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EDITOR'S MESSAGE

by Anne Ciesla Bancroft

The summer issue of the *Labor And Employment Law Quarterly* addresses several recent, significant United States Supreme Court decisions. Glenn Grindlinger and Eli Freedberg analyze the landmark decision of *Wal-Mart Stores, Inc. v. Dukes*. The discussion of employment class action continues in Nicholas Grippo's article on *AT&T Mobility v. Concepcion*. Andrew Moskowitz and Carly Skarbnik discuss the availability of the "cat's paw" theory of liability under *Staub v. Proctor Hospital*. Kristine Grady Derewicz explains the expansion of employee protection from retaliation under the Fair Labor Standards Act after *Kasten v. Saint-Gobain Performance Plastics Corp*.

This issue also addresses recent developments in New Jersey case law. Ty Hyderally and Francie Foner analyze the applicability of the Court's analysis under the Conscientious Employee Protection Act (CEPA) in *Donelson v. DuPont* to the New Jersey Law Against Discrimination (LAD). The discussion of CEPA continues in Douglas Klein's article on *Hester v. Parker* and *Madera v. Horizon Blue Cross Blue Shield of New Jersey.* Bruce McMoran and Justin Burns review the changes to punitive damages and attorneys' fees under the LAD after *Saffos v. Avaya Inc*. Alexander D'Jamoos and Dena Calo compare the holding in *Stengart v. Loving Care Agency, Inc*. with a California court's interpretation of the applicability of the attorney client privilege to employee communications with her attorney from her employer's computer.

Finally, Ari Burd and Jay Becker review the final regulations under the Americans with Disabilities Act Amendments Act.

What better beach reading! ■

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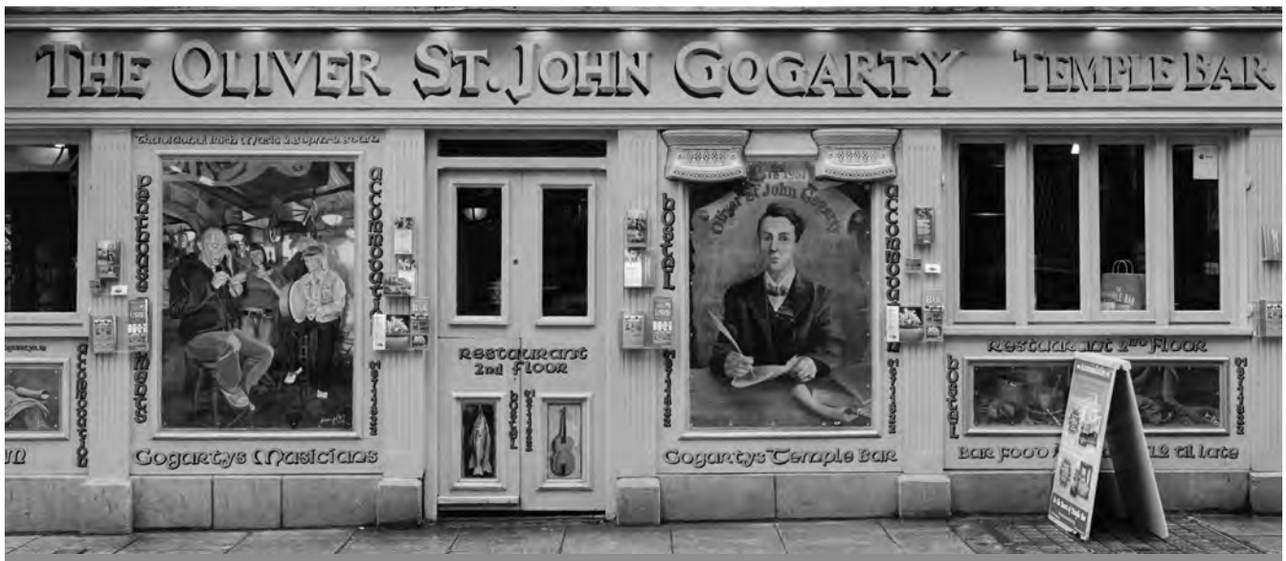

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CHANGING THE GAME

THE SUPREME COURT RAISES THE BAR ON THE CRITERIA NECESSARY TO CERTIFY A CLASS ACTION

by Glenn S. Grindlinger and Eli Z. Freedberg

Over the past few years, employers have seen a precipitous increase in the number of employment-related class actions. Whether the lawsuit asserts discrimination claims, purported wage and hour abuses, or claims that employers have failed to provide proper notice of a plant closing, these class action lawsuits target employers of all sizes across all industries. Furthermore, many employment-related class action lawsuits often take years to resolve. Aside from the massive legal costs necessary to defend these lawsuits, class actions provide employees with a vehicle to incorporate all similarly situated employees into one lawsuit, even if only one employee is actively pursuing those claims. In those cases where the employee can establish liability, the employer will be required to pay a settlement of judgment incorporating each employee's claims, even if those employees did not participate in the lawsuit.

Recently, the United States Supreme Court issued a decision that will have a profound impact on how employment-related class actions are litigated. In *Wal-Mart Stores, Inc. v. Dukes,*[1] the Supreme Court clarified the standards that plaintiffs must satisfy in order to certify a lawsuit as a class action. The clarifications enunciated by the Supreme Court will make it more difficult for plaintiffs to have their lawsuits certified as a class action, and will provide some procedural relief to employers.

The Lower Court Decisions

In 2001, a group of female employees filed an action against their employer, Wal-Mart Stores, Inc., in the United States District Court for the Northern District of California. These female employees alleged that the company discriminated against women with respect to its pay and promotion practices, in violation of Title VII of the Civil Rights Act of 1964.[2] Specifically, the plaintiffs claimed Wal-Mart had a policy that permitted individual store managers to exercise discretion in determining pay and promotions. The plaintiffs further complained that the practical effect of allowing individual store managers to determine raises and promotions resulted in a policy that disproportionately favored male employees over female employees, and led to a disparate impact in violation of Title VII. The plaintiffs also alleged that Wal-Mart's corporate headquarters was aware of the disparate impact that these policies had on female employees.[3]

The plaintiffs moved to certify a class consisting of all female employees who have been employed at any Wal-Mart store nationwide at any time since Dec. 26, 1998.[4]

Under the Federal Rule of Civil Procedure 23(a), litigants wishing to certify a class action need to demonstrate that:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims and defenses of the representative parties are typical to the claims or defenses of the class; *and,*
4. The representatives will fairly and adequately protect the interests of the class.[5]

In addition, in order to certify a class action, litigants must satisfy at least one of the three requirements set forth in Federal Rule of Civil Procedure 23(b):

1. Prosecuting separate actions would create a risk of either "inconsistent or varying adjudications" or "adjudications...that, as a practical matter, would be dispositive of [putative class members] or impede their ability to protect their interests";
2. "The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive [or declaratory] relief...is appropriate respecting the class as a whole"; or
3. Questions of law or fact are common to the class as a whole, "predominate over any questions affecting individual members," and a class action would be "superior to other available methods for fairly and effectively adjudicating" the matter.[6]

The plaintiffs sought primarily injunctive relief, and therefore they sought to certify the class under the second criteria. As such, they had to establish that Wal-Mart "acted or refused to act on grounds that apply generally to the class so that final injunctive relief is appropriate respecting the class as a whole."[7]

In support of their motion for class certification the plaintiffs introduced statistical evidence about pay and promotion disparities between the genders, anecdotal reports of discrimination, and testimony from a sociologist that Wal-Mart's culture was susceptible to gender discrimination. The plaintiffs also introduced approximately 40 declarations from female Wal-Mart employees describing instances of alleged actual discrimination. The district court granted the plaintiffs' motion, and certified the class, finding that their reliance on statistical evidence

was sound. The district court also found the plaintiffs satisfied the second criteria under Rule 23(b), even though the plaintiffs also sought back pay and punitive damages for class members, because any monetary award was incidental to the equitable and declaratory relief sought by the plaintiffs.[8] The district court estimated that the class could include as many as 1.5 million people.[9]

Wal-Mart appealed the class certification to the Ninth Circuit Court of Appeals, which affirmed the district court's decision.[10] Wal-Mart then petitioned for an *en banc* review, which was granted.[11] In April 2010, a divided Ninth Circuit, now sitting *en banc*, affirmed the class certification, although it removed from the class all individuals who were no longer employed by Wal-Mart at the time the lawsuit was filed.[12]

Wal-Mart petitioned the Supreme Court for *certiorari*, which the court granted in December 2010.[13]

The Supreme Court Decision

In an opinion authored by Justice Antonin Scalia, parts of which were unanimous, the Supreme Court disagreed with the lower courts' conclusions that the plaintiffs had satisfied the requirements necessary to certify the action as a class action under the Federal Rules of Civil Procedure.[14] The Supreme Court, therefore, reversed the lower courts' decisions and denied the plaintiffs' motion for class action certification.[15]

In his decision, Justice Scalia reaffirmed the well-established maxim that a plaintiff moving for class certification bears the burden of proving that "there are *in fact* sufficiently numerous parties, common questions of law and fact, etc."[16] He emphatically acknowledged that this will often require courts to examine the merits of a plaintiff's substantive claims when reviewing a motion for class action certification even though determining whether an action is amenable to class certification is largely a procedural issue.[17] Justice Scalia noted, however, that such overlap "cannot be helped," and must not cause courts to refrain from a "rigorous analysis" of whether the plaintiffs have met the class certification standards.[18]

Plaintiffs Did Not Establish Commonality Under Rule 23(a)

The first issue the Supreme Court examined was whether the plaintiffs established that there were common questions of law and fact applicable to all putative class members. To meet this standard, the Court held that the plaintiffs were required to show they and the putative class members have all suffered the same injury.[19] The Court further explained that the alleged common injury must be capable of class-wide resolution, and Justice Scalia noted that "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[20] That is, the answer to the crucial question must be the same with respect to each putative class member; if the answer is not the same, the case cannot proceed as a class action.

The plaintiffs attempted to satisfy their burden of establishing commonality through expert witness testimony, which included a detailed statistical analysis of Wal-Mart's hiring and promotion policies and a "social framework analysis," which made Wal-Mart vulnerable to "gender bias" and "stereotyped thinking."[21] The plaintiffs also introduced sworn testimony from putative class members who described alleged discriminatory acts at their individual Wal-Mart locations.

The Court held that this evidence was thoroughly insufficient to establish the commonality element required for class action certification. In particular, the Court cast doubt on the statistical data relied on by the plaintiffs because the data could not explain with any certainty how "stereotyped thinking" impacted pay and promotion decisions made by Wal-Mart's store managers.[22] Indeed, the Court held that establishing the answer to the question of how much stereotyped thinking impacted the decisions made by store managers was essential for determining whether a plaintiff has satisfied the commonality element necessary to certify a lawsuit as a class action.[23]

The Court also downplayed the significance of the anecdotal evidence adduced by the plaintiffs that described alleged individual acts of harassment and discrimination. The Court noted that the number of affidavits proffered was very limited in relation to the overall size of the purported class, and did not reach all of the regions or states where members of the putative class worked.[24]

The Court held that the plaintiffs failed to identify even one specific employment practice that was applicable across the entire alleged class; this omission ultimately led to the denial of the class certification motion.[25] The Court noted that this failure was inevitable. Wal-Mart's policy of allowing individual store managers to use their discretion in promoting individuals and providing raises to employees was likely to result in managers using the discretion given to them in a myriad of ways. As such, the answer to the question of why a woman did not receive a promotion or why a male employee was paid more than a female employee would not be the same across the entire putative class.

Improper to Certify Back Pay Claims Under Rule 23(b)

The Court unanimously rejected the plaintiffs claim that the case could be certified as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, even though they sought back pay and punitive damages on behalf of themselves and the entire class.[26] The Court held that Rule 23(b)(2) is specifically designed to apply to class actions where plaintiffs seek injunctive or declaratory relief for the entire class, and such relief, in and of itself, would provide relief to the entire class.[27] This was not the case in *Wal-Mart*, as there was a large group of class members (those no longer employed by Wal-Mart) for which an injunction would not provide any relief.

In addition, the Court held that Rule 23(b)(2) certification is unavailable when "each class member would be entitled to an individualized award of monetary damages."[28] Rather, plaintiffs who are trying to certify a class action for individualized damages to each class member must satisfy the more difficult "predominance" requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure, and show that issues common to the class predominate over issues affecting individual class members.

