Faragher-Ellerth at 20
How Far Have We Come? And Where Do We Need to Go?

By Lauren Stiller Rikleen

Silence in the workplace is the accelerant that fuels sexual harassment. Equally complicit, however, are reporting systems that offer a protective cover for employers without addressing the root causes of the silence.

Twenty years ago, the U.S. Supreme Court held that employers may be held vicariously liable for a hostile environment created by a supervisor’s behavior. If the behavior did not result in a tangible adverse job consequence, the employer may assert an affirmative defense that includes two required elements. First, the employer can demonstrate it exercised reasonable care to prevent and promptly correct sexually harassing behaviors. Second, the employer can show that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. Based on the names of the cases, this doctrine is frequently referred to as the Faragher-Ellerth Defense.

As employers sought to implement mechanisms that would demonstrate reasonable care to prevent bad behaviors, sexual harassment training emerged as a key strategy to assert the affirmative defense to a claim of a hostile work environment. Prudent employers required sexual harassment training coupled with a system for reporting harassment to, for example, the Human Resources Department.

One flaw in programs adopted to strengthen the defense against a potential law suit is that policies for reporting sexual harassment are generally underutilized. Based on an analysis of existing data, the U.S. Equal Employment Opportunity Commission (EEOC) stated that: “…approximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.”

Rather, the EEOC noted, those who experience sex-based harassment are more likely to avoid the harasser, deny or downplay their experience, or try to ignore or endure the behavior.

The failure to report is not unreasonable. Those who report unwelcome behavior can experience retaliation in two ways: from the workplace itself, such as being denied a promotion or being transferred; and socially from one’s peers, which can manifest in such treatment as being blamed, becoming the subject of gossip, or labeled as a troublemaker. For example, Moussouris v. Microsoft Corp., a lawsuit filed against Microsoft for gender discrimination,1 includes allegations that when complainants reported their concerns about pay disparity and promotion issues to HR, their circumstances were either ignored or worsened.

If the #MeToo Movement and the revelations over the past 6 months have taught us anything, it is that standard sexual harassment policies and related training programs are woefully inadequate. The outpouring of stories from workplaces around the country demonstrate that a far more comprehensive commitment to a respectful and inclusive workplace culture is essential if meaningful changes are to occur.

continued on page 10
DON’S DIARY

December » The year ended with the Section leadership aggressively evaluating all aspects of the Annual Conference which had been held in Washington. The final grade assigned was an overall “A+”, but there were many observations on ways to improve our performance in the future. With each passing year there are “lessons learned” which help make the next conference even better. The immediate assessment of past performance is especially helpful in that the Planning Committee had already begun the process of laying the foundations for the upcoming 2018 program: CLE topics, speakers, sponsorships and sites for social/networking activities.

January » I turned my attention to Big ABA (the “Mothership”) matters such as pending resolutions scheduled to come before the House of Delegates at the ABA Midyear Meeting (addressing such topics as “sexual harassment in the workplace”) and the proposed restructuring of the association's dues through the implementation of a program entitled “OneABA”. OneABA will have impactful implications for our Section that range from good to bad: possibly more members, lower ABA dues for most current members and no Section dues. It is that last element that is most troubling to our leadership. Currently, our Section collects more than $800,000.00 in dues—money that is put back into programming (e.g.: Webinars, Leadership Training, Trial Advocacy Competition, Fellowships, Section Development Scholarships, Law School Outreach, staff support for standing committees). We also use some dues money to help fund the Annual Conference in order to keep the registration fees affordable and lower than similar training offered by other providers. The proposed revenue sharing formulas, which as yet are not final, would provide an amount less than half of the Section's current dues intake. Were this to happen, programming would have to be trimmed and Conference registration fees raised.

February and March » Standing Committee Midwinter Meetings take up much of the Section's energy and oxygen for these two months. Held in numerous locations as diverse as San Diego, San Juan, Puerto Vallarta and Nassau. Joe Tilson and I, along with our Council Liaisons, worked together to ensure that Section leadership was present and participative at each and every one of the gatherings. By all reports, the meetings were a success in relationship both to the academic content and to the networking opportunities provided at social events. At each meeting, a self-critique session was held by the Committee Chairs interacting with Section officers/liaisons to determine how to improve the programming for the following year.

April » Refocusing on Section business: Coordinating with the appropriate Committees on (1) preparing the 2018–2019 budget; (2) planning the August ABA Summer Meeting CLE presentations; (3) choosing speakers for the November Annual Conference program; (4) finalizing the curriculum for the upcoming Leadership Development Program (September); (5) setting the schedule for the fall Trial Advocacy Competition (October–January); (6) circulating a survey concerning immigration issues; (7) releasing applications for Fellowships and Section Development Scholarships; (8) nominating Section members for service on the Council and Executive Committee; and (9) working with BBNA to insure that publication schedules are met for release of new/updated/revised Section treatises. Finally, getting ready to host the Council for its Spring Meeting here in Coral Gables, Florida.

May » The work on Section business continues even at the International Labor and Employment Law Committee’s Midyear Meeting in Milan, Italy…someone has to do it!

Until the summer edition of this critically-acclaimed newsletter reaches you, stay safe and may good fortune be yours.

Don Slesnick is a Partner in the Coral Gables, Florida office of Slesnick and Casey LLP. He became Chair of the Section on August 5, 2017.
ERISA: What Employment Lawyers Need to Know

By Sarah Bryan Fask

Many attorneys who practice employment law run like the wind when the Employee Retirement Income Security Act is mentioned. ERISA is a complicated statute that can be intimidating for attorneys who do not regularly deal with employee-benefits issues in their practice. Although ERISA practitioners frequently counsel that “dabbling” in benefits law is ill-advised, employment attorneys cannot completely ignore this statute. ERISA can impact run-of-the-mill discrimination cases and other common-law employment claims.

