Aspen Casebook Series

Teacher's Manual

Employment Law

Third Edition

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Course Strategy

Where This Course Fits Within the Law School Curriculum

This casebook is designed for a survey of employment law with two primary goals in mind. First, for students who might take no other employment-related course, this survey provides a good across-the-board exposure to issues and problems in employment law. Second, for students who want a more concentrated education in employment law, this survey fills the substantial gap between the traditional bookends of employment law: labor law (or collective bargaining) and employment discrimination law. For the latter group of students, neither labor law nor employment discrimination is a prerequisite for this course. Students who have studied labor law or employment discrimination before this course experience some redundancy, but they gain the opportunity to apply what they learned in their other courses in some new contexts.

Organization of the Text

The text is organized according to the principal interactions between employers and employees. After a brief overview of the history of employment law (Chapter One) and the essential characteristics of employment subject to protective legislation (Chapter Two), the book proceeds to the first principal interaction, employee selection (Chapter Three). The next topic is compensation and benefits (Chapter Four), which is a convenient opportunity to discuss formation and modification of the employment contract, or of the benefit "plan" for purposes of some forms of compensation. Then comes an employer's responsibility for employee safety (Chapter Five). Modern expressions of this responsibility lie in workers' compensation law and in the Occupational Safety and Health Act.

Employer management and supervision of employees is the subject of Chapter Six, and this topic includes an employer's investigation of employee misconduct. A related interaction, presented separately in Chapter Seven, is the conflict and accommodation of an employer's demands for an employee's time versus the employee's personal, family or civic needs. Chapter Eight addresses an employer's termination of the relationship, and this topic includes analysis of the employment at will doctrine, wrongful discharge, and a number of statutes and doctrines that mitigate an employee's injury in an involuntary termination. The employer's risk in termination of the relationship, such as the loss of trade secrets and exposure to an employee's competition, is the subject of Chapter Nine. Finally, Chapter Ten is an overview of special problems in the settlement, resolution and litigation of disputes between employees and employers.

Four primary sources of law are interwoven in these areas of interaction: (1) the common law (contract and torts), (2) employment discrimination law, (3) other employment statutes, (4) constitutional law, and (5) collective bargaining. Students are likely to arrive at this course with a foundation in contracts, torts and constitutional law. Still, I find that students can forget much of what they learned in first year classes, and employment law is an opportunity for students to renew, fortify and apply their knowledge of these areas of law. Moving from chapter to chapter, there are particular points where it is most profitable to reintroduce the basics of these laws in order to highlight some of the special problems posed by employment.

For example, common law and constitutional rights of privacy are reintroduced in Chapter Three on selection of employees. The problem of privacy reappears in Chapter Six in the section on surveillance and investigation of employees. This approach divides analysis of privacy into two separate parts, but there are different sets of interests, strategies and analyses for the law of privacy at each interaction. Separating the problem of privacy in employee selection from the problem of privacy in employer investigation of current employees makes it easier for employees to appreciate the differences in these settings. Moreover, it is rare that any dispute over employee selection or employer investigation is strictly a dispute over privacy. Organizing material according to the nature of the interaction encourages students to analyze problems holistically and with better appreciation of potential overlap and conflict between laws and remedies.

Discrimination law and collective bargaining law are two more themes that run throughout the book. The book is designed for a class in which some students have already studied these laws in depth in other courses, some will study these laws in future courses, and some have not and will not study these laws in any other course. Chapter Three introduces (or for some students, reintroduces) the basic theories and models of proof of discrimination in the context of employee selection, which is conveniently early in the course and which is also the very context in which these theories and models originated. In comparison with what students would learn in a course on Employment Discrimination Law, this book's treatment of the subject is thin but sufficient to give students the tools for identifying the discrimination law angle in a variety of situations. After Chapter Three, the topic of discrimination law appears in other contexts a solution for problems of compensation and benefits, workplace safety, supervision and termination.

Collective bargaining is presented with much less depth but is still a recurring theme from start to finish. The principal introduction to collective bargaining is in Chapter Four as an alternative system for negotiating the contract of employment. Other important discussions of collective bargaining are in Chapter Six's section on interrogation of employees, Chapter Eight's section on alternative job security schemes, and Chapter Nine's section on overlapping remedies.

Recommendations for a Three Hour Course

The text includes more than a semester's worth of material even with an abbreviated treatment of discrimination and collective bargaining. Thus, one must pick and choose according to one's own priorities. Here is a recommendation for coverage based on my own experience and use of this text. It omits enough material to allow for a comfortable pace in a one semester, three hour course.

Chapter One: I assign this entire chapter as a reading assignment for my students, but I devote classroom time mainly to the *Halliburton* case. *Halliburton* introduces the employment at will doctrine as a factor affecting nearly every other part of employment relations. The "at will" character of a relation affects more than job security and longevity. It also affects the parties' capacity to make long-term promises or to secure long-term expectations and aspirations in employment. An employer's freedom to discharge an employee at will also affects the enforceability of the employee's statutory rights, unless the law effectively prohibits retaliatory discharge.

Chapter Two: Not all parts of this chapter are equally important. One could dispense with some parts to leave more time for others. The first part, *The Employee/Independent Contractor Problem*, is the most important part, because it presents a persistent problem affecting nearly every aspect of employment relations and because it requires some thought about what we mean by "employee." In *Who Can Be Employed?*, the section on *Children* could be omitted in favor of *Aliens*, which presents the topic of greater current interest to future employment lawyers. Finally, I favor including *Who Is the Employer?* at least up to p. 93 so students will understand the wide range of multi-party employment relations that have always existed to some extent but which are becoming more complex and troublesome as employers seek new ways to manage or avoid regulatory requirements. The remainder of this Chapter after p. 93 is optional.

Chapter Three: After the *Overview*, it might be tempting to skip part B, *Duties to Third Parties*, but I recommend that you include part B. An employer's tort liability to third parties is a factor in many other problems of employee selection and retention. Much of part C, *Statutory Prohibitions Against Employment Discrimination*, is indispensable unless you are sure all your students are well versed in discrimination law, as they might be if you have made Employment Discrimination a prerequisite to this course. If you opt in favor of a light treatment of discrimination, you can probably omit *Price Waterhouse v. Hopkins* as better left to a course in Employment Discrimination, with a few words to your students about group decision-making, stereotyping, subconscious bias and burden of proof in a mixed motive case. Subpart 5 on *Affirmative Action* might be omitted and left to coverage in another course because it is not essential to understanding any of the other materials in this text. Part D, *Beyond Discrimination*, covers the gap left by employment discrimination and should definitely be included. Part E, *Screening Employers*, is easily omitted in the interest of time.

Chapter Four: I cover this chapter in its entirety. A better treatment of issues of compensation is one of the main purposes of this course. However, for those looking for material to omit in favor of other topics, the following sections are less important than others: part A, part B.2 (if you believe a comparison with collective bargaining is unnecessary), and the *Hudacs v. Frito Lay* case at page if you believe the text includes more than enough on the matter of wage "deductions."

Chapter Five: It is tempting to regard workers' compensation and occupational safety & health law as separate topics that should be excluded from a course on employment law. However, workers' compensation is part of the matrix of laws for the disabled or injured incumbent employee. For many incumbent employees with ADA or FMLA problems, there is a workers' compensation angle. Moreover, students who do not go on to practice "employment law" will certainly confront workers' compensation problems as in-house lawyers or as personal injury, insurance, or general business lawyers. Occupational Safety and Health is the more dispensable part of Chapter Five, but I still prefer to include it because of the increasing connections between OSHA and other areas of employment law, such as discrimination law. However, I tend to move lightly and quickly through the section on promulgation of OSHA standards. Section C.4, on employer rights, is the most dispensable of all, because this material is likely covered in any course on Administrative Law.

Chapter Six: I recommend all of this Chapter, but I expect many people will prefer to travel lightly and quickly through some of the more technical material on interception of communications and electronic data storage.

Chapter Seven. Conflict over working time is a hot and still emerging topic in employment law. The depth of this book's treatment of military service and reserve duty might seem unusual, but rights of service personnel are likely to continue to be important as increasing numbers of service personnel return to their private sector jobs. Therefore, I recommend including all of this chapter.

Chapter Eight: I normally omit section C on alternative job security schemes such as public employment and collective bargaining, which are easily left to separate courses on constitutional law, collective bargaining and public employment. Two other sections that might reasonably be omitted are section D.1.b on stigmatization and D.2 on unemployment compensation.

Chapter Nine: The first two sections are most important. Section C on interstate disputes could be regarded as the domain of conflicts of law or remedies courses.

Chapter Ten: One can reasonably omit section B as material likely to be covered better in separate employment discrimination and collective bargaining courses.

A brief summary of this recommendation is as follows:

Chapter I: All (class time reserved mainly for *Halliburton*)

Chapter II: A, B.2 and C through page 93.

Chapter III: A, B, C (*Price Waterhouse* and affirmative action optional), D

Chapter IV: All (parts A and B.2, and *Hudacs* at pp. 304-308, are optional).

Chapter V: All except section C.4.

Chapter VI: All

Chapter VII: All

Chapter VIII: All except section C. Sections D.1.b and D.2 are optional.

Chapter IX: All except section C.

Chapter X: Section A and C.

Chapter One
An Overview of Employment and the Law

A. The Changing Nature of Work in America

There are several important themes in this section that prepare students for the chapters that follow and could serve as topics for class discussion:

1. Changing ways work is organized and managed.
   —Shifts from agriculture to industry to services and information management.
   —From small craft shops to large factories and corporate enterprises.
   —Increasing employer control over the work, schedule and pace.
   —Standardization and institutionalization of relations; emergence of managerial bureaucracy.
   —The collective bargaining alternative for organizing workers and setting terms.
   —Growing importance of employment for welfare benefits.
   —Some current trends: diminished commitment (?), the "contingent" workforce.

2. Integration of the workforce, as a goal and as an outcome.
   —Promotion of equal employment opportunity and desegregation as public goals.
   —New issues and challenges created by integration of genders in the workplace, older workers, disabled workers.

3. Changing expectations regarding work and an employer's responsibilities.
   —Work as a means of subsistence.
   —Personal identity based on work, career, affiliation with employer.
   —The nature of the relationship: Personal versus institutional; long term v. short term; adversarial v. shared interests.
   —Work as a source of security, health insurance, retirement savings.

B. Alternative Legal Systems for Regulating Employment Relations

For any employment relations problem addressed in this book, there are at least five systems of law that might supply an answer:

(1) The common law of contracts and torts
(2) Collective bargaining law
(3) Discrimination law (such as Title VII)
(3) Other statutes for employees or including protection for employees
(4) Constitutional law, especially the First, Fourth, Fifth and Fourteenth Amendments

One could add property rights for a few problems, particularly with respect to inventions and trade secrets in Chapter Nine. Students should keep this checklist handy as they move through the materials. Obviously, many students will know little about discrimination or collective bargaining law unless they have completed other employment law courses, but the basics of these legal systems are introduced in later chapters as the need and occasion arises.

C. Complications Created by Employment for an Indefinite Duration

Termination of employment is addressed in depth in Chapter Eight, but the parties' freedom to terminate is a problem that affects nearly every other aspect of employment. The possibility of termination "at will" is an important source of the employer's power to manage the relationship. It also affects the parties' abilities to make long-term commitments to each other, and it could be a problem for the enforceability of statutory, common law or constitutional rights of employees.

In re Halliburton

Key facts: Halliburton issued a notice to employees in November 1997 of a "Dispute Resolution Program," including arbitration as the "exclusive" means of resolving disputes. The notice stated, "if you accept or continue your employment after January 1, 1998, you will agree to resolve all legal claims against Halliburton through this process instead of through the court system." Myers, a 30 year employee "at will," received the notice and continued working past January 1, 1998, but in this lawsuit he denied he had understood the notice. This lawsuit stemmed from Halliburton's action demoting Myers because of a "lack of interpersonal skills." Myers' claims were based on alleged race and age discrimination. Halliburton moved to stay the action and to compel arbitration, but the trial court denied the motion. Halliburton filed a petition for a writ of mandamus (the usual remedy under Texas law to compel a trial court to order arbitration). A Texas court of appeals denied the petition, and the matter reached the Supreme Court of Texas.

Decision: Mandamus issued (if trial court fails to abide by this decision). Myers was bound by a contract to arbitrate employment disputes.

1. **Offer and Acceptance**. Under Texas law, an employer can change terms of employment if it unequivocally notifies an employee of a change, and if the employee accepts the change by continuing to work with knowledge of the change. Myers denied he understood Halliburton's notice, but the Court found the notice clear and unequivocal.

2. **Consideration**. Myers received consideration: Halliburton's promise to be bound by the results of arbitration.

a. Myers argued the promise was "illusory" because an employer can avoid a promise "dependent on continuing employment" by terminating an employee "at will." The Court disagreed. Halliburton's promise was not "dependent on continuing employment." If Halliburton had terminated Myers arbitrarily, it would have been bound to arbitrate disputes then existing between Halliburton and Myers–including disputes relating to the termination.

b. Halliburton's promise was not rendered "illusory" by its right to terminate or modify the Program at any time. By the terms of Program, Halliburton could change the Program only prospectively and only after ten days advance notice. It could not change the rules with respect to disputes that arose before notice of a change.

3. **Unconscionability**. The agreement was not unconscionable.

a. **Procedural Unconscionability**. Halliburton may have had superior bargaining power, stemming in part from its right to discharge Myers if he refused the new terms, but the same could be said of any employer proposing to change terms for "at will" employees.

b. **Substantive Unconscionability**. An employee bore only $50 of the costs of the arbitration, and Halliburton provided the employee with up to $2,500 for the costs of his own attorney. There could be other grounds for concern (e.g., rights to discovery, powers of an arbitrator to award relief, respective rights of appeal), but these issues were not presented in *In re Halliburton*. They are important topics in Chapter Ten.

Observations:

1. A question raised in note 3 is whether Myers could have negotiated or rejected the terms of the Program. Almost certainly not, without losing his job, but the question is worth discussing because it leads to the point that an employer has considerable power to dictate terms of employment without real "negotiation," provided its terms are not so severe that he alienates employees and causes them to resign. You might note, however, that the parties' respective bargaining strengths depend on many factors including the stage of their relationship. It is easier for an applicant to walk away from an employer's terms than it is for a 30-year employee. **Note**: According to a recent study, 75% of all employees are actively or passively looking for other jobs at any given time. Society for Human Resource Management, *New Survey Finds 75% of Employees Looking for New Jobs* (Nov. 30, 2004), www.shrm.org/press/CMS_010465.asp. Naturally, the state of the economy is another important factor.

2. This case illustrates that employers standardize some of the terms of their employment contracts, much as merchants standardize their consumer contracts. There are practical reasons for standardization. Halliburton's "Program" would have been difficult to administer if the rules were different for each employee. Imagine if it were a pension or medical insurance plan.

3. What if Halliburton had required each employee to ***sign*** the notice to acknowledge their acceptance? Employers frequently seek an employee's signature if only to prove the employee received the notice. If so, the signature rather than the continued employment might be deemed the acceptance. The point has been important in some cases. An employee might refuse or forget to sign, and a supervisor might choose not to press the matter because he's embarrassed by the request, forgets, fears conflict, or doesn't appreciate the importance. Some employer-drafted notices also require an employer's signature as if the employer is accepting the employee's offer. If so, there's a chance a manager will forget to sign or will lose the document. Halliburton was clearly a well-advised employer. Its notice clearly stated that continued work, standing alone, would constitute an employee's acceptance.

Chapter Two
Who Is an Employee
And Who Is the Employer?

A. The Employee/Independent Contractor Problem

One can emphasize a number of themes in this material. First, there is a lot at stake. I usually begin by enumerating legal consequences of the employee/independent contractor distinction, including *respondeat superior*, employment regulations, payroll taxes and workers' compensation. It's no wonder employers frequently try to structure worker relations to avoid "employee" status. Moreover, one worker's status can affect rights of other persons who are definitely "employees." Not counting one worker as an "employee" might mean that undisputed "employees" are insufficient in number for employer coverage under certain laws (e.g., Title VII applies only to employers with at least fifteen "employees").

Second, there are legitimate business reasons for employing independent contractors rather than employees. Contracting with independent firms rather than employing one's own "employees" for certain services can be less expensive in some situations even if one ignores any savings from the avoidance of labor laws. Contracting out can be less expensive when independent contractors are forced to bid for the opportunity to serve the employer, and when independent contractors are more efficient than the employer in managing the work in question. However, when an employer employs *individual* independent contractors who look in many ways like employees, and whose work still requires a fair amount of direction and coordination by the employer, it may be useful to ask whether there is any business reason for the arrangement other than the avoidance of employment laws.

Third, the common law concept of an "employee" rests on the employee's consent to an employer's right to control details of the work as a matter of contract. The idea of an employer's *right* to "control" makes the evolution from "servant" to "employee" a bit smoother, and it provides a rationale for *respondeat superior*. But how useful is the "control" test for distinguishing employees from individual independent contractors in the modern world? One can probably think of many employees who work without much employer supervision and "control" (and you might start with law professors). On the other, powerful employing firms sometimes exert considerable control over weaker "independent contractors."

In the real world, an employer's exercise of authority is just as likely to be based on economic advantage in ongoing relations as on a contract-based right to control. This is the essence of the economic realities test. A worker's economic dependence on an employer is also a likely reason why lawmakers believed it necessary to enact the protective law in question..

NLRB v. Hearst Publications

Key facts: "Newsboys" employed by four Los Angeles newspaper publishers voted in favor of union representation. The publishers refused to bargain with the union. In unfair labor practice (enforcement) proceedings before the NLRB, the publishers argued that the newsboys were independent contractors–not employees–and were outside the protection of the NLRA. The NLRB issued an order requiring the publishers to recognize and bargain with the union, but the court of appeals denied enforcement of the order, holding that the term "employee" in the act should be interpreted in accordance with the common law, and that the newsboys were not "employees" under this approach. The Board appealed to the Supreme Court.

Facts showing employee status. "Newsboys" is a bit of a misnomer. The workers in question were adult men who sold newspapers from "established spots." Unlike young "bootjackers", "schoolboys", and other "temporary" distributors, newsboys typically worked for the long term, and many supported families.

At first glance, the newsboys' compensation resembled an entrepreneur's "profit." They earned the difference between what they collected from buyers and what they owed publishers for the papers, and they were required to pay for missing or lost papers. You might note that it is not unusual for employers to shift risks of business loss to their employees. For example, a retailer might require its cashiers to bear the risk of a cash shortage (a topic in Chapter Four). Moreover, the publishers fixed the price at which the newsboys could sell, and while newsboys could decide how many newspapers to order, the publisher decided whether to honor a request for more papers. Perhaps most importantly, the publishers assigned and confined newsboys to sell from particular "spots," which would have limited the revenues and scope of any newsboy's "business."

The district managers who distributed papers and collected receipts appear to have acted as supervisors in a number of ways. Among other things, the district managers controlled the newsboys' hours of work and enforced adherence to "helpful" sales techniques. District managers enforced their control by reprimands, disciplinary transfers from one spot to another, and dismissal.

Newsboys do not appear to have invested much capital in their sales business. In fact, it appears that a person would have needed little or nothing to become a newsboy. The publishers provided sales racks, aprons, and placards. The publishers even provided transportation to take the newsboys to their assigned spots.

Facts supporting independent contractor status. The publishers neither carried the newsboys on their payroll nor included them in their workers compensation insurance coverage. A newsboy's "profit" varied with his ability and effort in selling papers and avoiding the loss of papers. A newsboy could hire assistants, "sell" his spots to another newsboy, and sell other publications. Note there were four different publisher-respondent-employers in this case.

Unknown: It's not clear from the Court's discussion whether it was common for a newsboy to hire assistants. Considering that no investment was needed to work directly for the publishers, why would anyone work as an employee of another newsboy at what must have been a lower rate of compensation? Also, it is not clear whether the sale of other publications was significant. Finally, it would be interesting to know if the four publishers acted in concert to set their terms for dealing with newsboys. If they acted separately and competitively in dealing with newsboys, the case for independent contractor status ought to be stronger. To the extent they behaved like a "single employer" or "joint employers" (these terms are the subject of the last part of this chapter), the case for employee status ought to be stronger.

Decision: The Court agreed with the Board that newsboys were "employees" for purposes of the NLRA. It reversed the court of appeals and remanded for further proceedings.

1. There is no uniform "common law test." Even if the test is imagined to be uniform, it does not yield uniform results. Courts that regard a worker as an independent contractor for purposes of *respondeat superior* might find the same worker to be an employee for purposes of social welfare legislation such as an unemployment compensation law.

2. State common law should not determine who is an employee under federal collective bargaining law. Otherwise, the meaning of "employee" would vary from one state to the next.

3. The term "employee ... must be read in the light of the mischief to be corrected and the end to be attained" by the statute in question. Congress' intention was to cover a field wider than "the technical relation of employer and employee" but not so wide as to cover any person rendering services. The Court identified three groups: (a) workers who are clearly employees, (b) those who are clearly "entrepreneurial," and (c) people in the "intermediate region." In determining the status of workers in the last group, a court should consider Congress' goal of achieving "industrial peace" through "collective bargaining."

4. The newsboys appear to be the very type of workers for whom Congress enacted the NLRA. Whether they are employees or independent contractors under the common law, they suffer the same inequality of bargaining power, and their efforts to enhance their position through collective bargaining and possibly by striking pose the same risks for "commerce."

Observations:

1. Did the publishers "contract out" the sale of papers because it was more efficient to allow independent firms bid for or manage the work? Did the publishers avoid any costs of managing the performance of the work?

2. Consider asking students how they might seek to prosper as entrepreneurs if they were newsboys. Could they distinguish themselves or expand their businesses despite the publishers' lingering control over some aspects of the business?

3. *Hearst* was important for three reasons. First, it endorsed a skeptical view of the common law "control" test, especially to the extent the old test looked for a *contractual* source of the right to control details of performance. The Court didn't completely reject the control test. Actual control over details and means of performance is still important. Indeed, the Court supported its decision by enumerating ways the publishers controlled the newsboys. But the Court looked beyond the "contract," and it treated actual control of the details of the work as one part of a larger test, not the whole test.

Second, in looking beyond contract-based control of details, the Court considered the newsboys' economic dependence on the publishers. The Court later refined this and other parts of the so-called "economic realities" angle in *Silk* and *Rutherford Foods*. See note 1. As refined, "economic realities" include the worker's dependence on the employer, his relative investment in an independent business, and the role of the worker in the employer's enterprise (is the work peripheral to the employer's business, or is it an integral part of the employer's business?).

Third, the Court added "statutory purpose" as a factor. The purpose of the NLRA was to promote and regulate collective bargaining. The newsboys were striving for collective bargaining, and a collective/standardized approach to their contracts was appropriate. Therefore, they were "employees" for purposes of collective bargaining law, although they might be independent contractors for other purposes.

4. Note 3 poses the question whether Congress overruled *Hearst*. Congress may have sent a "message" that the NLRB and the Court had gone too far, but it offered no particular restatement or revision of "the test." Half a century later two things became clearer in *Darden*. "Economic reality" factors are part of the test. However, the statutory purpose angle was stricken from the test for purposes of *federal* law.

5. Federal courts are not precluded from considering statutory purpose for all purposes. As you'll see in the discussion of "Other Non-Employees" and the *Town & Country* case, the Court recently considered the purpose of the NLRA in holding that "salts" are employees.

Problem

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The facts are adapted from National Data Services of Chicago, Inc. v. Director of Employment Sec., 746 N.E.2d 40 (Ill. App. 2001). The court applied the "ABC" test of the local unemployment compensation law in finding that the workers were employees, but it appears the court might have reached the same conclusion even without the ABC test. The court listed the following facts in support of an employer-employee relationship: (1) the right to terminate a worker if dissatisfied with her work; (2) the employer controlled which work went in-house, and which work went to home-based employees, leaving the latter only that work which required the least amount of supervision and control; (3) workers were required to "follow a routine" (4) the employer controlled the price to be paid for the work; (5) the employer bore the risk of nonpayment by the customer.

Some other observations: The recruiting and hiring process looks a lot like the way employers recruit and hire employees. A home-based worker really needs no investment in an independent business. Owning a computer is no more an investment than owning a TV. Home-workers don't bring any special training to the relationship. DCI tells them everything they need to know. Indeed, if the home-based workers are terminated, the experience and knowledge they gained will probably be useless for any other "business" or employment. Although home-based workers are "free" to hire assistants (and to expand their business), this is not really possible. A hiring worker would have to pay an assistant something less than the hiring worker's own piece rate in order for this "expansion" to yield any profit, but an assistant might just as well go directly to DCI and get the original piece rate, because the assistant needs no investment or experience or training to go into "business" for herself.

B. Who Can Be Employed?

As the first case illustrates, a defense often asserted by a putative employer in a child labor case is that the children were not "employees." The putative employer maintains that the children were independent contractors, volunteers, trainees, or helpers serving employee parents.

Reich v. Shiloh True Light Church of Christ

Key facts: Members of the church had a "religious belief" that their children should receive vocational training. For more information see *Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196 (4th Cir. 1989).[1]

The church contracted to perform construction work for which it received payment, but it relied partly on unpaid children to perform the work. The earlier appeal referenced above provides some additional helpful details. Evidently, church members who owned commercial businesses contracted or subcontracted work to the church. The church billed these commercial businesses for the work. Children under the age of 16 worked without pay. The children sometimes received lump sum "gifts" as high as $5,500, depending on their experience and achievements, but the church evidently discontinued payment of real money to children early in the Department's enforcement proceedings. Thereafter, the church granted "imaginary wages"

[1]The Church, described in the earlier decision as "a separatist religious sect," was founded in the late eighteenth century, but its membership was concentrated in one community in North Carolina. Starting in 1971, members withdrew their children from the public schools and began their own program of home schooling and "vocational" training "to insulate the children from idleness, teach them marketable skills, provide them with savings for the later launching of their own careers and to inculcate in them a scripturally mandated work ethic." 867 F.2d at 197.

that increased over time and determined the amount of real wages the children would receive when they reached 16.

The Department brought an enforcement action against the church, and the district court found that the church had violated the child labor and minimum wage provisions of the FLSA. The church appealed, arguing that the children were not "employees." The church's position appears to have been that the children were trainees or students.

Decision: The children were working as the Church's employees, and not as trainees. The test for distinguishing an employee from a trainee is to identify the primary beneficiary of that person's labor. In this case, the primary beneficiary of the children's labor was the Church and not the children, and in many respects the Church treated the children as employees, not trainees. First, unpaid children under 16 performed the same work as paid employees over the age of 16. Second, the district court discredited the Church's evidence of alleged non-wage (educational?) benefits to the children. Third, the Church's argument that the children were trainees was inconsistent with its system of compensation based on "imaginary wages" as a method of determining a child's later real wage. Fourth, the Church derived substantial financial benefit from the children's work (initially the Church solicited customer "donations" for the value of child labor; and later the Church simply billed for the entire project and evidently enjoyed a substantial profit from the free labor of the children). Fifth, the children's free labor placed the Church in an advantageous position to compete with commercial construction businesses.

Observations:

1. The FLSA contains specialized provisions for various trainee and student worker programs. Under one of these provisions, 29 U.S.C. §214(d), the Secretary is authorized but *not required* to issue regulations for a school's employment of children as an integral part of its educational program. I omitted a portion of the court's opinion rejecting the Church's argument that it could claim an exemption under this provision. The Secretary has not issued regulations that would have applied to the Church's use of child labor.

2. Was the Church entitled to more careful consideration of its argument that it was educating children in the Church's value system and preparing them to be productive, self-reliant members of the community? There doesn't appear to have been any evidence that would distinguish the children's activity from any other labor. If hauling cinder blocks and bricks at a construction site isn't work, what is?

3. Might the church have argued that the children were "volunteers?" The reward system and the commercial character of the projects appear to have undermined that argument. Perhaps it would have been different if the children were helping to repair the Church's own building or if the Church was providing free construction work for the poor (*e.g.*, Habitat for Humanity).

4. Arguably, the Church's use of the children was simply a more extreme example of the usual car wash, bake sale or other fund raising activity in which children participate. In these other situations, however, the essential purposes of the child labor laws are less likely to have been violated, the children are more likely to be true "volunteers," their activity borders on a social event, and other businesses are less likely to complain about unfair competition.

5. Invariably, someone will ask about door to door Girl Scout cookie sales. Girl scouts don't get "imaginary wages," but they do earn non-cash prizes based on the number of sales they make. However, I think it will be a cold day in Hell before the Department of Labor or competing cookie sellers take on the Girl Scouts of America. For purposes of state law, some legislatures have adopted what I call the Girl Scout Cookie Rule. See, e.g., Texas Labor Code §51.0145 ("Use of Child for Sales and Solicitation").

Collins Food International, Inc. v. INS

It may be important to point out that "alien" does not mean "unauthorized" to work. There are many resident aliens who are authorized to work. They entered the U.S. legally and have employment authorization (e.g., because they are permanent residents). On the other hand, some aliens who entered the country legally do not have employment authorization (e.g., tourists). Unauthorized workers are persons who entered *or* remained in the country illegally *or* who are lawfully present in the U.S. for a limited purpose not including employment..

Before 1986, it was illegal for an unauthorized alien to work in the U.S., but it was not illegal for an employer to employ the alien. In other words, the employer risked little more than the inconvenience of suddenly losing his employee if the INS arrested and deported the employee. That changed with the Immigration Reform and Control Act, which is the subject of the following case.

The *Collins Food* case serves mainly to set out the law prohibiting the employment of undocumented aliens. Later, we'll look at the question whether undocumented aliens should be regarded as "employees" entitled to the remedies of various employment laws.

Key facts: Soto, a manager at Collins's Phoenix "Sizzler," spoke by phone with Rodriguez, an employee at a California "Sizzler," and agreed to hire Rodriguez at the Phoenix restaurant. When Rodriguez arrived in Phoenix, Soto asked to see the usual I-9 supporting documents. Rodriguez did not have these documents with him, so Soto instructed him to come back the next day with the appropriate documents. Soto did return the next day with a card he presented as a social security card. Soto accepted the card without comparing it with the example in the INS handbook. The INS charged Collins (the owner of the restaurant) with knowingly hiring an undocumented alien in violation of the IRCA. An ALJ found that Collins had "constructive knowledge" that Rodriguez's card was a forgery. Collins appealed.

Decision: Reversed. The INS failed to prove that Collins had constructive knowledge that

Rodriguez had presented a forged social security card.

1. **Failure to Check Documents**. Collins did not unlawfully "hire" Rodriguez before checking his documents.

a. The INS's regulations define "hiring" as commencement of employment ***for wages.*** Moreover, the regulations allow three days ***after*** hiring to verify documents. Collins did more than the regulations required. It didn't allow Rodriguez to work at all until he presented documents.

b. You might wish to note that it is common, and frequently necessary for employers to extend "conditional" offers to prospective employees. A new employee like Rodriguez wants to know before he leaves California that there is a job waiting for him in Phoenix, even if it's understood he will have to present supporting documents, take a drug test, pass a criminal background check and so on.

c. Requiring an employer to demand document verification before making a decision to hire would expose the employer to unwarranted suspicion of discrimination. If the employer rejected an applicant after learning from the documents that the applicant was a resident alien, the applicant might suspect the employer illegally discriminated on the basis of national origin..

2. **Constructive Knowledge**. The INS failed to prove Collins had constructive knowledge of Rodriguez's unauthorized status.

a. The statute provides that an employer may accept a document that "reasonably appears on its face to be genuine."

b. The court disagreed with the INS that Collins should have suspected the social security card was a fake.

(1) The card misspelled Rodriguez, "Rodriquez," but the court did not believe this error or Collins' failure to spot the error was so suspicious. (As one who is married to an immigrant, I can attest to the fact that such errors in INS, Social Security, and IRS documents are the norm, not the exception).

(2) The card didn't look exactly like the one in the INS's handbook. But there are 16 different versions of the social security card, which is a frequent ground for criticism that employers are not in a good position to carry out the document verification process.

(3) Legislative history shows that Congress sought to assure employers that they would be not be strictly liable for accepting false documents. If the law imposed too high a duty of document verification, it might lead employers to discriminate against any employee who "looked like" an alien.

(4) Other cases adopting the constructive knowledge theory involved much more compelling evidence of knowledge. In those cases, the INS had warned the employers that some of their employees were using unverifiable documents, and the employers recklessly continued to employ these employees without further verification.

Observations:

1. As a result of post-September 11 reorganization, the INS's functions have moved to the Department of Homeland Security's Bureau of Citizenship and Immigration Services (BCIS).

2. There are two potentially important ongoing developments. The first is the federal government's effort to establish a more effective verification process known as E-Verify. Opposition to the process is described in the text. There is no clear resolution of the matter as of this writing. E-Verify will undoubtedly catch more undocumented aliens, but it will also ensnare some number of innocent victims of bureaucratic errors. Again, as the spouse of an immigrant, I can attest to the likelihood of bureaucratic errors and to the difficulty of correcting them within any reasonably short time frame.

3. A second ongoing development not described in the text but worth following is the assertion by some states of authority to implement and enforce E-Verify. For more on this development, see Migration Policy Institute, *Mandatory Verification in the States: A Policy Research Agenda* (Dec. 17, 2008), available online at www.uscis.gov/files/nativedocuments/e-verify-mandatory-impl-evaluation.pdf

Hoffman Plastic Compounds, Inc. v. NLRB

As *Collins Foods* illustrates, unauthorized aliens can still make their way through the verification process without employer complicity. This case deals with the question whether such workers are "employees" entitled to the remedies of federal employment law.

Key facts: Hoffman hired Castro, evidently without knowledge that Castro was unauthorized to work. Later, Castro joined a union organizing campaign. Hoffman retaliated by discharging Castro in violation of the NLRA. The NLRB issued a complaint against Hoffman and initiated a two-step enforcement procedure. First, the NLRB conducted a hearing and determined that Hoffman had illegally discriminated against Castro. Second, the NLRB conducted a hearing to determine Castro's right to reinstatement and backpay Hoffman. At the second hearing Hoffman's attorney questioned Castro about his immigration status, and it was revealed that Castro was an illegal alien.

Hoffman then argued that Castro was ineligible for reinstatement or backpay because it was illegal for Castro to work in the U.S. and illegal for Hoffman to employ Castro. The ALJ agreed, but on appeal the NLRB gave half a loaf to Castro: it denied reinstatement but awarded backpay measured from the date of Castro's termination to the date of Hoffman's discovery of Castro's unauthorized status. The court of appeals agreed with the NLRB, and the case reached the Supreme Court.

You may wish to note for your students that the Court's decision is ***thirteen years*** after Castro's discharge. Even if the Court had upheld some part of the NLRB's remedy, it might have come far too late to remedy the chilling effects of the employer's illegal tactics in opposing the union.

Decision: U.S. immigration policy precludes an award of backpay to Castro.

1. **Deference to Board**? Yes, but the Court has regularly reversed awards of backpay for employees who committed "serious illegal conduct in connection with their employment." In other words, the Court will not simply defer to the Board's judgment where the issue mixes collective bargaining policy with other policy outside the Board's realm, such as immigration.

2. **The *Sure-Tan* Precedent**. In that case, employers retaliated against union activists by reporting the activists to the INS. The activists voluntarily *left* the U.S. to avoid deportation. ***Sure-Tan*** held (a) illegal aliens can still be "employees" under the law, even when their employment is illegal; (b) the NLRB could properly hold that the employer violated the NLRA by reporting the employees to the INS for the purpose of interfering with union organization; but (c) any order of reinstatement or backpay for a departed alien must be conditioned on proof that he has *legally reentered* the U.S. and is now *authorized* to work; (d) backpay must not be awarded for any period during which the employee could not lawfully work in the U.S.

a. The NLRB argued that the no-backpay rule of *Sure-Tan* did not apply to Castro because Castro had *not left* the U.S. during the period for which he sought backpay. The Court rejected this distinction. Eligibility for backpay turns on authorization to work, not mere presence in the U.S.

b. IRCA, enacted in 1986, made the law even more definitive in prohibiting employment of unauthorized aliens. Not only was it illegal for Castro to work, he committed other crimes by using false documents to overcome the verification procedure.

3. **Accommodating NLRA**. The Board argued that awarding backpay to the point of discovery of Castro's status was the best accommodation of the different goals of the NLRA and IRCA. The Court rejected this argument.

a. Hoffman did violate the law, but so did Castro. An award of backpay would reward and condone past violations and encourage future violations.

b. The Board has imposed other sanctions on Hoffman, including a cease and desist order and the requirement that it must post a notice for its employees explaining that it will not interfere with their rights.

Breyer's dissent (with Souter, Stevens and Ginsburg):

1. Employers like Hoffman are not likely to be deterred from breaking the law of they do not face the threat of backpay liability.

2. IRCA does not expressly bar an unauthorized alien from obtaining relief as an employee under other employment laws.

3. An award of backpay in this case would not make illegal immigration more attractive.

4. Denying backpay might actually encourage more violations of immigration law. Undeterred by backpay liability, Employers may purposely choose to employ workers who cannot effectively vindicate their rights as employees.

Observations: The Court seemed to reaffirm its holding in *Sure-Tan* that unauthorized aliens are still "employees" within the meaning of the law. For example, they probably count toward any jurisdictional threshold based on the number of "employees," and their votes probably count in a union election. Moreover, as the notes explain, unauthorized aliens might be entitled to remedies for violations of "core" employee rights, such as the right to the minimum wage and overtime for work actually performed.

C. Who Is the Employer?

Amanare v. Merrill, Lynch Pierce, Fenner & Smith, Inc.

Key facts: Mature Temps, a temporary employment agency, assigned Amanare to work as a temporary employee in an administrative assistant position at Merrill Lynch. As in many other staffing situations, Mature Temps listed Amanare on its payroll and issued the paycheck for Amanare's work. However, Merrill Lynch supervised Amanare and received the benefit of her work. After two weeks, Merrill Lynch "discharged" Amanare from employment. Amanare sued Merrill Lynch for race and sex discrimination under Title VII. Merrill Lynch moved to dismiss the lawsuit on the ground that Mature Temps, not Merrill Lynch, was the employer. Amanare opposed the motion, arguing that Merrill Lynch and Mature Temps were "joint employers" and were both liable under Title VII (Amanare did not name Mature Temps as a defendant).

Decision: Merrill Lynch and Mature Temps were joint employers. Therefore, Merrill Lynch might be liable to Amanare if it discriminated against her in violation of Title VII.

1. There appears to have been no dispute that Amanare was an "employee." Nevertheless, when there is a dispute about who is the "employer," a court must examine more or less the same factors one uses to establish employee status. For example, there was no dispute

Amanare was subject to "control." The question was whether control was exercised at least in part by Merrill Lynch.

2. Merrill Lynch supervised Amanare's work, set her hours of work, and had the right to "discharge" her and request a replacement. This exercise of control was sufficient to make Merrill Lynch one of the Amanare's employers.

Observations:

1. In many temporary help staffing arrangements, only the agency can really terminate the employee's employment. A client employer might refuse to accept his service and demand a substitute, and the agency can reassign the employee to a different client or place the employee on hold. Viewing the matter in this light can be important for purposes of unemployment compensation benefits and possibly for purposes of calculating and assessing damages.

2. Although Merrill Lynch and Mature Temps were joint employers with respect to Amanare, their responsibilities and liabilities were separate. For example, Mature Temps would not necessarily be liable for Merrill Lynch's discrimination, and Merrill Lynch would not necessarily be liable for Mature Temps' practices.

3. As a prelude to the next case, you might ask the class if Amanare could have sued Merrill Lynch for wages if Mature Temps failed to pay her wages. The difficulty with a wage claim by Amanare against Merrill Lynch is that a claim for wages is essentially a contract claim, but Amanare had no contract with Merrill Lynch. Her contract and expectation of payment was with Mature Temps.

Black v. Employee Solutions

Key facts: CSX, a trucking firm, had been operating without workers' compensation insurance and evidently was having difficulty obtaining insurance. It entered into an agreement with ESI in which ESI "hired" CSX's employees and "leased" them back to CSX. ESI then obtained workers' compensation coverage for the employees as if it was the insured "employer" CSI evidently obtained better rates either because it "employed" a much larger combined workforce or because it was reporting a lower "experience rating" (accident rate).

ESI also performed the payroll function. ESI took the information CSX supplied, calculated appropriate deductions and withholding, and delivered paychecks to CSX. CSX delivered the checks to its employees. An employee who looked at his check would see both "CSX" and "ESI" (perhaps in the manner typical of payroll service arrangements). CSX paid ESI the cost of the payroll plus a "service fee."

The employees were unaware of the transaction between CSX and ESI. They were never informed that CSX had "terminated" them, that ESI had "hired" them, or that ESI had "leased" them back to CSX.

The arrangement lasted only a few weeks. CSX failed to pay ESI's invoices, closed its business, and entered Chapter 7 bankruptcy. ESI evidently refused to issue the next set of paychecks, leaving employees unpaid by either CSX or ESI for at least one pay period. CSX's bankruptcy proceedings yielded little or nothing for the employees. The employees then sued ESI under the local wage payment statute, alleging ESI was their employer and that ESI owed the unpaid wages. ESI sought, and the trial court granted summary judgment on the ground that ESI was not the employer. The employees appealed.

Decision: Affirmed. ESI was not the employer, and was not liable for the unpaid wages.

1. **Statutory Liability v. Contractual Liability**. The employees sued under a wage payment statute rather than for common law breach of contract. In Chapter 4, we'll see that a wage payment statute's primary function is to provide an unpaid employee with remedies beyond what contract law would provide. One could also argue that such a statute adds nothing unless there was a *contractual* right to the payment of wages, because employment is a contractual relation. By invoking the statute, the employees in this case might have been seeking an additional remedy, such as punitive damages or attorney's fees, or they might have theorized that the statute allowed them to reach beyond the contractual "employer" to persons who had no contract with the employees but who were associated with the employer or the employment, such as a payroll service. The court seemed to accept that the statute might widen the basis for wage liability to some extent, because the court conceded that the usual "contract" analysis might not be "dispositive" in an action under the statute. Nevertheless, the court held that ESI was not liable under the statute unless it qualified on some ground as an "employer."

2. **Mutual Assent**. To the extent employment is a contractual relation, ESI could not be an "employer" unless it had a contract with the plaintiff employees. The employees failed to prove they were parties to a contract with ESI. One cannot have a contract with another party without *mutual* assent.

a. The employees did not assent to be parties to the CSX/ESI agreement or to enter into their own contracts with ESI. They were not even aware of the CSX/ESI arrangement.

b. The CSX-ESI agreement recited that ESI was an "employer," but this recital was never conveyed to the employees. Moreover, the CSX-ESI agreement also said each employee "will be party to an agreement," and the court read this to mean that each employee would have to "agree" to the arrangement *after* CSX and ESI made their agreement . However, none of the employees ever agreed to a contract with ESI.

3. **Control of the Work**. The court assumed for the sake of argument that ESI might be an employer under the statute even *without* a contract with the plaintiff employees. In other words, the statute might allow for a finding of employer-employee relations outside the traditional contract model. Still, there must be some basis for treating a person as an "employer" under the statute. An alternative to contract, in the court's view, is an employer-like exercise of

control. In this case, however, ESI acted as nothing more than a payroll service and insurance broker. It lacked any control over the employees' work.

Observations:

1. Why did the CSX/ESI agreement provide that employees "will be a party to the agreement," and why did it recite that ESI would be the "employer," if the actual performance of the contract left CSX in the shoes of the employer? Perhaps ESI required this language so that it could obtain workers' compensation insurance as the "employer" of the employees. A provision that the staffing service is the "employer" is typical in these arrangements, even if the staffing service exercises no actual control over the work.

2. I assume that ESI was refusing to issue paychecks for a pay period for which it had never received its cost-plus fee. If CSX had in fact paid for the issuance of the checks, I suspect that the employees would have advanced an argument that they were third party creditor beneficiaries, or that ESI held the money in trust for the employees.

3. Was ESI an employer for any purpose? Perhaps for purposes of workers' compensation law or for payroll taxes.

4. If the employees were correct in their wage claims against ESI, payroll services like ESI would be the equivalent of insurers guaranteeing the creditworthiness of client employers. A payroll service would probably charge a premium for providing such insurance. A financially insecure firm like CSX would probably be unable to afford the premium.

5. One might briefly reconsider a situation like *Amanare* at this point. If a staffing agency fails to pay wages it owes under its contract with an employee, can the employee sue the client firm for her wages? Perhaps, if there's a statute like the one in *Black*, and if the statute expands the idea of an "employer" beyond the usual contract model. But what if the client employer has already paid its fee to the staffing agency?

Zheng v. Liberty Apparel

Zheng is one of a number of recent cases in which employees or regulatory authorities have attempted to use the joint employer theory to extend liability to parties who contracted with or outsourced to an irresponsible employer. These cases are different from the usual joint employer scenarios because the putative joint employer has no contractual relationship with the employees *and* it has little control over the work and performs none of the other employer functions. The putative joint employer is like a consumer buying goods he knows or should know were manufactured under very disturbing circumstances. An implicit basis for "employer" status seems to be the putative joint employer's purposeful or knowing reliance on contractors who achieved substantial savings in labor costs by violating employment regulations. The plaintiffs in *Zheng* also have the advantage of a special New York law for the garment industry that appears to be aimed exactly at cases like theirs.

Key facts: Liberty was a manufacturing company (a "jobber" in the garment industry) that contracted out the final sewing and assembly of clothing to 30 to 40 "contractors." Contractors employed garment workers such as the plaintiffs to perform this assembly work.

Liberty employed other people to "monitor" contractors and their workers. The extent of this monitoring was an issue in dispute between the parties. According to the plaintiffs, Liberty's representatives visited the contractors' workshops 2 to 4 times a week, up to 3 hours per visit. Liberty's representatives checked the work, gave instructions directly to the workers if corrections were necessary, and urged the workers to work faster. One of the plaintiffs said that she once complained to a Liberty representative that the contractor was not paying wages due. Liberty's witnesses maintained that their representatives visited briefly, infrequently, and with instructions to speak only with the contractors, not with workers.

The plaintiffs sued the contractors and Liberty for minimum wage and overtime violations, but all the contractors disappeared or ceased doing business (which might speak volumes about how Liberty selected contractors). Liberty and its officers appear to have been the only potential defendants left. The plaintiffs added an additional claim against Liberty based on N.Y. Lab. Law §345-a, which prohibits a garment manufacturer from contracting out work to another business if it knows or should know the contractor is violating state wage laws.

The district court granted summary judgment to Liberty and its officers as to the FLSA claims (and certain state wage law claims), on the grounds that the defendants lacked sufficient control over the work to be joint employers under federal law. That left the state law claim under N.Y. Lab. Law §345-a, which does not require proof of employer status, but the district court declined to exercise pendent jurisdiction over this claim. The workers appealed.

Decision: Reversed and remanded. There was a material issue whether Liberty was a joint employer.

1. **Special FLSA Definition**. The act defines "employ" as "to suffer or permit to work." [One might note at the outset that this definition seems not to require a contract between an "employer" and employee].

> a. This definition provides an expanded basis for finding employer status. A person might be an FLSA "employer" even if it would not be an employer under the common law or other federal statutes.
>
> b. **Note**: The FLSA definition appears to have its origin in early child labor statutes that were designed to negate any defense that a defendant merely permitted a child to work as an independent contractor or as someone else's employee. However, Congress adopted this definition of "employ" for purposes of all types of claims under the FLSA, so it remains a basis for liability in minimum wage and overtime cases.

2. **Economic Realities and Joint Employer Status**

a. In *Rutherford*, each supervisor (not the company) made contracts with factory workers in his crew, and he paid the workers from money the company paid to him. The Supreme Court applied its economic realities approach in finding the company was an "employer" of the workers.

b. *Rutherford* was a much stronger case for joint employer theory for a number of reasons, including the fact that the supervisors were employees of the company, not independent businesses.

c. Applying the *Rutherford* factors to the employees and their work:

(1) Whose premises and equipment were used? The contractors.

(2) Did the contractors have separate businesses that could shift as a unit from one client to another? In other words, did the contractors serve Liberty exclusively? Could they serve others and take the same workers, tools and equipment with them? Or were workers and other resources effectively dedicated to Liberty? Unclear.

(3) Did the workers perform discrete line-jobs integral to the putative joint employer's business? The court believed this might prove to be the crucial factor. [Note: this might be an occasion to recall the earlier discussion about a firm's reasons for contracting out certain work rather than using its own employees.]

(a) **Legitimate Outsourcing**? "*Rutherford* ... offers no firm guidance as to how to distinguish work that 'in its essence, follows the usual path of an employee,' from work that can be outsourced without attracting increased scrutiny under the FLSA."

(b) **Factors:** (a) whether the workers had special skills v. less-skilled assembly line work; (b) whether the work was an essential step in the production process; (c) whether the work required expensive equipment of the contractor; (d) whether the work was carefully scheduled to coordinate it with the putative joint employer's production process; (e) industry custom and practice (which might point either way, because history might show that the practice evolved as a legitimate business practice or as a widely used device to evade employment regulations).

(4) Did/could responsibility for workers pass from one contractor to another without material changes? In other words, if Liberty decided to terminate one contractor and work with a new one, did the workers simply become

> "employees" of the new contractor? The court believed this factor tilted against Liberty's status as employer.
>
> (5) Did the putative joint employer supervise? Some degree of supervision is common in legitimate contracting and outsourcing situations, especially for quality control and scheduling purposes. A more important form of supervision is control over terms and conditions of employment.
>
> (6) Do workers perform work exclusively or predominantly for the putative joint employer? In other words, are they dedicated in some fashion to serving the putative joint employer's business? Obviously, there is substantial overlap between this factor and no. 2. My editing omits the court's footnote explaining why these factors are not identical.

3. The district court failed to consider all the factors listed above, and the record as it stood was insufficient to support summary judgment for either party. Therefore, the court of appeals remanded the FLSA claims. Revival of the FLSA claims revived pendant jurisdiction for certain state law claims, including the claim under N.Y. Lab. Law §345-a.

Observations: The challenge in cases like *Zheng* is to distinguish legitimate outsourcing from labor law evasion. How much of what kind of evidence is needed to prove evasion? The old *Rutherford* factors might not be sufficient for the modern world. As cases like *Zheng* move through the courts, there are a number of issues still to be resolved, including:

> (1) Should constructive knowledge of a subcontractor's violations, and the doubtfulness of a general contractor's business reasons for outsourcing, be sufficient evidence of intent to evade the law (a sort of "pretext" analysis)?
>
> (2) Would a legitimate business reason for outsourcing preclude liability even if the general contractor knew its subcontractors were violating the law? Under the New York garment industry statute, knowledge standing alone appears to be a basis for liability.

Papa v. Katy Industries, Inc.

This case involves the "single employer" theory, which treats two separate firms as a single entity. It resembles a piercing of the corporate veil, but is limited to certain purposes under employment law, such as the satisfaction of thresholds for employer coverage.

Key facts: Two cases were consolidated for purposes of appeal. I focus on the *Papa v. Katy* case, but *Mueser v. Frederick Group of Companies* is quite similar. Katy Industries owned a number of subsidiaries, including Walsh Press. Katy ordered Walsh to shut down one of its production lines. In carrying out this instruction Walsh laid off a number of its employees, including Papa. Papa then sued Walsh for age and disability discrimination, but Walsh didn't have enough employees to qualify as an "employer" under either the ADEA or the ADA. Papa therefore argued that the real "employer" was the parent company, Katy, or the entire Katy corporate family consisting of thousands of employees.

Facts supporting single employer theory: Walsh relied on Katy for much of its management and administration. Katy decided rates of compensation for Walsh employees. They shared benefits plans and an integrated computer operation. Walsh did not have a separate bank account. Instead, it had a "subaccount" within Katy's account. Walsh needed Katy's approval to write checks over $5,000. Finally, Katy instructed Walsh to discontinue a part of its business, which led to Papa's layoff..

Facts weighing against single employer theory: Walsh and Katy have observed all the necessary corporate formalities to maintain separate entities.

Decision: The subsidiary employers were separate from their parents in each case, and only the subsidiaries' employees counted toward the jurisdictional thresholds. Therefore, the district court properly dismissed the plaintiffs' claims in each case.

Judge Posner recited the conventional 4-part test for the "single employer" theory: (1) interrelation of operations, (2) common management, (3) common ownership, and (4) centralized control of labor relations and personnel.

Judge Posner didn't like this test. The factors are unweighted and might point in opposite directions, and the test was really designed for some special problems under the NLRA. The test is not necessarily appropriate for treating two separate entities as one for all purposes under all employment laws. A small employer will often need to integrate operations with other firms either by contract or by common ownership in order to achieve economies of scale (consider, *e.g.*, employee leasing). Such integration does not justify disregarding separate corporate status. It is one thing to treat interrelated enterprises as one entity for purposes of defining a unit of employees for collective bargaining under the NLRA. But treating interrelated corporations as if they are one employer, for the purpose of applying anti-discrimination laws, is another matter.

Applying the single firm theory to satisfy a workforce threshold for employer coverage might undermine the purpose of the threshold, which creates an exemption for small employers. The purpose of the small employer exemption in anti-discrimination law is to spare small businesses the "potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits...." The exemption should apply even if the owner of the small employer is a wealthy corporate conglomerate. Even a wealthy corporate owner might discontinue a small business if the cost of labor law compliance became too great for that business.

There are three situations Judge Posner believes are appropriate for treating affiliated corporations as if they are one. First, if it would be appropriate to pierce the corporate veil for other purposes under the law, it would also be appropriate to treat separate entities as one for purposes of employment law.

Second, a corporate family should be treated as a single employer if it split itself into small subsidiaries "for the *express purpose* of avoiding liability under the discrimination laws." (my emphasis).

Third, if a parent corporation actually directed the subsidiary's action of which the plaintiff complains, then the parent may be held accountable as an "employer." This sounds like a "joint employer" case. However, Posner would not only allow the plaintiff to treat the parent company as an "employer," he would treat separate entities as one for purposes of jurisdictional thresholds.

Neither Papa nor Meuser established any of these three bases for treating their employers as if they were part of a larger, single employer entity.

Observations:

I discuss and criticize Judge Posner's opinion in *Katy* in *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 St. John's L. Rev. 1197 (2006). I argue among other things that Congress intended the exemption for small employers to be limited by the single employer theory. Congress intended mainly to protect "Mom and Pop" businesses that provide self-employment for their owners. Katy was not the sort of employer Congress intended to exempt. On the other hand, the traditional four-part test is not really suitable for achieving Congress's purpose, and Judge Posner is correct in calling for a revision of the test. My own proposal involves a much greater emphasis on common controlling ownership.