The Dissent

Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan, dissented from the Court's holding concerning commonality. They opined that the named plaintiffs satisfied the commonality requirement, and that the majority had incorrectly applied the more rigorous predominance analysis required by Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires a party to prove that common questions of fact or law predominate over individual issues.[29] Justice Ginsburg noted the plaintiffs established that Wal-Mart conditioned promotion on a candidate's willingness to relocate and that this centralized, common policy caused a "risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men."[30]

Impact of *Wal-Mart v. Dukes*

Although *Wal-Mart v. Dukes* was a Title VII case, this holding will likely affect all workplace class actions that are filed in, or removed to, federal court. Indeed, the Court has provided employers with a potential roadmap to defeat class action certification in federal court. Namely, if employers can establish that the question at issue does not have a common answer to all putative class members, class certification should not be granted. Likewise, if an employer can show that multiple managers applied subjective criteria toward multiple employees in making an employment decision, it will be difficult for the plaintiff to establish the commonality requirement of the Federal Rules of Civil Procedure, and therefore class certification would be denied. As such, employers hoping to avoid class actions should consider giving their managers more discretion in making employment decisions

There are two significant areas, however, where *Wal-Mart* will have less of an impact on employment-related class actions. The first area concerns claims arising under the Fair Labor Standards Act.[31] Class claims under this statute—which are known not as class actions, but collective actions—are not governed by Rule 23 of the Federal Rules of Civil Procedure. Instead, the act has its own mechanism for certifying collective actions, which are far less rigorous for plaintiffs to satisfy even prior to *Wal-Mart*. In these actions, plaintiffs need to show only that they are similarly situated to other putative collective action members. As such, *Wal-Mart* is unlikely to have an impact on these claims.

Second, *Wal-Mart* may not have much of an impact on class actions filed in state court. The New Jersey Supreme Court has held, coincidently in another case involving Wal-Mart, that it will review independently class actions on their own merits and the court will not be bound by decisions from other courts.[32] Because the "commonality" issue in *Wal-Mart* was decided by a narrow conservative majority, and knowing the more liberal nature of the New Jersey Supreme Court in comparison to its federal brethren, one should not be surprised if the New Jersey Supreme Court were to issue a decision on the commonality standard necessary to certify an action as a class action that is similar to Justice Ginsberg's dissent.

Nevertheless, *Wal-Mart* is a considerable victory for employers, and it should help ease the burden of employment-related class actions. This area of the law is still evolving, however, and practitioners should closely monitor developments in this important area. ■

Endnotes

1. *Wal-Mart Stores, Inc. v. Dukes*, __ S. Ct. __, No. 10-277, 2011 WL 2437013 (U.S. June 20, 2011).
2. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (Mem) (2010).
3. *Wal-Mart Stores, Inc.*, 2011 WL 2437013, *4.
4. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004).
5. *Wal-Mart Stores, Inc.*, 2011 WL 2437013, *5.
6. *Id.*
7. *Id.*
8. *Dukes*, 22 F.R.D. at 171.
9. *Wal-Mart Stores, Inc.*, 2011 WL 2437013, *4.
10. *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007).
11. *Dukes v. Wal-Mart Stores, Inc.*, 556 F.3d 919 (9th Cir. 2009).
12. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).
13. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795.
14. *Wal-Mart Stores, Inc.*, 2011 WL 2437013, *15-16.
15. *Id.*
16. *Id.* at *7(emphasis in original).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* (emphasis in original).
21. *Id.* at *9-*11.
22. *Id.*
23. *Id.* at *9.
24. *Id.* at *10.
25. *Id.*
26. *Id.* at *12.
27. *Id.*
28. *Id.*
29. *Id.* at *20.
30. *Id.* at *17.
31. 29 U.S.C. § 201 *et seq*.
32. *Iliadis v. Wal-Mart Stores, Inc*., 191 N.J. 88 (2007).

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AT&T MOBILITY V. CONCEPCION

IMPACT OF THE SUPREME COURT'S DECISION ON EMPLOYMENT CLASS ACTION LITIGATION

by Nicholas P. Grippo

On April 27, 2011, the Supreme Court in *AT&T Mobility v. Concepcion*[1] held that mandatory arbitration provisions that prohibit classwide arbitration are enforceable. The Court's holding overturned a California Supreme Court decision that found similar provisions unconscionable and unenforceable. While not an employment law case, the Supreme Court's decision could have far-reaching implications on employment class action litigation.

Factual Background

In February 2002, Vincent and Lisa Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T. AT&T had advertised free cellular telephones with the purchase of wireless service. When the Concepcions purchased AT&T service, they were not charged for the cellular telephones, but were charged $30.22 in sales tax based upon their retail value.

The Concepcion's contract with AT&T provided for mandatory arbitration of all disputes between the parties, and required that any claims be brought "in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[2]

In March 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California. The complaint was subsequently consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones that it had advertised as free.[3]

In March 2008, AT&T moved to compel arbitration pursuant to the arbitration provision in its contract with the Concepcions. The Concepcions opposed the motion and argued that the arbitration provision was unconscionable and unenforceable under California law because it prohibited classwide procedures.

Lower Courts' Decisions and the *Discover Bank* Rule

The district court denied AT&T's motion.[4] The court relied upon the California Supreme Court's decision in *Discover Bank v. Superior Court*[5] in finding that the arbitration provision at issue was unconscionable because AT&T had not demonstrated that bilateral arbitration adequately substituted for the deterrent effects of class actions.

Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause."[6] A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results."[7]

In *Discover Bank*, the California Supreme Court applied the above framework to class action waivers in arbitration agreements. The Court held that when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the parties predictably involve small amounts of damages, and "when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," such waivers are unconscionable and should not be enforced.[8] California courts have frequently applied the *Discover Bank* rule to invalidate arbitration agreements.

Although the district court found that the arbitration provision set forth in the Concepcion's contract with AT&T was consumer friendly, noting, for example, that the informal dispute resolution process was quick and easy to use, the court held that its prohibition on class proceedings was unconscionable under governing California law.

The Ninth Circuit affirmed the district court's decision.[9] The court agreed that the arbitration provision was unconscionable under California law as announced in *Discover Bank*.[10] The court also found that the *Discover Bank* rule was not preempted by the Federal Arbitration Act (FAA), which generally requires courts to enforce commercial arbitration agreements according to their terms.[11]

Section 2 of the FAA provides that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"[12]

The Ninth Circuit held that the *Discover Bank* rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California," and therefore was consistent with Section 2 of the FAA.[13]

The Supreme Court's Decision

The primary issue before the Supreme Court was whether the FAA prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures. In holding that it does, the Court reasoned that "[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[14]

The Court rejected the Concepcions' argument that the *Discover Bank* rule, with its origins in California's unconscionability doctrine, is a ground that "exists at law or in equity for the revocation of any contract" under Section 2 of the FAA.[15] The Court reasoned that the application of Section 2's savings clause "becomes more complex when a doctrine normally thought to be generally applicable, such as…unconscionability, is alleged to have been applied in a fashion that disfavors arbitration."[16] The Court noted that while the FAA preserves generally applicable contract defenses, "nothing in it suggests an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives."

The Court further held that a federal statute's savings clause cannot be construed as permitting a common law right which would be absolutely inconsistent with the provisions of the act. In other words, "the act cannot be held to destroy itself."[17]

The Court emphasized that the FAA's "principal purpose" is to "ensure that private arbitration agreements are enforced according to their terms."[18] The Court noted that the point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to a specific type of dispute. Indeed, the Court has repeatedly described the FAA as "embod[ying] [a] national policy favoring arbitration."[19]

Classwide Arbitration Inconsistent with FAA

Applying these principals, the Court found that California's *Discover Bank* rule "interferes with arbitration" in that it allows any party to a consumer contract to demand classwide arbitration "ex post."[20] The Court reasoned that class arbitration is inconsistent with the FAA for several reasons. First, class arbitration, as opposed to bilateral arbitration, sacrifices the principal advantage of arbitration–its informality–and makes the dispute resolution process slower, more costly, and increases "procedural morass."[21]

Second, class arbitration requires procedural formality to protect the rights of absent class members. Third, class arbitration greatly increases risks to defendants due to its informal procedures and lack of multi-layered judicial review. Consequently, the Court concluded that "arbitration is poorly suited to the higher stakes of class litigation."[22]

The Court ultimately held that the FAA preempts California's *Discover Bank* rule "because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[23]

Dissenting Opinion

Justice Stephen Breyer wrote the dissenting opinion and Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan joined. The dissent argued that the *Discover Bank* rule was consistent with the FAA's language in that it "falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist 'for the revocation of any contract.'"[24] The dissent further argued that the *Discover Bank* rule is consistent with the FAA's basic purpose of "ensuring judicial enforcement of arbitration agreements" since it puts agreements to arbitrate and agreements to litigate "upon the same footing."[25] The dissent disagreed with the majority's conclusion that the *Discover Bank* rule increases the complexity of arbitration procedures and noted that class arbitration is "consistent with the use of arbitration" and is "well known in California and followed elsewhere."[26]

The dissent also emphasized what would clearly have been the most compelling reason for enforcing the *Discover Bank* rule: that class proceedings are necessary to prosecute small dollar claims that might otherwise slip through the legal system. Justice Breyer wrote: "what rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[27] The majority responded to this concern in concluding that "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[28]

This debate is likely to continue as lower courts begin applying the AT&T Mobility decision and Congress considers legislative responses to issues regarding class action litigation.

Impact of Decision on Employment Class Actions

While the Supreme Court's decision in AT&T Mobility did not arise in the employment context, there is no reason to believe that the Court would not reach the same decision if the class action at issue were a wage and hour claim. The courts are generally less protective over employees than consumers, and this decision is likely to apply to agreements to arbitrate employment disputes. As such, many employers with mandatory arbitration provisions in employment contracts may now include class action waivers and/or requirements for individual arbitration if their agreements do not already contain them. Such limiting arbitration provisions in employment contracts could preclude representative litigation such as wage and hour and discrimination class actions.

For example, in *Vilches v. The Travelers Co. Inc.*,[29] a decision that predates the Supreme Court's decision in *AT&T Mobility*, the Third Circuit considered whether a class arbitration waiver in an employment contract was enforceable under New Jersey law. The plaintiffs had filed a class and collective action under the Fair Labor Standards Act[30] and the New Jersey Wage and Hour Law.[31] The Court held that the issue of whether the parties had agreed to the waiver, which the employer had added to the parties' contract by amendment, was an issue for the arbitrator to determine.

Nonetheless, the court considered whether, if determined to be binding, the waiver provision was unconscionable. The court noted that under New Jersey law, such provisions are not unconscionable per se, but that the analysis becomes more difficult

when a waiver is found in a consumer contract of adhesion. The court held that in the employer/employee context at issue, the unequal bargaining power of the parties alone was not enough to make the agreement to arbitrate a contract of adhesion, and that the plaintiff had failed to demonstrate unconscionability otherwise.

To the extent that the Third Circuit's decision suggests class arbitration waivers in adhesion contracts are unconscionable, the Supreme Court's decision in *AT&T Mobility* overrules it, as the Court specifically upheld a class arbitration waiver in an adhesion contract and even noted that "the times in which consumer contracts were anything other than adhesive are long past."[32]

Employers must keep in mind that, although they may be able to limit class action litigation through arbitration provisions in employment contracts, they cannot necessarily preclude employees from filing administrative charges, or bar agencies from asserting their statutory rights. Further, arbitration presents several potential drawbacks for employers, such as the increased cost of arbitration fees and the limited judicial review of arbitration awards. Despite these concerns, arbitration of employment disputes is likely to become far more prevalent based upon the *AT&T Mobility* decision. ■

Endnotes

1. 131 S. Ct. 1740 (2011).
2. *Id.* at 1744.
3. *Id.*
4. *Id. See also Laster v. T-Mobile U.S.A., Inc.*, 2008 U.S. Dist. LEXIS 103712 (Aug. 11. 2008).
5. 113 P.3d 1100 (2005).
6. *Id.* at 1746 (*quoting* Cal. Civ. Code Ann. 1670.5(a) (West 1985)).
7. *Id.* (*quoting Armendariz v. Foundation Health Psychcare Servs.*, 6 P.3d 669, 690 (2000)).
8. *Discover Bank*, 113 P.3d at 1110.
9. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (2009).
10. *Id.* at 855.
11. *Id.* at 857.
12. 9 U.S.C. 2 (emphasis added).
13. 584 F.3d at 857.
14. *Concepcion*, 131 S. Ct. at 1748.
15. *Id.* at 1747.
16. *Id.* at 1748.
17. *Id.* (*quoting American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-28 (1998)).
18. *Id.*
19. *Id.* at 1749.
20. *Id.* at 1750.
21. *Id.* at 1751.
22. *Id.* at 1752.
23. *Id.* at 1753.
24. *Id.* at 1756.
25. *Id.* at 1757.
26. *Id.* at 1758.
27. *Id.* at 1761.
28. *Id.* at 1753.
29. 2011 U.S. App. LEXIS 2551 (Jan. 11, 2011).
30. 29 U.S.C. § 201 *et seq.*
31. N.J.S.A. 34:11-4.1 *et seq.*
32. *Concepcion*, 131 S. Ct. at 1750.