Section 510 of ERISA prohibits an employer from discharging, fining, suspending, expelling, disciplining, or discriminating against a participant or beneficiary for exercising any right to which he or she is entitled under the provisions of an employee benefit plan or for the purpose of interfering with the attainment of such a right. Frequently, Section 510 claims hide under an Age Discrimination in Employment Act claim. If a complaint alleges that the plaintiff’s employment was terminated in order to interfere with the attainment of more generous retirement benefits, ERISA could be implicated. Section 510 claims are analyzed under the familiar McDonnell Douglas burden-shifting paradigm common to statutory anti-discrimination law claims.

Further, ERISA will preempt a state law discrimination claim if the state law claim attempts to prohibit a benefit plan from doing what ERISA permits. A benefit plan cannot be forced to comply with state and local ordinances in such circumstances. If a plaintiff seeks ERISA-regulated benefits under a state or local law, ERISA is implicated.

Employment lawyers also find themselves litigating claims for severance benefits, either as a stand-alone claim or because the former employee plaintiff seeks severance benefits as a form of damages. But, depending on how the severance policy or plan is drafted, ERISA can come into play once again. A severance policy or program can be considered an ERISA plan if it is a “plan, fund, or program” “established or maintained” by an employer or employee organization and it provides an ERISA benefit, such as a welfare benefit (like health insurance), retirement income, or deferred compensation. And, whether the severance policy or program is considered to be an ERISA plan often turns on how complex the policy or program is and whether the policy requires exercise of discretion and judgment that are part of an “ongoing administrative scheme” to provide the severance benefits. In contrast to an ERISA severance plan, simple payroll practices that do not require ongoing administration (i.e., a policy providing that laid off employees will always get 30 days of severance) do not qualify as ERISA plans. If the severance program is an ERISA plan, attorneys would be wise to take note of how ERISA may impact the case. For example, this situation could open the door for unique ERISA defenses such as failure to exhaust internal plan remedies and a deferential “abuse of discretion” standard of review for the decision to deny benefits.

When litigating disability discrimination cases, employment lawyers must also be cognizant of the plaintiff’s or potential plaintiff’s prior attempts to secure long-term disability (“LTD”) or Social Security Disability Insurance (“SSDI”) benefits. Although the Supreme Court has ruled that claims for SSDI and those filed under the ADA are not inherently contradictory, there is an obvious contradiction between an employee’s application for LTD or SSDI (in which he or she asserts that he or she is unable to work) and an ADA claim (which requires the employee to be able to work with or without a reasonable accommodation). Employment attorneys should be attuned to these often parallel proceedings in order to better represent and counsel their clients.

Importantly, the invocation of ERISA can have a huge impact on how a case is litigated. Almost always, ERISA claims are tried before a judge instead of a jury. For defendants, who frequently prefer to be in federal as opposed to state court, ERISA provides an avenue for federal question removal. Likewise, under ERISA, there are usually no consequential damages. Remedies for ERISA claims are typically more limited than common-law claims or claims under the anti-discrimination laws. Finally, and most important for defendants, if the ERISA plan administrator made the original decision denying benefits (under a severance plan, for example), under certain circumstances, that decision is reviewed under the highly deferential “abuse of discretion” standard of review. This can be a major advantage to the defendant.

Invoking ERISA, however, can have some downsides regardless of whether you represent employees or employers. ERISA provides that the successful party may be awarded attorney’s fees. Under the common law of most states, if the parties are disputing whether or not the employer breached a contract to provide severance benefits, there is no shifting of attorneys’ fees to the losing party. ERISA, however, pro-
Sexual Harassment At Work: A View From The UK

By Nick Hurley

In the United Kingdom, the Equality Act 2010 prohibits three types of harassment: sexual harassment; harassment related to sex (i.e. gender); and less favourable treatment for rejecting or submitting to harassment. This article concentrates on the first type and looks at what constitutes sexual harassment, what is needed to prove a claim, the remedies available, and what an employer should do to prevent harassment from happening and to protect itself against potential claims.

What is sexual harassment?
Sexual harassment is defined as unwanted conduct of a sexual nature which has the purpose or effect of violating another person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

Conduct of a sexual nature
Conduct of a sexual nature includes unwelcome sexual advances, physical contact or touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings, or sending emails with material of a sexual nature. Case examples of sexual harassment include being required to wear short skirts or a low-cut top when going to see a customer or continual unwelcome advances of a sexual nature. Importantly, a single incident—in one case, a remark about a female employee's body—is enough to constitute harassment. Moreover, an employee’s tolerance of certain conduct for years does not mean that the conduct is not unwanted. Similarly, if the employee initiates “banter” as a coping strategy, the conduct does not become wanted. In one case, for instance, employees took part in conversations of a sexual nature in order to deflect more intrusive questions about their sex lives.

Purpose or effect
To satisfy the definition, the employee must show that the unwanted conduct has the purpose or effect of violating his/her dignity or creating a hostile environment. Lack of intent to upset the employee does not matter, if the effect of the conduct is to create a hostile or humiliating environment. For example, where male employees download pornographic images onto their computers for their amusement, thereby upsetting a female employee, then the men’s action has the effect of creating a degrading or humiliating environment for her. A tribunal will take into account the perception of the worker (a subjective test), the other circumstances of the case (including the environment in which the conduct takes place) and whether it is reasonable for the conduct to have that effect (an objective test). If the worker is particularly sensitive and the tribunal believes another person subjected to the same conduct would not have been offended, it is unlikely to find that sexual harassment occurred.