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One can begin by choosing the most likely theory for this case: Joint employer or single employer. Single employer theory doesn't appear to be a very likely solution because of the lack of common ownership or affiliation. Joint employer theory might work, but this means Value-Shop and CSI must still be treated as separate persons. The difficulty in applying joint employer theory is that Value-Shop is not clearly responsible for any of the employer functions, like paying or supervising the employees. However, the claim against Value-Shop might be at least as strong as the claim against Liberty in *Zheng*.

Recall the six factors identified by the court in *Zheng*: (1) whose premises and equipment were used (Value-Shop's premises, probably CSI's equipment); (2) whether CSI had its own businesses that could or did shift as a unit from client to another (a need for further investigation); (3) whether the workers performed discrete line-jobs integral to Value-Shop's business (outsourcing of this sort of work has become quite routine, and there might be some argument that maintenance companies develop their own expertise, invest substantially in their own equipment, and can work more efficiently as independent operations able to serve many clients); (4) whether responsibility for the workers could pass from CSI to another contractor without material change (unclear); (5) the degree to which Value-Shop supervised the work (there is some evidence of this); and (6) whether workers performed work exclusively or predominantly for Value-Shop (a question that might need further investigation).

As I suggested earlier, it might be useful to focus on Value-Shop's reasons for contracting out and its knowledge of what CSI was doing. Because of its prior experience in dealing with maintenance employees, various circumstances that might have put Value-Shop on notice that CSI was acting illegally. The connection between the owner of CSI and Value-Shop might make a court more willing to entertain a joint employer argument.

Chapter Three
Selection of Employees

A. Overview

I ask my students to imagine they have received 100 applications for one truck driver position. Their job is to select the "one." How will they make this decision, if they still have their other "regular" work to perform and can't invest too much time in the decision? By what process will they reduce the pool of applicants to a more manageable group of interviewees? What will they look for in a twenty minute interview?

B. Duties to Third Parties in the Selection of Employees

Wise v. Complete Staffing

Key facts: The party doing the selecting in this case was a temporary employment agency, Complete Staffing. However, the court accepts the premise that Complete Staffing was standing in the shoes of the client employer (Mrs. Baird's Bakery). It might also have viewed Complete Staffing as an employer of the employee tortfeasor (as the staffing service often is in a temporary employment situation).

Mrs. Baird's and Complete Staffing entered into an agreement for Complete Staffing to supply Mrs. Baird's with one or more temporary employees. Compete Staffing allegedly agreed to conduct a "thorough" criminal background check of the employees it referred. With respect to Turner, Complete Staffing examined criminal records in Harris County (one of *several* counties in the Houston area) where Turner had lived for the last four years. Complete Staffing did not check the neighboring county of Fort Bend. Had it done so, it would have learned that Turner had a criminal record. Complete Staffing did not have any other reason to suspect Turner. He was a "repeat" temp for the firm and his prior temporary employers did not report any problems.

Complete Staffing referred Turner to Mrs. Baird's, and while Turner was working there he assaulted Mr. Wise. Mr. and Mrs. Wise sued Complete Staffing for negligent hiring. The trial court granted summary judgment against the Mr. and Mrs. Wise.

Decision: Reversed and remanded for further proceedings. Complete Staffing may have promised a more thorough background check. If not, it will not be liable to the Wises.

1. **Strategic Concerns**. Unlike *respondeat superior*, which imputes the servant's negligence to the master, "negligent hiring" is based on the employer's (or staffing service's) own negligence. Potential advantages: (1) a way around the "scope of employment" limit; (2) a

better chance for exemplary damages; and (3) jury appeal in a case that might be close on any disputed fact (such as who provoked the fight).

2. **Was Complete Staffing Negligent?** The Wises' appear to have argued that a criminal background check is a duty of any employer selecting employees. The court rejected this argument.

a. The doctrine of negligent hiring protects the public from employees who are unsafe *in the performance of their work* (i.e., they are incompetent).

b. Whether an employer has a duty to conduct a criminal background check depends on special hazards presented by the work (i.e., does the work provide a criminally disposed individual a *special opportunity* to harm those to whom the employer might owe a duty of care?). The court offered as an example the selection of an armed security guard. The special hazards of offering a uniform and a gun to a criminally disposed person are such that an employer owes the public a duty to conduct a criminal background check.

c. Some work presents a special hazard that requires an extra degree of care in selection, but not necessarily a criminal background check. The court offered as an example a case involving an employer's selection of a truck driver. It would be negligent not to check the driver's driving record, but there is no duty to check the driver's non-vehicular criminal background.

d. Turner was just a temporary factory worker. His factory work did not involve any special hazard requiring the imposition of a duty on his employer to conduct a criminal background check.

e. The court rejected the Wises' reference to a line of cases that impose a higher duty of care on employers of workers who provide care for vulnerable persons, such as patients or children. In such cases, the nature of the work presents a criminally disposed person a special opportunity to harm persons to whom the employer owes a special duty of protection.

3. **Breach of Contract**. The Wises argued that Complete Staffing actually undertook to perform a criminal background check and thereby accepted a duty to perform the background check carefully. The court agreed that there were material issues about what Complete Staffing promised, and whether checking a single county would satisfy an agreement to provide a "thorough" background check. Therefore, it remanded the case for further proceedings.

Observations:

1. Students may not be alert to or ready for the workers' compensation angle in this case, but the problem is addressed in note 1.

2. The Wises ultimately lost. At trial, they apparently failed to persuade the jury that Complete Staffing promised to perform a more careful criminal background check. (Telephone conversation with Ron Ramey, attorney for the Wises, January 13, 2003).

3. The court's decision to remand the case for trial on the "undertaking" or breach of promise claim was curious to begin with. After all, the Wises were not parties to that agreement, and there was no evidence the Wises relied on the promise. I asked Mr. Ramey about the basis for the claim. He recalled arguing to the jury that the promise was to the whole corporation, of which Mr. Wise was a member (as an employee). He also argued a third party beneficiary theory. The court did not find it necessary to rule on these dubious theories, because the jury found no breach by Complete Staffing.

4. It may be worth emphasizing that negligent hiring can overcome the scope of employment defense in two different ways. First, negligent hiring makes the employer liable for actions that were during work but clearly not part of the job, like assault and battery. Second, it might make an employer liable for what the employee does *after* work and *away* from the workplace, if the employment relationship facilitated the employee in the commission of a tort against persons to whom the employer owed a duty. See note 4 on page 111. Much more could be said about this problem. See note 7 on page 539.

C. Statutory Prohibitions Against Employment Discrimination

The basic rules for the proof of discrimination have their origin in the classic employee selection cases, *McDonnell Douglas* and *Griggs*. Thus, what students learn in the employee selection context provides a solid foundation for learning about other forms of discrimination in the chapters that follow. They will also learn some theories and rules of proof applicable to other employee selection issues and other types of adverse employment action.

McDonnell Douglas v. Green

Key facts: Green worked for McDonnell Douglas for several years before he was laid off. As a result of his layoff and his objections to McDonnell Douglas's employment practices in general, Green became involved in public demonstrations (including a "lock-in" and a "stall-in") against McDonnell Douglas. Three weeks after these activities, McDonnell Douglas advertised job openings for mechanics (Green's trade), and Green applied. McDonnell Douglas later admitted that Green was qualified, and that his performance for the company before layoff was "satisfactory." Nevertheless, McDonnell Douglas rejected Green's application, and it continued to accept applications from other prospective mechanics. McDonnell Douglas later explained that it rejected Green's application because of his participation in the illegal stall-in and lock-in.

Green sued under Title VII, alleging discrimination on the basis of race and on the basis of his civil rights activities. I have edited out the Court's description of the administrative and lower court proceedings, which were thrown off-course by the district court's dismissal of the complaint on plainly incorrect grounds that might confuse or distract students. By the time the case reached the Supreme Court, the issue in the case was whether Green had presented a prima facie case of discrimination.

Decision: Green presented enough evidence for a prima facie case of discrimination, and McDonnell Douglas's rebuttal evidence created a triable issue of fact whether McDonnell Douglas rejected Green because of his race and protected activity, or because of his illegal conduct. Therefore, the Court remanded the case for further proceedings.

1. **The Formula**. A plaintiff in a discriminatory hiring case can establish a prima facie case with the following facts: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." Green provided evidence of each of these facts.

2. **The Shifting Burden**. Once a plaintiff establishes a prima facie case of discrimination, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas did articulate a legitimate, nondiscriminatory reason for its decision. It explained that it rejected Green's application because of his illegal lock-in and stall-in activity.

3. **Pretext**. On remand, Green will have the opportunity to prove McDonnell Douglas's explanation was a "pretext" for discrimination. The Court suggests a few of the ways Green might be able to prove pretext: (a) "white employees involved in acts ... of comparable seriousness" were retained or rehired; (b) McDonnell Douglas's "treatment of [Green] during his prior term of employment;" (c) McDonnell Douglas's "reaction, if any, to [Green's] legitimate civil rights activities;" (d) McDonnell Douglas's "general policy and practice with respect to minority employment;" and (d) statistics.

Observations:

1. The essence of this case is that an employer's unexplained adverse action, under circumstances consistent with discrimination, supports an inference of discrimination. However, the plaintiff must also negate two or three of the most likely nondiscriminatory reasons for the employer's action. In a hiring case, for example, the plaintiff must show that there was a job opening (negating the possibility that there simply was no opening), that the plaintiff satisfied the minimum requirements for the job (negating the possibility that the plaintiff was unqualified), and that the position remained vacant (negating the possibility that employer had already filled the position just before the plaintiff applied). Negating these nondiscriminatory reasons leaves discrimination as a plausible explanation, at least until the employer articulates some other

explanation. The formula can be adapted for any type of discrimination, and any type of adverse action.

2. Why should one presume *race* discrimination in the absence of an employer's alternative explanation? Why not infer any other possible explanation for rejecting the plaintiff? Some courts have suggested there is an unstated additional "fact" in the *McDonnell Douglas* formula: Race discrimination is a frequent basis for employer decision-making. Also, adopting a low threshold for the plaintiff at the opening of the case serves to shift the burden of production to the party who can best explain what really happened. This burden shifting is especially important in employee selection cases. A rejected applicant rarely knows why the employer rejected him, and there is no legal process, aside from an EEOC charge or a lawsuit, to compel an employer to explain its action.

Price Waterhouse v. Hopkins

This case introduces a number of problems: (1) mixed motive, (2) burden of proof and potential limits on employee remedies, (3) stereotyping, and (4) subconscious bias. I spend much more time on this case in my Employment Discrimination course than in my Employment Law course.

Key facts: Ann Hopkins had been at the firm for five years when she was proposed for partnership. At the time, only seven of 662 partners were women–barely over *one percent*. Of the eighty-eight candidates for partnership in Hopkins' first year of candidacy, Hopkins was the *only* woman (again, a little better than one percent). Forty-seven were promoted to partner the same year. Twenty, including Hopkins, were placed on hold for reconsideration in the following year. Twenty-one were rejected.

The partners' reactions to Hopkins were mixed. Only thirty-two submitted comments in the process. Thirteen supported her promotion. Eight proposed outright rejection. The rest were somewhere in the middle.

Hopkins' record was strong. The district court found she had the *best* record of all candidates in securing major contracts. Her clients were mainly officials of public agencies her office served. I've wondered if there was a cultural difference between the government contract side of the firm and private sector side. Hopkins' clients seem to have been very impressed with her work. At least one official of a client agency testified for Hopkins at the trial.

The firm's explanation for its rejection of Hopkins was that she was abrasive, especially toward the staff. Even the partners who supported her agreed she was unduly harsh with the staff. However, the partners' impressions of Hopkins were frequently expressed in sexist terms. They said she was "macho," that she "overcompensated for being a woman," that she needed "a course at charm school." Even her supporters seemed to understand that the discussion of Hopkins' candidacy was affected by stereotypes of how a woman should behave. Supporters conceded she needed to act more lady-like but argued she had made progress in this regard. The "coupe de gras," according to the district court, came from Hopkins' most important supporter, Thomas Beyer, who advised Hopkins that to overcome opposition, she must learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Hopkins' evidence of sex discrimination included testimony by a social psychologist who concluded that the firm's decision was likely influenced by sex stereotyping. She based her opinion on overtly sexist comments and on the fact that some partners were so quick to condemn Hopkins based on little or no personal experience with her. The few successful female candidates of the past had also been judged in terms of femininity. At least one male partner repeatedly expressed his steadfast opposition to *any* female partner, without any corrective action by the firm.

The district court concluded that the firm made its decision based on a combination of legitimate concerns about Hopkins' interpersonal skills *and* unlawful sex stereotyping. Because the firm's decision was affected by unlawful sex discrimination, the district court held, the firm's failure to promote Hopkins to partner constituted unlawful sex discrimination notwithstanding the additional effect of some lawful factors. The intervening proceedings at the court of appeals level are omitted. The firm appealed to the Supreme Court.

Decision: The evidence was sufficient to show unlawful sex discrimination, but the Court remanded the case for reconsideration based on the principles it announced in this case.

1. The firm argued it did not violate Title VII unless discrimination played a "decisive" part in its decision. In its view, Hopkins bore the burden of proving discrimination was a factor *and* that the firm's decision would have been different but for discrimination. Hopkins, on the other hand, argued that the firm violated Title VII if it allowed sex discrimination to play "any part" in its decision. She conceded that the firm could limit the remedy if it bore the burden of proving it would have made the same decision regardless of discrimination.

> a. After considering the text and history of Title VII, the Court arrived in the middle: An employer violates Title VII if unlawful discrimination was a "motivating factor" in its decision *unless* the employer bears the burden of proving it would have made the same decision regardless of unlawful discrimination.
>
> b. Congress later amended Title VII to adopt a rule much closer to Hopkins' position: an employer violates Title VII if unlawful discrimination was a "motivating factor" in its decision. However, a court may limit the remedy if the employer proves it would have made the same decision even if it had not been affected by discrimination.

2. Sex stereotyping, particularly of this sort, constitutes illegal discrimination. The feminine stereotype expected of women placed them in a "catch 22." It held women to an expectation that they must not be aggressive like men, but they were still judged by

achievements that might require aggressiveness.

3. The stereotyped remarks were evidence that sex discrimination was a motivating factor in the firm's decision. They were not mere "stray remarks." The firm invited partners to make comments; it relied on the comments, and it did not disclaim clearly discriminatory comments. Even stereotyped statements by supporters were evidence that discrimination was a motivating factor, because these statements may have led other decision-makers to think less highly of Hopkins.

Observations:

1. *Price Waterhouse* and the issues that spin out of it deserve lengthy and careful treatment in an Employment Discrimination course, but I recommend a much lighter treatment in an Employment Law course. I focus more on the facts than on the law with just a few goals in mind: (1) mixed motive is probably the rule rather than the exception; (2) motives might be "mixed" because an individual decision-maker is influenced by multiple factors or because there are multiple decision-makers; (3) there might not be much of a remedy for many "prevailing" plaintiffs in mixed motive cases.

2. A practical problem for discussion might be the "loose cannon" phenomena. What should a firm or member of a decision-making panel do if one decision-maker persists in making prejudiced remarks? In *Price Waterhouse,* the Court emphasized that the firm had done nothing to disavow or repudiate sexist remarks by some partners.

Griffin v. Steeltek, Inc.

Key facts: Griffin applied for employment with Steeltek. The application included two questions:

(1) "Have you received Worker's Compensation or Disability Income payments? If yes, describe."

(2) "Have you physical defects which preclude you from performing certain jobs? If yes, describe."

Griffin answered the first question, but not the second. An earlier ruling of the court explains how Griffin answered the question about past workers' compensation or disability claims. *See* 160 F.3d 591 (10th Cir. 1998). According to the earlier opinion, Griffin wrote, "3 degree burn to hand & foot, surgery to elbow, spain [sic] in shoulder." He simply left a blank after the question whether he had "physical defects." Griffin apparently did *not* maintain at trial that he was disabled or had any physical defects.

Steeltek did not hire Griffin, but the evidence appears to have been persuasive (and it did persuade the jury) that Steeltek was not motivated by illegal discrimination. Griffin lacked the requisite experience for the job, and Steeltek hired a more experienced person who had worked previously for the company before a layoff.

Nevertheless, Griffin sued Steeltek claiming that the questions on the application violated the ADA's prohibition against medical inquiries or examinations. He claimed to have suffered emotional distress in confronting the questions. He also alleged that the questions were evidence that Steeltek actually discriminated against him on the basis of disability when it rejected his application. The jury answered a special interrogatory finding that Griffin had suffered no injury. Based on the jury's finding, the district court entered judgment for Steeltek on the ground that, without any injury, Griffin was not entitled to nominal or punitive damages. Griffin appealed.

Decision: The court affirmed judgment against Griffin.

The court stated that nominal damages are compensatory in nature, and without proof of some injury Griffin was not entitled even to nominal damages. Similarly, the court held that without injury, there could be no punitive damages.

The court also held that Griffin was not entitled to attorney's fees because, having failed to win a judgment on any claim, he was not a prevailing party, even though the lawsuit may have caused Steeltek voluntarily to change its hiring procedure.

Observations:

1. Was this a "mixed motive" case? The court's opinion indicates the employer proved it gave *no* consideration to Griffin's answers to the challenged questions. If it *was* a mixed motive case, the outcome might be different in at least one important way: an award of attorney's fees.

2. In an earlier appeal in the same case, a different panel of the same court held that Griffin could establish a prima facie violation of the ADA's medical inquiry prohibition without proving he was a disabled person. 160 F.3d 591 (10th Cir. 1998).

3. The first question (about workers' compensation or disability claims) is probably illegal under the ADA because it is the equivalent of a question leading to a past record of disability, and it may be illegal under some state laws prohibiting discrimination on the basis of workers' compensation claims. Is there any legitimate reason for an employer to ask this question? Employers and their insurance carriers would certainly argue that there is. If the employer hires an applicant who later claims an on-the-job injury, there may be a question whether the injury was pre-existing or whether it was an exacerbation of a prior injury. However, as is true of any legitimate medical or health inquiry, the employer can ask this question after it has extended an offer of employment.

4. The ADA goes farther than Title VII or the ADEA in making pre-hire questions per se illegal. However, the result in *Griffin* raises the question whether this difference is important. Under either type of law, an individual plaintiff must still prove injury. But the explicit prohibition in the ADA strengthens the EEOC's position in negotiating an employer's change in practices, or in suing for a court order to prevent illegal questioning.

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Photographs may record an applicant's protected characteristics as effectively as any application question. On the other hand, there is a legitimate reason for taking pictures. As anyone who has interviewed candidates probably knows, taking a picture of each candidate could be very helpful later on when the interviewers are trying to remember each candidate.

One might argue that an interviewer's photograph of an interviewee adds nothing to an applicant's charge of discrimination if the interviewer was the decision-maker. Presumably, the interviewer could have observed the race, color, ethnicity, age, disability or gender of the applicant with his own eyes. However, the pictures may remind and re-enforce the interviewer's prejudices later on as he is narrowing a field many interviewees. The photographs may also inform other decision-makers who were not present at the interview.

I think the best answer is that taking a picture at an interview is not a per se violation, but it does create some risk that a disappointed candidate will use the interviewer's picture-taking as evidence of an intent to discriminate. The disappointed candidate will still have to prove discrimination. Considering the usefulness of a picture in many situations, I believe it is reasonable for an employer to decide to accept this risk.

Griggs v. Duke Power Co.

Key facts: Prior to the effective date of Title VII (July 2, 1965), Duke's plant was racially segregated. There were five departments, and four of these departments were closed to African Americans. African Americans were eligible to work in only one department, labor, where the very highest possible wage rate was lower than the very lowest wage rate in any of the departments reserved for white employees.

For about ten years the plant had required a high school diploma for initial assignment in any department except labor. In the whites-only departments (everything but labor), employees hired without a diploma before this requirement kept their jobs, but they could not transfer between departments without a diploma. The most important effect of this rule was that it prevented transfer from an "outside" job (coal handling) into one of the "inside" departments without a diploma. *See also* 292 F.Supp. 243 (D.C.N.C. 1968).

When Title VII took effect, the plant adopted three important changes. First, it abandoned its practice of restricting African American employees to the labor department.

Second, it rewrote its rule requiring a high school diploma for an inter-department transfer, and it made this rule applicable to transfers out of the labor department as well. Arguably, this second change made the plant's treatment of all inter-departments transfers equal. If the diploma requirement for transfers did not apply to labor before 1965, this was probably because transfers from labor into any other department were simply impossible before 1965. However, a high school diploma remained unnecessary for initial assignment in the labor department.

The third change was that the company now required a satisfactory score on two aptitude tests (the Wonderlic Personnel Test of general intelligence, and the Bennett Mechanical Comprehension Test), in addition to a high school diploma, for placement in any department but labor. The minimum scores selected by the company as "satisfactory" were the national *medians* for high school graduates. Thus, the employer's use of the tests would have disqualified many high school graduates. The tests were not required of incumbent employees either to keep their jobs or to transfer. Thus, an African American employee formerly confined to the labor department could transfer to any other department without taking the tests, provided he had a high school diploma. Moreover, an incumbent employee who lacked a diploma could take the tests as a substitute for a diploma, for the purposes of transferring to a new department.

Incumbent employees without diplomas also received assistance from the company for the purpose of finishing high school (evidently without regard to race). The company paid two-thirds of the tuition for high school training.

The company's witnesses testified that they adopted the diploma and test requirements believing, but without any real study, that these requirements would improve the overall quality of the workforce. Actual experience showed that, contrary to the company's expectations, employees were promoted at the same rates within their departments regardless of high school diploma.

However, the diploma and test requirements disqualified a disproportionate number of African American applicants within the labor market of North Carolina at that time. Statistics from the most recent census (1960) showed that 34% of white males and only 12% of African American males had completed high school. As for the tests, the EEOC had previously determined in another case that the administration of a battery of tests including those used by the company resulted in a "pass" rate of 58% for whites but only 6% for African Americans.

The lower courts found that while the company had clearly discriminated against African American applicants and employees before July 1965, the company ceased discriminating on the effective date of Title VII and did not intend to discriminate by adopting the new policies. The plaintiffs appealed.

Decision: The Court reversed the judgment, finding for the plaintiffs.

1. Title VII's purposes include the removal of barriers to equal opportunity, and the prohibition of "practices, procedures, or tests neutral on their face, and even neutral in terms of

intent" that "operate to 'freeze' the status quo of prior discriminatory employment practices." Also, "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

2. The high school diploma and test requirements are examples of selection practices that might be facially neutral and without a purpose to discriminate, but that have the effect of freezing the status quo and perpetuating discrimination. These requirements will disqualify a disproportionate number of African Americans, and this disproportionate effect is directly traceable to years of inferior education North Carolina provided for African Americans in its segregated school system.

3. Title VII does not guarantee a job to every person regardless of qualifications. However, Title VII requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." If a facially neutral practice has a discriminatory effect, the issue becomes one of "business necessity." In other words, the practice must be "related to job performance."

4. Once the plaintiffs had established disparate impact, the company bore the burden of proving business necessity. However, it failed to prove that a diploma or test results had a "demonstrable relationship to successful performance of the jobs." In fact, the evidence was to the contrary.

5. The evidence of good intentions (e.g., tuition assistance) did not preclude a finding that the challenged practices were unlawful. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."

6. The company's test requirement was not permitted by §703(h), 42 U.S.C. §20000e-2(h), which authorizes the use of "any professionally developed ability test" that is not "designed, intended or used to discriminate because of race...." A test does not qualify under this provision unless it is shown to be job-related.

Observations:

1. Students who read this case too quickly usually assume that the changes the company adopted on the effective date of Title VII were a subterfuge for continuing the practice of discrimination. However, there are reasons to believe the company was acting in good faith. Upper management might reasonably have concluded that merely prohibiting racism as an official policy matter would not have sufficed to end a century of segregation and bigotry. The implementation of an "objective" testing procedure might have seemed a good way to diminish the authority of prejudiced supervisors who would otherwise make hiring decisions based on tainted subjective grounds. Of course, an interesting test of good faith would have been whether supervisors still exercised wide and possibly prejudiced discretion in selecting from among a surplus of applicants who survived the "cutoff" based on education and test scores.

2. Most disparate impact cases involve employee selection. In later chapters, there will be some additional opportunities to look at disparate impact theory in other contexts, including benefits discrimination, workers' compensation discrimination, and factory closings.

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The facts in this problem remind students of the employer's potential liability for not asking or checking about an applicant's experience with the criminal justice system. Of course, potential liability for the criminal acts of employees is not the only reason an employer might start asking these questions, but the experience of a lawsuit certainly focuses one's attention.

Asking about arrest or conviction records does not lead directly to information about an applicant's protected status, except in one of the few states that grant limited anti-discrimination protection to ex-convicts. However, as the materials in this section show, a practice of rejecting applicants based on criminal justice records could have disparate impact. Merely asking the question suggests that the answer will be important (and the facts here suggest it will be very important to Fun Land). If it would be unlawful to make a clean record a job qualification, then asking the question is probably unlawful too. At the very least, the presence of the question will discourage many otherwise qualified applicants from even trying.

But does a policy of rejecting applicants with arrest or conviction records really have disparate impact? This could be a good occasion to lay out the proof of disparate impact. Minorities may be disproportionately disqualified by an arrest record in many times and places, because of socio-economic conditions and because minorities are more likely to be subject to suspicion arrests. But I warn my students not to take these conclusions for granted, and not to rely on old data from other places. To prove the point, one would need data showing the arrest rates of different population groups in the relevant labor market during a reasonably appropriate time frame. Moreover, statistics drawn from the general population do not necessarily show that a selection practice caused discrimination within the employer's workforce. The courts frequently demand evidence that shows disparate impact within the applicant pool or the pool of qualified persons from which the employer hired employees. *See* Watkins v. City of Chicago, 73 F.Supp.2d 944 (N.D.Ill. 1999) (finding plaintiff's attempted proof of disparate impact insufficient).

You might also address problems of statistical significance, and whether it makes a difference if one looks at "pass rates" as opposed to "fail" rates in measuring the significance of disparate impact (e.g., a job qualification that disqualifies 10 percent of minorities but only 5 percent of non-minorities appears to a have double the impact on minorities; but the pass rates are 90 percent and 95 percent, respectively, and the difference doesn't look so bad).

If requiring a clean arrest record or a clean conviction record has disparate impact, Fun Land will need to be able to prove the requirement is job related. Arrest records are difficult to defend, because being arrested, standing alone, does not equate with guilt. Conviction records mean that a court has adjudicated guilt.

There are two other issues here, one of which I use as a continuing theme in this chapter, and a related issue only starting to develop here. First, there is a larger question, apart from Title VII, whether we want criminal convicts to be unemployable. Second, a requirement of a clean record, especially if the employer is prying into deferred adjudication records, will tend to exclude many people who got into trouble with the law early in life, and who were granted a "second chance" by the criminal justice system. This problem comes up again in this chapter in the materials in background checks.

Johnson v. Transportation Agency

Key facts: In 1978 the Agency adopted an affirmative action plan to comply with the County's plan. The Agency's plan included the following findings: Women were 36.4% of the area labor market but only 22.4% of Agency employees. Women employees were concentrated in jobs traditionally held by women (office and clerical), and they were significantly underrepresented among officials and administrators, professionals, technicians, service and maintenance workers, and skilled craft workers. The road dispatcher job involved in this case was a "skilled craft worker" position. ***Not one*** of 238 skilled craft workers was a woman

The Plan's long-term goal was a work force eventually reflecting the proportion of minorities and women in the area labor force (36% for women). This goal was to be achieved by "a statistically measurable yearly improvement" in categories where women and minorities were underrepresented in hiring, training and promotion."

Note: One could read this "long term" goal as meaning the Agency would increase the number of women from 0% to 36% in skilled craft worker jobs, but the Plan also envisioned adoption of short term goals for each classification based on current, actual availability of *qualified* women or minorities in the labor market. The Agency had not yet adopted a short term goal for skilled craft worker positions at the time of the events leading to this lawsuit. The Agency eventually adopted a short term goal of 6% for women in skilled craft positions, apparently based on a finding that there were few women currently in the labor market who were qualified and seeking such jobs.

To achieve the Plan's goals, the Plan authorized consideration of sex/minority status as a "factor" in hiring. However, the Plan did not set aside a specific number of positions for minorities or women in any category (i.e., it did not establish a mandatory quota).

The Agency announced a road dispatcher opening (skilled craft work) in 1979, and Joyce and plaintiff Johnson were among nine qualified employees who sought the position. A two person panel of interviewers scored candidates. Johnson scored 75 (second place) and Joyce scored 73 (third place). After this first round of interviews and before the second round of interviews, Joyce contacted the County's Affirmative Action Office to express concerns that her application would not be taken seriously. The AA Office then contacted the Agency's AA Coordinator, who in turn contacted the Agency's Director, Graebner, to recommend that the Agency promote Joyce, who would be the first woman ever employed in a skilled craft position.

In the meantime, a second round of interviews by a panel of three supervisors resulted in a recommendation in favor of Johnson.

The respective qualifications of Joyce and Johnson were as follows:

	Joyce	**Johnson**
Years with the Agency	8	13
Experience as dispatcher	occasional substitute for the Agency	occasional substitute for Agency, plus experience for another employer 13 yrs. ago
First interview scores	73	75
Second interview recommendation	No	Yes

Agency Director Graebner made the final decision, and he chose Joyce. Graebner later testified that he looked at the "whole picture," which included a combination of scores, background, and "affirmative action matters."

Johnson sued for sex discrimination. The district court found that the Agency had discriminated on the basis of sex, and it entered judgment in favor Johnson. The court of appeals reversed, finding that the Agency acted on the basis of a lawful affirmative action plan. Johnson appealed to the Supreme Court.

Decision: The Agency acted lawfully in accordance with its affirmative action plan. The Court affirmed the court of appeals. Judgment for the Agency.

1. **The order of Proof for Reverse Discrimination**. (1) the plaintiff shows that sex was a factor in the employer's decision (easy in this case, because the employer admitted that the sex of each candidate was a factor); (2) the employer articulates a nondiscriminatory explanation for its action, but the existence of an affirmative action plan satisfies this requirement; and (3) the plaintiff seeks to prove the employer's explanation is pretextual.

a. In a reverse discrimination case this means the plaintiff will likely be arguing that the plan is invalid, or that the employer was not acting according to the plan.

b. There was no issue whether the employer was in fact acting according to the affirmative action plan, and therefore the Court proceeded directly to the issue of whether the plan was valid.

2. **Test of Validity**. A voluntary affirmative action plan is valid if it (1) is justified by a manifest imbalance in employment of men and women or minorities and non-minorities; and (2) does not unnecessarily trammel rights of male or nonminority employees.

3. **Manifest Imbalance**. The requirement of a manifest imbalance is less than what is required as a basis for court-ordered affirmative action. It may also be less than what is required for a prima facie case of discrimination. Otherwise, and employer could not adopt an affirmative action plan without gathering evidence that would subject it to a colorable Title VII lawsuit. The facts in this case showed manifest imbalance (not even one skilled craft worker was a woman).

a. Regarding the Agency's failure to first determine the current and actual availability of women for skilled craft jobs (recall that the long term goal was 36% women, but later investigation of actual availability of qualified women yielded a short term goal of only 6%): Ordinarily, an employer must make this determination as part of the finding of a manifest imbalance. However, underrepresentation of women in skilled craft worker positions (no women at all) was "obvious." Moreover, the Plan simply authorized supervisors to consider affirmative action goals among many other factors, and it directed supervisors to consider actual availability of women candidates. The Plan did not order supervisors to hire strictly in accordance with the long term goal or any other percentage.

b. The Agency was also entitled to consider the importance of "finally hiring a woman in a job category that had formerly been all male," and the possibility that employment of the first woman would motivate other women to seek such positions.

4. **Effect on Other Employees**. The Court then considered whether the Plan "unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement."

a. The plan stressed that its goals were aspirations, not mandatory "quotas," and that affirmative action was merely one factor to consider in making hiring decisions.

b. It did not set aside a specific number of positions for women.

c. Johnson had no absolute entitlement to the position (as he might have had under some system of contractual seniority), and therefore the denial of the promotion to him "unsettled no legitimate, firmly rooted expectation on the part of Johnson.

d. Johnson retained his employment and remained eligible for other promotions.

e. The plan was designed to "attain" a goal, not maintain one. A failure to expressly provide that a plan is "temporary" is not fatal to its validity where other evidence shows no intent to adopt a permanent and strictly proportionate representation.

f. The majority also noted that Johnson and Joyce were both qualified, that the differences between them, apart from gender, were insignificant, and that it was reasonable under the circumstances to choose Joyce after giving some weight to her gender.

5. Justice O'Connor concurred. She favored a higher standard of justification for affirmative action, requiring a "firm basis" for believing remedial action was required. An employer has a firm basis for affirmative action if statistics support a prima facie "pattern or practice" claim against the employer. O'Connor found sufficient justification in this case.

6. Scalia, with Rehnquist and White, dissented. The majority's approach "replace[s] the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace." There was insufficient justification for affirmative action in this case. The majority's approach allows an employer to engage in reverse discrimination to undo the effects of societal discrimination when the employer itself is not guilty of discrimination. Indeed, the under-representation of women in skilled craft jobs might be because of disinterest by women, rather than employer or societal discrimination. The effect of the Plan was unfair to Johnson. It was hurtful to Johnson that he would be passed over as long as there was at least one "minimally qualified" woman or minority competing for the same job. Finally, Scalia worried that the majority's opinion would signal to employers that they could best avoid Title VII lawsuits and liability by engaging in reverse discrimination.

Observations: A question for employers after *Johnson* is "How much weight should I accord gender or minority status?" Of course, there are many unweighted factors in any subjective employee selection process, but one does not ordinarily worry about breaking the law by granting too much weight to experience, education, or personality (provided there is no disparate impact). However, the amount of weight one grants to minority status might mean the difference between a lawful decision and an unlawful. One can read *Johnson* as granting employers considerable discretion (looking at my chart, Johnson was the superior candidate in every way but gender), or not necessarily much discretion at all (the majority regarded the differences between the candidates as insignificant, and the need to hire the very first woman in a skilled craft position was particularly compelling).

Opuku-Boateng v. State of California

Key facts: Opuku-Boateng (OB) was a member of the Seventh Day Adventist Church, which requires members to refrain from secular work from sundown Friday to sundown Saturday (the Sabbath). Repeated violations imperil one's salvation. Before this lawsuit, OB had consistently refused to work during the Sabbath.

In 1982 OB applied for plant inspector job with the Cal. Dept. of Food and Agriculture. Several weeks later the Department appointed OB to a plant inspector position at a 24 hour, 7 day per week border-inspection station. To maintain this schedule, the border station required all inspectors to work "an equal number of undesirable weekend, holiday, and night shifts," and it required inspectors to work varying schedules to prevent bribery or corruption of inspectors.

Several days before beginning work, OB and his pastor visited the station and learned that OB's schedule required work on a Saturday. OB explained his religion rules to the supervisor, Whiteacre. Whiteacre responded that if OB would not work on Saturdays, his appointment would not be processed. During the next few days, OB and representatives of the Adventist Church discussed possible solutions the Department. OB offered to work other undesirable shifts (nights and holidays) in place of the Sabbath period, and to trade shifts with other employees on a voluntary basis.

During these negotiations a Department manager, Ingham, asked a station supervisor to conduct a poll to determine how many employees would be willing voluntarily to trade shifts with OB. Two employees said they might trade, but not on a "permanent" basis. One of the employees recalled being told that the trade would involve three days per week: Friday, Saturday and Sunday. It appears that employees may have believed that one or more employees would be asked permanently to cover for all three days for OB. The results of the poll, as vague as they were, were misreported back to Ingham (the manager who appears to have made the final decision). He recalled being told that "none" of the other employees would voluntarily accommodate OB on a "regular basis."

The Department found OB's request for accommodation to be "unreasonable," and it rejected his application for a plant inspector position. OB sued, alleging discrimination on the basis of religion. The district court entered judgment for the Department, finding that accommodating OB would result in an undue hardship. OB appealed.

Decision: The Department failed in its duty reasonably to accommodate OB. Reversed and remanded with instructions for the district court to grant equitable relief to OB.

1. A plaintiff can establish a prima facie case by showing that he informed his employer of a bona fide religious practice in conflict with a requirement of his work, and that the employer discriminated against him because of his inability to fulfill the work requirement. The burden then shifts to the employer to show that it negotiated in an effort reasonably to accommodate the employee's religious practice. If an employer makes no proposal of its own, the employer must either accept the employee's proposal or prove that the employee's proposal would cause undue hardship.

2. In a Title VII case of discrimination on the basis of religion, "undue hardship" means more than *de minimis*. A burden might be undue either because of its impact on the employer or its impact on other employees.

3. OB easily established a prima facie case, and the court assumed that the Department did engage in good faith negotiations to find a reasonable accommodation. However, the Department made no proposals of its own. Thus, the main issue was whether the Department proved that all of OB's proposals would have caused undue hardship.

4. OB's proposals were as follows:

a**. *Excusing OB from Sabbath, scheduling him for other undesirable shifts***.

(1) This need not make OB's schedule too "predictable" (something to be avoided, to discourage corruption).

(2) The burden, if any, would be felt primarily or exclusively by other employees, because of the difference in treatment other employees would experience. However, the fact that an accommodation is discriminatory is not necessarily an undue burden. Discrimination is an undue burden if it constitutes "preferential treatment." This particular accommodation would not have constituted preferential treatment.

(a) Altering the schedule to accommodate OB would not have violated any contractual seniority rights of other employees to work particular shifts or avoid particular shifts.

(b) All employees were required to work equal numbers of undesirable shifts, and the Department did not prove that assigning OB to an equal number of undesirable non-Sabbath shifts would increase the number of undesirable shifts for anyone else.

(3) The argument (and trial court's finding) that accommodating OB would make it harder to accommodate occasional personal needs of other employees, and would cause morale problems was "hypothetical" and "wholly inadequate." In any event, unhappiness of other employees about accommodations for an individual employee like OB is not a reason to bar the application of Title VII.

b. ***Adopting a system of voluntary or mandatory shift trades***. The court believed it likely that other employees would willingly trade shifts, particularly undesirable shifts, for OB's Sabbath Day shifts. The Department could have tested this proposition by presenting a tentative six month schedule for employees, and soliciting trades for OB's Sabbath Day assignments. However, the Department's only investigation of this proposal was the badly conducted employee poll (described above) which proved nothing.

c. ***Employing a combination of the above procedures***. See above.

d. ***Temporary accommodation as experiment pending search for transfer***. "At the very least, the State should have either temporarily scheduled [OB] not to work on the Sabbath or sought to obtain voluntary shift trades for him" until the end of his probationary term, as a test of the proposed accommodations. "Had the State followed this course, it would have placed itself on far firmer ground to argue that [OB] could not reasonably be accommodated."

Observations:

1. The Department is compelled to run an experiment by actually employing and accommodating OB, because it failed accurately to test or investigate its prediction of "difficulty" before going to trial, and its claim was not sufficiently persuasive to be accepted on its face. The outcome of this experiment will depend in part on whether Sabbath shifts are no more undesirable than shifts than on other unpopular days. What if free Saturdays are particularly prized by employees? If other employees fail to volunteer in required numbers, and some are required against their will to work extra Saturdays to cover for OB, they might not feel that relief from other "undesirable" days constitutes an even exchange.

2. It might be tempting to require an employer to experiment by actual employment whenever an accommodation is not *certain* to fail. However, if the experiment fails and the employer must terminate the employee and start a new selection, hiring and training process, the burden will likely be more than de minimis.

D. Beyond Discrimination: Inaccuracy and Intrusion

Inaccurate and intrusive tests or investigations are not just employee selection problems. Current employees continue to face random drug tests, disciplinary investigations and other types of tests and inquiries. However, I treat the problem of employee selection separately from investigation and testing of current employees, because applicants are in a distinctly different position than current employees. The general principles may be the same, but the way a court applies those principles depends on whether the examinee is an applicant or current employee. Moreover, some important statutes distinguish between testing of applicants and testing of current employees.

The *Smithkline* cases and *Norman-Bloodsaw* introduce two basic problems common to nearly any kind of employee selection, limited accuracy and intrusiveness. I do not dwell on the mechanics or details of the tests the employers used in these lead-off cases. There are more detailed looks at particular types of tests, including drug tests, immediately following these cases. Additional rules, statutory rights and constitutional rights are introduced as needed. Chapter Six revisits these many of these rules in the context of investigation of current employees.

Doe v. Smithkline Beecham Corp. (The intermediate court's opinion)

I have included both the intermediate court and state supreme court decisions in *Smithkline Beecham Corporation* for two reasons. First, the intermediate court addressed Doe's claim against the employer, and there was no appeal of that part of the case to the Texas Supreme Court, so only the first decision discusses that claim. Second, both courts addressed Doe's claim against the laboratory, but reading both opinions makes for a better debate.

Key facts: Quaker Oats offered Jane Doe, an MBA student, a job at its Chicago office, conditioned on satisfactory completion of a drug test. Doe signed a form consenting to the test, and at Quaker's direction she visited an occupational health center where she completed a form listing her recent medications. The only medication she listed was her prescribed birth control pills. The form did not ask what foods or beverages Doe had recently consumed (in particular, it did not ask if she had recently consumed "poppy seeds").

The health center received and delivered Doe's urine sample to Smithkline, which performed the actual the testing of urine samples for Quaker. SmithKline had represented to Quaker that "a positive result from [SmithKline] can be accepted with *virtual certainty* as evidence of drug use." (emphasis added).

Smithkline properly tested Doe's sample (there was no allegation to the contrary) and reported to Quaker and Doe that Doe had tested "positive" for opiates. Based on this report, Quaker "automatically" (in accordance with the stated conditions of the offer) rescinded its job offer to Doe, with the statement that her only recourse was to "reapply" in six months.

Doe, trying to persuade Quaker to change its mind, explained that she might have tested positive because she had recently used her roommate's prescription painkiller. When this explanation failed to persuade Quaker to change its mind, Doe "retracted" her statement about using her roommate's medicine. She also said that she had offered this false explanation "under extreme duress" and at a time when she was "completely, essentially out of [her] mind."

Sometime later, Doe discovered that eating poppy seeds could cause a positive test result. She sued Smithkline, alleging that she had eaten a poppy seed muffin not long before the test, that the poppy seeds caused the positive test result, and that Smithkline was negligent in (1) failing to advise her of the effect of poppy seeds, (2) failing to determine whether poppy seeds had caused her positive test result, and (3) failing to retain her sample. After Quaker rejected her re-application on the ground that she had misrepresented her use of her roommate's medication, she named Quaker as an additional defendant, alleging breach of contract (based on the job offer).

Decision: (1) The court affirmed summary judgment dismissing the breach of contract and tort claims against Quaker. (2) The court reversed summary judgment with respect to the negligence claim against the laboratory Smithkline, and remanded this claim for further proceedings.

1. Claims Against the Prospective Employer, Quaker (Dismissed)

a. Even if the conditional offer of employment was a contract, it was a contract for employment at will. Quaker could have fired Doe for any reason, and "We see no reason to place greater contractual duties on Quaker in a pre-employment situation." In any event, Doe's misrepresentation about the cause of her positive drug test would have been "cause" for discharge. The court rejected Doe's arguments that Texas law imposes an implied a duty of good faith, or that Quaker owed an implied duty to allow her a "reasonable time" in which to pass a drug test. The court also rejected Doe's argument that she was at least entitled to the $4,000 signing bonus.

b. The court rejected Doe's tort claim against Quaker, finding that there was no "special relationship" between Doe and Quaker that would justify the imposition of a tort duty in this matter of contract.

2. Claims Against the Laboratory, Smithkline (Remanded)

a. The court recited a rule that a party who negligently creates a "situation" owes a duty to others he knows or should know might be injured by that situation in the lawful exercise of their rights. If Smithkline created such a situation, its duty was not simply to desist from further acts causing injury. It had an affirmative duty to act to prevent others from being injured by the situation.

b. The court applied this rule to Smithkline: SmithKline created a dangerous situation by implying the infallibility of its tests, and by failing to warn customers about the possible meanings of raw test results. The risk posed by this situation was that an employer would misinterpret a test result and would take adverse action against an applicant or employee. The court viewed Smithkline's role as analogous to a credit-reporting agency, which owes a duty of care in collecting and distributing financial information about other persons. Smithkline invited Quaker to rely on its test reports, and it was foreseeable that Quaker might take adverse action against an employee like Doe on the basis of Smithkline's report.

c. In particular, Smithkline had a duty to provide Quaker with "sufficient information on possible test anomalies to prevent [a] misleading perception." The court rejected Smithkline's argument that an Illinois law prohibiting Smithkline from "interpreting" raw test results barred it from providing further information. Providing additional information would not be "interpreting" test results.

d. Smithkline also acted negligently by failing to preserve Doe's sample for retesting by an independent laboratory.

Smithkline Beecham Corporation v. Doe (The Supreme Court of Texas)

Doe did not appeal the dismissal of her claim against her prospective employer, Quaker. However, Smithkline appealed the court of appeals' decision to remand Doe's claims against it.

Key facts: The facts are described above in the summary of the court of appeals decision. The Texas Supreme Court added the following: "Of the more than 4,000 persons Quaker has had screened for drugs, none besides Doe has ever claimed a positive result due to ingestion of poppy seeds." But the Texas Supreme Court assumed for the sake of these proceedings that poppy seeds could cause a positive test result; Smithkline knew of this fact; and if Smithkline had informed Quaker of this fact, Quaker might have acted differently.

Decision: Smithkline breached no duty to Doe. The court reversed the court of appeals' decision in this regard, and reinstated the district court's summary judgment against Doe.

1. **Other Jurisdictions**. The court summarized decisions from around the country. Several intermediate courts had held that drug-testing laboratories and other professional testers owe a duty of care in conducting drug tests, but there was no precedent one way or the other for a laboratory's duty to warn an employer or applicant/employee about a problem like the effect of poppy seeds. The court was not even willing to confirm a duty of care in *conducting* the test, because the only court of last resort that had addressed the issue at that time had denied any such duty (New York).

2. **The Merits of a Duty to Warn**. The court considered general tort principles in deciding whether it should recognize a new duty. This required consideration of the nature of the risk, its foreseeability, and the likelihood of injury, weighed against the utility of the actor's conduct, the magnitude of the burden of a duty, and the consequences of a duty. The Court was particularly concerned about the consequences of imposing a duty.

> a. It would require a laboratory to inform employers and employees of "all possible causes of positive results" (including inhalers and second-hand marijuana smoke), which would tend to increase the number of excuses a person might have for a positive test result.
>
> b. It would alter the contractual allocation of responsibilities (Quaker was responsible for asking prospective employees about prior use of medications, and for interpreting results based on this information).
>
> c. It might lead to liability for other types of professionals in other situations.

Observations:

1. The court cautioned that it was not deciding the question whether a laboratory owes a duty of care in conducting the test. As discussed in the notes, the current weight of authority

appears to favor holding an independent laboratory or tester liable for negligent administration of a test. However, it might make a difference whether the plaintiff is an applicant or a current employee, and whether he is suing the employer or an independent laboratory.

2. Did Quaker breach a duty *to Doe* by intentionally or negligently misrepresenting the accuracy of its test *to Quaker*? In the appellate proceedings Doe did articulate this additional theory, but the Supreme Court held that consideration of this issue was barred because of Doe's failure to present this theory more clearly in her response to Smithkline's motion for summary judgment. 903 S.W.2d at 354-55.

3. I use this occasion to raise some general questions about testing job applicants:

a. Why would an employer use this test in the hiring process? What is the employer trying to learn? How important is the test to the employer's goals?

b. Should we care about the risk of a mistake caused by a test like this? Is the risk or consequence of this kind of error any worse than for other errors an employer might make in selecting employees by any other means? If the employer or the tester owes a duty of care or warning, what's the remedy for an applicant who would have been employed "at will?" What are some possible consequences of making employers or testers liable to examinees?

Norman-Bloodsaw v. Lawrence Berkeley Laboratory

Key facts: Lawrence Berkeley Laboratory (LB) hired the plaintiffs over a period of many years, and in each instance it conditioned its initial job offer on an applicant's successful pre-placement medical examination. A purpose of the examinations was to comply with a Dept. of Energy requirement that contractors conduct pre-placement examinations.

When LB made its conditional offers to the plaintiffs, it informed them of the examinations but provided little information about the scope of the examinations. The examinations included questionnaires inquiring about 61 medical conditions, including sickle cell anemia, venereal disease, and, in the case of women, menstrual disorders. Examinees were also required to give blood and urine samples, but the plaintiffs alleged they were never told what tests might be conducted with their samples. Among other things, LB tested the samples for syphilis (required by the Department until 1992, discontinued by LB in1993), pregnancy (discontinued 1994), and sickle cell trait (discontinued 1995).

The plaintiffs, all administrative and clerical workers, learned (evidently years after the fact) that LB had analyzed their samples for syphilis, pregnancy and sickle cell trait, and they brought this action against LB. The plaintiffs alleged violations of their constitutional rights of privacy, Title VII and the ADA.

The district court granted summary judgment to LB, finding that the statute of limitations began to run when the LB conducted the tests, that the time for filing suit on any of the claims had expired, and that there was no merit to any of the plaintiffs' claims.

Decision: Issues of fact made summary judgment improper, except with respect to the ADA claims. Reversed and remanded.

1. **Statute of Limitations/Consent**. I have included the court's discussion of the statute of limitations issue, because this discussion shows why LB could not likely have successfully argued that the plaintiffs consented to be tested. A period of limitations runs from the date when the plaintiff knew or had reason to know of the injury. There are material issues of fact as to when the plaintiffs became aware or should have known the *specific* tests LB conducted.

> a. The mere fact that the plaintiffs submitted to medical examinations in general was not necessarily reason for them to know about these particular tests. There was an issue of fact, based on conflicting declarations of medical experts, whether these tests were "inconsistent with sound medical practice," and therefore not to be expected.
>
> b. The mere fact that the plaintiffs completed the questionnaires and answered questions about certain conditions did not necessarily put them on notice that their blood or urine would be tested for these conditions. The questions weren't identical to the tests (e.g., a question about menstrual disorder is not a question about pregnancy); and being asked a question on a form is not the same as being told that one's blood or urine might be tested for the same purpose (it might even lead a person to believe that completing the form obviated the test).
>
> c. Consenting to the collection of blood and urine samples was not necessarily consent or knowledge that LB would analyze the samples for pregnancy, syphilis or sickle cell trait, particularly where analysis does not appear to be routine for standard medical examinations, and where these conditions did not bear any relationship to the employees' clerical or administrative jobs.

2. **Privacy Interests**. The testing may have violated the plaintiffs' U.S. and California Constitutional rights of privacy (Fourth Amendment and Fourteenth Amendment).

> a. Personal health is a private matter, and medical examinations are clearly intrusive. Matters of personal sexual history are particularly sensitive, and information about sickle cell trait "can pertain to sensitive information about family history and reproductive decisionmaking." Moreover, some of the results LB sought may have been unknown even to the examinees.
>
> b. Even though the plaintiffs voluntarily completed the questionnaires and provided urine and blood samples, the additional nonconsensual intrusion by further examination was not merely "incremental" and "de minimis." Drawing blood or taking

urine is an intrusion (as to which the plaintiffs admittedly consented), but analysis of the sample is a separate and additional intrusion.

3. **Governmental Interest**. Intrusion might be justified by LB's interest in obtaining medical information from prospective employees, but there were fact issues about LB's claimed interests. There was an issue of fact whether the tests in question were "part of generally accepted medical practice" (LB's only clearly articulated explanation).

4. **Title VII Claims**. LB tested for pregnancy of prospective female employees, and this subjected females, but not males, to a discriminatory intrusion and condition of employment. LB tested black prospective employees for sickle cell, and this subjected blacks, but not whites, to a discriminatory intrusion and condition of employment. Note that none of the plaintiffs complained that they had lost any job opportunity because of the tests. However, the *intrusions* were "adverse actions" that, if discriminatory, violated Title VII.

5. **ADA Claims**. The ADA permits an employer to a conduct medical examination after making a conditional offer of employment, and the examination need not satisfy any test of "job-relatedness," provided the employer preserves the confidentiality of the information and does not misuse the information.

Observations:

1. In California, the state constitution extends the right of privacy to the private sector. Thus, state action was necessary for the U.S. Constitutional claim, but not for the California Constitutional claim. Outside California, private sector employees with similar facts might sue for common law invasion of privacy.

2. As an introduction to the problem of intrusion, this case is a good occasion for asking students about the interests at stake, the need for limits, and the differences between the Constitutional right of privacy and the common law right of privacy:

a. Was the information as sensitive as the plaintiffs (and the court) says it was? Why? What about the rest of the medical examination, as to which the plaintiffs had no complaint?

b. Why might the employer have sought this information? I have often noted, from personal experience, that employers don't always give much thought to the information they are collecting. They collect the information because it's on a "form" or checklist they borrowed from some other source. However, having the information tends to make it important, especially when there isn't much other information.

c. The court is careful to emphasize that all the plaintiffs are administrative and clerical employees. Would laboratory technicians fare differently as plaintiffs? Remember, this involves work for the Department of Energy. I don't know, but wouldn't be surprised, if there was the potential for handling radioactive materials.

d. Note that none of the plaintiffs suffered any adverse employment action. In what way were they harmed?

e. It is not unusual for an employer to require a physical examination when it hires an employee. Does the court's decision make this precaution too risky?

f. How might the court's analysis and conclusions have differed if the plaintiffs sued for common law invasion of privacy, instead of violation of their constitutional rights of privacy? (Under many statements of common law privacy, a plaintiff must prove the invasion was "highly offensive").

Obabueki v. IBM

Key facts: Obabueki sued IBM for revoking its job offer after IBM learned of Obabueki's criminal record.

Obabueki had been charged with misdemeanor welfare fraud because he failed to report income he earned as a summer intern while he was a graduate student at Stanford University. He pleaded nolo contendere, paid restitution and a small fine, spent 13 days in jail, and received two years probation. In accordance with California's first offender law, and after Obabueki had fulfilled the terms of probation, a California court converted his plea to "***not guilty,***" and it ***dismissed*** and ***vacated*** the conviction.

About two years later, Obabueki applied for a job with IBM in New York. IBM made a conditional job offer and required Obabueki to fill out a "security data sheet" (SDS). Among other things, the SDS asked Obabueki whether he had pleaded "guilty" or "no contest" to any criminal offense, *excluding* "arrests without convictions" or "convictions or incarcerations for which a record has been ***sealed*** or ***expunged***." (Note: IBM probably was thinking of New York, and not California, when it wrote these questions). The SDS stated that misrepresentation or deliberate omission would be grounds for termination of the offer/employment. IBM's policy was that a criminal conviction would not automatically disqualify an applicant, but that IBM would make a decision on a case by case basis. Obabueki answered "no" to the question about convictions (he was *right*, if a "dismissed and vacated" conviction, based on a plea converted to "not guilty," fit within the SDS's exception).

