismissed his complaint.

Impact of *Reynolds v. Army*

Reynolds is consistent with the way federal and state courts in New Jersey have been ruling in discrimination and retaliation cases based on Title VII and the NJ LAD.

Like ADEA, Title VII discrimination and retaliation claims also require a showing of an adverse employment action.[13] The Third Circuit relied on cases construing Title VII in adopting the standard for an ADEA claim in *Reynolds*.[14] Moreover, New Jersey courts have traditionally looked to federal precedent governing Title VII as a "'key source of interpretive authority'" in construing the LAD.[15] Although New Jersey courts have interpreted the LAD protections against discrimination broadly, they still have only found that a PIP constituted an adverse employment action when the PIP was accompanied with some type of change to the conditions of employment.[16] Therefore, it is also likely that the New Jersey courts will follow *Reynolds*.

Employees who rely on a PIP alone will likely be unsuccessful in a discrimination or retaliation case. However, a PIP may enhance an adverse action claim when changes in an employee's work conditions are present.

For employers, *Reynolds* will have the effect of providing some assurance that merely placing an employee on a PIP will not lend credence to an unsubstantiated employment discrimination claim. However, caution is still warranted, as the Third Circuit did not comment on the extent to which changes to pay, benefits, or employment status are required in order for a PIP to be the basis for a successful adverse action claim. Furthermore, disparate treatment in the use of PIPs with different employees could present a different fact pattern that might be held to constitute an adverse action under applicable laws.

To protect against future employment discrimination suits, employers who continue to utilize PIPs should ensure that such plans are implemented uniformly and not accompanied with changes to pay, benefits or employment status in any way.

One thing is clear from the *Reynolds* decision: Absent more, an employee's reliance on mere placement on a PIP will not pass muster in an adverse action claim. ■

Endnotes

1. No. 10-3600, 2011 WL 2938101 (3d Cir. July 22, 2011).
2. 29 U.S.C. § 621 *et seq*.
3. 42 U.S.C. § 2000e *et seq*.
4. N.J.S.A. 10:5-1 *et seq*.
5. Under the framework, the plaintiff bears the initial burden of proving a *prima facie* case of discrimination. Once proved, the burden of production shifts to the employer to identify a legitimate nondiscriminatory reason for the adverse employment action. If the employer does so, the burden of production shifts back to the plaintiff to demonstrate that the employer's proffered rationale was a pretext for age discrimination. At all times, however, the burden of persuasion rests with the plaintiff. *Smith v. City of Allentown*, 589 F.3d 684, 689-90 (3d Cir. 2009).
6. To establish a *prima facie* case of discrimination in an ADEA case, a plaintiff must show "first, that the plaintiff is forty years of age or older; *second, that the defendant took an adverse employment action against the plaintiff*; third, that the plaintiff was qualified for the position in question; and fourth, that the plaintiff was ultimately replaced by another employee who was sufficiently younger to support an inference of discriminatory animus." *Id.* (emphasis supplied).
7. *Reynolds v. Dep't of the Army*, No. 08-2944, 2010 WL 2674045, at *11, 18 (D.N.J. June 30, 2010).
8. 524 U.S. 742, 761 (1998).
9. *Reynolds*, WL 2674045, at *3. *See, also, Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215, 1224 (10th Cir. 2006) (holding that while a PIP, standing alone, is not an adverse employment action, a written warning may indeed constitute an adverse employment action where "it effects a significant change in the plaintiff's employment status."), *cert. denied,* 549 U.S. 1252 (2007); *Cole v. Illinois*, 562 F.3d 812, 816-17 (7th Cir. 2009) (holding under the FMLA that an improvement plan cannot constitute adverse employment action, where the most onerous aspect required only submission of daily and weekly schedules, but did not deprive employee of responsibility, hours or pay); *Givens v. Cingular Wireless*, 396 F.3d 998, 998-99 (8th Cir. 2005) (noting that placement on employee improvement plan is actionable only if later used to detrimentally alter terms and conditions of plaintiff's employment).
10. *Reynolds*, 2011 WL 2938101, at *2.
11. *Id.* at *3.
12. *Id.*

See ***Performance*** *on page 9*

CAREFUL WHERE YOU STEP

DRAFTING AND ENFORCING SOCIAL MEDIA POLICIES REQUIRES WALKING A FINE LINE

by Kenneth A. Rosenberg, Todd A. Palo and student co-author Adam R. Roseman

Over the past year, the National Labor Relations Board (NLRB) has reviewed a number of cases dealing with employers' attempts to manage their employees' activities in cyberspace through the promulgation of social media policies and/or disciplinary action.[1] The NLRB's focus on this issue is a reminder to all employers that the National Labor Relations Act (NLRA)[2] requires employers to balance their efforts to protect their corporate reputations, customers and business associates from harassing and untruthful allegations on the Internet against their employees' rights to discuss their working conditions.

In particular, the NLRB's Division of Advice's recent social media decisions show that an employer's attempts to manage its employees' activities in cyberspace will be deemed a violation of Section 8(a)(1) of the NLRA where:

1. The employer's actions improperly interfere with, restrain or coerce its employees' right to engage in "protected and concerted" Section 7 activities; and/or
2. The promulgation of the employer's social media policy in and of itself improperly chills its employees' rights to engage in "protected concerted activities" under Section 7 of the NLRA.

An employer violates Section 8(a)(1) of the NLRA where it coerces, intimidates, disciplines and/or discharges employees who engage in "protected concerted activity." Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with employees in the exercise of their Section 7 rights.[3]

Section 7 of the NLRA, in relevant part, grants employees the "right" to strike, picket, handbill and/or demonstrate peacefully against their employer, and to engage in a full range of activities related to these rights. Pursuant to these rights, employees are entitled to communicate with their coworkers, and the general public, as part of a concerted effort to affect changes in their terms and conditions of employment. Moreover, an employer violates Section 8(a)(1) merely by implementing a policy that could interfere with employees' Section 7 rights.[4]

Accordingly, an employer's promulgation of a social media policy and/or enforcement of that policy must not improperly interfere with its employees' rights to engage in "protected concerted activity." It is thus incumbent upon all employers to determine whether the employee(s)' social media activity constitutes protected concerted activity, and/or whether the promulgation of a social media policy can be interpreted as interfering with same prior to taking such action to avoid violating the NLRA.

In sum, employers should ask:

1. Is the employee engaged in activities that are "concerted"?
2. Is the employee engaged in social media activities that are "protected" by the NLRA?
3. Does the employer's social media policy interfere with its employees' rights to engage in "protected concerted" activities?

Where the answer is no to these questions, an employer's response to an employee's social media activities and/or promulgation of a social media policy will be permissible under the NLRA.[5]

Is the Employee Engaged in Social Media Activities that are "Concerted"?

The NLRB has held that protected "concerted activities" are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[6] Personal gripes are not deemed concerted by the NLRB.

The board has also stated it will find concerted activity: "[w]hen the record evidence demonstrates group activities, whether specifically authorized in a formal agency sense,…or otherwise[.]"[7] Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action," and where individual employees bring "truly group complaints to management's attention."[8] Thus, individual activities that are the logical outgrowth of concerns expressed by the employees collectively are considered concerted.[9]

In addition, the board has found that employee discussions related to shared concerns about terms and conditions constitute concerted activity, even if no specific group action is contemplated, because such discussions usually precede group action.[10]

The division examined whether an employee's social media activity was concerted in *JT's Porch Saloon & Eatery, Ltd*.[11] There, a bartender conveyed to his stepsister via Facebook that he had not had a raise in years, and was working without tips, and described his customers as "rednecks" who he hoped "choked on glass as they drove home drunk."[12] The employer fired the bartender when it saw the Facebook posts.[13] The division found that the employee "did not engage in any concerted activity," as the online complaints were never discussed with other employees, and other employees did not respond to the posting.[14]

Likewise, in *Sagepoint Financial, Inc.,* the division concluded that an employer did not violate the NLRA when it fired an employee over his Facebook posts that lambasted his supervisor's performance, because his activities were not concerted.[15] The employee's criticisms, through numerous Facebook posts, included calling the supervisor a bitch and lazy, and insinuating that she was having an affair with one of the other analysts. The division reached this conclusion even though a coworker occasionally responded to the posts to express amusement or sympathy for his situation, and a friend who was not a coworker asked whether he was "[g]unnin for a raise or promotion...[.]" He responded, "[k]issing up I am not. Gunning? Perhaps[.]"

In reviewing the employee's Facebook complaints, the division found the statements were made solely on the employee's own behalf, and were not designed to advance any cause other than his own. Moreover, it found the employee did not evidence any intention of instigating group action or bringing any group concern to management.[16] Thus, the division deemed the employee's comments personal gripes, which were not concerted activities.

The division also recommended an 8(a)(1) violation complaint be dismissed against *Frito-Lay Inc.,* because again the employee did not engage in concerted activity.[17] There, the employee told his supervisor he was not feeling well during his shift, and the supervisor stated that he could leave work but it would cost him an attendance point.[18] The employee completed his shift because he did not want to risk losing another attendance point.[19] After work, the employee accessed his Facebook account through his phone and posted, "[i]t's a Damn shame when ur own boss don't even care about ur health.smh. I Damn there had a heart attack on the fukin floor I bet he would let me go home if I was w*$#% I'm not even goin to say it lmao."[20]

Importantly, none of the employee's coworkers responded to the posts on Facebook expressing similar concerns. Thus, the division concluded that the posts were not intended to initiate group action, nor were they the logical outgrowth of prior employee complaints.[21] Accordingly, the division decided the employee's conduct on Facebook was "just venting," and therefore not protected concerted activity.[22]

These cases demonstrate that where an employee is simply engaging in personal gripes in cyberspace, does not call for group action, and/or the activity is not the logical outgrowth of prior employee complaints, most likely the NLRB will not deem the behavior as being concerted activity. This approach is a positive development for employers, as most employee postings are personal rants regarding their own employment issues, and do not satisfy the concerted activity standard. Hence, disciplining employees for engaging in such behavior will not likely violate Section 7.

Is the Employee Engaged in Social Media Activities "Protected" by the NLRA?

As noted above, Section 7 of the NLRA protects employees' rights to discuss their terms and conditions of employment with their coworkers. Protected subjects include, but are not limited to, compensation, tips, health or fringe benefits, work hours, health and safety issues, disciplinary action and/or other working conditions.