Men can be victims of sexual harassment. The victim need not be of the opposite sex from the perpetrator. Nor does the perpetrator have to be motivated by sexual desire for the victim. In one case, for example, the complainant and the perpetrator were both heterosexual males.

Claim and remedies
An employee can bring a claim in the Employment Tribunal against the perpetrator as well as against the employer. He/she must do so within 3 months from the date of the act complained of, but the Tribunal has discretion to extend the time if the Tribunal considers it just and equitable.

If an employee is successful, the primary remedy is compensation, which is calculated on the basis of the employee’s loss (financial and non-financial) with no upper limit on the amount that can be awarded. The amount of compensation will depend on whether the harassment resulted in the employee losing his/her job, and is likely to include an amount for injury to feelings with the level dependent on the seriousness and nature of the harassment.

Employer’s liability and defense
The employer is liable for any acts of sexual harassment carried out by employees during the course of their employment, even where the harassment takes place without the employer’s knowledge or approval. However, it will have a defense if it can show it took “all reasonable steps” to prevent this behaviour from occurring. Reasonable steps include having policies, conducting training on them, monitoring their effectiveness, and taking action when allegations are made.

An employer who does nothing will be potentially liable for significant sums of compensation if that failure results in a successful claim. It may also suffer reputational damage if the details of a claim are reported by the media.

Workplace policies
Employers need to ensure that they enact a robust policy which covers sexual harassment and outlines what type of behaviour is appropriate, how managers should handle complaints, and a clear procedure for reporting allegations. Reporting is a particularly sensitive issue; victims should have confidence that their allegations will be taken seriously and investigated promptly on a confidential and impartial basis. A policy should indicate to whom an employee can complain if the perpetrator is the employee’s line manager. It is also important that employers take disciplinary action where appropriate.

Conclusion
Unfortunately, although anti-harassment legislation has existed in the UK since 1975, it is increasingly clear that sexual harassment is a continuing problem. This situation is evidenced, for example, by a number of recent surveys and the reported incidents at the now notorious Presidents Club in London. However, with all the publicity on this issue post-Weinstein and with increased awareness following #MeToo and Time’s Up, we may now see victims of harassment in the workplace being more emboldened and prepared to call out the perpetrators. Sexual harassment is a reality that employers must address. It is important that they create and disseminate a zero-tolerance attitude to any harassment, that they take any allegations seriously, and act upon them promptly. Most good employers readily accept this advice, especially given the liability and reputational risks associated with turning a blind eye.

Nick Hurley (nick.hurley@crsblaw.com) is a Partner with Charles Russell Speechlys in London, England.
In the fall of 2018, the ABA Journal of Labor & Employment Law (Journal) will have a new home. Following a nationwide search to replace the University of Minnesota as the editorial base for the publication of the Journal, St. Louis University (SLU) was the selected candidate.

Asked why SLU had bid on the ABA’s Request for a Proposal (RFP), Professor Matt Bodie, Co-Director of SLU’s Wefel Center for Employment Law said “We had three full time faculty members [Bodie, Miriam Cherry and Marcia McCormick] available to serve as co-editors of the Journal, and we noted that the RFP recommended that the bidding law school assign a minimum of two faculty editors to the Journal.

Also, I talked with our Dean, William Johnson, who is very active in the International Section of the ABA about us editing the Journal and he was very enthusiastic and thought that the Wefel Center provided a natural home for the Journal.” Bodie also noted that the SLU students were very excited about the Center’s taking on a new Journal, since the Center had recently gone from three Journals to two and students were looking for another opportunity to serve as editors. Bodie added that upon being selected as the new home for the Journal, he had scheduled a meeting of interested students and over 40 persons showed up. Bodie said that the Wefel Center for Employment Law had been around for 30 years, and had many alumni in the area who were very active in the ABA Section of Labor and Employment Law. He said that he would be looking to them to guide the content of the Journal as he wanted the Journal to continue to address issues of concern to practicing labor and employment lawyers.

The need for a new home for the Journal arose in February, 2017, when Laura Cooper and Steve Befort, Faculty Editors of the Journal, notified the Journal’s Editorial Board (Board) that they would be retiring in June 2018, and would be unable to continue as Faculty Editors. Laura and Steve had been the Faculty Editors since the Fall of 2009. Here is how Laura and Steve discussed their transition in 2009:

This issue of the journal ushers in a new beginning, including a new editorial home and a new name. At the same time, we hope to continue and build upon the great traditions of the past.

The Labor Lawyer began twenty-four years ago (1985) under the leadership of Professor Robert Rabin at Syracuse University College of Law. Professor Rabin molded the journal into the intellectual voice of the Labor and Employment Law Section. He carefully crafted the journal’s agenda and established a consistently high bar of scholarly excellence. All Section members are indebted to Professor Rabin for that wonderful resource of blue publications that adorn our bookshelves. We have big shoes to fill.

But “fill them” they did. In the ten years that Laura and Steve have served as Faculty Editors of the Journal they have continued and enhanced the course of excellence begun by Professor Rabin. The strong labor and employment law curriculum at the University of Minnesota Law School served to encourage excellent students to matriculate through the law school and to serve as editors and writers for the Journal. The Journal staff included eight second year staff members who were managed by five third year students. These students were led by an Editor-in-Chief. The Section is most appreciative of the work of these 140 students who served in these or similar roles during the past ten years on the Journal.