IBM relied on its regular background checking service, Choicepoint, to check Obabueki's criminal record. Choicepoint, in turn, relied on an independent contractor to check Obabueki's records, and the contractor spotted the conviction but missed the order dismissing and vacating the conviction. Thus, Choicepoint's report to IBM disclosed Obabueki's conviction without disclosing the subsequent order. When IBM confronted Obabueki about the report, he explained that the conviction was vacated and presented a copy of the court order. However, he failed to use the words "expunged" or "sealed" in his conversations with IBM. IBM decided that

Obabueki had misrepresented the facts on his SDS. It informed him by letter that it intended to withdraw its offer based on the report. Five days later IBM formally withdrew the offer.

Obabueki sued IBM for violating a New York law prohibiting discrimination on the basis of criminal conviction, and he sued IBM and Choicepoint for violating the Fair Credit Reporting Act (FCRA).

Decision: The court granted summary judgment dismissing all Obabueki's claims against IBM. The court granted summary judgment in favor of Obabueki on one of his FCRA claims against Choicepoint, and reserved some other claims against Choicepoint for trial.

1. **Discrimination**. IBM did not unlawfully discriminate on the basis of Obabueki's criminal record. IBM really believed Obabueki had misrepresented the facts on his SDS. IBM honestly didn't know a vacated conviction is the same as an expunged conviction. (I wonder if IBM simply learned more information than it wanted, and then decided that the information it hadn't wanted was too troubling. Still, this would not necessarily constitute a violation of the N.Y. law).

2. **FCRA Claims Against IBM**. IBM was entitled to summary judgment against Obabueki's claims.

> a. **Duty to Provide Copy of Report**. An employer is required to provide the employee with a copy of the report *before* taking adverse action based on the report (to provide an opportunity to respond). Section 1681b(b)(3). Obabueki argued that IBM had made its decision before it gave him a copy of the report. But "deciding" is not "taking action." The formal withdrawal of offer was the action. The Act allows that an employer will have already formed an intention ("the person *intending* to take" the adverse action must provide the report).
>
> b. **User's Certification**. An agency must not supply a report to a user until the user has certified that it is seeking the report for lawful purposes and will comply with the requirements of the Act. Section 1681b(b)(1). True, Choicepoint never obtained certification from IBM (see below). However, §1681b(b)(1) is directed against the agency, and only the agency can violate this rule, not the user. (It would have been different if IBM had falsely certified its purpose in obtaining the report).

3. **FCRA Claims Against Choicepoint**. Obabueki was entitled to partial summary judgment in his favor against Choicepoint.

> a. **Certification by User**. The failure to obtain IBM's certification ***was*** unlawful as to Choicepoint–it was Choicepoint's obligation to obtain the certification before issuing the report. §1681b(b)(1)(A). Choicepoint was unable to locate a written certification by IBM. It submitted vague and unsworn statements about an alleged ***oral*** certification. The court doubted whether oral certification could be "certification" at all. In any event, there was not enough evidence to create even an issue of fact. Summary

judgment for Obabueki. For purposes of damages, the omission was one of neglect, not willful intent.

b. **Notice or Caution in Report of Adverse Public Record**. If an agency reports on a matter of public record that is likely to have an adverse impact on an applicant, the agency must *either*: (1) ***notify*** the applicant that another party has asked for the information, and supply the name and address of that party; *or* (2) maintain "***strict procedures***" to insure that the information is "complete and up to date." §1681k. There was an issue of fact whether Choicepoint violated this provision.

i. Choicepoint did not notify Obabueki that its response to a request for a report would include adverse information. Therefore, Choicepoint needed to comply with #2 ("strict procedures"). Choicepoint reported information that was *not* up to date. It included the conviction, but not the order dismissing and vacating. However, this error was not, standing alone, a violation of the requirement of "strict procedures." There were issues of fact about the sufficiency of Choicepoint's procedures. Thus, neither party was entitled to judgment as a matter of law.

ii. Facts that presented at least an issue of fact against Choicepoint: (1) Choicepoint sometimes relied on employees, sometimes on independent contractors (suppliers) to do the records-checking; (2) where more than one "supplier" was available, Choicepoint selected the lowest bidder; and (3) Choicepoint did not double-check "hits" (discovered criminal records) except for the purpose of verifying the identity of the person in question.

c. **Duty of Reasonable Procedures**. There was an issue of fact whether Choicepoint violated §1681e(b), which requires agency to follow "reasonable procedures to assure maximum possible accuracy." An agency *always* has this duty, but this duty is less demanding than the "strict procedures" duty described above. Naturally, since there are issues of fact whether Choicepoint had "strict procedures," there are also issues of fact whether it fulfilled the lesser duty of "reasonable procedures."

Observations:

1. For the sake of reducing the length of this case, I omitted the court's discussion of an interesting fact the court deemed irrelevant. During the litigation, IBM discovered that Obabueki was also once convicted of shoplifting (footnote 5 of the opinion). IBM argued that this "after-acquired" evidence was relevant to Obabueki's claim that IBM had unlawfully discriminated against him under New York law. The court simply noted that the fact of Obabueki's other conviction could not have played any role in IBM's decision not to hire Obabueki.

2. The FCRA regulates consumer reporting agencies much more than it regulates employers and other users. An employer's role is to inform an applicant that it will request a

report, provide the applicant with information about the act, and disclose the report to the applicant before taking any adverse action based on the report. But the act creates no duty to hire, even when the employee "corrects" erroneous information (a process that might take some time). Thus, Obabueki had no remedy against IBM. IBM was not required to hire Obabueki even when Choicepoint's error came to light.

3. Obabueki might have a remedy against Choicepoint, but only if a judge or jury determines that Choicepoint did not maintain "strict" procedures to prevent such mistakes. The court assumes, correctly I believe, that the law does not make the agency strictly liable for mistakes. An agency could have "strict" or "reasonable" procedures, and might still make mistakes. Moreover, some mistakes are by the public officials who create the records–not by the reporting agencies. As this case shows, the damage is often done, and perhaps without any remedy, before the injured party can correct the record.

4. One can speculate that the "facts" about Obabueki's conviction, and whether a "vacated" conviction is "expunged," didn't make any difference to IBM. However, there is not much law to protect an employee or applicant from "discrimination" of this sort.

5. Some general questions I pose at this point:

a. Why enact laws to regulate background checks performed by an agency like Choicepoint, but not background checks by an employer like IBM?

b. How does the FRCA protect against intrusion? In three ways: By always requiring notice to the applicant that information is about to be transferred, by limiting the time frame a background check can cover for certain types of information, and by requiring extra notice or extra safeguards when an agency knows it is about to transmit information likely to have an adverse impact.

c. Is protection sufficient? This could be another occasion to consider the problem of criminal records and employment. Many states have "first offender", "deferred adjudication", or similar laws that, to one extent or another, are designed to clear a person's record. But as this case illustrates, a "first offense" can leave a trace and can still have some impact.

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This problem is inspired by *Walls v. City of Petersburg*. 895 F.2d 188 (4^{th} Cir. 1990), where the court rejected the officer's Constitutional right of privacy claim.

The city's action may seem unfair, but in most states there is no law to prohibit an employer from rejecting applicants because of ne'er-do-well relatives, poppy seed muffins, or "expunged" convictions. But there might be an invasion of privacy claim, and the limits of the FCRA are worth discussing.

First, was there an intrusion cognizable under the Fourth/Fourteenth Amendment or the common law of privacy? By now, criminal background checks are probably taken for granted, especially for jobs in law enforcement. *Walls* and this problem raise a different question whether an employer can pry into the background of the applicant's relatives. In *Walls*, the court found no intrusion of the *applicant*'s privacy because the information the city was seeking was a matter of "public record." I would argue that the employer's search for this sort of information still constitutes an intrusion for the applicant and his relative, at least in the way it affected family relations, and the facts of the problem are designed as an example. One might also argue that the brother had his own claim of intrusion, and he did not consent to the intrusion. *Walls* might preclude this argument by its holding that a search of "public" records is not an intrusion of anyone's privacy.

Assuming there is any intrusion, is there a legitimate employer/public interest in obtaining this information? The employer might argue that an applicant's association with criminals raises a security issue.

The FCRA is not likely to be much help here. The act doesn't apply to mere inquiries about one's background, or to an employer's own search of public records. In the unlikely event the city obtained a report from a covered third party "agency," however, the rights of the applicant and his brother must be considered separately. While the applicant might have consented to a search of his public records, the brother did not.

Loder v. City of Glendale

This case involved challenges on behalf of applicants and current employees, but I have edited this case to focus on the court's disposition of the applicants' claims. The court's disposition of the claims of current employees is summarized in Chapter Six, because those claims hinged on facts and circumstances typical of employer investigation of current employees and specific wrongdoing.

Key facts: The City instituted a drug testing program in 1986 after a spike in disciplinary problems in which drugs appeared to be a "significant" factor. Before implementing the drug testing program the City tested applicants in a "pilot" program and discovered that about 21% of all applicants tested positive. When the city adopted its drug testing program, it merely added an additional component to the urinalysis (previously only health related) it already required as part of a mandatory pre-placement physical examination.

The court's opinion describes many features of the drug testing program. Here are the most important features:

1. Job announcements stated that a physical examination and drug test were required.

2. Job offers were explicitly conditioned on a physical examination and drug test.

3. The applicant signed a written consent form before the test.

4. The applicant was asked to disclose medications and drugs he was taking.

5. Measures to prevent fraud or adulteration: Applicant changed into a hospital gown; use of a sealed container, opened in presence of applicant; a medical employee in the next cubicle ("aural" monitoring, but without visual observation); blue colored water in toilet; immediate measurement of temperature of the sample.

6. The container was sealed, and the applicant and medical employee signed a chain of custody slip and placed it in an envelope with the sample.

7. The laboratory conducted an enzyme immunoassay test. If the sample tested positive, the laboratory conducted a chromatography/mass spectrometry test. If the second test was negative, the overall test result was considered negative.

8. Samples testing positive retained for 12 months for retesting in the event of an appeal.

9. Test results were treated as confidential and not disclosed to law enforcement.

Decision: The drug testing of applicants did not violate the Fourth Amendment. The government's interest in screening its employees outweighed the interests of applicants in avoiding the kind of intrusion testing caused.

1. **Applicants v. Incumbents**. The court noted at the outset that pre-placement testing (applicants with conditional offers) is distinctly different from pre-promotional testing (current employees), and precedents invalidating pre-promotional testing do not necessarily apply to pre-placement testing.

2. **State's Interests Justifying Intrusion**.

a. The court listed problems caused by employee drug use: "increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover."

b. An employer can observe a current employee for any of these problems and take appropriate disciplinary or investigatory action, or consider the employee's record in any promotional decision, but the employer has no way of observing an applicant in advance. Other background information may not be very reliable.

3. **Nature of Intrusion**. Not severe, because drug testing was part of a pre-employment medical examination already required. A regular medical examination naturally involves some intrusions, but the plaintiff did not complain about the general medical examination (and the court appears to have regarded a routine medical examination as not unlawful). The added intrusions of a drug test in this context, even with the additional security precautions, were "minor" and "incremental."

4. **The ADA Example**. The court cited the ADA's authorization for a general physical examination after a conditional offer as reflecting a general societal understanding that medical examinations do not unreasonably violate privacy. Pre-employment physical examinations and urinalysis are "simply too familiar a feature of the job market" to be regarded as an unreasonable intrusion.

Observations:

1. Drug testing involves two types of intrusion. First, it reveals something about the examinee's lifestyle and past conduct. However, the courts don't seem very sympathetic to drug use as a privacy interest if the examinee knew he was being tested for drugs. In *Loder*, this privacy interest does not appear to have been given much weight. Second, the test involves the physical intrusion of the examination process, especially when combined with the usual procedures to avoid fraud or adulteration.

2. The court said its decision did not depend on the advance notice that applicants received that testing would be required. *See* footnote 19. Advance notice is only a factor affecting the reasonableness of the expectation of privacy. It is not an absolute requirement for a legitimate intrusion. But the court's view of the importance of advance notice cuts both ways. On the one hand, if advance notice isn't always required for an intrusion to be lawful, an employer could surprise applicants with intrusive tests fairly late in the selection and hiring process, as long as it can be said that the applicant has an opportunity to back out of the process. On the other hand, in the California court's view, advance notice will not always be enough to legitimize intrusion, at least in a case subject to Fourth Amendment analysis.

3. While the *Loder* case deals with the issue of intrusion, the procedure the city followed in that case is a good rough outline of how an employer and its laboratory can minimize errors and false positives. Retesting and preservation of samples for further testing is certainly one important component of a fair drug testing procedure. The accuracy of a test may affect the court's view of the reasonableness of the intrusion. If a test is inaccurate, an employer might find it difficult to persuade a court that its interest in performing the test outweighs the employee's interest in privacy.

4. This test procedure had a number of safeguards to reduce the risk of rejection because of a false positive (sample preservation, administrative appeal and retesting). I ask my students, "Are these safeguards required by the Constitutional or common law of privacy? By any other aspect of tort law?"

5. Advances in the science and technology of drug testing seem to be reducing some risks and increasing others. A search of the internet will reveal many "home" drug testing kits available for employers who might seek to reduce the cost of relying on a professional or licensed laboratory. Many of these tests involve analysis of saliva, rather than urine–much less intrusive, but also less accurate, especially if performed by the employer.

Veazey v. Communications & Cable of Chicago, Inc.

This excerpt from *Veazey* includes only the court's discussion of the reliability of polygraph examinations. The facts and the court's decision are discussed in Chapter Six in connection with the use of polygraph examinations for the investigation of particular incidents of wrongdoing by current employees.

Observations: The effect of the EPPA on employee selection is simple: The administration of a polygraph examination is illegal. The law is more complex with respect to employee selection in the exempt public sector, where the legality of polygraph examinations is governed by the Constitutional right of privacy. The EPPA authorizes limited use of a polygraph examination in connection with the investigation of particular incidents of employee misconduct, a topic covered in Chapter Six.

Karraker v. Rent-A-Center, Inc.

Key facts: Rent-A-Center (RAC) required all candidates (internal and external) for management positions to take the "APT Management Trainee-Executive Profile." The Profile included some math and language skills components, and it also included a test based on 502 questions from the Minnesota Multiphasic Personality Inventory I (MMPI). The MMPI portion of the Profile was designed to test personality, and it rated an examinee according to scales of depression, hypochondriasis, hysteria, paranoia, and mania. Highly elevated scores could be used to diagnose psychiatric disorder. All parts of the Profile were scored together. An employee was not eligible for promotion if his test scores showed more than twelve "weighted deviations."

The district court's decision, at 316 F.Supp.2d 675, reveals that an independent firm, Associated Personnel Technicians (APT), scored and interpreted the tests, and sent RAC a psychological profile of each examinee.

Although the Karrakers and other members of the plaintiff class were current employees, the test was administered as a condition of promotion. Therefore, for ADA purposes, the test constituted an employee selection test.

Each of the Karrakers had more than twelve weighted deviations. Thus, they were disqualified from promotion. They sued RAC for themselves and on behalf of other employees of RAC for alleged ADA violations and for the tort of public disclosure of private facts. The parties filed cross motions for summary judgment. The court granted summary judgment for RAC and dismissing the plaintiffs' claims. The plaintiffs appealed.

Decision: Reversed as to the ADA claim, and remanded with directions for the district court to enter summary judgment in favor of the plaintiffs. Affirmed with respect to dismissal of the public disclosure claim.

1. **Focusing the ADA Issue**: RAC might have defended the test in either of two ways: (1) by proving the test was not a "medical examination" restricted by the ADA, or (2) by showing that the test was "job-related and consistent with business necessity" for purposes of *post*-job offer examination. However, RAC relied only on the first of these defenses. It argued that the test was not a "medical examination." One might surmise that test scores were not well correlated with actual job performance, and that RAC knew a losing argument when it saw one. RAC had ceased using the test by the time of the trial.

2. **The Test Was a Medical Examination**. The test was a "medical examination" within the meaning of the ADA, and the RAC's use of the test to select employees violated the ADA. The court relied on the EEOC's guidelines for determining whether a test is a "medical examination."

a. According to the EEOC, whether a psychological test is a medical examination depends on whether it is designed to identify mental disorders or impairments, or whether it merely measures personality traits like honesty.

b. RAC argued that, *as it used the test*, the test measured only personality. RAC attempted to distinguish between testing for clinical depression versus "depression that everyone feels from time to time." The distinction made no sense. For what purpose would RAC test employees to see if they were capable of feeling the sort of depression everyone feels from time to time? Why would RAC care if the an employee happened to be sad about something on the day he took the test? The only believable explanation was that RAC used the test to identify persons impaired by more serious forms of depression.

c. EEOC Guidelines say that a test (a) designed to identify emotional illnesses such as depression *and* (b) actually interpreted *by a psychologist is* a medical examination, even if an employer purports to use the test only to measure personality.

i. RAC argued that its test was not actually interpreted by a psychologist. Evidently, the test in question could be scored according to two different "protocols: "clinical" or "vocational." RAC relied on the "vocational" protocol. Thus, RAC argued, the test was not "interpreted" by a "psychologist."

ii. The court rejected RAC's argument on this point. Whoever scores the examination, and regardless of what protocol is followed, the result is the same:

People with certain impairments are likely to score high on certain scales and will be weeded out.

3. **Tort Claims**. RAC's disclosure of test results to various persons within the company did not constitute a tortious "public disclosure of private facts."

a. This tort requires proof of a public disclosure of private facts that would be highly offensive to a reasonable person.

b. There was no improper disclosure of the plaintiffs' test scores. Disclosure to persons with a "natural and proper interest" in the information is not tortious. Thus, for example, as discussed in the district court opinion at 316 F.Supp.2d 675, RAC's disclosure to supervisors making the personnel decisions in question was not improper.

c. The district court's opinion also notes that clerical employees received the reports from APT, entered the data in a computer, photocopied the reports, and placed the reports in the appropriate personnel file. Such handling of records was necessary to the collection and maintenance of data. The court of appeals evidently agreed with the district court that these actions constituted disclosure to persons with a natural and proper interest.

d. An item from the district court's opinion but omitted from the court of appeals decision: One of the plaintiffs recalled that a store manager discussed test scores of several employees with a group of employees, but the disclosures he recalled (that this plaintiff was "high strung," should drink less coffee, smoke fewer cigarettes, and drink more water) were not "highly offensive."

Observations:

1. There might, of course, be some "personality" tests that are not designed to diagnose mental or emotional impairments. However, such a test might *still* have disparate impact, and it might be unlawful on this basis whether or not it constitutes a "medical examination." The disparate impact might be against persons with emotional disorders, or it might be against persons from certain cultural or linguistic backgrounds. Calling the test a "medical examination" or not a medical examination is important for purposes of burden of proof. If the test is a medical examination, the employer must administer the test post-offer, *and* it must prove job-relatedness. If the test is not a medical examination, the employee must prove disparate impact before the employer will be required to prove job-relatedness.

2. A test of psychological disorder might be predictive at some point on a scale, but not at lower points. For example, a very high score for paranoia might be predictive of poor performance, while a merely elevated score might not be predictive. RCA's evident problem with proving validity might have related to the manner in which it scored the test. In short, *Karrake*r is not necessarily a death blow to "personality" testing or to "psychological" testing by employers.

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The test is distinguishable from the one in Karracker in at least one important way: It was designed to test only personality (or so the designer will say), and it was not designed to be used to diagnose emotional or mental impairments. On the other hand, if one accepts the Seventh Circuit's "effects" approach, is it really possible to distinguish "personality" tests from psychological tests? It might be important to know the full range of "traits" the test purports to reveal. If the test might be a medical examination, the employer should administer it only post-offer.

Whether or not the test is a medical examination, it might have disparate impact. In fact, personality tests probably do have disparate impact, at least against persons with emotional impairments.

Discontinuing the test might be the safe thing to do, but there is another option: The employer might try to "validate" the test. A detailed description of the process of validation is probably better left to a course on Employment Discrimination. However, you could point out to the class that the process of validation is difficult and expensive, if the test has not been validated in advance for the jobs the employer is seeking to fill.

E. Screening Employers: Placement Agencies

Keck v. American Employment Agency

Key facts: Keck sought employment through American Employment Agency, AEA, agreeing to pay a $300 placement fee. AEA referred Keck to Joiner, who was pretending to be a prospective motorcycle repair shop owner and employer, and who seemed to be in a hurry to hire someone right away (he offered to pay half the placement fee). The interview evidently was at AEA's office, and Joiner arrived for the interview looking "unkempt" with long hair and a beard, and wearing a T-shirt with the word "bullshirt." AEA was so concerned by Joiner's appearance that it asked him to wait in an office away from the usual reception room.

During or after the interview Joiner offered an office job to start the following Monday. However, AEA's job counselor, who was surprised by Joiner's appearance, advised Keck to think about the job over the weekend. AEA's counselor later claimed to have warned Keck to check things out before starting the job.

Although the job was not to begin until the next Monday, Joiner called Keck to his office on the intervening Saturday. Joiner's "office" was empty except for a telephone, ashtray, and a television set. He instructed Keck to assist him in the creation of a "rope" sign for his business, but he suddenly used this rope to assault, rape and kidnap Keck.

AEA had performed no background check with respect to Joiner. Had it done so, it would have learned that Joiner had no business when he called AEA; that he did not have an office until he rented one an hour *after* the interview with Keck; that his "office" was not suitable for a motorcycle repair shop; that Joiner was living in a "flop house."

Keck and her husband sued AEA for negligently failing (1) to investigate Joiner, (2) to ascertain whether Joiner had a legitimate business, or (3) to warn Keck that AEA had not yet checked Joiner's background. At the close of Keck's case in chief, the trial court granted a directed verdict in favor of AEA, finding no negligence.

Decision: Reversed, and remanded for retrial.

1. A defendant is not ordinarily liable for a third party's actions against a plaintiff, unless there is a special relationship creating a duty to protect the plaintiff against the third party. The court found that AEA had a special relationship with Keck, and had a duty to investigate prospective employers.

2. An Arkansas statute requires that an employment agency must have a "bona fide job order" before they refer anyone for an interview. AEA had a duty to investigate whether the position for which Joiner was hiring was "bona fide" (the court concedes this provision was probably intended to prevent fraudulent practices in recruiting job hunters, but it uses the statute as evidence of "the duty" an agency has toward its client applicants.

3. A third party's tort or crime is usually a superseding cause, for which a defendant is not liable, except when the defendant created a situation and knew or should have known that a third party might take advantage of the situation to commit such a tort or crime. Restatement §448.

4. As for AEA'a warning to Keck that she should check things out before taking the job, the court described this as AEA's effort to shift its responsibility to Keck.

5. Reasonable minds could conclude that AEA violated a duty to Keck.

Chapter Four
Compensation and Benefits

A. Wages and the Labor Market

Todd v. Exxon Corp.

This case offers an introduction to the labor market and a glimpse of the sometimes bureaucratic and not always competitive process for an employer's decision to pay employees a certain amount. It's also a brief introduction to the possibility of "collective" action, although in this case it's the *employers* who are acting collectively.

Key facts: This was a class action under Section 1 of the Sherman Act (prohibiting contracts or restraints in restraint of trade), alleging that an association of 14 employers in the integrated oil and petrochemical sector unlawfully exchanged wage data in order to maintain artificially low wage rates.

According to the plaintiff's allegations, the defendants collectively controlled 80-90% of the industry's revenue and 80-90% of the industry's labor force. The defendants periodically conducted surveys of current and past salaries of non-union managerial, professional and technical (MPT) employees. In the course of exchanging this information, the defendants assured each other that they would use the information in setting their compensation levels. The court's opinion describes a fairly sophisticated process to assure accurate comparison of classifications from one firm to the next and with due regard for irregular pay such as bonuses. The defendants even employed an outside consultant, Towers Perrin, to collect, analyze, refine and distribute the data.

The gist of the complaint was that the defendants used this process to depress salaries by preventing the members of the defendants' group from bidding up salaries, in violation of the Sherman Act. The district court granted the defendants' motion to dismiss for failure to state a claim.

Decision: Vacated and remanded. The plaintiffs stated claim for relief under the Sherman Act.

1. **Alternative Methods of Stating a Violation**: A clear agreement to fix wages would be a per se violation of the Sherman Act. In the absence of proof of such an agreement, a plaintiff might still show a violation of the Act by either of two ways. ***First,*** a plaintiff can present evidence from which an agreement to fix wages can be inferred. Such an agreement might be inferred from "conscious parallelism," facilitating conduct such as information sharing, and other circumstantial evidence.

Second, a plaintiff can try to prove that information sharing standing alone is a violation, even without an agreement to fix wages, because of its anti-competitive effect. Under the second approach, information sharing is not per se illegal, but it might be under a "rule of reason." The plaintiff alleged *only* the second type of violation. Therefore, the court tested her claim under the "rule of reason."

2. **Application of the Rule of Reason** (Information sharing unlawful even without an express agreement to fix wages). The rule of reason depends on a number of factors.

a. **Defining the relevant market**. The first step is to define the relevant market.

The Sherman Act applies not only to monopoly and oligopoly but also to monopsony or oligopsony (buyer or employer-side control of the market). Thus, the relevant market is the market of competing buyers (employers) offering opportunities for employment. Limiting the market to the group of integrated oil and petrochemical employers depends on the interchangeability of employment opportunities inside and outside the group. In other words, could employees in the proposed plaintiff class reasonably seek *substitute* employment with employers in some other industry? If so, the defendants would have limited control over the labor market. They would be exposed to competition by employers in other industries. However, if employment opportunities were not reasonably interchangeable, the defendant employers would exercise effective oligopsony control over the labor market for the proposed plaintiff class.

The plaintiff alleged that employees might develop firm specific skills in the industry in a way that would tend to limit their employment opportunities to the defendants. The plaintiff also alleged that the defendants' investment in their information sharing program showed their own belief that they constituted the relevant market. The court noted that whether the defendants actually constituted the relevant market would also depend on evidence of the actual effect of their practices on wages. In sum, the court found that the plaintiff's allegation that the defendants constituted the relevant market was at least plausible.

b. **Susceptibility of the Market**. Having defined the relevant market, the court must determine the extent to which the market is susceptible to control by the defendants. This in turn depends on the concentration of power within the defendant group and on the fungibility of the "product" (or in this case, job opportunities).

> (1) ***Concentration***: A function of market share controlled by the defendants and the number of the defendants (the greater the number, the less manageable the effort to control the market). The court found the plaintiff's allegations were sufficient to state a plausible case for a significant degree of concentration.
>
> (2) ***Fungibility***: A function of the extent to which employment opportunities offered by the defendants are so alike that it is easy for the defendants to compare salaries. The defendants' great effort and sophisticated methods to compare their

respective job classifications and compensation schemes comparable lent credence to the possibility of fungibility.

(3) ***Inelastic demand***: In the case of oligopsony, this means the degree to which seller/employees can abstain from selling goods or services at the price or wage offered by buyer/employers. Of course, employees can only withhold their services for so long before they must accept the best employment offered.

(4) ***Conclusion***: The plaintiff's allegations stated a plausible cause for the susceptibility of the relevant market to the defendants' control.

c. **The nature of the information exchanged**: Some shared information is more likely than other shared information to lead to restraints of trade. The key is timing. The more current the information, such as wage data, the more likely the information sharing will actually cause a restraint of trade. The plaintiff alleged that the defendants not only exchanged very current information, they even shared budgeting information reflecting likely *future* wage rates.

d. **Effect on competition and antitrust injury**: The plaintiff alleged that the defendants' wage information sharing efforts had reduced wage competition. The plaintiff alleged remarkably specific figures in this regard. Exxon allegedly reduced the wage differential between itself and its "competitors" from 6.5% to 0%.

e. **Conclusion**: The plaintiff should be permitted to produce her evidence on all these points. Thus, the court remanded the case to the district court for further proceedings.

B. Contractual Rights

This chapter on compensation and benefits is an appropriate place to begin looking at the contract of employment. Compensation is the most likely subject for express bargaining between the parties.

Martin v. Mann Merchandising, Inc.

Key facts: Mann Merchandising discharged Martin after eleven years of employment. Mann provided Martin with a certain amount of severance pay and the cash value of some unused vacation time, but Martin claimed these benefits were only half the amount to which he was entitled, and he filed sued for breach of an implied contract for a larger amount of severance pay. In particular, Martin alleged that Mann promised one week's severance pay for each year of service and two weeks' vacation if Martin's employment terminated.

Mann admitted that no one ever told Mann he would receive severance pay (evidently he did not point to any written policy, either), and he never asked about severance pay while he was employed because he didn't expect to be terminated. Mann asserted by affidavit that other managers terminated before him received severance pay, but he admitted in a deposition that he didn't know how other employees' severance pay was calculated.

The evidence of Mann's "reliance" on the severance pay plan was dubious. In his deposition, Mann admitted he didn't accept the regional manager job based on the promise of severance pay, because he didn't learn of the "policy" until after he was on the job. However, in his affidavit Mann asserted, "I must have and did consciously rely upon receiving" severance pay.

The employer moved for summary judgment, evidently on the ground that Martin did not "rely" on the promise of severance pay. The trial court granted summary judgment against Mann and dismissed his claim.

Decision: Reversed and remanded. There was a triable issue of fact with respect to an implied contract for severance pay.

1. The company argued that there could be no contract for severance pay, because Mann admitted in the deposition that he accepted his job without any knowledge of a severance pay policy, and the existence of the policy was not the reason he continued his employment. However, the court merely noted Mann's [contradictory] affidavit that he *did* rely on the alleged severance pay policy.

2. More importantly, reliance isn't a necessary ingredient of a contract. It simply didn't matter if Mann relied on the severance pay policy in continuing to work.

3. Employees have a right to expect that whatever plan or policy is in effect during their employment will be applied equally to them.

4. Whenever an employer adopts a new policy or plan, an employee accepts the new terms by continuing his employment. The employee need not prove that he continued his work in reliance on the new terms.

Observations:

1. My experience is that many students have already forgotten, by their second or third year, that reliance (in the "but for" sense) is not a necessary feature of a contract claim, so it's not surprising that practicing lawyers sometimes forget. The irrelevance of reliance, at least with respect to particular terms, is especially important in the employment context, where employees frequently seek to enforce terms of which they had no knowledge until the day they were terminated. Severance pay is a typical example.

2. In this case and the next (*Russell*), an important theme is that employers frequently adopt personnel "policies" and benefit "plans" that resemble contracts, but employers often

assert their policies are not contracts. *Russell* deals more specifically with "policies." Later, we will see how modern employee benefits law now differentiates a "plan" from a "contract" and creates a new basis for enforcement.

Russell v. Board of County Commissioners

Key facts: The county board of commissioners adopted a personnel policy manual, codifying pre-existing policies, providing inter alia that certain employees "shall be entitled" to extra compensation for "overtime" or holiday work. As written and adopted by the Board, the overtime/holiday pay policy applied to "law enforcement officers."

At the front of the policy manual was a statement that the manual was *not* an employment contract. Another provision stated that the manual was intended to serve as a "working *guide*."

Following the adoption of the policy, the county denied overtime or holiday pay to its deputy sheriffs. Ten deputy sheriffs, employed "at will," brought his lawsuit alleging they qualified as "law enforcement officers" under the policy. They argued that the policy manual had become part of their contract of employment, or that they were entitled to the extra pay under the doctrine of promissory estoppel.

The trial court granted summary judgment for the county. The intermediate court reversed. The county then appealed to the Supreme Court of Oklahoma.

Decision: There were triable issues of fact whether the county breached its contract of employment with the plaintiffs or whether the county was bound by promissory estoppel. The Oklahoma Supreme Court affirmed the intermediate court's judgment, reversing summary judgment for the county, and remanding the case for trial.

1. **Handbook as Contract**. Oklahoma law regards an employee handbook personnel manual as a possible basis for an "implied" contract. To create an implied contract, the handbook and circumstances must satisfy the usual requirements of contract law, including the requirement of definiteness. Statements in a handbook that are nothing more than vague assurances do not create an implied contract.

2. **The Disclaimer Problem**. A disclaimer, such as the county's statement that the manual was not a contract, might negate any contractual effect if the disclaimer is clear.

> a. However, the disclaimer itself might be negated by employer conduct "inconsistent" with the disclaimer. In a footnote, the court explains that an employer's "pattern and practice" of following a provision of a manual might reasonably lead one to conclude that the provision was part of the contract of employment.
>
> b. The specific manual provision in question stated that the qualified employees

> "shall be entitled" to extra compensation. The county paid other classifications of employees in accordance with this provision and the holiday pay provision. This facts create an issue of fact whether the employer's conduct negated the effect of the disclaimer as to the provision in question.

3. **Promissory Estoppel**. The plaintiffs might also have a claim based on promissory estoppel, if they prove the usual requirements (including a clear promise, and reasonable and foreseeable reliance).

4. On remand, there will be a further question to be resolved: Assuming the provision created an implied contractual right or stated a promise for purposes of promissory estoppel, are deputy sheriffs among the employees entitled to this right (remember, it applies to "law enforcement officers").

Observations:

1. If a disclaimer is effective in denying that a handbook is a contract, a court is still left with the question: *what was* the parties' agreement? A handbook that is not a contract might still be some *evidence* of the parties' mutual expectations. However, the actual practice of the parties is also likely to be important in proving the parties' agreement. What are we to make of a salaried employee's continued services if the employer clearly and persistently rejects the employee's demand for "overtime" compensation? My understanding of *Russell* is that there was never a time when deputy sheriffs received extra overtime or holiday pay. Thus, the issue might be stated as whether the county commissioners' codification of overtime/holiday pay rules for "law enforcement officers" was sufficient evidence of an agreement to change the established practice for deputy sheriffs.

2. Could the Board reasonably have believed and intended that a provision for "law enforcement officers" would not apply to deputy sheriffs? The full statement of the case sheds only a little light on this question. The Board maintained that the provision applied to "jail personnel" but not deputy sheriffs. Perhaps the provision was designed to implement the County's obligations under the Fair Labor Standards Act. County employees are covered by the act's overtime rules, but there is an exemption for the "personal staff" selected by and serving an elected official, such as a sheriff. 29 U.S.C. §203(e)(2)(C). Perhaps the Board believed that if the provision implemented FLSA obligations, it implicitly included the FLSA's exemptions. If my understanding of the case is correct, the case is a useful example of the importance of remembering that statutory wage obligations are separate from contractual wage obligations. Even if the statute exempted deputy sheriffs from overtime pay, but they might still have a contract right to such compensation.

3. There will be another opportunity to consider handbooks, policies and disclaimers in connection with alleged promises of job security in Chapter Eight. There are special reasons why courts may be especially reluctant to treat disciplinary policies as contracts or evidence of contracts.

4. It is unusual for employees to sue their employers while the employment continues, especially if they are employees at will. Of course, public employment is different in many ways. The deputies were suing the Board, not the Sheriff who appointed them. And public employees may enjoy First Amendment protection in asserting their rights in court.

J.I. Case Co. v. NLRB

The purpose of this brief look at collective bargaining is very limited. It is mainly to consider the fundamental difference between individual bargaining and collective bargaining, the difference between the law of contracts and the law of collectively bargained contracts, and the effect of collective bargaining on individual contract rights.

Key facts: In 1937, about two years after the enactment of the Wagner Act, the company started to offer employees standardized, one year contracts of employment. The company promised employment for the one year term as long as "conditions permitted," but it reserved the right to change the rate of pay if the job changed. In return, an employee promised to serve for the one year term. The company did not require employees to sign contracts to continue their employment. About 75 % of employees accepted the annual term arrangements.

In 1941 a union petitioned the NLRB for certification as the exclusive bargaining representative of the employees. The company opposed the union, arguing that the individual contracts were a "bar" to the union's effort to bargain on behalf of the employees. Nevertheless, the NLRB conducted an election in which the union prevailed.

Still, the company refused to bargain with the union about any matter already covered by the existing individual contracts (which would have precluded bargaining about wages), until the individual contracts had expired.

The NLRB found that the company had violated the National Labor Relations Act by using the individual contracts to interfere with the rights of the employees to engage in collective bargaining. It ordered the company to cease and desist, and the court of appeals enforced the order.

Decision: Affirmed. The company interfered with the employees' rights by refusing to bargain over matters already covered by the individual employee contracts.

1. A collective bargaining agreement is different from other contracts. The agreement, in itself, isn't the hiring or employment of any person. It's more like a "trade agreement" or a schedule of rates for anyone who might enter into employment with the company. Standing alone, the agreement doesn't identify the persons who are or will be employed. Individual contracts are still required in the sense of a "*hiring*" to establish the employment relationship. But a person hired is then analogous to a third party beneficiary of the collective bargaining

agreement. His individual contract is "subsidiary" to the collective agreement.

2. An employer may not use individual contracts to "defeat" or delay the process of collective bargaining. "Wherever private contracts conflict with [the collective agreement's] functions, they obviously must yield or the Act would be reduced to a futility." No employee within the bargaining unit can "waive" the terms of the collective agreement, and the agreement must apply to all employees in the unit regardless of their individual contracts.

3. It is possible for a collective bargaining agreement to grant some opportunity for further individual bargaining. The collective agreement could establish a "minimum" rate, and permit employees to negotiate individually for higher rates. But such individual bargaining can be disastrous for the union because an employer can use the opportunity to favor some employees in a way designed to undermine collective bargaining by sowing dissent against the union. Thus, individual bargaining to vary the terms of the collective agreement is permitted only when the collective agreement permits such bargaining.

Observations:

1. The company and its lawyers were probably thinking of the usual rules of contract law when they refused to bargain with the union. If the union demanded higher wages, the company would have responded that the employees were already bound to accept employment at a certain wage for the duration of their contracts. A strike would have breached the individual contracts. A threat to strike would have constituted anticipatory repudiation of the individual contracts. If the company and union had reached an agreement, the agreement would have been unenforceable because the employees had a "pre-existing duty" to serve the employer without interruption, and a no-strike clause would have been "no consideration" for any of the promises the union demanded of the company. Naturally, the law of collective bargaining changes the usual rules.

2. An important topic covered in the notes following *J.I. Case* is the concept of "concerted" employee action outside the collective bargaining context. Thus, for example, many company policies prohibiting employees from disclosing their wage rates to each other are in violation of the National Labor Relations Act.

Office of the General Counsel, NLRB, Memorandum OM 11-74 (August 18, 2011)

This memorandum summarizes the General Counsel's response to requests for advice by regional directors who were deciding whether to issue complaints against employers who had disciplined employees or maintained certain rules under various circumstances relating to employee postings on social internet media.

Overview of Cases: The internet, including Facebook, is simply a new way employees may find to communicate with each other either to organize their concerted dealings with an employer or to solicit support for mutual causes. The internet might also become part of employees' arsenal against an employer in bargaining relating to a labor dispute. But protection under Section 7 requires (1) the action was "**concerted**; (2) for the purpose of dealing with the employer with respect to matters of **employment**; and (3) not in violation of certain limits against **unreasonable** employee behavior. But the NLRA does tolerate conduct that some people—particularly employers—might have thought was unreasonable. After all, the NLRA protects the right of employees to engage in concerted action that can be highly destructive to the employer. A strike, for example, might ultimately destroy an employer's business, but in general striking is protected conduct. In general there are two lines of cases pertinent to whether "concerted" Facebook postings dealing with matters of employment are so unreasonable as to lose protection. First, there is the *Atlantic Steel* cases dealing with employee outbursts that are angry or offensive and might constitute insubordination. Second, there is the *Jefferson Standard* line of cases dealing with employee defamation or disparagement of their employer or its product.

First Case: Employee of Luxury Auto Dealer. One employee posted negative images and comments about his employer's promotional event. This, in the GC's view, was "**concerted**" because the employee was vocalizing the complaints of himself and co-workers. In the GC's view, he was representing the views of his coworkers. The posting was for the purpose of dealing with the employer in a matter concerning **employment** because the employees were upset that their employer's promotional efforts would affect their commissions. The employee's conduct was not so **unreasonable** as to lose protection. It was no more offensive as an "outburst" than other conduct found to be protected (compare picketing attacking an employer as "unfair" or "oppressive"); and it was not unreasonable disparagement because it did not attack the quality of the employer's product and was part of an ongoing "labor dispute." **Update**: The NLRB ultimately found that the dealer did not violate the NLRA by discharging the employee, because the real cause of his discharge was a Facebook posting relating to an accident in which a car ended up in a pond, and had nothing to do with the dealer's promotional event. The NLRB did not pass on the issue whether the employee's postings about the promotional event were protected. Karl Knauz Motors, Inc., 358 NLRB No. 164 (2012).

Second Case: Several employees (and customers) discussed on Facebook that they owed federal income taxes because of their employer's alleged failure to withhold a sufficient amount of income taxes from their paychecks. One of the employees used an insulting expletive in reference to her employer. The conversation was obviously **concerted**. It related to a matter of **employment**—the way in which employees were paid. And the employees' conduct was not **unreasonable**. As "outbursts" these communications did not disrupt work and were no more offensive than many other actions the Board has deemed protected. As a form of disparagement, the communications did not lose protection because they were not proven to be "false" and were not "malicious." One might add they were not likely to cause much harm in comparison with many other actions the Board has deemed to be protected. The Board also found that the employer's rule against "inappropriate" internet discussions was unlawful because "inappropriate" is too broad a standard that might chill the exercise of Section 7 rights.

Third Case: An employee posted a Facebook comment critical of the employer's customers and wishing they would choke on glass. The action was not **concerted,** despite the employee's argument that he was initially provoked by his exclusion from the "tip pool." On its face the posting also had nothing to do with terms or conditions of **employment**. One might add that an attack against the employer's customers is not a **reasonable** form of opposition and is generally not protected.

B. Statutory Minimums and Remedies

Overnight Motor Transport Co. v. Missel

Key facts: Missel was a rate clerk for the company. His hours of work fluctuated widely, averaging 65 hours per week and ranging as high as 80 hours in a week. The company paid him a fixed weekly salary (with no additional compensation for "overtime" hours).

Missel sued the company under the FLSA for overtime pay. The company argued, and the trial court agreed, that the company had satisfied its obligations under the act by paying a salary that always exceeded the statutory minimum wage for each hour of work, plus one and one-half times the minimum wage for each "overtime" hour. The court of appeals reversed, and the company filed a petition for certiorari.

Decision: The court of appeals is affirmed. Missel was entitled to overtime pay in addition to his fixed salary, even if his salary was more than he would have received at the minimum hourly rate and overtime.

1. "[T]he purpose of the act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the act *even though their hourly wages exceeded the statutory minimum*." (emphasis added).

2. The overtime requirement of the act has two goals. First, it is intended to apply "financial pressure ... to *spread employment* to avoid the extra wage." (emphasis added). Second, it is to assure "additional pay to compensate [employees] for the *burden* of a workweek beyond the hours fixed in the act. (emphasis added).

3. If an employer pays an employee a fixed salary, regardless of the number of hours actually worked in a week, the "regular" hourly rate, for purposes of calculating the statutory overtime requirement, is the weekly salary divided by the number of hours actually worked each week. The Court observed that the regular hourly rate (for purposes of overtime calculations)

will decrease as the number of hours worked increases.

Problems
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1. (a) In a week with no overtime hours, the FLSA is satisfied as long as Reed earns at least the minimum wage, and clearly she does. Thus, the problem really becomes more a matter of contract than statute. The employer may have called it a salary, but the arrangement is essentially an hourly rate of $10 per hour because Reed agreed to work a certain number of hours (and to "make up" missed hours) for a weekly "salary" that paid for a certain number of hours. If Reed does not make up the missed time, the company may reduce her pay by the hourly rate for each missed hour.

(b) Now Reed has worked overtime. Therefore, in addition to her regular salary (which covered only the first 40 hours) she must receive one and a half times her "regular hourly rate" for ten hours of overtime (10 x $15), or $150 in additional overtime pay.

2. Note at the outset that Cash has a different kind of agreement. He earns a true salary– a fixed sum paid without regard to the number of hours of work. The salary represents his "regular" rate both for the first 40 hours and all hours above 40.

(a) $400. A true salary is not affected by slight fluctuations in hours of work. But, later on, we'll see that more substantial absences might justify a reduction in pay, at least for FLSA purposes.

(b) The answer, to many people, is surprising. For *statutory* overtime purposes, the answer is as follows: Cash's regular rate is his regular salary divided by the hours of work for that week (in a 50 hour week, his "regular" hourly rate is $8). The longer he works, the smaller his hourly rate. For the ten hours of overtime, Cash has already received his hourly rate ($8). Thus, his additional statutory overtime right is overtime hours times **one -half** his hourly rate for the week (10 x $4 per hour). Total overtime pay is $40. Compare with 1.b. **Note**: Although this system substantially reduces overtime costs for the employer, this does not appear to be a widely used system. Remember the employer must pay full salary for short weeks, too, and employees who have a right to overtime are deeply distrustful and resentful of this system.

3. (a) Hand's piece rate earnings are $200 for the week, but that might not be enough to satisfy the minimum wage obligation. It all depends on whether the "orientation and training" should be treated as work for which the company must pay the minimum wage. Later on, we'll look at some rules for determining what time counts, for minimum wage purposes. "Orientation" probably counts. Therefore, Hand probably worked a 40 hour week. His piece rate earnings yield $5 per hour, but the minimum wage is $5.15 per hour. The company must pay an additional $6 to bring Hand's earnings up to the minimum wage.

(b) Hand's piece rate earnings are $1,000 for 50 hours ($20 per hour), clearly enough to satisfy the minimum wage. But he worked 10 hours overtime. The piece rate has already compensated him at the regular hourly rate, so the company must pay Hand another one-half the regular rate for each overtime hour ($10 x 10). The answer is $100 in overtime pay. Alternatively, the parties might have agreed to a bona fide "premium" piece rate for work performed after the 40th hour. A likely bona fide premium piece rate in this situation would be $1.50 for each timepiece Hand inspects after the 40th hour.

Final Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

A salary–one of the basic requirements for most of the white collar exemptions–is not as simple as it seems. Some employers try to have it both ways. They want exemption from overtime requirements, but they also want to reserve the power to deduct pay for hours the employee misses. Or, they use a pay "docking" system or a short term suspension without pay as a disciplinary measure.

This excerpt from the DOL's summary of the new white collar exemption regulations addresses issues regarding the salary requirement. There are many other controversial aspects of these regulations, but the salary issues are the easiest and most interesting to present in the classroom.

Here's a hypothetical you can use to take the class through this material.

Hypothetical:

Andy Burger is the salaried manager of a Wendall's fast food restaurant, and the nature of his work satisfies the requirement for an "executive" employee exemption. The district manager visited Andy's store and gave him a "failing" grade on cleanliness. Andy maintained that the store was dirty that day because two employees failed to show up and Andy had a hard time covering all the work with the other two employees. Nevertheless, the company "fined" Andy by deducting $100 from his weekly salary. Andy has averaged 50 hours of work per week for the last two years. What are Andy's rights under the FLSA?

Does the answer have any significance for Sally Pickle, who manages another Wendall's restaurant on the other side of town?

Answer:

See 29 C.F.R. §541.602. Many disciplinary "fines", "penalties" and "unpaid suspensions" have the effect of converting a salary into an hourly wage, which means the employee was not an exempt salaried employee after all.

There are some limited reasons for which an employer can reduce a weekly salary, including *full day* absences for certain reasons. But Andy's "fine" was not based on absence from work.

The new regulations also authorize unpaid disciplinary *suspensions* of one or more *full days* (no fractional days) for violations of "workplace conduct rules." Employers had argued that suspensions without pay are an important "intermediate" punishment for salaried workers as well as hourly workers, and the DOL agreed. However, the "fine" levied against Andy was not a "suspension" unless Andy was relieved from work for a period of time corresponding to the amount of the fine. Moreover, the fine appears to be based on a "performance" standard, not a "conduct" rule. Finally, it's not clear whether the rule was sufficiently clear, written and applicable to "all" employees.

The DOL also allows an employer to impose a "penalty" (i.e., a reduction in pay *without* a suspension) for an employee's violation of a *safety* rule of *major* significance. It is very doubtful that the standard Andy may have violated constituted a "safety" rule of "major" significance. Instead, it appears to be a performance standard.

If the fine violated the salary rules, what are the consequences? Strictly speaking, the company has violated no law (whether it breached its contract to pay Andy a "salary" is a separate issue). For FLSA purposes, an employer's failure to treat a salary as a salary means that the employee might be "nonexempt" and entitled to backpay for any overtime hours. But how far back in time does the backpay liability run? For the single week in which the company violated the salary rule? Or for the entire two years Andy has worked as a manager?

The company will lose the exemption with respect to Andy if the evidence shows it did not intend to pay Andy on a salary basis. Intent can be shown by an "actual practice," and the fine, especially combined with other evidence that the company charges such fines on a regular basis, would seem to satisfy the idea of an actual practice. What if the fine is but a single or "isolated" occurrence? The company has a "window of correction." If it reimburses Andy for the fine, it can still claim the exemption. The company can also strengthen its position if it has a "clearly communicated policy permitting or prohibiting improper deductions" and can prove the fine was an isolated violation of its policy.

If the company does not take advantage of its opportunity to correct an isolated mistake, or if the evidence of an "actual practice" is beyond repair, it will lose the exemption "during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions." If the "practice" goes back two years, Andy will recover two years' worth of overtime.

Sally's rights are affected too. If she is in the same classification and subject to the same manager who fined Andy, she might also claim to be a nonexempt employee with a claim for unpaid overtime, regardless of whether the company has ever charged her for a fine.

McComb v. Shepard Niles Crane & Hoist Corp.

Key facts: Beginning in 1940, the company began to pay its employees quarterly bonuses in addition to the usual hourly and incentive earnings. Before each bonus, the company's board of directors generally made a resolution authorizing the bonus "as additional compensation for services rendered." The amount of an employee's bonus was based on his hourly rate. The company "changed" the amounts of the bonuses three times. Unfortunately, the court failed to explain how the company changed the amounts.

The company deducted social security taxes from bonuses, reported the bonuses as "Salary and Wages" in its income tax returns, and included the bonuses in computing workers' compensation premiums, unemployment insurance taxes, "Victory" deductions (this was during World War II) and income tax withholding. But the company did *not* include bonus payments in computing the employees' "regular rates" for purposes of calculating statutory overtime rates.

In 1943 (in the midst of World War II price and wage controls), the company sought approval of the National War Labor Board for bonuses it had already made, and it sought the Board's approval for continued bonus payments (wage increases required the Board's approval). The company reported to the NWLB that the bonuses were within the "exclusive discretion" of the company and for the purpose of offsetting the increased cost of living.

The same year, the company was evidently resisting a union's effort to organize the employees. Just before a union representation election, the company sent each employee a letter showing that employee's compensation, including bonuses. The letter was probably designed to respond to the union's argument that employees were not well paid, or to make employees fear that they had a lot to lose.

The DOL sued for the amount of overtime the company would have paid if it had included the bonuses in calculating regular hourly wages. It moved for summary judgment. The summary judgment proceedings included the following additional facts:

a. A stipulation that several employees would testify that they expected further bonuses and regarded bonuses as an integral part of earnings, because the company had paid the bonuses at regular intervals for a substantial period of time.

b. Affidavits of six employees that they regarded the bonuses as gifts, not wages.

c. An affidavit of the company's President that the bonuses were an exercise of "arbitrary discretion" and were awarded based on what the board believed was "reasonable" at the moment.

The district court denied the DOL's motion for summary judgment, and dismissed the complaint.

Decision: Reversed, and judgment is entered for the DOL. The company was required to pay for the additional overtime pay resulting from inclusion of the bonuses in the calculation of regular hourly rates.

1. The court noted cases holding that bonuses announced in advance were "compensation" for purposes of calculating regular hourly rates, even though the employers had reserved the right to cancel or change the bonuses at any time before actual payment.

2. There was no formal advance notice of bonuses in this case, but the company paid bonuses with such regularity that employees expected and relied on the bonuses had been announced in advance.

3. As in the *Richmond Screw Anchor* case, some employees submitted affidavits that they understood the bonuses were discretionary and the company was not legally obligated to pay the bonuses. Nevertheless, employees reasonably assumed they would receive the bonuses, and this fact was enough for the bonuses to become part of their regular compensation.

4. The court also worried that if a reservation of discretion, standing alone, precluded inclusion of a bonus in regular compensation, "it would afford a ready means for a company to obtain discriminatory rights in paying overtime."

Observations:

1. In view of cases like *Martin* and *Russell*, at the beginning of the chapter, the DOL and court might have conceded too much on the issue whether the bonuses were legally binding. To the extent the bonuses were not enforceable, *Shepard Niles* is another illustration of the fact that the employment contract and the FLSA are two different tracks of obligation.

2. The 1949 amendment, cited in the notes following *Shepard Niles*, is another example of a Congressional action so ambiguous it might be cited either as approving or disapproving the court decisions it seemed to address. Court decisions, law review articles and legal encyclopedias after 1949 continued to cite *Shepard Niles* as good law. However, did Congress overrule *Shepard Niles* when it excluded payments "not pursuant to any prior contract, agreement, or promise?" Was this a renewed invitation for an employer to include a simple reservation of discretion that neither the employer nor the employees take too seriously?

3. A simple message of this case, consistent with the 1949 amendment, is that an employer cannot have it both ways. It cannot use the regularity of a bonus to claim the bonus as regular compensation for some purposes, while relying on "discretion" to deny it's compensation for other purposes.

Dinges v. Sacred Heart St. Mary's Hospitals, Inc.

Key facts: The plaintiffs, Dinges and Foster, were EMTs (emergency medical technicians) for a hospital located in "rural" Tomahawk, Wisconsin. The hospital employed "on-premises" EMT crews for service during the day, and "on call" EMT crews later in the evening.

Dinges and Foster worked "on-premises" and "on-call" according to a two-week schedule, which included seven "on premises" day shifts, and seven "on-call" evening shifts.

When Dinges and Foster were "on call," they served on the "first-out" standby crew. If needed, they were required to arrive at the hospital within 7 minutes of being paged. A "second-out" standby crew had 15 minutes to arrive after a page, but the hospital paged the second-out crew only if the first-out crew was in the field when another emergency occurred.

Dinges and Foster asked for and received the first-out crew assignment for their on-call duty, even though this meant they would have to abide by the shorter response time and they would more likely be called to active duty. However, they earned more money on the first-out crew than they would have earned on the second-out crew. During their on-call hours, they received $2.25 per hour for on-call time, but they received 1 ½ times their regular duty rate for any time actually responding to an emergency. The hospital always credited them with at least two hours of active service when they received a page, even if they finished the job and returned home in less than two hours. The court estimated that the chance of being called to duty during any "on call" shift was roughly one in two.

