Labor AND Employment Law

WINTER 2017
VOLUME 45, NUMBER 2
Section of Labor and Employment Law
American Bar Association

AMERICAN BAR ASSOCIATION
Section of
Labor and Employment Law

Insiders' Perspectives: The NLRB and Its General Counsel

By Johnda Bentley

The Meet the National Labor Relations Board and General Counsel panels at the 10th Annual Labor and Employment Law Conference provided audience members with critical insight about the NLRB's major jurisprudence and enforcement initiatives over the past several years, as well as lively discussions about anticipated changes at the NLRB in the wake of the 2016 Presidential election.

One of the panels' moderators, Susan Davis, of Cohen, Weiss and Simon LLP in New York, opened by acknowledging that "the next four to eight years are going to be fundamentally different for the labor movement and our practice." The five-member Board, which is currently comprised of two Democrats and one Republican, is anticipated to change quickly to Republican control when the two vacancies are filled.

Joint employer status has been a very hot topic at the Board this past year. In addressing the standard for joint employment and determining bargaining units, Chairman Mark Pearce identified the primary challenge he believes the Board is trying to resolve as "the constant evolution of business models and relationships…" He explained that there are "almost 3 million of the nation's workers employed through temporary agencies." Given the changing workforce compositions, Pearce said the Board has had to redefine the standards for joint employment in its decision in *Browning-Ferris Industries (BFI)* and for bargaining units where solely and jointly employed employees share a common "user" employer at a single facility in its decision in *Miller & Anderson*.

Turning to the Board's significant body of new decisions on handbook and work rules, Member Philip Miscimarra expressed his disagreement with *Lutheran Heritage Village-Livonia*, the 2004 decision in which the Board established its current standard for determining whether a rule is unlawful under the NLRA—i.e., if it explicitly restricts Section 7 activities, or upon a showing of one of the following: (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. Miscimarra argued that the first prong of this test results in invalidating too many reasonable rules regardless of how strong an employer's

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Kudos to Young Lawyers

All of the articles in this edition were written by new lawyers who are members of the ABA Young Lawyers Division. Most articles cover programs presented at the 10th Annual Labor and Employment Law Conference held November 9–12, 2016 in Chicago.

The Section encourages new lawyers (those under 36 years old or admitted to practice for five years or less) to author articles in future editions of the Newsletter. If you are interested in doing so, please contact Sarah Bryan Fask (*sfask@littler.com*).

Diligence vs. Perfection: Maintaining High Ethical Standards While Avoiding Burnout

By Ciara Rogers

Panelists speaking on 10th Annual Labor and Employment Law Conference session entitled "Diligence vs. Perfection: Maintaining High Ethical Standards While Avoiding Burnout," provided an array of tips and practice pointers to help everyone from law students, to newly minted lawyers, to the senior partners, and members of the judiciary cope with the stresses of the legal profession.

J.E. "Buddy" Stockwell, Executive Director of Judges and Lawyers Assistance Program, Inc. in Mandeville, Louisiana, started the session with harrowing statistics from a 2016 study, which found that lawyers are five times more likely to be depressed than the general public and two times more likely to suffer from alcoholism or drug addiction and abuse. He went on to explain that lawyer's assistance programs, commonly known as LAP programs, exist across the country to provide members of the legal community with a confidential resource to discuss and cope with the constant demand for perfection that many attorneys feel. Stockwell emphasized that LAP programs are available to help before there is a problem or dependency on drugs or alcohol.

Next, Stockwell turned to what he says is the underlying cause of the anxiety that many members of the legal community feel—perfectionism. Stockwell said, "The practice of law demands perfection, but that is not possible." He defined perfectionism as the "self-destructive and addictive belief system that fuels the notion that we look perfect, live perfectly, and do everything perfectly, that we can avoid the painful feelings of shame, judgment, and blame."

Stockwell explained that there are three types of perfectionism: self-oriented, other-oriented, and socially prescribed. Self-oriented perfectionism is the belief that one has to be perfect. Other-oriented perfectionism is the belief that others should be perfect. Finally, socially prescribed perfectionism is the belief that others expect one to be perfect. Regardless of the type, the goal of being perfect is always self-destructive because it is unattainable. Instead of ever becoming perfect, people often become addicted to the quest to live, look, and do everything just right; and, when they fall short they invariably experience the shame, judgment, or blame that they have been trying so hard to escape.

Lawyers are five times more likely to be depressed than the general public and two times more likely to suffer from alcoholism or drug addiction and abuse.

Perfectionism was contrasted with striving for self-improvement, which focus on being the best version of one's self. Stockwell said, "Perfectionism is not the same as striving to be your best. You can always strive to be your best, but you can't ever be perfect."

Panelist Barbara J. D'Aquila of Norton Rose Fulbright in Minneapolis, Minnesota, asked Stockwell whether perfectionism was a generational trait exhibited more by lawyers who were not of the millennial generation. Stockwell responded that he did not see a generational divide amongst the members of the legal profession who were perfectionists, but did say that in his experience millennial lawyers are more apt to place a high priority on work-life balance. In concluding his portion of the session, Stockwell suggested that perfectionism can be combatted by acknowledging our vulnerabilities to experiencing shame, judgment, and blame, practicing self-compassion, and taking time to be mindful or meditate.

Panelist William D. Frumkin of Frumkin & Hunter, LLP in White Plains, New York focused his presentation on stress management. He gave the audience three tips he has found helpful in managing the stresses of a profession that expects attorneys to be perfect and attorneys' desire to be present and engaged with our family and friends.