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THE CAT'S OUT OF THE BAG

U.S. SUPREME COURT ENDORSES "CAT'S PAW" THEORY OF LIABILITY IN EMPLOYMENT CASES

by Andrew M. Moskowitz and Carly J. Skarbnik

In *Staub v. Proctor Hospital*,[1] the United States Supreme Court addressed when an employer may be held liable due to "the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision."[2] The majority opinion, issued by Justice Antonin Scalia, endorsed the cat's paw theory of liability. Although *Staub* did not involve a Title VII claim, the case's holding will almost certainly be applied to claims brought under Title VII. The Court's holding in *Staub* could also potentially be applied to claims asserted under New Jersey state law.

The "cat's paw" theory gets its name from a 17th century fable written by Jean de la Fontaine.[3] In the story, a monkey persuades a cat to pull chestnuts out of a fire. In the process, the cat gets burned while the monkey gobbles up the chestnuts. Today the term cat's paw means "one used by another to accomplish his purposes."[4]

In the workplace context, an employer (the cat) may be held liable for discrimination even if the actual decision to terminate was made with no unlawful *animus* on the part of the firing agent. Specifically, when a supervisor with a discriminatory *animus* (the monkey) performs an act which is a causal factor in the adverse employment action, the employer is responsible.[5]

In *Staub*, the statute at issue was the Uniformed Services Employment and Reemployment Rights Act (USERRA).[6] As noted by Justice Scalia, "[t]he statute is very similar to Title VII," as both statutes prohibit adverse employment actions where discrimination was a motivating factor.[7] Under USERRA "[a]n employer shall be considered to have engaged in actions prohibited [by USERRA]...if the person's membership…in the uniformed services is a motivating factor in the employer's action."[8] In the same vein, Title VII prohibits employment actions where an employee's "race, color, religion, sex, or national origin" was a motivating factor.[9]

Vincent Staub was employed as an angiography technician for Proctor Hospital. Throughout his employment, Staub was a member of the United States Army Reserves. Evidence presented at trial demonstrated that Staub's supervisor, Janice Mulally, and Mulally's supervisor, Michael Korenchuk, were hostile to Staub's military obligations.

Mulally regularly scheduled Staub for shifts when she knew he had Reserve commitments. She also made several disparaging comments about his military duties and asked one of Staub's coworkers to help her "get rid of him." In January 2004, Mulally issued a "corrective action" disciplinary warning to Staub. Four months later, Korenchuk informed Linda Buck, Proctor Hospital's vice president of human resources, that Staub had violated the corrective action. In reliance on Korenchuk's accusation, and after reviewing Staub's personnel file, Buck made the decision to terminate Staub's employment.

Staub sued Proctor Hospital and alleged that his membership in the Reserves was a motivating factor in the decision to terminate his employment. At trial, the jury found that the decision to terminate him was motivated by discriminatory *animus*.

The Seventh Circuit reversed.[10] In so holding, the court determined that for a cat's paw case to succeed, the discriminatory *animus* of a non-decision maker had to have a "singular influence" over the decision maker. Inasmuch as Buck had considered Staub's personnel file, she did not merely rely on the representations of Mulally and Korenchuk. Thus, the Seventh Circuit held that, because the decision maker's determination was not wholly dependent on the representations of the non-decision maker, Proctor Hospital was entitled to judgment as a matter of law.[11]

The Supreme Court reversed. In its opinion, the majority held that "if a supervisor performs an act motivated by antimilitary *animus* that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[12] Therefore, the Court found that because Buck had relied on both the corrective action and the statement by Korenchuk, discrimination could have been a causal factor in the decision to terminate Staub.

In its analysis, the Court focused on construing the statutory phrase "motivating factor in the employer's decision." The Court found that when a "decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination," discrimination could be considered a "causal factor" in the decision to terminate the employee.[13]

Proctor Hospital had argued that a decision maker's independent judgment or, alternatively, a decision maker's independent investigation and rejection of allegations of discriminatory *animus* should immunize the employer from liability. However, the Court rejected those arguments. Specifically, the Court declined to adopt "such a hard-and-fast

rule," and noted that it was "aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect."[14]

The Court further noted that multiple individuals usually have the authority to reward or punish an employee, and as such, the ultimate decision maker relies on the representations of those other individuals. The Court held that the biased report still may remain a causal factor "if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified."[15]

As noted above, although USERRA was the statute at issue, due to the two statutes' similarities, the *Staub* holding will almost certainly be applied to claims brought under Title VII. Both statutes require only that plaintiffs demonstrate that discrimination was a "motivating factor" in the adverse employment action.[16]

The *Staub* holding could also impact courts' analyses of New Jersey employment statutes. Although, prior to *Staub*, the Third Circuit had endorsed the cat's paw theory of liability in a LAD case,[17] research has disclosed only one unpublished New Jersey case addressing the issue of the cat's paw or "subordinate bias."[18]

Staub is clearly a significant case. Employers will have a far more difficult time arguing that, due to the absence of a bias on the part of the ultimate decision maker, they cannot be held liable. Rather, the issue will be whether the biased supervisor's discriminatory actions proximately caused the adverse employment action. Because this analysis is inherently fact-specific, the result could be that fewer employment cases will be dismissed at the summary judgment stage of the litigation. ■

Endnotes

1. 131 S. Ct. 1186 (2011).
2. *Staub*, 131 S. Ct. at 1189.
3. *Id.* at 1190, n. 1.
4. *Staub v. Proctor Hosp.*, 560 F.3d 647, 650 (7th Cir. 2009) (*quoting Webster's Third New International Dictionary* (1976)), *rev'd*, 131 S. Ct. 1186 (2011).
5. *Staub*, 131 S. Ct. at 1194.
6. 38 U.S.C. § 4301 *et seq.*
7. *Staub*, 131 S. Ct. at 1191.
8. 38 U.S.C. § 4311(c).
9. 42 U.S.C. §§ 2000e–2(a) and (m).
10. *See Staub*, 560 F.3d at 647.
11. *Id.* at 659.
12. *Staub*, 131 S. Ct. at 1194.
13. *Id.* at 1192.
14. *Id.* at 1193.
15. *Id.*
16. *Id.* at 1190-91 (*citing* 38 U.S.C. § 4311 (c); 42 U.S.C. §§ 2000e-2(a) (m)).
17. *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 200 & n.11 (3d Cir. 1996).
18. *Kwiatkowski v. Merrill Lynch*, Docket No. A-2270-06T1 (App. Div. Aug. 13, 2008).

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KASTEN V. SAINT-GOBAIN

VERBAL COMPLAINTS COUNT

by Kristine Grady Derewicz

The Fair Labor Standards Act[1] (FLSA), originally passed in 1938, has never been more relevant to employers that are committed to compliance and litigation avoidance than it is today. With its decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*,[2] the United States Supreme Court has added another arrow to the quiver held by employees who pursue wage/hour claims against their employers. Now, an employee who verbally complains to his or her employer about a potential violation of the FLSA may state a claim for retaliation under the FLSA, despite the absence of any written documentation of the complaint. In so ruling, the Court resolved a split among the circuit courts of appeals, and provided guidance to employers in this once-murky area.

The FLSA contains an anti-retaliation provision that forbids employers from discriminating against any employee because the employee has "filed any complaint" regarding the employer's compliance with the FLSA.[3] These three words spawned the question, addressed by the Court, of whether an employee's verbal complaint to his or her employer rises to the level of "fil[ing] any complaint," such that the anti-retaliation provision of the act can be invoked. The Court held that it did.

Kasten's Verbal Complaints

Plaintiff/petitioner Kevin Kasten based his retaliation claim against Saint-Gobain on his assertion that he "raised a concern" with his shift supervisor that the location of the company's time clocks caused employees to engage in compensable "donning and doffing" prior to clocking in for their shifts and after having clocked out. He further claimed that he told a human resources employee that if the company were challenged on the location of the time clocks, the company would lose. Kasten finally claimed that he told his lead operator that he was considering filing a lawsuit against Saint-Gobain based on the location of the time clocks.

Saint-Gobain denied that Kasten made any "significant complaint" about the location of the time clocks, and further maintained that Kasten's employment was terminated due to his repeated failure to record his work time properly. The Court, however, accepted Kasten's version of events for purposes of its analysis and opinion because the issue reached the Court through the district court's entry of summary judgment in favor of Saint-Gobain and the Seventh Circuit Court of Appeals' agreement with the district court's judgment.[4]

Saint-Gobain's code of ethics and business conduct imposed on every employee "the responsibility to report... suspected violations of...any applicable law of which he or she becomes aware."[5] Further, the employee policy handbook instructs employees with complaints to contact their supervisors and, if necessary, to address their concerns to the human resources department.

The Court's Analysis

The issue presented to the Court was simple: whether an oral complaint of a violation of the FLSA is protected conduct under the act's anti-retaliation provision. The Court immediately recognized that the plain language of the statute was open to varying interpretations, but ultimately concluded that the act's purpose and the language's context compelled the conclusion that a verbal complaint was, in fact, protected conduct.

First addressing the statutory language, the Court noted that while the word "filed" may imply the presentation of a document or writing, its usage extends to the contemplation of oral statements.[6] Further, the Court referred to the act's use of the phrase "*any* complaint" to imply a broad proscription: "the phrase 'any complaint' suggests a broad interpretation that would include an oral complaint."[7]

Looking beyond the statutory language, the Court found that the act's basic objectives are best served by a broad interpretation of its anti-retaliation provision. Specifically, the act's enforcement is dependent, in part, upon information received from employees; therefore, Congress would want to incentivize a simple complaint mechanism, as opposed to requiring written statements from employees who are often those in most need of the act's protections.[8] Moreover, employers' informal grievance processes should be encouraged in this arena, and almost certainly do not require the presentation of a written complaint.[9]

In a nod to Saint-Gobain's stated concern that the FLSA's anti-retaliation provision should only be invoked when an employer has received fair notice of a complaint, the Court did recognize that the phrase "filed any complaint" portends a level of formality that would require that any verbal complaint be sufficiently serious in purpose and presentation to permit the employer to recognize it as such. In fact, during oral argument a number of justices questioned counsel for Kasten about the possibility that a "tap on the shoulder" of a supervisor or a "passing comment at a cocktail party" could constitute a complaint. Kasten's counsel believed it would, but the Court did not ultimately subscribe to this view. The Court explained, "[t]o fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and

detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."[10]

The Dissent

Justice Clarence Thomas and Justice Antonin Scalia dissented from the Court's majority opinion, authored by Justice Stephen Breyer, based on their conclusion that the statutory language refers only to complaints lodged with courts or administrative agencies. At oral argument, counsel for Saint-Gobain maintained that this issue, in fact, was the most important question inherent in the company's appeal. Writing for the dissent, Justice Scalia parsed various sections of the act and concluded that the intent of the anti-retaliation provision was limited to "filing" in a formal sense, that is, an official filing with a governmental agency.[11]

Because the majority refused to consider this argument due to Saint-Gobain's failure to raise it properly on appeal, Justice Scalia's thorough and lengthy analysis may provide a road map for future litigants' efforts to limit the act's anti-retaliation provision to those complaints lodged with courts and administrative agencies.

The Practical Import of the Court's Decision

Read any employer's employee handbook, code of conduct, or internal complaint mechanism, and you will likely find that it contemplates, and indeed encourages, employees to lodge verbal complaints. The ubiquitous 'employee hotline,' in fact, relies solely upon verbal complaints made anonymously by telephone. Thus, the fundamental holding of *Saint-Gobain* does not require any meaningful shift in the way in which employers receive and react to employee complaints. When an employee complains about potential violations of the FLSA, employers are on notice of the employee's protected status. Further, in light of the majority's refusal to consider the propriety of a complaint to the employer, as opposed to a government agency, it is prudent to assume that the former are covered by the act.

As a practical matter, however, the *Saint-Gobain* case suggests that the employer's own documentation of an employee's complaint becomes very important. The fact that the employee need not reduce a complaint to writing does not mean that the content, timing, and disposition of the complaint are not critical to the employer's ability to defend a future retaliation claim when the complaining employee is subsequently disciplined or discharged for unrelated reasons.