The entire town of Tomahawk is within a seven mile radius of the hospital. Nevertheless, the plaintiffs' listed the following ways that on-call duty limited their use of time: (1) They could not travel outside Tomahawk to visit or assist relatives or attend various family occasions; (2) They were unable to hunt, fish or engage in other outdoor activities away from the town; (3) They were unable to engage in activities that would prevent their using or hearing a pager, such as using a lawnmower or attending a concert; (4) They were unable to drink alcohol; (5) They were limited to shopping in Tomahawk, which was too small to provide a full range of shopping opportunities; and (6) Foster required an "on call" babysitter and was unable to attend some school events.

The city noted, however, that during every two week period, an EMT was scheduled for three 48 hour periods with no "on premises" or "on call" duty. The city also noted plenty of personal pursuits that are possible within the limits of on-call duty: cooking, eating, sleeping, reading, exercising, watching TV, doing housework, and caring for pets and family.

Dinges and Foster sued the hospital, alleging that the inactive hours of on-call time were compensable and should have been counted for overtime purposes. The district court entered judgment for the hospital, and plaintiffs Dinges and Foster appealed.

Decision: Affirmed. The plaintiffs' ability to use time during inactive on-call duty was sufficient to exclude these hours in determining whether they worked overtime.

1. **Possibilities for Personal Pursuits**. The DOL's regulations provide that being "on call" is not necessarily compensable time, even though the employee must provide the employer a means to call the employee back to duty. The test of compensability depends on whether the limitations placed on the employee by on-call duty are "so restrictive that the employee cannot

use the time *effectively* for personal pursuits." (emphasis added).

a. The court interprets the "effectively for personal pursuits" standard as meaning an employee must be able to use the time for "many" personal pursuits, though not necessarily all.

b. True, the seven minute response time was less than any on call time limit approved in any other court decision, but seven minutes was enough time to report to the hospital from any point in a town like Tomahawk. "Seven minutes may be the lower limit, for it takes time to shake off the cobwebs when awakening and to jump into clothes, but we need not explore the question further."

2. **Consent?** Dinges and Foster asked for "first out" duty rather than "second out" duty, and they willingly put up with the inconvenience because they wanted more pay. Conceding that the FLSA overrides contracts, the court stated, " in close cases it makes sense to let private arrangements endure–for the less flexible statutory approach has the potential to make everyone worse off." If the hospital must treat "on-call" time the same as "on premises" time, there is nothing to stop it from requiring EMT's to remain on the hospital premises for any time they are on duty, and "*likely hiring additional EMTs* so that it can limit the premium pay for overtime." (Emphasis added). That's bad for Dinges and Foster, because they will earn less for fewer hours, and it's bad for the hospital because it must bear additional labor expense.

Observations:

1. Ironically, the court's worry that a "windfall" judgment for the plaintiffs might result in the hiring of additional EMTs might be the best argument *for* the plaintiffs. Remember, the overtime rules were designed to spread employment opportunities. *Overnight Transport, supra*. This would not be not good for EMTs who already have jobs, but it's exactly the right result for EMTs still looking for jobs.

2. The fact that the plaintiffs accepted the jobs they are complaining about is no more relevant in this case than it would be in any other FLSA case. However, the fact that they asked to serve on the "first out" crew might tend to undermine the credibility of their argument that "on call" duty was oppressively restrictive for their personal lives.

3. Perhaps the court should have given stronger emphasis to circumstances that ameliorated the restrictions of "on call" duty. For example, in every two week period, the EMTs had the equivalent of three weekends of complete freedom from duty. The hospital also had a "liberal" shift swapping policy so that EMTs could avoid duty during special occasions.

Problem

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(1) According to the IBP case, the first step is to determine when "preliminary" activity

ends and "principal" activity begins. Waiting in line is compensable if it occurs *after* principal activity has begun. The employees have done nothing that could constitute "principal activity" before they clock in, so this time is compensable only if standing in line and clocking in is, in itself, principal activity. Neither standing in line nor clocking in is the very activity for which the employer employs these employees. Are they "integral" or "indispensable" to principal activity? According to IBP, waiting in line is not integral or indispensable. What about actually clocking in? Is that comparable to donning special gear in the *IBP* case? If so, clocking in would constitute the beginning of principal activity. Waiting to begin real work after that point, and waiting in line to clock out at the end of the day would be compensable, because these waiting times occurred during and before the end of "principal" activity.

Thus, the problem boils down to whether clocking in is more like donning special gear in *IBP* (integral), or more like sundry non-integral things we do before beginning work, like looking for a parking place?.

A regulation that sheds some additional light is 29 C.F.R. 785.14:

> Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged."

Is there an agreement between the parties on this point? The company has insisted it will not pay for this time. Although Counts objects, his continuing work might constitute acceptance, but I would argue that if he filed his claim quickly, he will not properly be viewed as having "accepted" the company's rule.

Another circumstance that might bear on the issue is the amount of the time workers must stand in line. The employees often waited 10 minutes. According to §785.74, ten minutes a day is not de minimis. But §785.74 is mainly addressing time *after* the initial beginning of principal activity.

An argument for Counts: The employer has required clocking in to make its record-keeping easier. The employer has some control over the duration of this activity, and could shorten the waiting time by installing a second or third time clock.

Section 785.15 suggests a simple solution to the company's problem: Get rid of the time clock. The act doesn't require a time clock. The company's old practice of setting clear starting and ending times was sufficient for FLSA purposes, although it may have been burdensome for supervisors to enforce.

(2) The company described compensation as a salary, but the parties must have

understood that pay depended on time measurement. Again, there might be some question whether Counts accepted the company's new terms by not resigning. The company can't terminate Counts for objecting, because of the likelihood of an FLSA retaliation claim. In any event, it is worth noting again that one must frequently think about contract claims separately from statutory claims. See the note on "gap time" in the text.

Arriaga v. Florida Pacific Farms, L.L.C.

Key facts: The plaintiffs were migrant farmworkers who entered the U.S. on H-2A visas pursuant to agreements to work for the defendant growers during the 98-99 raspberry/strawberry season. The H-2A visa program required authorized temporary agricultural employment of nonimmigrant aliens, required payment of at least the FLSA minimum wage, and a contract for reimbursement of inbound transportation and subsistence costs if the worker completed 50% of the contract work period. An employee who completed the contract work period was entitled to the remainder of such costs. The growers recruited the plaintiffs in Mexico through other agents. The farmworkers incurred the following expenses to reach the growers' fields:

Description	**Amount**	**Reimbursed?**
A "recruitment fee" collected by a recruiter's employee, but not authorized or expected by the growers	variable	No
Visa application fee, paid to recruiter	$45	No
Visa fee, paid to recruiter	$100	No
Transportation from home to Monterrey	variable	No
Bus fare, Monterrey Mexico to Florida	$130	Yes (after completion of 50% of contract)
Entry document fee, paid to U.S. Immigration	$6	No

The court's opinion does not disclose the plaintiffs' wage rates. Perhaps the wage rate varied from worker to worker. Presumably, their rates were not much more than the FLSA minimum wage.

The farmworkers sued the growers, alleging that the non-reimbursement and delayed reimbursement of expenses had the effect of reducing their wages below the FLSA minimum wage, and also that the growers breached a contractual obligation to reimburse all the listed expenses. The parties filed cross motions for summary judgment. The district court granted the growers' motion and dismissed the farmworkers' FLSA and contract claims.

Decision: Reversed except as to the recruitment fees. Except for the recruitment fees, the expenses were not properly borne by the plaintiffs to the extent the expenses reduced the plaintiffs' hourly rate below the minimum wage.

1. **FLSA Allocation of Expenses**. The rule that an employee must receive the minimum wage free and clear limits not only deductions but also the nonreimbursement of expenses ("de facto deductions") initially but improperly borne by an employee.

a. **Test**: is the expense is primarily for the benefit of the employee or primarily for the benefit of the employer? For example, DOL regulations allow an employer a wage credit or deduction for "board, lodging, or other facilities," but only if these items are not primarily for the benefit or convenience of the employer.

(1) Examples probably for employee's benefit: meals; housing; utilities.

(2) Examples probably for employer's benefit: tools and uniforms.

b. **Mixed Purpose Items**. Some costs are "employment-related," such as buying nice clothes for work. However, employment-related costs are the personal expense of the employee if he would bear the costs "as a normal living expense" regardless of his employment. For example, he must have ordinary clothes whether he works or not, but a uniform is primarily for the benefit of the employer.

2. **Duty to Reimburse**. If the expense is primarily for the benefit of the employer, the employer must reimburse the employee in the *same workweek* in which the expense occurred (at least insofar as necessary to pay the employee the minimum wage for that week).

a. The employer must reimburse such expenses even if the employee bore the expenses before commencing employment and as a condition of employment (e.g., the employee's purchase of necessary tools before commencing work).

b. **Note**: I have omitted a part of the court's opinion that discusses the conflict between the FLSA (requiring immediate reimbursement as far as necessary to yield the minimum wage) and H-2A visa program (permitting the growers to postpone reimbursement until completion of 50% of the contract). In sum, the growers were required to comply with the FLSA to the extent of the minimum wage, and the visa program required reimbursement of any further costs at the 50% mark.

3. **Transportation**: Although the growers paid transportation costs from Monterrey to Florida, they did not reimburse these expenses in the week the farmworkers incurred the expenses. The court held that the transportation was primarily for the benefit of the growers, not the farmworkers.

a. The one-time transportation expense for reaching Florida was not a routine commuting expense. It was "an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States."

b. Moreover, "Employers resort to the H-2A program because they are unable to employ local workers who would not require such transportation costs."

c. The growers' position was not supported by cases dealing with the Portal to Portal Act and the compensability of *time* spent in transportation. The plaintiffs were not seeking pay for the time they sat on buses from Monterrey to Florida. The question was whether the growers were entitled to a credit for having paid the bus fare.

4. **Visa/Immigration Costs**: Visa costs, visa application fees, and immigration fees for the entry documents "were necessitated by the Growers' employment of the Farmworkers under the H-2A program.... [T]hese fees are not costs that would arise as an ordinary living expense." Moreover, the visas were limited to employment by the defendant growers, and required the farmworkers to return to Mexico at the end of their employment with the defendant growers.

5. **Recruitment Fees**: The persons in Mexico who charged some of the farmworkers "recruitment fees" were not acting with the express or apparent authority of the growers. Not reimbursable.

6. **Transportation from Home Villages to Monterrey**: The court granted the farmworkers their claim for reimbursement of these fees based on their clearance order work contracts.

Observations:

If the local transportation costs in Mexico were not covered by the contracts, would the farmworkers have been entitled to reimbursement of these costs under the FLSA? The answer might depend on whether the growers hired and authorized recruiters to go to the villages to recruit farmworkers where they lived.

Hudacs v. Frito-Lay, Inc.

Key facts: Frito-Lay employed route salespeople to pick up and deliver snack foods from the company's warehouses to retailers, and to collect payment from retailers on behalf of the company. Each day, the amount a salesperson picked up from the warehouse was verified by the salesperson and a warehouse employee. Upon delivery by a salesperson, a creditworthy retailer could pay a salesperson with a "charge ticket" (a form of credit) or a check written to Frito-Lay. A non-creditworthy retailer was required to pay cash. At the end of each day, a salesperson mailed checks and charge tickets to the company (evidently to save the salesperson the trouble of driving back to the warehouse and then back home again each evening). The salesperson converted case receipts into a personal check or money order, which he included with the other checks he mailed to the company.

Every 20 days the company issued an accounting report for each employee, showing any discrepancy between the amount of product taken by the salesperson and the amount of money he had remitted to the company. The salesperson was required to reimburse the company for any deficit, but the company also allowed the salesperson an opportunity to show that the deficit was the result of damaged or stale product, bounced checks, third-party theft or other causes for which the salesperson was not responsible.

The company paid a salesperson's full wages regardless of any deficit, and without any deduction for the deficit. However, the company did impose "other sanctions" for nonpayment of unexcused deficits.

In 1989, the New York Commissioner of Labor issued an order finding that Frito Lay's deficit collection practices violated New York's anti-wage deduction law, and requiring repayment of the amounts the salespeople had paid Frito Lay. The N.Y. Industrial Board of Appeals revoked the order; the supreme court reinstated the order, and the appellate division reversed, leaving the Commissioner's order revoked again. The Commissioner appealed to the N.Y. Court of Appeals.

Decision: Affirmed. The Commissioner's order was properly revoked. Frito Lay did not unlawfully deduct the deficits from the wages of its salespeople.

1. New York Labor Law §193 provides, among other things, that "No employer shall make any *deduction* from the wages of an employee, except deductions which ... are for the *benefit of the employee*...." The charges in this case, if "deducted" from wages, would have been illegal because they were not for the benefit of the employees and were not otherwise authorized by law.

2. Section 193 also makes it illegal for an employer to "require an employee to make *any payment by separate transaction* unless such charge or payment is permitted as a deduction from wages under ... this section. (emphasis added). The Commissioner of Labor argued that Frito Lay was doing exactly what was forbidden by the "separate transaction" provision.

3. In context, the phrase "any payment" actually means only payments from wages. However, the transactions in question "merely represent full remittance of company funds temporarily entrusted to the employee's control, which the company has every right to expect will be fully remitted."

4. The court was careful to distinguish cases in which an employer requires an employee to make up shortages in a cash register. The distinguishing feature was the salespersons' "extended control over funds belonging to the company outside of a discrete workplace." In contrast, a cashier's shortage usually "result[s] from change being incorrectly paid to customers or the mishandling of the employer's funds," and "[t]hese workers do not place company funds in their own bank accounts and then reimburse their employers from those funds."

5. In sum, "Having accepted funds owed to the company and converted them to their own accounts, these employees must accept a concomitant obligation to make corresponding, coequal payments back to the company. To the extent that they initially fail to do so, the company has every right to expect that the employees will make up any account deficits at a later date.

6. Furthermore, if the Commissioner's position was correct, it would mean that even the initial remittance of funds collected for the company would be an illegal "payment by separate transaction."

7. Frito-Lay's system would have been unlawful had it not allowed setoffs for deficits caused by the sorts of losses §193 was designed to allocate to the employer, such as third party theft or damaged or spoiled merchandise.

Observations:

Though not "directly relevant," the court says it is "worth noting" that Frito-Lay's procedure was approved in a collective bargaining agreement. Moreover, salespersons seeking to establish their right to an offset probably would have had the right to union assistance.

Clausnitzter v. Federal Express Corp.

Key facts: The plaintiffs alleged Fed Ex breached its contracts with them by failing to pay for (1) time between their arrival at their workplaces and the scheduled beginning of work; (2) time between their scheduled end of work and their departure from their workplaces; and (3) time spent working during unpaid "breaks."

Each employee in the proposed class signed a somewhat standardized contract at the outset of employment and was designated an employee at will. Each employee received a Handbook and Manual with certain policies, but both the Handbook and Manual disclaimed that they constituted contracts. Both the Handbook and Manual stated Fed Ex's policy of paying "in accordance with applicable state and federal laws." The Manual added: ""[e]xcept for certain approved preliminary and post-liminary activities, no employee should perform work 'off the clock' for any reason, whether on their own initiative or at the request of management."

Fed Ex recorded working time partly by personal employee "trackers." Using a tracker, an employee typed in a code for each activity at the beginning and end of the activity. Fed Ex also required employees to punch a time clock at the beginning and end of the day. However, in calculating actual working time, Fed Ex assumed actual work did not begin until *scheduled* work time, regardless of whether an employee clocked in early. The dispute involved this "gap time" between clocking in or out and the scheduled beginning or end of work, and it also involved break time. The plaintiffs alleged Fed Ex routinely required them to perform work during "gap time" and during breaks. Their' statistician testified that the average gap time per employee per day was 8.1 minutes [over the course of a year, that's the equivalent of more than 30 hours]. He testified that 17.6 % of breaks were interrupted by work.

Fed Ex did not *require* employees to arrive or punch the time clock earlier than the scheduled start time, or to delay their departure after the scheduled stop time. Employees gave a variety of reasons why they arrived or clocked in early, or left or clocked out late. Fed Ex's official policy was that employees were *not* to work during break or gap time.

Because this was mainly a contract action, the plaintiffs sought class action certification under Rule 23 (rather than collective action certification under the FLSA). The plaintiffs moved for certification of a class of hourly paid employees in every state plus the District of Columbia but excluding California [California's laws are unique and especially favorable to employees, and the plaintiffs' attorneys brought a separate class action in that state].

Decision: Motion to certify denied. The plaintiffs failed adequately to define the proposed class, and common questions did not predominate.

1. ***Inadequate definition of class***: Because this was a contract action, each employee's inclusion and the extent of his claim depended on the local statute of limitations for such contract claims. However, statutes of limitations are different in every jurisdiction. The plaintiffs proposed "subclasses" grouping employees together according to the duration of the period of limitations for their states, but they hand not yet provided the court with a set of subclasses the court could certify.

Making matters even more complicated, individual contracts were not perfectly standardized. Some required employees to file claims within a certain time period, such as six months. These provisions varied, and local law regarding their effectiveness varied.

The court did not invite the plaintiffs to offer solutions to these problems because there were other reasons for refusing to certify the class.

2. ***Rule 23, subpart (a) issues***: The court found that the class was sufficiently numerous and shared at least some common questions, and that the plaintiffs had claims typical of the class and would serve as adequate representatives for the class.

3. ***Rule 23, subpart (b)(3) issues***: Because the plaintiffs sought certification of a Rule 23(b)(3) class, they were required to prove that their common issues would "predominate" over the individual issues. The plaintiffs failed to satisfy this requirement for a number of reasons.

> (1) Their claims depended in part on the Handbook and Manual. However, the law regarding such “policy” statements, and whether they can constitute contracts in spite of a disclaimer, varies from state to state.
>
> (2) Their claims depended in part on the Handbook and Manual statement that wages would be paid in accordance with federal and state law. However, state wage and hour laws vary by substantive requirement and remedy.
>
> (3) Their claims were likely to be affected in part by Fed Ex’s rule that employees were not to work off the clock, *even at the instruction of management*, “except for certain approved preliminary and post-liminary activities” (a truly inscrutable statement). The interpretation of this rule would likely vary according to the laws of each state.
>
> (4) There were too many individualized, different and factual explanations regarding each employee’s performance of work during “gap time” or during unpaid breaks.
>
> (5) Considering the complexity of such a class action, a class action proceeding would not be superior to other methods of adjudication.

4. Alternative certification under subpart (b)(1)(A): An alternative ground for certification of a class action is that individual actions will present the risk of inconsistent adjudications and incompatible standards of conduct. The court dealt with this question very briefly. Because the plaintiffs sought money damages, there was little risk that Fed Ex would face conflicting standards of conduct arising out of different judgments in different states.

Observations:

Plaintiffs have a much easier time seeking certification of collective actions under the FLSA, because federal law provides a uniform rule for all claims. Unfortunately, for all its complexity the FLSA doesn’t provide as much protection as many state laws do. The FLSA might even fall short of what contract law provides. In *Clauswitzne*r, for example, the employer’s failure to count “compensable” time would not have constituted a violation under the FLSA unless the effect was either (1) to depress wages to a point below the minimum wage, or (2) to cause the company’s failure to pay an overtime premium for hours in excess of 40 in any workweek. Some employers avoid these problems by paying well above the minimum wage for the hours they do count, and by scheduling a little *less* than 40 “compensable” hours per week.

Ansoumana v. Gristede’s Operating Corp.

Key facts: Plaintiffs, unskilled immigrant deliverymen, worked 60 to 84 hours per week for $1-2 per hour, without overtime, for supermarkets and drug stores who asserted the deliverymen were not their employees, but rather independent contractors of the independent contractor they hired to provide delivery services. The stores depicted the deliverymen as akin to Fed Ex truck drivers, who may be employees or independent contractors of Fed Ex, but certainly are not the employees of the Fed Ex customers for whom they make deliveries. Plaintiffs sued under the federal and state wage statutes, yielding the complicated procedural posture at issue: (a) for the state wage claims, plaintiffs can sue in a Rule 23(b)(3) class, in which all covered workers are automatically included unless they affirmatively opt out; but (b) the federal FLSA, in 29 U.S.C. 216(b), lets "similarly situated" workers join federal wage claims together in only a "collective action" in which each files a "consent in writing" to sue – not a Rule 23 class action. The issue thus was whether plaintiffs can litigate in the same case a "hybrid" Rule 23 "out-out" class action for the state claims and 216(b) "opt-in" collective action for the federal claims.

Decision: The court approved a hybrid opt-out Rule 23 state-law class action and opt-in 216(b) FLSA collective action.

First, the case satisfies both procedural types: the workers' claims are amply numerous and similar, and best litigated in a class rather than individually, to satisfy Rule 23(b)(3); and the workers' essentially identical claims render them "similarly situated" under 216(b). "[T]he class action device is superior to the alternatives of numerous actions in a number of courts, or a loss of guaranteed rights because many Plaintiffs will not have the ability or means to file individual suits. ... If the related FLSA and Minimum Wage Act claims were to be litigated in parallel fashion, in [federal and state] court ... , there would be great potential for confusion of issues; considerable unnecessary costs, inefficiency and inconsistency of proceedings and results; ... overlapping, uncoordinated discovery; differing rulings by multiple courts with respect to discovery, relevance and privilege; ... and the difficulties of managing joint trials even where multiple courts agree jointly to manage complex litigations."

Second, even if combining an automatic-inclusion Rule 23 state-law class with an opt-in-only federal law class means some class members will be litigating only state claims in federal court, the federal supplemental jurisdiction statute so permits, as long as the state-law-only plaintiffs share sufficient commonality with the federal law plaintiffs – and here, they do: "[t]he essential facts and issues are likely to be the same, and pre-trial proceedings are not likely to be materially more burdensome, nor is it likely that a trial will be materially prolonged, if supplemental jurisdiction is exercised over the related [state law] claims."

Third, while complications may arise when the same case features one claim that a plaintiff must opt in to press, but another that a plaintiff must opt out to avoid pressing, the court has the power and duty to manage the various administrative complications that class actions often entail: "the tasks that I will have to perform in order to manage these ... claims are essentially the same as those required for class actions generally, and considerable guidance exists in the developed jurisprudence ... [D]istrict judges must oversee the fairness and sufficiency of notice to those who have become parties by their filed consents. The district judge must be assured that counsel are competent and responsive to all for whom they act, that there be no discrimination among the parties, [and] that settlements be fair .... The protections of Rule 23, although directed to class actions, can be easily adapted to ... a collective action under section 216(b) of the FLSA... . [Rule] 16, providing for the 'just, speedy, and inexpensive disposition' of all civil cases ... , gives me ample discretion to supervise these proceedings and to take wisdom from the entire body of Civil Procedure, including Rule 23, to accomplish those goals."

Observations:

(1) The weight of the case law follows Ansoumana, but what if any limits exist to its holding? What if only ten plaintiffs opted in but 1000 were in the Rule 23 class; would supplemental jurisdiction over similar state-law claims cease being proper if there are 100 state plaintiffs for every one federal plaintiff?

(2) The basic FLSA claim in Ansoumana was that workers in the same job title all were misclassified; would the commonality be sufficiently decreased to affect the propriety of a class or collective action if the FLSA claim were of one of the other main types, e.g., that each plaintiff did a certain amount of "off-the-clock" work? What about other types of FLSA claims?

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This problem is an opportunity to look at several rules that limit an employer's right to "deduct" or withhold wages because of an employee's misconduct or fault in some accident.

First, because the company treats Rassler as an exempt salaried employee, remember that docking Rassler's pay might not be consistent with the idea of a salary. See this Teacher's Manual discussion of *The Final Rule: Defining and Delimiting the Exemptions*, *supra*. The DOL permits an employer to levy a "penalty" against a salaried exempt employee for violating a *safety* rule of major significance, but I don't believe a sexual harassment policy would be regarded as a safety rule. The DOL allows an employer to impose an unpaid *suspension* on a salaried exempt employee, but the employer did not "suspend" Rassler. The employer's "fine" could affect Rassler's exempt status, which is important if Rassler ever works overtime.

Second and third, there are state wage deduction statutes and state wage payment statutes that might come into play. Is a disciplinary suspension without pay a deduction or failure to pay wages? An employer will likely argue that no payment is due for days of suspension because the employee did not work those days. The employee will likely argue that his salary was a fixed weekly payment not subject to reduction for variations in the number of hours of actual performance.

C. Deferred and Contingent Compensation

Twiss v. Lincoln Tel. & Tel. Co.

Key facts: The company hired the plaintiff in August, 1917. Earlier than year, it had issued a pamphlet describing employee pensions, disability benefits, and death benefits. The company presented and explained the pamphlet to Twiss when it hire her. A trust fund for pension benefits was funded exclusively by the company, without any contribution by Twiss or deduction from her wages.

Among other things, the pamphlet included the following terms relating to the pension:

> 1. An employee would receive a pension after reaching the age of 55 and having 20 or more years of service.
>
> 2. "No employee shall have any right to a service pension by reason of service less than that specified in ... [the above paragraph], nor shall any employee have any right in the pension fund unless a service pension authorized by the committee has not been paid."
>
> 3. A discharged employee would have no right to a pension "unless the right to such pension or benefit has accrued prior to such discharge."

The company discharged Twiss after 18 years of service, when she was 38 years old. Her slander claim against the company indicates that the company had accused her of "having beer parties with men in the office" and asking "a traveling man from Kansas City to stay all night with her." The company denied her request for a pension, and she sued, alleging that she had a contractual right to the present value of pension benefits for her 18-years of service. An actuary calculated this amount to be $1,272.95, and the jury awarded Twiss this amount in a verdict in her favor. The company appealed.

Decision: Reversed. Twiss had no right to a pension.

1. Twiss clearly did not satisfy the requirements for a pension. She did not compete 20 years of service, and she was not yet 55. Moreover, she was discharged before she had fulfilled these requirements.

2. The company created the pension trust fund voluntarily and gratuitously and was free to decide the conditions for granting a pension.

Observations:

The court did not necessarily reject the theory that an offer of pension benefits could be the basis for a contract claim. Twiss simply did not fulfill the conditions for payment. Her pension never “accrued.” The court wasn’t sufficiently disturbed (if it was disturbed at all) by the fact that the company prevented Twiss from achieving the age and service requirements for a pension. In emphasizing that Twiss made no “contribution” to the trust fund, the court seemed to suggest that the company could not have confiscated money she paid into the fund.

Moeller v. Bertrang

Key facts: The plaintiff Moeller worked for the defendant employer, Bernard Bertrang, owner of Bernie's Body Shop, for about twenty five years. During Moeller's employment, Bertrang established an unwritten policy that an employee who worked for at least five years would receive a lump sum upon retirement at 62 years of age. The retirement payment was calculated as follows. When an employee reached his fifth year of employment, Bertrang would credit the employee with $5,000, and Bertrang would credit the employee with an additional $1,000 for each year of employment thereafter, until the employee reached the age of 62.

Bertrang alleged that the unwritten policy included two other terms, although the existence of these terms was in dispute. First, according to Bertrang, an employee was required not to engage in "moonlighting" in work substantially similar to the employee's work for Bernie's Body Shop. Second, according to Bertrang, an employee who resigned before the age of 62 years forfeited all rights to the lump sum payment

Bertrang never reduced any of these terms to writing, and he never prepared any of the written reports ERISA requires of a pension plan. However, at least one employee did retire and receive a payment in accordance with these terms. Other employees left the business before the plaintiff without receiving any payment, but it is unclear why they received no payment.

Moeller worked for Bertrang for about 25 years, beginning at the age of 21, and his employment terminated at the age of 46. Bertrang refused to make a payment of pension benefits, because Moeller had not continued his employment until the age of 62, and/or because Moeller had engaged in "moonlighting." After Moeller left, Bertrang "cancelled" the pension plan because he discovered that "everybody was moonlighting."

Moeller sued Bertrang under ERISA for benefits due the terms of an employee benefits plan. Bertrang's principle defense was that his retirement plan was not subject to ERISA.

Decision: Judgment for the plaintiff Moeller. Bertrang's pension plan was an ERISA plan. Therefore, even if Bertrang included the alleged conditions of work until the age of 62 and no moonlighting, ERISA prohibits such conditions, and Bertrang was entitled to as much of his pension as had accrued when his employment terminated.

1. **ERISA Purposes**.

   a. To protect employees from deprivation of pension benefits on which they had relied during long years of service.

   b. An employer is not required to establish a pension plan, but if it does, its employees may accumulate certain vested rights in their benefits in accordance with ERISA.

2. **Was This an ERISA Plan?** ERISA applies to any employee pension benefit plan, which the act defines as "any plan, fund, or program ... established or maintained by an employer ... that by its express terms or as a result of surrounding circumstances ... provides retirement income to employees...."

a. **A test**: "whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." The evidence in this case satisfied this test.

(1) One could identify the beneficiaries of the plan and the amount of pension benefits that had accrued for them.

(2) As for the source of financing, although Bertrang did not establish a separate fund for pension benefits, it appears that pension benefits were payable from the general assets of the business. Bertrang's failure to provide more secure funding might have violated ERISA, but an employer cannot avoid ERISA coverage simply by failing to comply with the requirements of ERISA.

(3) Finally, the plan's procedure, while simple, was sufficient to establish a plan for purposes of ERISA.

b. **Writing Required**? Bertrang argued that his promise of a pension could not be an ERISA "plan" because it was not in writing. True, ERISA places a duty on an employer to put a plan in writing, but an employer can still establish a plan without a writing. Otherwise, an employer could circumvent ERISA by promising benefits without satisfying ERISA's formal reporting requirements. The failure to put the plan in writing was a violation of ERISA, not a basis for avoiding ERISA coverage.

3. **Plan v. Individual Promise or Gratuity**. The court distinguished a case in which an employer did *not* establish a pension plan by making an oral promise of a "substantial pension" to one employee and an apparently gratuitous periodic payment to another retired employee.

a. Here, Bertrang's paid a pension to another employee (Matteson) exactly in accordance with the terms of the plan, and there was no evidence that the payment was a surprise or was gratuitous to Matteson. The payment to Matteson corroborated the existence of the plan.

b. Bertrang's promise was not just for a "substantial pension." It was sufficiently clear and definite that an employee could know when his right to the pension would accrue, and how much he would receive.

c. Bertrang evidently induced employees to rely on the plan, because he told employees that his retirement plan compared favorably with a competing employer's plan.

4. **Forfeiture.** Bertrang's alleged conditions that an employee must work until age 62 and must not "moonlight" could not defeat Moeller's vested right to his accrued pension benefits. ERISA requires that pension benefits must "vest" according to a minimum schedule, and under Bertrang's plan it appears that benefits vested after five years service when the employee was credited with a $5,000 benefit (if the plan did not provide for vesting in this fashion, it probably would have been in violation of ERISA for failing to do so).

5. **Preemption**. Moeller's breach of contract claim under state law is preempted (but also unnecessary at this point).

6. **Remedy**. Bertrang's promise was to pay a lump sum retirement benefit when an employee such as Moeller reached the age of 62. Therefore, the court gave Moeller the option of receiving the present value of the amount of accrued benefit ($24,000) he would have received at the age of 62, or of receiving the full $24,000 upon attaining the age of 62.

Observations:

Moeller alleged two alternative claims. Either he had a contract claim for a lump sum payout when his employment terminated, or he was a participant in an employee pension benefits plan. As this case illustrates, the elements and consequences of proof are distinctly different for each claim. To prove a plan, Moeller was required to show that Bertrang, as an employer, "established" a plan for pension benefits with sufficient facts for a reasonable person to ascertain (1) the intended benefits, (2) the intended beneficiaries, (3) the source of financing, and (4) procedures for receiving benefits. In contrast, Moeller's contract claim would have been subject to the usual questions of offer and acceptance between Bertrang and Moeller, consideration, and definiteness.

If Moeller had failed to prove a plan, he might have proceeded on his contract claim, based on Bertrang's promise to Moeller and Moeller's acceptance by continued employment. But Moeller's ERISA claim was clearly the stronger of the two. Bertrang alleged conditions to his promise (continued employment until 62, and no moonlighting), and these conditions might have been effective defenses against Moeller's contract claim. But ERISA's vesting rules and anti-forfeiture rules prohibit such conditions in an employee pension benefits plan.

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The promised benefit in *Martin* involved severance pay. Employers, employees and their attorneys frequently overlook the fact that a severance pay policy might be an ERISA plan (see also the next case, *Firestone Tire & Rubber*). Depending on how the employer designs the plan, it might be a pension benefits plan (e.g., if it results in a "deferral of income by employees for periods extending to the termination of covered employment," 29 U.S.C. §1002(2)(A)(ii)), or a welfare benefits plan (if it provides benefits for "unemployment" benefits, 29 U.S.C. §1002(1)(A)).

If *Martin* did involve an ERISA plan, and not a simple contract claim, then ERISA preempted state contract law (preemption gets additional attention a little later), and the parties and the court tried the case under the wrong law. Fortunately, they were in the right court, because (as we will see later) ERISA grants state courts concurrent jurisdiction over claims for benefits due.

Did Mann Merchandising "establish" a plan? If the court had remanded the case as an ERISA case, rather than as a contract case, Martin would have been required to prove some action by Mann to establish a plan under circumstances sufficient to determine the basic elements of the plan. The fact that Mann may have granted benefits to other employees is probably not enough. An employer does not establish a plan for all employees by making a gift to some employees. Recall that in the *Moeller* case, Moeller was able to point to Bertrang's oral statements about his policy and his comparison of his policy with the policy of a competitor. Perhaps on remand, Martin will be able to testify that Mann actually stated the policy to Martin or to some other employee.

Firestone Tire & Rubber Co. v. Bruch

Key facts: In 1980 Firestone sold its plastics division to Occidental Petroleum. Occidental rehired most the affected employees and employed them in their same positions at the same rates of pay.

Firestone had a number of benefits plans in which the affected employees participated. One of the plans was a "termination pay" plan. Prior to Firestone's sale of the plastics division, Firestone had not been aware that the termination pay plan was an ERISA plan, and Firestone had not established a claims procedure or fulfilled the reporting and disclosure obligations ERISA required with respect to the plan. Because Firestone had not designated an "administrator" of the plan, Firestone was the administrator by operation of law (in accordance with ERISA).

The termination pay plan provided that "... you will be given termination pay if released because of *a reduction in work force* or if you become physically or mentally unable to perform your job." (emphasis added). Six employees affected by the sale of the plastics division requested termination pay, but Firestone denied their request on the ground that the sale did not constitute a "reduction in workforce." These six former employees then filed a class action under ERISA seeking termination pay benefits for all workers affected by the sale.

The district court granted summary judgment in favor of Firestone on the ground that its decision denying benefits was not "arbitrary or capricious." The court of appeals reversed, noting that Firestone acted as the plan administrator and had a conflict of interest in making benefit decisions. The court of appeals held that when an employer acts as the administrator, its conflict of interest requires a de novo standard of judicial review. Firestone then petitioned for writ of certiorari.

Decision: Court of Appeals decision affirmed in pertinent part. The appropriate standard of review is de novo, unless the plan grants the administrator discretionary authority to interpret and apply the terms of the plan.

1. **Source of Law**. ERISA does not specify the appropriate standard of judicial review of an administrator's benefit decision. Therefore, it is necessary to look elsewhere for guidance.

a. **Labor Management Relations Act.** Some courts have looked to this law, which among other things regulates benefit funds established by collective bargaining. The LMRA did not provide for judicial review of decisions by such funds, but federal courts found a jurisdictional basis for review when a plan subject to the LMRA denied benefits for reasons that were so "arbitrary and capricious" as to violate the LMRA's requirement that a plan must be for the exclusive benefit of the employees. In contrast, ERISA explicitly grants the courts jurisdiction to entertain suits for the denial of benefits due under an ERISA plan. Thus, there is no need for any other premise for jurisdiction. The restrictive "arbitrary and capricious" standard is not a necessary part of the court's reason for reviewing an ERISA plan's decision.

b. **Trust Law**. Trust law offers better guidance for ERISA. "ERISA abounds with the language and terminology of trust law." In trust law, whether a trustee's decision is subject to deference by a court depends on the authority the trust instrument grants to the trustee. To the extent a trustee is exercising "discretionary" authority, a court must defer to his judgment if it is "reasonable" and not "arbitrary or capricious."

(1) The plan in this case did not grant the administrator any "discretion" (remember, Firestone didn't know it had established an ERISA plan, so it hadn't even named an administrator).

(2) When a trust does not grant discretionary authority to a trustee, a court reviews the trustee's interpretation of trust language in the same fashion as it reviews one party's interpretation of a contract.

(a) In other words, the trustee's interpretation is not entitled to any special deference by the court.

(b) A de novo standard of review is consistent with the practice of the courts in interpreting employee benefit plans before the enactment of ERISA. Prior to ERISA, courts interpreted plans in the same fashion as they interpreted contracts, without deference to an employer's interpretation.

2. **Response to Firestone's Objections**. Firestone argued in favor of an "arbitrary and capricious" standard of review. The Court rejected Firestone's arguments.

a. ERISA defines "fiduciary" as a person who exercises "discretionary" authority with respect to a plan, and an administrator is one kind of fiduciary. However, this does not mean an administrator or any other fiduciary exercises "discretionary" authority with respect to *all* his actions regarding a plan.

b. Congress's failure to enact a bill that would have amended ERISA to provide for de novo review does not show that Congress approved the more restrictive "arbitrary and capricious" standard of review. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."

c. The threat of increased litigation and higher administrative costs that might be caused by de novo judicial review is not a sufficient reason to adopt a more restrictive standard. Moreover, if an employer prefers, it can grant the administrator discretionary authority, and judicial review will be limited to the more restrictive standard.

3. **Conflict of Interest?** The Court emphasized that its decision was not based on concern for an employer/administrator conflict of interest.

a. Again, an employer can grant the administrator discretionary authority to decide benefit claims and interpret the plan, and if it does so, judicial review will be limited to an arbitrary and capricious standard of review.

b. The standard of review will be the same even if the employer appoints an independent administrator and regardless of whether the plan is funded (with its own trust account) or unfunded (financed from the employer's general assets).

c. However, an administrator's conflict of interest is an appropriate factor for the court to consider in reviewing the administrator's decision.

4. **Standing**. In an omitted portion of the Court's opinion, the Court addressed the issue whether Firestone properly denied the plaintiff's access to plan documentation on the grounds that they were no longer employees and were not "participants" or "beneficiaries" at the time they requested the documents. The Court held that for purposes of the informational rights provisions of ERISA, a person is a "participant" if he has "a *colorable* claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."

Observations:

1. In the end, the practical effect of the Court's decision leaves employers largely in control of the standard of judicial review that will apply if a beneficiary challenges the

administrator's decision. If the plan grants the administrator discretionary authority to decide claims and interpret the plan, a court will be limited to the arbitrary and capricious standard of review. In fact, most plans do grant such authority. The most likely basis for a court's more careful review of the administrator's decision is that the administrator was affected by a conflict of interest. But see the *Glenn* case in the notes.

2. I ask my students if they think they would reverse the administrator's decision in *Firestone* under either standard of review. Most students think the employees were seeking a windfall by claiming termination pay when they hadn't really lost their jobs. However, there are some arguments to be made on behalf of the employees. If Firestone's termination pay policy was like most such plans, it was not contingent on any period of unemployment. Thus, the fact that the employees were immediately re-employed isn't necessarily relevant. Moreover, an employee's job with a successor employer isn't necessarily the same, even if it's at the same rate of pay. Occidental's benefits might not have been as good; security might not have been as good (a successor might be biding its time before laying off a number of the employees); and supervision and management might not have been as good.

Problem

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This problem is a variation of a more common dispute about the termination or modification of retiree health benefits. Welfare benefits, unlike pension benefits, do not "vest" under ERISA (although they might vest under the terms of the plan or the agreement of the parties). A "death benefit" plan is a type of "welfare benefit plan." 29 U.S.C. §1002(1). I've wondered about the argument that this really is a "pension" benefit (a deferral of income until after termination), because the amount is fixed at the time of retirement, and it is certain to be paid (everyone dies sooner or later). But the main point of this problem is to take students through the problems of interpretation and judicial review, assuming the benefit is a "welfare" benefit.

The summary plan description appears to promise that life insurance benefits will remain in force at the 50 % level for the remainder of the retiree's life. Standing alone, this seems to preclude the employer's right to terminate the benefits. However, the SPD does direct a reader's attention to the Life Insurance Plan Statement, which includes the usual proviso that the employer may terminate or modify the plan at any time. As set forth in the notes, there are two or three different views about how a court should resolve such a conflict between a plan document and a SPD. Some courts favor the SPD, some favor the plan document, at least if the SPD referred to the plan document.

The administrator (the VP of Human Resources) denied Fisher's claim, but that's not necessarily the end of it. If Fisher sues, a court will consider that the administrator had discretionary authority and that the court can overturn his decision only if the decision was "arbitrary and capricious." However, there is an argument in favor of greater judicial scrutiny in this case. A Vice President of Human Resources is certainly closely attuned to his employer's financial interests, which are always at stake to some extent when an employee-administrator decides a benefit claim (especially with respect to an unfunded plan). Here, the conflict of interest might be compounded by the VP's clear position, many months earlier, that the company had the right to terminate the plan and was exercising that right. The VP is in no position now to act as neutral arbiter of a dispute over the effect of the SPD's language.

Varity Corp. v. Howe

Key facts: Varity Corp. owned Massey-Ferguson, Inc., and the two corporations were "alter egos." The plaintiff employees were employed by Massey Ferguson, and they were participants in that company's welfare benefits plan.

In the mid-1980s, Varity devised "Project Sunshine" to deal with the ailing financial condition of some of Massey-Ferguson's operations. In accordance with this plan, the troubled parts of Massey-Ferguson's business and some of its debts were collected together to form a new subsidiary, "Massey Combines." Varity evidently expected that Massey Combines might fail. However, it was Varity's intention to protect Massey-Ferguson's other, more successful lines of business from having to pay for the debts and prospective failure of businesses transferred to Massey Combines. One of the obligations Varity sought to transfer away from Massey-Ferguson was Massey-Fergusons's obligation to pay for certain welfare benefits to employees of the troubled divisions.

Varity/Massey Ferguson could have simply terminated the welfare plan without violating the law. However, terminating the plan would likely have lost the goodwill of employees of other Massey Ferguson operations. Therefore, Varity called a meeting in which it urged employees voluntarily to switch their employment and benefit plan enrollment from Massey-Ferguson to Massey Combines. The meeting included a fairly lengthy and detailed presentation about Massey Combines' welfare benefits plan. Varity also presented employees with a fairly rosy picture of Massey Combines' future and assured employees that their benefits would be secure. However, the district court found that Varity's presentation was a "deception." In fact, Massey Combines was insolvent as soon as it was created. About 1,500 employees voluntarily transferred. In addition, Varity transferred 4,000 retirees from the Massey-Ferguson plan to the Massey Combines plan, without seeking the permission of these retirees.

Massey Combines soon failed, went into receivership, and terminated its welfare benefits to employees and retirees. The plaintiffs, who included transferred employees and retirees, sued Varity/Massey Ferguson for breach of fiduciary duty under ERISA. Note: a simple suit for benefits due would have yielded nothing, because no more benefits were due under the terminated Massey Combines plan. The district court rendered judgment for the plaintiffs. Among other things, it granted equitable relief in the form of an order requiring Varity to re-enroll the plaintiffs in the welfare benefits plan it still maintained for employees and retirees of Massey-Ferguson. The court of appeals affirmed, and Varity sought review before the U.S.

Supreme Court.

Decision: Affirmed. Varity breached a fiduciary duty by its deceptive description of Massey Combines and the Massey Combines plan. The district court had authority under ERISA to grant equitable relief to the plaintiffs.

1. **Employers as Fiduciaries**. An employer is not necessarily a fiduciary with respect to the plans it establishes. However, a person is a fiduciary "to the extent" he exercises "discretionary authority" or "discretionary responsibility in the administration of the plan." 29 U.S.C. §1002(21)(A). When Varity had its meeting with employees, it was wearing both its "employer" hat and its "fiduciary" hat. The meeting was substantially about benefits, and Varity was acting as a fiduciary when it made certain misrepresentations about Massey Combines' benefits. Conveying information about benefits so that beneficiaries can make informed choices is an action appropriately part of the administration of a plan. Moreover, the persons who made the presentation were persons who had authority to communicate as plan fiduciaries with plan beneficiaries. Finally, employees could reasonably have believed Varity was speaking to them in its capacity as plan administrator when it provided information about their benefits.

2. **Varity Acted As a Fiduciary**. The Court rejected Varity's arguments that it was not acting as a fiduciary.

> a. The fact that Varity was providing more information and communication than ERISA requires does not mean that it was doing something other than administering the plan. Plan administration can involve providing more information than the law requires, or taking actions other than the law requires.
>
> b. Varity argued that its misrepresentation of Massey Combines' financial condition was an action in Varity's capacity as an employer, because the statement related to the business of Massey Combines and not its benefits plan. "But this argument parses the meeting's communications too finely." The question whether transfer would affect the security of benefits was important to employees, and the answer to the question depended largely on the financial security of the business of Massey Combines.
>
> c. The fact that Varity could have terminated the plan (and would not have been acting as an administrator or fiduciary in doing so) did not preclude a finding that Varity was engaged in an act of administration when it communicated about the likely future of the plan.

3. **Breach of Fiduciary Duty**. Varity's deception was a breach of fiduciary duty. The Act requires a fiduciary to act "solely in the interest of participants and beneficiaries." 29 U.S.C. §1104(a). Deceiving beneficiaries in order to save money at the expense of beneficiaries is a violation of this duty.

4. **Remedy**. ERISA provides authority for the equitable relief the district court granted (ordering Varity to re-enroll the plaintiffs in the original Massey-Ferguson plan). ERISA

authorizes participants and beneficiaries to seek "appropriate equitable relief...." 29 U.S.C. §1132(a).

a. **Varity's Argument**: Varity argued that ERISA's authorization for "appropriate" equitable relief allows a participant or beneficiary to seek equitable relief on behalf of the plan, but not as an individual. Individual equitable relief would open the door for beneficiaries to challenge an administrator's denial of benefits as a breach of fiduciary duty. Varity argued that if administrators must fear liability for breach of fiduciary duty, they will err in favor of paying claims, rather than preserving assets.

b. **Court's Response**. The Court rejected Varity's argument. The act authorizes appropriate equitable relief for the individual claimant.

(1) A fiduciary duty requires an impartial decision for the benefit of all beneficiaries, and this includes a due regard for preservation of assets for future claims as well as present claims.

(2) Challenging a denial of benefits as a breach of fiduciary duty will not necessarily change the standard of review (it could still be an "arbitrary and capricious" standard, depending on the language of the plan).

(3) The act requires that equitable relief will be "appropriate." If relief is already available under another provision (as it is in the case of a denial of benefits due), the availability of other relief will factor into the court's determination of whether equitable relief is appropriate.

Observations:

Varity failed to answer two important questions with which the lower courts have continued to struggle. First, is it a breach of fiduciary duty to fail to disclose information, particularly when employees have asked about the information or the information will certainly be important to decisions they are about to make? Second, to what extent does the act's authorization for "other appropriate equitable relief" permit a court to award *monetary* relief to an individual beneficiary? These issues are addressed in the notes.

Lessard v. Applied Risk Management

Key facts: Lessard was a participant in ARM's self-funded welfare benefits plan. In October 1997 she suffered a work-related injury, for which she received workers' compensation benefits. She went on extended workers' compensation leave, but remained enrolled in the plan (it would not be unusual for the plan to have provided for continued coverage in the event of a disabling injury). Thus, she was not "actively" employed while she recovered from her injury, but she remained eligible for plan benefits–an important matter for someone already suffering from a debilitating and possibly worsening medical condition.

In 1999, ARM agreed to sell its assets to PRM. Along with the transfer of the business, ARM's employees automatically transferred to active employment with PRM, and by this arrangement PRM was able to continue the business without interruption. Pursuant to the agreement, ARM continued funding its plan for a certain number of days, and then its plan terminated. Employees then became covered under PRM's plan.

The agreement did not transfer all employees. An employee was transferred only if she was (1) actively employed ("at work") on the day of the sale, or (2) on *non-medical*, non-extended leave at the time of the sale (e.g., on vacation). Employees such as Lessard who were on medical, disability, workers' compensation or other extended leave at the time of the sale were eligible for transfer "if and when" they returned to active employment.

Lessard's prognosis for ever returning to active employment was poor. Thus, when ARM's plan terminated, she was not an employee of PRM and was left without coverage under any plan. She sued PRM, ARM and ARM's parent for interfering with her rights in an ERISA plan, in violation of § 510 (29 U.S.C. §1140). The district court granted summary judgment in favor of the defendants. Lessard appealed.

Decision: Reversed. The court of appeals ordered the district court to enter judgment in favor of Lessard, with further hearings to determine the measure of damages.

1. **The Purpose of Section 510:** To "prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan."

  a. In general, an employer violates §510 if it terminates an employee for the purpose of interfering with the employee's right to benefits.

  b. However, an employer has a right to terminate or modify its plan, even though this may affect a participant's future benefits.

2. **Violation**. ARM's actions did unlawfully interfere with Lessard's access to benefits in violation of § 510.

  a. ARM acting alone clearly would have violated the law if it had discharged all employees absent for medical reasons on a particular day, because this would have targeted employees for elimination based on the likelihood of their use of benefits.

  b. "Absence from work due to disability or medical leave is a clear, even if incomplete, proxy for high rate of use of health benefits."

  c. ARM also would have violated the law if it had amended the plan to terminate benefits for high-rate users of its plan, because this would have punished employees for their use of the plan.

d. ARM accomplished the same thing in its transaction with PRM. Requiring employees to return to active employment in order to make the transition to the new benefits plan effectively barred high rate users like Lessard, who had little likelihood of returning to work in the near future, from maintaining their benefits coverage.

e. The discrimination wasn't as obvious as in the earlier examples, because Lessard was discharged with everyone else, and the plan terminated for everyone else, but only Lessard and others on medical leave were effectively excluded from continued coverage under the new plan.

3. **Specific Intent Necessary?** The defendants denied specific intent to discriminate against Lessard, but their purchase agreement was discriminatory on its face by treating medical absences one way and nonmedical absences another.

4. The fact that other high-rate users may have succeeded in returning to work does not change the fact that the defendants' discrimination caused harm to Lessard.

Observations:

1. In the notes following this case (and in the court's description of the procedural history), there is the suggestion of an ADA claim. A policy that discriminates against persons absent for medical reasons will likely have disparate impact against disabled persons. But thinking about the problem in that way might lead to another question: Why doesn't an employer (e.g., PRM) have a viable "business necessity" defense against hiring persons who are unable to work? The court avoided that question in *Lessard* in part by treating the case as one of disparate treatment, not disparate impact.

2. Regardless of whether the case works best as one of disparate impact or disparate treatment, a different outcome might have encouraged a game of musical chairs in business ownership. Over time, any business might accumulate a number of employees like Lessard. The accumulation of older and disabled employees with continued benefit rights would make the business less valuable to the existing owner. However, if ARM and PRM were right, the business would be more valuable to a prospective buyer who could buy the assets and "unload" the high-rate users. Such transfers might become part of the natural life cycle of the firm and its workforce.

Problem

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The problem emphasizes that students are to prepare an answer based on what they have learned in this chapter. Other laws regulating employee waiver of claims, particularly the Older

Workers Benefits Protection Act, are the subject of Chapter Ten.

However, there is much to say about the ERISA angle. At the outset, there is a Supreme Court decision that comes deceptively close to the facts in this problem. In Lockheed Corp. v. Spink, 517 U.S. 882, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996), the Supreme Court held that an employer was acting as a "settlor," and not as a fiduciary, when it amended its plan to make certain benefits contingent on a beneficiary's release of claims against the employer. Therefore, the employer did not violate its fiduciary duty under ERISA when it amended the plan. Nor did company officials violate their fiduciary duties in paying out benefits in exchange for waivers of claims against the company, because they were simply following the terms of the amended plan.

The situation between Middleton and Waiverly Disposal, however, is different. Waiverly did not amend its plan to require a waiver, so this problem does not involve an employer's right to amend. When Waiverly required Middleton to sign a waiver, it was bargaining over the payment of benefits due under the terms of the plan. And in seeking the waiver, Waiverly was using the plan for its own interests and not "exclusively" for the interests of beneficiaries.

Middleton did in fact receive the benefits allowed by the plan. Thus, if he is seeking additional rights it might be because he wants to sue for discrimination (age discrimination being the most likely claim). To sue based on any claim connected with his employment, he will have to show that the waiver he signed is voidable. One possible avenue is to seek equitable relief under ERISA to rescind the waiver, and Middleton would like a rescission without having to return the severance pay.

First, was Middleton entitled to severance pay benefits even without signing the waiver? The plan allows benefits for employees involuntarily discharged "without cause." Middleton appears to have a good argument that his discharge was the result of the company's decision to reduce its workforce, and was more in the nature of a layoff than a disciplinary discharge. Could Middleton persuade a court to overturn the decision of the human resources manager (acting as administrator) that the discharge was for cause? If the plan has a "discretion" clause, the administrator's decision is subject to an arbitrary and capricious standard of review, but the court will likely consider the administrator's conflict of interest: Benefits were payable from the company's general assets, the company was under financial stress and was looking for ways to reduce costs, and the company was very clearly motivated to obtain a waiver without really having to pay for it. Considering the manner in which the company presented the waiver, one might surmise that it was the company's plan to obtain a waiver from the very start.

Second, can Middleton avoid the waiver he signed? Perhaps he can, as a matter of "other appropriate equitable relief" under ERISA. And Middleton could argue that the company breached its fiduciary duty by conditioning benefits it owed to Middleton to bargain with Middleton over a waiver of claims. Lockheed Corp. v. Spink is of no help to the company on this point, because Waiverly never amended its plan to require a waiver in exchange for benefits.

In Re Union Pacific R.R. Employment Practices Litigation

Key facts: This was a class action against Union Pacific under Title VII as amended by the PDA. The plaintiffs alleged the Union Pacific discriminated on the basis of "pregnancy" by denying benefits for all contraceptive drugs, devices or procedures (except for contraception for a non-contraceptive medical purpose).

The district court granted summary judgment in favor of the plaintiffs, finding that the PDA requires an employer to provide coverage of contraception if it provides medical benefits for employees. Union Pacific appealed to the Eighth Circuit Court of Appeals.

Decision: Reversed. An employer does not engage in pregnancy or sex discrimination by creating a medical benefits plan that denies coverage of contraception.

Union Pacific argued the PDA applies only to discrimination based on conditions *after* a woman becomes pregnant. The plaintiffs argued that the PDA prohibits discriminatory denial of benefits for contraception because contraception is "related" to pregnancy.