Six law schools submitted a letter indicating an interest in being the new home for the Journal; three law schools filed a Response to the RFP. The Board held telephone interviews with each of the three schools and following a robust discussion of each law school’s candidacy, the Board voted to recommend SLU as the new home for the Journal. Two days later, the Council approved this selection at its Fall Council Meeting.

Matt Brodie, one of the three new Faculty Co-Editors, was a field attorney at the NLRB and served as a reporter for the Restatement of Employment Law. He was an editor of the Harvard Law Review and supervised the Saint Louis University Public Law Review for five years. Miriam Cherry, also a Co-Director of the Wefel Center for Employment Law is an internationally recognized expert in virtual work and the platform economy, and was a visiting scholar at the International Labour Organization in Geneva. Following her graduation from Harvard Law School she clerked for Justice Roderick Ireland of the Supreme Court of Massachusetts and Judge Gerald Heaney of the U.S. Court of Appeals to the Eighth Circuit. Marcia McCormick is Professor of law and Associate Dean for Academic Affairs at SLU Law School. She has been the managing editor for the peer-reviewed Employee Rights and Employment Policy Journal since 2004. In commenting on her upcoming role as Faculty Editor of the Journal Marcia said: “I think the field of labor and employment law is rich, interesting and always changing. Being part of a Journal like this where you interact with people facing these issues on the ground will be great for our students and great for the practicing bar. I think having the Journal at our school will strengthen the Wefel Law Center and strengthen the labor and employment law bar. We are certainly honored to have been selected and are appreciative of the work of Laura, Steve and Bob in continuing the fine work of the Journal.”

The Board of Editors looks forward to working with SLU as we continue to provide this educational benefit to our Section members.

Ellen Kearns (ekearns@constangy.com) is a Partner in the Boston office of Constangy, Brooks, Smith & Prophete, LLP.
Controversial Decisions and a Look to the Future: A View from the NLRB

By Courtney Begley

During the 11th Annual Labor and Employment Law Conference, a program entitled “A View from the National Labor Relations Board” showcased collaborative dialogue and thorough analysis during the panel’s focus on changes in membership and decisions regarding topics such as joint-employer status and employment confidentiality rules. The panel of the five then-current members of the National Labor Relations Board (“NLRB”) reflected on some of the Board’s most controversial decisions and looked to upcoming issues.

Marvin Kaplan discussed his transition to the NLRB and said that “some of the smartest people and thorough thinkers are there.” Newest Board Member William J. Emanuel discussed the agency’s extreme emphasis on ethics and described the staff as “intelligent,” “committed,” and very respectful of what they think his views may be on certain issues. Then-current Chairman of the Board, Philip A. Miscimarra, remarked on the transitional year of 2017, which included the departure of Richard Griffin as General Counsel and the recent confirmation of Peter Robb. In light of his decision to not accept appointment to another term, Miscimarra stated that “every day serving on the Board is an enviable position.” He praised the efficiency of the NLRB, noting that the Board receives less than ten percent of the agency’s cases due to the NLRB staff’s hard work. Miscimarra also highlighted the unannounced nature of the Board, noting that the majority of the cases they decide are unanimous.

Board Member Lauren McFerran discussed the Board’s emphasis on “handbook cases” and focused on the seminal case of Lutheran Heritage Village - Livonia (NLRB 2004), in which the first question is whether maintenance of an employment rule explicitly restricts Section 7 of the National Labor Relations Act (“NLRA”). If it does not, a rule is only unlawful if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Responding to some calling the decision too pro-employer, McFerran reminded the audience to read the footnotes of such cases, as the Board will dispose of a number of handbook allegations that it agrees on. Noting the Board only gets the “hard cases”, McFerran explained that Lutheran Heritage provides some clear guiding principles for both employers and employees to grasp which rules are permitted and which are prohibited.

The panel then focused on confidentiality and civility rules. Regarding confidentiality, McFerran warned, employers must avoid drafting a rule so broadly that a reasonable employee would construe it to prohibit discussing information related to employee wages or working conditions. Specifically, the Board would generally uphold confidentiality rules that are narrowly tailored to protect employee ID and social security numbers, but not employee telephone numbers and addresses, because the latter restriction would interfere with employees’ rights to engage in organizational activity. The more clearly an employer articulates the interest it is trying to protect, the less likely a reasonable employee would construe it as limiting Section 7 activity.

Regarding civility rules, McFerran noted that rules targeting extremely egregious conduct, such as workplace violence and harassment, will likely not violate Section 7 while rules that instruct employees to be nice to each other likely will. Miscimarra discussed his dissenting view in William Beaumont Hospital (NLRB 2016), where the Board found that a hospital rule prohibiting conduct by employees or doctors that impeded harmonious interactions or relationships violated the NLRA. Miscimarra highlighted the struggle between the reasonable expectation that healthcare providers working in a hospital would have harmonious interactions at work and the notion that federal law prohibits putting such in writing. Miscimarra emphasized the need to give employers latitude to put reasonable standards in writing for what employers reasonably expect and employees reasonably desire in the workplace.

Board Member Mark Gaston Pearce submitted to attendees that “if a rule book is conscientious about compliance with Title VII, ADA, ADEA and all of the other statutes that mandate sensitivity to those rights under the law, then Section 7 has to be given equal consideration.” Addressing employee hesitation in exercising their Section 7 rights due to ambiguity in such rules, Pearce stated the Board’s role is to be the umpire in such instances and look at each rule’s context.

Pearce also gave an overview of the joint employment standards under Browning-Ferris Industries (NLRB 2015), which departed from focusing on whether putative employers controlled terms of employment under a strict application of BFI due to a dramatic increase in the number of claims. The panel also addressed the modification of election rules, with Pearce highlighting the effectiveness of the rules and noting they brought us into an area where “everyone gets treated the same.”