First, when possible, schedule your time wisely. Ironically, to begin scheduling wisely, you must accept that you do not have complete control over your schedule. Professional and personal obligations will cut into the schedules you make for yourself. Expect those things to happen and you can avoid the feelings of anxiousness and nervousness that often follows disruptions to the plans we have for ourselves.

Second, be aware of the transition back to the workweek. On Sunday afternoons when thoughts of everything we have to do in the coming workweek start creeping into our thoughts, Frumkin suggests "going on the attack." He recommended going for a run or scheduling something enjoyable for Sunday afternoons to overcome any late weekend jitters about transitioning back to the workweek. This way, you are looking forward to Sunday afternoon/evening and not dreading Monday morning.

Third, pursue perfection realistically. No one can do it all and it is unrealistic to think we can. In contrast, if you take imperfection into account when making professional assessments, then you can reduce the self-imposed disappoint that we often feel when we fall short of the ideals we hold out for ourselves. An audience member astutely pointed out that despite what we think, clients often do not expect us to be perfect. We assume that we are expected to be perfect, when the client just wants us to do the best we can in advocating on their behalf. D'Aquila added, "we are all human and will all fail."

The panel closed with D'Aquila, who sits on the Minnesota Board of Law Examiners, discussing the increase in character and fitness issues for bar applicants. In her experience, bar applicants who have acknowledged a problem and sought help for that problem have less of an issue than applicants who ignore a problem. The same is true for lawyers. Ignoring a problem never makes the problem go away and seeking help isn't a sign of weakness. ■

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Revealing Invisible Disabilities in the Workplace

By Ashley Totorica

How can an employer accommodate an employee's disability that has no outward symptoms but may have impacts on an employee's work performance? Seasoned practitioners tackled that challenging question with pragmatic advice in a panel entitled "Helping Your Clients Understand and Accommodate Invisible Disabilities" at the 10th Annual ABA Labor and Employment Conference in Chicago.

An employer's workforce likely contains many employees with so-called "hidden" or "invisible" disabilities—conditions with no obvious outward physical manifestations. These hidden conditions come in many forms, including depression, diabetes, sleep apnea, and anxiety disorders. Even though these medical conditions are often hidden from the plain view of co-workers and management, employers should be prepared to recognize issues and engage with employees with such conditions where work performance is impacted.

Alisa B. Arnoff, a founding partner of Scalambrino & Arnoff, LLP in Chicago, provided not only adept analysis on the issue of accommodating invisible disabilities, but also a personal perspective as she openly relayed her work experience as a sufferer of Crohn's disease. Ms. Arnoff emphasized the importance of bringing such conditions into the open so as to "first understand why these disabilities remain hidden" and then work in tandem with employees to determine potential accommodations.

In many cases, the ailments remain concealed by employees because they carry a social stigma or a general lack of knowledge or understanding in the community. Kathleen Phair Barnard, who advises employees and unions at Schwerin Campbell Barnard Iglitzin & Lavitt LLP in Seattle, stated that employees often don't disclose disabilities because of "fear of how employers will react" and, for that reason, employers should aim to establish a "culture of openness" where employees feel confident bringing forward health issues that may be affecting their performance. Ms. Barnard acknowledged that it is a challenging endeavor for employers to help "overcome the stigma that can exist" for these hidden diseases. Employers may need to deal with employees "in a more circumscribed manner because of [the] sensitive nature [of invisible disabilities]," advised Ms. Barnard, including by inquiring if "there's something hampering your ability to do job" and establishing a culture that the employee feels safe to identify if any disease could be a reason.

In seeking to encourage such an open culture, Brett Rawitz, Associate General Counsel for Litigation and Employment at U.S. Foods in Chicago, advised that it is helpful to have front-line supervisors be sensitized and trained to identify when a disability may be impacting an employee's workplace performance, and how to handle through the proper channels. Mr. Rawitz underscored that, just because anybody at the company can search Google for symptoms of a particular ailment, "employers are not doctors" and should not act as such. In the end, Mr. Rawitz advised that "it is all about getting the information to help the employee and company to succeed," and that establishing an open culture at the workplace makes a large difference in achieving that goal.

The panel also tackled the difficult subject of what constitutes a disclosure for ADA purposes, which is especially tricky for hidden disabilities. For example, if a call center worker with performance issues regarding call volume in the morning tells her supervisor she is groggy in the morning due to medication and would like to come in later, is that simply requesting a run of the mill schedule change or should the business begin a formal interactive dialogue? Questions often arise with hidden disabilities as to whether the employee has crossed the hazy line from relaying information into seeking an accommodation, and if crossed, how much information should be provided to a direct supervisor about the medical condition.

John A. Henderson, Administrative Law Judge at the U.S. Equal Employment Opportunity Commission in Baltimore, emphasized that the law imposes on an employee the obligation to make an accommodation request, but that "employees do not need to use magic words to implicate the ADA." Judge Henderson recounted his experience in seeing employers attempt to reduce liability by keeping the facts of the disability away from direct managers so as maintain a defense in case of any adverse action, but finds it unpersuasive in most cases because even in the case of invisible disabilities, the "gossip mill at the workplace often makes the non-obvious obvious." Ideally, according to Judge Henderson, human resources should work with the employee and his or her physician to provide relevant information to direct supervisors so as to enable the supervisor to manage the employee on a day to day basis.