As the court's opinion illustrates, differences in treatment that are related to pregnancy, facilitating pregnancy, or avoiding pregnancy can be analyzed from several different angles, including simple gender discrimination. The court recalled its decision in *Krauel*, where it held that the PDA did not prohibit an employer from excluding medical benefits for fertility treatment. In *Krauel* the court held that the phrase "related medical conditions" in the PDA means conditions related to *pregnancy* or *childbirth*, the terms that precede that phrase. Infertility is *not* "related to" pregnancy or childbirth in the intended way. Infertility prevents conception, but pregnancy and childbirth can happen only after conception. However, this sort of reasoning required the *Krauel* court to distinguish *Johnson Controls*, where the Supreme Court held that an employer unlawfully discriminated on the basis of an employee's *potential* for pregnancy (a pre-conception state). Discriminating on the basis of potential for pregnancy *is* "pregnancy" discrimination, because potential for pregnancy is both a medical condition "related to" pregnancy *and* a condition *unique to women*. For much the same reason, discrimination on the basis of potential for pregnancy can also be treated as straight-forward sex discrimination without regard to the PDA, because only women can become pregnant. In contrast, the exclusion of benefits for fertility treatment in *Krauel* was not discrimination on the basis of pregnancy or sex, because either men or women can be infertile and require fertility treatment.

Following the reasoning of *Krauel*, the court held that a denial of benefits for contraception is not discrimination on the basis of pregnancy, because contraception relates to treatment prior to conception. Moreover, the benefit plan's rule was not pregnancy discrimination under *Johnson Controls* because the denial of benefits for contraception applies to both male contraception and female contraception.

The court also noted that there was nothing in the legislative history of the PDA to suggest Congress intended to prohibit an exclusion of benefits for contraception. The court was unpersuaded by an EEOC decision that an employer would violate the PDA by providing coverage for contraceptive surgery (e.g., vasectomy and tubal ligation) while denying benefits for prescription contraception such as birth control pills. The court disagreed with the EEOC's reasoning, but in any event the EEOC decision was inapplicable to the issue before the court, because the Union Pacific plan denied coverage for *all* contraception, including surgical, prescription and non-prescription.

Finally, the denial of benefits for contraception was not sex discrimination. The district court had found sex discrimination by comparing the plan's benefits for preventive treatments for non-pregnancy conditions, such as vaccinations, versus its denial of treatment to prevent pregnancy. The Eight Circuit rejected this comparison and substituted another: contraception for women as compared with contraception for men. The employer's plan denied benefits for either type of contraception, and therefore it was gender neutral.

Judge Bye's Dissent: The employer's plan discriminated in violation of the PDA, because the effect of the denial of benefits was experienced as a medical problem solely by women, and only women bear the health and medical consequences of pregnancy. Judge Bye also concluded that contraception is in fact "related to pregnancy" in the sense intended by Congress in the PDA.

Judge Bye also found that the plan was unlawful as simple sex discrimination. Judge Bye agreed with the district court that the appropriate comparison is between prevention of pregnancy and other "preventive" treatments, especially those for conditions experienced exclusively or mainly by men. By treating the prevention of pregnancy (an exclusively female condition) less favorably than the prevention of other conditions, the plan discriminated on the basis of gender.

Aetna Health Inc. v. Davila

Key facts: In two separate cases consolidated for purposes of appeal, Davila and Calad complained that they suffered personal injuries from medical complications after their respective employee benefits plans denied coverage of needed treatments. They sued the insurer-administrators of their plans in state courts, alleging violations of a Texas statute imposing a "duty to exercise ordinary care when making health care treatment decisions." The insurers removed the cases to federal court on grounds of ERISA preemption. In the federal court proceedings, Davila and Calad declined to amend their complaints to allege claims under ERISA, and therefore the federal courts dismissed their complaints with prejudice. Davila and Calad appealed, and the Fifth Circuit consolidated their cases and reversed, holding that the claims under Texas law were *not* preempted. The insurers sought review in the Supreme Court.

Decision: Reversed. ERISA completely preempted Davila's and Calad's claims.

1. **The ERISA Preemption Rule**. ERISA includes an "expansive" preemption provision to ensure that employee benefits regulation will be "exclusively a federal concern."

ERISA also has its own comprehensive enforcement mechanism that balances the "need for prompt and fair settlement procedures against the public interest in encouraging the formation of employee benefit plans." To assure a proper balance of these goals, "any state-law cause of action that duplicates, supplements, or supplants" ERISA remedies is preempted.

2. **Removal to Federal Court**. A preemption defense is not ordinarily a ground to remove a complaint alleging a claim under state law (i.e., ordinarily, a defendant must present its preemption defense to the state court in which the lawsuit originated, as a consequence of the so-called "well-pleaded complaint rule").

a. However, for some federal statutes, including ERISA, the federal courts have applied a rule of "complete preemption" for purposes of removal. In other words, ERISA is such a preemptive statute that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."

b. An issue in this case was whether the type of state law claim the plaintiffs alleged was of the sort that is "completely preempted" and subject to removal to a federal court.

3. **Complete Preemption Rule**. The complete preemption doctrine applies when a plaintiff's state law claim is "within the scope" of the remedy provisions of ERISA. ERISA provides a cause of action to recover benefits due under the terms of a plan or to enforce rights under the plan. 29 U.S.C. §1132(a)(1)(B). The plaintiffs' claims in this case were within the scope of this ERISA provision.

a. The legal duty which the plaintiffs alleged the insurers violated arose from the terms of the respective plans. The plaintiffs did not allege any breach of duty independent of the plans.

b. Each plaintiff alleged that an insurer refused to pay for certain medical care. ERISA provided a remedy in each case. Each plaintiff could have paid for the care out of his own pocket and sought reimbursement in an ERISA action for benefits due, or he could have sought a preliminary injunction.

c. By its terms, the Texas statute would not have imposed any liability if the insurers denied coverage in accordance with the plans. If the treatment was not covered, the proximate cause of the plaintiffs' injuries would have been the lack of coverage under the terms of the plan, rather than the denial of benefits by the insurer/administrators.

d. The court of appeals erred in characterizing the plaintiffs' claims as torts rather than as claims for benefits due. A plaintiff cannot avoid complete preemption simply by recharacterizing a breach of contract claim as a tortious breach of contract.

e. The plaintiffs' claims were not saved from complete preemption by the fact that their claims might have required proof of facts or elements in addition to those required in an ERISA claim for benefits due. The scope of ERISA preemption is not limited to "duplicative" claims. It also bars claims that supplement ERISA's remedies. Otherwise, Congress's goal of an exclusive enforcement scheme would be undermined.

4. **Exceptions**. ERISA provides an exception from preemption for a state law that "regulates insurance." The plaintiffs argued that the Texas law in question was an insurance regulation. However, even a state insurance regulation is preempted to the extent it would undermine the exclusive scheme of remedies set forth in ERISA. Therefore, the Texas statute was not saved from preemption as an insurance regulation.

5. Concurring, Justices Ginsburg and Breyer worried that the result of the Court's decision might leave participants and beneficiaries without effective remedies for the personal injuries caused by an improper denial of medical benefits. However, they also suggested that the "other appropriate equitable relief" ERISA authorizes might have allowed a monetary remedy for the injuries the plaintiffs suffered.

Observation

Why were Davila and Calad so determined to sue under state law? As the majority notes, each plaintiff could have avoided injury by paying for medical treatment out his own pocket, then suing for the amount the insurer should have paid. However, this is not always a practical course of action for very expensive medical care. Alternatively, the Court suggests, Davila and Calad could have sued for preliminary injunctions. The Court's apparent endorsement of this remedy might prove to be one of the other important aspects of this case for the future.

But Davila, Calad and their doctors might have been optimists. The plans' decisions would not necessarily have led to medical complications. The denial of benefits simply increased the risk of medical complications. At that stage, preliminary injunction proceedings to determine whether the plans had erred too much in favor of saving money might not have seemed to have been worth the trouble. The plaintiffs certainly hoped they would not need the extra or more expensive treatment after all.

When things turned out badly, Davila and Calad could have sued under ERISA for benefits due, but the amount of benefits the plans should have paid was probably small in comparison to the pain, suffering and other losses Davila and Calad suffered. Davila, for example, would have recovered only for the additional cost of the more expensive medicine he alleged the plan should have provided. Presumably, their additional medical expenses resulting from the lack of complete or proper treatment were already paid by the plans. ERISA does not allow recovery for emotional distress from the denial of benefits. Nor does it authorize punitive damages. Thus, the plaintiffs sued under state law for emotional distress and punitive damages.

All of this raises the question that bothered Ginsburg and Breyer. Maybe ERISA falls short, and Congress needs to fix the problem by augmenting ERISA's remedies. However, "fixing" the problem could also make it worse if insurers increase the price of coverage, in order to compensate for additional liability for erroneous coverage decisions.

Chapter Five
Workplace Safety and Health

A. Workplace Safety & Health At the Beginning of the Modern Regulatory Era

The comparison between the common law approach to workplace injury and illness and the modern workers' compensation approach is not strictly an historical exercise. In Texas, employers can "opt-out" of the workers' compensation system. Employers and their representatives everywhere occasionally advocate a return to the common law out of frustration with various aspects of the workers' compensation system. Thus, it is worth a few moments recalling why the common law failed so badly in compensating employees for their work-related injuries and illnesses.

B. Compensation for Work-Related Injuries

New York Central Railroad Co. v. White

This case sets out the general outline of the workers compensation scheme and the underlying compromise that was the basis for its acceptance in state legislatures around the country. The essential features are (1) mandatory, employer financed insurance for work-related injury; (2) the elimination of tort law causes of action and defenses, and the substitution of an exclusive insurance-based remedy for workplace injuries; and (3) payment of limited benefits for work-related injuries or death, without regard to fault.

Stillman v. Workers' Compensation Board

The workers' compensation system eliminates the issue of fault for work-related injury. However, a claimant must now prove that the accident was in fact work-related. This case, *Technical Tape*, and *Porter* are designed to introduce the problem of determining whether an accident is work-related. In Pennsylvania, the site of the first case, the law requires only that the accident was "in the course of employment." In contrast, the law in most states requires that the accident must also "arise out of" the employment. It is important to bear these different legal standards in mind as you compare *Stillman* with *Technical Tape*.

Key facts: Stillman was an employee of CBR, a business that delivered and serviced portable toilets. Stillman drove a truck supplied by the company, and he often started his rounds from home, and finished his rounds by driving directly home, usually after 4:00 p.m., from the last location he had serviced.

One day Stillman stopped at home about 3:00 p.m., and there appears to have been an issue whether he was finished for the day or was taking a late lunch break while he refilled his truck with water. Stillman's wife prepared a sandwich, and while he was eating a bee or wasp stung him under the tongue (evidently, the bee or wasp was on the sandwich when he took a bite). Stillman had an allergic reaction and died as a result of the sting.

Stillman's widow sought workers' compensation death benefits. The workers' compensation board (after a hearing conducted by a referee) held that Stillman was not "in the course of his employment" when he suffered his injury, because he was either finished for the day or was taking a lunch breach. Mrs. Stillman sought judicial review.

Decision: Reversed and remanded for further proceedings. The referee failed to give Stillman the benefit of a presumption that he was still in the course of his employment at the time of the sting.

1. Stillman was a "roving" employee and had no fixed place of employment. When a traveling worker is injured between the beginning and end of his travels, there is a presumption that he was "in the course of his employment" unless he was engaged in an activity "wholly foreign thereto."

2. The court remanded the case for the workers' compensation board to reconsider Stillman's claim in light of the court's observation that Stillman might still have been in the course of employment even if he was at home eating lunch at the time of his accident.

Observations:

1. The court's reasoning is not very clear, because even a roving employee who has stopped working to eat lunch is usually not in the course of employment. The disputed facts that might have supported Mrs. Stillman's claim were: (1) Mr. Stillman had not completed his rounds for the day (and there is a presumption that he was still in the course of his employment between the beginning and end of the work day), and (2) he was filling the truck with water as he ate his sandwich, and filling his truck with water was part of his job even though it required little effort by him at the moment of his accident.

2. If the facts might satisfy Pennsylvania's "course of employment" rule, they do not necessarily satisfy the more common approach which *adds* a further requirement that the accident was one "arising out of" the employment. Thus, the additional requirement found in most state laws probably changes the outcome. But what if Stillman was required to eat lunch on the road, along the highway where he was exposed to nature and the greater risk of a bee sting?

3. There is a strong motivation for claimants and sympathetic adjudicators to extend workers' compensation coverage to make up for a shortcoming in other welfare benefits. In this case, Mrs. Stillman's only life insurance on the death of her husband might have been a workers'

compensation death benefit. The motivation to stretch workers' compensation coverage is even greater when employers fail to provide general medical insurance or disability benefits.

Technical Tape Corp. v. The Industrial Commission

Key facts: Technical Tape employed Crain and assigned him to clean the residue from a glue churn, which was entirely enclosed except for the small opening in the top. The glue (and the residue in the churn) contained toluene, a solvent that can have an intoxicating effect. After 30 minutes in the churn, and near the end of his shift, Crain came out of the churn feeling dizzy and sick. His father, who was a fellow employee, saw Crain's condition and attempted to prevent him from driving home, but the father was too late. Crain went to his car and began to drive home. Crain's father attempted to follow in his own car and observed Crain driving erratically and dangerously for about five miles. Finally, Crain collided with another car, and suffered serious injuries.

The Industrial Commission, which was the local workers' compensation tribunal, found that Crain's accident arose out of and was in the course of his employment, and it awarded benefits. The employer sought judicial review, but the trial court affirmed the industrial tribunal's award of benefits. The employer appealed.

Decision: Affirmed. The evidence supported the Commission's conclusion that Crain's accident arose out of and in the course of his employment.

1. An accident arose out of and in the course of employment if it had its origin in some risk connected with the employment.

2. Although Crain was injured after he had finished work and left the workplace, his accident had its origin in a risk caused by his work: Exposure to intoxicating toluene.

Observations:

In this case, local law added the requirement that an accident arose out of the employment. The "arising out of" requirement was the easy part of the problem. The harder part of the problem was to explain how the accident was "in the course of the employment."

Dallas Independent School Dist. v. Porter

Key facts: Porter was a janitor for an elementary school, and he lived directly across the street from the school. One day while Porter was on duty at the school, he believed he saw a young child vandalizing his car parked at his residence across the street. Porter walked across the street to his house, and he confronted and "spanked" the child. The child left and Porter returned to the school.

Later the same day, the child's grandmother came to the school to complain. The principal called Porter to the office, and the grandmother and Porter engaged in a heated argument about the spanking incident. The principal sent Porter out of the office and back to work, but when the grandmother left the office some time later, she happened to meet Porter in the hallway. Their argument continued, and the grandmother took a pistol from her purse, and shot and killed Porter.

Porter's widow sought workers' compensation death benefits, and she prevailed in the lower administrative and judicial proceedings. The school district appealed, arguing that Porter was killed not because of his work but as a result of an intentional act by a third party "because of reasons personal to" Porter.

Decision: Reversed, and judgment rendered for the school district. Porter was not killed in the course of his employment.

1. A claimant must show that the accident in question arose out of and in the course of employment. The statute also specifically excludes coverage of "[a]n injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment."

2. The court distinguished Porter's case from another, Nasser v. Security Insurance, in which a restaurant manager recovered compensation for stab wounds he a suffered after being attacked at the restaurant by the former boyfriend of one of the restaurant's customers. The assailant, who had recently been released from a mental hospital, believed the manager was being too friendly with the assailant's former girlfriend. The manager testified, and the court agreed, that being friendly to customers was part of the manager's job, and his routine service for a customer was what provoked the assailant.

3. In this case, nothing about Porter's work was a provocation for the attack. The provocation for the attack was Porter's attempt to discipline a child outside the school's property for reasons having nothing to do with Porter's work.

Observations:

1. Given the very broad meaning courts have sometimes granted the "arising out of and in the course of employment" rule of coverage, a statutory third party intentional tort exception might exclude some cases that would have been included under the general rule of coverage.

2. The third party intentional tort exception is one important angle for the problem of an employer's responsibility for protecting employees against abusive spouses and other violent intruders. If a third party's assault is not covered by workers' compensation, there may be an issue whether a negligence claim against the employer would be barred by the exclusive remedy defense (this possible effect of noncoverage is discussed later in this chapter). But even if a court would reject the exclusive remedy defense in such a case, a plaintiff still must show that the employer had a duty to protect employees from an attack that was not connected with the

work.

3. The third party intentional tort exception is not to be confused with the employer's intentional tort exception, which is addressed near the end of this chapter.

Problem

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This problem is inspired by a series of workers' compensation cases that grew out of the September 11 attack. *Compare* Betro v. Salomon Smith Barney, 8 A.D.3d 847, 779 N.Y.S.2d 147 (2004) (similar facts, court denying coverage); *with* Tompkins v. Morgan Stanley Dean Witter, 1 A.D.3d 695, 766 N.Y.S.2d 923 (2003) (finding coverage based on similar facts). *See also* Stroka v. United Airlines, 364 N.J.Super. 333, 835 A.2d 1247 (2003) (flight attendant suffered post-traumatic stress syndrome after learning circumstances of fellow flight attendants' deaths; no coverage).

One might begin with the "going and coming" rule, according to which an employee is not in the course of his employment when he is commuting to or from work. At first glance, it might look like that rule precludes Hopkins' recovery. However, Hopkins had reached a point where he could have returned home. He made the decision to proceed in the face of unusual danger in order to assist with an emergency. This might call for an exception to the usual rule for commuting.

Hopkins' claim might be subject to the third party tort exception, because the accident was caused by the intentional torts of suicide terrorists for reasons having nothing to do with Hopkins' work. However, it is possible that the attack really was connected with the work, because the terrorists targeted what they believed was the financial heart of America, or at least a very visible symbol of the western world. The attack certainly was not for reasons "personal" to Hopkins.

Brunell v. Wildwood Crest Police Dept.

Key facts: The claimants were police officers who suffered post-traumatic stress syndrome. Brunell was involved as a dispatcher in the response to and aftermath of the shooting death of another officer. Four years later, she began to suffer emotional problems that led to her short-term suspension from the force. A doctor subsequently diagnosed her condition as post-traumatic stress disorder connected with the earlier shooting incident.

Stango was affected by an incident in which he comforted a wounded officer and watched the wounded officer die. Six years later he experienced a "flashback" triggered by the popping of a balloon at his twin daughters' birthday party. He eventually resigned from the department.

Brunell and Stango filed workers' compensation claims. A trial judge consolidated their cases and dismissed their claims on the grounds that neither claimant had filed within the usual two year statute of limitations. The court of appeals affirmed. Brunell and Stango appealed to the Supreme Court of New Jersey.

Decision: Reversed and remanded. The claimants' claims were not necessarily time barred. The resolution of their claims will depend on whether their claims involved "accidental" injuries or "occupational disease," and when they reasonably should have known of their injuries.

1. **Time Limits**. New Jersey law provides one set of notice and claim provisions for "occupational disease" claims, and another for "accident" claims.

a. **Accidents**. In the case of an accidental injury, the worker must report his injury within 90 days of the *occurrence of the injury*, and he must file his claim within two years of the date of the *accident*.

b. **Diseases**. Naturally, occupational diseased claims are subject to a more generous "discovery" rule. The time for reporting an occupational disease is 90 days after the worker reasonably should have *discovered his disability*, and the time for filing his claim is two years from the date he should have understood the relationship of his disability to his employment.

2. **Distinguishing One from the Other**. The classification of the claimants' injuries was important to the timeliness of their claims. Their claims might have been timely if classified as occupational diseases, but they were probably time barred if classified as accidental injuries. Thus, the court discussed the difference between an accidental injury and an occupational disease.

a. An accident is an "unlooked for mishap or an untoward event which is not expected or designed."

b. An "occupational disease" is "due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment." In contrast with an accidental injury, an occupational disease does not involve "unexpectedness."

3. **Borderline Cases**. While most cases are either clearly "accidents" or clearly "occupational diseases," there are some cases that fall somewhere between the two extremes. PTSD claims are among those that might be categorized either as accidental injury or occupational disease, depending on the circumstances.

a. PTSD might best be viewed as an accidental injury if it arose from a single traumatic event, not peculiar to the employment, and the symptoms were immediate.

b. PTSD might best be viewed as an occupational disease if it arose out of a series of traumatic events experienced by workers whose employment naturally exposed them to such events.

4. **Alternative Claims**. The court held that a PTSD claimant should be allowed to file his claim under both theories. However, to support a claim for occupational disease, he will be required to prove that his condition was "not unexpected" but was due to causes "characteristic of or peculiar to" his work. A worker who cannot prove "occupational disease" might still be able to prove an accidental injury arising from an "unexpected" event.

5. **On Remand**. The claimants will have the benefit of the longer "discovery" rule if, on remand, the workers' compensation tribunal determines that their injuries were a form of occupational disease. However, the facts of this case illustrate that even the victim of an "accident" may need the additional time allowed by the "discovery rule." the court also interpreted the time limits for accidental injury in a way that left some possibility that the claimants could prevail under an accidental injury theory as well.

a. Ordinarily, in a case of accidental injury, the clock begins to run as soon as a worker knows an accident caused injury, even if he is not yet aware of the full extent of the injury.

b. However, in the case of PTSD, symptoms might not emerge until long after the accident. The court held that an employee has not sustained a covered injury until he should be aware of the injury. An injury is an essential element of a claim. Moreover, if the employee were required to file his claim before he was aware of his injury, the law would have the strange result of requiring a claim for benefits earlier than it required a notice of injury.

Observations:

1. On remand, one might expect it to be easy for these claimants to show that PTSD is an "illness" that could naturally result from conditions unique or peculiar to police work. These claimants are the sort who will typically have the option of claiming PTSD either as an accidental injury or an illness. Moreover, it might be natural to infer that police or emergency work caused PTSD, either because of any single stressful event or because of the accumulated stress of a series of events. A civilian office worker who claims PTSD will likely be in a very different position. There is nothing about most office work that is uniquely likely to cause PTSD. Most office workers who suffer psychic injury will have to prove the occurrence of an "accident," such as workplace violence, that caused their stress.

2. Because the nature of public law enforcement and emergency work makes it comparatively easy to present psychic injury as an "accidental injury" or "illness" connected to

work, lawmakers in some jurisdictions have feared that such claims might become a burden on public finances. Thus, some states have enacted laws restricting psychic injury claims by such employees.

3. Not all states permit recovery for "pure psychic injuries" such as the PTSD suffered by the claimants in *Brunnell*. Some allow recovery for psychic injury only if the psychic injury is connected to some physical injury.

Carey v. Bryan & Rollins

Key facts: While driving a truck in the course of his employment, Carey struck a telephone pole and was injured. At the time of the accident, Carey was driving "55, 65 something like that" in a 50 mile per hour zone. Carey lost control of his vehicle when he reached down to the floor to retrieve a cigarette he had dropped.

The Industrial Accident Board awarded benefits, despite the employer's argument that Carey should be disqualified by reason of his "willful" misconduct in driving the truck. The employer sought judicial review.

Decision: Affirmed. Carey's negligence in driving was not the sort of "willful" misconduct for which he should be disqualified from receiving benefits.

1. Delaware law disqualifies a claimant whose injury was the result of intoxication or certain intentional or willful misconduct, including "willful failure or refusal ...to perform a duty required by statute."

2. Delaware defines "willful" conduct as "an act done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently."

3. The employer failed to carry its burden of proving that Carey acted willfully (the disqualification is an affirmative defense). There was no evidence that Carey "intentionally and deliberately exceeded the speed limit or drove recklessly, knowingly and purposely, without justifiable excuse."

a. Most drivers have probably found themselves driving in excess of the speed limit without a conscious intention to do so.

b. It is common knowledge that many drivers, by reflex and impulse, engage in actions such as reaching for a cigarette, to prevent burns.

4. The court rejected the employer's argument that the violation of a penal statute such as the speed law in this case was a per se "willful failure or refusal ... to perform a duty required by statute."

a. A Georgia case cited by the employer was based on a Georgia statute that, while very similar, was not identical (it disqualified a claimant because of "willful misconduct").

b. While the violation of a penal statute may constitute *negligence* per se in Delaware, mere negligence is not a bar to workers' compensation recovery.

c. Precedents from other states denying recovery because a worker was speeding at the time of his accident are too harsh and are in conflict with the no-fault basis of workers' compensation law.

Observations:

The court's conclusion that Carey's speeding was inadvertent may be a bit of a stretch in view of Carey's apparent concession that he knew he was driving well in excess of 50 miles per hour. However, it is not difficult to see why the court strained to avoid disqualification. The problem arises from the lack of a proper fit between two separate statutory schemes. On the one hand, the legislature enacted driving regulations so comprehensive that perfect compliance is out of the question for all or most drivers. Fortunately, the penalties are relatively minor. If the penalties were severe, driving could become impossibly expensive. Thus, the legislature probably did not intend that the punishment for any violation of the rules of the road might include denial of medical and disability benefits to a severely injured driver.

On the other hand, when the legislature enacted a disqualification provision in the workers' compensation law, it was dealing generally with the moral hazard of insuring workers against their own very serious misconduct. Only very serious misconduct results in disqualification because the essence of the workers' compensation is that mere *negligence* is irrelevant (as it is in many forms of insurance).

Thus, courts and legislatures have tended to limit disqualification to fairly severe and reasonably avoidable types of misconduct, like intoxication on the job or intentional torts. The court is probably correct when it says that Carey's mistakes were the sort that most people make sooner or later if they drive. The penalty is the usual fine, not the loss of medical and disability benefits.

Swearingen v. Owens-Corning Fiberglas Corp.

Key facts: In 1986, Swearingen was disabled in a work-related accident, and she received workers' compensation benefits. Because she was unable to return to work immediately after the accident, the company placed her on medical leave. In 1988, after Swearingen had been on leave for more than two years, the company informed her that it was terminating her in accordance with an "absence control provision," a rule that was included in the collective bargaining agreement that applied to Swearingen's employment. The absence control policy stated that an employee was subject to termination (she lost her "seniority rights") if she was away from work for twenty-four consecutive months. [If she lost her seniority rights, she was unable to "bump" any less senior employee who might have replaced her].

Swearingen attempted to return to work in 1980, four years after her disabling injury, but she "then discovered that ... she had lost her seniority rights and that [the company] had terminated her employment." She sued the company for retaliating against her for filing a workers' compensation claim, in violation of the Texas anti-retaliation law. The district court granted summary judgment against Swearingen and in favor of the company. Swearingen appealed.

Decision: Affirmed. The company terminated Swearingen in accordance with a lawful absence control policy, and not in retaliation for her workers' compensation claim.

1. Texas law prohibits an employer from discharging or otherwise discriminating against an employee because the employee filed a workers' compensation claim. An employee bears the burden of proving a violation of this law, but the employee need only prove that retaliation was a "determining factor" (i.e., that there was a causal link between her claim and her discharge) even if her claim was not the only reason for the employer's action. If an employee presents evidence of unlawful retaliation, the employer must then present a legitimate reason for its action.

2. Swearingen could not prove that her claim was a determining factor in her discharge, because she conceded that she was discharged in accordance with the absence control policy.

3. The court disagreed with an opinion of the Attorney General of Texas and decisions of a few other courts (see footnote 3) holding that an absence control policy *was* discriminatory unless the employer was able to present a legitimate job-related reason for not reinstating an employee whose extended absence was due to an accident or illness covered by workers' compensation.

Observations:

1. Swearingen appears to have been relying on the "disparate impact" theory described in connection with the *Griggs* case in Chapter Four. If the court had accepted the theory, it might have required the employer to prove that its two-year limit was supported by business necessity. Perhaps application of the theory would have required the employer to justify non-reinstatement on a case by case basis. Because the court rejected the theory out of hand, and because the plaintiff failed to present a prima facie case of intentional retaliation, no proof or defense was required of the employer. Does this make it too easy for an employer to rid itself of temporarily disabled employees who might otherwise be a burden in the future? Not necessarily. The employer must apply the policy in a nondiscriminatory fashion, without regard to the cause of an employee's extended absence. An employee who suffers a non-work related disabling condition (e.g., a heart attack) must be subject to the same rule.

2. As I read this case, Swearingen was not automatically rejected for re-employment simply because she had been gone for more than two years. She lost her seniority, and could not displace an employee who had less seniority than Swearingen had accumulated before her accident. However, a policy disqualifying an employee like Swearingen from future employment might be illegal even under the Fifth Circuit's view.

3. A temporarily disabled employee might also challenge an absence control policy under the Family and Medical Leave Act or the Americans with Disabilities Act. We will return to this issue in Chapter Seven.

Problems

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1. One of the cases that inspired this problem is Glass v. Amber, Inc., 2002 WL 31430097 (Tex. App. 2002) (unpublished) (safety incentive program was evidence of employer's intent to discriminate).

There are two possible ways of looking at this problem. The first, and the way most likely to fit within the language of most of workers' compensation retaliation statutes, is that the employer may have discriminated against Stoik and the other workers by denying them a bonus they would have received but for Stoik's claim. The employer may argue that it had no intent to "retaliate" against the filing of a claim as such, and that its intent was to reward employees for avoiding "accidents." Perhaps this is a laudable goal. However, not awarding the bonus is still an adverse employment action, and the reason for not awarding the bonus might be discriminatory on its face. The employer either pays a bonus, or it does not, depending on whether an employee reported an accidental *injury*. In contrast with the neutral "absence control" policy in *Swearingen*, this policy is triggered only by the sort of events that would result in a workers' compensation claim.

Second, if the wording of local law accommodates such an argument, a disappointed employee might contend that the policy unlawfully "interferes" with the filing of a workers' compensation claim. Looking at the facts of this problem, the policy certainly did "interfere" with Stoik's claim up to a point, and it is likely to have that effect for other employees in the future. But is it unlawful for an employer to "interfere" without actually taking discriminatory adverse action? Would the employer have violated the law if Stoik had never filed a claim, and then received his bonus? Section 8(a)(1) provides an analogy here, but I believe most state statutes I have seen fail to include a clear prohibition against "interference."

2. This question was inspired in part by City of University Park v. Van Doren, 65 S.W.3d 240 (Tex. App. 2001) and Cahill v. Frank's Door and Bldg. Supply Co., Inc., 590 So.2d 53 (La. 1991). A policy of discharging accident prone employees is not necessarily discriminatory on the basis of workers' compensation claims. It would clearly be discriminatory if it counted only those accidents causing the employee's own compensable injury, and it counted such accidents without regard to fault or mitigating circumstances (in other words, it

simply counted an employee's claims). The policy in this hypothetical is more defensible, first because it counts all accidents, including those not resulting in workers' compensation claims (e.g., it counts accidents involving property damage); and second, because it focuses at least somewhat more clearly on the employee's *misconduct* by requiring a finding that the accident was "serious" and was his fault. A better policy would be one that disciplines an employee for violating a specific safety rule. This last alternative would be supported by OSHA law, which as we will see, appears to require such a rule in some contexts.

In some cases involving allegedly "accident prone" employees there could also be an Americans with Disabilities Act or Title VII angle. This side of the problem is discussed near the end of this Chapter, in the section on Occupational Safety and Health Law.

Mead v. Western Slate, Inc.

Key facts: The plaintiff Mead was an experienced employee in the defendant's slate quarry pit. Harrison, a co-owner of the business and manager of the site at the time of the accident, was also experienced in quarry operations. Harrison ordered Mead to perform certain work on the face of a wall of rock. When Mead returned to the same spot the following day, he noticed some freshly fallen rock, which meant there had been a recent rock slide (and that this face of rock might be unstable). Mead sent two other employees to report the situation to Harrison, but he didn't wait for further instructions from Harrison. Instead, Mead continued his work on the face of the rock, which including drilling the rock to prepare it for explosives.

When the other employees reported the recent rock slide to Harrison, Harrison (like Mead) evidently wasn't very worried about it. He sent the two employees back to Mead with supplies, including explosives, and with orders to continue what they were doing. Instead of going immediately to the site to inspect the rock slide, Harrison evidently went first to the store.

Mead continued his work and was inserting explosives into the rock when he was struck by falling rock and suffered serious injuries. He sought and obtained workers' compensation benefits, but he also filed a tort suit against Harrison and the company, alleging that they had committed an intentional tort by failing to order him to cease dangerous work.

The trial court denied the defendants' motions for directed verdict based on the exclusive remedy defense, finding sufficient evidence to support the plaintiff's intentional tort claim. The trial court then instructed the jury that the plaintiff could show that the defendants' had a "specific intent to harm him" if he proved that they knew to a "substantial certainty" that their actions would result in the plaintiff's injuries. When, in the midst of deliberations, the jury sought further explanation of this rule, the trial court refused any further explanation. The jury's verdict was for the plaintiff. The defendants appealed.

Decision: Reversed. The evidence was not sufficient to show that the defendants acted with substantial certainty that Mead would suffer injury.

1. **The Intentional Tort Exception**. As is typical in workers' compensation laws, the Vermont law provides that workers' compensation benefits are the exclusive remedy for an employee's work-related injuries, insofar as any claim against his employer or fellow employees.

a. Like most other states, Vermont also recognizes an exception to the exclusive remedy defense for an employer's intentional torts, but in order for this exception to apply, the Vermont court has ordinarily required proof of specific intent.

b. In the absence of specific intent, even proof of willful or wanton conduct is not enough to overcome the exclusive remedy defense.

2. **Expansion of the Exception**. Some states have broadened the intentional tort exception to allow a tort claim against the employer if the employer must have been "substantially certain" that its conduct would cause injury.

a. This standard requires more than gross negligence, more than recklessness, and more than action with an appreciation of risk. Some courts have described the "substantial certainty" standard as "tantamount to an intentional tort," or as a substitute for proof of a subjective desire to injure.

b. Some states have rejected any broadening of the intentional tort exception. Critics of the "substantial certainty" rule have argued that it undermines the balance and compromise that were the basis for legislative approval of the workers' compensation system. The Vermont court agreed that these were good reasons for caution in applying an expanded version of the intentional tort exception.

3. **Application to the Facts**. The evidence in this case did not support application of the "substantial certainty" rule.

a. **Evidence for the Employee**: The evidence showed that the company permitted or directed Mead to continue working despite a substantial risk of a rock fall. There was also evidence that continuing work under these circumstances violated federal safety regulations.

b. **Evidence for the Employer**: There was no evidence "tying a second rock fall to any particular time-frame," and no evidence of any prior rock falls causing injury at the quarry. The court also noted that Mead had considerable experience as a quarry worker, and that he decided to continue work even without receiving further instructions from Harrison.

c. **Conclusion: No Substantial Certainty**. The court contrasted this case with those in which an employer had ordered employees to continue work despite inevitable exposure to harmful agents, or in which an employer ordered an employee to work on a machine that had injured other employees, despite the employee's objection and with the threat of discharge. At best, the evidence in this case showed negligence by the defendants. But this was not enough to overcome the exclusive remedy defense.

Observations:

This case presents the other side of the moral hazard problem first introduced in *Carey* case. Workers' compensation is a form of liability insurance for the employer. Clearly, an employer should not be insured for intentionally harming or killing its employees. The more difficult issue is whether an employer should be insured for elevated degrees of negligence, where there are no bright clear lines for measuring degrees of culpability. If a court or administrative agency can sit in after-the-fact judgment of whether an employer's conduct was merely negligent, grossly negligent, or reckless, the liability insurance function of workers' compensation may lose a substantial part of its function and appeal for employers.

Moreover, if employer conduct was truly egregious, there are other punitive measures that federal and state authorities can take against the employer, including OSHA enforcement proceedings and even criminal proceedings (topics of the next section of this chapter). A truly reckless employer should also see its insurance premiums rise. Why muddy the waters of workers' compensation law by introducing vague concepts of recklessness or "substantial certainty" that fall short of specific intent?

The argument for the injured employee is that the workers' compensation system has deprived him of his right to punitive damages and damages for the full measure of his disability, pain and suffering, and emotional distress. In the case of truly egregious employer negligence, the legal system needs some way of responding to the moral outrage of the victims, their families, and the local community. Merely punishing the employer with OSHA fines might not be enough to satisfy these constituencies if the victims are left far short of adequate compensation. There may also be cases in which one can reasonably suspect that business owners have considered the costs of dealing with OSHA, the cost of safe work practices, and the cost of workers' compensation premiums, and they have determined that reckless work practices are less expensive. One way of discouraging that sort of thinking is to require the truly reckless employer to pay the full measure of an employee's life, disability and suffering.

C. Preventive Regulation: Occupational Safety and Health Law

The early proponents of workers' compensation believed that this system would provide the best and most natural incentive for employers to maintain safe work practices and safe workplaces. As the Spieler article explains, there are a number of reasons why workers' compensation law, standing alone, does not provide sufficient incentive for employers to protect the safety and health of their workers. First, the manner in which insurance premiums are determined is not sufficiently related to an employer's actual safety record, especially for employers of small workforces. Second, premiums do not reflect the cost of injuries that, for one reason or another, are not compensated by the system. Third, the system provides only limited benefits, and therefore employers do not pay the full cost of injury to their employees.

National Realty & Construction Co. v. OSHRC

Key facts: OSHA instituted these proceedings after the death of an employee at the employer's construction site. The deceased employee, Smith, was a foreman at the site. On the day of the accident, Smith rode on the running board of a front-end loader being driven by one of Smith's subordinates. Riding on the running board was against company policy, and the company's managers had previously reprimanded several employees for riding on running boards (and would have fired any employee for a second offense). However, these managers did not see Smith get on the running board, and they did not see the ensuing accident. The loader stalled while going down a ramp and rolled over, killing Smith.

The fatality evidently prompted an OSHA (Secretary of Labor) investigation, and OSHA cited the company for a "serious" breach of the general duty clause, with a $300 fine. The company's alleged breach was in permitting an employee to stand as a passenger on the running board of front end loader. A hearing examiner dismissed the citation. OSHA sought review before the OSHRC, and the Commission reversed, with a majority of the Commission finding that the company had not effectively implemented and enforced its policy against riding on running boards. The company petitioned for review in the court of appeals.

Decision: Reversed. OSHA failed to prove that the company "permitted" Smith to ride the running board, or that the company's implementation of its policy was inadequate.

1. **Proof of Violation of General Duty**. OSHA bears the burden of proving a violation of the general duty clause, and in judicial review proceedings it must show that the Commission's finding of a violation is supported by "substantial evidence." To prove a violation of the general duty clause, OSHA must prove (1) a certain hazard was a "recognized" hazard; (2) the hazard caused or was likely to cause death or serious physical harm; and (3) the employer failed to provide a workplace "free" of that hazard.

> a. **Recognized Hazard**. It was undisputed that the hazard, riding on a running board, was a recognized hazard. Proof that a hazard was "recognized" might be by evidence of the employer's knowledge of the existence of the hazard and its potential for harm (and the company's policy proved it knew of the hazard) or by evidence of the common knowledge of safety experts familiar with the industry or the activity (and there was supporting expert testimony in this case).
>
> b. **Likely to Cause Death/Injury**. There was substantial evidence that the hazard was likely to cause death or serious physical harm. "Likely to cause death or serious physical harm" does not mean OSHA must prove a greater than 50% chance that an accident will result from any given instance of riding the running board. It is sufficient that the evidence shows that an accident would "eventuate" from other than a freakish or utterly implausible concurrent of circumstances. The fact that Smith was killed was sufficient evidence in this case.

c. The remaining issue, and the key issue for the court, was whether the company failed to provide a workplace "free" of that hazard.

2. **"Free" of Hazard? Preventable v. Unpreventable**. Congress stated the general duty clause requirement of a workplace "free" of hazard in terms that are absolute and unqualified. Thus, it is not enough for the workplace to be "reasonably free."

a. However, Congress did not intend to impose strict liability. The duty must be *achievable*. Therefore, an employer's duty is to eliminate "preventable" hazards.

b. An employer is not responsible for "unpreventable" employee misconduct. For example, the law does not require an employer to eliminate the risk that a "demented, suicidal or willfully reckless" employee might violate the very best safety program.

c. Employee misconduct is unpreventable if it is so idiosyncratic and implausible that safety experts would not take it into account in designing a safety program.

3. **Preventability and Feasibility**. Another limitation on an employer's duty is that the means of eliminating a hazard must be "feasible" in the view of safety experts.

a. Thus, employee misconduct is not preventable if eliminating the misconduct would require measures so expensive that safety experts would agree they are not feasible.

b. A proposed measure is not infeasible merely because it is very expensive.

c. However, if the expense of the proposed measure would threaten the economic viability of the employer, OSHA should propose the measure by rulemaking rather than by adjudication.

d. OSHA must also prove that a proposed measure would have materially reduced the risk that the misconduct would have occurred.

4. **Failure of Proof**. In this case, OSHA failed to prove that the company failed in its duty to prevent employees from riding the running board on heavy equipment.

a. The record showed several incidents of employees riding on running boards, and the court believed it "unlikely" that these incidents were unpreventable.

b. However, OSHA bears the burden of proving particular measures that would be effective, and OSHA presented no evidence at the hearing in this regard.

c. The OSHRC's suggestion of measures not presented at the hearing deprived the company of a fair chance to respond and present a defense.

Observations:

1. The fine in this case was only $300, and I ask my students why the company would have fought so hard (and undoubtedly with great expense) to contest this fine. There are a number of reasons why employers contest citations even with very small fines at stake. First, the employer might be delaying its duty to abate the violation, especially if the cost of abatement is very high (not likely in *National Realty*). Second, the employer might worry that the citation will lead to further inspections, or that the next fine will be even higher (because the amount of the fine is based on an employer's record). Third, the employer might worry that an injured employee or a deceased employee's survivors will use an OSHA adjudication against the employer to establish tort liability. In Texas, for example, the exclusive remedy of workers' compensation law does not bar certain wrongful death actions.

2. The fact that an employer has a duty to prevent avoidable employee misconduct may have important implications for other areas of employment law. For example, an employer can argue more persuasively that a policy of discharging accident-prone employees has a legitimate business purpose and is not discriminatory against workers' compensation claimants. Employers have also relied on OSHA law successfully to argue that salaried workers should be subject to fines and suspensions for safety violations.

Eliminating hazards might also mean rejecting applicants or discharging employees who are more susceptible to injury or accident no matter how careful they are. This aspect of OSH law is a topic near the end of this chapter.

3. Judge Wright's solution to the problem of economic feasibility in "general duty" cases is different from the solution in cases involving specific standards. As will be seen, OSHA can adopt specific standards that might bankrupt some employers if the industry as a whole would still survive, but in Judge Wright's view a single employer's threatened bankruptcy could be a defense in a general duty case, with the effect that OSHA would be required to promulgate its proposal as a specific standard in accordance with the usual rulemaking process. See fn. 37. This approach would tend to guard against arbitrary, uneven and misguided enforcement of rules that might be fatal to some businesses.

AFL-CIO v. OSHA

Key facts: When Congress enacted the OSH Act in 1971, it authorized OSHA to adopt "start-up" standards based on "national consensus" and existing federal safety standards, without the usual proceedings that must attend the rulemaking process. The idea was that OSHA could quickly begin to enforce these established or "national consensus" standards while taking the time to develop its own more current and carefully drawn standards. OSHA quickly exercised this authority to issue 435 permissible exposure limits (PELs), most of which were based on old regulations issued under the Walsh Healey Act.

Seventeen years later, OSHA had managed to promulgate only 24 substance-specific standards of its own, although it recognized that there were "thousands" of unregulated substances. Therefore, in 1988 it began a "generic" rulemaking process for an Air Contaminant Standard with PELs for 428 toxic substances. Ordinarily, a generic process is one that leads to the adoption of a single requirement that applies in many different situations. But the 428 substances regulated by the Air Contaminant Standard had little in common except that they were toxic.

The new PELs lowered some of the old limits and limited some previously unregulated substances. By an allegedly "generic" process, OSHA was attempting to streamline an otherwise very slow and resource-consuming process for a large number of toxic substances. However, the generic process was a cause for one of the challenges that industry groups raised against the PELs in this judicial proceeding to review the agency's rulemaking.

Decision: The court vacated the standard and remanded the matter to the agency for further proceedings. OSHA improperly resorted to generic rulemaking (if it was truly "generic" at all) in promulgating the updated PELs.

1. **Substantial Evidence Rule**. OSHA's standards must be supported by substantial evidence. This standard is higher than an "arbitrary and capricious" standard, but it requires a court to uphold a standard which reflects the agency's choice between two fairly conflicting views, even if the court would have adopted the contrary view.

2. **Requirements for a Standard**. OSHA must show that a standard is "reasonably necessary or appropriate" for the safety or health of employees. 29 U.S.C. §652(8). In the *Benzene* case, The Supreme Court interpreted this provision to mean that OSHA must show a significant risk of material health impairment at current levels of exposure to the substance in question (and thus, a lower standard is "reasonably necessary").

a. The health impairment must be "material."

b. OSHA must provide an estimate of the actual risk of such impairment at a certain level of exposure. OSHA often satisfies this requirement by estimating the number of workers likely to suffer the effects of exposure or the percentage risk to any particular worker. In *Benzene*, the Supreme Court suggested the risk would be "significant" if the odds were 1 in a 1000 that regular exposure to a certain concentration of benzene would be fatal.

c. If a substance poses a significant risk of material health impairment, the Act requires OSHA to adopt the standard that will prevent material health impairment "to the extent feasible."

3. **Risk of Material Health Impairment**. Substantial evidence supported OSHA's determination that the substances in question could cause "material health impairment."

a. Industry groups argued that "sensory irritation" (e.g., stinging, itching, burning of the eyes or nasal passages) caused by certain substances at certain levels of exposure was not a "material" health impairment.

b. However, sensory irritation can increase an employee's susceptibility to the other effects of the substance and to other disease, and it may affect job performance in a way that increases the risk of accident. OSHA adequately distinguished between minor irritation and more serious levels of irritation.

4. ***Significant*** **Risk**. Substantial evidence did not support OSHA's conclusion that exposure at certain levels posed a *significant risk* of material impairment.

a. OSHA is not required to calculate the exact probability of harm, but it must explain to a reasonable degree the risk posed by *each* substance.

b. OSHA cannot avoid the need to prove significant risk for each substance by purporting to engage in generic rulemaking.

c. For many substances, OSHA relied on studies associating certain health impairments with exposure, but OSHA failed to estimate the risk that such impairments would occur at any particular level of exposure.

d. On the other side of the coin, as noted above, the act requires OSHA to adopt the standard that will prevent material health impairment "to the extent feasible." However, OSHA did not show that the exposure levels it adopted would prevent material health impairment.

e. OSHA argued that it was permitted to include a "safety" or "uncertainty" factor, reflecting uncertainty about the exact level at which exposure might be safe, as a reason for adopting standards more restrictive than might be supported by the limited studies then available. However, the difference between the exposure levels proven to be harmful, and the exposure levels permitted by the Standard, were often substantial, and OSHA failed to explain or account for the role of an "uncertainty" factor in each PEL.

f. OSHA need not establish its case with absolute scientific certainty. The agency is entitled to err in favor of overprotection, as long as the levels it adopts are supported by scientific evidence, but such evidence was lacking for many of the substances in this case.

g. In sum, OSHA probably proved that all or most of the substances posed a significant risk at some level, it did not prove significant risk at the existing PELs or that new standards would eliminate or substantially reduce risk.

5. **Feasibility**. OSHA failed to prove that the new PELs were both technologically and economically feasible.

a. OSHA generally must prove technological feasibility on an industry by industry basis. In this case, OSHA failed to explain how or show that various contaminant control methods would achieve the new PELs in each particular industry.

b. True, OSHA is entitled to a presumption of feasibility throughout an industry, but this presumption merely saves OSHA from proving feasibility for *each firm* within an industry, once OSHA has established feasible means that are already in use or could be used in an industry.

c. OSHA also failed to show economic feasibility. To satisfy this burden, OSHA must show the likely range of costs and the effect of these costs on each industry. Very expensive measures are feasible even if they will result in the failure of marginal firms, provided the cost is not so great as to threaten the viability of the entire industry. Again, OSHA attempted to prove feasibility for each industry sector, rather than each industry.

Observations:

1. Small wonder that OSHA was tempted to try a shortcut to the usual requirements of rulemaking to establish PELs for some of the "thousands" of potentially dangerous substances in the workplace.

2. Occupational safety and health law has been fertile ground for the debate over cost-benefits analysis, as described in the note, *From Feasibility to Cost-Benefit Analysis*. The language of the act does not provide any obvious answer to the question whether such analysis is necessary or permissible. Note, however, that in considering this question, there are three different types of OSHA rules, and the answer might be different for each type. First, there is the general duty clause, with its own language of risk and feasibility. Second, there is the act's general definition of a standard, 29 U.S.C. §652(8). Third, there is the act's special provision for "toxic materials or harmful physical agents," 29 U.S.C. §656(b)(5).

Whirlpool Corp. v. Marshall

Key facts: Whirlpool operated a factory in which overhead conveyors carried parts. A wire mesh screen stretched just below the conveyors to catch falling parts that might injure employees. The wire mesh screen was about 20 feet above the ground.

Maintenance employees sometimes had to perform work on the screen, such as collecting parts that had fallen from the conveyors. Sometimes, this work required an employee to step off the iron frame holding the screen, and to step onto the screen itself. In 1973, the company began to replace the old screen with heavier, stronger wire, to make it safer. Evidently, the work did not proceed fast enough, and in 1974 an employee fell through an old section of the screen. This fatality prompted an OSHA investigation, a $600 fine, and a citation requiring an immediate abatement of the company's practice of requiring or permitting employees to walk on the screen.

The company contested the citation. However, it purported to adopt a new rule prohibiting employees from stepping on the wire mesh screen. In the future, employees were to use raised platforms and hooks if necessary to retrieve parts from the screen.

Immediately before or just after the citation, maintenance employees Deemer and Cornwell voiced their own concerns about the safety of the screen. Evidently, they suspected the sincerity or effectiveness of the company's response to the fatality and/or the OSHA citation. They requested and obtained the telephone number for OSHA, and Deemer called OSHA that day to report his concerns.

On the following day, a foreman ordered Deemer and Cornwell to walk out onto the screen to perform some work. The order appears to have been in direct violation of the new company rule prohibiting such work practices. The order also would have been in clear violation of the OSHA abatement order if the company had not contested the citation (thus suspending the effect of the order to abate).

Deemer and Cornwell refused to follow the order, contending that the screen was unsafe. The foreman sent them to the personnel office, where they were ordered to clock out for the day. As a result, they missed six hours of pay. The company also issued written a reprimand against each employee.

OSHA filed suit alleging that the company's actions with respect to Deemer and Cornwall violated OSHA §11(c)(1), 29 U.S.C. §661(c)(1). Section 11 prohibits an employer from discriminating against an employee for exercising any right under the OSH Act. The particular right that Deemer and Cornwell had exercised was the right to refuse an order to perform work under hazardous conditions, but this right is expressed in an OSHA regulation, not in the text of the Act. OSHA sought an order requiring the company to compensate the employees for six hours of pay, and requiring expungement of the reprimands.

The district court dismissed the complaint, holding that the work refusal regulation was not a proper interpretation of the Act and exceeded the Secretary of Labor's authority. The court of appeals reversed, finding that the regulation was valid. The company sought review before the Supreme Court.

Decision: The Court affirmed the decision of the court of appeals upholding the regulation. The Court remanded the action for further proceedings.

1. **The Usual Remedies**. The court enumerated statutory employee rights to initiate or aid proceedings under the act.

a. The Court described the procedure by which employees can seek, and the Secretary of Labor can obtain, a temporary restraining order to protect employees from an "imminent" danger.

b. If an employee believes the Secretary has erred in failing to seek a restraining order, the employee can sue the Secretary to compel such action.

c. In the ordinary scheme of events the enforcement procedures of the act provide all the protection an employee needs.

2. **When Usual Remedies Fall Short: Right of Work Refusal**. As this case illustrated, however, sometimes an employee reasonably believes the usual enforcement procedures of the act are insufficient to protect him from death or serious injury.

a. **Requirements**. Such a case occurs when an employer orders an employee to perform work the employee reasonably believes poses an *imminent* risk of death or serious bodily injury, and the employee has reason to believe there is *insufficient time or opportunity* to seek redress from his employer or to apprise OSHA of the danger.

b. **Source of Right**. The act does not expressly grant a right of work refusal under such circumstances, but the Secretary of Labor has recognized such a right in a regulation, 29 C.F.R. §1977.12.

3. **Upholding the Regulation**. The Secretary's right of work refusal regulation is a proper interpretation of the act.

a. The act's goal is to *prevent* death or serious injury to employees, and granting an employee a right of work refusal in cases such as this is necessary to achieve this purpose.

b. The regulation could be viewed as a way of effectuating the general duty clause. OSHA inspectors cannot be present around the clock in every workplace, and a limited right of refusal is necessary to assure employees of their right to a workplace free of serious hazards.

c. Congress's rejection of a "strike with pay" proposal did not reflect a rejection in advance of the regulation in question in this case. The regulation does not require an employer to compensate an employee for work missed because of the employee's work refusal, and therefore the regulation is very different from the proposal Congress rejected.

d. Congress's rejection of a proposal to grant the Secretary of Labor authority temporarily to shut down all or part of an employer's business in imminent danger situations, without advance judicial supervision, did not reflect a rejection in advance of the regulation in this case. The regulation does not grant an employee the authority to order an employer to suspend its business or change its work practices.

Observations:

1. The regulation creating the right of work refusal, 29 CFR § 1977.12, can be broken down into three elements: (1) the condition that caused the employee's work refusal was one that a reasonable person, under the same circumstances, would have believed presented a real danger of death or serious injury; (2) the employee, where possible, sought but was unable to obtain the employer's correction of the condition; and (3) the situation was urgent and there was insufficient time to eliminate the danger by resorting to the usual statutory enforcement channels.

2. When the Court issued its decision, enforcement proceedings with respect to the original citation and order of abatement were still underway in the Court of Appeals for the District of Columbia. See fn. 3. In 1981, seven years after the fatality that began this series of events, the D.C. Circuit vacated the citation and order on the grounds that OSHA had failed to prove a feasible alternative. See note 2 following the *Whirlpool* case.

NLRB v. Washington Aluminum Co.

Key facts: Washington Aluminum operated a machine shop that was not insulated, and that had a number of doors that were frequently opened in the course of the work. An oil furnace in the adjoining building and two space heaters in the machine shop were the principal sources of heat during cold weather, but they were frequently inadequate and employees complained "from time to time" about cold working conditions.

One day the temperature dropped to a range of 11 to 22 degrees. Unfortunately, on this day the oil furnace was broken (evidently, the company was in the course of attempting to fix the furnace). The machine shop was "bitterly cold." When the foreman Jarvis saw the employees "huddled" together against the cold, he told employee Caron, "[i]f those fellows had any guts at all, they would go home." Caron joined his fellow employees, reported what Jarvis had said, and stated his own intention to go home. But before leaving he discussed the issue with the other employees. They decided it would be a good idea to leave, and "maybe we could get some heat brought into the plant that way." As they were leaving, the foreman Jarvis attempted to persuade them to stay. Seven left, but one stayed.