Courtney Begley (courtney.begley@pedowitzmeister.com) is an Associate at Pedowitz & Meister, LLP in New York City. She is a member of the ABA Young Lawyers Division.
Gale Force Winds of Change: National Labor Relations Board Reverses Course on Several Significant Obama-Era Decisions

By Amy Moor Gaylord, Christopher A. Johlie and Melissa D. Sobota

Shortly after the 11th Annual Labor and Employment Law Conference concluded, the National Labor Relations Board issued a number of decisions overturning Obama-Board precedent. Because the Board is made up of members appointed by the President, Board law shifts as administrations change. In late summer, early fall 2017, the U.S. Senate confirmed two Republicans to the Board, resulting in a Republican majority on the Board for the first time in ten years. A new General Counsel, management-side lawyer Peter Robb, was confirmed in November 2017 and another management-side lawyer, John Ring, was nominated in January 2018 to fill former Chairman Phil Miscimarra’s seat on the Board after his term expired on December 16, 2017. If Ring is confirmed, we can expect many more Board decisions may be revisited over the next few years.

On December 11, 2017, the newly-constituted Board issued its first reversal of an Obama-era decision. In UPMC Presbyterian Hospital, the Board overruled United States Postal Service, a case that limited the circumstances under which unfair labor practice charges could be settled, which often made settlement of those cases more difficult. In UPMC, the Board restored an administrative law judge’s authority to accept a settlement, even if the General Counsel or one of the parties objected to it, so long as the proposed terms of the settlement are “reasonable.”

On December 14, 2017, in The Boeing Company, the Board overruled Lutheran Heritage Village-Litonia, a 2004 decision which established the test for evaluating workplace rules and policies under the National Labor Relations Act. Under Lutheran Heritage, the Board routinely invalidated facially neutral employer rules and policies that employees “would” reasonably construe as interfering with their right to engage in protected, concerted activity under federal labor law.

Boeing involved the company’s “no camera rule” which restricted the use of “camera-enabled devices” at work. An administrative law judge found Boeing’s rule unlawful under Lutheran Heritage because employees would reasonably construe it to interfere with their rights under the Act. On appeal, the Board jettisoned Lutheran Heritage and established a new test: when evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of protected rights, the Board will balance the “nature and extent” of the challenged rule’s potential impact on employees’ rights under the Act with the employer’s business justifications for such rules.

The Board then turned its attention to another subject that had generated a firestorm of criticism from the management community: the test for determining joint employer status under the Act. In Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co., also issued on December 14, the Board overturned its 2015 Browning-Ferris Industries decision, which had expanded the test the Board applies for determining joint employer status.

In Browning-Ferris, the Board held that if an employer retains the right to control another employer’s employees—regardless of whether it actually exercises that control—such “reserved” control is sufficient to establish a joint-employer relationship over employees it has retained the right to control.

In Hy-Brand, the Board overturned Browning-Ferris and returned to its previous standard, finding that joint-employer status requires proof that: the alleged joint employer entities have actually exercised joint control over essential employment terms (rather than merely having “reserved” the right to exercise control); the control must be “direct and immediate” (rather than indirect); and joint-employer status will not result from control that is “limited and routine.”

In February 2018, the Board abruptly vacated its decision in Hy-Brand, based on a Board’s Ethics Officer’s determination that recently-appointed Member Emanuel should not have participated in the decision because his prior law firm was involved in Browning-Ferris. As a result, Browning-Ferris returns as the joint employer test...for now.

On December 15, the Board overruled its 2016 E.I. Du Pont de Nemours decision in Raytheon Network Centric Systems. Disposing of decades of labor law precedent, Du Pont held that any employer discretionary action constituted a change that must be bargained with the union, even if the employer’s action simply continued a past practice. For years before Du Pont, unionized employers operated under an established labor law principle allowing them to make unilateral changes to, for example, a health insurance plan, as long as the changes were consistent with past practice. Although a unionized employer is prohibited from unilaterally changing terms and conditions of employment unless it first provides a union with notice and the opportunity to bargain over the change, unilateral employer change is permitted if it is part of a past practice and simply continues or maintains the status quo.

Du Pont did not survive long, however. In Raytheon, the Board overruled Du Pont and determined, based on pre-Du Pont precedent, that the company could make the unilateral changes it had made to its health insurance plan did because it had implemented similar changes over the prior 12 years. The Board emphasized that its decision did not excuse employers from the duty to bargain over mandatory subjects of bargaining. Moreover, even when employers are allowed to take unilateral actions, they still are obliged to bargain upon request with respect to all mandatory bargaining subjects—including actions the employers have the right to take unilaterally—whenever the union requests such bargaining.

Finally, on December 15, 2017, in PCC Structurals, Inc, the Board overturned its 2011 Specialty Healthcare decision which revised the test the Board applies to determine whether a union’s petitioned-for unit is appropriate. In Specialty Healthcare, the Board explained that where the employees in a union-proposed voting unit are readily identifiable as a group and share a “community of interest” (common terms and conditions of employment), the election may be conducted in the proposed unit and the Board may therefore certify the unit.