The practical issues of managing performance of employees can become more complicated with employees with hidden disabilities. "Document everything," advised Tracie DeFreitas, Lead Consultant with the Job Accommodation Network in Morgantown, West Virginia, which offers free non-legal consultation and information for both employees and employers to better understand rights and responsibilities for disability accommodation. Ms. DeFreitas stressed that "employees make requests for adjustments in working conditions for many reasons;" the key determination for the employer is to determine whether the request is due to a hidden disability, and if so, if there is a nexus between the disability and full performance of the job requirements.

In the end, all employees should always be evaluated accurately based upon their work performance against known standards. But, when an employee provides information that a hidden medical condition is impacting work performance, the employer should take the next step to manage the performance and determine if can be performed with accommodations. The panel emphasized that the workplace should support an open dialogue to help employees meet the essential functions of their job, regardless of whether they have a visible, invisible, or no disability. ■

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By Gail Golman Holtzman

Hidden Figures/Inspiring Leaders and Mentors

I recently saw the inspiring movie *Hidden Figures* celebrating the story of unsung "sheroes," the African American women from the early 1960s recruited by NASA in Langley, Virginia, as human "computers" to help America win the space race. The movie depicts the conditions to which Katherine Johnson, Dorothy Vaughan and Mary Jackson were subjected, including separate work areas and bathrooms in the remote, "West Area Computers" unit, as well as lack of equal pay and promotion opportunities.

Based on the book written by Margot Lee Shetterly, the movie depicts the tenacity, fortitude, resourcefulness, talent and leadership of these incredible women. Against tremendous odds, these women rose to high level positions within NASA and paved the pathway for so many other female, diverse scientists, mathematicians and engineers. Katherine Johnson, now close to 100 years old, began working for NASA's predecessor in June 1953 and moved from the segregated unit to the forefront of the space program where she contributed to orbital missions for Alan Shepard and John Glenn. Dorothy Vaughan began at Langley in 1943, and she and her team moved from the segregated unit to a racially and gender-integrated group on the frontier of electronic computing, contributing to the Scout Launch Vehicle program. Mary Jackson began in Langley's segregated section in 1951, reporting to Vaughan, and became NASA's first black female engineer after being required to obtain permission to join white class members.

This inspiring biography underscores the importance and significance of the work of our Section. Through our publications, such as the *FLASH*, Newsletter, other e-publications and *Journal*, as well as continuing legal education initiatives, such as our Annual Section Conference, ABA Annual Meeting, Committee Midwinter Meetings and webinars, our Section is able to provide balanced programs with different perspectives that focus on a myriad of laws, including the various anti-discrimination statutes, as well as diversity and inclusion.

For example, our Section's first webinar this year, "Implementing Diversity and Inclusion Initiative in the Workplace," addresses the types of diversity and inclusion initiatives employers are implementing, including practical observations on what is working and what is not, as well as the legal implications of putting diversity initiatives into action. Further, our Section's Diversity in the Legal Profession Committee continues to develop programs and initiatives to advance diversity and inclusion in the workplace and our Section, such as the presentation at the Tenth Annual Section Conference on the implications of implicit association in legal decision-making.

Hidden Figures highlights in a poignant manner the importance of leadership and mentoring. Johnson, Jackson and Vaughan displayed strong leadership, as against all odds they moved up the NASA ranks. They inspired the confidence of co-workers and supervisors through their diligence, focus, and work ethic. The three women also mentored and supported other women on their teams throughout their employment, identifying opportunities and promotions for others.

I am so proud that our Section includes a Leadership Development Program Committee, and that every two years our Section offers leadership development opportunities for our members. During our most recent program this past September, attendees learned about communicating across differences, delegation, and team building skills. Our Section leadership supports leadership development, and we believe that our Section is fostering this important goal in a meaningful way.

Finally, our Section offers many opportunities for mentoring. Not only was there a mentoring opportunity offered as part of the Leadership Development Program and at our Annual Section Conference in November, but many of our 15 Standing Committees offer mentoring to new meeting attendees and others. Our Section leadership is committed to ensuring that its members feel welcomed and included, and that all members understand the pathways to leadership in our Section. I currently serve as a mentor, as I have for many years, and always richly benefit from the experience.

As our Standing Committee Midwinter Meetings begin, our leadership encourages you to become involved and to make a difference in the work we do. Please let our Section staff or leadership know if you are seeking a mentoring relationship or if you are seeking opportunities for greater involvement, whether as a writer, speaker, moderator, mentor or mentee. As we approach our exciting Midwinter Meeting season that spans from January through May, our leadership looks forward to meeting and welcoming you! ■

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Labor and Employment Law (ISSN: 0193-5739) is published four times a year by season, by the Section of Labor and Employment Law of the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654, 312/988-5813. *www.americanbar.org/laborlaw*

Tipping—Is it worth the price?

By Saranicole A. Duaban

Tipping has been a time-honored part of the American dining system and service industries. However, with the recent rise of restaurants eliminating tipping, many have been asking "does tipping hurt or help employees?" and "Is the tipping system worth it?"" At the 10th Annual Labor and Employment Law Conference panelists Loren B. Donnell of Burr and Smith, LLP, Todd S. Aidman of Ford & Harrison, LLP, Hope Pordy of Spivak Lipton, LLP, and Dane Steffenson from the U.S. Department of Labor discussed these questions.