However, whether employees are engaged in discussing "protected" subjects under Section 7 is not always crystal clear. For instance, while employees have the right to discuss and even criticize their coworkers' or supervisors' job performance where it affects their terms and conditions of employment,[23] they do not have an unfettered right to protest an employer's operations or the quality of service the employer provides where such concerns have only a tangential relationship to employee terms and conditions of employment.[24]

Additionally, while the NLRB generally holds that defamatory statements are not protected by Section 7, a wide range of statements made by employees that are critical of the employer and its management have been deemed protected under the NLRA. In determining whether an employee's statement is protected by Section 7, the NLRB considers the following four factors:

1. The place where the statement was made;
2) The subject matter of the statement;
3. The nature of the employee's communication; and
4. Whether the employee's statement was, in any way, provoked by an employer's unfair labor practice.[25]

The NLRB has applied the foregoing analysis to hold that an employee's use of profanity directed toward his or her employer was protected activity because the foul language was issued in connection with an underlying grievance or dispute.[26] However, the NLRB also has recognized that an employee's speech will lose its Section 7 protection where the statements are found to be disloyal or maliciously false (*i.e*., knowingly false or made with reckless disregard for their truth or falsity).[27]

The foregoing principles were applied by administrative law judges (ALJ) in several recent social media cases, including: *Hispanics United of Buffalo, Inc.*[28] and *Karl Knauz Motors, Inc., D/B/A Knauz BMW*.[29]

In *Hispanics United of Buffalo, Inc.* the NLRB filed a complaint against an employer after it fired five employees who criticized its service to the public, as well as working conditions.[30] Upon hearing a coworker criticize other employees for not doing enough to help the organization's clients, an employee posted on Facebook, "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?"[31] Four other employees responded to this posting in defense of their job perfor-

mances, and complained about the staffing levels and their workloads.[32] One employee responded, "What the f…Try doing my job I have 5 programs."[33] Another commented, "[t]ell her to come do my f…ing job…if I don't do enough, this is just dum."[34]

In finding the employees' terminations unlawful, the ALJ found that the employees engaged in "protected concerted activity," even though they were not trying to change, initiate or induce group action about their working condition and did not communicate any of their concerns to the employer.[35] The ALJ reasoned that although the first post was about the employer's service to the public, not terms or conditions of employment, the Facebook discussion was the inception of concerted protected discussions among employees about their working conditions. Accordingly, he concluded that by firing the employees who participated in the discussion, the employer unlawfully prevented further discussion on the employees' working conditions.[36]

The NLRB also examined an employee's Facebook postings, which criticized his employer's operations and promotional event in *Karl Knauz Motors, Inc., D/B/A Knauz BMW*.[37] There, on his Facebook page, the employee criticized the food served by the dealership at its BMW event and mocked an accident in which a customer's child test drove one of the employer's Land Rovers into a pond.[38]

As to the comments and pictures critical of the food served at the event, the postings stated in part, "but to top it all off…the Hot Dog Cart. Where our clients could attain an over cooked wiener and a stale bunn…"[39] Along with the comment, the employee posted numerous pictures of sales representatives serving food to customers.[40] One picture contained the comment, "[n]o, that's not champagne or wine, its 8 oz. water. Pop or soda would be out of the question. In this photo, Fadwa [a coworker] is seen coveting the rare vintages of water that were available for our guests."[41]

The ALJ found the employee's critical Facebook comments and pictures regarding the event were protected concerted activity because they constituted a continuation of concerns raised by fellow coworkers during and after a staff meeting.[42] Further, and perhaps more important, the employee's comments related to how the food presentation at the event would effect future commissions, a term or condition of employment, for the employee and his coworker.[43]

The ALJ concluded the Facebook conduct logically grew out of the prior concerted activity of the employee and a fellow coworker discussing the inadequacies of the food being served at the event to management at a meeting prior to the event, and their continued discussions with each other about the food after the meeting with management.[44]

In contrast, the ALJ found that the employee's mocking Facebook postings and pictures regarding the Land Rover accident were not protected, because the employee made these postings without any discussion amongst his fellow employees, and they had no connection to any of the employees' terms and conditions of employment.[45] Accordingly, as the ALJ found that the employee was fired because of the Land Rover Facebook postings, rather than the event postings, it upheld the employee's termination.

These cases demonstrate that prior to taking disciplinary action, employers must carefully investigate the facts to determine whether the employees' social media postings involve terms and conditions of employment or other protected subjects. If they involve the employer's operations or quality of service and the line is blurry, employers must carefully determine if the postings are only tangentially related to terms and conditions of employment. If so, then the foregoing cases show the employees can be disciplined for their cyberspace activities.

Does the Employer's Social Media Policy Interfere With Its Employees' Rights to Engage in "Protected Concerted" Activities?

The NLRA provides that employers cannot issue policies that prohibit or otherwise infringe on its employees' rights to discuss and/or compare their wages or other benefits. Where the policy does so, it violates Section 7.

In *Lafayette Park Hotel*, the NLRB clarified its standard for determining whether policies regulating "employee speech" are lawful.[46] In doing so, the NLRB tried to strike a balance between the Section 7 rights of employees, and employers' legitimate business interests, by establishing a two-part test for determining whether a policy unlawfully restricts employee speech.

Pursuant to this test:

1. If the policy expressly restricts communications protected by Section 7, it is unlawful.
2. If the policy does not expressly restrict Section 7 communications, the NLRB will consider whether the policy:
   a. Could reasonably be construed by employees to prohibit Section 7 activity;
   b. Was promulgated in response to union activity; or
   c. Was applied so as to restrict the exercise of Section 7 rights.[47]

The central inquiry of the *Lafayette Park Hotel* test is whether the policy actually prohibits, or could be reasonably understood to prohibit, communications protected by Section 7.

The NLRB, however, does recognize an employer's legitimate business interest in regulating employee conduct for purposes of maintaining order in the workplace and facilitating the efficient operation of its business. As a consequence, the NLRB has also recognized an employer's right, if acting in furtherance of its legitimate business interests, to promulgate policies the restrict "employee speech"—provided, however, that the types of statements the policies prohibit are not protected by Section 7. As such, if the statements are made to encourage the employer to remedy problems in working conditions and not to disparage its product or undermine its reputation, the communications are protected.[48]

Over the past year, the NLRB has applied these principles in social media cases to hold an employer's social media policy improperly interfered with its employees' rights to engage in Section 7 activities.[49] In doing so, the NLRB's Division of Advice has found social media policies as being overbroad and thus illegal where the policy improperly prohibits: "employees from

using any social media (tweet, blog or social networking page)" that "may in any way violate, compromise, or disregard…the rights and reasonable expectations as to privacy or confidentiality of any person or entity."[50] The division has stated a rule that contains this language infringes on employees' Section 7 rights because it does not provide any definition or guidance on what the employer considers to be private or confidential. Hence, the division concluded this rule could be interpreted as prohibiting employees from discussing their wages and other terms and conditions of employment.

In addition, the division found a rule in a social media policy as overbroad where it prohibited the use of social media to post "any communication or post which would be embarrassing, harassing or defamatory to the employer or its employees or that lacks truthfulness or which might cause or does damage the reputation or goodwill of the employer."[51] The NLRB has stated that this rule was overbroad because it could be applied to prohibit an employee from criticizing an employer's labor policies or treatment of its employees that is considered protected activities and failed to advise the employees that the rule was not intended to interfere with the employee's Section 7 rights.

Finally, the board has found social media policies that prohibit employees from communicating with the press or media to be overbroad because they are broad enough to encompass labor disputes. Such a prohibition is a violation of Section 7 as well.[52]

These cases demonstrate that in drafting social media policies employers must ensure their efforts to manage their employees activities in cyberspace do not infringe on its employees' rights to engage in protected concerted activities. Failing to do so can result in one's policy being deemed unlawful.

Looking Forward

In view of the NLRB's recent social media cases, it is evident that instituting and policing one's social media policy can result in missteps. These cases, however, demonstrate that social media cases can be defended, especially where employees are voicing personal complaints. To enforce social media policies and defend against inflammatory and defamatory comments lawfully, employers must ensure they are balancing their legitimate business interests against their employees' rights to engage in protected concerted activities. Where an employer fails to do so, the NLRB has made clear it will hold the employer liable for violating the NLRA's provisions. Fortunately, the NLRB's recent decisions provide a valuable roadmap for employers to follow in order to avoid being faced with an NLRB charge. ■

Endnotes

1. Report of the General Counsel, NLRB Memorandum OM 11-74 (Aug. 18, 2011).
2. 29 U.S.C. §§ 151-169.
3. Section 7 of the NLRA provides:

   [e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...

   29 U.S.C. § 158(a)(1).
4. *Lafayette Park Hotel*, 326 NLRB 824 (1998).
5. Additionally, the NLRB will inquire whether an employer's review of its employee's social media postings constitutes illegal surveillance of or creates an impression of surveillance which would improperly interfere with its employees' rights to engage in "protected concerted activities" in violation of Section 7 of the NLRA. An employer creates an impression of illegal surveillance when the employee would reasonably assume from the employer's statement that their union activities had been placed under surveillance. This test is met where the employer reveals specific information about a union activity that is not generally known and does not reveal its source. *See MONOC*, 2010 WL 6162573 (N.L.R.B.G.C. May 5, 2010) (holding that the employer did not engage in illegal surveillance or create the impression that it had done so because it made the employees aware that their fellow employees had provided the Facebook postings and that it did not solicit same.)
6. *Myers Industries (Myers I*), 268 NLRB 493 (1984); *Myers Industries (Myers II)*, 281 NLRB 882 (1986).
7. *Meyers II*, at 886.
8. *Id*. at 887.
9. *Id.* at 884.
10. *Id.* at 885-87.
11. *JT's Porch Saloon & Eatery, Ltd.*, 2011 WL 2960964, at *1 (N.L.R.B.G.C. July 7, 2011).
12. *Id.*
13. *Id.*
14. *Id.* at *2.
15. *Sagepoint Financial, Inc.,* 2011 WL 3793672 at *2 (N.L.R.B.G.C. Aug. 19, 2011).
16. *Id.*
17. *Frito Lay, Inc.*, 2011 WL 4526828, at *2 (N.L.R.B.G.C. Sept. 19, 2011).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *See, e.g., Endicott Interconnect Technologies, Inc.,* 453 F.3d 532 (D.C. Cir. 2006); *The Korea News, Inc*., 297 NLRB 537, 538 (1990) (holding that an employee was unlawfully terminated after he organized a series of meetings with his coworkers to discuss pay, personnel and working conditions in his department, and then sent a petition to the employer indicating that a supervisor in the department treated them harshly and should be discharged, because these activities were protected by Section 7).
24. *See, e.g. Five Star Transportation, Inc*., 349 NLRB 42, 44 (2007), *enforced,* 414 F.3d 1249 (10th Cir. 2008) (holding bus drivers' letters to school district raising concerns about students' safety not protected speech).
25. *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979).
26. *See, e.g., Alcoa Inc*., 352 NLRB

1222, 1234 (2008) (applying the *Atlantic Steel* factors, the NLRB found that an employee's reference to his supervisor as an "egotistical f..ker" at the conclusion of a grievance meeting was protected by Section 7); *Winston-Salem Journal*, 341 NLRB 124, 126-27 (2004) (holding that an employee was unlawfully suspended after he called a supervisor "a racist" and a "red-neck son-of-a-bitch," because the statements were made after a meeting between the employee and supervisor during which the employee complained that the supervisor was playing favorites).