The NLRB: PAST, PRESENT AND FUTURE
Taking a Stand on Kneeling, Sexual Harassment in the Entertainment Industry, and Immigration Strikes: A View from the NLRB

By Courtney Begley

Jennifer Abruzzo skillfully wore two hats at the Meet the National Labor Relations Board General Counsel and Deputy General Counsel session at the 11th Annual ABA Labor and Employment Law Conference. Abruzzo, at the time Deputy General Counsel at the National Labor Relations Board (NLRB), was also Acting General Counsel when the presentation took place. (Current General Counsel Peter Robb was to appear, however his commission was not yet signed and therefore he had not assumed his position). Abruzzo, with fellow panelists James W. Bucking of Foley Hoag, LLP in Boston, Massachusetts and Samantha Dulaney, General Counsel of the International Alliance of Theatrical Stage Employees, gave a dynamic overlook at the NLRB’s current status. The panel discussed several topics, including sexual harassment, kneeling during the National Anthem, and “A Day Without Immigrants.” When discussing sexual harassment in work relationships, Abruzzo displayed a slide containing Harvey Weinstein’s picture and stated “this is a significant problem right now.” Abruzzo explained that before the Harvey Weinstein scandal broke, the NLRB was already working very closely with other agencies, such as the U.S. Equal Employment Opportunity Commission, to develop joint guidance in an effort to “marry up” Title VII of the Civil Rights Act (“Title VII”) and the National Labor Relations Act (“NLRA”). Abruzzo explained that, often, when an employer receives an employee’s claim about misconduct, harassment or discrimination it responds to the complaint by taking an adverse action against the complained-about employee to comply with Title VII. According to Abruzzo, “we can’t use compliance with Title VII as a way to squelch workers’ rights to speak with one another, try to improve things, get help from one another if misconduct arises.” Abruzzo indicated the need to balance: (1) Section 7 rights under the NLRA; (2) the right to engage with employees, the media, and others in order to support workplace concerns; with (3) the employer’s need to maintain production, order and discipline. Addressing confidentiality in investigations, Abruzzo noted that an employer can have a confidentiality policy if, instead of speculative harm, the policy is based on actual harm—such as destroyed evidence or a risk to witnesses—on a case-by-case basis.

The panel also analyzed the recent “take a knee” issue that arose when National Football League (“NFL”) players, including Colin Kaepernick, knelt during the National Anthem in a statement against certain political issues, such as police mistreatment. Bucking asked Abruzzo if the NLRA protected other NFL players who took a knee to show solidarity with players who initially did so. Abruzzo responded that the second kind of act was a “concerted and arguably protected activity” under the NLRA; the question was whether or not the initial protest was also protected. While Abruzzo did not give a definitive answer, she stated that the real question in her mind was whether these players’ jobs are confined to the circumference of the stadium or whether they are public figures who are treated as employees where the public realm is their workplace.

The panel interestingly covered “A Day Without Immigrants”, when immigrants across the nation did not go to work on February 16, 2017 in response to President Trump’s comments regarding immigration. According to the NLRB, employees were engaged in a protected strike for mutual aid and protection. The agency so concluded after examining whether the strikers were trying to improve their situation as employees and finding that the workers were reaching out to employers and the business community to achieve job security. Furthermore, Abruzzo postulated that if workers, documented or not, cannot complain without retaliation, this situation would affect everyone in the workplace. Thus, the agency found that many of the individuals who engaged in the day without immigrants were unlawfully discharged.

Abruzzo ended the session with a discussion about the agency’s budget, and highlighted the extreme hard work of those in the NLRB’s regional offices. ■

Courtney Begley [courtney.begley@pedowitzmeister.com] is an Associate at Pedowitz & Meister, LLP in New York City. She is a member of the ABA Young Lawyers Division.

Gale Force continued from page 7

conditions of employment), an employer who seeks a larger unit must demonstrate that the excluded employees share an “overwhelming” community of interest with the employees sought by the union.

In PCC Structural, the Board ditched the “overwhelming” community of interest standard and returned to its traditional test for determining an appropriate bargaining unit. The Board noted that, throughout its history, its analysis looked at whether the employees in a petitioned-for unit shared a community of interest sufficiently distinct from excluded employees to justify the exclusion. In making this determination, the Board has traditionally applied a multi-factor test that requires the Board to assess a variety of factors including the employees’ skills and training, job functions, contact and interchange with other employees, terms and conditions of employment, and supervision.

A number of other significant Board decisions have followed and, it goes without saying, that we will continue to see precedent overturned and clarified under the new Board, as we have seen under prior Boards. ■

Amy Moor Gaylord [amg@franczek.com] and Christopher A. Johlie [caj@franczek.com] are Partners with Franczek Radelet PC, in Chicago. Melissa D. Sobota [mds@franczek.com] is an Associate with the same firm.
When it comes to labor and employment law, it’s practice made perfect.

From market-leading news that brings you essential stories as they break, to analysis and analytics that help you develop effective litigation strategies, Bloomberg Law® has everything a labor and employment practitioner needs to provide optimal advice to their clients.


To see all that Bloomberg Law has to offer the labor and employment practitioner, request a free trial today at bna.com/labor-employment-aba

New Edition!

By Brian M. Malsberger; Board of Review Associate Editors: David J. Carr, Arnold H. Pedowitz, and Eric Akira Tate; Committee on Employment Rights and Responsibilities

Now in its Fifth Edition, Tortious Interference in the Employment Context examines the elements of the cause of action, as well as the types of relief afforded on a successful claim, including damages, injunctive relief, and attorneys’ fees. It also discusses at-will employment, indemnification agreements, the personal liability of a defendant’s employees, and acceptable hiring measures for screening employees bound by restrictive covenants.

New Cumulative Supplement!