Thus, employers should review their internal protocols to ensure that supervisors and, more important, human resources professionals carefully and accurately document the complaint received, the steps taken to investigate the complaint, and the remedy, if any. Then, if the need arises to discipline the complaining employee, in addition to adequate documentation of the reasons for the discipline, the 'file' regarding the employee's underlying protected conduct will be accurate and complete, allowing the employer to make a well-reasoned and prudent decision regarding the risks and benefits of disciplining the complaining employee and the likelihood of receiving and successfully defending a retaliation claim. ■

Endnotes

1. 29 U.S.C. § 201 *et seq.*
2. No. 09-834 (U.S. March 22, 2011).
3. 29 U.S.C. § 215(a)(3).
4. No. 09-834 (slip op. at 3).
5. *Id.* (slip op. at 2).
6. *Id.* (slip op. at 5).
7. *Id.* (slip op. at 7).
8. *Id.* (slip op. at 9).
9. *Id.* (slip op. at 10).
10. *Id.* (slip op. at 12).
11. *Id.* (dissent, slip op. at 2).

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A CEPA CLAIM FOR LOST WAGES IS NOT DEPENDENT UPON A CONSTRUCTIVE OR ACTUAL DISCHARGE

WILL *DONELSON V. DUPONT* APPLY TO LAD RETALIATION CLAIMS?

by Ty Hyderally and Francine Foner

In early June 2011, the New Jersey Supreme Court, in a 4–2 decision, reversed the Appellate Division's narrow interpretation of the Conscientious Employee Protection Act[1] (CEPA) conditioning recovery of economic losses upon the existence of an actual or constructive discharge.

Guided by CEPA's broad remedial purpose and expansive remedies and protections, the Supreme Court of New Jersey held in *Donelson v. DuPont Chambers Works*[2] that neither an actual nor a constructive discharge is a prerequisite to recovery of lost wages where an employer's retaliatory conduct causes an employee to suffer from an emotional condition that renders the employee incapable of working.[3]

In *Donelson*, the plaintiff, John Seddon,[4] worked for DuPont Chambers Works for approximately 30 years. As an operator technician in the phosgene building, Seddon was responsible, in part, for ensuring the safety of employees and those who lived in the surrounding area. In late 2002, Seddon expressed concern to his shift manager about the dangerous manner in which security guards were conducting random searches of employees in the dark alongside passing traffic. When DuPont did nothing to address these safety hazards, Seddon filed a complaint with the Occupational Safety and Health Administration (OSHA).[5] Upon learning of Seddon's complaint, DuPont assigned a supervisor to oversee him. This supervisor began imposing sick and vacation reporting requirements that were specific to Seddon.

Seddon filed subsequent complaints with DuPont's management about unsafe conditions in the operation of equipment through which a highly toxic and reactive chemical was processed. Specifically, Seddon warned that deficiencies in the equipment could potentially cause an explosion that could result in the release of deadly gas into the atmosphere, which would kill and/or seriously injure residents in surrounding areas. In response, Seddon's supervisor took further retaliatory actions against him, including providing him with negative evaluations, falsely accusing him of performance failures, requiring him to undergo performance reviews every three months, and subjecting him to constant verbal abuse. Seddon complained to Dupont that he was being targeted for harassment because he complained about safety issues.

During the investigation into Seddon's complaints, DuPont's investigators focused on allegations that he threatened DuPont employees even though Seddon denied making any such threats. DuPont subsequently placed him on short-term disability leave and conditioned his reinstatement upon examination by three mental health experts and a fitness-for-duty evaluation. Seddon remained suspended for 53 days, which caused him to suffer lost wages because of the overtime compensation he no longer earned, made him feel "worthless" and "beaten," and caused him to suffer anxiety attacks. Upon returning to work, DuPont placed Seddon on probation, required that he undergo performance reviews every three months, and assigned him to 12-hour shifts in isolation, which further exacerbated his psychological condition. Additionally, Seddon's supervisor continued to lodge false accusations against him.[6] As a result, he sought treatment and took a six-month leave of absence. Seddon, however, never returned to DuPont. Rather, he applied for and was granted a disability pension.

Seddon Did Not Plead Constructive Discharge

Seddon filed a complaint against DuPont in which he asserted violations of CEPA, as well as claims of intentional and negligent infliction of emotional distress. He sought compensatory damages for "loss of earnings and other employment benefits."[7] The trial court charged the jury that lost wages were not dependent upon Seddon proving a constructive discharge. The jury found in favor of Seddon, and awarded him $724,000 for the "economic losses he ha[d] suffered as a proximate result of DuPont's violations of [CEPA]," $500,000 in punitive damages, and $523,289 in counsel fees.[8]

The Appellate Division reversed, and, in doing so, held that an award of lost wages is dependent upon the existence of an actual or constructive discharge.[9] In reaching this conclusion, the Appellate Division relied, in part, on case law holding that economic damages are not recoverable in the absence of an actual or constructive discharge under the New Jersey Law Against Dis-

crimination[10] (LAD).[11] Thus, the Appellate Division concluded that the trial court's denial of the defendant's motion for judgment notwithstanding verdict was erroneous, and remanded for an order vacating the compensatory damages award, punitive damages award (because of the absence of a compensatory damages award), and the award of counsel fees.[12]

The Supreme Court rejected the Appellate Division's restrictive interpretation of CEPA conditioning recovery of economic losses upon the existence of an actual or constructive discharge. Rather, based upon the remedial nature of CEPA and its underlying purposes, which require that it be liberally construed, the Supreme Court declined to find that an actual or constructive discharge is a prerequisite to recovery of back wages where an employer's retaliatory conduct causes an employee to suffer from an emotional condition that renders the employee incapable of working.

The Supreme Court further opined that LAD precedent, while sometimes appropriate to rely upon in a CEPA matter, did not compel a different finding.

The Supreme Court Left the Door Open on the Application of LAD Retaliation Claims to CEPA

The Supreme Court of New Jersey acknowledged its ability to rely upon holdings in LAD cases in interpreting disputes brought under CEPA "when appropriate," but simultaneously emphasized the distinction between the purpose underlying each act and the differing statutory language.[13] The Court was deliberate in its reluctance to draw any bright line rules regarding when and under what circumstances a CEPA plaintiff can look to a LAD holding, or visa versa. Rather, the Court limited its holding to the facts before it "based on the controlling statutory language in CEPA without resolving different scenarios that might arise under LAD."[14]

Thus, the majority rejected DuPont's assertion that *Shepherd v. Hunterdon Development Center*[15] stands for the proposition that in a LAD retaliation case, a constructive discharge is always a prerequisite to a claim for lost wages.[16] In fact, the Court distinguished *Shepherd* factually from *Donelson* because the plaintiff in *Shepherd* claimed that his employer's harassing conduct resulted in his constructive discharge but failed to establish that "his employer's conduct was 'so inteolerable that a reasonable person would be forced to resign rather than continue to endure it.'"[17]

In contrast, the Court noted that the plaintiff in *Donelson* did not allege a constructive discharge and, unlike the *Shepherd* plaintiff, "presented expert testimony that his employer's harassing conduct caused him a psychological illness that rendered him incapable of working...."[18] In short, the Court concluded that *Shepherd* addressed different issues, under different facts, under a different statute.[19] DuPont's reliance upon *Shepherd* was, therefore, not appropriate.

But what about future LAD retaliation cases alleging that employers' retaliatory conduct caused employees' mental illness, rendering them incapable of working, under facts which are more analogous to those in *Donelson*?

When Will It Be "Appropriate" to Apply *Donelson's* Holding to a LAD Retaliation Claim?

The Court expressly left open "whether, under the anti-retaliation provisions of the LAD, a plaintiff can proceed with a lost-wage claim when an employer's misconduct causes a mental-illness-induced retirement."[20] The Court declined to give any advisory opinion of whether the holding in *Donelson* can be used as a precedent in a LAD retaliation matter, or to consider various circumstances under which application of the *Donelson* holding to a LAD retaliation claim might be "appropriate."[21] However, the Court's opinion suggests that guidance may be found by looking to the plain language of the LAD and the CEPA, as well as the remedial nature of each statute.

The two lynchpins of the *Donelson* opinion are the "plain language" of CEPA's definition of "retaliatory action," which includes any "other adverse employment action," and its ever-expanding remedy provision, which entitles prevailing plaintiffs to "'all remedies available in common law tort actions.'"[22] Thus, the similarities between these CEPA provisions to the analogous provisions in the LAD (*i.e.*,"[a]ll remedies available in common law tort actions shall be available to prevailing plaintiffs" for unlawful employment practices or discrimination which includes "reprisals against any person"),[23] could support application of the *Donelson* holding to a LAD retaliation claim, where the incapacity to work was similarly caused by the employer's retaliatory conduct.

The Plain Language of Both CEPA and LAD Reflects an Intent to Cover a Wide Range of Retaliatory Conduct

Though not identical, the anti-retaliation language of both the CEPA and the LAD reflect a similar intent to cover a broad range of adverse actions to serve the important public policy underlying each act. The LAD's main purpose is to prevent discrimination in the workplace based on protected categories.[24] The CEPA's fundamental purpose is to protect whistleblowers from retaliation for reporting a wide range of legal and unethical conduct.[25] Despite that the statutes have distinct purposes, they also share the common purpose of "deterrence of improper employer conduct to protect society from the vestiges of discrimination."[26] Both the CEPA and the LAD "seek…to overcome the victimization of employees and to protect those who are especially vulnerable in the workplace from the improper or unlawful exercise of authority by employers."[27] The "overriding" policy underlying both acts is to "protect society at large."[28]

The Court emphasized that the plain language of the CEPA's definition of "retaliatory action" includes not only "discharge, suspension or demotion," but also any "other adverse employment action taken against an employee in the terms and conditions of employment."[29] This broadly worded definition persuaded the Court to reject the Appellate Division's narrow construction of the CEPA, which would condition an award of lost wages on an actual or constructive discharge (or arguably a suspension or demotion)—at least where the employer's retaliation induces the employee into retirement or disability leave. This interpretation is consistent with a long line of cases that broadly construes the remedial language of the

LAD and CEPA to effectuate the purpose of "eradicating the cancer of discrimination" and rooting out retaliation in the workplace.[30]

Although the LAD does not contain a parallel definition of "retaliatory action," its anti-retaliation provision forbids "reprisals" and prohibits retaliation designed to "coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment" of one's exercise of his or her rights under the LAD, without mention of discharge, suspension or demotion.[31] Thus, the plain language of the LAD's anti-retaliation provision is arguably even broader than CEPA's definition of "retaliatory action." The language in both acts, therefore, reflects a similar intent to cover a broad spectrum of retaliatory actions that can justify an award of compensatory damages, without conditioning the same upon an actual or constructive discharge.

Similarities of Available Remedies Under CEPA and LAD

Also common to both the CEPA and the LAD, is their provision of "all remedies available in common law tort actions."[32] The CEPA's remedy provision goes somewhat further in its requirement that the court order "where appropriate and to the fullest extent possible[,]...compensation for all lost wages, benefits and other remuneration."[33] The "remedies" provision of the LAD similarly allows recovery of "all remedies available in common law tort actions" as well as any other remedies "provided by this act or any other statute."[34] Moreover, the LAD's legislative findings section calls attention to the fact that under the common law, available damages include compensatory and punitive damages and is followed by the directive that the act should be liberally construed.[35]

Thus, the LAD contains the identical CEPA language of "all remedies available in common law tort actions." The LAD, like the CEPA, is to be liberally construed, which includes interpretation of its remedy provision. Such similarities of remedies and the mandate of liberal construction support providing the same relief in a LAD retaliation claim as that awarded in *Donelson* where the employer's retaliation caused the employee to be mentally unfit to work.