27. *NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953).
28. *Hispanics United of Buffalo, Inc. & Carlos Ortiz an Individual*, 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges Sept. 2, 2011).
29. *See also, The Wedge Corp. d/b/a The Rock Wood Fired Pizza and Spirits*, 2011 WL 4526829 (N.L.R.B.G.C. Sept. 19, 2011 (ruling employee's termination for Facebook activity was not illegal because complaints were about quality of service rather than terms and conditions of employment).
30. *Hispanics United of Buffalo, Inc. & Carlos Ortiz an Individual*, 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges Sept. 2, 2011).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Lafayette Park Hotel*, 326 NLRB 824 (1998).
47. *Id.* at 825; *See also Lutheran Heritage Village*, 343 NLRB 646 (2004).
48. *See Valley Hospital Medical Center, Inc.*, 351 NLRB 1250 (2007) (overruling the termination of an employee who publically questioned the employer's staffing levels and alleged that patient care was being adversely affected).
49. *Flagler Hospital*, 12-CA-27031, 2011 WL 5115074 (N.L.R.B.G.C. May 10, 2011); *see also Karl Knauz Motors, Inc. d/b/a Knauz BMW*, 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011).
50. *Flagler Hospital*, 2011 WL 5115074 at *2.
51. *Id*. at *3.
52. *Crowne Plaza Hotel*, 352 NLRB 382 (2008) (holding that a rule that prohibits employees from exercising their Section 7 right to communicate with the media regarding a labor dispute is unlawful).

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PERFORMANCE

Continued from page 4

13. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).
14. *Reynolds*, 2011 WL 2938101, at *2; *see Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215, 1224-25 (10th Cir. 2006) (concluding that an employee's placement on a PIP was not an adverse employment action upon which Title VII, ADEA, and ADA claims could be based, absent changes in pay or responsibilities).
15. *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 600 (1993); *see also Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 13-14 (2002).
16. *See Hendricks v. N.J. Dep't of Health & Senior Services*, No. A-4965-07T1, 2009 N.J. Super. Unpub. LEXIS 1787, at *13-14 (N.J. App. Div. July 9, 2009) (holding under the LAD that unfavorable performance reviews coupled with significantly reduced and limited work responsibility constituted adverse action).

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OSHA RESURGENT

THE AGENCY ADDRESSES WORKPLACE VIOLENCE, DISTRACTED DRIVING, WHISTLEBLOWING AND SARBANES OXLEY

by Denise Keyser and student co-author Shazrae Mian

Relatively quiet during the eight years of the Bush administration, the Occupational Safety and Health Administration (OSHA) has been more active under President Barack Obama. Reflecting Washington's current employee-friendly atmosphere, over the past year and a half, OSHA has issued several sets of guidance with the potential to impact virtually every employer across the country.

This article will discuss the guidelines OSHA has issued on four subjects: workplace violence, distracted driving, whistleblowing, and Sarbanes Oxley. Given that the agency expects to be stepping up its enforcement efforts despite the current budget stalemate in Congress,[1] employers are well advised to become familiar with these pronouncements and to take steps now to protect themselves against potential violations of the Occupational Safety and Health Act of 1970 (OSH Act).[2]

Workplace Violence

On Sept. 8, 2011, OSHA issued a directive on *Enforcement Procedures for Investigation of Workplace Violence Incidents*,[3] which establishes uniform procedures for OSHA's field staff responding to incidents of workplace violence, and for conducting investigations in those industries considered most vulnerable to the problem. The directive is not the first time OSHA has addressed this topic. In 2004, the agency issued *Guidelines for Preventing Workplace Violence in Health Care and Social Service Workers,*[4] and in 2009, revisited the issue in its *Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments*.[5] The new directive is the first published instruction to OSHA's own personnel on how that earlier guidance should be applied.

As evident from their titles, the prior guidance addressed the three industries research has shown to be especially susceptible to violence against workers.[6] But the new directive does not limit itself to those fields. Every employer subject to OSHA[7] has a "general duty" to provide a workplace "free from recognized hazards."[8] The directive, therefore, advises OSHA field investigators, in any workplace violence case, to determine whether the employer "recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees."[9] OSHA investigators "should focus on the availability to employers of feasible means of preventing or minimizing such hazards."[10] Thus, under the "general duty clause," any employer who knew or should have known of a potential for violence against its workers risks violating the OSH Act if there is a reasonable means of reducing or eliminating that risk, and the employer does not do so.

The directive identifies several factors that may increase the risk of workplace violence. These include: working with unstable or volatile persons; working alone or in small groups; working late at night or in the early morning hours; working in high-crime areas; handling money; delivering passengers or goods; and working at a mobile site. Because these risk factors are often present in the healthcare and social service settings, and in late-night retail settings, OSHA has identified these as high-risk industries.

The directive also establishes evidentiary elements for a violation. First, in determining whether a serious workplace hazard exists, OSHA will look to documents such as medical records of workplace injuries, and police and security records. Second, in assessing whether there was employer or industry recognition of risk, OSHA field investigators may consider actions and reports of business groups and trade associations, journal articles, OSHA publications and national consensus standards, and the employer's awareness of prior incidents or "close calls" related to workplace violence. Third, in assessing whether an identified hazard either caused or was likely to cause death or serious physical harm, employee interviews, injury or illness logs, and police reports may be used. Fourth, the presence of a feasible abatement method may be established through expert opinion or the use of a particular safety item or process within the relevant industry.

OSHA has recommended both general and industry-specific abatement methods.[11] Most important, the directive outlines the need for, and the contents of, a comprehensive workplace violence prevention program, which should include a hazard assessment and security analysis, a recordkeeping system for violent incidents, development of a training program, and a response team. The directive also suggests that businesses reduce employee exposure to hazards through the use of engineering, administrative and work practice controls, such as requiring employees to

report all assaults or threats, integrating violence prevention strategies into daily procedures, installing curved mirrors, controlling facility access, using video surveillance, requiring "drop safes" and keeping only minimum amounts of cash on hand, developing emergency procedures, and installing a reliable alarm and response system.

It is important that employers, especially in the targeted fields of healthcare, social work and late-night retail, assess their workplaces' potential for violence and take steps now to reduce or eliminate those risks. Failure to do so before OSHA's enforcement efforts get fully underway may result in significant liability down the road.[12]

Distracted Driving

On Oct. 4, 2010, again acting under the general duty clause, OSHA announced its *Distracted Driving Initiative*, aimed at workers who text while driving.[13] On this point, one might say OSHA is late to the party. Thirty states have already prohibited this action,[14] while an executive order and Department of Transportation rules now prohibit federal employees and bus, truck and train operators from doing so.[15] As virtually anyone who has ever driven a car can attest, texting while driving is unquestionably dangerous. Statistics show that this practice is nearly universal as well.[16] Yet, with its initiative, OSHA has placed the burden to stop this dangerous habit among those who drive for a living squarely on the shoulders of employers—who, needless to say, are not doing either the driving or the texting—rather than the employees themselves.

Businesses who employ workers who drive for at least part of their duties now must maintain clear and unequivocal policies against texting while driving. And more is required; mere words are not enough. OSHA warns that "[i]t is imperative that employers eliminate the financial or other incentives that encourage workers to text while driving."[17] In other words, employers may not turn a blind eye to a practice many employees and/or their managers believe increases productivity, efficiency or client service (assuming workers are engaging in work-related texting while driving and working, not merely checking Facebook or handling personal matters).

Whistleblower Investigations Manual

On Sept. 20, 2011, OSHA released its revised *Whistleblower Investigation Manual*, addressing procedures for handling retaliation complaints under the 21 statutes (including the OSH Act) whose "whistleblower" provisions OSHA enforces.[18] The new manual reflects OSHA's efforts[19] to restructure its Whistleblowers Protection Program by increasing the quality and consistency of the agency's investigations.

The manual implements procedural changes, which, while making it easier for employees to file complaints, also significantly increase the burden on employers defending investigations. For example, the manual provides guidance on handling uncooperative respondents and OSHA's administrative subpoena authority, and clarifies that complaints may be filed in any language either orally, in writing, or electronically on OSHA's Whistleblower Protection Program website. Additionally, investigators now also must attempt to interview the complainant in all cases, and provide the complainant, upon request, with the respondent's submissions, in accordance with confidentiality laws.[20]

Interim Rule for SOX Whistleblower Cases

Finally, on Nov. 3, 2011, OSHA issued an interim[21] rule amending the regulations governing the whistleblower provision of the Sarbanes-Oxley Act (SOX). The rule implements the statutory amendments to SOX made by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.[22] The amendments include: 1) adding protection for employees from retaliation by nationally organized statistical national organizations; 2) doubling the filing period for whistleblower complaints from 90 to 180 days; 3) forbidding the waiver of whistleblower protection rights and remedies, including by predispute arbitration agreements; 4) allowing OSHA to choose, on a case-by-case basis, whether actual reinstatement or "economic reinstatement" (*i.e.*, back pay and benefits) should be pursued; and 5) clarifying that the companies subject to SOX's whistleblower provision include subsidiaries and affiliates of the companies registered under Section 12 of the Securities and Exchange Act.[23]

Practical Tips

Against the backdrop of a reinvigorated OSHA, businesses should take steps now to limit the potential downside of a complaint or investigation. These include:

Workplace Violence

Every employer should assess its workplace for the potential of a violent incident that may endanger the health and safety of its workers, and take action now to minimize or eliminate those risks wherever possible. Those employers operating in identified high-risk industries, and those who have had prior problems with workplace violence, should be especially diligent, and may wish to retain a safety consultant to help determine what "feasible" means exist to better manage their risk. All employers should also keep abreast of developments in their industries with respect to the prevalence of workplace violence, and with respect to accepted means of prevention.

Distracted Driving

Businesses that employ workers who drive for at least part of their workday should implement, publicize and strictly enforce a policy against texting while driving. Although OSHA has not yet addressed cell phone use while driving, it is not unreasonable to assume that it eventually will turn to this topic as well. Proactive employers should address that issue now as part of a general distracted driving initiative.