The panel opened with several video clips from popular culture of comedians, celebrity chefs, and restauranteurs discussing the history of tipping and why they believe it is a good or bad idea. Panelists pointed out that although tipping is norm in America, it is not the norm in other countries.

Hope Porty of Spivak Lipton explained the Fair Labor Standards Act ("FLSA") mandates and Department of Labor ("DOL") regulations on tipping. The FLSA allows for tipped employees to be paid at a wage lower than the minimum wage; however, the employee must be informed of the lower wage and the employer's intention to have tips make up the difference between the lower wage and the minimum wage. The notice to employees has certain requirements, one being that it must be provided in advance. Further, the FLSA specifies that tips are considered the property of employees. Pordy stated that determining what "property of employees" means is a hotly contested topic in current litigation. Additionally, employers may not take a deduction from employees' wages that takes them below the minimum wage, and if a deduction is taken, the employer must provide documentation of the costs. She also discussed tipping arrangements. Tip-pooling is a system that can be set up by the employer to pool tips between employees who "customarily and regularly provide service." The panel discussed that there is a large amount of case law around which employees "customarily and regularly provide service."

Ms. Donnell stated that from a employees's perspective, any errors regarding the tipped minimum wage invalidates the entire tip credit. This means that arguably employers who have made a mistake with the regards to notice or deductions do not get the benefit of the tipped minimum wage and owe their employees the difference from their tipped minimum wage to the federal minimum wage.

The DOL is also taking the same stance to the tip credit. Dane Steffenson of the DOL gave an example of a case the DOL investigated where a restaurant had issues with incorrectly rounding employees' time. While the rounding mistake was only a small amount of owed wages, according to the DOL, this invalidated the tip credit and the restaurant also owed the difference between the tipped minimum wage and the full $7.25 minimum wage for the last three years.

Mr. Aidman, a management attorney, stated that he's seeing a lot of courts disregard the employer's defense of "we meant to do it right." He argues that unless the employer can rely on an attorney letter or an old DOL opinion letter courts will invalidate the tip credit and find the violation to be willful. Steffenson stated that this is why the DOL is seeing a lot of management attorneys advising their clients to not even take the tip credit and asking them, "is it really worth it the risk to take the tip credit?"

Donnell agreed that many courts follow this strict approach. She pointed to the fact that many judges have stated that even though the result is harsh for violating a tip provision, it's too bad for the employers because it is necessary to enforce these laws for subminimum wage employees. Aidman stated that he did not believe that employees who are paid on the tip credit are being taken advantage of by employers. He believes that the tipping system "provides an opportunity for individuals to make a living well above the minimum wage," and "no one is being paid less than the minimum wage because any successful server will make more the minimum wage."

Pordy vehemently disagreed and stated that statistics show that most servers and tipped employees in the restaurant industry make around $9.00 an hour. She went on to discuss that a lot of the criticism of the tipping system in America is because there is a lot of disparity between the amount of tips people receive. For instance, statistics have shown that women and people of color are getting lower tips than white men. Additionally, the tipping system put the onus on someone else besides the employer to pay these employees the minimum wage.

The panel ended with a discussion of a contested area of tip litigation: the invalidation of a tip pool. In Cumbie v. Woody Woo, Inc., a Ninth Circuit case from 2010, employees received minimum wage and also participated in a tip pool that included servers and kitchen staff. The Ninth Circuit found that since the employer was not taking the tip credit, it was not unlawful to include in the tip pool employees who were not customarily tipped employees. After the case, in 2011, the DOL revised 29 C.F.R. §531.52 to clarify that tips are the property of an employee; and therefore, an employer can only regulate tips for the specified purposes in FLSA section 3(m) to take a credit against the minimum wage or in a valid tip pool. Therefore, the DOL's position is that where a tip pool includes employees who are not customarily and regularly tipped employees, the entire tip pool is invalid and all the tips belong to employee who earned it.

A lot of courts disregard the employer's defense of "we meant to do it right."

There currently is a circuit split on this issue on whether the DOL rule is valid, and there a pending cert petition from the Ninth Circuit. While Steffenson argued that this has always been the proper and long-standing interpretation of FLSA by the DOL, Aidman disagreed. Aidman stated this interpretation would create more litigation because the "case law on who is a customarily tipped employee is as clear as mud." This new area of litigation increases the amount of management attorneys and employers asking, is the tipping system really worth it? ■

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Closing the Gap: Do Men and Women Need to "Lean In" Together?

By Alison Loomis

Gender equality and social norms have long been a topic of interest in the legal community. With the recent fifty-year anniversary of the passage of Title VII, a panel discussion at the 10th Annual Labor and Employment Law Conference noted that laws, stigmas, and policies continue to impact both women and men in the workplace. The panel examined where we have been, where we are, and how we can continue to collapse and surpass gender bias, stereotypes, and outcomes in the work environment.

Providing paternity leave does not just impact males; in fact, it sends a message that women can have an equal opportunity to stay at work and continue to focus on their career, while their male counterparts can play a more significant role in caregiving.

Michele Coleman Mayes, Vice President and General Counsel of the New York Public Library, and the Honorable Jenny Yang, Chair of the Equal Employment Opportunity Commission in Washington, opened the discussion with an overview of statistics regarding gender equality. Coleman Mayes noted that although there has been progress for women in the legal field, there is still much work to do. For example, Coleman Mayes cited a recent study finding that men are three times more likely to be lead counsel on a civil trial, and that men are lead counsel on class action lawsuits 87% of the time. Yang added that in families with children, women were the breadwinners in 40% of households, but that an overall 50% of women eventually leave the workforce. Yang concluded that this flight from the workforce occurs because women do not believe that they will be successful as men based on the culture of the workplace.