The end result of this holding will likely be that both defendants and plaintiffs will attempt to rely upon *Donelson.* Plaintiffs will argue that *Donelson* supports a lost wage claim in their LAD retaliation cases in the absence of an actual or constructive discharge, as long as the employer's retaliation rendered the plaintiff incapable of working. Defendants, on the other hand, will attempt to distinguish the facts and issues from those in *Donelson* to argue that it is not "appropriate" to look to CEPA precedent in construing a LAD claim with facts analogous to those presented in *Donelson.*

In both LAD and CEPA actions, employers will inevitably dispute that their conduct caused the employee's inability to return to work, as opposed to some other event or pre-existing condition. In any event, the *Donelson* holding is sure to spawn a new succession of case law that will either provide more predictability, or create further uncertainty, regarding whether and when an employee may recover lost wages in the absence of an actual or constructive discharge. ■

Endnotes

1. N.J.S.A. 34:19-1 to 8.
2. 2011 WL 2224538 (N.J. June 9, 2011). Justice Roberto Rivera-Soto filed a separate, abstaining opinion for the reasons expressed in *Hopewell Valley Citizens' Group, Inc. v. Berwind Property Group Development Co., L.P.*, 204 N.J. 569, 585-87 (2010) (Rivera-Soto, J., dissenting).
3. *Donelson*, 2011 WL 2224538, at *10. Justices Jaynee LaVecchia and Helen E. Hoens dissented based on a different interpretation of the CEPA's "traditional tort remedies" language, opining that the majority "conflates proximate causation and the extent of damages." The dissent opined that proximate causation exists in the absence of an actual discharge only where plaintiff meets the standard for a constructive discharge (*i.e.*, "only if the defendant's conduct was severe or pervasive enough to amount to constructive discharge"). Therefore, in the dissent's view, an award of lost wages without a constructive discharge effectively permits an employee to reap the benefits of a constructive discharge claim "through the back door," without having to prove that one occurred. *Id*. at *14-15.
4. Joseph Donelson was also a plaintiff whose claim was tried jointly with Seddon before the same jury. Unlike Seddon, Donelson pled constructive discharge and a CEPA violation (as well as intentional infliction of emotional distress). The jury instruction for Donelson's claim included a specific instruction regarding the standard for prevailing upon on a constructive discharge claim, which the jury found was not met and rejected Donelson's claims. *Id*. at *16, n.7, *15.
5. *Id.* at *1.
6. *Id.* at *2.
7. *Id*. at *3.
8. *Id*. at *4.
9. *Donelson DuPont Chambers Works*, 412 N.J. Super. 17, 35 (App. Div. 2010).
10. N.J.S.A. 10:5-1, *et seq.*
11. *Donelson*, 412 N.J. Super. at 32-33.
12. *Id.* at 36.
13. *Donelson*, 2011 WL 2224538, at *9.
14. *Id*.
15. 174 N.J. 1 (2002).
16. 174 N.J. 1 (2002).
17. *Donelson*, 2011 WL 2224538, at *9 (*quoting Shepherd*, 174 N.J. at 28).
18. *Id.*
19. *Donelson*, 2011 WL 2224538, at *9.
20. *Id*. at *10.
21. *Id*.
22. *Id*. at *6-8. The majority reflected upon amendments to the CEPA in 1990 and 2005, which strengthened the CEPA's remedy provision, giving it more "teeth." In 1990, CEPA's remedy provision was expanded to add as available relief: "[a]ll remedies available in common law tort actions shall be available to prevailing plaintiffs." *See* L. 1990, c. 12, § 4. In 2005, CEPA was further strengthened to mandate the court to order "where appropriate and to the fullest extent possible[,]...compensation for *all* lost wages, benefits and other

remuneration." (L. 2005, c. 329, § 2)(emphasis added). The prior version had provided only that the "court *may* also order . . .compensation for lost wages, benefits and other remuneration." L. 1990, c. 12, § 4. (emphasis added).

23. N.J.S.A. 10:5-13 and N.J.S.A. 10:5-12.
24. N.J.S.A. 10:5-3.
25. "The essential purpose behind CEPA is to provide 'broad protections against employer retaliat[ion]' for workers whose whistle-blowing actions benefit the health, safety and welfare of the public." *Feldman v. Hunterdon Radiological Assoc.*, 187 N.J. 228, 239 (2006)(*citing Mehlman v. Mobil Oil Corp*., 153 N.J. 163, 179 (1998)).
26. *Cedeno v. Montclair State Univ.*, 163 N.J. 473, 478 (2000).
27. *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 418 (1994).
28. *Cedeno*, 163 N.J. at 478.
29. *Donelson*, 2011 WL 2224538, at *6. *N.J.S.A.* 34:19-2(e).
30. *See e.g.*, *Nini v. Mercer Community College*, 202 N.J. 98, 108-09 (2010); *Abbamont v. Piscataway Township Board of Education*, 138 N.J. 405, 418 (1994); *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988), *cert. denied*, *Univ. of Med. & Dentistry v. Fuchilla*, 488 U.S. 826 (1988) (*quoting Jackson v. Concord Co*., 54 N.J. 113, 124 (1969)).
31. N.J.S.A. 10:5-12(d).
32. N.J.S.A. 34:19-5 and N.J.S.A. 10:5-13.
33. N.J.S.A. 34:19-5(d).
34. N.J.S.A. 10:5-13.
35. N.J.S.A. 10:5-3.

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GIVE A LITTLE WHISTLE

CAN CONSCIENCE'S GUIDE GENERATE A VALID CEPA CLAIM?

by Douglas J. Klein

Two recent unpublished Appellate Division decisions, *Hester v. Parker*[1] and *Madera v. Horizon Blue Cross Blue Shield of New Jersey*,[2] reaffirm New Jersey's Conscientious Employee Protection Act (CEPA)[3] as a mechanism for combating harmful public ramifications of certain employer conduct and not for resolving employer-employee disputes addressing primarily private issues.

The well-settled criteria for establishing a *prima facie* case of retaliation under CEPA require an employee to show: 1) a reasonable belief the employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; 2) a whistleblowing activity described in the act; 3) an adverse employment action taken against the employee; and 4) a causal connection between the whistleblowing activity and the adverse employment action.[4]

In both *Hester* and *Madera*, the Appellate Division provides valuable guidance on the extent an employer's alleged misconduct must relate to violation of a law, rule, regulation or public policy in order for a plaintiff to state a valid CEPA claim.

Hester v. Parker

Plaintiff Terry Hester claimed he was dismissed in violation of the CEPA after engaging in the whistleblowing activity of filing a lawsuit alleging reverse racial discrimination.[5] A Caucasian, Hester was hired as the director of facilities/operations for the Winslow Township Board of Education in August 2003. He oversaw cleaning and maintenance of all equipment and grounds within the Winslow Township Public School District. Defendant Patricia Parker, an African-American, was elected to the board in April 2004 and served until her term expired in April 2007. During that time, she served as board president from April 2005 to April 2006.

While on the board, Parker made public comments that some found racist or discriminatory—for instance that she did not want to hire "regulars," which some believed referred to Caucasians. Parker allegedly harbored disdain for Hester, evidenced by her attempts to prevent him from wearing a necktie at work and prohibiting him from attending a back-to-school night. District business administrators testified that Parker directed them to evaluate Hester negatively, even though Hester's performance was satisfactory.

In December 2005, Hester filed a complaint with the district's director of human resources claiming Parker discriminated against him in violation of his civil rights. Hester was informed that the district's affirmative action policy did not cover his complaint. He was directed to contact the New Jersey Division on Civil Rights, which he did.

On May 18, 2007, after expiration of Parker's term, Hester filed a notice of claim pursuant to the New Jersey Tort Claims Act[6] and a civil complaint against Parker and the board alleging reverse racism. Before service of the complaint, the board renewed Hester's contract. Thereafter, the business administrator noted several performance issues and recommended Hester's termination. Hester's civil complaint was served on June 18, 2007, and nine days later the district superintendent recommended Hester's termination. The board finally terminated Hester on Aug. 2, 2007.

Following a partial stipulation of dismissal, the Law Division granted summary judgment dismissing Hester's action, finding he could not establish two of the four prongs of his CEPA retaliation claim: There was no competent evidence that Parker had any role in Hester's termination, and Hester failed to demonstrate a causal connection between his December 2005 human resources complaint and/or his May 2007 civil complaint with the August 2007 termination.

The Appellate Division faced an unsettled question over whether filing an employment complaint with an administrative agency or court amounts to whistleblowing activity under CEPA.[7] It recognized that in the context of employment disputes, certainly not every employee who files an administrative complaint or a civil action against his or her employer, or who utilizes another dispute resolution procedure, has a CEPA claim.[8] However, the court ultimately determined that based on both the nature and breadth of Parker's alleged wrongdoing—propagating race discrimination throughout a public school board, which, if true, clearly violated law and public policy mandates—Hester's filing a civil lawsuit could constitute disclosure to a public body under the CEPA.

Accordingly, the Appellate Division reversed the "premature" grant of summary judgment. In addressing the public ramifications issue, the court ruled that an allegation of reverse racial discrimination by a school board could not be considered a private disagreement.[9] In addressing the causation issue, the court called for a more fact-sensitive inquiry into whether Parker engaged in broad, unlawful attacks on Caucasians' job performance and the implications on Hester if in fact she did. By so holding, the court underscored CEPA's goal of addressing the public ramifications of employer wrongdoing which extend

far *beyond* the confines of personal employer-employee disputes.

Madera v. Horizon Blue Cross Blue Shield of New Jersey

Plaintiff Kim Madera claimed she was terminated in violation of the CEPA after engaging in the whistleblowing activity of refusing to alter company performance reports, which she reasonably believed would have been fraudulent or involved a violation of a clear mandate of public policy.[10] Her case reached the Appellate Division on appeal from the Law Division's denial of her motion for reconsideration of its grant of summary judgment in favor of the defendants.

Horizon Blue Cross Blue Shield of New Jersey employed Madera beginning in 1985. She ultimately became director of compliance for Horizon's service division, where she served until her termination in 2005. Madera's immediate supervisor was codefendant Linda Wells, division director of process improvement, who in turn reported to codefendant Patrick Geraghty, division senior vice president.

Among her responsibilities, Madera forecasted Horizon's late claim payment penalties, statutorily assessed under New Jersey's Prompt Pay Act.[11] She reported her findings to Wells and Geraghty. While all penalty assessments were eventually disclosed to the New Jersey Department of Banking and Insurance (DOBI), Madera's reports were for internal use only, and were never submitted to the DOBI or any other external entity.

In 2004 and 2005, Geraghty allegedly asked Madera to adjust forecasted results because he felt her projections were unfavorable to the division. Madera also alleged Wells made five similar requests to alter reports. Every time, Madera expressed discomfort with her supervisors' requests and did not obey.

In May 2005, Madera was asked to determine the cause of complaints from customers and healthcare providers about their experiences with Horizon. She concluded most complaints were attributable to the division, which she also found was responsible for the vast majority of prompt pay assessments. Geraghty and Wells were again displeased with Madera's findings, and asked her to adjust them to reflect better on the division's performance. Madera did not comply. She was terminated soon after.

Geraghty denied telling Madera to change any reports. He testified Madera was fired for failing to supervise her subordinate, Dave Morton. Morton was terminated for operating a travel agency from his desk at Horizon, and after Madera provided written acknowledgment she knew about Morton's side business, she was discharged. Madera admitted using Morton's travel services on four occasions, including to book three personal vacations.

Madera filed suit against Horizon under the CEPA. She claimed that she engaged in protected whistleblowing activity by refusing to comply with her supervisors' demands to make fraudulent misrepresentations in her reports. She further claimed that Horizon's conduct was incompatible with the public policy behind the Prompt Pay Act, since the company would be unable to improve its customer service based on manipulated prompt pay data, and customers would face artificially increased premiums.

The Law Division dismissed Madera's CEPA claim because her reports were internal documents, so their alternation did not constitute illegal or fraudulent activity that harmed the public. The court also found Horizon's ultimate submissions to the DOBI accurately reflected the company's prompt payment penalties, so public policy was not implicated.

The Appellate Division affirmed, agreeing that Madera failed to show how her supervisors' alleged conduct constituted fraud or defrauded Horizon's customers or clients.[12] Even if her supervisors engaged in fraud, the court found Madera had not demonstrated a reasonable belief that modifying her findings would defraud others outside Horizon, since her reports were for internal use, meant only to improve the company's efficiency.[13]

Moreover, Madera's public policy argument that the premiums of Horizon's insureds would be affected was dismissed. The court acknowledged a CEPA plaintiff such as Madera, alleging her employer's retaliatory discharge resulted from the employee's decision not to perform an act she believed involved a violation of a clear mandate of public policy, must identify a statute, regulation, rule or public policy that closely relates to and is incompatible with the complained-of conduct.[14] The plaintiff need not, however, prove the employer's conduct actually violated public policy. While Madera alleged she believed the complained-of conduct was incompatible with public polices behind the Prompt Pay Act, the court held that because her reports were solely for internal purposes, her concerns about public policy violations or undesirable public ramifications arising from changes to those reports were purely speculative.[15]

Finally, the Appellate Division also rejected Madera's attempts to demonstrate the pretext of Horizon's claim it fired her for failing to supervise Morton by showing that other employees were not disciplined for utilizing Morton's travel services. The court noted Madera disobeyed corporate policies for work conduct by condoning Morton's personal business activities during company time and on company equipment. Nevertheless, because the activity Madera complained of involved a private dispute with her employer absent any genuine public ramifications, she had no CEPA claim, so the pretext argument was moot.