By Barbara T. Lindemann, Paul Grossman, and C. Geoffrey Weirich (Main Volume); Debra A. Millenson, Laurie E. Leader, and Scott A. Moss, Executive Editors (2017 Cumulative Supplement); Equal Employment Opportunity Law Committee

Employment Discrimination Law is the definitive treatise in this field—it is described as an “indispensable resource” in the Legal Information Buyer’s Guide and Reference. The 2017 Cumulative Supplement analyzes issues including:
- “Supervisor” status after Vance v. Ball State University
- Race and color discrimination under §1981
- Affirmative action

Coverage includes theories of discrimination; prohibited bases of discrimination; employment actions; parties, procedural issues; other sources of protection; and remedies and resolution.

Visit www.bna.com/bnabooks/abaledl for more detailed information.

Order #3295/$515.00/Special Member Price: $386.25

New Edition!

The Family and Medical Leave Act, Second Edition
William Bush and James M. Paul, Editors-in-Chief; Federal Labor Standards Legislation Committee

Fully revised in its Second Edition, The Family and Medical Leave Act addresses the issues that practitioners on all sides face in exercising rights under, and in complying with, the Act.

Detailed and comprehensive, yet user friendly, each chapter addresses a discrete FMLA concept, and includes a short overview and a listing of the key statutory and regulatory provisions covered.

Visit www.bna.com/bnabooks/abalefmla for more detailed information.

Order #3314/$535.00/Special Member Price: $401.25

For more information about Bloomberg Law® books call 800.960.1220, or visit www.bna.com/bnabooks/abale
Two Big Changes to the FLSA

By Anna P. Prakash

Congress and the Supreme Court have made unexpected changes to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. Congress amended the FLSA to prohibit employers from keeping their employees' tips. The Supreme Court, in Encino Motorcars, LLC v. Navarro, No. 16-1362, -- S.Ct. --, 2018 WL 1568025 (April 2, 2018), discarded decades of precedent requiring that FLSA exemptions be construed narrowly and, instead, held that exemptions must be given a fair reading.

Employers Cannot Take Employees' Tips Under New FLSA Amendment

The FLSA has long allowed employers to take a "tip credit" against their tipped employees' wages if certain conditions are met: 29 U.S.C. § 203(m). That is, employers may pay tipped employees less than minimum wage if employees are: (1) given notice; and (2) allowed to retain all tips unless they are participating in a valid "tip pool" (i.e., an arrangement where tips are shared between employees who customarily and regularly receive tips). Id. Thus, employers who want to avail themselves of the FLSA's "tip credit" cannot take employees' tips for reasons other than a valid tip pool.

In 2011, the Department of Labor ("DOL") issued regulations that made tips "the property of the employee whether or not the employer has taken a tip credit... [and] prohibited [employers] from using an employee's tips, whether or not it has taken a tip credit, for any reason other than...[a] credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool." 76 Fed. Reg. 18832-42 (April 5, 2011). Then, with the change of administration in 2017, the DOL reversed course, proposing to rescind portions of the regulations to allow employers who do not claim a "tip credit" to distribute their employees' tips to employees who are not customarily and regularly tipped. 82 Fed. Reg. 57395-413 (Dec. 5, 2017).

In March of 2018, before further action was taken on the 2011 regulations, Congress passed an omnibus spending bill, the Consolidated Appropriations Act. The bill, which has been signed into law, amends the FLSA to explicitly prohibit employers from keeping employees' tips "for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit." H.R. 1625, title XIII, available online (last accessed April 5, 2018). The FLSA's allowance of valid tip pools remains in place and the bill nullifies the relevant provisions of the 2011 regulations until such time as DOL takes further action. As amended, the FLSA prohibits employers from taking employees' tips irrespective of whether they claim a tip credit.

FLSA Exemptions Are To Be Given A "Fair Reading"

Although the FLSA generally requires employers to pay overtime when their employees work over forty hours in a work week, certain types of employees are exempt from the FLSA's requirements. 29 U.S.C. § 213. On April 2, 2018, in Encino Motorcars, the Supreme Court held that car dealership service advisors are exempt from the FLSA's overtime compensation requirements. 2018 WL 1568025. Employment lawyers have paid particular attention to the portion of the Court's opinion pertaining to how FLSA exemptions are to be construed. Specifically, the Court rejected the longstanding principle that FLSA exemptions are to be "construed narrowly." Id. at *7. The Court, in the majority opinion written by Justice Thomas, explained that it had "no license to give the exemption anything but a fair reading." Id.

The Court did not overturn precedent requiring that exemptions are limited to those circumstances "plainly and unmistakably within their terms and spirit." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); see generally Encino Motorcars. Nor did the Court shift the burden of proving that an exemption applies away from the employer, see e.g., Desmond v. PNGI Charles Town Gaming, LLC, 564 F.3d 688, 691-92 (4th Cir. 2009); Ale v. Tenn. Valley Auth., 269 F.3d 680, 691, n.A (6th Cir. 2001), or enunciate something new in requiring courts to give their cases a fair reading. See generally Encino Motorcars. Rather, in acknowledging the remedial purpose of the FLSA, the Court held that exemptions are also a part of the FLSA's purpose. Id. at *7. Quite likely, then, whether and to what extent Encino Motorcars actually changes how FLSA exemptions are litigated will be borne out in lower court decisions. ■

Faragher-Ellerth

continued from page 1

This goal is in the full interests of any organization. For years, studies have demonstrated a positive link between financial performance and diverse organizations. A workplace engaged in a culture of respect, civility and inclusion performs better financially and does not need to rely on prescriptive training and failed reporting policies.

To accomplish this goal, however, requires senior leadership willing to invest in data gathering, analysis, training and systems that can help develop a culture in which intolerance and harassment can neither thrive nor be protected. Data gathering is an essential component because only through a candid internal assessment can an organization truly understand where it needs to focus its efforts and identify the appropriate metrics for measuring success.