Bias and stigma relating to gender norms is not relegated to women alone. Men are also affected by workplace culture that associates women, and not men, with caregiving. Josh Levs, an Atlanta-based journalist and author with first-hand experience of disparate policies for men, remarked that men are more likely than women to make a career change than women because of family issues. Men have family responsibilities, and often will leave their job for a different, more accommodating workplace where there is not a stigma regarding male caregivers. Levs noted that the difference between men and women is that when men leave their jobs for a work-life balance reason, they do not talk about it as openly as women; accordingly, companies may not be aware of the impact its policies and treatment of male caregiving has on its employees and overall culture.

These traditional societal and workplace norms are colliding with the emerging workforce: millennials. As Levs stated, millennials expect flexibility to be a part of their lives, "the template isn't Mad Men, it's Mark Zuckerberg." Levs believes that to attract the best workers, companies need to provide opportunities for both men and women to be caregivers. He explained that providing paternity leave does not just impact males; in fact, it sends a message that women can have an equal opportunity to stay at work and continue to focus on their career, while their male counterparts can play a more significant role in caregiving. Levs also noted a correlation between companies addressing gender norms and attempting to provide equal opportunities for all of their employees and better financial performance.

Each of the panelists noted that everyone must actively work to change workplace culture. For example, rather than avoiding talking about your family life at work for fear that you may be perceived as uncommitted, panelists suggested speaking openly about your family can model to coworkers how to balance home life with leadership roles. Joan C. Williams, Professor of UC Hastings College of the Law in San Francisco, and Coleman Mayes added that while having policies to encourage work-life balance and shared caregiving are necessary, simply having these policies in place is not enough. Rather, these policies need to be tested and verified that they are being used because Williams and Mayes believe a policy is not effective if no one feels empowered to use it. For example, they explained the language used in a policy must be appropriate, and must not communicate a negative, unintended message or subtext.

Williams added that the general dialogue should not be how to "fix the women;" but rather, how to "fix the organization." She said that gender bias is transmitted through the system and culture as a whole. In order to change the culture, she feels strongly that an organization must measure the changes that it wants to make. As she remarked, "If you aren't keeping track, you don't know if what you are doing is working and you are communicating that you don't care."

The panel closed with comments that we are all on one side, employees and companies, men and women in closing the gender gap. Levs put it well, "we all benefit from the same thing." Everyone may have their own gender bias, but it is up to us, collectively, as individuals and organizations to challenge that bias to achieve a harmonious and truly equal workforce. ■

Alison Loomis (*aloomis@seyfarth.com*) is an Associate at Seyfarth Shaw LLP in San Francisco. She is a member of the ABA Young Lawyers Division and is a Young Lawyers Division Fellow to the Section's Practice and Procedure under the NLRA Committee.

Clash of the Generations—Panel Discusses Managing Millennials in the Workforce

By Keith D. Greenberg

"Millennials seek the ability to have good and challenging work; to have someone to help them with their skills and career development; effective mentoring; feedback; supporting work-family issues; and flexibility. . . . I don't think there would be anything on this list that all the rest of us wouldn't appreciate and want as well," emphasized Lauren Stiller Rikleen, President of the Rikleen Institute for Strategic Leadership. At the 10th Annual Labor and Employment Law Conference, a generationally diverse panel, including Rikleen, encouraged law firm leaders and other managers to embrace the Millennial employees who have come to represent a growing segment of their workforces. The 10th Annual Labor and Employment Law plenary session, moderated by Julie A. Totten of Orrick, Herrington & Sutcliffe LLP, explored the challenges and opportunities presented by the differing perspectives and expectations for work, career development, work-life balance, and leadership opportunities among older and younger employees.

The panel premised its discussion on the separation of the population and workforce into three large generational cohorts: the Baby Boom generation, born between 1946 and 1964; Generation X, born between 1965 and 1978 or 1982 (depending on the cutoff used by researchers); and Millennials, also referred to as Generation Y, born between 1978 or 1982 and 2000. The Baby Boomers and Millennials each number approximately 80 million, while Generation X consists of approximately 46 million people. Rikleen explained that many of the expectations of Millennial workers, particularly regarding matters of work-life balance, had been sought by Generation X as well, but that the Generation X cohort had not been large enough to effectively push for changes in workplace culture and norms.

Rikleen disputed the notion that Millennials frequently displayed a sense of entitlement in the workplace. Rather, she stated that, "what we are seeing is what a generation looks like who has been raised to be self-confident, have enormous self-respect, and [what happens] when a generation raised that way goes into the workplace." She noted that, anecdotally and empirically, Millennials have been shown to change jobs more frequently than members of other generations. Rikleen attributed the behavior to the coming-of-age of the Millennial workforce during the economic recession of the late 2000s in the high levels of student debt, disappearing job benefits, and insecurity associated with the recession. She asserted that Millennials tend to be loyal to individuals, particularly those who they see as invested in their career development, rather than to institutions.

Significantly, as one audience member noted, the panel focused on issues relating to Millennials who have steady work, and did not address labor and employment issues relevant to the significant number of Millennials who are unemployed or underemployed.