Whistleblowing

Because OSHA can—and thus is expected to—be more aggressive in enforcing whistleblower rights under the procedural changes effected by the new manual and the SOX interim rule, employers who already have internal whistleblowing complaint procedures should insure that they are well known to the workforce, and effective. Employers who do not yet have such internal policies should consider imple-

See ***OSHA*** *on page 14*

WHAT'S NEW ABOUT THE NEW JERSEY WAGE AND HOUR REGULATIONS?

by Anne Ciesla Bancroft and student co-author Nobumasa Hiroi

On Sept. 6, 2011, the New Jersey Department of Labor and Workforce Development (NJDOL) promulgated new regulations,[1] which brought New Jersey's standard for overtime exemptions for *bona fide* executive, administrative, professional and outside sales employees in line with the federal tests.[2] Prior to the passage of these new regulations, New Jersey's standard for overtime exemption was more protective of employees than the federal standard. With these new regulations, which adopted by reference the federal standard codified in 29 C.F.R. Part 541, NJDOL raised the minimum threshold for exemption and abandoned the quantitative element of the duties test that has long been seen both within and outside of New Jersey as a confusing and outdated method of assessing the primary duties of employees.

Although the new regulations still contain some discrepancies between the federal and New Jersey standards, overall they should make both compliance to and enforcement of the overtime exemption easier for employers.

Discrepancies Between the Federal and New Jersey's Former Overtime Exemption Standards

Under New Jersey's minimum wage law, employers in New Jersey are required to pay overtime wages to employees who work more than 40 hours per week unless the employer establishes the right to an exemption from the "overtime" obligation.[3] Prior to adopting the federal regulations at 29 C.F.R. Part 541 (defining the exemptions for *bona fide* executive, administrative, professional and outside sales employees) under the federal Fair Labor Standards Act (FLSA),[4] New Jersey's exemptions and the FLSA exemptions differed in several significant ways. First, New Jersey had a minimum salary requirement of $400. In addition, New Jersey required an employee to perform exempt work 80 percent of the time. New Jersey also had a stricter duties test for the administrative exemption, requiring not only that the employee exercise discretion and independent judgment, but also that the employee: 1) regularly assist the owner or an administrative or executive employee; 2) perform specialized or technical work under generalized supervision; or 3) execute special assignments under general supervision. New Jersey also imposed stricter requirements on the type of work to be performed to satisfy either the learned or professional exemption.

Accordingly, New Jersey employers were faced with a two-tiered approach to determining exemptions, with the stricter of the two regulations applying.[5]

New Jersey's Adoption of the Federal Tests

The Secretary of the Department of Labor (DOL) originally published Part 541 in 1949 as the regulatory interpretation of the FLSA. In 2004, DOL introduced amendments to Part 541 in order to reinforce the overtime protections of American employees that were significantly eroded by the changes in the economy and lifestyles of Americans over 50 years.[6] The amendments revised the federal overtime rules substantially. For example, the amendments raised the threshold salary requirement from $155 per week to $455 per week,[7] eliminated the special rules for exemption applicable to "sole charge" executives, and added the language that clarifies that the FLSA provides minimum standards that may be exceeded but cannot be waived or reduced.[8]

Besides the changes listed above, the amendments to Part 541 also simplified the primary duties test, which was used to assess the nature of the employee's job, by adopting a single standard. Prior to the amendments, Part 541 provided two different tests depending on the employee's salary. For those employees whose earnings were between $155 and $250 per week, the so-called "long" test applied. Under this test, strict percentage limitations were imposed on nonexempt work.[9] Such limitations required employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine the applicability of the exemption to the employee. On the other hand, under the "short" test, which applied to those employees whose earnings were more than $250 per week, there was no quantitative requirement; instead, the test only required that the employee's primary duty was management and he or she regularly directed the work of at least two other employees.[10]

The new regulations that NJDOL recently promulgated made New Jersey's standard for overtime exemptions almost identical to the federal standard by adopting by reference the entirety (except those provisions applying solely to employees of the government and other governmental agencies) of the amended Part 541.[11]

While the new regulations are expected to lessen the confusion between employers and employees by creating consistency between the federal and New Jersey standards, the overall changes that the new regulations would bring to the employers' table may not be so drastic.

First, the New Jersey regulations had a minimum salary threshold of $400—much higher than the old federal standard of $155 until the amendments to Part 541 were introduced in 2004. In other words, the amendments to Part 541 of 2004, in a sense, reduced the dis-

crepancies between the federal and New Jersey overtime regulations. Although the $55 difference could exempt more employees in New Jersey, relatively speaking the change would be milder compared to other states where the threshold used to be $155.

Second, although NJDOL legislatively abandoned its quantitative element of the management duties test by adopting Part 541 and repealing its old regulations, the Appellate Division already had modified the strict and unwieldy quantitative approach in *Marx v. Friendly Ice Cream Corporation*[12] by instead accepting the employer's expectation in assessing the primary duty of managerial employees.

Two other employer-friendly changes are noteworthy. New Jersey has now adopted the FLSA "highly compensated employee" exemption, which exempts an employee with total annual compensation of at least $100,000 if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.[13] Second, New Jersey now provides its employers with a safe harbor if they inadvertently make an impermissible deduction from the salary of an exempt employee, thus otherwise defeating the exemption. Specifically, if an employer has a clearly communicated policy that prohibits the improper pay deductions and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.[14]

Quantitative Test After *Marx*

While the new New Jersey regulations officially eliminated the prior quantitative test for analyzing the performance of exempt and non-exempt work, the court in *Marx*[15] already looked to the FLSA primary duty executive exemption test, and cases interpreting it, in applying New Jersey's former executive exemption. In *Marx,* a New Jersey court applied N.J.A.C. 12:56-7.1 (prior to the amendments of Sept. 6, 2011) for the first time.[16] Five general managers of restaurants owned by Friendly Ice Cream Corporation (FICC) sued FICC seeking overtime payments. The trial court concluded that they were employed in an "executive capacity" within the meaning of N.J.A.C. 12:56-7.1, and thus ineligible for overtime.[17]

Upon appeal, the Appellate Division held that an employer may comply with the former New Jersey overtime regulation by demonstrating the following:

> [P]roper performance of expected managerial duties reasonably requires devotion of more than 60 percent of the employee's workweek; and the staffing levels in the unit are based on criteria adequate to meet the demands without assistance of the exempt managerial employees that takes more than 40 percent of their time.[18]

In so doing, the Appellate Division relied upon judicial decisions applying the FLSA regulations, which, the court noted, were in many instances identical to the N.J.A.C. 12:56-7.1.[19]

The only differences between the federal and New Jersey standards, according to the court's observation, were the minimum threshold for the salary test and the quantitative element of the management duties test required under the New Jersey standard.[20] In reviewing the quantitative element of the management duties test, the court noted the fact that the amended federal regulations, 29 C.F.R. §541.1 (as amended effective Aug. 23, 2004), no longer required a time-percentage analysis of non-exempt activities for employees.[21] The court also looked at a Supreme Court of California's opinion regarding the problems inherent in a "quantitative" review of exempt and non-exempt work.[22]

The court then concluded that requiring employers to establish proof in the form of a moment-to-moment analysis of an employee's workweek only to meet the quantitative requirement is overly burdensome, and thus should not be the intention of the commissioner.[23] Instead, the court followed the California court's analysis that incorporated both the realistic basis for the employer's job description and the employee's fulfillment of the employer's reasonable expectations.[24] The court then held that FICC's expectation for its general managers to devote less than 40 percent of their workweek to non-exempt work was reasonable.[25]

Although in the holding the court referred to specific percentages, in effect, the court diminished the quantitative test by incorporating the employer's expectations of what job duties the managerial employee was to perform. That is to say, under *Marx*, New Jersey employers no longer needed to worry about the actual time employees spend on non-exempt work in order to meet the exemption requirement provided the employers' expectation of how much time the employees were to spend on such work was reasonable. This conclusion was confirmed two years later in *Golden v. Merrill Lynch & Co., Inc*.[26] Facing an overtime claim under N.J.A.C. 12:56-7.1, the Southern District Court of New York applied *Marx* and stated that compliance with New Jersey's quantitative requirement can be met "where the realistic requirements of the job demand that no more than 20% of the employee's time be spent on non-exempt duties, even if the employee actually performed such duties a greater percentage of the time."[27]

New Jersey's Inside Sales Exemption

There is an unintended discrepancy between the federal and New Jersey standards caused by the adoption of Part 541. By adopting Part 541 and repealing the prior regulations for overtime exemptions, NJDOL also eliminated the "inside sales" exemption that exempted from overtime any employee whose primary duty consists of sales activity, and who receives a regular weekly rate of pay of at least $400 and at least half of his or her compensation from commissions. To rectify this error, NJDOL published on Nov. 21, 2011, a proposed amendment to N.J.A.C. 12:56-7.2 to restore the "inside sales" exemption.[28] NJDOL conducted a public hearing on Dec. 13, 2011. The final regulations are currently pending.

Conclusion

The changes to the New Jersey exemptions favor employers by eliminating a two-tiered approach; accepting the "primary duty" test already essentially

recognized by the court in *Marx*; adding an exemption for "highly compensated" employees; and, creating a safe harbor for inadvertent impermissible deductions from the pay of salaried employees. While the amendment inadvertently eliminated the inside sales employee exemption, that exemption should be restored. While these changes in general benefit employers, they still need to audit their workforce and ensure that employees are classified properly to avoid claims for unpaid overtime to employees who are improperly treated as exempt. ■

Endnotes

1. N.J.A.C. 12:56-7.1-2.
2. 43 N.J.R. §725(a).
3. N.J.S.A. 34:11-56a to 56a30.
4. 29 U.S.C.A. §§ 201-219.
5. 29 U.S.C.A. § 218(a).
6. 69 Fed. Reg. 22260 (April 23, 2004).
7. 29 C.F.R. §541.600 (as amended April 23, 2004).
8. 29 C.F.R. §541.4 (as amended April 23, 2004).
9. 29 C.F.R. §541.112 (prior to the amendments of April 23, 2004).
10. *See Donovan II,* 675 F.2d 516, 518-21 (2d Cir. 1982); *Donovan v. Burger King Corp.*, 672 F.2d 221, 223-24 (1st Cir. 1982).
11. N.J.A.C. 12:56-7.2.
12. 380 N.J. Super. 302 (App. Div. 2005).
13. 29 C.F.R. 541.601(a).
14. 29 C.F.R. 541.609(d).
15. 380 N.J. Super. 302 (App. Div. 2005).
16. 380 N.J. Super. at 310.
17. *Id.* at 304.
18. *Id.* at 324.
19. *See Id*.
20. *See Id.*
21. *Id.* at 320.
22. *Id.* at 321.
23. *Id.* at 321.
24. *Id.* at 322.
25. *Id.* at 323.
26. 2007 WL 4299443, 15 (S.D.N.Y. Dec 6, 2007).
27. *Id.*
28. 43 N.J.R. 3075(a).