Take-Away

The CEPA encourages public and private-sector employees to report illegal or unethical workplace activities, and discourages employers from engaging in such conduct.[16] While courts liberally construe the CEPA in light of its broad remedial nature, *Hester* and *Madera* accentuate the fine line employees walk when invoking the CEPA's anti-retaliatory provision following objection to their employer's conduct or requests to engage in certain activity, and subsequent termination. The Appellate Division in *Hester* recognized that where personal *animus* is so pervasive it becomes public, filing a civil or administrative complaint can constitute a whistleblowing activity under the CEPA, especially where the alleged wrongdoing bears upon a fundamental public policy goal such as deter-

ring race discrimination.

In *Madera*, the Appellate Division reaffirmed that the safeguards of the CEPA are not available to an employee alleging retaliatory termination for merely following her instinct not to acquiesce to what she perceived as suspect conduct on the part of her employer. The CEPA requires that the employee reasonably perceived public harm. ■

Endnotes

1. *Hester v. Parker*, et al., No. A-1681-09T1 slip op. (April 14, 2011).
2. *Madera v. Horizon Blue Cross Blue Shield of N.J.*, et al., No. A-4813-09T4, slip op. (App. Div. April 25, 2011).
3. N.J.S.A. 34:19-1 *et seq.*
4. *Hester*, No. A-1681-09T1, slip op. at 10 (*citing Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003)).
5. *See* N.J.S.A. 34:19-3a.
6. N.J.S.A. 59:1-1 *et seq.*
7. *Hester*, No. A-1681-09T1, slip op. at 15-17.
8. *Id*. at 17-18.
9. *Id*. at 17.
10. *See* N.J.S.A. 34:19-3(c)(2) and 3(c)(3).
11. N.J.S.A. 17B:30-26 *et seq*.
12. *Madera*, No. A-4813-09T4, slip op. at 16. *See also* 34:19-3(c)(2).
13. *Madera*, No. A-4813-09T4, slip op. at 17-18.
14. *Madera*, No. A-4813-09T4, slip op. at 13 (*citing Dzwonar v. McDevitt*, 177 N.J. 451, 462-63 (2003)). *See also* 34:19-3(c)(3).
15. *Madera*, No. A-4813-09T4, slip op. at 20
16. *Id*. (*citing Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 179 (1998) (*quoting Abbamont v. Piscataway Bd. of Educ.*, 138 N.J. 405, 431 (1994))).

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SAFFOS V. AVAYA INC.

THE APPELLATE DIVISION REWRITES THE LAW ON PUNITIVE DAMAGES AND ATTORNEY'S FEES

by Bruce P. McMoran and Justin D. Burns

By the time the Appellate Division was finished rewriting the law on punitive damages and attorney's fees in New Jersey Law Against Discrimination (NJLAD) cases, plaintiff Nicholas Saffos' jury verdict of $10,743,000 and fee award of $1,054,547 was slashed to $3,208,000 and $822,100.50, respectively.[1] Saffos will not be the only individual affected by the Appellate Division's holding in *Saffos v. Aviva.* As a result of the *Saffos* decision, victims of discrimination in New Jersey will now have their punitive damages capped at five times economic damages, and will not be entitled to a fee enhancement unless the attorney's fees recoverable by counsel under the retainer agreement are less than the actual fees incurred in the case.

At a time when employers are becoming increasingly more sophisticated at covering up discrimination, the Appellate Division's decision to: 1) reduce the punishment of employers who violate the NJLAD, and 2) carve away at the incentive for competent counsel to represent victims of discrimination, could have disastrous consequences.

Background

The Trial Court

Avaya Global Real Estate terminated the employment of the plaintiff, Nicholas Saffos, in September 2003 at age 49, after 20 years with the company.[2] Avaya replaced Saffos with a 35-year-old employee with very little experience. At trial, Saffos demonstrated that his termination was part of a scheme by the Avaya group's new director to terminate older workers and replace them with newly hired younger employees.[3] The director frequently justified these discriminatory terminations through the use of a sham performance improvement plan, which human resources led him to understand was the best way to terminate employees he wished to replace.[4]

The jury returned a verdict in Saffos' favor, awarding him $250,000 for his emotional distress, $325,500 for back pay, and $167,500 for front pay. The jury also awarded $10,000,000 in punitive damages. However, "based on the guidelines set forth in *Gore*[5] and in *Baker*"[6] the trial judge remitted the punitive damages award to $3,715,000, which was five times compensatory damages.[7] The trial judge also awarded $843,638 for attorney's fees and an additional $210,909 as a 25 percent fee enhancement.[8]

The Appellate Division

Punitive Damages

The Appellate Division affirmed the trial court's remittitur of punitive damages, agreeing that $10,000,000 was not reasonable and that the five-to-one ratio between punitive and compensatory damages was appropriate.[9] However, the Appellate Division decided that, because "emotional distress damages often contain a punitive element," when applying the five-to-one ratio, the trial court should have deducted the emotional distress damages from the total compensatory damage award before applying the ratio.[10] Thus, the Appellate Division further reduced the punitive damages from $3,715,000 to $2,465,000.

Attorney's Fees

After reducing the trial court's fee award by $21,537.50 to account for the fees incurred in an unsuccessful attempt to have defense counsel disqualified, the Appellate Division affirmed the lodestar amount of $822,100.50.[11] However, the Appellate Division took issue with the trial court's award of a 25 percent fee enhancement. After analyzing the amount of the contingency fee Saffos' counsel would eventually receive under the retainer agreement ($1,374,459.62), the Appellate Division concluded that a fee enhancement was not appropriate because the fees ultimately received by Saffos' counsel were significantly higher than the actual fees incurred during the case ($843,638).[12]

The *Saffos* Court Adopted the Five Times Cap in the Punitive Damage Act

The Punitive Damages Act

The Punitive Damages Act (PDA)[13] prohibits a trial judge from entering a punitive damages award in excess of five times the liability for compensatory damages. However, the PDA expressly excepts claims under the NJLAD from the statutory cap.[14] Although NJLAD claims are excepted from the statutory cap, "the court may consider, but is not bound by, the Legislature's judgment of five times compensatory damages as a normative measure of the limits of proportion."[15]

The trial judge remitted the $10,000,000 punitive damages award, determining that a $3,715,000 punitive damages award was appropriate, proportionate to Saffos' damages, and reasonable considering Avaya's value ($4-7 billion).[16] Although purporting to defer to the trial court's findings, the Appellate Division further reduced the remitted award by employing its own rigid application of the five times multi-

plier. The Appellate Division's application of the five times multiplier to reduce a punitive damages award that the trial court had already found was reasonable undermined the clear exemption of the LAD from the caps under the PDA.[17]

The Appellate Division Improperly Subtracted Emotional Distress Damages from Compensatory Damages Before Applying the Multiplier

The Appellate Division did not rely on any precedent or authority to deduct emotional distress damages from compensatory damages before applying the five times multiplier. In fact, the Appellate Division ignored controlling precedent to the contrary. In *Baker v. National State Bank*, the New Jersey Supreme Court held that, when analyzing the reasonableness of a punitive damages award, the court should examine the proportion of compensatory damages to punitive damages, without deducting emotional distress damages.[18] In guiding the lower court on remand, the Supreme Court made clear that distress awards should be included when considering proportionality, referring to "unquantifiable harm" and consideration of whether defendants committed "an outrageous affront to human dignity."[19]

On remand in *Baker,* the Appellate Division thoroughly analyzed the types of damages that should be included in compensatory damages when reviewing their proportion to punitive damages. In one sentence, the court in *Saffos* eviscerated the standards articulated in the *Baker* decisions.[20] In *Baker,* the Appellate Division stated that, "[s]ince the motivating purpose behind the ratio is to ensure that the relationship between the punitive damages awarded and the actual damages suffered is reasonable, it is appropriate for the actual or compensatory damages figure to include all monies awarded to fully compensate the plaintiff, including prejudgment interest."[21] Relying on the Supreme Court's calculation of compensatory damages, which included pain and suffering,[23] the Appellate Division in *Baker* held that, when determining whether the ratio is appropriate, "the amount of compensatory damages consists of plaintiff's awards for back pay, front pay (as awarded by the jury), pain and suffering, and prejudgment interest."[23]

The court in *Saffos* justified its novel holding by citing to one sentence from *State Farm v. Campbell*—an action for bad-faith failure to settle an insurance claim—that "emotional distress damages often contain a punitive element."[24] The decision in *Saffos* directly contradicts the holdings of the New Jersey Supreme Court and Appellate Division in *Baker*.

The Saffos *Effect on Future Punitive Damages Awards*

New Jersey courts have routinely held that the five times cap on punitive damages contained in the PDA does not apply to NJLAD claims. Indeed, the PDA expressly states that it does not apply to NJLAD claims. However, the rigid application of the five-to-one ratio adopted by the court in *Saffos* implies that five times is the high-end multiple that itself was only justified in this case because the conduct was egregious and targeted a large class of workers, not just the plaintiff. The Appellate Division's affirmance of remittitur in connection with the blatantly discriminatory conduct of a $4-7 billion company is likely to mislead lower courts to conclusions in contravention of the PDA's exemption from the cap.

Saffo's Analysis of Attorney Fee Enhancements Violates the New Jersey Supreme Court's Holding in *Szczepanski* and Rewrites *Rendine*

The Appellate Division Ignored the New Jersey Supreme Court

In reviewing whether the trial court's award of a 25 percent attorney fee enhancement was appropriate, the Appellate Division analyzed the retainer agreement to compare the amount of attorney's fees that Saffos' counsel would ultimately receive under the terms of the retainer agreement to the fees actually incurred in the case.[25] The court framed the issue as follows: "Was a fee enhancement appropriate in this case in light of the fee provided by the retainer agreement."[26]

The Appellate Division's reliance on the retainer agreement was improper and violated the New Jersey Supreme Court's holding in *Szczepanski*—decided the same day as *Rendine*—that "the reasonable counsel fee payable to the prevailing party under fee-shifting statutes is determined independently of the provisions of the fee agreement between that party and his or her own counsel."[27] Indeed, the *Saffos* court quoted *Szczepanski's* bar against considering retainer agreements when holding that an unenforceable provision in a retainer agreement does not preclude a statutory fee award.[28] The court's internal inconsistency in later rejecting a fee enhancement due to the language of the retainer agreement itself underscores the error in the *Saffos* holding. Plaintiff's counsel's retainer agreement should have been irrelevant to the analysis of enhancement.

The Appellate Division Rewrites Rendine

The Appellate Division in *Saffos* acknowledged that the New Jersey Supreme Court's holding in *Rendine* governs the determination of fee enhancements in NJLAD cases.[29] The purpose of fee enhancements is to level the playing field between employers and employees by encouraging capable attorneys to represent victims of unlawful discrimination who cannot afford a lawyer and ensure that a reasonable fee is paid to prevailing counsel. As the Supreme Court held in *Rendine*:

> Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of law… But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy [that] he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.[30]

In order to encourage capable counsel to vindicate these rights, the Supreme Court held that, after calculating the lodestar amount, the trial court should consider whether to enhance the attorney fee award "to reflect the risk of

nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome."[31] "Both as a matter of economic reality and simple fairness...a counsel fee awarded under a fee-shifting statute cannot be 'reasonable' unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed."[32]

In addition to assessing the risk of nonpayment when determining the fee enhancement, the Supreme Court also directed trial courts to account for the likelihood of success on the claim,[33] whether the attorney was able to mitigate risk of nonpayment in any other way,[34] and whether other economic risks were aggravated by contingency of payment.[35]

The Appellate Division's holding in *Saffos* added a new consideration not articulated by the Supreme Court in *Rendine*: whether the attorney's fees plaintiff's counsel will ultimately receive under the retainer agreement are greater than the lodestar.[36] With the addition of this new consideration, the Appellate Division turned the *Rendine* factors from a forward-thinking incentive designed to encourage capable attorneys to take 'high-risk' NJLAD contingency cases, to a hindsight approach that punishes attorneys who obtain favorable results for their clients. Had the Supreme Court in *Rendine* wanted trial courts to examine retainer agreements when awarding fee enhancements, it would have said so. It also would not have instructed trial courts that same day in *Szczepanski* to determine fee awards independently of the provisions of the retainer agreement.