The process of data gathering can be accomplished in a myriad of ways, including through a confidential interview process. It is critical, however, that the organization also be committed to addressing challenges identified in the assessment by, for example, creating a short- and longer-term plan for meaningful progress and change.

Another essential element to foster change is accountability. Individuals must be held responsible for their conduct, including those who ignore or otherwise enable harassing or demeaning behaviors to continue. If the standard is respect and inclusivity, then direct and honest conversations about words and deeds that deviate from those goals may actually become easier once removed from a legally constrained definition of harassment.

Here is what the #MeToo Movement tells us: when employers ignore the disconnect between their training and reporting policies and a respectful and inclusive environment, they may win the battle of legal protection, but they will fail to achieve a workplace that can compete for talent and engage workers in their common goals.

Anna P. Prakash (aprakash@nka.com) is a Partner at Nichols Kaster, PLLP in Minneapolis, MN.
Collusion or Coincidence: A Quarterback Lines Up For Arbitration

By Mark Risk

A child of one black and one white parent, Colin Kaepernick was adopted and raised by white parents in Wisconsin and California. Though he excelled as a high school athlete in three sports, his question-able throwing mechanics made him an unattractive college football prospect. Kaepernick received a single football scholarship offer from the University of Nevada-Reno after an assistant coach from that school saw him dominate a high school basketball game.

Kaepernick brought to the quarterback position a strong arm and an extraordinary ability to run with the football. In four years at Nevada, he became the only quarterback in NCAA history to have passed for over 10,000 yards and rushed for over 4,000 in a college career. He was drafted by the San Francisco 49ers and became their back-up quarterback.

Late in his second NFL season, he stepped in for injured quarterback Alex Smith. Kaepernick was successful in both passing and running for touchdowns. When Smith was ready to return, the team stuck with Kaepernick as the starter. Kaepernick took the 49ers to the Super Bowl, where they lost narrowly, and to the NFC title game the following season. He remained unsigned as the 2017 season began. While many teams lost quarterbacks to injury during the season, no team signed Kaepernick, on Twitter and elsewhere, and the conduct of Kaepernick and other players became a public controversy and an issue for the NFL.

An Unusual Arbitration Procedure
After the 2016 season, Kaepernick elected to become a free agent in order to sign with another team. He remained unsigned as the 2017 season began. While many teams lost quarterbacks to injury during the season, no team signed Kaepernick. In many instances, they opted for other quarterbacks who were thought to be inferior players. Midway through the season, Kaepernick, represented by Los Angeles attorney Mark Geragos, commenced an arbitration proceeding against the NFL and all of its teams, alleging that they colluded in refusing to sign him.

Article 17 of the collective bargaining agreement between the NFL and its players union provides that the teams shall not enter into any “express or implied” agreement to restrict team decision-making as to whether to offer a contract to any player. Designated arbitrator Professor Stephen Burbank of the University of Pennsylvania Law School hears cases under Article 17, in hearings to which the Federal Rules of Evidence apply.

The parties are entitled to discovery, including production of documents and depositions. The complaining party has the burden to prove its case by a “clear preponderance” of evidence. Prevailing party remedies include lost compensation and additional damages of at least two times the amount of compensatory damages awarded. In Kaepernick’s case, this would likely be millions of dollars.

Professor Burbank’s decision can be appealed to a three-person panel, at least one member of which must be a former judge.

Kaepernick is seeking discovery from team owners, coaches, and executives and league officials, looking for evidence of coordinated activity. Though the proceedings are conducted confidentially, press reports have stated that electronic documents have been produced using key word searches, and that depositions have been conducted.

Skeptical Pundits
Sports law commentators have predicted that Kaepernick will have a difficult time winning, pointing out that the individual NFL teams were entitled to decline to sign Kaepernick, as long as they did not collude together.

Labor and employment lawyers might evaluate the case differently. Employment lawyers routinely deal with claims that motivations should be inferred from facts, and work with a body of case law about permissible inferences. Labor lawyers expect arbitrators to apply their practical knowledge of the particular workplace in which a dispute is set.

While the outcome of the case will depend on evidence that we will never see, 34 teams who compete fiercely against each other for every small advantage will have to explain why they declined to sign the best available quarterback.

Mark Risk (mdr@mrisklaw.com) is Principal at Mark Risk, P.C. in New York City.
Calendar of Events

2018

August 3–4
ABA Annual Meeting (Section Events)
Swissotel
Chicago, Illinois

October 27–28
Law Student Trial Competition
U.S. Courthouse
Dallas, Texas
Miami, Florida

2019

January 23–29
ABA Midyear Meeting
Caesars Palace
Las Vegas, Nevada

February 6–9
Employee Benefits Committee Midwinter Meeting
Loews Vanderbilt Hotel
Nashville, Tennessee

March 19–23
Employment Rights & Responsibilities Committee Midwinter Meeting
Four Seasons Las Vegas
Las Vegas, Nevada

2018 American Bar Association Annual Meeting
August 2–7 • Chicago

November 3–4
Law Student Trial Advocacy Competition
U.S. Courthouse
Chicago, Illinois
Washington, DC

November 7–10
12th Annual Section Conference
Hilton San Francisco Union Square
San Francisco, California

November 17–18
Law Student Trial Advocacy Competition
U.S. Courthouse
Los Angeles, California
New York, New York

April 3–6
National Conference on Equal Employment Opportunity Law
Presented by the EEO Committee
The Biltmore Hotel
Coral Gables, Florida

For more event information, contact the Section office at 312/988-5813 or visit www.americanbar.org/laborlaw.