The panel highlighted the strong emphasis placed by Millennials on work-life balance including on the use of parental leave without stigma, the ability to work in locations other than the traditional office setting through the use of technology, a reduced emphasis on accumulating wealth and hierarchy, and greater stress placed on spending working time on matters of significance. Michael C. Hyter, of Korn Ferry, addressed part of the distinction succinctly: "I value title and responsibility as a boomer; my kids value meaningful work." He reassured the audience that Millennials would mature, but that they would do so in the context of the values and focus on technology that marked their formative years.

Katherine M. Larkin-Wong, an associate at Latham & Watkins LLP, Immediate Past President of Ms. JD, and an avowed Millennial, noted that the distrust of institutions and emphasis on transparency generally attributed to Millennials was the product of entering the workforce in the midst of a recession. She stressed that a recent survey of millennial lawyers revealed that Millennials seek regular and consistent feedback about their job performance, as well as opportunities for career development. She suggested that, in the law firm context, management give Millennial attorneys "real" opportunities—involving true autonomy and budget responsibility—to head their firms' efforts in areas where effective leadership does not necessarily require the type of experience gained over many years of practicing law, such as diversity and pro bono initiatives. Hyter suggested that firms consider introducing "mentoring up" programs, where younger employees help their more senior colleagues to better understand and utilize technology as the more experienced employees serve in a more traditional mentoring and career development role for their younger coworkers, as an approach to bring together Millennials and their more senior colleagues.

"Good news—technology is a solution to some of your Millennial problems. . . but only to the extent that you can get comfortable with the fact that people can get work done outside of the office. . . that they do not need to be face to face to be effective," said Larkin-Wong. "Law firms and companies that are not ready to adopt technology. . . are going to get beat. . . by all of these other places that are [adopting technology] and you are going to lose your Millennial talent to those places." ■

Keith D. Greenberg (*kdgreenberg@laborarbitration.com*) is an impartial labor and employment arbitrator and mediator in North Bethesda, Maryland. He serves as the neutral Co-Chair of the Section's Webinar Committee, and is a member of the Millennial generation.

Litigants Should be Wary of How Workers' Compensation Proceedings Can Impact ADA Claims

By Esmeralda Aguilar

What employees and employers say in workers' compensation proceedings can come back to bite them in later disability discrimination claims under the Americans with Disabilities Act (ADA) or similar state laws.

During a presentation at the 10th Annual Labor and Employment Law Conference entitled "What Every Labor and Employment Lawyer Needs to Know about Workers' Compensation," Matthew B. Schiff of Sugar Felsenthal Grais and Hammer LLP, explained that state workers' compensation laws and federal and state disability discrimination statutes often intersect, and it is therefore imperative that employment counsel coordinate with workers' compensation counsel to prevent tactical decisions in a workers' compensation case from "poisoning the well" in other forums.

Workers' compensation is a state-mandated insurance program that provides loss income and medical care for workers who suffer job-related injuries and illnesses. Each individual state has its own laws and programs for workers' compensation. Meanwhile, Title I of the ADA prohibits discrimination on the basis of disability in employment, and requires employers to provide "reasonable accommodation" to "qualified individuals" with disabilities, except when such accommodation would cause an undue hardship.

According to Schiff, an employer's strategy in workers' compensation may diverge from its interest in an ADA case. For example, in a workers' compensation case, the employer wants to reduce the award by arguing that the injured worker is not really all that injured. Then, in a subsequent ADA case brought by the same injured worker, the employer may want to argue it has no duty to provide an accommodation for the employee because he or she is too disabled to perform the job. Schiff urged employers to consider these angles in developing a strategy in workers' compensation cases.

Schiff explained that workers' compensation proceedings in most states include sworn testimony from the allegedly injured worker. He advised that employers take advantage of inconsistent testimony from the employee in the workers' compensation case to prevail on summary judgment in a subsequent ADA suit. Inconsistent statements made by the employee in one forum may judicially estop the employee from taking a contrary position in a different forum. Schiff discussed *Hamilton v. Dayco Products, LLC* (D.S.C. 2009), in which the district court granted summary judgment to the employer in an ADA case based on the plaintiff's earlier factual statements in a workers' compensation proceeding. The court emphasized that, during those earlier proceeding, the plaintiff clearly and repeatedly stated that she was completely disabled, which was in stark contrast to plaintiff's claims before the court that she was fully capable of performing her job if reasonable accommodation were made by the employer. The court explained that the doctrine of judicial estoppel exists to deal with exactly this sort of situation. The court concluded that because the plaintiff could not perform her job, she was not a "qualified individual" subject to the protections of the ADA.

Schiff also advised employers to consider providing the injured worker with "light duty" work because, in a later ADA suit, the employer can use that offer to show it made a reasonable accommodation for the worker. Schiff also stated that employers typically want employees to return to work because the longer the employee is out, the higher the insurance cost.

He also suggested that, during workers' compensation proceedings, employers can elicit testimony from the worker to defeat later claims of retaliatory discharge. For example, if the employer's counsel is able to obtain testimony from the worker stating that his understanding of the reason for termination is his inability to work, the employee may later be barred from testifying that he was terminated in retaliation for protected activity.

What a worker says in a worker's compensation deposition may impact ADA claims and the union's ability to negotiate the employee's return to work.