Later that morning, when the president of the company learned of the walkout, he ordered the immediate termination of the seven employees who had left the shop.

The NLRB initiated enforcement proceedings against the company, based on the company's alleged interference with the employees' right under NLRA § 7 (29 U.S.C. §157) to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The NLRB found that the company had in fact interfered with the employees' §7 rights, and it ordered the company to reinstate the employees and make them whole for any lost pay. The court of appeals refused to enforce the Board's order, and the Board petitioned for review before the Supreme Court.

Decision: The Court reversed the decision of the court of appeals. The employees were engaged in protected concerted activity, and the Board properly ordered the employer to reinstate them and make them whole for any lost pay.

1. **Informality of Employee Action**. The fact that the employees did not present a specific demand to the employer to remedy the condition they found objectionable does not preclude their assertion that their activity was protected by §7. Section 7 is broad enough to protect concerted activity before, after or at the same time that employees make their demand.

2. **Allowance for Non-Union Employees**. These employees lacked union representation and had to speak for themselves as best they could. They had no established procedure for collective bargaining. However, their walkout was preceded by their earlier complaints about the lack of heat on other cold days. The walkout seemed to them the most direct way to let the company know how serious their complaint was.

3. **Reasonableness**. The company argued that the employees acted unreasonably in walking off the job when they did.

> a. The fact that the company was already attempting to fix the furnace shows only that the walkout might have been unnecessary, but protection under § 7 does not depend on the reasonableness of the employees' *decision* to engage in concerted activity.
>
> b. In any event, it appears that their decision was reasonable, and even the foreman Jarvis initially appeared to agree.
>
> c. There are limits to the protection § 7 offers. The NLRA does not protect employees if they engage in unlawful or violent activities, indefensible acts of disloyalty,

> or breaches of contract, but no such conduct was involved in this case. The employees here were simply acting to protect themselves from intolerable working conditions.

Observations:

1. The Court says that the employees need not be reasonable in their *decision* to engage in protected activity. I make a point of emphasizing to students (especially for those who have not studied collective bargaining) that their *methods or conduct* must be reasonable. The employees could reasonably decide to walk out, but their walkout probably would have been unprotected if they had purposely maximized the company's damage by timing their walkout in a way to cause particular damage, such as by waiting for the middle of a manufacturing process that, if left unattended would result in serious damage to the company's property.

2. Congress had not yet enacted the OSH Act when the employees walked off the job in *Washington Aluminum*. Would their walkout be a protected work refusal under OSHA regulations? There is no specific standard, as far as I know, regarding workplace temperature. Requiring employees to work in frigid conditions might constitute a violation of the general duty clause. Recall from the *AFL-CIO* case that sensory irritation can be a serious health hazard. But the OSHA work refusal regulation would have required proof of an *urgently* serious risk of death or injury, a more clearly stated demand to the company, and a better opportunity for the company to fix the furnace.

By acting in concert, the employees gained broader protection, because they were not required to have been reasonably motivated, and their walkout might have continued until some agreement by the company. If they had acted individually, however, the OSH Act would have provided the only possible protection.

Marshall v. Barlow's, Inc.

Key facts: An OSHA inspector entered the customer service area of Barlow's, Inc., presented his credentials, and stated that he wished to conduct an inspection of the company's working areas. Barlow, the president and general manager, asked if there was a complaint about the company. The inspector answered no, but that the company had simply turned up in OSHA's process of selecting inspection targets. Barlow asked if the inspector had a search warrant. When the inspector replied that he did not, Barlow denied the inspector permission to enter the nonpublic area of the business.

Three months later, OSHA petitioned the local federal court for an order compelling Barlow to admit the inspector. The court granted the order, but when OSHA attempted an inspection a few days later on the basis of the order, Barlow again denied entry. Barlow also sought an injunction against OSHA's warrantless search. A three-judge court ruled in Barlow's favor based on the Fourth Amendment. The Secretary of Labor petitioned for a writ of certiorari.

Decision: Affirmed. OSHA must have a warrant to inspect a business without the owner's consent, but the requirements for such a warrant are considerably less rigorous than the requirements for a warrant in a criminal investigation.

1. **Warrant Clause Applies**. The warrant clause of the Fourth Amendment protects commercial buildings as well as private homes.

a. The rule that warrantless searches are generally unreasonable applies to *commercial* premises as well as homes.

b. The rule that warrantless searches are generally unreasonable applies to *civil* proceedings as well as criminal proceedings.

c. The Court has found exceptions for administrative inspections of particular industries that have such a history of regulatory oversight that they could have no reasonable expectation of privacy (e.g., liquor and firearms). A person embarking on such a business has chosen to subject himself to intrusive governmental regulation. But these cases represent the exception and not the general rule. The exception does not apply to business as a whole. Engaging in business (outside liquor, firearms, and some others) or employing employees is not a voluntary waiver of the Fourth Amendment.

d. Of course, employees lawfully on the premises can report to OSHA what they have observed. What they see in the course of their work is beyond the employer's reasonable expectation of privacy. OSHA, however, is not an employee. "Without a warrant he stands in no better position than a member of the public."

2. **Practical Arguments Against Warrant Requirement**? "[R]easonableness is still the ultimate standard" under the Fourth Amendment. Thus, the Secretary of Labor urged the Court to dispense with a warrant requirement based on a balance between administrative necessities and the incremental protection of privacy a warrant would afford. The Court rejected this suggestion.

a. The Secretary contended that warrantless "surprise" inspections were necessary for proper enforcement. However, OSHA can obtain a warrant ex parte without prior notice and the Court was not persuaded by the Secretary's argument that an ex parte warrant procedure would impose too great an administrative burden. The great majority of businesses permitted inspection without an order, and the Court saw no reason to believe that employers would behave differently if it imposed a warrant requirement.

b. OSHA's existing practice of seeking legal process (such as the order in this case) when denied free entry showed that a requirement of judicial action would not unduly burden enforcement or deprive the agency of the element of surprise.

c. The requirement of a warrant would not necessarily preclude surprise. OSHA could still seek the warrant ex parte, and could then appear for inspection without notice.

3. **Standard of Justification for Warrant**. The Court held that OSHA would need a warrant to inspect a business over the business owner's objection, but the Court adopted a relaxed standard for what would be required for the issuance of a warrant for an OSHA inspection.

a. OSHA will not be subject to the same probable cause requirement that applies to the police in a criminal investigation. Whereas the police must show probable cause to believe a crime has been committed, OSHA will not have to show probable cause to believe an employer has violated the OSH Act.

b. OSHA's probable cause may be based *either* on specific evidence of an existing violation, *or* that inspection of a particular establishment complies with a reasonable administrative plan for conducting inspections.

c. A reasonable administrative plan would be derived from neutral criteria such as "dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area."

d. The protection this warrant requirement provides employers is more than "marginal," and is enough to outweigh the additional burden to OSHA. Without a warrant requirement, OSHA officials, particularly those in the field, would have "almost unbridled discretion [about] ... when to search and whom to search." A warrant will assure that inspection is reasonable and pursuant to an objective plan, and the warrant will inform the employer of the lawful scope and objects of the search.

Observations:

1. Why didn't Barlow simply appeal from the district court's order that he must submit to an inspection? Indeed, in the later proceeding for an injunction against the inspection, the Secretary of Labor argued that Barlow was precluded from challenging the inspection because of his failure to appeal. The three judge panel that heard Barlow's petition for an injunction found that the judge in the earlier proceeding had declined to decide the Fourth Amendment issue because the issue was "premature" (evidently on the theory that Barlow must submit to the inspection and reserve his Fourth Amendment defense in any resulting enforcement proceedings). See Barlow's, Inc. v. Usery, 424 F.Supp. 437, 439-440 (D. Idaho 1976). Because the judge had declined to decide the issue, the three-judge panel held that it was appropriate to consider Barlow's petition for an injunction on Fourth Amendment grounds.

2. OSHA's position before the Court was certainly undermined by the fact that its existing practice was to seek a court order compelling an employer to grant entry *after* an initial

refusal. Such an order might have been based on OSHA's asserted authority to inspect under the act, without "probable cause" of any sort, and it might have lacked a warrant's constraints with respect to scope and purpose. If OSHA had persuaded the Court that this procedure was Constitutional, its power to inspect certainly would have been augmented. But, having relied on the procedure, it was difficult for OSHA to persuade the Court that the need for "surprise" was a compelling reason to reject the requirement of a warrant.

Chevron U.S.A. Inc. v. Echazabal

Key facts: Echazabal worked for an independent contractor at a refinery owned by Chevron. Twice he applied for a job directly with Chevron, and Chevron offered to hire him if he could pass a physical examination. On each occasion his examination showed a liver abnormality, eventually identified as Hepatitis C. Chevron's doctors believed Echazabal's condition would be aggravated by exposure to toxins at Chevron's refinery, and on each occasion the company withdrew its offer. With the second rejection, Chevron also asked the contractor employing Echazabal to reassign him to a safer position or remove him from Chevron's refinery. The contractor laid him off in early 1996.

Echazabal sued claiming, among other things, discrimination in violation of the ADA. For purposes of a summary judgment motion, Chevron conceded that Echazabal's liver condition was a disability or that it regarded him as disabled, but it defended its actions on the ground that Echazabal's disability would pose a "direct threat" to his own health in the employment he sought. Two medical witnesses disputed Chevron's judgment in this regard, but the district court granted summary judgment for Chevron on the ground that Chevron acted reasonably in relying on its own doctors' advice even if their advice proved incorrect. The Ninth Circuit reversed, holding that Chevron's concerns for Echazabal's own safety, as opposed to the safety of others, did not justify Chevron's discrimination. Chevron petitioned for certiorari.

Decision: Reversed and remanded for further proceedings. Chevron was permitted to consider the risk to Echazabal personally, and not just the risk to "others," but on remand Chevron will have to prove a sufficient basis for its opinion of Echazabal's risk.

1. **"Direct Threat" As One Type of Business Necessity**. The ADA provides an affirmative defense for rejection of an applicant/employee based on a job qualification that is "job-related" and "consistent with business necessity." The qualification or standard can be based on "a requirement that an individual shall not pose a direct threat to the health or safety of *other* individuals *in the workplace*," §12113(b). The EEOC has interpreted this provision to permit an employer to consider not only the risk to "other individuals," but also the risk to the individual applying for the position. 29 CFR §1630.15(b)(2).

a. Echazabal admitted that the "qualifications standards" affirmative defense (based on "job-relatedness" or "business necessity"), if left unqualified, might authorize an employer to reject an applicant whose condition posed a risk to his own personal safety. However, Echazabal argued that the ADA's further statement that a qualification standard could be based on the risk posed to "others" limited the affirmative defense and made it inapplicable where the risk was to the employee himself. Echazabal also noted that regulations under the older Rehabilitation Act had recognized both kinds of risks, and that Congress's express endorsement of a defense based on one risk, without addressing the other, was significant.

b. The Court rejected Echazabal's argument. The "business necessity" defense is broad, and grants the EEOC considerable leeway for interpretation. The statute's further statement that the defense might "include" risk to others was an example and not a limitation of the range of the defense. Moreover, Congress's failure to expressly endorse the EEOC's interpretation of the Rehabilitation Act was equivocal at best. Congress might just has well have assumed that the EEOC would use the same measure of discretion to interpret the ADA as it had used to interpret the Rehabilitation Act.

c. If Echazabal were correct in his interpretation, an employer would be barred not only from considering a threat to the employee/applicant's safety, but also to the safety of people outside the workplace.

2. **EEOC Interpretation Reasonable**. The EEOC's "direct threat" regulation is a reasonable interpretation of the job relatedness/business necessity defense.

a. **Legitimate Business Concerns**. Among the legitimate business reasons for Chevron's qualification standard were its concerns for lost working time due to sickness, excessive turnover due to medical retirement or death, state tort law liability [what about workers' compensation law?], and the risk of violating the OSH Act.

b. **OSH Act v. ADA**. The Court rejected Echazabal's argument that the lack of OSHA enforcement actions against the hiring of illness prone employees showed that OSH Act liability was a "red herring." "Although there may be an open question whether an employer would actually be liable under OSHA for hiring an individual who knowingly consented to the particular dangers the job would pose to him, there is no denying that the employer would be asking for trouble." Echazabal's interpretation of the ADA would put that law "at loggerheads" with the OSH Act, which requires an employer to provide for the safety of "each" and "every" worker. The EEOC made a reasonable resolution of the conflict between the ADA and the OSH Act.

c. **The Requirement of Supporting Objective Evidence**. The ADA requires employers to "give an even break to classes of disabled people" and to prohibit an employer's reliance on "untested and pretextual stereotypes." The EEOC's regulation permitting an employer to consider the risk to the applicant/employee is consistent with this goal, because the EEOC requires that the employer's action must be based on (1) "a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," (2) an "individualized assessment of the individual's present ability to safely perform the essential functions of the job," and (3) an assessment of the imminence of the risk and the severity of the potential harm. 29 CFR §1630.2(r).

3. **Paternalism**? Allowing an employer to consider the risk to the individual applicant/employee is not the kind of paternalism the ADA was meant to prevent. The Court's earlier decisions in Title VII cases (*e.g., Dothard* and *Johnson Controls*) expressing concern for employer policies rejecting women for jobs the employer believed were too risky for women do not require rejection of the EEOC's regulation. Those cases disapproved paternalistic judgments excluding the entire class of women, while the EEOC's regulation requires individualized risk assessment.

Observations: As the notes following *Echazabal* explain, the Supreme Court's decision was not the end of the road for Echazabal. The Court remanded the case to the Ninth Circuit, and the Ninth Circuit remanded the case to the district court. In the district court, Chevron might still fail to carry its burden of proving that its estimation of the risk to Echazabal was adequately supported by the kind of objective, individualized assessment required by the EEOC's regulations (which the Supreme Court seemed quite clearly to approve).

Problems

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1. The facts are designed to present a situation in which OSHA can require no more. Present levels of exposure to axylenia present a significant risk of death, but the industry has persuaded a court that further reductions in exposure levels would be economically infeasible. In case anyone might argue further, the facts also make it clear that the industry is so important that eliminating the industry would be worse than permitting it to continue at the current level of risk.

The facts steer discussion away from the ADA toward Title VII (and perhaps state laws prohibiting discrimination on the basis of genetics). Even if a genetic trait is not a "disability," there may be a close association between a genetic trait and race. The comparative "pass" rates for African-Americans versus others appears to satisfy the 4/5 rule for proof of disparate impact. If disparate impact is the correct theory for this situation, the employer must present a "business necessity defense." Title VII lacks a specific endorsement of a safety or health based defense. However, given the Court's opinion in *Echazabal*, the term "business necessity" in Title VII might be broad enough to encompass the same personal safety/health defense Chevron raised. Is there a less discriminatory alternative? Unfortunately, a court has already determined that further measures to reduce exposure levels or protect employees are infeasible.

One might also remember from Chapter Three that some states have enacted laws prohibiting discrimination on the basis of genetics. Assuming these laws lack anything like a business necessity or BFOQ defense, would the OSH Act preempt the states from enforcing such laws in this instance? I think not likely. The facts are that OSHA has not required the employer to discriminate against persons with this genetic trait. The OSH Act might still preempt a state's safety standard requiring what OSHA has not chosen to require, but I doubt a court would view a state's genetic discrimination law as a law regulating safety or health.

2. There is no clear answer to the question whether OSHA should require discrimination (or whether, on the petition of some interested party, a court would compel OSHA to adopt such a standard). One might question whether OSHA can regulate hiring and other employment practices as a kind of safety and health standard, but there is some precedent for such rules, as discussed in the notes after the *AFL-CIO* case. Some may argue that individual applicants should be free to decide for themselves whether to accept this risk. However, the Court's decision in *Echazabal* appears to condone a rule that would permit or require an employer to take this decision away from the individual, particularly in view of the potential costs to the employer. On the other hand, OSHA might choose not to require discrimination. The Court seems to have approved some leeway for OSHA in deciding whether to adopt a standard even in the face of evidence of need (see the section on cost-benefit analysis).

Chapter Six
Management and Supervision of the Workforce

A. Rights and Duties of Supervision

Kelley v. Johnson

Key facts: The Commissioner of the Suffolk County Police Department adopted a hair-grooming standard for male officers, regulating the style and length of hair, sideburns and mustaches, and prohibiting beards (except under certain medical conditions). The president of the police officers' union sued the department under §1983, alleging that the standard violated the officers' right of free expression under the First Amendment, and their due process and equal protection under the Fourteenth Amendment. The district court rendered judgment for the plaintiff, and the court of appeals affirmed. The Commissioner appealed to the Supreme Court.

Decision: Reversed. The hair grooming standard was not an unconstitutional intrusion on the officers' rights.

1. **Liberty Interest**? The plaintiff police officer claimed a liberty interest, protected by the due process clause of the 14^{th} Amendment, in personal appearance.

   a. **Personal Appearance Liberty Questionable**. The Court found no clear support for a liberty interest in personal appearance in any of its recent decisions involving liberty interests in procreation, marriage and family life. However, it assumed a liberty interest in personal appearance for the sake of argument.

   b. **Citizen v. Employee**: The plaintiff asserted a liberty interest in personal appearance not as a member of the general public, but as a police officer. Public employees do not relinquish their constitutional rights by accepting public employment, but the state's interests in regulating the behavior of public employees is different from its interests in regulating the behavior of citizens in general, and the state can regulate its employees in ways it could not regulate citizens in general. The standard in question "touches respondent as an employee of the county, and more particularly, as a policeman."

2. **Standard of Justification**. A public employer's regulation of its own employees is entitled to the same presumption of validity as are other state legislative actions. Here, the Commissioner had several reasons for adopting the standard. The court of appeals erred in requiring the Commissioner to prove a "genuine public need." Actually, the plaintiff police officer challenging the standard bore the burden of proving that there was "no rational connection" between the standard and any asserted legitimate purpose.

3. **Evidence Supporting Need**. The standard was sufficiently supported by the facts that nearly all police departments have deemed it important to maintain uniform appearance among their officers, in order to make officers easily recognizable, and for esprit de corps.

Observations:

The First Amendment claim appears to have been lost in the Court's decision, but this gap appears to have been mainly the fault of the plaintiff, or of both parties. In footnote 2, omitted from this reproduction of the Court's decision, the Court states simply, "the parties did not address any First Amendment issues in any detail in this Court." However, "governmental regulation of a citizen's personal appearance may in some circumstances not only deprive him of liberty under the Fourteenth Amendment but violate his First Amendment rights as well." Presumably, the Court's analysis of the Fourteenth Amendment claim was equally applicable to the First Amendment claim.

City of San Diego v. Roe

Key facts: The "speech" in this case was off-duty and away from the workplace—a completely "private" venture by Roe. The department discovered that Roe had produced and was selling pornographic videos in which he performed in a police uniform. The department ordered him to desist, and when he seemed to continue the department fired him for "conduct unbecoming of an officer, outside employment, and immoral conduct." Roe sued the city under Section 1983 and alleged his discharge was in violation of the First Amendment. The district court dismissed Roe's complaint finding that his videos did not involve a matter of "public concern" for purposes of First Amendment protection. The court of appeals disagreed, emphasizing that Roe produced the videos on his own time and away from the workplace, and the videos did not involve his work or workplace issues.

Decision: The decision of the court of appeals was reversed. Roe's videos were not protected by the First Amendment.

1. Public employees do not lose all First Amendment protection by virtue of their public employment. Moreover, a public employer cannot prohibit employees from any speaking or writing for profit on their own time. However, public employees are subject to work-related restrictions their employer could not impose on non-employee citizens. The extent of First Amendment protection for a public employee depends on whether the speech in question involves a matter of public concern, and whether the speech in question was off-duty. "[W]hen government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification 'far stronger than mere speculation' in regulating it."

2. The city had a sufficient interest in preventing employee speech of the type involved in this case, even if such speech took place off-duty and outside the workplace.

a. Roe's use of a police uniform (though not necessarily a San Diego uniform) in his performance and other deliberate links between his videos and the police profession brought the work of the police into disrepute.

b. The *Pickering* line of cases requires a court to balance the employer's interest in the efficient performance of government services against the employee's (and public's) interest in free speech concerning matters of public concern.. But the *Pickering* balancing test does not apply to a case in which the speech in question does not involve a matter of public concern.

> (1) A "matter of public concern" is a "subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."
>
> (2) Even some private remarks such as the criticism of the President in Rankin could qualify as a matter of "public concern."
>
> (3) But the speech in this case "did nothing to inform the public about any aspect of the SDPD's functioning or operation. Nor did it involve a private remark about political issues. Roe's speech was simply "designed to exploit his employer's image."

Observations:

This per curium decision finds the facts "not a close case." Many students will likely agree this was an easy case. But what Roe had not used a police uniform in his performance and made no other reference to police work or the police profession? Even with his use of the police uniform, is the Court correct in presuming harm? To whom? The City of San Diego? Or the profession of law enforcement in general? Do students believe this harm was real? Perhaps the speech in this case was simply underserving of more than the slightest protection.

Kristie's Katering, Inc. v. Ameri

Key facts: The facts are a bit garbled. It appears that all the witnesses were evasive about certain facts. The story, according to Ameri, appears to have unfolded as follows: Ameri, a citizen of Yemen who had come to the U.S. for college, often went to the Discovery Club for dancing and entertainment. Before the events giving rise to this lawsuit, he had encountered trouble with the Discovery Club's security. In one incident, Ameri had a "dispute" with Charleston, one of the security guards, in the parking lot. The dissenting judge clarifies the circumstances of this dispute. Ameri had intervened in a confrontation between Charleston and another person, and Ameri was a “witness” against Charleston. Sometime after that incident, Charleston reportedly told Ameri, “I will get you.”

About six weeks later Ameri arrived at the Discovery Club with a friend, Saif. Saif argued with another man, and Ameri tried to intervene and separate the two, but he was unsuccessful. The disc jockey announced that the club was closing, and as Ameri tried to leave, Charleston (the security guard) grabbed Ameri from behind and wrapped his arm around Ameri’s neck. While Charleston held Ameri, another guard hit Ameri in the face and broke his nose.

Ameri sued the owner of the Discovery Club. At trial, Charleston denied everything. He denied that he had ever met Ameri or ever fought with Ameri. He denied the earlier dispute with Ameri in the parking lot, “because we didn’t have any liability [insurance?] on what happened in the parking lot.”

The owner of the club testified that he was in charge of security and hired the security guards, but that he had no formal training program for security guards, no training manuals, materials, or workbooks, and no written rules or regulations governing their conduct. He testified that most of the security guards he hired were experienced and he expected them to use common sense on the job.

The jury awarded Ameri damages of $16,000. The owner moved for judgment notwithstanding the verdict. The trial court denied the motion and the owner appealed.

Decision: Affirmed. There was sufficient evidence to support the jury’s finding that the owner was negligent in training and supervising the guards.

1. There was evidence to support the jury’s verdict either under a theory of *respondeat superior* or negligent training and supervision.

> a. As for *respondeat superior*, the evidence was sufficient to show that the security guards were acting in the scope of their employment when they assaulted Ameri.
>
> b. Even if *respondeat superior* were inapplicable, there was evidence to support the verdict based on the employer’s own negligence in training and supervising the guards. The employer had no training program, written materials or rules for the supervision of the guards in restraining or ejecting unruly customers, although the evidence showed that the guards regularly needed to perform this work. But even assuming these omissions constituted negligence of the employer, did these omissions *cause* the assault? The court’s resolution of the issue of causation is quite vague.

2. Justice Robbins, dissenting, found the evidence insufficient to support a finding that the guards were acting in the scope of their employment, that the employer was negligent in supervising them, or that any such negligence was a proximate cause of the assault..

a. The guards clearly acted with intentional malice, and Charleston in particular was motivated by revenge. [Thus, the guards were not acting in the scope of their employment].

b. The lack of training or supervision was not the proximate cause of the assault. No amount of training, manuals, or rules would have prevented this personal and intentional act of violence.

Observations:

The evasiveness of the witnesses is part of the story. Evidence of Ameri's first incident with Charleston certainly made a claim against Charleston for the second incident much stronger because it showed a motive for the assault. However, the lawsuit was against the club owner, not Charleston. Interestingly, Ameri revealed the first incident *only* under cross examination. Evidently, he or his attorney worried that the court would conclude (as did the dissent) that the first incident proved that the second incident was a purely "personal" matter between Charleston and Ameri, and that the second incident (which was the basis for the lawsuit) had nothing to do with the purposes for which the club owner employed Charleston (taking the matter outside the scope of employment).

Charleston appears to have been a reluctant and evasive witness for either party. He probably had little interest in helping with the defense of his (former?) employer, especially because the employer's defense was to present the matter as a personal dispute outside the scope of employment. Presenting the assault as a personal dispute might have saved the owner from liability if it had worked, but it also would have exposed Charleston to greater personal liability. And then there's the complication of liability insurance. A liability insurance policy for the club owner might cover employee torts in the scope of employment but not outside the scope of employment. And if the employer is defended by an insurance company, what strategy should the defense lawyer take? Thus, Charleston's "denial" that the first incident ever happened may have been intentionally sarcastic. He might also have been bound by his earlier statements in any investigation of the first incident.

Of course, it is not unusual for an employer, employee-tortfeasor, victim and insurer to have a web of conflicting interests in this situation. A closely related problem is the matter of joint representation. Attorneys sometimes try to represent both a defendant employer and the employee-tortfeasor, but there is risk in doing so.

Respondeat superior and negligent supervision are a backdrop for the next series of cases involving abusive supervision and sexual harassment.

GTE Southwest, Inc. v. Bruce

GTE employed Shields as a supply operations supervisor, in a department with eight subordinate employees. The Court makes a point of noting that Shields was a former Army supply sergeant. From the beginning of his tenure as a supervisor for the GTE office in question, he regularly spoke with vulgar, offensive and obscene language. His use of abusive language appeared to be more than an accident. It appeared that Shields intended to humiliate the employees. Employees complained to Shields about his language on several occasions. His typical response was "I will do and say any damn thing I want. And I don't give a s___ who likes it." When the employees complained about Shields's behavior, he told them "he was in a position to get even for what [the employees] had done."

When angry at an employee, Shields would "bend his head down, put his arms straight down by his sides, ball his hands into fists, and walk quickly toward or 'lunge' at the employees, stopping uncomfortably close to their faces while screaming and yelling." The image the court conveys is perhaps intentionally reminiscent of the sergeant in the old TV show, "Gomer Pyle, USMC." Shields seemed to do this to frighten the employees, and sometimes they did fear that Shields would hit them. He often berated and intimidated employees in this fashion in front of the others and not in private.

Shields became enraged if little things were out of order. He frequently threatened that the employees would be fired, and that they "could be replaced by two Kelly girls." He urged one of the employees to quit.

Three employees, Bruce, Davis and Poelstra, filed suit, alleging that GTE intentionally inflicted emotional distress against them by the actions of Shields. A jury awarded a total of $275,000, split among the three plaintiffs. GTE appealed to the court of appeals, which affirmed. GTE then appealed to the Supreme Court of Texas.

Decision: Affirmed. The evidence was sufficient to support a finding that Shields had committed the tort of intentional infliction of emotional distress ("outrage"), and liability was properly imputed to GTE.

1. **Workers' Compensation Remedy**? In an omitted portion of the court's opinion, the court held that the plaintiffs' emotional distress was not a compensable injury for purposes of workers' compensation law, and therefore the exclusive remedy defense did not bar their tort claim against the employer.

2. **Imputing the Tort of Outrage**. The evidence supported the jury's finding that Shields had committed the tort of intentional infliction of emotional distress. The elements of the tort: (a) outrageous conduct; (b) intent; (c) a causal link between the outrageous conduct and the plaintiff's distress; and (d) severe distress. The key issues for the court were whether Shields's conduct was "outrageous," and whether his intent should be imputed to GTE.

3. **Evidence of Outrageous Behavior**. The evidence showed "extreme and outrageous" behavior by Shields.

a. **Special Standard for Employment**? Is an employee entitled to greater protection against an employer's outrageous conduct than if he were a "stranger" to the employer?

(1) Some courts favor an affirmative answer, focusing on the employee's side of the equation: The employee is a captive audience, dependent on the employer, and may be subject to prolonged abuse without easy retreat.

(2) The Texas court, however, followed a different approach which focuses on the employer's side of the equation:

(a) The employer needs some leeway to supervise, review, and discipline, even though this might involve some unpleasantness.

(b) Thus, a claim will not lie for an "ordinary employment dispute." Criticism, even if unfair, is still to be expected in employment relations.

(c) A plaintiff employee must prove conduct that is "outside the scope of an ordinary employment dispute" and that is "extreme and outrageous."

b. **Cumulative Effects**. GTE argued that none of Shields's actions, taken in isolation, was "outrageous." However, in determining whether an employer exceeded the bounds of an "ordinary employment dispute" and acted "outrageously," the court could consider the cumulative effect of many incidents. The court noted the example of discriminatory harassment cases, in which courts consider the offensive conduct as a whole.

c. **Was Conduct "Outrageous**?" Taken as a whole, Shields's conduct was more than the usual insults, indignities or annoyances that fall short of outrageous behavior in the employment context. Shields "greatly exceeded the necessary leeway to supervise, criticize ... and discipline, and created a workplace that was a den of terror for the employees." And his abusive conduct was "common, not rare." "Terrorizing" employees is unacceptable. If Shields was dissatisfied with the plaintiffs conduct, he should have terminated them, disciplined them, or taken some more appropriate approach to the problem.

4. **Imputing the Tort**. Shields's intentional tort was in the scope of his authority, and was properly imputed to GTE.

a. An employer is only liable for an employee's actions within the scope of his employment. An intentional tort can be in the scope of the employee's employment if the action, though not specifically authorized by the employer, was closely connected with the employee's duties. For example, an intentional tort is in the scope of employment when an employee commits the tort in the accomplishment of his duties, rather than because of personal animosity.

b. Shields's actions were in the scope of his employment, and GTE seemed to admit as much when it argued that the case involved ordinary employment disputes. There was no evidence that Shields was motivated by a personal dispute.

5. **Injury and Causation**. The plaintiffs proved that Shields's conduct caused their distress, and that their distress was severe.

Observations: I omitted some parts of the opinion that include other facts indicating that GTE was aware of Shields's unusual management style, which probably explains his threat to "get even" with the plaintiffs. Such evidence might have supported an alternative "ratification" basis for imputing liability to GTE, but the Court did not rely on ratification and it did not rely on evidence of management's knowledge for any other purpose.

There was a concurring opinion that worried that the case was much closer than the majority would have us believe. Justice Owens agreed with the result reached by the majority, but not with the majority's reasoning. Justice Owens believed that Shields crossed the line of civilized behavior only because he "physically threatened" the plaintiffs, and because some of his conduct constituted "sexual harassment." But she did not agree that profanity, threats to fire, and the other humiliations were sufficiently outrageous to be tortious.

Burlington Industries, Inc. v. Ellerth

Key facts: Ellerth was a salesperson for Burlington in its Chicago office. She reported to a supervisor in the same office, and her supervisor reported to Slowik, who was stationed in New York and was the alleged harasser in this case. Slowik was a "midlevel manager" with the title of vice president. He had authority to make hiring and promotion decisions subject to the approval of his own supervisor.

There were three particularly important "harassment" incidents involving Slowik and Ellerth over the course of about a year. First, during a business trip, Slowik invited Ellerth to join him in the hotel lounge. Ellerth accepted his invitation because Slowik was her boss, but she gave no encouragement when he made remarks about her breasts. Slowik told Ellerth to "loosen up," and he warned, "I could make your life very hard or very easy...."

Second, when Ellerth sought a promotion, Slowik interviewed her and told her that she was not "loose enough," and he reached over and rubbed her knee. Ellerth received the promotion, but Slowik then told her "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs."

Third, Ellerth called Slowik to ask permission to insert a customer's logo into a fabric sample. Slowik replied, "I don't have time for you right now, Kim ...–unless you want to tell me what you're wearing." Ellerth told Slowik she had to go and she ended the call. When Ellerth called a day or two later to renew her request, Slowik refused and added, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."

Burlington had a policy against sexual harassment, but Ellerth did not report any of these incidents to anyone with authority during her employment. In fact, she later explained that she did not bring Slowik's conduct to the attention of her direct supervisor because "it would be his duty as my supervisor to report any incidents of sexual harassment." However, on one occasion she told Slowik he had made an inappropriate comment.

A short time after the third alleged harassment incident, Ellerth's supervisor cautioned her to return customer telephone calls promptly. In response, Ellerth quit and presented a letter listing reasons not including sexual harassment. Three weeks later, she sent a second letter explaining that she quit because of Slowik's behavior.

Ellerth sued Burlington under Title VII for sexual harassment and constructive discharge. The district court granted summary judgment to Burlington. The court of appeals reversed, and Burlington petitioned for a writ of certiorari.

Decision: The Court affirmed the decision of the court of appeals remanding Ellerth's claims for trial. There were triable issues of fact with respect to Burlington's liability for Slowik's alleged harassment.

1. **A New Dichotomy**? The Court assumed, for purposes of its decision of other issues, that Slowik had threatened to retaliate against Ellerth if she did not submit to his sexual overtures. Slowik did not carry out these threats (he approved her promotion, and he did not discharge her), and this fact had been important in the lower courts, which had relied on the "quid pro quo" versus "hostile environment" dichotomy for purposes of vicarious employer liability. However, the Court now downplayed the importance of labeling sexual harassment either "quid pro quo" or "hostile environment." Later, the Court appears to offer a new dichotomy: Tangible job actions versus hostile environment.

2. **Agency Law As Source**. The Court looked to agency law to determine an employer's vicarious liability for a supervisor's harassment of a subordinate, noting that Title VII defines "employer" to include "agents." The Court looked to the "general" law of agency, and not the

law of any particular state. In particular, the Court relied on the Restatement (Second) of Agency (1957).

3. **Scope of Employment**. The starting point for an employer's vicarious liability is the rule, stated in the Restatement, that "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."

a. Courts once routinely rejected that an employer was liable for an employee's intentional torts. Today, courts still agree that employer liability for intentional torts is limited, but they hold an employer liable if an employee's "purpose, however misguided, is wholly or in part to further the master's business."

b. A supervisor's sexual harassment is usually motivated by sexual urges or other personal motivations and is not conduct within the scope of employment.

4. **Beyond the Scope of Employment**. Although sexual harassment is generally outside the scope of a supervisor's authority, an employer might still be vicariously liable in some cases. The Restatement lists the following types of cases in which an employer may be liable for actions outside the scope of an employee's authority:

a. The employer intended the conduct or the consequences (e.g., where the agent's high rank makes him the employer's alter ego**—**inapplicable).

b. *The master was negligent or reckless* (e.g., where the employer knew of the harassment and failed to stop it**—**possible in harassment cases but not the Court's choice for analyzing this case).

c. The conduct violated a non-delegable duty of the master (inapplicable here).

d. The employee purported to act or to speak with authority he did not really have, (but in the usual supervisory harassment case the supervisor really did have authority, and therefore this category is inapplicable), *or* in committing the tort**,** *he was aided by the existence of the agency relation*.

5. **Tangible Employment Action.** Where the harasser is a supervisor, the "aided in the agency relation" standard is most likely applicable for determining the employer's liability.

a. The "aided in agency" rule applies when a supervisor takes a tangible employment action against the subordinate. A tangible employment action is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." Such action often requires the imprimatur of the enterprise and the use of its internal processes. The authority to take a tangible employment action distinguishes a supervisor from a mere co-employee.

b. Examples of tangible employment actions: hiring, firing, failing to promote, reassignment with significantly different responsibilities, or other significant change in employment status.

c. A supervisor's tangible employment action against an employee is the act of the employer for purposes of Title VII. The agency relation standard is met whenever a supervisor takes a tangible employment action against a subordinate.

6. **No Tangible Employment Action**. When a supervisor's harassment does *not* culminate in a tangible employment action [e.g., his action created only a hostile atmosphere], the employer's liability under the "aided in agency" rule is less certain.

a. A supervisor is always aided by the agency relation to the extent his position makes his harassment particularly threatening.

b. However, a supervisor's action may be no different from what a co-employee might commit, and the supervisor's status might make little difference in enabling him to harass another employee.

c. In cases not involving tangible employment actions, Title VII policies might provide other reasons for limiting an employer's liability, aside from the rules of agency. These policies include encouraging employers to adopt anti-harassment policies and grievance mechanisms, and encouraging conciliation rather than litigation. The Court also noted the "avoidable consequences" rule of tort law.

7. **Summary of Employer Liability**. The Court summarized the following rules of vicarious liability for harm caused by a supervisor's misuse of his authority to commit sexual harassment:

a. "An employer is subject to vicarious liability ... for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."

b. However, if the employee has suffered no tangible employment action, the employer may assert an affirmative defense that "comprises two necessary elements:" (a) the employer exercised "reasonable care to prevent and correct promptly any sexually harassing behavior," and (b) the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

c. The Court reiterated that the affirmative defense is not available if the supervisor's harassment culminated in a tangible employment action.

8. **On Remand**. Because Ellerth had presented her case as a quid pro quo claim in accordance with prior law, she should have an opportunity on remand to show that she has a claim under the rules announced in this case. Burlington should have an opportunity to prove an affirmative defense.

Observations:

In addition to "aided in the agency" based liability, there are two other standards for employer liability when a harasser is acting outside the scope of his authority (as he almost always is). First, an owner or other very highly placed manager might be an alter ego, and the court can simply treat his actions as the action of the enterprise.

Second, the Court's opinion implies that the "negligence" standard for employer liability will be available in other types of cases, particularly those involving co-employees. To prove negligence, however, it appears that a plaintiff would have to prove that the employer knew of the harassment and failed to stop it. This means that a plaintiff alleging co-employee harassment bears the burden of proving the sort of facts that are the *employer*'s burden to disprove when the harasser is a *supervisor*.

Problems

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1. In discussing this problem, you may wish to consider the results of a survey of managers by the American Management Association, which shows that 12 percent of managers married someone they started dating at work. Another 7 percent entered into long-term relationships with someone they started dating at work. *AMA 2003 Survey on Workplace Dating*, http://www.amanet.org/research/pdfs/dating_workplace03.pdf.

> a. The likely motivations for such a policy are practical (to reduce distraction, jealousy and conflict) and legal (sexual harassment). The Notes point out that many relationships that appear to be welcome to both sides at the start can take a bad turn, and can result in a harassment charge.
>
> b. Enforcing such a policy creates new problems. First, there is the intrusion on employee privacy and autonomy. In the public sector, the right of privacy might preclude such a policy. Monitoring is also likely to be a problem. Will an employer know the difference between "dating" and other social interaction? Could the policy "chill" social interactions in a way that could be detrimental to gender equality?

2. Of course, the very premise of Title VII is that we *do* have to change the way we are. If the station is perpetuating an environment "hostile" to women by failing to regulate the behavior of the men, it may have violated Title VII. The wall decorations were there before

Blaze, so they do not appear to be part of an effort purposely to annoy her or drive her from the workplace. Still, if it would be reasonable for her to be offended, she might have a viable claim.

If the department prohibits Playboy, Penthouse, and similar magazines in the living quarters of the station, there could be a First Amendment problem, but the department could probably avoid a successful First Amendment challenge by prohibiting only the display of the pictures and not the reading of the magazines.

3. In any other working environment, the question whether Swizler committed sexual harassment would depend on whether his conduct was severe or pervasive. When it comes to intimate touching like an attempt to kiss, one incident by a manager might be enough, and it's fairly clear that Swizler's advance was unwelcome. Hoover's might have a good affirmative defense if it had a policy and an effective grievance procedure.

Hoover's has a further defense that Tips was not *subjectively* offended by Swizler's conduct, considering the fact that she routinely tolerated such conduct by customers. Tips will argue in reply that a manager, by virtue of his authority, is much more intimidating than a customer because of his control over her employment. Also, whatever Tips should have expected from customers when she accepted the job, she was not required to expect the same behavior from her boss.

B. Intrusive Investigation of Employees

Kelly v. West Cash & Carry Building Materials Store

Key facts: Kelly was an assistant head cashier at West Cash & Carry Buildings Materials Store. Shortly after her promotion to this position, the store held an employee meeting to announce its concern that there was an inventory shortage and that someone might have helped a customer leave with merchandise without paying. An employee later reported to the manager that an unknown customer had left the store without a receipt because Kelly had "vouched" for him. Another employee confirmed the story.

The manager and two other store managers met with Kelly in his office beginning at 10 a.m. to question her about the incident. They immediately accused her of stealing a lawnmower and other merchandise by helping the unidentified customer. Kelly denied the charge, and she denied having "vouched" for a customer. The managers told Kelly that if she would confess, they would not call the police. Kelly still refused to confess.

The managers kept Kelly in the office for about three hours (the store contended that the interrogation lasted only sixty minutes). When she stood up and walked near the closed door, the store manager ordered her to sit down, and he and the other managers continued to question her. However, Kelly never asked to leave, and the door to the office was not locked.

Eventually Kelly's husband arrived, and he told her she "did not have to stay there and take this." But the managers told Mr. Kelly that his wife must stay, and they ordered Mr. Kelly to leave. Kelly's father also arrived a little later, but by then the police had arrived and they placed her under arrest.

Criminal charges against Kelly were ultimately dropped. In addition, the local unemployment compensation agency rejected the store's argument that Kelly was discharged for misconduct based on theft, and the agency awarded benefits to Kelly.

Kelly sued for false arrest and imprisonment, and for the intentional infliction of emotional distress. The trial court granted summary judgment in favor of the store, and dismissed Kelly's claims. Kelly appealed.

Decision: Affirmed. The store did not unlawfully restrain Kelly, because she was always free to leave during her interrogation.

1. **False Imprisonment Defined**. False imprisonment is an unlawful and total restraint of liberty. When a person submits to an employer's directions without force or threats [other than the threat to discharge], there is no false imprisonment.

2. **Restraints in Employment**. It is a normal part of the employment relationship that an employer gives instructions to the employee that restrict the employee's freedom of movement, but such instructions, standing alone, do not constitute false imprisonment. [And this is true even if the employee will suffer discharge if she disobeys].

3. **Evidence Insufficient**.

a. Instructing Kelly to remain in the room in her capacity as an employee was not unlawful restraint

b. Threatening to call the police if Kelly did not confess did not constitute the unlawful use of force for purposes of false imprisonment. Such a threat might render any resulting confession involuntary, but it would not constitute unlawful force for purposes of false imprisonment.

c. The fact that the store permitted Kelly to make telephone calls and to receive visits from family members supported the view that there was no false imprisonment.

4. Shoplifter Law. The store did not violate a statute that permits a store to detain a suspected shoplifter for no more than sixty minutes. Assuming the statute applied to an employer's interrogation of its own employee, the store did not restrain Kelly for any length of time because she was always free to leave.

5. Outrage: The court also rejected Kelly's claim for intentional infliction of emotional distress, although without much discussion why, except that it did not involve any claim "separate and apart from" false imprisonment.

6. Dissenting, Judge Murray believed that the manager's instruction that Kelly must not leave, combined with the summoning and arrival of the police, might have created an issue of fact whether there was false imprisonment.

Observations: Employers often walk a thin line between using various psychological techniques to extract a confession from an employee by seeming to corner the employee, and leaving the employee "free" to leave at will. The difference between the majority and the dissent appears to boil down to the fact that the store seemed to detain Kelly so that the police could arrest her. Its purpose was not so much an arrest as a confession, but it clearly intended to use the impending threat of the former to obtain the latter.

Because of the psychological pressure an employer sometimes exerts on an employee to obtain a confession, the more likely tort is intentional infliction of emotional distress, and the case law summarized in the Notes suggests that employees are more likely to prevail under this theory.

IBM Corporation

Key facts: After receiving a former employee's letter charging sexual harassment, IBM conducted investigatory interviews of three employees (the "charging parties" in this case). None of these employees requested the presence of a witness during the first round of interviews. At the outset of the second round of interviews, IBM rejected each employee's request to have a co-worker present, and it rejected one employee's request to have an attorney present. IBM discharged all three employees about a month later.

The discharged employees filed charges with the NLRB alleging that IBM's denial of their requests for a fellow employee at their investigatory interviews constituted interference with their *Weingarten* rights. The ALJ, applying what was then the law (*Epilepsy Foundation*) held that IBM had committed an unfair labor practice, even though the employees were not represented by a union and were not subject to a collective bargaining agreement. IBM appealed to the NLRB.

Decision: Reversed. The complaint against IBM was dismissed. The Board overruled its decision in *Epilepsy Foundation*, and returned to its pre-*Epilepsy Foundation* rule that the *Weingarten* doctrine does not apply in the nonunion context.

1. **Need for Reconsideration**? In recent years, new legislation and certain events have presented employers with new reasons to conduct investigations of employees in cases of sexual

harassment, financial impropriety, and terrorist threats. These developments strengthen the policy considerations that once led the Board to reject the extension of *Weingarten* to nonunion settings.

2. **Reasons for Weingarten Inapplicable**. The premises of Weingarten do not support its extension to the non-union setting.

a. *Weingarten* was based on the idea that a union representative would safeguard the interests of the entire bargaining unit, but a co-worker in the nonunion setting does not represent the interests of the entire workforce. A nonunion co-worker owes no duty of fair representation.

b. *Weingarten* was based on the idea that a union representative would level the playing field. He has the collective force of the bargaining unit behind him. He also has experience in dealing with the employer, which contributes to consistency and efficiency of the dispute resolution process. A co-worker in a nonunion setting lacks these characteristics.

3. **Practical Considerations**. There are additional reasons why the presence of a co-worker is likely to impede the investigation without supplying much real aid to the employee.

a. **Advocacy Skills**. A union representative is likely to have certain skills in eliciting facts and clarifying the issues. He is familiar with the "law of the shop." He is experienced in proposing solutions. A co-worker with no training or experience could actually frustrate or interfere with the investigation, especially if he has a personal or emotional connection to the employee under investigation. Even worse, he might be a co-conspirator in the matter under investigation.

b. **Confidentiality**. Many employer investigations involve matters of very private matters, such as sexual harassment, drug use, or health problems. Confidentiality is important in such investigations, and a union representative's duty of fair representation helps to assure confidentiality.

(1) A nonunion co-worker has no duty, and his lack of experience makes it more likely that he will inadvertently disclose confidential information to others.

(2) A co-worker can impede the investigation if the interviewee becomes more inhibited in answering questions in the presence of the co-worker, or if the co-worker discloses to other potential interviewees the fact and nature of the investigation and the questions the employer is asking. These risks are reduced in the union setting because of the union representative's duty of fair representation and his interest in an amicable relationship with the employer.

c. **Quality of Employer's Factfinding**. An employer can avoid these problems by proceeding without an interview of the employee, but the employee then loses his chance to present his side of the story, and the employer is exposed to the charge that it did not conduct a fair and complete investigation.

4. Dissenting, Board Members Liebman and Walsh argued that the NLRA requires that employee and employer interests must be balanced, but the majority's approach completely sacrificed employee interests for the employer interests. Moreover, if the presence of another employee in the interview might thwart the employer's purposes, a union representative might have this effect too. A union representative's skill might make him even more effective in frustrating the investigation. The dissenters proposed a different balance of interests in which nonunion employees could request the presence of a co-worker, but the employer could reject a particular co-worker if he presented a special risk to the investigation, as would a potential co-conspirator.

Blackwell v. 53rd-Ellis Currency Exchange

Key facts: Blackwell was a cashier for 53rd-Ellis. The company discovered that a notary seal was missing, and apparently there was also a cash shortage. The company announced that all the employees at the facility would have to undergo a polygraph examination.

A day or two after the general announcement, Blackwell received and signed a statement acknowledging that 53rd-Ellis had requested that she and other employees submit to the test. The company administered the test one day later. Immediately after the test, the examiner informed Blackwell that she had passed the test, and the owner also informed her of this fact when she reported for work later that afternoon.

About two weeks after the polygraph examination, 53rd-Ellis discharged Blackwell for cashing several forged checks, misrepresenting the verification of a $1300 cashier's check, failing to perform certain tasks, and being "sassy."

Blackwell sued 53rd-Ellis under the Employee Polygraph Protection Act, seeking reinstatement, actual damages, punitive damages, and attorney's fees. She moved for partial summary judgment on the issue of liability.

Decision: Partial summary judgment granted in favor of Blackwell. The company's administration of the examination was unlawful because it did not qualify for any of the act's exemptions. Damages remained to be determined.

1. **The Investigatory Exception**. The EPPA begins with a broad prohibition against any use of a "lie detector" in the employment context. However, it provides a limited exemption in the case of an employer's use of a "polygraph" (but not any other "lie detector") in an "ongoing

investigation" involving economic loss to the business. Among the requirements for the "ongoing investigation" exemption are:

a. the employee had access to the property in question; and

b. the employer had a reasonable suspicion that the employee was involved.

2. **No Reasonable Suspicion**. Blackwell may have had access to the property, but the employer did not have an independent basis for reasonable suspicion.

a. Blackwell argued that 53rd-Ellis did not have a reasonable suspicion that she was involved in the loss of the cash and seal, because 53rd-Ellis had simply administered the test to everyone without stating any reason why it was suspicious of any particular person.

b. In response, 53rd-Ellis argued that it had reasonable suspicion of Blackwell and *all* the employees because they all had access to the missing property.

c. The court found that legislative history and the DOL's regulations supported Blackwell's view that the requirement of "reasonable suspicion" meant an "observable articulable basis in fact" other than the loss and the employee's access. Access, standing alone, might support a reasonable suspicion as to a particular employee if that employee was the *only* person with access at the time the loss occurred, but such was not the case in this instance.

d. The defendants failed to show a reasonable suspicion that Blackwell was involved in the loss of the missing seal and cash.

3. **Procedural Failures**. The defendants also failed to provide Blackwell with the notice the act requires in advance of a polygraph test. Among other things, the notice must include a statement of the particular loss being investigated, and the basis for the employer's reasonable suspicion of the employee. The employee must receive this statement at least 48 hours in advance of the test.

a. The company's notice failed to state the basis for its suspicion of Blackwell, and it failed to include other information required by the act.

b. The company delivered its notice to Blackwell in fewer than 48 hours before the examination.

c. The company was not entitled to the exemption for an "ongoing investigation" for the additional reason that its notice was defective and untimely.

Observations:

1. As explained in the notes, the court later vacated its opinion. Had Blackwell proceeded to trial on the issue of damages, it is questionable whether she would have recovered any damages in the absence of proof that the examination caused emotional distress or that her discharge for other reasons was a pretext (i.e., contrary to the company's initial statement to her, she really "failed" the unlawfully administered examination).

2. If the Secretary of Labor had brought an enforcement action against the company, it could have collected up to $10,000 in civil penalties for the company's violations of the act, but the money evidently would have gone to the U.S. Treasury, and not to Blackwell. *See* 29 U.S.C. §2005(a).

3. The Act requires an employer to provide an employee with a copy of the results and the examiner's report before the employer takes any adverse action against the employee. What if the employee's own expert interprets the results differently? What if the first examiner was "negligent" in his interpretation? The EPPA does not address these problems. In this regard, it resembles the Fair Credit Reporting Act, offering no remedy for an erroneous or negligently prepared report. On the other hand, the EPPA does *not* preempt local tort law.

4. Note that the investigatory exemption applies only to "polygraph" examinations. It does not apply to the use of any other "lie detector."

Problem
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Because sexual harassment cases often involve a swearing match between the accuser and the accused, and frequently without any other witnesses, it may be tempting to an employer to use a lie detector to break the deadlock. The EPPA does provide an exemption for an ongoing investigation, but the investigation must involve an "economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of industrial espionage or sabotage." Is sexual harassment an "injury to the employer's business?" Perhaps, if "injury" to the "business" includes an employer's potential liability. But none of the examples included in the statement of the rule are comparable to sexual harassment. Razor will probably rely on *ejusdem generis* as a rule of interpretation to argue that the injury must involve a loss of property by an act of dishonesty.

If a court were willing to adopt a broader interpretation of the "ongoing investigation" exemption, there is another potential problem for Sleuth. It cannot discharge Razor for his refusal to take the test. It can, however, discharge him for sexual harassment based on evidence other than the refusal to take the test. That evidence could be the same evidence that gave Sleuth sufficient grounds for suspicion to offer the test (Mohr's statement against Razor). By my reading of the act, it might even include the results of Mohr's lie detector test.

O'Connor v. Ortega

Key facts: Dr. Ortega was the Chief of Professional Education at a state hospital, a position he had held for 17 years. In 1981, other officials at the hospital believed Ortega might have coercively and improperly solicited "donations" from residents for the purchase of a computer for the residency program, that he might have sexually harassed two female employees, and that he might have taken improper disciplinary action against a resident. The hospital placed Ortega on paid administrative leave pending investigation, with instructions that Ortega should stay away from the hospital during the investigation.

An investigative team eventually decided to enter Ortega's office, but the reason for this decision was unclear. Initially, the investigative team said that they entered Ortega's office pursuant to a hospital rule requiring an inventory of hospital property when an employee was terminated. However, this explanation was somewhat suspicious because Ortega had not been terminated. He was on administrative leave with the possibility of returning to active duty. Moreover, the investigators did not in fact separate or remove state property or perform any inventory.

Ortega contended that the real reason for the search was to look for evidence to use against him in disciplinary proceedings. Indeed, the investigators searched very thoroughly and removed Ortega's billing records for his private patients. They also removed a number of personal items from Ortega's office, including a Valentine Day's Card, a photograph and book of poetry sent to Ortega by a former resident. These items were later used at the disciplinary hearing to impeach the resident who sent them.

The hospital eventually conducted a disciplinary proceeding against Ortega and terminated his employment. Ortega sued the hospital under §1983 alleging that the search violated his Fourth Amendment rights. The district court granted summary judgment in favor of the hospital and the individual defendants, and dismissed Ortega's claims. The court of appeals reversed, finding that Ortega was entitled to summary judgment on the issue of liability. The defendants appealed to the Supreme Court.

Decision: Remanded to the lower courts to reconsider Ortega's claims in light of the Court's opinion.

1. **Workplace Privacy Possible**? Ortega's Fourth Amendment rights were implicated only if he had an "expectation of privacy that society is prepared to consider reasonable." This case involved the issue whether Ortega could have a reasonable expectation of privacy in a part of the workplace.

a. The "workplace" includes areas and items (e.g., desks and file cabinets) related to work and generally within the employer's control. Such areas and items remain part of the workplace even though an employee has placed personal items in them, such as a photograph placed in a desk.

b. However, while an employee may have no expectation in the outward appearance of personal luggage or other closed personal items he brings to the workplace, the contents of a closed personal container may be subject to different standards.

c. The Court had previously recognized that employees may have a Fourth Amendment right against searches by the police in the workplace. *Mancusi*: a private sector employee who shared an office with another employee had a Fourth Amendment right against a warrantless search of the office by police.

d. A public employee can also have some expectation of privacy in a public workplace. "Individuals do not lose Fourth Amendment rights merely because the work for the government instead of a private employer."