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OSHA

Continued from page 11

menting them. Far better for an employer to field—and hopefully resolve—an internal complaint, than to have that employee turn to OSHA for redress. ■

Endnotes

1. Site-Specific Inspection Program Expands, Includes Employers With 20 or More Workers, *BNA Daily Labor Report*, Sept. 14, 2011, Tough Political Climate Has Slowed Activity at OSHA, but Not Stopped It, Michael Says, *BNA Daily Labor Report*, Nov. 1, 2011.
2. 29 U.S.C. § 651, *et seq*.
3. OSHA Instruction CPL 02-01-052: Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents, Sept. 8, 2011.
4. OSHA, Publication 3148: Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers, 2004.
5. OSHA, Publication 3153: Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments, 2009.
6. Injury Prevention Research Center. 2001. *Workplace Violence: A Report to the Nation*. The University of Iowa.
7. 29 U.S.C. § 653.
8. "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).
9. *Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents*, at 3.
10. *Id.*
11. Directive's Appendix B – Potential Abatement Methods.
12. An employer may be subject to civil and criminal penalties for an OSHA general duty clause violation, depending on the degree of the violation. 29 U.S.C. § 666.
13. NHTSA, (2008, September). Traffic Safety Facts: Distracted Driving 2009. DOT HS 811 379. Washington, DC: National Highway Traffic Safety Administration, *available at* www.distraction.gov/download/research-pdf/Distracted-Driving-2009.pdf .
14. OSHA's Distracted Driving Initiative, *available at* www.osha.gov /distracted-driving/initiative.html.
15. Exec. Order: 13513, 74 FR 51225 (Oct. 1, 2009), 76 FR 75470 (Dec. 2, 2011).
16. *Id*.
17. OSHA's Distracted Driving Initiative, *available at* www.osha.gov/ distracted-driving/initiative.html.
18. OSHA Instruction CPL 02-03-003: Whistleblower Investigation Manual, Sept. 20, 2011.
19. *Id*.
20. *Id*.
21. 29 C.F.R. Part 1980.
22. *See* 18 U.S.C. 1514A.
23. 29 C.F.R. Part 1980.

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STATE OF NEW JERSEY QUICKLY SETTLES DISPARATE IMPACT LAWSUIT REGARDING POLICE SERGEANT'S PROMOTION EXAM

by Iván A. Méndez Jr.

On Sept. 15, 2011, U.S. Magistrate Judge Michael Shipp signed a consent decree settling *United States v. State of New Jersey*.[1] In that case, the United States Justice Department's Civil Rights Division (DOJ) charged that since 2000 the New Jersey Civil Service Commission (NJCSC) maintained selection procedures for promotion to the rank of police sergeant that had a disparate impact on Hispanic and African-American candidates.[2] This article examines the unusually speedy resolution of that case when compared to a similar case filed against the city of New York in 2007, challenging the New York City Fire Department's hiring practices.

In *United States v. State of New Jersey*, the Justice Department claimed that the written exam administered by the NJCSC for the police sergeant position is neither job-related nor consistent with business necessity.[3] According to the complaint filed by the Justice Department, between 2000 and 2008 approximately 89 percent of the white candidates who took the written exam passed it, while only 73 and 77 percent of African-American and Hispanic applicants, respectively, passed the exam.[4] The complaint further charged that among candidates who passed the written exam, African-Americans and Hispanics were underrepresented in higher score ranges and overrepresented in lower score ranges for each year between 2000 and 2008.[5] The specific scores are significant because the NJCSC keeps eligibility lists on which it ranks candidates for promotion to police sergeant based, in part, on a candidate's written score. The NJCSC certifies candidates in descending rank order from such eligibility lists.[6]

The complaint further charged that in jurisdictions where the NJCSC established eligibility lists that contained white candidates and African-American or Hispanic candidates, the latter were less likely to be ranked sufficiently high to be placed on a certification list, and therefore considered for promotion, than were white candidates.[7] According to the complaint, between 2000 and 2008 35 percent of white candidates on the eligible lists in those jurisdictions were certified for promotion, while only 20 percent of African-Americans and 22 percent of Hispanics were similarly certified.[8]

Rather than engage in lengthy and burdensome discovery and motion practice, on May 19, 2011, just over one year after the state answered the complaint, and six full months before the discovery deadline, the parties advised the court that they had reached a settlement in principle.[9] On Nov. 2 and 22, 2011, respectively, District Court Judge Katharine S. Hayden approved a first and second amended consent decree.[10]

The second amended consent decree provides, among other things, that:

> The State will no longer use the police sergeant's written exam as currently constituted;
>
> The State will cease using current eligibility lists as part of its selection procedure for police sergeants in certain jurisdictions within the state where continued use of the lists will create an additional shortfall of African-Americans and Hispanics who would have been promoted but for the State's use of the challenged exam;
>
> The State will designate a person who will be responsible for enforcing the Consent Decree;
>
> The State will pay $1,000,000 into a settlement fund for the purpose of awarding backpay to eligible African-American and Hispanic claimants;
>
> The State will certify 68 claimants eligible for priority promotion with retroactive seniority;
>
> In consultation with DOJ, the State will develop and administer a new selection procedure to select qualified candidates for promotion to the position of police sergeant; and
>
> The Consent Decree will be in place no longer than three years.[11]

The relief afforded in the consent decree is significant and far reaching. It is particularly significant that the state consented to such far-reaching relief, and to the sort of intense oversight and scrutiny of its promotion practices for which the consent decree provides, without any motion practice and without any litigation concerning the issue of liability.

A review of the docket in this case also reveals no documented discovery disputes, no adjournments of the discovery deadline, and only a handful of brief adjournment requests. Moreover, it appears from reviewing the docket, as well as from a review of the correspondence exchanged by the parties and filed with the court, that the parties were able to work cooperatively throughout this litigation in order to achieve a mutually agreeable result.

The procedural history and conduct of this case stands in stark contrast to a similar lawsuit commenced in the Eastern District of New York by the Department of Justice against the city of New York and the city's fire department. The Justice Department commenced that action, *United States of America v. City of New York*,[12] on May 21, 2007, by filing a complaint alleging that the city of New York's pass/fail and rank order uses of written examinations to hire entry-level firefighters had an unlawful disparate impact on black and Hispanic applicants.[13] The parties are still fiercely litigating that case, and the court has issued two adverse rulings on liability against the city.[14] The case has already cost the

city a significant amount of money to defend, has resulted in a slew of bad press for the city and its leaders, and has spawned several harsh and tersely worded opinions from the presiding judge, the Honorable Nicholas Garaufis.

In his most recent significant decision in the case, a draft remedial order dated Oct. 5, 2011, Judge Garaufis excoriated the city for its litigation approach, and for what he viewed as the city's inability or unwillingness to work with the Justice Department to address the court's findings concerning liability:

> Today-four years of litigation and two adverse liability rulings later-the City still doesn't get it. In testimony and depositions in this case, the City's senior leaders have routinely denied that they are responsible for doing anything to remedy nearly forty years of discrimination. Throughout this litigation City officials have routinely disclaimed accountability for the City's failures, shifting blame to offices, bureaus, divisions, and departments that lie outside the scope of their narrow parochial concerns.
>
> This litigation could have turned out much differently. Had the City's leadership shown the least bit of concern for the effect of the court's liability rulings, had the City demonstrated by word and deed an intention to use this litigation as an opportunity to reconsider and reevaluate hiring practices and procedures that have illegally excluded black and Hispanic firefighter candidates for nearly forty years, this would be a much different order. Instead, the court's assessment of the evidence, including the testimony of senior City officials, reveals a pervasive disregard-an absolute rejection—of the court's conclusions. Lacking from the City's response to this litigation is an attitude of voluntary compliance and any indication that its leaders have the will to carry out a program of reform to prevent future violations of the equal employment opportunity laws at the New York City Fire Department.[15]

This case, which has not even yet reached the appeals process, will likely be litigated for several more years, and will likely end up costing the taxpayers of the city of New York millions of dollars. Judge Garaufis has appointed a court monitor to oversee the city's development of a new exam, and to oversee the city's recruitment and hiring efforts. Notably, the court has stated that it will retain jurisdiction over this matter for 10 years.[16]

It is unclear why the state of New Jersey chose such a drastically different litigation approach. It would be fair to surmise that New Jersey, like other states and municipalities, has been tracking the progress of *United States v. City of New York*, given that this case has been one of the highest profile disparate impact cases in recent memory. It is also possible that the state was motivated by the district court's decision in *NAACP v. North Hudson Regional Fire & Rescue*,[17] which the June 2011 edition of this publication addressed.[18]

In the *North Hudson* case, the court granted the plaintiffs' summary judgment motion, finding that the defendants' residency requirements had a disparate impact on African-American applicants to firefighter positions. In granting summary judgment to the plaintiffs, the court, among other things, permanently enjoined the defendants from using its current list of firefighter candidates, and froze the defendants' hiring until they obtained a candidate list that included candidates from three counties that had previously been excluded.[19] The Third Circuit affirmed the district court's decision in its entirety on Dec. 12, 2011.[20]

What is clear is that the approach taken by New Jersey likely saved the state a substantial amount of money in litigation expenses and other associated costs, and greatly reduced the amount of negative press the state would have otherwise received. While the city of New York, North Hudson, and state of New Jersey cases are not one and the same, the contrasts of the defendants' approaches to litigating these cases are significant.