Meanwhile, Richard Swanson of Macey, Swanson and Allman in Indianapolis explained that, fortunately for workers, most of the time the attorney that represents the employer's labor and employment interests, is not the same attorney that handles the employer's workers' compensation cases. The employer's workers' compensation carrier will typically provide an attorney to handle worker's compensation claims, and that attorney will rarely cross paths with the employer's management attorney. Swanson explained that, for the worker, "the danger lies in those situations where a sophisticated employer has a management law firm that is producing both the worker's compensation lawyer and the employment lawyer, and the lawyers are working together." According to Swanson, the union needs to be especially vigilant in these situations, and not just because what the worker says during the worker's compensation proceedings may impact any subsequent ADA claims. Swanson emphasized that what an employee says in a worker's compensation deposition may also have an impact on the union's ability to negotiate the injured employee's return to work.

Swanson explained that if a doctor tells an injured employee that, as a result of his work-related injury, he may never be able to perform the duties of his job again, the employee's worker's compensation attorney will likely start laying the groundwork for a permanent total disability claim. This means that, during the worker's compensation proceedings, the attorney will advise the worker to testify that under no circumstances will he be able to return to work. This type of testimony makes it very difficult for the union to negotiate any sort of accommodation for that worker down the road. Swanson advised that, to protect the injured worker's interests, there needs to be a fair amount of pre-planning early on between the union, the employee and the employee's worker's compensation attorney.

In short, attorneys must be cognizant of both workers' compensation litigation and ADA claims when determining case strategy. ■

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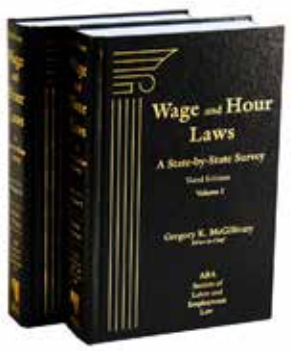

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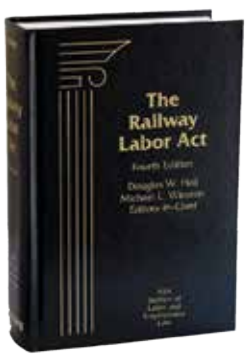

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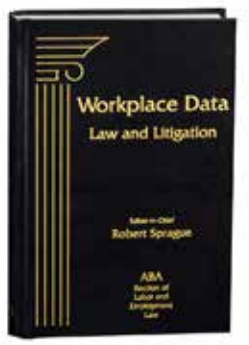

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business justification might be. Member Miscimarra suggested that the Board use a balancing test instead, saying "the Board needs to consider two things in these [rule] cases, not just one. . . . [first] the potential adverse impact on the NLRA protected activity . . . [but also weigh] the justifications associated with the particular rule."

In response to Miscimarra, Member Lauren McFerran argued that *Lutheran Heritage* gives employers clear principles to follow. She advised that to comply with the NLRA, employers need only "articulate what your interest is in regulating [workplace behavior], and narrowly tailor your policy to focus on that interest."

Member McFerran turned to social media cases, stating that "[the Board is] not reinventing the wheel." McFerran explained that the Board is applying decades-old principles to the facts. However, she identified "two areas where creative thinking is needed" to analyze social media—first, in determining when expressions constitute protected concerted activity, as was the case in the Board's recent decision in *Chipotle*, and second, in addressing when expressions are so offensive that they lose protection of the Act, as was the case in *Pier Sixty* and *Richmond District*.

"To comply with the NLRA, employers need only 'articulate what your interest is in regulating [workplace behavior], and narrowly tailor your policy to focus on that interest."
—Lauren McFerran, NLRB Member

NLRB General Counsel Richard Griffin discussed the cases concerning whether arbitration agreements that bar employees from pursuing work-related class or collective actions violate the NLRA. As of the time of the panel discussion, there were about 70 cases on this issue pending in every Circuit except the 10th. Griffin stated, "The Board's position has prevailed in cases in the 7th and 9th Circuits." Of the four pending certiorari petitions, Griffin hopes the Court will grant certiorari in *NLRB v. Murphy Oil*, a case from the 5th Circuit. NLRB Deputy General Counsel Jennifer Abruzzo added that the General Counsel's office will continue to take these cases and "tee them up" for now, but once *certiorari* is granted, the office will reassess its approach.

Griffin and Abruzzo reviewed immigration issues in prosecuting unfair labor practices. After issuing numerous certifications for U-Visas, Griffin reported that the first U-Visa was finally granted. A "U-Visa" is a temporary non-immigrant status available to non-citizen victims of certain crimes. Every Region now has an immigration coordinator to address instances where immigration status is at issue and a U-Visa may be needed in order to prosecute the unfair labor practice charge.

Abruzzo described some of the NLRB's major initiatives to educate workers around the country about their rights. One of those initiatives, the White House Initiative on Asian Americans and Pacific Islanders (WHIAAPI), involved the DOL, NLRB, EEOC, and DOJ. "After listening to these vulnerable communities say, 'this is my problem, but I have no idea which agency I need to go to, or how to find it,'" Abruzzo said the agencies realized workers needed more help in finding the correct agency to address their problems. With the help of Presidential Innovation Fellows, the agencies worked together to develop the website worker.gov to do just that.