2. **Limits on Employee Expectations**. In comparison with the expectation of privacy against police searches, an employee has a lesser expectation of privacy against workplace searches by the employer.

a. In *Mancusi*, for example, the Court suggested that the employee would not have had the same expectation of privacy had the search been by the employer.

b. Expectations of workplace privacy may be limited by office procedures and regulations.

3. **A Test of Reasonableness**. The reasonableness of an employee's expectation of privacy must be assessed in the context of the employment relation.

a. An office is usually not a private enclave. It is open and subject to entry by other employees and visitors.

b. Even an office assigned to particular individual might be subject to regular visits by other employees.

c. Some offices may be so open that there can be no reasonable expectation of privacy.

d. Whether an employee has a reasonable expectation of privacy with respect to some area of or item in the workplace must be decided on a case by case basis.

4. **Was Ortega's Expectation Reasonable**? A common ground for a majority of the Court (including two concurring Justices and three dissenting Justices) was that Ortega had a reasonable expectation of privacy in his *office*. All Justices (including those represented by the opinion of the Court) agreed that Ortega had a reasonable expectation of privacy with respect to his *desk and file cabinets*.

a. Ortega did not share his desk and file cabinets with other employees.

b. He had occupied the office for 17 years and kept personal items in the desk.

c. There was no hospital rule or regulation depriving employees of any expectation of privacy in desks or filing cabinets (although the absence of such a rule would not necessarily leave employees with an expectation of privacy).

5. **Was the Search Reasonable**? Given that Ortega had a reasonable expectation of privacy at least with respect to his desk and file cabinets (and according to the concurring and dissenting Justices, also with respect to the office as a whole), it was necessary to determine ***if the search was reasonable***. The appropriate standards depend on a balancing of employee privacy interests against the government's need for supervision, control and efficient operations.

a. **Is a warrant required**?

(1) While the Fourth Amendment ordinarily requires a warrant based on probable cause to search without consent, a balance of interests sometimes leads to the conclusion that something less is required (e.g., OSHA inspection).

(2) To require a warrant for an employer's search of its workplace would be unworkable. Unlike police investigating a crime, an employer has ongoing reasons to enter offices and desks, including: (a) to retrieve a document when the employee is away, or (b) to identify and safeguard public property in connection with an investigation of misfeasance (as first alleged by investigators in this case).

(3) In contrast with the police, supervisors have no training in Fourth Amendment requirements and search procedures.

(4) In sum, a warrant is not necessary for a public employer's search of its workplace for "work-related" purposes.

b. **Is “probable cause” required**?

(1) The Fourth Amendment ordinarily requires “probable cause” for a search without consent, but sometimes a balance of interests results in a lower standard (e.g., OSHA inspections).

(2) **Purpose of Search**. The appropriate standard depends on the circumstances and purpose of the search. There are many possible purposes for an employer’s search. The Court limited its analysis to two types of searches:

(a) **Work Related (Noninvestigatory)**: A warrant requirement would interfere with efficient management of the workplace. Moreover, the concept of “probable cause” was designed for searches involving suspected criminal conduct, not routine business purposes.

(b) **Investigatory Searches**. Same conclusion (probable cause not required). The employer’s interest in effective service to the public requires ability to deal quickly with employee incompetence or misfeasance. Again, supervisors lack experience and training in Fourth Amendment matters.

(3) **The Employee’s Privacy Interests**: Less than at home or in some other contexts. The workplace is for the business of the employer agency. An employee can avoid the risk of intrusion by leaving his personal effects at home.

(4) **Result: Requirement of Reasonableness,** not probable cause.

(a) A search of an employee’s office is usually justified at ***inception*** if there are reasonable grounds for suspecting it will reveal evidence of work-related misconduct, or the search is necessary for a work related purpose. In this case, the hospital had “individualized” suspicion with respect to Ortega, but the Court declined to decide whether a reasonableness standard would always require individualized suspicion.

(b) A search is reasonable in ***scope*** if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct].”

c. **Issues not Decided**: The proper standard for the seizure of property (e.g, the hospital’s seizure of the card, photograph and book in this case) or for investigations of criminal or non-work-related misconduct.

6. **On Remand**. Neither the plaintiff nor the defendants were entitled to summary judgment. There were issues of fact regarding the actual justification for the search and the reasonableness of the scope of the search and the seizure of Mr. Ortega's personal property.

Observations:

An important issue dividing the Court in this case was whether Dr. Ortega had a reasonable expectation of privacy with respect to his office, and not just with respect to his desk and file cabinet. Scalia was the swing vote on this issue. His opinion is described in the Notes. Like the dissenting Justices, he believed Ortega did have a reasonable expectation of privacy with respect to his office, and that appears to be the rule of this case. However, Scalia parted company with the dissenters on the issue whether the hospital's intrusion violated the Fourth Amendment. Justice Scalia joined with the Court's decision in concluding that the hospital's search of the office may have been reasonable.

BNSF Ry. v. Department of Transportation

Key facts: To prevent "cheating" on drug tests required in the regulated transportation industry, the Department of Labor had once allowed an employer to require "partial disrobing" and "direct observation" of employees who had previously tested "positive" and were returning from suspension. Under a new regulation, the Department made partial disrobing and direct observation mandatory under these circumstances. A union and a railroad challenged this requirement under the Fourth Amendment.

Decision:

1. The Department produced "voluminous" evidence of the availability of devices designed to defeat a drug test. The petitioners did not dispute any of this evidence. The petitioners did fault the Department for failing to prove how frequently employees used such devices, but the Court agreed that the huge market for such devices, presumably purchased to be used, sufficed to support the regulation.

2. Employees who have already tested positive and are returning from suspension have an "elevated" rate of drug usage and a powerful motivation to cheat. Even if the tests are unannounced, such employees have a certain time from within which they know they will be tested and can prepare to cheat.

3. The petitioners faulted the Department for failing to consider alternatives such as hair testing, but only urinalysis has been approved for drug testing by the Department of Health and Human Services. Also, other proposed security devices were not as efficacious.

4. In sum, the Department's regulation was neither arbitrary or capricious.

a. The government has a compelling interest in preventing drug use by employees in the transportation industry.

b. Although the new procedure is highly intrusive, the employees' privacy interests in this case are diminished.

(1) These employees accepted work in a highly regulated industry.

(2) Employees can avoid being subject to the regulation by not using drugs.

(3) Employees subject to the regulation violated rules against drug use.

(4) Employees are not subject to the new regulation forever—only for 5 years.

Observations:

The notes discuss the virtues and shortcomings of other methods of testing that would not require such intrusive anti-cheating procedures. Could private sector employers not operating under government mandate adopt a similar rule? The private sector would be subject to tort law (in the absence of local statute), not the Fourth Amendment. Unregulated private sector employers would not enjoy the presumptive compelling interest in testing that the transportation industry enjoys by virtue of government safety regulation. But some work not regulated by the federal government might still be especially hazardous.

Vega-Rodriguez v. Puerto Rico Telephone Co.

Key facts: Vega and Reyes were employed by PRTC (a quasi-public corporation) as "security operators" monitoring computer banks to detect signals from alarm systems at PRTC facilities. For security reasons, access to their work area was restricted. The work area was not subdivided and was open to view by all who worked there. Employees did not work in offices or cubicles, and they did not have assigned desks.

PRTC first installed a video surveillance system in the work area in 1990, but it discontinued the system when employees "groused." Four years later the company reintroduced the system for "security reasons." Three cameras surveyed the work area, and one monitored the main entrance. No cameras monitored the rest area. The cameras had no audio capability. However, they provided a video record of the work area all day, every day.

A monitor was kept, and all video tapes were stored, in the general manager's office. No one could view the tapes or the monitor without the general manager's permission.

The plaintiffs sued PRTC, alleging that the surveillance was an unconstitutional search in violation of the Fourth Amendment. The district court granted summary judgment in favor of PRTC. The plaintiffs appealed.

Decision: Affirmed. The surveillance did not violate any reasonable expectation of privacy of the plaintiffs.

1. **Expectation of Privacy?** The Fourth Amendment protects expectations of privacy that satisfy subjective (did they actually expect?) and objective (does society recognize the expectation as reasonable?) criteria.

a. *O'Connor v. Ortega* holds that employees may have some expectation of privacy in the workplace.

b. However, society would not recognize as reasonable an employee's expectation that he will not be viewed in an "open and undifferentiated work area."

c. Moreover, the nature of the intrusion in this case strengthens the conclusion that PRTC did not violate a reasonable expectation of privacy.

(1) Efficient operations usually requires supervisors to monitor "at will" what is in plain view in the work area.

(2) The surveillance was not surreptitious. It occurred openly and only after advance notice to the employees (the court cautioned that advance notice might not overcome an expectation of privacy in some places, such as a private residence).

(3) The plaintiffs argued that video surveillance is different from a human supervisor's surveillance, because a camera is "unremitting." The court was unpersuaded, and it followed the general rule that management is entitled to observe electronically what it can lawfully see with the naked eye.

(4) The plaintiffs complained that they could not scratch, yawn or engage in other movement in privacy, but the test of an expectation of privacy is "not whether a person chooses to conceal assertedly 'private' activity, but whether the intrusion is objectively unreasonable."

2. **Cautionary Notes**

a. In passing the court noted a further qualification of the employer's right to observe: Observation must be from a lawful "vantage point," but there was no issue in this regard in the instant case. Later in the court's opinion, the court noted that this case did not involve cameras that might pry behind closed office doors, into desks or into other enclosed spaces.

b. The court also emphasized that there was no sound recording (thus, no eavesdropping which might raise separate Fourth Amendment or statutory issues).

3. **Reasonableness of the Intrusion**? Because the video surveillance did not constitute an intrusion against the plaintiffs' reasonable expectations of privacy, it was unnecessary to determine whether video surveillance was reasonable under the circumstances in accordance with *O'Connor*.

4. **Other Rights**? The court rejected that the Constitution engendered a right to be free of video surveillance, as part of the general right of privacy that protects individual autonomy.

Problem

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This problem serves as a transition to the problem of employer searches of electronic communications and data storage. By now, students will have enough familiarity with the Fourth Amendment and common law invasion of privacy to be able to tackle those aspects of an employer's search of an employee's computer. The section that follows will introduce them to some important statutory law for electronic communications.

Peyton is a private sector company so the Fourth Amendment does not apply, but the common law of privacy provides a roughly analogous set of rules. There are two steps to this problem: (1) Did Files have a reasonable expectation of privacy in the personal files he kept in his office computer? (2) If so, was the search highly offensive? The second step would include consideration of the reasons for the search and the manner and scope of the search. If Peyton were a government agency, the problem would involve three steps: (1) Did Files have a reasonable expectation of privacy in the personal files he kept in his office computer? (2) If so, was there a reasonable justification in the inception for Hazard's search of the computer? (3) Was the search reasonable in its manner and scope?

It would seem that an employee who uses a computer exclusively assigned to him could have as much of an expectation of privacy in the computer files saved on the computer as he would have with respect to his office, desk or file cabinet. The employer has sought to limit any expectation of privacy by issuing a notice or rule that personal use of a computer is prohibited and that the company reserves the right to inspect computers. Like many such rules, this one is diminished to some extent by actual practice. There may be an issue of fact whether Files could have an expectation of privacy despite the company's notice.

If Files had an expectation of privacy, was Hazard's inspection highly offensive? I think most people would find that a search of another person's personal correspondence could be highly offensive in some contexts. Moreover, Hazard did not have any of the usual business purposes, such as to retrieve a file he needed for work. The inspection might have been an investigation based on *anticipated* misconduct, but it is not clear whether anticipation of misconduct is enough to justify such a search. On the other hand, the courts have approved some "preventive" random searches of personal effects, where preceded by advance notice. Fourth Amendment analysis may be instructive: The company does not need "probable cause" as long as it acts reasonably. There could be an issue of actual motive to inspect in this case, especially considering the reason for which Hazard actually terminated Files. If Hazard's motive was personal, that fact probably undermined the reasonableness of the cause for the inspection (but it might also prevent imputing liability to the company).

If the search was reasonable in the inception, was the search unreasonable in manner or scope? The facts are designed to present the issue whether an employer can proceed with an inspection when it confronts a clearly marked "personal" file. Whether or not it was proper for Files to put personal data on the computer, and whether or not he could be disciplined for doing so, could the company properly open the file? Perhaps the company would be "reasonable" in opening a file on its *own* computer if it would be reasonable for it to suspect that the file might contain data relating to its business.

Fraser v. Nationwide Mut. Ins. Co.

Key facts: Fraser was an independent contractor/agent for Nationwide, but the analysis of this case is no different than if he had been an employee.

Nationwide, having already discovered letters (possibly never delivered) in which Fraser offered to bring his policyholders over to two competing insurance companies, decided to investigate whether Fraser was revealing trade secrets to competitors. It searched its main file server looking for Fraser's emails. It opened any email to or from Fraser that had potentially "relevant" headers. The search confirmed the company' suspicion of Fraser's disloyalty, to the company's satisfaction, and the company terminated its relationship with Fraser. Fraser sued Nationwide under the ECPA.

The district court granted summary judgment in favor of Nationwide. Fraser appealed.

Decision: Affirmed. Nationwide did not "intercept" any electronic communications between Fraser and any other party, and it was authorized to examine email stored on its own server, therefore it did not violate the ECPA.

1. **Interception**. Title I of the ECPA prohibits interceptions of electronic communications under certain circumstances. Nationwide argued that the ECPA did not apply to

its search of stored email, because an "intercept" is something that occurs *contemporaneously* with transmission. The court agreed.

a. The structure of the statute and its history support the conclusion that, in the case of electronic communications such as email, a person can only "intercept" contemporaneously with transmission. Until the Patriot Act, the ECPA defined "electronic communication" (such as email) separately from "wire communication" (such as telephone). The definition of wire communication expressly included "storage," but the definition of "electronic communication" did not.

b. Note: After the Patriot Act, neither definition includes "storage."

2. **Accessing Storage**. Fraser also alleged a claim under Title II of the ECPA, which among other things prohibits a person from exceeding his authorization to access an electronic communications service facility to obtain a wire or electronic communication while it is in "electronic storage." Electronic storage includes temporary, intermediate storage of a communication incidental to its transmission; and any storage for purposes of backup protection.

a. The district court had granted summary judgment on the ground that the emails were in "post-transmission" storage rather than intermediate or backup storage. In other words, the emails were sent and received, the transmission was complete, and Fraser had chosen to leave them on the computer or had neglected to delete them.

b. The court of appeals believed that leaving the emails on the server might have left them in "backup storage." It found a different reason to affirm summary judgment. The act allows seizure of an email "by the person or entity providing a wire or electronic communications service." Since the email was stored on Nationwide's system, Nationwide could search the emails without violating Title II.

Problem

p. 626

The argument that there has been "interception" is now stronger, because Files has not received and read the email. Therefore, Hazard accessed the email contemporaneously with the communication between Files and Mrs. Hazard.

There is also an argument that regardless of the limits of the ECPA, either Files or Mrs. Hazard might have a tort claim for common law invasion of privacy. Files's privacy claim was discussed in connection with the first version of this problem. Mrs. Hazard may have a greater expectation of privacy and a stronger claim, because she may not be on notice that the company could read her email.

C. Negligent Investigation

Mission Petroleum Carriers, Inc. v. Solomon

Key facts: The employer, a trucking carrier subject to DOT drug testing regulations, performed its own urine sample collection procedure, although the actual testing was performed by an independent laboratory. Solomon, one of Mission's drivers, tested positive for marijuana. In a discussion with the Medical Review Officer who discussed the test result with Solomon, Solomon denied using marijuana. He did not complain of any aspect of the sample collection or testing, but he did request a retest. Mission sent a reserved second sample to a second laboratory. The second test, like the first, was positive.

Mission terminated Solomon. Solomon then sought work with other carriers, but DOT regulations require a carrier to inquire of a prospective driver's previous employer as to test results going back two years. Solomon signed a written consent for the prospective employers to obtain this information from Mission, and Mission reported Solomon's positive test result. The prospective employers rejected Solomon.

Solomon sued Mission for negligent administration of the test (*not for wrongful discharge*, because he admitted he was an employee at will). He sought recovery for damages (e.g., loss of earning capacity) he had suffered to his career as a driver as a result of Mission's negligence.

In particular, Solomon alleged that Mission was negligent in a number of ways in collecting and preserving his sample, including relying on Solomon's immediate supervisor to collect the sample; removing the collection container from its sealed kit out of Solomon's presence; failing to restrict access to the collection site; and failing to accept the sample and seal it during Solomon's continuous observation. As explained in the Notes following this case, the jury's view may have been affected by evidence that the supervisor who collected the sample was under deferred adjudication under terms that required his own drug testing. The jury gave a verdict for Solomon. The court of appeals affirmed. Mission appealed.

Decision: Reversed. Mission did not breach any duty to Solomon under the common law of torts.

1. **Summary of Law in Other Jurisdictions**. Law from other jurisdictions appears to reject "negligence" as an exception to employment at will.

   a. The courts of other states are split in resolving the issue of a *third party* laboratory's duty of care toward an employee. Here, however, the collection phase and the alleged negligence was by the employer, not an independent agent, and the question of an *employer*'s duty is somewhat different.

b. In cases in which at will employees have sued their former employers for wrongful termination based on allegedly negligent tests, courts have generally held that an employee at will cannot assert "negligence" to overcome the employer's right to discharge at will.

2. **Effect of Federal Scheme**. The court also considered whether recognition of a cause of action in this case would be consistent with the federal regulatory scheme.

a. DOT regulations strictly regulate the procedure of testing, but they also provide employees with a number of avenues of redress. For example, an employer can challenge the test in a number of ways, with the result that the independent Medical Review Officer must investigate the collection, chain of custody, and testing of the sample.

b. Solomon failed to challenge the test result in accordance with the regulations. He also could have challenged Mission's collection procedure, thereby initiating an investigation by the DOT, but he failed to do so.

3. **Risk/Utility Analysis**. The Court weighed the risk to employees if employers are negligent in testing, the foreseeability of harm to employees, and the costs, burdens and consequences of imposing a duty.

a. **Risk of Harm**. Admittedly, there is a serious risk of harm to an employee like Solomon if there is a false positive result. However, the risk is reduced by the DOT's regulations, which provide procedural remedies (but no private cause of action) for employees and incentive for employers to administer their tests carefully.

b. **Consequences of Imposing Duty**. While Solomon was not suing for wrongful discharge, his claim did involve the process by which Mission terminated him, and thus it went to the "core" of the employment at will doctrine, a doctrine the Texas court was not prepared to diminish.

Observations:

1. Federal law required Mission to conduct drug tests for its drivers, and the DOT regulations were certainly an important part of the court's analysis in *Mission Petroleum*. However, some employers conduct such tests without any legal duty to do so. If an employer conducts tests not actually required by law, and reports results when not required to do so, the argument for imposing a duty of care might be stronger. On the other hand, the Texas court's defense of employment at will was vigorous.

2. Another angle on the issue of negligent testing might be defamation, which is covered in Chapter Eight. In the view of some courts (and in any event, as a result of DOT regulations), merely reporting a test result is not defamation (or if it is, it is subject to the truth defense), even

if the plaintiff alleges that the positive test result was a "false" positive. An employer is probably more likely to expose itself to liability for defamation if it was not required by law to report the test result, and the employer's report included a careless interpretation of the facts. Some tests and investigations require more "interpretation" than others.

Problem

p. 633

There are a number of possible angles to this problem, including an invasion of privacy claim (no Fourth Amendment claim because the school was a private academy). But the main purpose of the problem is to prompt discussion of the effects of an employer's negligent investigation, especially in view of the growing number of reporting statutes. The striking difference between this reporting law and the DOT's regulations is the lack of an effective means of redress for the employee. A court might therefore be more sympathetic, and might be more willing to recognize a private cause of action.

Chapter Seven
Accommodating Personal, Family & Civic Needs

A. Introduction

Several laws and problems intersect in this chapter. The FMLA is the center of attention here, but students will also need to recall what they learned in earlier chapters about sex discrimination, disability discrimination, and workers' compensation law.

B. Personal Needs

Miller v. AT & T Corp.

Key facts: AT&T recorded employee absences as either "chargeable" (counted for purposes of evaluating employee performance) or "non-chargeable" (not counted). FMLA absences were non-chargeable.

AT&T employed Miller as an account representative. In November, 1994, Miller's supervisor had a "serious" discussion with her about her attendance. He warned her that further absences would result in disciplinary action, and he encouraged her to use FMLA leave if she needed to be absent. Over the next two years, however, Miller accumulated nine more chargeable absences, and she received additional warnings that AT&T might discharge her if she incurred additional chargeable absences.

Thus, Miller was evidently very near the limit of chargeable absences on December 26, 1996 when she began feeling ill. She finished her shift for that day, but was too sick to work on the 27th. On the 28th, Miller sought treatment in an urgent care center. A doctor diagnosed her condition as flu, and he also found that she was severely dehydrated and that her white blood cell and platelet counts were low. The doctor administered intravenous fluids and instructed Miller to return on the 30th.

On December 30, Miller returned to the doctor's office, and the doctor found that Miller's condition had improved. Since her white blood cell and platelet counts were still lower than normal the doctor instructed Miller to return in two weeks for a follow-up examination. The urgent care center gave Miller a work-excuse slip good through December 31.

On December 31, Miller called the urgent care center to explain that she was better but needed one more day off work, and she requested another work-excuse slip for January 1. The urgent care center granted this request, and Miller was absent on January 1. Subsequently, she sought FMLA leave for December 27 through January 1.

Nearly two months later, the company decided that Miller's absences from December 27 to January 1 were not FMLA-covered leave, because the company believed (1) the "flu" was not a "serious health condition," and (2) even if the flu could be a serious health condition, DOL regulations require that a condition treated on an outpatient basis is not "serious" unless it involves treatment on two or more occasions (or other medical services irrelevant to this case), but Miller had received "treatment" only once, not twice. As a result, all of Miller's absences resulting from the flu were chargeable, and AT&T discharged her for excessive chargeable absences.

Miller sued AT&T for violating her rights under the FMLA. The district court granted judgment in favor of Miller. AT&T appealed.

Decision: Affirmed. Miller's absences were because of a "serious health condition," and AT&T violated the FMLA by discharging her because of her use of qualified FMLA leave.

1. **Serious Health Condition Defined**. Miller was not admitted for inpatient care at a medical facility, so the pertinent variation of "serious health condition" is that her condition required "continuing treatment by a health care provider." DOL regulations define a condition involving "continuing treatment" as

—"[a] period of *incapacity* (i.e., inability to work ...)
—of *more than three consecutive calendar days* ...
—that also involves:
(A) *Treatment two or more times* by a health care provider ...; or
(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

29 C.F.R. §825.114(a)(2).

2. **Two Treatments**? It was undisputed that Miller was incapacitated by the flu for more than three consecutive days. Thus, For Miller's case, the pertinent test was whether her period of incapacity also involved "*treatment* two or more times by a health care provider."

a. AT&T argued that a doctor's examination is not "treatment," and therefore Miller's second trip to the doctor did not qualify (the doctor only drew blood, he did not administer intravenous fluids or any other "treatment" on that occasion).

b. The court rejected this argument. The DOL's regulations define "treatment" to include "examination." 29 C.F.R. §825.114(b).

3. **Flu Expressly Excluded**? Next, AT&T argued that the DOL's regulations exclude "flu" from the definition of "serious health condition." 29 C.F.R. §825.114(c). The court rejected this argument. The regulations state that the flu "ordinarily" is not a "serious health

condition." However, a DOL opinion letter clarifies that the flu might be a serious health condition if it satisfies one of the objective tests (e.g., treatment two times), and Miller's condition did satisfy the test.

4. **Validity of DOL Definition**. Finally, AT&T argued that the DOL had exceeded its authority by defining "serious health condition" to include a relatively minor illness like Miller's flu, or by deeming a doctor's *examination* to count toward satisfying the act's requirement for "continuing *treatment*." The court rejected this argument.

a. Congress delegated authority to the DOL to interpret the statute, and its interpretation is entitled to controlling weight unless it is "arbitrary, capricious, or manifestly contrary to the statute."

b. The DOL's view of a health care provider's decision that a condition requires continued monitoring, but not aggressive treatment, is not inconsistent with anything in the statute or its history (the court found no statutory history on this point).

c. The additional requirement that the employee must experience a period of incapacitation will "weed out" less serious conditions.

d. AT&T argued that legislative history showed an intent not to cover minor illness that last only a few days, with the thought that most employers already provide sick leave coverage for minor conditions. AT&T pointed to a Senate report that listed very serious conditions that would qualify (like "heart attacks," but did not list anything like the flu). However, the DOL properly adopted an objective test that focused on the actual effect of an illness and the need for treatment, rather than on the particular diagnosis.

5. **Result**. Miller's condition and the resulting treatment satisfied the test for a "serious health condition." Her leave was protected under the FMLA, and it was illegal for AT&T to discipline her for this absence.

Observations:

The statement in the regulations that the flu is not "ordinarily" a serious health condition is true even after *Miller*. Miller was saved by the fact that her condition was serious enough to require treatment (intravenous fluids) and a follow-up examination. Merely being incapacitated is not enough.

Problem

p. 650

1. Julie did not have a serious health condition. Although she may have been incapacitated for more than three days, she satisfied neither of the other two alternative outpatient tests. She did not receive treatment from a health provider on two or more occasions, and she did not receive a regimen of treatment under the supervision of a health care provider.

2. The FMLA does not guarantee reinstatement if an employee has exceeded the statutory limit for medical leave. However, Julie might have rights under other laws.

First, under the laws of most states, Sally's Steakhouse cannot discriminate or retaliate against Julie for having filed a workers' compensation claim. When Julie is ready to return to work, Sally's must treat her on a nondiscriminatory basis. Perhaps it was necessary for Sally's to replace Julie because Julie was away for so long, or perhaps Sally's has a neutral absence control policy that results in termination after an employee has exceeded a certain period of absence. In either event, depending on local law, Julie might be entitled to be rehired on a nondiscriminatory basis.

Second, the Americans with Disabilities Act prohibits discrimination on the basis of disability, and if Julie's back condition qualified as a "disability" within the meaning of the ADA (there is some question in this regard, because her condition was temporary), Sally's might be required to reinstate or rehire her, if not doing so would be discrimination on the basis of disability or record of disability.

3. The FMLA, ADA and workers' compensation laws do not require an employer to employ someone who is unable to perform the job. The ADA, for example, would require Sally's to reinstate Julie only if some "reasonable accommodation" would make it possible for Julie to perform the "essential functions" of the job.

C. Family Obligations

Seidle v. Provident Mut. Life Ins. Co.

Key facts: Seidle was the mother of a four year old son, Terrence. When Terrence's illness began, Seidle called a doctor's office and spoke with "Donna," who recommended aspirin and scheduled an appointment for the next day. The next day the doctor diagnosed Terrence's earache and prescribed antibiotics. Terrence's fever and pain from the earache ended after about one day, but Terrence remained tired, listless, and without appetite for the remainder of the week. Moreover, Terrence's day care center would not have permitted his attendance because he still had a runny nose. Seidle attempted to return to work after missing four days of work (in addition to an excused personal absence), but the employer discharged her.

Seidle sued under the FMLA, and the employer moved for summary judgment arguing that Terrence's condition was not a "serious health condition" because it did not require "inpatient care" or "continuing treatment." The employer further argued that even if Terrence had received "continuing care," his condition was not serious because it did not require absence from work or school for more than three days.

Decision: The court granted summary judgment for the employer, and dismissed Seidle's claims. Terrence did not have a serious condition.

1. **Incapacity**? Even if the day care center would have refused to allow Terrence's attendance on the fourth day of Seidle's absence, Terrence was not in fact incapacitated on that day. He had a runny nose, was listless, and was without appetite, but these symptoms are not serious.

2. **Treatment on Two Occasions**? Terrence was not treated two or more times. He visited the doctor only once. Telephone consultations with the doctor's office did not count as treatments.

3. **Supervised Treatment**? Terrence did not meet the alternative test for outpatient treatment of a serious health condition, based on a single treatment followed by a "regimen" of supervised continuing treatment. The fact that Seidle administered doses of antibiotics to Terrence, in accordance with a doctor's instruction, did not constitute a regimen of supervised continuing treatment. There was no actual and continuing supervision by the doctor (and the court noted that Seidle never scheduled the recommended follow-up visit to the doctor in two weeks).

Observations:

The definition of a serious health condition of an employee's child is essentially the same as it is for the employee. The difficulty for parents is that a young child might still need the direct and personal attention of a parent even if he does not satisfy the objective criteria for a "serious health condition." It might be unreasonable to expect a sick, but not "seriously" ill child to attend day care, and the day care center might refuse to have him. Again, the expectation of Congress must have been that pre-existing sick leave policies would fill the gap left by the FMLA. But voluntary employer sick leave policies do not necessarily apply to leave to care for a family member.

Presumably, adult children can care for themselves during most of the day even when they are incapacitated by illness. Thus, a parent cannot take leave to care for an adult child unless the child is disabled, although defining what constitutes a requisite disability is obviously a problem.

Why not require that an employee's spouse or parents must be disabled to justify the employee's absence to care for them? Perhaps because a parent or spouse is more likely to be weakened by age, regardless of any specific disability. Obviously, this will not always be true, but drawing a precise line between more capable adults and less capable adults might have been too great a challenge.

Problems

p. 657

1. Linda's mother was not admitted to inpatient care, and she was not incapacitated for more than three days. Moreover, Linda's mother received treatment by a doctor on only one occasion. Thus, she did not have a serious health condition, and Linda's absences are not protected by the FMLA.

2. An adult *child* must also be incapacitated by "disability." Perhaps Congress added this requirement because an employee's adult child is less likely to be rendered infirm by age. Even if the flu is serious enough to keep an adult away from work or school, it might not be disabling.

3. A minor child need not be "disabled" in order for her condition to serve as a qualified cause for a parent's FMLA leave. Still, the child must be incapacitated by the condition, and the *Seidle* case suggests no accommodation for a child's lingering need for parental attention during recovery.

Fioto v. Manhattan Woods Golf Enterprises, LLC

Key facts: Fioto's mother had been hospitalized for cancer for several days, and he learned one morning that the cancer had spread to his mother's brain and that doctors intended to operate that day. Fearing his mother "wasn't to get through it," but not knowing exactly what time the doctors had scheduled the surgery, Fioto decided to travel to the hospital immediately "to be there" for the surgery. Fioto telephoned his employer to say he would not be coming to work that day.

The record at trial did not reveal whether Fioto saw his mother before the surgery–clearly an oversight by Fioto's attorney (unless he was hoping the jury would assume something that wasn't true). Fioto testified that he did not see his mother after the surgery. In the words of the court, "It is entirely possible that his mother was aware of her son's presence at the hospital and felt succored and reassured by it. It is equally possible that she never even knew he was there."

When Fioto returned to work the next day, he received a memorandum informing him that the company had terminated his employment.

Fioto sued his employer in two counts. The first count alleged a claim under the FMLA. The second count alleged a claim for breach of contract. The jury returned a verdict in favor of the plaintiff on both counts. The defendants moved for judgment notwithstanding the verdict.

Decision: Motion granted in part and denied in part. The court entered judgment notwithstanding the verdict for the employer on the FMLA claim, because Fioto was not needed to care for his mother. However, the court entered judgment for Fioto on the breach of contract claim.

1. **Need for Care**. The FMLA guarantees family leave to "care for" a seriously ill family member. Leave must be "needed" to care for the family member.

   a. DOL regulations provide that "need" might be established by the ill family member's physical needs or psychological needs, "including psychological comfort and reassurance."

   b. An employee might also be needed to care for a family member despite the availability of other care givers, if the employee is needed to fill in for other caregivers, or to arrange for a change in care, such as a transfer to a nursing home.

   c. Some case law supports the view that an employee is providing needed care when he is making medical decisions for an incapacitated patient.

2. **Participation in Care**. However, merely visiting a seriously ill family member is not protected leave (unless it is for needed psychological comfort). The employee must be involved in some part of the patient's ongoing care.

   a. The record failed to show whether Fioto's mother was even aware of his presence, so there is no evidence to show that he provided comfort or reassurance.

   b. Fioto failed to bear his burden of proving that he was "needed to care for" his mother.

3. **Contract Claim**. The court did uphold the jury's verdict on the breach of contract claim. Fioto had a contract that promised he would not be discharged except for "reasonable" cause. The court held that the jury could properly have concluded that discharging Fioto under the circumstances was not reasonable.

Observation

There might have been one more FMLA argument for Fioto. The act doesn't necessarily require that an employee must be successful in endeavoring to care for his mother. Perhaps the status of leave under the FMLA depends on the employee's purpose and intent, rather than his accomplishments.

Problem

p. 662

This problem is inspired by *Scamihorn v. General Truck Drivers*, 282 F.3d 1078 (9th Cir. 2002) (finding an issue of fact, precluding summary judgment, based on similar facts). DOL regulations clearly support the view that providing psychological and emotional support is a form of care for which the FMLA provides protected leave. Still neither the act nor the regulations speak clearly about some potentially important issues. Frequently, it would be possible for other members of the family to provide care. Is it enough that the employee is able to provide "better" care? When it comes to emotional support, who will decide what is "needed" for how long, and by what standard? Would the employer be entitled to question the duration of the leave?

The certification provision of the act suggests that the determination of need is ultimately for a doctor to make (at least if the employer insists on certification).

Bachelder v. America West Airlines, Inc.

Key facts: Bachelder was a passenger service supervisor for American West during the time relevant to this case. Early in 1996, a manager had a "corrective action discussion" with Bachelder regarding her attendance record. Among several absences that concerned the manager were [two] FMLA leaves. The manager advised Bachelder to improve her attendance and he scheduled future meetings to evaluate her attendance.

During the next month, Bachelder was absent from work again for three weeks. About a month after that extended absence, she was absent for one day to care for her baby, who was ill. American West evidently erred in determining that these absences were not covered by the FMLA. When she returned to work from the last absence, American West fired her for continued excessive absences and for unsatisfactory performance.

Bachelder sued, alleging that American West unlawfully considered her FMLA protected leave in deciding to terminate her. After a bench trial the district court held that the company did not violate the FMLA by discharging Bachelder, and it dismissed Bachelder's claim.

Decision: Reversed. Bachelder was entitled to summary judgment against American West as to liability. American West improperly considered Bachelder's FMLA-covered absences in discharging her.

1. **Types of Prohibitions**. The FMLA contains two kinds of prohibitions with respect to employer conduct. First, it makes it unlawful for an employer to "***interfere*** with, ***restrain***, or ***deny"*** employee rights to FMLA leave or to job restoration.. Second, it prohibits ***discrimination*** or ***retaliation*** for opposing violations of the act or initiating or aiding enforcement of the act.

a. The ***discrimination or retaliation*** standard did not apply in this case, because Bachelder did not allege that American West took action against her for opposing a violation or for initiating a proceeding.

b. The pertinent standard was ***interference***, which is the standard for employer action with respect to an employee's exercise of rights, such as taking leave.

2. **Interference or Restraint**. DOL regulations reasonably and properly interpret the prohibition against interference or restraint to bar the employer from considering an employee's FMLA leave as a negative factor in employment actions, including hiring, promotions or disciplinary actions.

a. The terms "interfere" and "restrain" appear to be borrowed from §8(a)(1) of the National Labor Relations Act. In decisions under the NLRA, courts have held that employer actions that deter employees from exercising their rights may constitute unlawful interference with employee rights.

b. Attaching negative consequences to the exercise of FMLA rights "tends to chill" an employee's willingness to exercise those rights. The DOL's interpretation of "interfere" and "restrain" in the FMLA in this regard is reasonable.

3. **Elements and Proof of Interference**. Because this case involves "interference," and not "discrimination," the burden-shifting analysis of the *McDonnell Douglas* line of cases is inapplicable.

a. Significance: an employee prevails if she proves the employer considered her FMLA leave as "a factor" in taking an adverse employment action against. (i.e., the court might mean that a plaintiff need not prove her FMLA leave was a motivating factor).

b. An employer violates the act even if it considered other lawful factors in making its decision. Indeed, the court suggested that American West would could not have avoided liability by proving it would have taken the same action regardless of Bachelder's FMLA leave.

c. As in a NLRA "interference" case (e.g., a no-solicitation rule case), an employee in an FMLA "interference" case is not required to prove employer *intent* to interfere.

4. **Application**. American West unlawfully interfered with Bachelder's FMLA rights when it considered her absences in discharging her.

a. Some of the absences American West counted against Bachelder were FMLA-protected absences.

b. Because intent is irrelevant in an interference case, it was no defense for American West that at the time it discharged Bachelder, it honestly believed that the absences it considered were not protected by the FMLA.

c. Moreover, although an employee has certain duties of notice and certification regarding the reason for an absence, Bachelder fulfilled her duties by providing America West with enough information (in two doctor's notes) for America West to surmise that her leave qualified under the FMLA. It is the employer's responsibility to determine whether the circumstances of an employee's absence satisfy the requirements of the act.

5. **Employer Good Faith**? An employer's good faith is irrelevant to the issue of liability, but it might be relevant to the issue of damages. The court suggested that if the employer did not know it was acting in violation of the act, it should not be liable for liquidated damages, but it will still be liable for "actual" damages.

a. American West argued that Bachelder failed to prove she would not have been fired *but for* the illegal factor. However, this wasn't Bachelder's burden. She needed only to prove that her FMLA leave was "a factor."

b. American West evidently did not argue that it had proved the converse–that it would have discharged Bachelder anyway (a "mixed motive" defense)–but in any event American West's liability was established by its admitted consideration of Bachelder's FMLA leave.

Observations:

In essence, an employee does not have to prove causation in a wrongful discharge case under the FMLA, as long as FMLA leave was a factor. This leaves the question, what if American West had proved it would have taken the same action anyway, even if it had not considered the illegal factor? Perhaps it would have avoided liability for actual damages as well as liquidated damages.

D. Civic Duties

Rogers v. City of San Antonio

Key facts: The plaintiffs were firefighters who were also military reservists. They sued the city for alleged violations of USERRA with respect to the way the city treated their reserve leave. The plaintiffs challenged a number of policies. The principal policy in dispute concerned the denial of credit for military leave in the calculation of overtime pay. In accordance with special FLSA rules for firefighters, the city and the union agreed to a special 21-day work period with 159 regular hours at a regular rate. The firefighters actually worked 168 hours per work period, and they earned an overtime rate for nine of these hours. Only hours *actually worked* counted for purposes of determining whether a firefighter had worked overtime, but as long as a firefighter worked his regularly scheduled hours, he was sure to earn pay at an overtime rate for the 160^{th} through 168^{th} hours, and additional overtime pay for hours in excess of 168. If a firefighter missed scheduled working time, the general rule was that hours of absence would not count toward overtime.

An important exception was to count some vacation time and certain other leave as if a firefighter had actually worked, for overtime purposes. Whenever a firefighter "lost" 27 hours of overtime pay he would have earned but for vacation or other eligible leave, his subsequent hours of vacation and eligible leave would count as if he had actually worked, for overtime purposes. Thus, the loss of overtime pay due to vacation and other eligible leave was "capped" at 27 hours. In contrast, hours of absence for military leave were simply hours not worked, either before or after an employee reached the 27 hours lost overtime "cap."

Other challenged policies are ***not*** described in the Fifth Circuit decision in any detail, but they are described in the district court's opinion. 211 F. Supp.2d 829, 844 (W.D. Tex. 2002). As described by the district court, these other policies included: (1) treating a firefighter who was away on reserve duty as if he had *refused* an unscheduled overtime opportunity, for purposes of eligibility for future opportunities; (2) failing to allow reservists to make up training and upgrade opportunities they missed because of military leave; (3) treating military leave as an "absence" for purposes of earning certain rewards for "perfect attendance;" (4) a policy, not described by either court, that evidently resulted in a loss of "straight-time pay."

Firefighters who were in the reserves sued, alleging that these policies violated USERRA by denying them benefits because of their military leave. The district court granted summary judgment for the firefighters. The City appealed.

Decision: Reversed and remanded. The district court used the wrong analysis in applying the law to each policy.

1. **Types of Employer Duties**. There were three provisions of USERRA that might apply to the resolution of this case.

a. Section 4311 prohibits "discrimination" in general, and an employer cannot take certain adverse employment actions against an employee because of his military service leave.

b. Section 4316(a) states the so-called escalator principle that an employee on protected leave continues to accumulate seniority as if he were actively at work, for purposes of any seniority-based rights (e.g., protection against layoff).

c. Section 4316(b) states a different rule for rights and benefits not determined by seniority. Simply stated, an employer must treat military service leave in the same fashion as it treats other comparable forms of leave, for purposes of non-seniority based leave.

2. **Anti-Discrimination?** The plaintiffs and the district court favored the application of the first rule (prohibiting discrimination). They believed that not counting hours absent for military service resulted in discrimination against the reservists.

3. **Comparable Treatment?** The court held that the proper rule was §4316(b) which allows an employer to treat military service leave as time not worked to the same extent the employer treats other comparable forms of leave as time not worked.

a. Legislative history supports the view that Congress meant this provision to confirm cases holding that an employer could treat military service leave as absence from work for purposes of non-seniority based rights and benefits, if the employer treated comparable forms of leave the same way.

b. The district court erred in thinking that § 4316(b) applies only to an employee returning to employment after long term *active* duty. By its terms, §4316(b) applies to absence "by reason of service in the uniformed services." USERRA defines "service in the uniformed services" to include "inactive duty training."

c. The district court also erred in thinking that §4316 applies only to an employee being "reemployed" (see in particular subpart (a)), and that reemployment occurs only after prolonged absence due to active duty. USERRA treats even an employee's return from *inactive* duty training as "reemployment." It provides rules for reemployment of an employee whose service was for less than 31 days. 38 U.S.C. §4312(e)(1)(A); 4313(a)(1).

4. **Application**. Applying §4316(b) (requiring comparable treatment of military service leave), to the plaintiffs' claims, the court reached the following conclusions:

a. The plaintiffs were not entitled to straight-time pay for time they were on military leave (i.e., the city didn't have to pay for this time, because it didn't pay employees for comparable forms of leave). The court reversed and rendered judgment for the city on this claim.

b. The plaintiffs were not entitled to compensation for lost overtime opportunities and missed upgrading opportunities, because nonmilitary leave would have resulted in the same loss of benefits. The court reversed and rendered judgment for the city on this claim.

c. There were issues of fact whether the city acted unlawfully in treating military leave differently from other forms of involuntary leave for purposes of the lost overtime cap and the accrual of bonus leave and perfect attendance leave benefits. The city appeared to treat involuntary leave due to jury duty, bereavement, and line of duty injury more favorably than military leave by counting these types of absences as if an employee was actively at work, for purposes of these benefits. The court remanded the case for further proceedings on these claims.

Problem

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Resolution of the problem begins with the issue whether a sabbatical is a seniority based right, or a non-seniority based right. The answer to this question is important, because a seniority based right is subject to the "escalator" rule (the professor continues to make progress toward his sabbatical while on military leave, regardless of how the employer treats other forms of leave), while a non-seniority right is subject to the rule that an employer must treat comparable forms of leave comparably (the professor makes no progress toward a sabbatical during military leave if he would make no progress during other comparable forms of leave).

I believe the correct answer is that the right to a sabbatical is a non-seniority based right. It is analogous to vacation time, which is earned by performing a certain amount of service. The six year rule is not designed to set priorities among professors based on comparative length of service. To the contrary, a professor with thirty years of service has no more right to a sabbatical than a professor with six years of service.

Chapter Eight
Employment Security

A. Introduction

Employment is a contractual relationship. Arguably, it is one of those special kinds of contracts, like insurance or undertaking, that involve more than a commercial exchange. It also serves as a source of security, peace of mind, self-esteem and identity. For many employees, involuntary termination of employment also means the loss of health insurance and the interruption or frustration of any effort to build retirement savings. Children and other dependents are also affected, not only because of the loss of financial security but also because of the psychological and emotional toll unemployment takes on their parents. The potentially devastating personal effect of involuntary termination is the principle reason why an employer's ability to terminate an employee without much restriction is so controversial in an era of very high expectations for economic security.

B. Overcoming the Presumption

Toussaint v. Blue Cross & Blue Shield of Michigan

Key facts: This appeal was a consolidation of two cases, one by Toussaint against Blue Cross, and one by Ebling against Masco.

The facts in each case were quite similar. Each plaintiff inquired about job security when they were hired. In Toussaint's case, someone replied that the company would retain Toussaint "as long as I did my job." Toussaint also received a manual of personnel policies that set forth a disciplinary procedure "[t]o provide for the administration of fair, consistent and reasonable corrective discipline." The manual also stated that the company's "policy" was to release employees "for just cause only."

Ebling recalled that when he asked about job security, someone stated that if Ebling was "doing the job," the company would not discharge him. However, Ebling did not receive a manual or any other writing containing any similar statement.

Toussaint and Ebling filed lawsuits against their respective employers, alleging that their employers' actions in discharging them violated the terms of the employment contracts. Each employee prevailed at trial. A court of appeals reversed in the case of Toussaint, and a court of appeals affirmed in the case of Ebling.

Decision: Toussaint's case: Reversed, reinstating the jury verdict in his favor. Ebling's case: Affirmed, upholding the jury verdict in his favor. The respective plaintiffs presented sufficient evidence to rebut the presumption that employment for an indefinite term is at will.

1. **Employment at Will in Michigan**. The traditional rule in Michigan was that the presumption of employment at will was not rebutted by evidence of a promise of "permanent" employment or employment for "life." Such promises were construed as promises of employment for an indefinite term, leaving either party free to terminate the contract at will.

a. However, this rule was not a substantive limitation against such promises, but was a rule of construction.

b. At the time of this decision, there was already an exception to this traditional rule for cases in which an employer had promised deferred compensation that had induced an employee's reliance [Not really: Deferred compensation cases, discussed mainly by the dissent, allowed an employee to sue for the deferred compensation, and did not question the employer's right to terminate]. A promise of job security without any form of deferred compensation is just as likely to induce reliance.

2. **Mutuality**? The employers argued that the contracts alleged by the employees were not "mutual," and were without consideration, because the employers were bound to preserve the relationships but the employees were free to resign. The court rejected this argument.

a. The enforceability of a promise depends on consideration, not mutuality of obligation.

b. The court did not state clearly what consideration the employees provided in exchange for the promises, but in the rest of the opinion it is clear the court believed the employers gained "loyal" workforces as a result of the promises.

3. **Presumption v. Substantive Rule**. The court recited the history of the employment at will doctrine, starting with the English rule and then Horace Wood's rule. The rule is a presumption for purposes of interpretation. It does not necessarily preclude the possibility that an employer could make and be bound by a promise to discharge only for cause, even when employment is for an "indefinite" term.

4. **Practical Considerations**. The employers and amici curiae argued that to limit an employer's right to discharge would adversely affect productivity and discipline in the workplace. The court rejected this argument.

a. An employer can reserve its right to discharge at will, but if the employee asks for and the employer promises job security, the employee should be able to enforce the promise.

b. Later in its opinion, the court emphasized that an employer would be free to adopt standards of performance to become part of the contract, and that the employer could also require alternative dispute resolution, such as by binding arbitration.

c. The existence of "term" contracts, and of collective bargaining agreements requiring cause for discharge, demonstrate that there is no public policy against allowing parties to limit the right to discharge.

d. The court was not disturbed by the possibility that employees might falsely allege oral promises. Many civil and criminal lawsuits depend entirely on testimonial evidence, and the court saw no need for a special requirement of a writing in the case of employment.

5. **The Manual as a Contract**. The court responded to the dissent's argument that there was no evidence that the personnel manual (in the Toussaint case) was a contract of employment.

a. When an employer establishes "policies or practices," both parties gain. The employer gains a loyal workforce, and the employees gain the assurance that they will be treated fairly and that the employer will apply the policies consistently.

b. With the adoption of such policies, pre-employment negotiation is unnecessary, and an employee need not know the "particulars" of the employer's policies or even of the existence of the policies at the time he accepts employment.

c. The fact that the employer can change a policy unilaterally is unimportant.

d. The employees could justifiably have relied on the policies [but remember that the court stated elsewhere that knowledge of and reliance on the policies was unnecessary].

e. The situation is then "instinct with obligation" (for the employer). Thus, an employee does not need other evidence that the parties agreed that the policies would be part of the contract of employment.

6. **Policies as Contracts**. One of the amici argued that giving contractual effect to "policies" and similar documents intended only to promote "clarity and accuracy" would hamper large employers in their ability to issue policy statements. The court rejected this argument.

a. Remember, even if a policy is a contract, an employer can unilaterally change the policy (prospectively).

b. Employees could reasonably expect that the employer would apply its policies in effect at any given time, but not that the policies would remain unchanged forever.

Observations:

1. As I've indicated in the notes, before *Toussaint* the courts seem to have had much less difficulty accepting the contractual effect of "policies" when the policies related to things like compensation and benefits, as opposed to job security. Perhaps this was because compensation and benefits are indisputably the consideration for which an employee works, and it is natural to expect that the details of compensation and benefits are set forth in the policy manual (where else would the necessary details be?). In contrast, many policy statements about job security and discipline sound more like the "puffing" a salesperson engages in when he sells a car or appliance, and until *Toussaint* it was not normal to expect job security tomorrow in exchange for working today.

2. The court's opinion anticipates several major developments of the next two decades of employment law: (1) disclaimers that preserve an employer's right to discharge; (2) the right of the employer to "take it back" (although the court is not completely clear in this regard with respect to promises of job security); and (3) binding arbitration.

Ohanian v. Avis Rent A Car System, Inc.

Key facts: Ohanian was a Vice President for Sales for Avis's Western Region in San Francisco at the beginning of the events relevant to this case. An Avis general manager named Mahmarian, who evidently was a witness for Ohanian and was the person who made the alleged promise, described Ohanian's performance in that position as "excellent." Ohanian's region stood out among all the others by earning a profit in an otherwise "bad, depressed economic period."

Mahmarian and the President of Avis decided they should persuade Ohanian to take over the Northeastern sales region, which was "dying" despite its great potential. It was difficult to persuade Ohanian to accept this reassignment, because he and his family were happy in San Francisco, he had a good "team" there, and he felt "secure" in his position. Ohanian was also reluctant to become involved in the "politics" of Avis World Headquarters.

Mahamian (a witness for Ohanian), persuaded Ohanian to accept the move to the Northeast "[on] the basis of promise, ... if it didn't work out and he had to go back out in the field, or back to California, or whatever else, fine;" that "his future was secure in the company;" and "that at worst he would get his [severance] because there was some degree of responsibility on the part of management, Calvano and myself, in making this man make this change." To Ohanian's concerns about job security, Mahmarian's replied, "[u]nless [he] screwed up badly, there is no way [he was] going to get fired ... [he would] never get hurt here in this company."

Ohanian accepted the position of V.P. of Sales/Northeast Region. It was a short assignment. After a few months he was promoted and moved to the company's world headquarters. After a few months more, he returned to his position for the Northeast Region at his own request. A month later, Avis fired him, *without* severance pay.

Ohanian sued for wrongful discharge in breach of contract. The jury returned a verdict in his favor. Avis appealed.

Decision: Affirmed. The promise that Avis would not fire Ohanian “unless he screwed up badly” was enforceable, and was not barred by the statute of frauds.

1. **The Statute of Frauds**. The purpose of the statute of frauds is to prevent fraud and injustice. In emphasizing this point, the court may have been thinking about the fact that Mahmarian, the individual who made the promise on behalf of Avis, testified that he made the promise and believed management had an obligation to Ohanian. In other words, there was no doubt that Mahmarian made the promise (unless there was some collusion between Ohanian and Mahmarian).

a. The majority termed the statute of frauds “an anachronism,” because “[t]he reasons that prompted its passage no longer exist today.”

b. Strict application of the Statute of Frauds would cause more injustice than it would prevent.

2. **Performance Within One Year**? Avis asserted the Statute of Frauds because Mahmarian’s promise was of a performance that could not be performed within a year. However, the majority found that Mahmarian’s promise *could* be performed within a year.

a. The rule in New York (as interpreted by the majority) is that a promise is not subject to the Statute of Frauds unless “by its very terms” the obligation it creates is to endure for longer than a year.

b. If the party against whom enforcement is sought has a right to terminate the contract “at will,” the contract is capable of performance within one year and is not subject to the Statute.

(1) Note: Ohanian could terminate (resign) at will, but not Avis. Thus, the above rule would not have avoided application of the Statute to Avis’s alleged promise because Avis was the party against whom enforcement was sought.

(2) What about the fact that Ohanian might have breached the contract by bad performance, so as to justify Avis’s termination of the employment in less than a year? The court observed that this argument would not work, because the *excuse* of one party’s performance based on the other’s breach is not “performance.”

c. However, Avis's alleged promise *was* performable within a year in another way. Avis would have had "cause" to terminate in less than a year *without* a "breach" of duty by Ohanian if there were other economic reasons for discontinuing Ohanian's services (e.g., adverse market conditions requiring the cessation of certain operations).

3. **Proof of Promise**. The court also found that there was "ample" evidence to support the jury's finding that Avis made the promise of job security and that the context in which Avis made the promise evidenced an intent to be bound.

4. Judge Wyatt dissented. He would have applied the Statute of Frauds and barred enforcement of the alleged promise on the grounds that it was a promise that could not be performed within a year.

a. Judge Wyatt evidently saw Avis as the potential fraud victim. First, he clarified the reason for Ohanian's discharge: Avis alleged that he submitted false expense reports, a charge that had been the basis of a counterclaim by Avis against Ohanian.

b. Judge Wyatt also explained that Mahmarian, the witness who admitted making the promise, was discharged by Avis within days of Ohanian's dismissal and "was presumably hostile to Avis." In other words, "Avis was at the mercy of Ohanian and Mahmarian in the sense that no person and no writing was available to confirm or contradict them; they alone had made the claimed oral contract and there was no writing."

c. Judge Wyatt also noted that Ohanian and Mahmarian never used the phrase "just cause." Mahmarian said Ohanian would keep his job unless he "totally screwed up."

Observations:

1. As the Notes explain, subsequent cases appear to support the dissent's opinion of New York law. But regardless of which interpretation of the Statute is correct, *Ohanian* is a good occasion for the larger policy debate as to whether courts should permit enforcement of oral promises of job security at all. For example, the scenario of a group of ousted managers testifying against current managers in a breach of employment contract case is not unusual. Is there not a real danger of collusion between the ousted managers? Should a court leave it to a jury to sort out "the politics of the Avis World Headquarters"?