Conclusion

The Appellate Division delivered a damaging blow to victims of discrimination when it ignored longstanding precedent in *Baker* and held that emotional distress damages should be removed from consideration when determining whether the ratio of punitive to compensatory damages is reasonable. By reducing the punitive and deterrent effect of NJLAD damage awards, future discriminating employers were the real winners in the *Saffos* holding. The court also failed to follow the letter and the spirit of *Rendine* and *Szczepanski* when it overturned the lodestar enhancement, because *Saffos*' counsel obtained a favorable jury verdict for his client. Contrary to our Legislature's intent, the *Saffos* court punished—rather than rewarded—the prevailing party and her attorney for having undertaken to enforce New Jersey's public policy against discrimination. ■

Endnotes

1. *Saffos v. Avaya, Inc.*, 419 N.J. Super. 244 (App. Div. 2011).
2. Saffos began his employment with AT&T in 1983 in the corporate real estate department. After AT&T created Lucent Technologies, Saffos was transferred to Lucent. When Avaya was created in 2000, Saffos was transferred to Avaya's Global Real Estate group. *Id.* at 252.
3. *Id.* at 260.
4. *Id.* at 257.
5. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).
6. *Baker v. Nat'l State Bank*, 161 N.J. 220 (1999).
7. *See Saffos*, 419 N.J. Super. at 262.
8. *Id.* at 277-78.
9. *Id.* at 264, 269.
10. *Id.* at 269.
11. *Id.* at 275.
12. *Id.* at 275, 278.
13. N.J.S.A. § 2A:15-5.14b.
14. N.J.S.A. 2A:15-5.14c. *See also, Baker v. National State Bank*, 161 N.J. 220, 229 (1999).
15. *Baker*, 161 N.J. at 231.
16. *Saffos*, 419 N.J. Super. at 261-62 (noting that there was dispute whether Avaya was valued at either $4 or $7 billion).
17. *Id.* at 269.
18. *Baker*, 161 N.J. at 231.
19. *Id.*
20. *Compare, Saffos*, 419 N.J. Super. at 269, with, *Baker v. National State Bank*, 353 N.J. Super. 145, 158-59 (App. Div. 2002).
21. *Baker*, 353 N.J. Super. at 159 (emphasis added).
22. *Id.* at 158.
23. *Id.* at 161.
24. *See, State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003).
25. *Saffos*, 419 N.J. Super. at 275, 278.
26. *Id.* at 277.
27. *Szczepanski v. Newcomb Med. Center, Inc.*, 141 N.J. 346, 358 (1995).
28. *Saffos*, 419 N.J. Super. at 273 (holding that an unenforceable provision in the retainer agreement does not prevent the award of counsel fees under the LAD because "the Court in *Szczepanski* made it clear that 'the reasonable counsel fee payable to the prevailing party under fee-shifting statutes is determined independently of the provisions of the fee agreement between that party and his or her counsel").
29. *Id.* at 276.
30. *Rendine v. Pantzer*, 141 N.J. 292, 323 (1995) (quotation omitted).
31. *Id.* at 337.
32. *Id.* at 338, 341 ("…the lodestar amount is not a reasonable fee to be charged to the nonprevailing party because it does not reflect the risk of nonpayment") (emphasis added).
33. *Id.* at 340-41.
34. *Id.* at 339.
35. *Id.* at 339.
36. *Saffos*, 419 N.J. Super. at 278-79.

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THE DIFFERENCE BETWEEN A POSTCARD AND A SEALED LETTER

CAN EMPLOYEES PRESERVE THE ATTORNEY-CLIENT PRIVILEGE WHEN USING A WORK COMPUTER TO COMMUNICATE WITH THEIR ATTORNEY?

by Alexander L. D'Jamoos and Dena B. Calo

In 2010, the New Jersey Supreme Court issued a decision in *Stengart v. Loving Care Agency, Inc.*,[1] which expanded the protections of employees' private use of company computers. In *Stengart*, the Court held that an employee can expect privacy and confidentiality in emails exchanged with her attorney through her personal, password-protected, web-based email account when using an employer-issued computer.

A recent decision from California's Third District Court of Appeals, *Holmes v. Petrovich Development Co.*,[2] appears to have arrived at a contrary result. In *Holmes*, the court held that an employee did not have a reasonable expectation of privacy when exchanging emails with her attorney through a password-protected company email account while using an employer-issued computer. Though these two cases produced contrary results, a close comparison of the facts suggests sound reasoning behind the courts' diverging decisions. When considered together, these decisions provide clearly definable standards for determining when an employee may have a reasonable expectation of privacy, notwithstanding his or her use of company property to communicate with her attorney and in which state he or she does so.

Stengart v. Loving Care Agency, Inc.

In *Stengart v. Loving Care Agency, Inc.*, the Supreme Court of New Jersey unanimously held that an employee could reasonably expect that email communications with her lawyer sent through her personal, password-protected, web-based email account while using a company-issued laptop computer would remain privileged and confidential. The *Stengart* decision recognizes that in the modern workplace "the line separating business from personal activities can easily blur," and the Court's holding protects an employee's right to privacy when using company property, particularly under circumstances where there exists ambiguity in the company's email monitoring policy regarding an employee's private use of the system.

The facts of this case are pivotal to the Court's ruling. Loving Care Agency, Inc., a home-care nursing and health services company, employed the plaintiff, Marina Stengart, as the executive director. She filed a lawsuit against Loving Care, its owner, officers and several board members, alleging violations of the New Jersey Law Against Discrimination.[3] Upon her departure, Stengart returned her company-issued laptop computer. To preserve electronic evidence, Loving Care hired experts to create a forensic image of the laptop's hard drive. Unbeknownst to Stengart, the computer automatically made a copy of each web page she viewed, and stored the copies as temporary Internet files. Among these files were emails sent between Stengart and her attorney through her personal, password-protected email account on Yahoo's website concerning the lawsuit against Loving Care.

Stengart objected to the use of these privileged emails by Loving Care's attorneys during the litigation of her discrimination suit. Several differing court opinions followed regarding the use of these emails.

In preventing Loving Care from using the emails, the New Jersey Supreme Court focused on two principle areas: first, the adequacy of notice provided by the company's electronic communication policy; and, second, the important policy concerns raised by the attorney-client privilege.

Loving Care's electronic communication policy stated that "the company reserves and will exercise the right to review, audit, intercept, access and disclose all matters on the company's media systems and services at any time." It further stated that "e-mail and voice mail messages, Internet use and communication and computer files are considered part of the company's business and client records."

However, the Court found that the policy was not clear because the policy permitted "occasional personal use," and failed to warn employees specifically that the contents of their personal, password-protected, web-based email accounts were subject to monitoring if company equipment is used to access the account. The policy was also unclear because it failed to warn employees that the contents of personal emails would be stored on the computer's hard drive after they were viewed, and could later be retrieved by the employer. These drafting flaws rendered the Loving Care policy ambiguous and fatal to the defendant's arguments in the case.

The Court also found that Stengart had a reasonable expectation of privacy in the emails at issue because of the strong public policy supporting the attorney-client privilege. These confidential emails were exchanged between Stengart and her attorney. Communications between a lawyer and his or her

client are generally regarded as privileged, confidential and protected from disclosure. The strong public policy supporting the confidentiality of attorney-client communications could not be waived by the ambiguous company policy. Therefore, sending and receiving messages with her attorney through her private, password-protected Yahoo email account did not waive the privilege even though Stengart used the company computer to do so.

The Court emphasized that the employer need not read the contents of personal, privileged, attorney-client communications in order to enforce lawful policies relating to employee computer use.

Holmes v. Petrovich Development Co.

In *Holmes v. Petrovich Development Co.*, California's Third District Court of Appeals did not recognize the attorney-client privilege when the employee used her password-protected company email address on an employer-issued computer to exchange emails with her attorney. Focusing on the company's clearly articulated technology resource policy, the court held that the employee did not have a reasonable expectation of privacy in her personal email communications with her attorney when using the company network.

Plaintiff Gina Holmes was the executive assistant to Paul Petrovich, the principal of Petrovich Development Company. Shortly after Holmes began her employment, she informed Petrovich that she would be taking maternity leave, but that she planned to work up until her due date. Initially, she informed Petrovich that she would take maternity leave for only six weeks, commencing on her due date. One month later, when they discussed the need to find a temporary replacement for her during the leave, Holmes stated that she would be taking leave several weeks before her due date and could be on leave for four months, the maximum time allowed by California law and company policy.

Thereafter, Petrovich and Holmes exchanged several contentious emails. Holmes revealed very personal information with Petrovich about her medical issues and prior pregnancies, and Petrovich shared those emails with others in the organization, including the company's in-house counsel, human resources director, and the office administrator that manages payroll and personnel files. Upon learning this fact, Holmes consulted an attorney, Joanna Mendoza, via email. Holmes used the company's email system to communicate with Mendoza, and forwarded her several of Petrovich's emails.[4] Holmes then quit her employment claiming, among other things, that she was constructively discharged.

Holmes brought a lawsuit against her employer and supervisor for discrimination, retaliation, wrongful termination, violation of the right to privacy, and intentional infliction of emotional distress. The trial court granted summary adjudication with respect to the causes of action for discrimination, retaliation and wrongful termination. A pivotal issue was the defendants' use of email communication between Holmes and her attorney in support of the defendants' motion for summary judgment. The trial court allowed the use of the emails because it found that Holmes had waived the attorney-client privilege.

On appeal, Holmes argued that the trial court erred in denying her motion seeking return of the emails she sent her attorney using the company computer, and requesting discovery sanctions for the alleged violation of her attorney-client privilege. Evaluating the propriety of the defendants' use of the emails Holmes sent to her attorney, California's Court of Appeals focused on the adequacy of notice to employees provided by the company's technology resources policy while keeping in mind the statutory framework protecting the attorney-client privilege.

The company's employee handbook contained provisions clearly spelling out the policy concerning use of its technology resources, such as computers and email accounts. The policy unequivocally stated that the company's technology resources should be used only for company business and that the employees are prohibited from sending and receiving personal emails. Significantly, the handbook warned that "[e]mployees who use the Company's Technology Resources to create or maintain personal information or messages have no right of privacy with respect to that information or message." The "Internet and Intranet Usage" policy in the handbook specifically stated: "E-mail is not private communication, because others may be able to read or access the message. E-mail may best be regarded as a postcard rather than as a sealed letter...." The handbook also provided that the company may "inspect all files or messages...at any time for any reason at its discretion" and that it would periodically monitor its technology resources for compliance with the company's policy.[5]

By using the company's computer to communicate with her lawyer, knowing the communications violated the company's computer policy and could be read by her employer, the court found that Holmes did not communicate "in confidence by means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted," as set forth in Evidence Code Section 952.[6] Pursuant to Evidence Code Section 912(a),[7] Holmes waived her right to claim a lawyer-client privilege by transmitting this communication over a medium she knew was accessible by her company.[8]

Holmes argued that her email did not lose its privileged character "for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication," as set forth in Evidence Code Section 917. The court rejected her argument, finding that Section 917 does not mean that an electronic communication is privileged: 1) when the electronic means used belongs to the defendant; 2) the defendant has advised the plaintiff that communications using electronic means are not private, may be monitored, and may be used only for business purposes; and 3) the plaintiff is aware of and agrees to these conditions.[9]

The court concluded that the "e-mails sent by Holmes to her attorney regarding possible legal action against defendants

did not constitute 'confidential communication between client and lawyer' within the meaning of Evidence Code section 952."[10] The court reached this conclusion because Holmes used the company's computer to send the emails even though: 1) she had been told of the company's policy that its computers were to be used only for company business and that employees were prohibited from using them to send or receive personal email, 2) she had been warned that the company would monitor its computers for compliance with this company policy and thus might "inspect all files and messages...at any time," and 3) she had been explicitly advised that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message."[11] Under these circumstances, the court did not deem the communications to be privileged.

California's Court of Appeals commented that "the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him."[12]

Reconciling the *Stengart v. Loving Care* and *Holmes v. Petrovich* Decisions

The Court of Appeals in *Holmes* distinguished the holding in *Stengart* by noting that, in the latter, the plaintiff: 1) used a personal web-based email account accessed from an employer's computer, 2) where the use of such an account was not clearly covered by the company's policy, and 3) the emails contained a standard hallmark warning that the communications were personal, confidential, attorney-client communications. A comparison of these facts reveals the sound reasoning of the courts' diverging decisions.