In concluding remarks, Chairman Pearce commented on "what might be the Obama legacy as it relates to the Board." After many political roadblocks, five Board members were finally confirmed in 2013 for the first time in a decade, and they did remarkable things, many aimed at educating the public. Yet Pearce also remarked that a friend had described him as "well-adept at building sandcastles," suggesting the work of the Obama Board may easily be washed away. Griffin was asked how the anticipated change to Republican control of the Board would affect his work. For the remainder of his term, which is set to expire on November 3, 2017, Griffin said his office will "continue to aggressively protect employees' rights under Section 7, make the best legal arguments we can, and let the chips fall as they may." ■

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SPORTS

College Athletes May Be One Step Closer to Unionization

By Erin Fowler

In the late 19th century, many colleges and universities began fielding football teams. East Coast teams like Yale, Harvard, Princeton, and Columbia dominated the field. As college football rose in popularity, alumni deciding where best to donate their funds demanded winning football teams. As a result, schools often paid athletes under the table, admitted players solely for the purpose of playing football and devised schemes to ensure that players remained academically eligible to play.

As college football became more commercialized, injuries to players increased. The injuries were due, at least in part, to the game itself, but were also likely encouraged by enthusiastic alumni wanting to ensure their school's victory. Recognizing the rampant injuries within college football, in 1905, President Teddy Roosevelt called together a number of schools to discuss the state of college football. Later that year, representatives from schools all over the country formed the Intercollegiate Athletic Association, an enforcement body aimed at ensuring compliance with rules the group developed. In 1910, the organization changed its name to the National Collegiate Athletic Association, or NCAA.

It is no surprise that the main goals of the NCAA were to protect student athletes from the over-commercialization of college athletics and to ensure their safety. Against this backdrop, the NCAA introduced the term "amateur" to college athletics to ensure that student-athletes were not considered professionals and were not susceptible to unethical influence through the acceptance of payment by others. To some, this requirement has the opposite effect and leaves student-athletes vulnerable to be taken advantage of by their institutions and the NCAA, both of which profit heavily from Division I sports, including football and men's basketball.

Fast forward to 2016. Although student-athletes are not given a salary, Division I and II student-athletes are eligible for athletic scholarships, ranging in amount, up to and including a full scholarship covering tuition, room, and board. According to many, this should satisfy the student-athletes' needs as many students attend colleges and universities all over the country without any form of financial assistance from their institutions. Therefore, to those, to be compensated on top of receiving a "full ride," seems preposterous.

But, the College Athletes Players Association ("CAPA"), the entity representing student-athletes across the country is not simply requesting payment for the student-athletes' participation in college sports, or pay-for-play. Instead, CAPA identifies the following goals, some of which are reminiscent of the founding goals of the NCAA: (1) "guaranteed coverage for sports-related medical expenses for current and former players;" (2) "minimizing the risk of sports-related traumatic brain injury;" (3) "improving graduation rates;" and (4) "securing due process rights" for players.

Recently, in January 2014, the scholarship football players at Northwestern University sought to be recognized as employees so that they could unionize. On March 28, 2014, the National Labor Relations Board ("NLRB") Regional Director for Region 13, Peter Sung Ohr, found that the Northwestern University scholarship football players were employees under the National Labor Relations Act ("NLRA"). By designating these players as employees, the players were then entitled to unionize under the NLRA.

Noting that the players' relationship with the University was primarily economic, as opposed to academic, Ohr reasoned that the scholarship football players were recruited because of their "football prowess and not because of their academic achievement in high school."

In addition to finding the relationship between the players and the University to be economic in nature, Ohr also found that the University exerted "strict and exacting control" over the players throughout the year. For these reasons, he determined the players were employees, their scholarships were compensation, and that they had the right to unionize under the NLRA.

After Northwestern appealed Ohr's decision, the full Board issued a decision on August 17, 2015 declining to exercise jurisdiction over this single team, stating that to do otherwise would create chaos and jeopardize the stability of labor relations. The Board noted that should it exercise its jurisdiction, more than half of the Division I student-athletes would be excluded because they attend public colleges and universities, over which the Board has no control.

For some, the Board's decision was thought to be the end of student-athletes' fight for employee status. However, on October 13, 2016, the NLRB's Associate General Counsel issued an advice memorandum indicating that a number of policies in the Northwestern University Football Handbook were unlawful under the NLRA. By subjecting the handbook to the Act and specifically referring to scholarship student-athletes as employees, it seems as though the NLRB is now more concretely articulating its position on the status of student-athletes as employees.

The Seventh Circuit weighed in on December 5, 2016 in *Berger v. National Collegiate Athletic Association, et al.* decision, and the Seventh Circuit considered whether two student-athletes were employees under the Fair Labor Standards Act ("FLSA"). Determining that "student-athletic 'play' is not 'work'" under the FLSA, the Seventh Circuit held that student- athletes are not employees entitled to a minimum wage under the FLSA. The Seventh Circuit's decision, therefore, seems to eliminate the possibility of student-athletes achieving any sort of pay-for-play compensation under the FLSA.

For now, it seems clear that, at least in the Seventh Circuit, student-athletes are not employees under the FLSA. What remains to be seen, however, is whether student-athletes will achieve employee status for purposes of unionization under the NLRA or if other appeals courts will disagree with the Seventh Circuit. Given the NLRB's most recent advice memorandum, it seems that the NLRB is leaning toward classifying scholarship student-athletes as employees. This advice memorandum, along with the Board's decisions concerning student-athletes, however, is subject to review by President Trump's administration. The Board may articulate a different position on student-athletes in the near future. Therefore, the fight to determine whether scholarship student-athletes will earn the right to unionize lives on. ■

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WINTER 2017, VOL. 45, NO. 2

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