Employers faced with disparate impact litigation, particularly municipal employers, should be mindful of the high cost of defending disparate impact litigation. The cost of defending such cases generally includes the hiring of expert statisticians, the potential cost of backpay for large numbers of employees, the cost of consultants to develop new tests or other selection criteria, and significant attorney's fees. The lesson of these cases is that employers faced with potential disparate impact litigation should determine at an early stage of a case whether to work toward a negotiated resolution prior to incurring significant costs. ■

Endnotes

1. *See* Order/Consent Decree, *United States v. State of New Jersey*, 10 Civ. 00091 (No. 45).
2. *See generally* Complaint, *United States v. State of New Jersey*, 10 Civ. 00091 (No. 1).
3. *See Id*. at ¶ 26.
4. *See Id*. at ¶¶ 14, 16.
5. *See Id*. at ¶¶ 19, 21.
6. *See Id*. at ¶ 18.
7. *See Id*. at ¶ 23.
8. *See Id.*
9. *See* Text Order, *United States v. State of New Jersey*, 10 Civ. 00091 (No. 35).
10. First Amended Consent Decree and Second Amended Consent Decree, *United States v. State of New Jersey*, 10 Civ. 00091 (No. 48 and 49, respectively).
11. *See* Second Amended Consent Decree, *United States v. State of New Jersey*, 10 Civ. 00091 (No. 49).
12. 07 Civ. 2067 (E.D.N.Y.).
13. *See United States v. City of New York*, No. 07 Civ. 2067, 2011 U.S. Dist. LEXIS 115074, at *4 (E.D.N.Y. Oct. 5, 2011)
14. *Id*. at *23.
15. *Id*. at **23-24, 31-32.
16. *Id*. at **48-51.
17. *NAACP v. North Hudson Regional Fire & Rescue*, 742 F. Supp. 2d 201 (2010), *aff'd* 2011 U.S. App. LEXIS 24562 (3d Cir. Dec. 12, 2011).
18. *See* Raquel S. Lord and Kerri A. Wright, *NAACP v. North Hudson Regional Fire and Rescue*—The Business Case for Residency Requirements—Do They Live Up to the Court's Expectations?, *NJ Labor and Employment Quarterly*, Vol. 32, No. 4 (June 2010).
19. *NAACP, supra*.
20. *NAACP v. North Hudson Regional Fire & Rescue*, 2011 U.S. App. LEXIS 24562 (3d Cir. Dec. 12, 2011).

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THIRD CIRCUIT OUTLINES APPLICABLE STANDARD FOR RESIDENCY REQUIREMENT, DISPARATE IMPACT CASE

by R. Shane Kagan

Attorney Gregory Meditz, moving as a *pro se* plaintiff, recently received the ruling he was seeking from the Third Circuit Court of Appeals. Meditz, who is a white male, brought a claim involving reverse discrimination against the city of Newark. He sued Newark because he believed that its residency requirement had a disparate impact against him as a white, non-Hispanic, in seeking employment with the city, because Newark's population did not mirror the racial composition of the relevant labor market in the surrounding area.[1] In other words, according to Meditz, whites were under-represented in Newark's non-uniformed work force because of its residency policy.[2]

In *Meditz v. City of Newark*, the issue was whether Newark's residency requirement for its non-uniformed work force had a disparate impact on white, non-Hispanics and, thus, gave rise to a Title VII disparate impact claim.[3] While the United States District Court for the District of New Jersey initially granted summary judgment in favor of Newark with respect to all of Meditz's claims, the appeals court held that the grant of summary judgment was not appropriate with regard to his disparate impact claim.[4]

Meditz, who lived in Rutherford, applied for the non-uniformed position of housing development analyst in Newark. Unfortunately for Meditz, Newark had a residency requirement for the city's non-uniformed employees.[5] The city rejected his application because he did not live there.[6]

Under Title VII of the Civil Rights Act of 1964, in order for Meditz to be successful on his disparate impact claim, he had to demonstrate initially that Newark used a particular employment practice that caused a disparate impact on the basis of race.[7] The disparity must be significant[8]—a proper statistical analysis must be based upon a comparison "between the racial composition of [the at-issue jobs] and the racial composition of the qualified...population in the relevant labor market" seeking those jobs.[9]

Newark could then overcome that showing by proving that a "business necessity" existed. The business necessity defense involves a "manifest relationship between the policy and job performance."[10] However, Meditz could still overcome the city's proffered business necessity defense by demonstrating that an alternative policy existed that would aid Newark's employment goals and the policy at issue with less of a discriminatory effect.[11]

In the district court, Newark brought a motion for summary judgment in an attempt to dismiss Meditz's claims. Meditz argued that the residency requirement for non-uniformed employees was negatively impacting the hiring of white, non-Hispanics. In support of this argument, he proffered statistical information comparing the ethnic distribution of non-uniformed employees to the ethnic makeup of Newark.[12] The city argued that the statistics were not sufficient to demonstrate that the residency requirement caused whites to be excluded from jobs with it as a result of their race.[13]

However, Meditz also argued that Newark was not the relevant labor market at issue, but that the relevant labor market, in fact, included the six-county region surrounding the city.[14] He then provided statistics demonstrating the ethnic breakdown of the general populations in those counties, each of which included a higher percentage of whites than the percentage hired as non-uniformed employees in Newark.[15] He further demonstrated that the percentage of whites in government positions and in the private labor force within each of those surrounding counties greatly exceeded the number of whites in Newark's non-uniformed work force.[16] Finally, Meditz revealed that the Essex County government, which is located in Newark, employed a higher percentage of whites than the city of Newark employed.[17] These statistics enabled Meditz to posit that the residency requirement caused Newark to employ a lower percentage of white, non-uniformed employees.[18]

Nevertheless, the district court granted Newark's motion for summary judgment. It concluded that because the city was large and diverse, the relevant labor market was Newark itself, and Meditz's statistics were insufficient to maintain a reverse-discrimination, disparate impact claim.[19] It held that the difference between the percentage of whites employed by Newark (9.24 percent) and the percentage of whites living within Newark (14.2 percent) did "not constitute sufficient evidence of a significantly discriminatory hiring pattern."[20]

The Third Circuit Court of Appeals disagreed with and rejected the district court's analysis. The appeals court found that Meditz's statistical evidence was appropriate and supported his disparate impact claim.[21] In fact, the difference between the percentage of whites hired by Newark and the percentage of whites within the Newark labor market was slightly over six standard deviations. The court noted that only a difference of two or three standard deviations is necessary to demonstrate a *prima facie* disparate impact case.[22] Thus, the court held that Meditz had established a *prima facie* disparate impact claim.[23]

In addition, the Third Circuit did not accept the district court's finding that the city's boundaries were necessarily the relevant labor market, and criticized the lower court for failing to address the essential factors in determining the relevant labor market. The Third Circuit held that in determining the relevant labor market, a court must consider geographical location, the flow of transportation facilities, locations from which private employers draw their work force, and commuting patterns.[24]

The Third Circuit also noted that "[s]ince the enactment of the Civil Rights Act of 1991," it had not had "the occasion to consider the business necessity defense in a case involving a challenge to an employment related residency requirement."[25] The appeals court recognized that it had previously considered "the evolution" of the "business necessity" defense, and disagreed with the district court that Newark had met the requirements necessary to establish it.[26] According to the appeals court, the lower court failed to apply the proper test, and should have considered whether Newark's hiring criteria "effectively measure[d] the minimum qualifications for successful performance of the job in question."[27]

As a result, the Third Circuit remanded the matter so the district court could properly determine the relevant labor market, and so it could conduct a complete statistical analysis between Newark's employed, non-uniformed labor force and the same labor force in the relevant labor market.[28]

For labor and employment law attorneys representing plaintiffs or defendants, this case is significant in several aspects. Initially, the Third Circuit Court of Appeals implicitly acknowledged the vitality of reverse-discrimination claims in the context of a Title VII disparate impact analysis. This holding comes down in the wake of *Ricci v. DeStefano*, where the United States Supreme Court found that the defendant engaged in disparate treatment in violation of Title VII, and held that before an employer could intentionally deny white firefighters promotions "for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability" if it does not take the discriminatory action.[29]

More practically, this case clarified and defined the applicable standards for disparate impact claims within the context of residency requirements. The Third Circuit underscored the importance of determining the relevant labor market utilizing the appropriate factors. It likewise reaffirmed the necessity for a motion judge to conduct a proper statistical analysis to decide whether a "significant" disparity exists, and acknowledged that a difference of two or three standard deviations may indeed be "significant." The Third Circuit also analyzed the types of statistical evidence proffered by Meditz and, therefore, provided direction to attorneys with regard to the relevant evidence necessary to substantiate or undermine future disparate impact claims in similar contexts.

Finally, in a case of first impression, the appeals court clearly articulated the standard an employer must meet in order to maintain a business necessity defense vis-à-vis a city's residency requirement. In admonishing the district court for its "bald conclusion" that summary judgment was appropriate on Meditz's disparate impact claim, the Third Circuit seemingly made it more difficult for an employer to make a successful application to dismiss a Title VII disparate impact claim as a matter of law.

While an employer may have an opportunity to dismiss such a claim by demonstrating a business necessity exists for its employment practice, the appeals court noted that the lower court "focused only on whether the business justifications offered by Newark had any connection to the residency policy even if unrelated to Meditz's ability to perform the job in question."[30] The Third Circuit suggested that for an employer to dismiss successfully a disparate impact claim on summary judgment under a business necessity defense, it needed to engage in a more sophisticated analysis addressing actual business necessity and not merely "business convenience."[31] Thus, a motion judge must also consider whether an employer's hiring policy "effectively measure[s] the minimum qualifications" necessary for performing the job.[32]

The Third Circuit recently reiterated this standard in *National Association for the Advancement of Colored People v. North Hudson Regional Fire & Rescue* in stating "we have interpreted the business-necessity defense to apply only when an employer can show that its challenged hiring criteria define minimum qualifications for the position."[33]

In this case, employer-Newark could not deny that the county of Essex, which is an employer similar to the city of Newark, had an office in Newark but did not need to require its employees to reside within the city.[34] Further, the available statistics did not aid the city of Newark's motion for summary judgment. A comparison of the percentage of white, government employees in Essex County, the county encompassing Newark, with the percentage of white, government workers employed by Newark, resulted in a difference of over 34 standard deviations.[35] In other words, the evidence here may well suggest that the city itself is not the relevant labor market, and that the percentage of white, non-uniformed employees employed by the city are under-represented with respect to the actual relevant labor market.

When a plaintiff has demonstrated such a *prima facie*, residency requirement disparate impact claim, it is not enough for the employer to prove that certain business justifications had a connection to the residency requirement. It must show that the residency requirement, in fact, defines the minimum qualifications for the job at issue. Even if an employer does successfully proffer a business necessity defense, the employer's policy must then still withstand the plaintiff's rebuttal argument that an alternative policy is possible that would have less of a discriminatory effect. Thus, an employer who utilizes or maintains a residency requirement must make certain it is necessary and not simply convenient. ■

Endnotes

1. *Meditz v. City of Newark*, 2011 WL 4470677, at *1 (3d Cir. Sept. 28, 2011).
2. *Id*.