First, in *Holmes*, the California Court of Appeals placed considerable weight on the company's explicit notice that employees did not have a right to privacy in personal email sent on company computers, which were subject to inspection at any time, and the company never conveyed a conflicting message or practice. The employer's enforcement of these policies, or lack thereof, was not a prevalent factor in the *Holmes* decision,[13] but may be a more significant factor when this issue is addressed by other courts. The employee's expectation of privacy was deemed unreasonable given the unambiguous company policy. The court relied on the United States Supreme Court's decision in *City of Ontario v. Quon*,[14] which recognized that "employer policies concerning communications will shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."

By comparison, in *Stengart* the Court found that there was ambiguity in the company's email monitoring policy allowing for an employee's "occasional" private use of the system.[15] Therefore, Stengart had a reasonable expectation that her personal emails would be kept private and confidential.

Second, while both Holmes and Stengart had used company-issued computers to communicate with their attorneys, their two cases are factually distinguishable because of the simple fact that the plaintiff employees used different email accounts. Though not emphasized by either decision, this fact is of particular importance when evaluating whether the employees' expectation of privacy is reasonable. On the one hand, Holmes sent an email to her attorney using a password-protected[16] *company email account*. As previously stated, the company policy expressly prohibited personal use of its technology resources, stated that emails are not private, and warned employees that their emails would be monitored. On the other hand, in *Stengart* the plaintiff used a company-issued laptop computer to access her *web-based, password protected, personal email account* to communicate with her attorney. Loving Care did not have an express policy notifying the employee that all web pages, even those that are password-protected, would be stored as images in the computer's hard drive and were reviewable by the company. Loving Care's policy also permitted employees some personal use of the computer system, while the Petrovich policy forbade all personal use.

Third, Holmes' emails contained no message or warning that the emails were confidential, attorney-client communications, while Stengart's emails did contain a standard hallmark warning that the communications were personal, confidential, attorney-client communications. This distinction supported the New Jersey Supreme Court in preserving the privilege.

These factual differences resulted in the courts' divergent opinions, and should guide employers in the future. An employer's right to monitor and later use employee email goes only as far and the employer's own clear and unambiguous policies will allow. Where the employee leaves the employer's network, and takes additional measures to preserve confidentiality by utilizing a web-based, password-protected email system to communicate with a lawyer and attorney-client privilege designation, it is more likely that the employee's right to privacy will be preserved.

Practical Application of the Case Law in *Stengart* and *Holmes*

When considered together, these decisions provide clearly definable standards for determining when an employee may have a reasonable expectation of privacy, notwithstanding her use of company technology resources to communicate with his or her attorney, or where she does so. An employee has a reasonable expectation of privacy when the employer fails to provide notice of a clear, unambiguous policy prohibiting personal use of the employer's computer and technology resources. Where an employee has a reasonable expectation of privacy that is violated by his or her employer, an employer may be held liable to the employee under the common law tort of "intrusion on seclusion," and, if a public employer, under the search and seizure clauses of the federal and state constitutions.

The New Jersey Supreme Court's holding in *Stengart* restricts an employer's ability to monitor *privileged* content even if it is accessible using the company's computer or Internet surveillance system.

To avoid this result, employers are encouraged to communicate their technology resource policies to their employees clearly. In order to have an

effective and enforceable electronic communication policy, employers must unambiguously notify employees that:

1. technology resources should be used only for company business;
2. employees are prohibited from sending and receiving personal emails;
3. employees who impermissibly use the company's technology resources to create or maintain personal information or messages have no right of privacy with respect to that information or message;[17]
4. the company regularly monitors the use of its property and systems and may inspect all files or messages at any time for any reason at its discretion to ensure compliance with the company's policies;
5. the contents of all information or messages created or maintained, regardless of their personal nature, will be stored, monitored and potentially accessible by the employer or its agents; and,
6. email is not private communication because others may be able to read or access the message.

By communicating these workplace technology rules, employers are properly maintaining their right to monitor email and clearly informing employees that they lose their right to privacy when using the company's technology.

However, the *Stengar*t case is a good reminder that policies must not be overreaching. The Court discouraged employers from instituting "zero-tolerance" policies that ban all personal computer use, and stated that it will not enforce policies that permit employers to read an employee's attorney-client communications even if accessed on a personal, password-protected email account. In doing so, the Court was reminding employers that in this ever-changing world of technology, there still need to be some boundaries. Where an employee attempts to exit the employer's computer system and enter a password-protected, web-based email application to send and receive confidential and privileged email, an employer's blanket technology resource policy will not overcome the strong privacy protections to which that employee is entitled. This limitation is especially true when those communications are between the employee and his or her attorney. ■

Endnotes

1. 201 N.J. 300 (2010).
2. 119 Cal.Rptr.3d 878, 896 (Cal. App. 3 Dist. Jan 13, 2011).
3. 201 N.J. at 308.
4. *Id*. at 1056.
5. *Id*. at 1052.
6. Section 952 provides that a "confidential communication between client and lawyer" is "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted...." *Id*. at 1064-65.
7. Section 912(a) provides that the right of any person to claim a lawyer-client privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." *Id*. at 1065.
8. It should be noted that during discovery, Holmes' counsel specifically permitted defendants' counsel to ask questions concerning the e-mails, stating: '"If the only extent of your questions are going to be about this e-mail exchange, *and you're not going to go into a follow-up meeting that was had or any other communications with her attorney,* and it's not going to be considered a waiver of any of *those communications,* then I have no problem with it. (Italics added.)'" *Id*. at 1066.
9. *Id*. at 1068.
10. *Id*.
11. *Id*. at 1051.
12. *Id*. at 1051, 1068.
13. The court found that it was unreasonable for Holmes to believe that her personal email sent by the company computer was private simply because, to her knowledge, the company had never enforced its computer monitoring policy. It should also be noted that Holmes had been employed by the company only for approximately three months. *Id.* at 1071.
14. __ U.S. __, 130 S. Ct. 2619, 2630 (2010).
15. *Id*. at 1071.
16. Holmes believed that her personal email would be private because she utilized a private password to use the company computer and she deleted the emails after they were sent. However, the court found her belief to be unreasonable because she was the company warned her that it would monitor e-mail to ensure employees were complying with office policy and told her that she had no expectation of privacy in any messages she sent via the company computer. Moreover, the company's controller, the company's information technology person, and the company owner, Cheryl Petrovich, had access to all email sent by employees with private passwords that were sent and received by company computers. *Id*. at 1069-70.
17. In *Holmes*, this policy was not interpreted as granting employees permission to use the company's technology resources for personal use.

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A REVIEW OF THE ADAAA FINAL REGULATIONS

by Ari G. Burd and Jay S. Becker

Although the ADA Amendments Act of 2008 (ADAAA) was enacted on Sept. 25, 2008, and became effective Jan. 1, 2009, the U.S. Equal Employment Opportunity Commission (EEOC) did not issue the final amended regulations to the ADAAA until March 25, 2011. These regulations, which became effective on May 24, 2011, provide guidance to employers regarding the treatment of their disabled employees. The main thrust of these regulations is to shift the focus from whether an individual's impairment is a disability to whether discrimination is the cause of any adverse employment action.

In enacting the ADAAA, Congress sought the reinstatement of a "broad scope of protection" for individuals.[1] Without actually changing the definition of a "disability," the ADAAA makes it easier for an individual seeking protection under the Americans with Disabilities Act (ADA)[2] to establish that he or she has a disability within the meaning of the statute.[3] It accomplishes this change by appreciably expanding the rules of construction used to determine if a person qualifies as disabled. In making these changes, the ADAAA in essence overturns a number of United States Supreme Court decisions that Congress indicated had interpreted the definition of "disability" far too narrowly. These decisions, such as *Sutton v. United Airlines, Inc.*,[4] *Murphy v. UPS*,[5] *Albertsons v. Kirkingburg*,[6] *Toyota v. Williams*,[7] and others had denied protection to individuals suffering from a variety of impairments such as cancer, diabetes and epilepsy, which are now all covered under the ADAAA.

Under both the ADA and the ADAAA, a disability is determined using a three-pronged approach, and is defined as either:

1. A physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"); or
2. A record of a physical or mental impairment that substantially limited a major life activity (referred to as "record of"); or
3. When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor (referred to as "regarded as").[8]

The rules also contain a broad definition of "physical or mental impairment." The definition includes any physiological disorder or condition; cosmetic disfigurement; or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine. Also covered are any mental or psychological disorder, such as intellectual disability (previously referred to as mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.[9]

The definition of "impairment" in the new regulations is almost identical to the definition in the EEOC's original ADA regulations, except that the immune and circulatory systems have been added to the list of body systems that may be affected by an impairment. These systems are specifically mentioned in the ADAAA's examples of major bodily functions.

Examples of "major life activities" are also discussed within the new regulations; however, most of the examples provided date back to the original ADA regulations, EEOC guidance or case law. The non-exhaustive list of such activities includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

The regulations do expand the scope of "major life activities" to include the operation of major bodily functions, including functions of the immune, digestive, neurological, respiratory, circulatory, and reproductive systems, to name a few. Also specifically included in the final regulation is the operation of an individual organ within a body system (such as a kidney or liver). While there is no *per se* list of impairments that must be considered disabilities, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability (such as deafness, blindness, cancer, diabetes, HIV).

The interpretation of the term "substantially limits" is of great importance to the ADAAA. A definition of the term was specifically omitted from the final regulation. In doing so, the EEOC argued such a definition would likely lead to greater focus and attention paid to the threshold issue of coverage under the act, which was not Congress's intent. Instead, the regulations provide nine rules of construction that must be applied in determining whether an impairment substantially limits (or substantially limited) a major life activity.[10] These rules of construction seek to ensure that a wide range of individuals will be covered under the ADA.

1. *Broad construction*: "Substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA, and is not meant to be a demanding standard.
2. *Comparison to general population*: An impairment will be considered a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. The individual need not have an impairment that prevents or significantly or severely restricts him or her from performing a major life activity in order to be considered substantially limited.
3. *Extensive analysis is not needed*: The primary focus in cases brought under the ADA should be whether covered entities have complied with their obligations, not whether an individual's impairment substantially limits a major life activity. The emphasis in ADA cases should be squarely on the merits, and not on the initial coverage question.
4. *Individualized assessment*: There continues to be a need for an individualized assessment. When making this assessment, the term "substantially limits" is to be interpreted and applied to require a degree of functional limitation that is considerably lower than the standard applied previously.
5. *Use of scientific or medical evidence*: The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Such evidence remains permissible when appropriate.
6. *Mitigating measures*: The determination of whether an impairment substantially limits a major life activity is made without regard to the ameliorative effects of mitigating measures (with the exception of the ameliorative effects of ordinary eyeglasses or contact lenses). This change is meant to protect individuals from discrimination who were previously not considered disabled because the positive effects of their medication, medical supplies or other interventions were taken into consideration.
7. *Impairments in remission or episodic*: An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity in its active state.
8. *Only one substantial limitation required*: An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.
9. *Impairments lasting fewer than six months*: The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting; however, this assessment only applies to the "regarded-as" coverage (the third prong of the disability definition).

"Regarded as" coverage is now easier than ever for individuals to establish. Under the original ADA, an individual seeking coverage under this definition had to show that a covered entity *believed* the individual's impairment or *perceived* impairment substantially limited performance of a major life activity. Now a covered entity "regards" an individual as having a disability if it takes a prohibited action (termination/demotion/failure to hire) based on an individual's impairment or an impairment that the entity believes the individual has. In essence, the focus is now on how the covered entity treats the individual because of his or her impairment, rather than what the covered entity may have actually believed about the individual's impairment.[11] The regulation also makes clear that reasonable accommodations are not required for those "regarded as" having a disability, as opposed to those with an actual disability or with a record of disability.[12]

Clearly the ADAAA and the EEOC's final regulations make it easier for individuals to establish their right to protection pursuant to the ADA. These regulations will ensure that the attention of future litigation is shifted away from the question of whether a disability actually exists to whether discrimination has, in fact, occurred. ■

Endnotes

1. 29 CFR § 1630.1 (c)(4).
2. 42 U.S.C. § 12101 *et seq*.
3. Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA at http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.
4. 527 U.S. 471 (1999).
5. 527 U.S. 516 (1999).
6. 527 U.S. 555 (1999).
7. 534 U.S. 184 (2002).
8. 29 CFR § 1630.2(g).
9. 29 CFR § 1630.2(h).
10. 29 CFR § 1630.2(j)(1)(i)-(ix).
11. 29 CFR § 1630.2(l).
12. 29 CFR § 1630.2(g)(1)(iii).

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