See ***Residency Requirement*** *on page 21*

NEW JERSEY'S BAN ON JOB ADVERTISEMENTS THAT DISCRIMINATE AGAINST THE UNEMPLOYED

ALL BARK AND NO BITE?

by Richard G. Rosenblatt and Lia N. Brooks

In Nov. 2011, the New Jersey Department of Labor issued a $1,000 fine against Crestek, Inc., a New Jersey-based manufacturer of ultrasonic cleaning equipment, for publishing an advertisement for a sales manager job that stated that candidates for the job "must be currently employed."[1] Crestek is the first—and, to the authors' knowledge, the only—New Jersey employer to receive a fine for violating New Jersey's recently enacted law prohibiting job postings that state that unemployed candidates will not be considered.[2] Governor Chris Christie signed the act into law on March 29, 2011, and it became effective on June 1, 2011.[3]

By this enactment, New Jersey became the first state to prohibit discrimination against the unemployed in the form of exclusionary advertising.[4]

The Law

The act, codified at N.J.S.A. 34:8B-1 – 34:8B-2, states that no employer

> [S]hall knowingly or purposefully publish, in print or on the Internet, an advertisement for any job vacancy in this State that contains one or more of the following:
>
> a. Any provision stating that the qualifications for a job include current employment;
> b. Any provision stating that the employer or employer's agent, representative, or designee will not consider or review an application for employment submitted by any job applicant currently unemployed; or
> c. Any provision stating that the employer or employer's agent, representative, or designee will only consider or review applications for employment submitted by job applicants who are currently employed.[5]

The act expressly states that it does not create a private right of action; individuals cannot sue employers who post ads that contain the prohibited language.[6] Governor Christie conditionally vetoed the original version of the bill, which did not specifically state that no private right of action existed under the law.[7] Under the New Jersey Constitution, the governor has the ability to veto parts of a bill and condition subsequent approval of the bill on the Legislature's adoption of specific amendments that would make the bill acceptable to the governor.[8] The specific language prohibiting a private right of action was added to the act by Governor Christie after his conditional veto to clarify that the intent of the sponsors of the law was to create administrative penalties only.[9] The Legislature then re-passed the bill with all of the governor's recommended amendments.[10]

The penalty for violating the act is up to $1,000 for the first offense, up to $5,000 for the second offense, and up to $10,000 for each subsequent offense thereafter.[11] The act does not define what constitutes an offense. For instance, it is unclear whether an advertisement that runs in both a print newspaper and the online version of the same newspaper constitutes one offense or two. Nor is it clear whether the same advertisement that runs for multiple days in a newspaper or that is placed on multiple job boards on the internet constitutes more than one offense.

If Crestek ran its advertisement on either multiple days or in multiple media, the fact that it was only fined $1,000 for one offense may indicate that the New Jersey Department of Labor (DOL) interprets the term "offense" to mean the *placement* of a particular advertisement, not the resulting appearance(s) of the ad in a newspaper or on the Internet, as the case may be. Such an interpretation would be consistent with the practice of the New Jersey Legislature, in other contexts, to state expressly when a single course of conduct constitutes more than one violation.

For instance, under the Consumer Fraud Act, it is a violation for a retailer to sell or attempt to sell merchandise unless the selling price of the merchandise is plainly marked with a tag or a sign.[12] However, the Consumer Fraud Act also expressly states that each day merchandise is not marked or tagged with the proper selling price constitutes a separate violation of that statute.[13] The absence of a similar provision in the act suggests the Legislature did not intend for employers to be liable for multiple violations of the act for the placement of a single advertisement that runs for a period of time, or in multiple publications or media.

The DOL has discretion to determine the fine for each offense under the act, subject to the statutory maximums allowed by the act.[14] The DOL's administrative rules regarding the act set forth five factors the DOL will take into account when assessing a penalty against an employer who violates the act: 1) the seriousness of the violation; 2) the past history of previous violations by the employer; 3) the good faith of the employer; 4) the size of the employer; and 5) any other factors which are deemed to be appropriate under the circumstances.[15] Employers fined under the law may appeal the fine to the commissioner of labor and workforce development.[16] The commissioner may, at his or her discretion, decide the appeal on the written record, or conduct a hearing

before an administrative law judge pursuant to the New Jersey Administrative Procedures Act.[17] Under either scenario, an employer may appeal the commissioner's decision to the Appellate Division of the superior court.[18]

The act does not prohibit employers from listing job qualifications, such as professional or occupational licenses or other credentials, or a minimum level of education, training or professional, occupational or field experience. The law also contains an exception for job advertisements that require that applicants be current employees of the employer who is posting the job.[19] This provision was added by Governor Christie to harmonize the act with New Jersey's existing civil service law, which dictates that the state fill certain civil service job vacancies based on the results of promotional exams taken by current state employees. Without this exception, the act may have conflicted with the mandates of the civil service law because it would have prohibited the state from posting advertisements for those job vacancies that could, by law, only be filled by current civil service workers.[20]

The *Mens Rea* Requirement

The penalties contemplated by the act are not automatic. In addition to the discretion given to the DOL to set fines below the statutory limits, the act contains a *mens rea* requirement of intent (*i.e.* the DOL may fine an employer only if it "*knowingly or purposefully*" publishes the offending posting). The words "knowingly" and "purposefully" were not in the original bill as it was introduced in the Assembly.[21] Governor Christie added the words in his conditional veto because of his concern the bill, as originally presented, would "subject the State's already beleaguered business community to significant fines, penalties and unwarranted litigation without requiring a finding of knowing and purposeful conduct on the part of the employer."[22]

Can an employer defend its discriminatory job advertisements on the basis of publishing them "unknowingly?" Crestek apparently argued that it would appeal because it was not aware that the law existed.[23] But being ignorant of the law, in addition to being no excuse, is different than being ignorant of the very fact that the advertisement was posted in the first place.

The law does not set forth what knowing and purposeful conduct means in the context of publishing job advertisements. In general, the use of the adverbs "knowingly" or "purposefully" requires that the actor in question have a culpable mental state in order for the particular statute to be applicable (*i.e.*, his or her conduct is intentional, not negligent or reckless).[24] It is hard to imagine a situation where an employer could negligently or recklessly post a job advertisement. Perhaps the added knowing and purposeful language contemplates a scenario where a 'rogue' employee posts a job listing in violation of the act without the employer's knowledge or consent. But even that interpretation of the statute is questionable, given the longstanding common law rule that the acts of an employee can be imputed to the employer if the employee is acting within the scope of his or her employment, even if the specific acts in question were not authorized or known by the employer.[25]

Discrimination Against Unemployed Not Prohibited By the Act

Despite the prohibition on exclusionary advertisements, some employers still may believe that hiring from the ranks of the currently employed is preferable than hiring a currently unemployed person. In fact, the owner of Crestek was quoted as stating that Crestek's advertisement contained an exclusion for unemployed persons because he wanted to hire someone at "'the top of their game.'"[26] Nothing in the act, however, prohibits an employer from making hiring decisions based on the employment status of the applicant—even if the employer may not advertise such an exclusion. Thus, while the act clearly prohibits employers from *stating* they discriminate against the unemployed, the law does not actually prohibit taking into account the fact that an individual is unemployed in making a hiring decision. An employer who posts a job advertisement in compliance with the law, but then rejects an applicant based on unemployed status does not violate the act.

Nonetheless, although unemployed persons may not fall within a protected class under the LAD, Title VII, the ADEA or the ADA, a hiring practice that has a disparate impact on a protected group may violate these laws. Recent data from the United States Department of Labor indicates that 15.5 percent of African-Americans are unemployed and 11.4 percent of Hispanics are unemployed. In contrast, 7.6 percent of Caucasians are unemployed.[27] Thus, a hiring policy that automatically excludes unemployed applicants from consideration, although facially neutral, may be challenged as having a disparate impact on African-American and Hispanic applicants, who are unemployed in greater percentages than white applicants. The Equal Employment Opportunity Commission recently held a hearing to investigate whether minority groups were disproportionately affected by employers' refusal to hire the unemployed.[28] Thus, although the act does not allow a private right of action against an employer who posts advertisements discriminating against the unemployed, it is conceivable that advertisements such as these may be introduced as evidence in lawsuits alleging a disparate impact theory based on an employer's practice of not considering unemployed persons for open positions.

Whether or not the act, as it is written, has any bite might soon be a moot point. Over the summer, the Fair Employment Opportunity Act of 2011 (FEOA) was introduced in both the Senate and House of Representatives. The FEOA would prohibit consideration of an individual's status as unemployed in screening for and filling positions, except where employment status is a *bona fide* occupational qualification reasonably necessary to successful performance in the job.[29] Similar bills are pending in Michigan,[30] New York,[31] and Illinois.[32] The fates of those bills, along with the impact of the act on the actual hiring practices of employers, remain to be seen. ■

Endnotes

1. Lisa Rose, Ewing Manufacturing Company Fined for Help-Wanted Ad that Excluded Jobless, *The Star-Ledger*, Nov. 13, 2011, *available at* www.nj.com/news/index.ssf/2011/11/ewing_manufacturing_company_fi.html.
2. *Id.*
3. N.J.S.A. 34:8B-1, 34:8B-2.
4. Lisa Rose, *Ewing* Manufacturing Company Fined for Help-Wanted

Ad that Excluded Jobless, *The Star-Ledger*, Nov. 13, 2011, *available at* www.nj.com/news/index.ssf/2011/11/ewing_manufacturing_company_fi.html.
5. N.J.S.A. 34:8B-1.
6. N.J.S.A. 34:8B-2(b).
7. www.njleg.state.nj.us/2010/Bills/A3500/3359_v1.HTM.
8. N.J. Const. art. V, § 1, para. 14(f).
9. Assembly Bill No. 3359, Recommendations for Reconsideration by Governor Chris Christie, Jan. 6, 2011, *available at* www.njleg.state.nj.us/2010/Bills/A3500/3359_V1.HTM.
10. www.njleg.state.nj.us/bills/Billview.asp.
11. N.J.S.A. 34:8B-2(a).
12. N.J.S.A. 56:8-2.5.
13. N.J.S.A. 56:8-2.6.
14. N.J.S.A. 34:8B-2(a), N.J.A.C. 12:67–1.4(a).
15. N.J.A.C. 12:67–1.4.
16. N.J.A.C. 12:67–1.5(a).
17. N.J.A.C. 12:67–1.5(c).
18. Rules Governing the Courts of the State of New Jersey, 2:2-3(2) (2011).
19. N.J.S.A. 34:8B-1.
20. N.J.S.A. 11A:4-2; Assembly Bill No. 3359, Recommendations for Reconsideration by Governor Chris Christie, Jan. 6, 2011, *available at* www.njleg.state.nj.us/2010/Bills/A3500/3359_V1.HTM.
21. www.njleg.state.nj.us/2010/Bills/A3500/3359_I1.HTM.
22. N.J.S.A. 11A:4-2; Assembly Bill No. 3359, Recommendations for Reconsideration by Governor Chris Christie, Jan. 6, 2011, *available at* www.njleg.state.nj.us/2010/Bills/A3500/3359_V1.HTM.
23. Lisa Rose, Ewing Manufacturing Company Fined for Help-Wanted Ad that Excluded Jobless, *The Star-Ledger*, Nov. 13, 2011, *available at* www.nj.com/news/index.ssf/2011/11/ewing_manufacturing_company_fi.html.
24. *See, e.g., State v. Ball*, 268 N.J. Super. 72, 128 (App. Div. 1993).
25. *See, e.g., New Orleans, M., & C.R. Co. v. Hanning*, 15 Wall. 649 (1872) ("The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of.").
26. Times of Trenton Editorial Board, Editorial: N.J. Law Rightly Bars Employers from Saying 'Unemployed Need Not Apply, Nov. 15, 2011, *available at* www.nj.com/times-opinion/index.ssf/2011/11/editorial_nj_law_rightly_bars.html.
27. Bureau of Labor Statistics, *The Employment Situation – November 2011*, U.S. Dep't of Labor 11-1691 (Dec. 2, 2011), *available at* www.bls.gov/news.release/archives/empsit_12022011.pdf.
28. *Out of Work, Out of Luck? Denying Employment Opportunities to Unemployed Job Seekers: Meeting of the Equal Employment Opportunity Commission*, Feb. 16, 2011 (Statement of Jaqueline A. Berrien, Chair), *available at* www.eeoc.gov/eeoc/meetings/2-16-11/transcript.cfm.
29. Fair Employment Opportunity Act, H.R. 2501, S. 1471, 112th Cong. (2011).
30. H.B. 4675 (Mich. 2011).
31. S. 5151, S. 5316, A.B. 7830 (N.Y. 2011).
32. S.B. 2153, 97th Gen. Assem. (Ill. 2011).

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RESIDENCY REQUIREMENT

Continued from page 18

3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. 42 U.S.C. § 2000e-2(k)(1)(A)(i)(2006).
8. *See*, *e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-58 (1989).
9. *Id.* at 650.
10. *Meditz*, 2011 WL 4470677 at *3 (*citing El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 239-40 (3d Cir. 2007)).
11. *Id.* (*citing El*, 479 F.3d at 240 n.9).
12. *Id.* at *1.
13. *Id.*
14. *Id.*
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id.* at *2 (*citing In re Meditz v. City of Newark*, No. 08-2912, 2010 WL 1529612, at *3 (D.N.J. April 15, 2010)).
20. *Id*. at *5 (*citing Meditz*, 2010 WL 1529612, at *3).
21. *Id.* at *4.
22. *Id.*
23. *Id*.
24. *Id.* at *5 (*citing N.A.A.C.P. v. Harrison*, 940 F.2d 792, 799-801 (3d Cir. 1991)).
25. *Id*. at *6.
26. *Id*.
27. *Id*. (*citing El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 242 (3d Cir. 2007)).
28. *Id*. at *5.
29. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2676 (2009).
30. *Meditz v. City of Newark*, 2011 WL 4470677, at *5 (3d Cir. Sept. 28, 2011).
31. *Id*. at *6.
32. *Id*.
33. *National Association for the Advancement of Colored People v. North Hudson Regional Fire & Rescue*, 2011 WL 6144188, at *13 (3d Cir. Dec. 12, 2011).
34. *Meditz v. City of Newark*, 2011 WL 4470677, at *5 n.16 (3d Cir. Sept. 28, 2011).
35. *Id*. at *4 n.14.

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ADMINISTRATIVE HEARING OFFICERS—THE NEW JUROR?

AN ANALYSIS OF *GIBBS V. CASWELL MASSEY*

by Cheoma M. Smith

Gone are the days when employers can ignore unemployment hearings or hastily respond to a claim before the Division of Wage & Hour Compliance. In a recent case decided by the Appellate Division, *Gibbs v. Caswell-Massey*,[1] the court considered an unemployment appeal tribunal's determination when reviewing a summary judgment appeal. According to the court, an unemployment hearing examiner is comparable to a reasonable juror, and so such an examiner's determination is *relevant* when analyzing a case. This opinion underlines a potential obligation on employers to 'try their case' before it begins—at the administrative level.

Background

Defendant Caswell-Massey hired plaintiff Linda Gibbs in 1993.[2] Caswell-Massey is a supplier of luxury bath and body products. During her employment, the company promoted Gibbs to the position of corporate manager, retail stores and international sales.[3] Her job duties included serving as a liaison between company headquarters and its satellite retail stores.[4] In 2000, Gibbs was diagnosed with sleep apnea, which began to interfere with her work performance. However, Gibbs continued to receive satisfactory performance evaluations.[5]

In Nov. 2006, while Gibbs was out on a disability leave, the human resources manager received an anonymous phone call from a male who claimed to have information about a Caswell-Massey employee stealing and selling its products.[6] The then-president of the company and the human resources manager met with the caller, Steven Cutler, who stated that he was in a business venture with Gibbs' husband to sell various items, including Caswell-Massey products, at a local flea market.[7] Cutler also informed them that Gibbs' husband had acquired a large amount of Caswell-Massey products through Gibbs.[8]

Cutler provided several items he claimed were evidence: 1) photographs of Caswell-Massey's products on display at the flea market booth; 2) a plastic bin filled with Caswell-Massey products; 3) a copy of a book with Gibbs' handwriting, which appeared to be a price list; and 4) a copy of the lease agreement the Cutlers entered into with Mr. Gibbs, which specifically mentioned Caswell-Massey products. In addition, Cutler provided a sworn statement that Gibbs admitted to him that she had accumulated this Caswell-Massey product over time.[9]

The company investigated these claims against Gibbs. The president conducted a search for receipts of purchases made by Gibbs and security records to see when Gibbs accessed office areas.[10] The president and the human resources manager then questioned Gibbs when she returned from disability leave.[11] Gibbs denied the allegations by Cutler, but admitted that her husband took Caswell-Massey products to the flea market without her knowledge, and that she informed her husband she could not sell these products.[12] Gibbs also stated that Cutler was blackmailing her due to a separate dispute he was having with her husband.[13] The president suspended Gibbs at the conclusion of the meeting pending the outcome of the investigation.

The investigation included a search of Gibbs' home, where several storage bins were located in the basement, but the contents were not searched.[14] The human resources manager also investigated the booth at the flea market, but no Caswell-Massey product was found.[15] On Dec. 1, 2006, the company terminated Gibbs' employment for violation of the covenant not to compete, which was part of her employment agreement.[16]

Gibbs applied for unemployment benefits, for which she was deemed eligible. Caswell-Massey contested Gibbs' eligibility for these benefits, and the appeal tribunal of the New Jersey Department of Labor heard the matter in early 2007.[17] The tribunal concluded that Gibbs was not discharged for misconduct, as the company did not present any evidence of the sale of its products by Gibbs or a violation of her employment agreement.[18]

Gibbs filed a complaint in the Law Division against Caswell-Massey, the president, and the human resources manager, alleging wrongful termination in violation of the New Jersey Law Against Discrimination[19] (LAD), in addition to other claims, including breach of contract, conversion, and violation of the federal Family and Medical Leave Act (FMLA).[20] Caswell-Massey removed Gibbs' complaint to federal court because of the FMLA claim. After two years of discovery, Caswell-Massey moved for summary judgment seeking to dismiss Gibbs' complaint.[21] The matter was remanded to state court shortly after Gibbs stipulated to dismiss her federal claim, and Caswell-Massey re-filed its motion for summary judgment

in May 2010.[22]

The trial court granted partial summary judgment of all claims except Gibbs' conversion claim. Caswell-Massey then offered Gibbs $5,000 to settle the matter with Gibbs reserving the right to appeal.[23] Gibbs filed an appeal of the Law Division's decision.

Appellate Division Finds Hearing Examiner to be a "Reasonable Person"

The Appellate Division, while analyzing Gibbs' LAD claim under the *McDonnell Douglas* burden-shifting formula,[24] found that Gibbs presented sufficient evidence of pretext to warrant submission of her claim to a jury. The Appellate Division, viewing the facts in the light most favorable to Gibbs, disagreed with the trial court in that the record evidence "could lead a rational juror to conclude that [the president and the human resources manager] engaged in an ineptly conducted, cursory investigation; relied upon a biased and highly questionable source (Steven Cutler); turned a blind eye to the explanation of a thirteen-year employee (Gibbs), and had no evidence whatsoever that even a single Caswell-Massey product had been either exposed for sale, much less actually sold, at the Route 18 Market or elsewhere."[25]

Interestingly, the Appellate Division relied on the decision of the unemployment appeals tribunal to "fortify" its opinion.[26] The fact the tribunal found that Gibbs was not fired for cause was "relevant" to the Appellate Division, but "not conclusive."[27] In effect, the Appellate Division viewed the tribunal as "an exemplar of a rational decision-maker akin to—but obviously not the equivalent of—a reasonable juror."[28] Even though the burden of proof differed and the evidence presented at the unemployment appeal hearing was minimal and most likely hastily composed compared to the evidence on the record for summary judgment, the Appellate Division would not discount the tribunal's view. The Appellate Division found the tribunal's argument to be one that an "objective, rational trier of fact in the Law Division"[29] might make. The Appellate Division then reversed the lower court's decision on this claim and affirmed on all other counts.

Conclusion

While not completely relying on an administrative decision as precedent, the Appellate Division's consideration of an unemployment hearing appeal decision may be a harbinger of opinions where administrative determinations are viewed as guidance in summary judgment or other contexts. Employers who have in the past viewed attendance at unemployment hearings or defense of a claim before an administrative agency as insignificant should take these proceedings very seriously. In other words, employers should defend their case as if they were before a jury. ■

Endnotes

1. No. A-2996-10T4 (App. Div. October 20, 2011) (slip op. at 1).
2. *Id*. at 3.
3. *Id*.
4. *Id*.
5. *Id*. at 4.
6. *Id*. at 5.
7. *Id*.
8. *Id*.
9. *Id*. at 5-6.
10. *Id*. at 6.
11. *Id*.
12. *Id*. at 7.
13. *Id*.
14. *Id*. at 7-8.
15. *Id*. at 8.
16. *Id*. at 9.
17. *Id*.
18. *Id*.
19. N.J.S.A. 10:5-1, *et seq.*
20. 29 U.S.C.A. §2601 to §2654.
21. *Gibbs, supra,* at 10.
22. *Id*.
23. *Id*. at 11.
24. 411 U.S. 792 (1973). The plaintiff must first demonstrate *prima facie* case of discrimination: 1) that she is a member of a protected class, 2) that she was otherwise qualified and performing the essential functions of the job; 3 that she was terminated; and 4) that the employer thereafter sought similarly qualified individuals for that job. The defendant must then present a legitimate non-discriminatory reason for the discharge. If met, the burden shifts back to the plaintiff to demonstrate that her employer's reasoning is pretextual.
25. *Gibbs, supra*, at 16.
26. *Id*. at 17.
27. *Id*.
28. *Id*.
29. *Id*.

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