2. One may also recall Ebling's claim in the *Toussaint* case, that during the hiring process he asked about job security and heard an oral promise that he would not be discharged without just cause. There was no writing (i.e., no personnel manual) to corroborate his testimony, but the court enforced the alleged promise anyway. Of course, if an employer induces an

applicant to accept a job by some assurance of job security, there is a good argument for making job security as part of the "deal." However, would it not be fairly easy for an interviewee to tease an alleged promise from an otherwise careful interviewer? If an interviewee asks whether the company has good job security, and it honestly seems to the interviewer that the company treats people fairly, what should the interviewer say that will not be an enforceable promise of job security?

3. The employer's solution to these problems may be a disclaimer, rather than the Statute of Frauds, but if employers insert disclaimers in every application form and every personnel manual, and disclaimers work, we are back to where we began insofar as job security. The effectiveness of disclaimers is addressed after the next pair of cases on implied promises.

Pugh v. See's Candies, Inc.

Key facts: Pugh had worked for See's Candies for 32 years at the time of his discharge. During over three decades of employment, he worked his way up the corporate ladder from dishwasher to vice-president in charge of production and member of the board of directors of a subsidiary corporation. When Pugh first went to work for See's, the reigning president in those early days frequently told him, "if you are loyal to (See's) and do a good job, your future is secure."

During most of Pugh's employment, the See family owned a controlling interest in the company. Laurance See, who served as president from 1951 to 1969, had a practice of not terminating administrative employees except for good cause. When Charles See succeeded his brother in 1969, he continued this practice.

However, in 1972 the See family sold its controlling interest to the Blue Chip Stamps Corporation. Just before this transfer of control, Pugh had received his latest promotion to vice-president in charge of production, and it was at this time that he also became a member of the board of directors for one of the company's subsidiaries.

In May 1973, Pugh had just returned from a mixed business and family trip in Europe when he received a message that he should meet with the company president. Pugh expected that the meeting involved yet another promotion, because the preceding months had been particularly successful for the business. Instead, the company president informed Pugh directly and with no advance warning, "We might as well get right to the point. I have decided your services are no longer required by See's Candies. Read this and sign it."

The president handed Pugh a letter confirming his termination with no explanation or reason, and directing him immediately to remove "only personal papers and possessions from your office," but "absolutely no records, formulas or other material," and to turn in and account for "all keys, credit cards, et cetera." The letter added, "No severance pay will be granted" and it instructed Pugh "not to visit or contact Production Department employees while they are on the job."

Pugh had never received any written criticism of his work, he had not heard any criticism at any of the annual meetings, and he had received no advance warning of disciplinary action. He had received every raise and bonus. When Pugh asked why he was being fired, the president replied, "look deep within yourself" to find the answer, and that "Things were said by people in the trade that have come back to us."

At trial, Pugh theorized that his termination was because he had voiced concerns within management about a suspected "sweetheart" deal with the union. To Pugh, a "sweetheart" contract gave an employer an unfair advantage over competitors by allowing a lower wage rate. Such a contract might have been disturbing to Pugh because it would have resulted in his employees earning less than others performing the same work (my interpretation of his definition). Pugh's objections to a "sweetheart" contract just a month or so before his discharge angered at least one other company official who banged on the table and said, "'You don't know what the hell you are talking about.'" Pugh had replied, "I don't know whether you have a sweetheart contract, but I am telling you if you do, I don't want to be involved because they are immoral, illegal and not in the best interests of my employees."

Pugh sued See's for wrongful discharge in breach of contract and in violation of public policy. He also sued the union, which he alleged had conspired with the company or induced the company to discharge him. The case went to trial, but at the conclusion of Pugh's case-in-chief the trial court granted defendants' motions for nonsuit. Pugh appealed.

Decision: Reversed and remanded for trial. Pugh presented evidence of an implied promise of job security.

1. **Implied Promise**. The presumption that employment (for an indefinite term) is "at will" is subject to rebuttal by evidence of an agreement, express *or implied*, that the relationship will continue indefinitely, until a specified event such as the employer's dissatisfaction or "cause" for termination.

2. **Proof**. An implied promise of job security might be proven by a number of factors, including the employer's personnel policies or practices, the employee's longevity of service, employer actions or communications seeming to assure continued employment, and the practices of the industry.

3. **Good Faith**. In a related vein, there exists in the employment relationship an "implied-in-law covenant of good faith and fair dealing." (We will look more closely at the implied in law covenant of good faith at a later point in this Chapter).

4. **Application**. The circumstances of Pugh's employment, along with the duty of good faith, establish that the company may have violated its duty to Pugh when it discharged him.

a. Pugh was employed for 32 years (another case had recognized implied in fact or implied in law duties not to discharge except for just cause after only 18 years of employment). The court avoided any rule that longevity, standing alone, is enough to create such a duty, but there were additional factors in this case.

b. The additional factors in this case included: Pugh's regular commendations and promotions, the lack of direct criticism, assurances of security, and the company's policies.

c. "While oblique language will not, standing alone, be sufficient to establish agreement, it is appropriate to consider the totality of the parties' relationship."

Montgomery County Hospital District v. Brown

Key facts: Valarie Brown was a ten year employee of Montgomery County Hospital District, working as a laboratory systems manager. Brown alleged that at the time she was hired, a hospital administrator said that she would keep her job as long as she was doing her job, and that she would not be fired unless there was a "good reason" or "good cause" to fire her. Brown alleged that this assurance of job security was important to her because she would need to relocate from Houston to Conroe (about 60 miles from Houston) to accept the position.

When the district terminated Brown's employment ten years later, she sued the district and two of its managers for wrongful discharge in breach of contract. The district court granted summary judgment in favor of the district and dismissed Brown's claims. The court of appeals reversed and remanded for trial. The district appealed to the Supreme Court of Texas.

Decision: Affirmed. Brown's evidence was insufficient to overcome the presumption of employment at will.

1. **The Presumption**. Absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all. Brown's evidence was insufficient to prove an agreement to the contrary.

2. **Specificity/Formality Required**. An employee who has no "formal agreement" cannot construct one from an employer's indefinite comments, encouragements, or assurances.

a. General statements like those Brown alleged do not, standing alone, show the employer intended to make a binding agreement. Furthermore, an employer's general statements that an employee will not be discharged as long as his work is satisfactory, or that an employee will be discharged only for “good reason” or “good cause” are insufficient to establish a binding contract.

b. The presumption of employment at will is overcome only by evidence that the employer made a statement to “*unequivocally* indicate a definite intent to be bound not to terminate the employee except under *clearly specified circumstances*” (my emphasis).

3. **Retreat in Other States**? The Texas court noted that several other courts, including the Michigan court (which had decided the *Toussaint* case), had “retreated from earlier decisions” and had decided more recently that “oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will.” The court also cited decisions of other courts distinguishing “platitudes, vague assurances, praise, and indefinite promises of permanent continued employment.”

4. **The Statute of Frauds**. Although the court rejected that Brown’s evidence of oral assurance was sufficient to overcome the presumption of employment at will, it emphasized that the Statute of Frauds was not a basis for its decision, and that the Statute of Frauds would not ordinarily bar enforcement of an otherwise sufficiently definite promise of job security.

a. “An employment contract for an indefinite term is considered performable within one year” and is not subject to the Statute of Frauds.

b. “It would be unusual, however, for oral assurances of employment for an indefinite term to be sufficiently specific and definite to modify an at-will relationship.”

Problems

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1. Students may wonder if there is a sex discrimination issue here, but the question is whether there is a breach of contract. Following the approach of *Toussaint*, statements in the policy manual might be a contract, even though the company has reserved the right to change or revoke its policies. There is no clearly stated promise in the manual that the company will discharge only for “cause,” but the company did set forth a list of reasons that might constitute grounds for discharge. If Sloan’s conduct is not among the listed types of conduct, she might argue that the company has breached its contract with her.

The argument for an express promise would be quite weak if it depended only on the manual. Toussaint, Ebling, Ohanian, Brown, and arguably Pugh were all able to point to particular promises, even if the promises were vague. Relying on ABC’s manual, Sloan would be asserting a promise by negative implication–the company promised not to discharge her for dating her supervisor because it did not say it *would* discharge her.

The "unwritten" policy against fraternization is probably irrelevant if the company failed to communicate the policy to employees. If the policy manual is a contract, it seems unlikely a court would recognize addendums or amendments of which Sloan could not reasonably have been aware.

Sloan's case might be strengthened by the promise Stevens made, provided a court accepts that Stevens was speaking for the company. The company will likely respond (1) Stevens lacked authority to make binding promises for the company, and (2) Stevens was clearly acting for his own personal purposes, and not for the company, in making assurances to a prospective romantic partner. If a court treats Stevens' promise as binding against the company, it might be sufficiently particular and unequivocal to overcome a strong version of the employment at will doctrine described in *Montgomery County Hospital District*.

The case for an implied promise is also weak, because Sloan was only employed for a year. Of course, many states do not even recognize the sort of implied promise theory described in *Pugh*.

If the company was bound by a promise to discharge only for cause, is dating a supervisor "cause?" Perhaps not as a disciplinary matter, if Sloan could not reasonably have been aware of the company's no-fraternization rule. But the court in *Ohanian* observed that "cause" is not necessarily a disciplinary standard. Cause might include other good faith business purposes. Even if the no-fraternization rule was unknown to Sloan, and not a valid basis for discipline, it might represent a reasonable business judgment. The company's response to the dilemma–keeping the "key" employee and letting the other go–might be "cause" in the business judgment sense.

2. Students might wonder if there is a First Amendment issue here, but the employer is not a government agency, and in most jurisdictions it can discriminate on the basis of politics and most forms of speech. The question is whether it breached its contract with Hutchins.

Hutchins might assert an express promise because there is a policy manual that apparently requires fair procedure and treatment of employees. However, the manual was not distributed to him. The company distributed it to supervisors with responsibility for carrying out disciplinary action, which suggests that the manual was designed to govern supervisors and not to promise anything to employees. Still, we have seen cases in which an employee proved a promise based on what he had overheard from other employees (*Martin* at the beginning of Chapter Four) or what he observed of the employer's "practice" (*Pugh*, at least for purposes of establishing an implied promise).

In a state that recognizes an implied promise theory, Hutchin's fifteen years of employment and apparent success in his employment strengthen his case, and if the limited-distribution manual is insufficient for an express promise, it might suffice to corroborate an implied promise.

If DEF was bound by a promise to discharge for cause, was that standard satisfied in this case? Perhaps this is a true jury question. DEF will undoubtedly argue that it is entitled to expect a certain degree of loyalty from its employees. If Hutchins is married to a person who is crusading for a cause that is particularly detrimental to the company, the company might honestly believe his loyalty is compromised. Hutchins will argue that the company is simply vindictive. The matter has nothing to do with his work performance.

Guz v. Bechtel National, Inc.

Key facts: Bechtel discharged Guz after 20 years of employment. During his employment Guz had received steady raises, promotions and good performance reviews. Nevertheless, Bechtel terminated Guz's employment because it had eliminated Guz's work unit and consolidated work in another Bechtel office.

Evidently, Bechtel had not stated anything like an express promise of job security to Guz. To the contrary, its "Policy 1101" included a statement that employees "have no ... agreements guaranteeing continuous service and may be terminated at [Bechtel's] option." Guz admitted he understood that Policy 1101 applied to him.

Nevertheless, Guz sued Bechtel for wrongful discharge in breach of an "implied" contract (and also for breach of the implied duty of good faith, to which we will return later). The trial court granted summary judgment for Bechtel and dismissed Guz's claims. A court of appeals reversed, finding that Policy 1101 did not foreclose Guz's implied contract claim. Bechtel appealed.

Decision: Reversed and remanded. The trial court properly granted summary judgment against Guz. Although Policy 1101 did not bar Guz from seeking to prove an implied contract claim, as a matter of law Guz failed to present evidence sufficient to support his claim. Policy 1101 was one reason why his evidence was insufficient.

1. **Effect of Disclaimer**. Neither the presumption of employment at will nor Bechtel's Policy 1101 absolutely foreclosed Guz from trying to prove an implied promise of job security. Policy 1101, however "satisfied Bechtel's initial burden, if any, to show that Guz's claim of a contract limiting Bechtel's termination rights had no merit."

> a. Under California, a provision in a handbook manual or other memorandum specifying that employment is "at-will" does not necessarily bar a plaintiff from presenting evidence that the employer did promise job security, especially if other provisions in the employer's documents suggest limits on the employer's discharge of employees.

b. The parol evidence rule does not bar an employee from introducing evidence of a promise of job security despite the employer's disclaimer. Parol evidence is admissible to explain, supplement, or *even contradict* the terms of an *unintegrated* agreement.

c. "Handbook disclaimers should not permit an employer, at its whim, to repudiate promises it has otherwise made in its own self-interest, and on which it intended an employee to rely."

d. A disclaimer might mean simply that employment is *not necessarily* based on any promise of job security.

e. Still a disclaimer cannot be ignored. it is part of the overall evidence of the understanding of the parties.

2. **Application**. Guz failed to present evidence sufficient to show that Bechel, despite its disclaimer, made an implied promise of job security.

a. Evidence of longevity and success on the job, standing alone, was insufficient to prove an implied contract.

b. A corporate official's deposition testimony that there was an *unwritten* "policy" regarding job security did not establish an implied contract, because there was no evidence employees were aware of the unwritten policy.

c. Guz's implied contract theory ultimately depended on Bechtel's written personnel documents, and there "is no triable issue of an implied contract on terms broader than the specific provisions of those documents."

d. In determining whether Bechtel's personnel documents might support an implied contract, the court looked at the documents in their entirety, and not just at Policy 1101.

(1) The Bechtel documents of which Policy 1101 was a part described detailed rules and procedures for terminating employees under particular circumstances.

(2) The statement in Policy 1101 that employees had no contracts "guaranteeing ... continuous service" and were terminable at Bechtel's "option," did not foreclose an understanding that Bechtel would make termination decisions according to Bechtel's rules and procedures for termination.

(3) The combination of the disclaimer and the specific rules of termination created an ambiguity, and a fact finder could rationally determine that

despite the disclaimer, Bechtel had bound itself to the rules and procedures for termination.

e. Viewed in their entirety, Bechtel's written personnel documents ("which, as we have seen, are the sole source of any contractual limits on Bechtel's rights to terminate Guz") did not limit the company's prerogatives to eliminate jobs or work units even if this would lead to the termination of an employee.

(1) Policy 1101 stated that Bechtel was free to reorganize itself or to change job requirements, and to initiate employee terminations caused by such changes, provided Bechtel provided the requisite advance notice.

(2) The RIF Guidelines set forth procedures for selecting individual layoff candidates and for helping such persons obtain jobs elsewhere within the company, but the RIF Guidelines did not state or imply any limits on Bechtel's freedom to reorganize itself.

(3) Whatever limitations Bechtel's personnel documents may have imposed on its right to terminate employees in other situations, they did not limit Bechtel's right to eliminate an entire work unit and the jobs therein if the decision was influenced by a belief that the unit's work would be better performed elsewhere within the company.

3. **On Remand**. The court found it necessary to reverse the court of appeals' judgment and to remand the case for further proceedings.

a. The court of appeals erred in finding that Guz had presented a triable issue whether Bechtel made and violated an implied promise limiting its right to terminate his employment.

b. The court of appeals did not reach issues pertaining to Guz's alternative theory, that Bechtel breached an implied promise to provide him with the fair layoff protection, including force ranking and reassignment help. The Court found it necessary to remand the case for further proceedings with respect to this theory.

Observations:

1. Although Bechtel prevailed against Guz's principle contract claim, the court's opinion leaves open the possibility that Guz might have prevailed if he had been discharged for disciplinary reasons subject to Bechtel's disciplinary rules and procedures.

2. *Guz* has some important implications for the implied contract theory even where there is no disclaimer. *Guz* appears to hold that longevity and success on the job are not enough to

establish an implied contract claim, and that an implied contract must be tethered to personnel policies or other employer communications that tend to confirm an implied promise even if they are insufficient to manifest an "express" promise.

3. *Guz* also appears to confirm the view that a layoff resulting from the elimination of work should be treated differently from a disciplinary discharge. Thus, an express or implied promise to discharge only for cause might not limit an employer's right to reorganize or shrink its business in a way that results in the loss of an employee's job, at least when the employer's policies provide for separate treatment of disciplinary action and layoff, as Bechtel's policies did.

4. An interesting question to raise with students is whether, under the law as described by *Guz*, it is possible for an employer to issue written policies governing disciplinary or layoff procedures without risk of liability for any breach of the policies.

In re Certified Question (Bankey v. Storer Broadcasting Company)

Key facts: Bankey was a salesman for Storer Broadcasting Company for thirteen years. He alleged that throughout his employment, Storer had a policy that Storer would not terminate its employees without just cause. Bankey also alleged that he remained in Storer's employ in reliance on this policy. The existence of the policy appears to have been confirmed by the 1980 version of Storer's Personnel Policy Digest, which stated that "an employee may be ... discharged for cause." However, in early 1981 (just after the Michigan court's *Toussaint* decision), Storer issued a new Digest which deleted the "for cause" statement. Instead, the 1981 Digest stated that employment was "at the will of the company." Three months after the company issued the revised 1981 Digest, it discharged Bankey, allegedly for poor performance.

Mr. Bankey filed suit against the company for wrongful discharge in breach of contract. The jury's verdict was for Bankey. The company appealed to the Sixth Circuit, and the Sixth Circuit certified following question to the Supreme Court of Michigan:

> Once a provision that an employee shall not be discharged except for cause becomes legally enforceable under *Toussaint* ... may the employer thereafter unilaterally change those written policy statements ... and alter the employment relationship of existing employees to one at the will of the employer in the absence of an express notification to the employees from the outset that the employer reserves the right to make such a change?

Decision: The Michigan court answered yes, with a qualification. "An employer may, without an express reservation of the right to do so, unilaterally change its written policy from one of discharge for cause to one of termination at will, *provided* that the employer gives affected employees reasonable notice of the policy change" (emphasis added).

1. **Unilateral Contract Analysis?** The court described and responded to the company's unilateral contract analysis, finding it insufficient:

a. According the company, the hiring of an employee for an indefinite period results in a unilateral contract (if you work, I will pay you), and an employer may change its policies with respect to such employment without an express reservation of right. The company argued that an employee accepts an employer's unilateral modification of terms by continuing to work for the employer.

b. The court found this analysis "artificial." After all, the court reasoned, "Few employers and employees begin each day contemplating whether to renew or modify the employment contract in effect at the close of work on the previous day."

2. **A Mutual Assent Analysis**? The court described and responded to Bankey's analysis of the case, finding it, too, insufficient:

a. Bankey did not indicate whether he relied on either unilateral or a bilateral contract theory. He simply argued that any unilateral attempt by an employer to change an existing "for cause" discharge policy is nothing more than a proposal to modify the contract, and that the change is ineffective without mutual assent based on a "meeting of the minds."

b. The court rejected Bankey's approach because the court had stated in *Toussaint* that a statement of policy can create contractual rights *without* evidence that the parties mutually agreed to give the policy contractual effect. If Bankey were right, an obligation that arose *without* mutual assent could only be altered *with* mutual assent, a paradox the court found unsettling.

3. **Examples From Other States**. The court reviewed conflicting decisions of courts in other jurisdictions that had addressed the question whether an employer may revoke a promise to discharge only for cause.

a. In *Chambers v. Valley Nat'l Bank*, a federal district court applying Arizona law adopted Storer's argument in this case. It held that an employer's revocation and disclaimer of an earlier promise to discharge only for cause was an offer to modify a unilateral contract, which the plaintiff accepted by continuing to work.

b. In *Thompson v. Kings Entertainment Co.*, a district court applying Virginia law rejected the unilateral contract analysis proposed by Storer. The court held that an employee's acceptance of a change in policy could not be inferred merely from plaintiff's continuing to work. The court held that a jury should hear the claim based on questions of acceptance and consideration.

4. **Policy/Contract Analysis**. Rejecting unilateral contract analysis, the court recalled *Toussaint's* focus on the "*benefit* that accrues to an employer when it establishes desirable personnel policies" (emphasis added).

a. Written personnel policies are enforceable *not* because of offer and acceptance of a unilateral contract, but because of the *benefit* the employer derives by establishing such policies. An employer need not adopt policies, but by doing so it "secures an orderly, cooperative and loyal work force." The employer is not trying to induce each individual employee to show up each day. Rather, it is seeking to induce collective productivity. Creating the policies and deriving these benefits creates a situation "instinct with obligation."

b. As the court held in *Toussaint*, "No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices *or that the employer may change them unilaterally."*

5. **Employer's Right to Modify**. A premise of *Toussaint* was that an employer's freedom to change its policies over time did not preclude the existence of a contract.

a. The very definition of "policy" negates a legitimate expectation of permanence. The common understanding of a "policy" is "a flexible framework for operational guidance, not a perpetually binding contractual obligation." Indeed, "the operating policies of a business enterprise must be adaptable and responsive to change."

b. However, an employer must uniformly apply personnel policies "in force at any given time."

c. The fact that an employer can change policies does not mean the promise to follow policies is illusory. A promise of job security could be for something less than "permanent" employment, and still be valuable.

d. To prove the value of promises of job security, subject to future modification, the court cited the example of collective bargaining (which normally results in a promise to discharge only for cause, subject to renegotiation every three years or some other term).

6. **Practical Considerations**. Denying an employer the right unilaterally to modify its policies would be impractical for modern employment relations.

a. It would mean that a policy could never be changed without successful renegotiation with every employee employed while the policy was in effect.

b. If the employer was required to negotiate separately with each employee, "the uniformity stressed in *Toussaint* would be sacrificed."

c. Employers might be tied to anachronistic policies in perpetuity if they failed to anticipate *Toussaint* by expressly reserving their right to make policy changes.

7. **Limits on Employer Modification**. While an employer can unilaterally rescind its policy of discharging employees only for cause, there are limits on an employer's right to change its personnel policies.

a. First, an employer must not make changes in bad faith, such as by suspending a "cause" rule just long enough to permit the firing of a particular employee without cause.

b. Second, "Fairness suggests that a discharge-for-cause policy announced with flourishes and fanfare at noonday should not be revoked by a pennywhistle trill at midnight." Thus, for a revocation to be legally effective, the employer must provide reasonable, uniform notice of the change to affected employees.

c. Third, an employer may not make changes in policy purporting to affect accrued or "vested" benefits (e.g., an employer could not modify a vacation policy to reduce the amount of vacation time an employee had already "accrued"). However, "the concept of accrued or vested rights cannot be stretched to include the right not to be discharged except for just cause."

Problems

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1. a. Apple was laid off for business reasons and not because of disciplinary cause. For him, the questions are (1) whether Main Street's policy for "transferring" employees to new jobs after the acquisition was enforceable as a contract, (2) whether Main Street effectively revoked that policy, and (3) whether Main Street breached its promise.

The argument that the policy was a binding promise is particularly strong because it was clearly intended and designed to induce First City employees to remain in their jobs through the transition, which can be very important to the new owners of a business. Even a "strong" employment at will state might treat this policy as a binding promise.

But Main Street later revoked its policy and established an "at will" job policy. One view is that Main Street can do this as long as it provides employees with reasonable advance notice, and it acted in good faith. Six months advance notice might be reasonable, but Apple could argue that six months is not enough for his occupation, given current economic conditions.

In jurisdictions that take a unilateral contract/offer and acceptance approach, there is another argument for Apple. If alternative employment within six months is not reasonably possible, then continuing to work for Main Street for six months might not be "acceptance."

Apple might also try to prove that Main Street acted in bad faith. It induced employees to ride out the transfer of ownership and merger of operations only to discharge them as soon as it could do so without disrupting operations. Main Street will likely argue that two months of employment plus six months notice is enough to make its offer of employment a fair deal, especially when one considers the additional severance pay.

Another view is that Main Street must provide additional consideration. Main Street will point to the additional severance pay it now offers. A case like this raises an issue as to a court's ability to evaluate the sufficiency of consideration. One week's severance pay is not really so much–only enough to support the employee for one more week of job hunting. Still, it is considerably more than the proverbial peppercorn.

b. With respect to Orange, one could raise all the arguments described above, plus at least one more. In a jurisdiction that requires an employer to supply consideration for a change in policy, Orange can argue that she received no consideration. Orange received no severance pay because Main Street purported to discharge her for cause, and severance pay appears to be the only possible consideration for the change. In a state that follows the *Bankey* approach, perhaps Orange can also argue that Main Street acted in bad faith by using disciplinary cause as a pretext for a layoff in order to avoid the cost of severance pay. However, Main Street's possible bad faith relates mainly to its characterization of its action against Orange and not to its change in policy. Of course, Orange can challenge the denial of her claim for severance pay even if she fails in her wrongful discharge claim.

2. Modification works both ways. Pear will argue that this is an example of an employer's promise of job security after having disclaimed any such promise. Main Street will respond that the alleged promise is still subject to the parol evidence rule because the interviewer's statement was "contemporaneous" with the written terms Main Street presented to Pear in the application form.

Perhaps Pear's best argument is that the parol evidence rule does not apply because the interviewer's promises "supplemented" and did not "contradict" the statement in the application form. Although the employer's general policy was that it did not need to prove cause for discharge, "cause" in this context might have meant disciplinary cause, and the interviewer assured that layoffs would not be a cause. She also assured that taking time off for the birth of Pear's baby was one thing that would not result in his discharge.

Wakefield v. Northern Telecom, Inc.

Key facts: Since 1975, Wakefield was a salesman of "telephone switching systems" at a company called Danray's that was bought by Northern Telecom, Inc. ("NTI"), in 1978. He earned commissions under a "Sales Incentive Plan" (the "Plan") that was in effect when Wakefield was one of 57 employees terminated in October 1979, twenty-one months after NTI bought Danray's. The key language of the plan is in Paragraph J: "to receive incentive compensation under this Plan, the participant must be a Danray employee on the date the incentive compensation is to be paid pursuant to the Plan. It will be Danray's policy to ensure a fair, equitable and prompt payment of any incentive due an employee whose employment is terminated or who is transferred to a non-sales position." Wakefield claimed NTI violated the implied covenant of good faith and fair dealing. He challenged his termination and the denial of impending commissions.

Decision: Analyzing both New York and Jew Jersey law (because there was a dispute as to which applied, and the court found that "New Jersey and New York contract law do not differ so far as the legal issues before us are concerned"), the court issued two holdings.

First, "the implied covenant of good faith does not give rise to a contract action for the wrongful discharge of an at-will employee" such as Wakefield, who "may not, therefore, recover for his termination per se."

Second, an implied covenant claim can arise from an employer's termination of an employee for the purpose of interfering with rights to commissions already substantially earned. Wakefield must prove "NTI's desire to avoid paying him commissions that were virtually certain to become vested" and this this was a "substantial motivating factor in the decision to discharge him." A right to such deferred compensation derives from a "contract for payment" distinct from the contract rights to terminate employment at-will. A contract granting a right to delayed commissions – i.e., to payment after some delay following the sale that triggers the commission – "cannot be read to enable the defendant to terminate an employee for the purpose of avoiding the payment of commissions which are otherwise owed." Moreover, commissions are typical in circumstances in which employees are not subject to direct supervision apart from measurement of results. An employer's right to avoid payment of such compensation would be counterproductive to the incentive purposes of the compensation. Indeed, the better the employee's results, the stronger the employer's motivation to terminate.

Observations:

(1) Was Wakefield's claim weakened by the fact that he was one of 57 employees terminated simultaneously? Wakefield might argue that he was selected for inclusion because, in a cost cutting environment, his termination would save a considerable amount of money.

(2) Not all jurisdictions agree with *Wakefield*. What policy arguments might they find compelling for rejection of the rule in *Wakefield*?

(3) The question of what relief a plaintiff can recover on such a claim is unsettled. *Wakefield* appeared to hold in a footnote that the plaintiff cannot "recover more than the commissions earned before his termination." Could a plaintiff argue that if he or she proves termination was motivated by a forbidden reason, relief includes reinstatement or post-termination back pay for a period the court deems proper. What argument might one make against such an expansive recovery?

Guz v. Bechtel National, Inc.

Key facts: To recap the facts set forth in the earlier reproduction of another part of the court's decision, Bechtel discharged Guz after 20 years of employment. During his employment Guz had received steady raises, promotions and good performance reviews. Nevertheless, Bechtel terminated Guz's employment because it had eliminated Guz's work unit and consolidated work in another Bechtel office. Guz sued Bechtel Corporation for wrongful discharge. As we saw earlier, the Supreme Court of California ultimately held that Guz could not prove an express or implied in fact contract that barred his non-disciplinary termination in the circumstances. However, Guz also alleged a breach of the implied in law covenant of good faith. In particular, Guz argued that Bechtel acted without good faith when it violated its established personnel policies by terminating him without an opportunity for him to improve his "unsatisfactory" performance rating, by failing to use certain objective criteria in selecting him for layoff, and by failing to consider him for other positions for which he was qualified.

Decision: The trial court properly dismissed Guz's claim for wrongful discharge in violation of the implied in law covenant of good faith and fair dealing.

1. **Good Faith in Employment**. The covenant of good faith that is a part of a contractual relationship might also be part of an employment relationship.

   a. The covenant of good faith and fair dealing prevents one party from unfairly frustrating the other party's enjoyment of the benefits of the agreement.

   b. The covenant of good faith may have some function in the employment relationship. For example, an employer might violate the covenant if it terminated an at-will employee simply to interfere with the employee's right to deferred compensation (e.g., compensation which the employee had earned but which was contingent on continued employment).

2. **Good Faith and the Right to Terminate**. The covenant of good faith does not impose duties or limitations on termination as to which the parties did not actually agree.

a. If Guz were to prove that the agreement expressly or impliedly limited the company's right to terminate, invoking the implied covenant would be superfluous.

b. If the agreement did not limit the company's right to terminate at will, Guz cannot alter the agreement in that regard simply by invoking the implied covenant of good faith.

c. Employment "at will," by definition, means the employer may terminate the employment peremptorily, arbitrarily, or inconsistently, and without prior warning, fair procedures, objective evaluation, or preferential reassignment.

d. The court distinguished an employee's expectation of continued employment from cases involving an employee's right to deferred compensation or benefits. If the employee has already earned deferred compensation or benefits, the implied covenant of good faith prevents the employer from denying the employee that benefit by terminating his employment. But the employee gets only the amount of that compensation, not a right to continued employment.

Roberts v. Geosource Services, Inc.

Key facts: Roberts was an oil drilling worker for a company in Louisiana when he sought a new job in an overseas position with Geosource Drilling Services. Roberts interviewed for the position in Houston, and Geosource immediately offered Roberts the job. Over a period of one day, Geosource sent Roberts to its doctor for a physical examination and to update his vaccinations, and it presented various employment-related forms for Roberts to read and sign, including a Drilling Service Employment Agreement (an agreement for employment at will). Sturm, who was responsible for hiring for Geosource, signed the agreement for Geosource.

Sturm knew that Roberts was employed by another company in Louisiana and was due to report back to work the next day for an offshore assignment. However, Geosource took possession of Roberts' passport (evidently to begin making overseas travel arrangements), and it informed Roberts that he would need to depart from Monroe, Louisiana in about a week and a half to travel to Peru, which was the location of his prospective job. Geosource assured Roberts it would provide detailed flight information in about three or four days.

Relying upon Sturm's oral promises and the written contract with Geosource, Roberts notified his employer in Louisiana of his new employment plans, and he resigned his employment with that employer. A few days later, Sturm contacted Roberts to say that Geosource had found someone better qualified, and that the company would not be hiring Roberts after all.

Roberts filed suit against Geosource and Sturm seeking recovery for breach of contract and detrimental reliance, among other things. The trial court granted summary judgment in favor of Geosource and Sturm and dismissed Roberts' claims. Roberts appealed.

Decision: Reversed. Roberts presented a triable issue of fact with respect to his claims for detrimental reliance or promissory estoppel.

1. **Reliance Theories**. Roberts' evidence was sufficient to support either of two "reliance" based claims against Geosource:

   a. "Detrimental reliance" (a Texas "sibling" version of promissory estoppel): (1) a promise (2) which Geosource made "designedly" to influence Robert to engage in certain conduct, which (3) though not necessarily constituting performance of a contract, was something Roberts was required to do before he could begin to perform; and (4) Geosource knew all this.

   b. Promissory estoppel: (1) a promise, (2) which Geosource should have foreseen would induce certain reliance by Roberts, and (3) substantial reliance by Roberts to his detriment.

2. **Application**. Roberts' evidence created at least a triable issue of fact and the trial court erred in granting summary judgment to Geosource.

   a. In particular, Roberts showed: (1) Geosource (Sturm) made a promise of employment, (2) Geosource (Sturm) must have foreseen that Roberts would rely on the promise and that Roberts must necessarily resign from his current employment and prepare for overseas travel to accept the new job, and (3) Roberts relied exactly in this way to his detriment.

   b. Although the employment Geosource offered was at-will, when an employer foreseeably and intentionally induces a prospective employee to materially change his position to his expense and detriment, and then repudiates its obligations before the written contract begins to operate, the detrimental reliance is sufficient consideration to bind the employer to its promise.

3. **On Remand**. Whether Roberts quit his job in Louisiana because of the offer from Geosource is an issue of fact for the jury to decide. So too is the amount of damages Roberts actually sustained.

Observations:

1. Promissory estoppel is one way around the employment at will doctrine even in a strong "at will" state like Texas (though the reception among Texas courts has been mixed). However, it is not clear whether Roberts would have had a claim if Geosource had fulfilled its promise by employing Roberts for at least a short time.

2. There are two views about the measure of damages for a claim based on promissory estoppel. According to one view, the employee (promisee) receives his expectation interest (the difference between what Roberts would have earned for Geosource and the amount he actually earned over a given period of time). The alternative view is that Roberts recovers his reliance interest (the difference between what he would have continued to earn with his Louisiana employer and the amount he actually earned over a given period of time. Section 90 of the Restatement of Contracts (Second) would allow the court some discretion to choose either measure of damages depending on the circumstances of the case.

Stewart v. Jackson & Nash

Key facts: Herzog, a partner at Jackson & Nash, recruited Victoria Stewart away from the environmental law department of rival firm by "represent[ing] to Stewart that Jackson had recently secured a large environmental law client, that Jackson was in the process of establishing an environmental law department, and that Stewart would head the environmental law department, and be expected to service the firm's substantial existing environmental law client." After Stewart arrived, Jackson & Nash assigned her mostly to other work. Herzog reassured her that environmental work was forthcoming and "that she would be promoted to a position as head of Jackson's environmental law department," but eventually another partner allegedly admitted "Jackson had never 'really' had this 'type' of work, nor had [it], in fact, secured an environmental law client." Jackson & Nash dismissed Stewart at the end of 1990, asserting that for a year it tried but failed to acquire environmental work. Stewart sued for fraud, alleging Jackson & Nash fraudulently induced her to accept employment and thwarted her career objective – environmental law. The district court dismissed her claim based on the employment-at-will doctrine.

Decision: Reversed. The misrepresentations "commenced well before her termination and were, in several important respects, unrelated to it," or at least unrelated to whether she could be fired at will. The court also rejected the argument "that Stewart's claim is nothing more than a contract action ..., since it is based on an oral agreement"; rather, "where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable.... Thus, fraud in the inducement of a written contract is not merged therein so as to preclude an action for fraud," making all four of the following misrepresentations actionable:

(1) “Jackson had recently secured a large environmental law client”;
(2) “Jackson was in the process of establishing an environmental law department”;
(3) “Stewart would head the environmental law department”; and
(4) “[Stewart would] be expected to service the firm's substantial existing environmental law client.”

These were false representations of present fact or present intention, which are actionable, not mere promises or predictions as to the future.

Observations:

What are the proper damages for Ms. Stewart, and what facts would Ms. Stewart have to show to obtain those damages (e.g., what evidence would justify recovery of damages for lost earning potential)? What if Jackson & Nash recruited a general litigator with a promise of obtaining more federal than state litigation, or a promise the new arrival would be able to be lead counsel in the lawsuits the firm already had?

Sterner v. Marathon Oil Co.

Key facts: In 1975, while Sterner was employed by a construction company, he was injured by inhaling gas fumes on Marathon’s premises. He filed a lawsuit against Marathon for these injuries (recall that as a third party, Marathon could not assert the exclusive remedy defense with respect to Sterner’s work related injury).

Nine months later, Sterner was employed by another contractor at a Marathon refinery (Sterner’s union had sent him to this job). On his second day of work, Sterner became sick. He departed early, and as he was leaving he passed by one of Marathon’s safety personnel. The Marathon employee asked Sterner why he was there, and Sterner replied, “I am working.” The Marathon employee rejoined, “not if [I have] anything to say about it.” The next day, the contractor/employer dismissed Sterner. The sole reason for discharge stated on Sterner’s “pink slip” was “per Marathon’s directive.”

Sterner sued Marathon for tortious interference with employment. A jury gave a verdict for Sterner and awarded $25,000 in damages. Marathon appealed, and the court of appeals reversed. Sterner appealed to the Supreme Court of Texas.

Decision: Reversed. Judgment in favor of Sterner reinstated. Sterner’s evidence supported his claim for tortious interference with his employment contract.

1. **What Relationships Protected**. Sterner’s relationship with his employer was protected against tortious interference.

a. The Texas doctrine of tortious interference applies to prospective contracts as well as existing contracts. (Thus, the fact that Sterner's employer had only a prospective, nonbinding intention to continue its employment of Sterner did not preclude a tortious interference claim.)

b. The unenforceability of a contract is no defense to an action for tortious interference. A promise may be a valid and subsisting contract even though it is voidable, and third parties are not free to interfere with such a contract before it is avoided. Similarly, an at will contract is valid and subsisting, and third persons are not free to tortiously interfere with it.

2. **The Privilege Defense**. A third party is not liable for interference when it had a "privilege," based on an economic interest that is being impaired by the contract. Marathon did not establish that it had such an interest.

a. Legal justification or excuse, based on privilege, is an affirmative defense, because the party asserting the privilege admits interference but seeks to avoid liability based on its asserted privilege. The defendant has the burden of proving its privilege.

b. A person is privileged to interfere with a contract if (1) he acts in a bona fide exercise of his own rights, or (2) his right in the subject matter of the contract is equal or superior to the injured contracting party's right.

c. Marathon failed to produce evidence of either alternative prong of the privilege defense. (Below, I've reversed the court's discussion of these two prongs, because it makes more sense to me to do so.)

i. Marathon did not show it interfered because of an "equal or superior right to that of Sterner *in the subject matter of his employment contract*." Marathon had no particular right in the subject matter of Sterner's employment contract. Marathon's contract with the contractor/employer left Marathon no right to supervise, manage, control or direct the details of the work. Marathon's interest was only in the results of the work. Could Marathon assert a right "in the subject matter of [Sterner's] employment" by virtue of its status as the owner of the premises where Sterner worked? The court simply stated, "Marathon's action went beyond an assertion of its right to control the premises." (In other word, perhaps, Marathon didn't act for any reason necessary to protect its property.)

ii. Marathon was not acting in the bona fide exercise of its own rights. (As I read it, this source of privilege is potentially broader than the first, because the defendant's "right" need not be based on an interest in the subject matter of the contract with which it interfered.) Again, the court rejected that Marathon could have been acting to protect any particular interest, such as its property, because

> "Sterner was not fired because of inadequate performance." It is clear enough that Sterner argued, and the court believed, that Marathon acted out of *retaliatory* intent for something that had happened elsewhere, many months earlier on some *unrelated* project.

Observations:

1. The court never really responds to the underlying question whether a business/property owner has the right to deny admission to its property to an opponent in litigation. Perhaps it is understandable that Marathon's personnel had hard feelings about being sued by Sterner. Hard feelings, however, do not translate into a justifiable business reason to meddle with the contractor's management of its workforce or Sterner's employment. If Marathon feared that Sterner threatened its property and business because he was a litigious individual, it does not appear to have made that argument before the court. The larger issue is whether common law tort plaintiffs should have the same protection against retaliation as do workers' compensation claimants.

2. In this setting, the tort of interference fills a gap left by workers' compensation anti-retaliation laws. The source of the retaliatory intent was a common law tort claim, not a workers' compensation claim, and the defendant was a third party, not the plaintiff's employer.

3. Although an "interference" claim is yet another way to overcome the employment at will doctrine, it seldom provides a remedy, because the most likely persons to interfere with an employee's employment are the employee's supervisors, who are probably acting in the scope of their authority for the employer.

St. Mary's Honor Center v. Hicks

The most important and reliable exception to the employment at will doctrine is that an employer must not discharge an employee for an illegal reason. A plaintiff can sue an employer for its illegal motivation regardless of the whether the contract provided any promise of job security. In general, one can divide "illegal" reasons into two categories: (1) status discrimination (e.g., race); and (2) protected conduct. The distinction is useful because, after some important common ground between the two categories, there are some important differences. *St. Mary's Honor's Center* addresses the problem of proof, particularly in an alleged wrongful discharge case based on status discrimination.

One could also discuss *St. Mary's Honor's Center* earlier in the initial discussion of discrimination in Chapter Four, but there are differences between the selection or hiring of employees and the discharge of employees that make it convenient to talk about these subjects separately.

Key facts: Hicks was a correctional officer and a "shift commander" (a supervisory position) at St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR).

In 1983 a MDCHR investigation of St. Mary's resulted in some supervisory changes. Hicks retained his position, but St. Mary's appointed a new chief of custody (Hick's immediate supervisor) and a new superintendent.

Hicks's employment record was "satisfactory" before the appointment of these new managers. However, the new managers subjected Hicks to a number of increasingly severe disciplinary actions, including a five day suspension for rules violations by his subordinates. Later, St. Mary's issued a letter of reprimand to Hicks for allegedly failing to conduct an adequate investigation of a brawl between inmates. Then St. Mary's demoted Hicks to a nonsupervisory correctional officer position for failing to ensure that his subordinates recorded their use of a St. Mary's vehicle in the official log book. Finally, St. Mary's discharged Hicks for threatening his supervisor, the chief of custody, during a "heated" exchange of words.

Hicks sued St. Mary's under Title VII for alleged race discrimination in demoting and discharging him, and he sued one of the individual managers under §1983. After a bench trial, the district court judge concluded that the defendants had advanced false reasons for demoting and discharging Hicks. The judge noted that Hicks was the only supervisor disciplined for violations committed by his subordinates; that St. Mary's ignored the same, and sometimes more serious violations by other employees, or disciplined other employees more lightly; and the superintendent who Hicks allegedly threatened had manufactured an argument with Hicks in order to provoke Hicks into threatening him.

Nevertheless, the trial judge held that Hicks had failed to prove that race was the determining factor in his demotion and discharge. Among other things, the judge noted that two blacks sat on the review board that recommended action against Hicks, that the subordinates who actually committed the violations and were not disciplined were of the same race as Hicks, and that "the number of black employees at St. Mary's remained constant." In conclusion, the judge found that "although [Hicks] has proven the existence of a crusade to terminate him, he has not proven that the crusade was *racially* rather than *personally* motivated" (emphasis added).

Hicks appealed, and the Eighth Circuit reversed on the ground that if Hicks had rebutted St. Mary's explanation of its actions, St. Mary's was in the position of having never fulfilled its burden of articulating a legitimate, nondiscriminatory reason for its action. Thus, in the Eighth Circuit's view, Hicks was necessarily entitled to judgment as a matter of law.

St. Mary's petitioned for writ of certiorari.

Decision: Reversed, and remanded for further proceedings (evidently leading to the reinstatement of judgment against Hicks).

1. **Order of Proof**. Hicks established a prima facie case of discrimination under *McDonnell Douglas* by proving (1) that he is black, (2) he was qualified for the position of shift commander, (3) he was demoted and then discharged from that position, and (4) that the position remained open and was ultimately filled by a white man.

a. The burden was then upon St. Mary's to produce an explanation that the adverse employment actions were for legitimate, nondiscriminatory reasons.

b. However, the *McDonnell Douglas* presumption shifts only a burden of production to the defendant. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

c. The defendants satisfied their burden by explaining, with evidence that they demoted and discharged Hicks because of the severity, and the accumulation of his rules violations.

d. Once an employer has articulated a nondiscriminatory reason for its action, "the shifted burden of production became irrelevant," and "the presumption raised by the prima facie case is rebutted ... and drops from the case." (This is a controversial statement by Justice Scalia that might be open to different interpretations. The statement was later qualified by *Reeves v. Sanderson Plumbing Products*, where the Court explained that a *McDonnell Douglas* inference of discrimination still has some evidentiary value, and that the inference plus rebuttal of the employer's explanation might suffice to support a judgment for the plaintiff even without additional evidence of discrimination.)

e. The plaintiff retains the ultimate burden of persuading the trier of fact that he was the victim of discrimination.

2. **Effect of Rebuttal of Explanation**. The Eighth Circuit erred in believing that rebuttal of the employer's explanation required judgment as a matter of law for Hicks.

> a. "The defendant's 'production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his race.'"
>
> b. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination, and "[n]o additional proof of discrimination is required."
>
> c. However, rejection of the defendant's proffered reasons does not in itself compel judgment for the plaintiff. The factfinder, reviewing all the evidence must still determine whether the plaintiff has satisfied his burden of persuasion. The factfinder

might conclude that while the defendant's explanation was wrong, the actual motivation for acting against the plaintiff was something other than illegal discrimination.

3. **Reward for Perjury**? Justice Scalia responded to arguments that the Court's decision would reward employer's who had given false evidence.

a. Rebuttal of an employer's explanation does not mean that the employer or its managers are perjurers and liars.

b. Even when two witnesses to the same physical occurrence disagree as to what happened, "surely it would be imprudent to call the party whose assertion is (by a mere preponderance of the evidence) disbelieved, a perjurer and a liar."

c. In discrimination cases the employer frequently relies on the word of an employee about the fact in issue, and "that central fact is not a physical occurrence, but rather that employee's state of mind." Neither the employer who introduces such testimony nor the testifying employee is necessarily a liar and a perjurer when the testimony is not believed.

d. "Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of ... race."

Observations: Under the Eighth Circuit's approach, the employment at will doctrine was less than it might have seemed. An employer could be liable for an arbitrary, incompetent or corrupt reason for discharging an employee, because a euphemistic version of such a reason is difficult to "prove" in a wrongful discharge action where discrimination is the alternative reason proposed by the plaintiff. After *St. Mary's Honor*, it is clear that the question is whether the employer was motivated by discrimination, not whether its explanation was competent. But a factfinder's rejection of the employer's explanation, "particularly if disbelief is accompanied by a suspicion of mendacity," is still an invitation for judgment for the plaintiff. Thus, an employer who cannot persuasively explain a tasteful reason for discharging an employee is at great risk of liability if the employee can present at least a prima facie case of discrimination.

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a. The same actor rule should have no application here, because Agis was not within the protected group when he was hired. On the other hand, the prima facie case is not particularly strong. There is only a seven year age difference between Agis and the woman who replaced him.

b. The prima facie case is as strong as it can be when it is based only on the *McDonnell Douglas* inference. The plaintiff was replaced by the opposite race and gender. But the same actor rule is likely to apply with some force here (she was discharged by the same person who hired her only six months earlier), especially with respect to any race discrimination claim because the decision maker was of the same race.

c. The prima facie case is just as strong but the same actor rule should not apply at all.

Banaitis v. Mitsubishi Bank, Ltd.

Key facts: Banaitis was a vice president of BanCal. Another financial institution, MBL, which was a member of the "Mitsubishi Group" acquired a controlling interest of BanCal. MBL transferred sent several of its officers from Tokyo to manage BanCal, and one of those officers, Tanaka, became plaintiff's supervisor.

Before MBL's acquisition, BanCal had a policy of keeping its customers' financial information confidential, and it stated this policy in its employee policy manual. Employees were required to certify that they understood the policy each year. An employee who breached the confidentiality policy was subject to immediate dismissal.

When MBL acquired BanCal, a number of BanCal's customers expressed concern that MBL would acquire information from BanCal that would be used by members of the Mitsubishi Group for competitive advantage. Some customers stopped doing business with BanCal, and others demanded written confidentiality agreements that would insure that their financial information would not be disclosed to MBL.

One day an MBL employee called Banaitis and asked for certain financial information about BanCal's grain company customers. Access to such information could give other grain companies a competitive advantage. Banaitis denied this request, because disclosure of the information was against BanCal policy, and (he believed) against the law and unethical. The MBL employee explained he would use the information for internal MBL purposes only, but Banaitis insisted on a written authorization from BanCal's president before he could release the information. Banaitis took the same position when another MBL manager requested financial information about a BanCal customer who had previously demanded a promise that confidential information would not be disclosed to MBL or any member of the Mitsubishi Group.

After these events, Tanaka gave Banaitis a performance evaluation that falsely accused him of failing to meet a budget. Later, Tanaka also falsely accused Banaitis of going on a business trip without approval and of being generally dishonest. After yet another poor but allegedly false performance evaluation, BanCal put Banaitis on probation for 90 days.

When Banaitis had completed his probation, he spoke with BanCal's Human Resources Department to say that he could not stay at the bank, and he offered to negotiate his resignation. While he was negotiating his resignation, Banaitis informed his staff that he would be leaving the bank soon. Banaitis had expected to continue at BanCal through December 31, 1987 to receive the bank's full contributions to his pension fund for that year, but BanCal dismissed him effective December 30, 1987 (making him one day short of gaining a full pension contribution). Tanaka informed Banaitis of the accelerated dismissal and left him with 30 minutes to "clean out his desk" (although the bank actually allowed him additional time to collect his things, under the observation of other employees).

Banaitis sued BanCal for wrongful discharge in violation of public policy, and he sued MBL for tortious interference with a contractual relationship. The jury's verdict was for Banaitis. BanCal and MBL appealed.

Decision: Affirmed. Banaitis was acting in support of a public policy that customer financial information should be safeguarded, and BanCal violated this public policy by discharging Banaitis.

1. **Constructive Discharge**. Appealing from the denial of a motion for a directed verdict, BanCal conceded for the sake of argument that it constructively discharged Banaitis in retaliation for withholding confidential BanCal customer information from MBL. However, BanCal argued, Banaitis was an at-will employee who could be fired for any reason that was not illegal.

2. **The Public Policy Exception**. Even though there is no particular law making it illegal to discriminate or retaliate against an employee who engaged in the sort of conduct involved in this case, the courts have recognized a wrongful discharge cause of action for an employee discharged for performing a public duty, fulfilling a societal obligation, or refusing to commit a potentially tortious act. The question in this case was whether Banaitis's termination for refusing to disclose confidential information involved this "societal obligation" or "public duty" exception to the at-will rule.

3. **Laws an Employee Might Uphold**. BanCal argued that there was no law that specifically prohibited the disclosures Banaitis resisted, and that discharging an employee for refusing to perform a legal act was not against public policy. The court rejected this position.

a. The Oregon Supreme Court has applied the public policy rule whether or not the employee conduct in question was specifically required by the law.

(1) *Nees v. Hocks*: Cause of action for an employee discharged for fulfilling jury duty. As evidence of public policy, the court looked to a number of laws regarding the importance of jury service, even though none of the laws the court cited imposed an obligation of jury service.

(2) In *Delaney v. Taco Time Int'l.*: Cause of action for employee discharged for refusing to sign a false performance evaluation. The court relied on provisions of the Oregon Constitution to support the view that "a member of society has an obligation not to defame others," although none of these provisions actually prohibited such defamation.

b. Public policy might be implied by the constitution, statutes, or caselaw, and even the caselaw of *other* jurisdictions.

4. **Duty to Preserve Confidentiality**? Discharging an employee for refusing to disclose a customer's confidential financial information falls within the societal obligation prong of Oregon's public policy rule. The underlying public policy is evidenced by a number of statutes:

a. The Right to Financial Privacy Act limits disclosure of customer records by a financial institution *to a government authority* without the customer's consent.

b. The Freedom of Information Act exempts privileged or confidential "commercial or financial information" from compelled disclosure *by public agencies*.

c. The Oregon Public Records Act exempts trade secret information (which could include confidential financial information) from compelled disclosure by *public agencies*.

d. An Oregon law authorizes protective orders to prevent disclosure of "a trade secret or other confidential ... commercial information."

e. Unauthorized removal or disclosure of a bank's files or other property is a felony under Oregon law.

f. Court decisions of *other* jurisdictions (e.g., Idaho) recognize a bank's duty not to divulge customer information to a third party, without the customer's consent.

5. **Importance of the Policy**. These statutes and rules are based on a common premise, that a customer's financial information entrusted to a bank deserves protection.

a. This public policy would be undermined if a bank could discharge an employee for refusing to cooperate in an effort to violate customer confidentiality.

b. The court rejected BanCal's argument that most of the laws protected against disclosure to or by the *government,* and that other laws or rules "only give rise to private remedies and, therefore, cannot be evidence of important public policies."

(1) Again, "it is not necessary that a statute specifically regulate the conduct that precipitated the discharge."

(2) Statutes and court decisions evidence a policy that would be thwarted if an employer were allowed to discharge an employee who sought to uphold that policy.

6. **Tortious Interference**. The court also upheld the verdict against MBL (tortious interference). MBL argued that is was "effectively" a party to the contract, and could not "interfere" with its own contract. The court rejected this argument. First, the court stated that there is no rule that shields a parent corporation from liability for "interfering" with a contract of a subsidiary it owns and controls. Second, the court stated that the record was incomplete and unclear regarding the extent of MBL's ownership and control of BanCal.

7. **Punitive Damages**. On a cross-appeal, the court agreed with Banaitis that the trial court erred in disallowing the jury's award of punitive damages.

Observations:

Employees frequently disagree among themselves and with their supervisors about what is illegal, immoral or just plain wrong. Not being lawyers, they are often misinformed, or perhaps the law, ethics or morality is uncertain. Even as this case reached the court of appeals, it seems the plaintiff still had trouble pointing to any particular rule or statute that prohibited him from doing what the bank instructed him to do.

If an employee refuses to accept the employer's position, does this mean he can unilaterally stymie the employer's plans by insisting he is right and the employer is wrong? If his sense of morality and personal values prevents him from accepting the employer's view, perhaps the solution is to resign (which is what Banaitis sought to do in this case). Perhaps the law should require the sort of "interactive" process courts have begun to require between employers and employees in "reasonable accommodation" cases. If so, a good argument for Banaitis is that BanCal jumped the gun by discharging him before he could bow out gracefully (assuming he was in fact being graceful in his departure).

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1. There might be an OSHA angle here too (general duty clause, and right of refusal). The law against speeding is clear enough. The facts may remind some students of "work to rule" actions in which employees purposely slow or impede production by following every picayune rule, not out of a sense of legal duty, but to gain bargaining power without a full strike.

2. What violates "international law" does not necessarily make the conduct she is protesting "illegal." If the store's business in selling shoes, and these are the shoes it has, what is the store to do if she refuses to cooperate? The typical answer of the courts has been: Either she

is right and the employer is wrong to discharge her, or vice versa. As noted above in connection with the *Banaitis* case, perhaps courts should encourage an interactive process.

3. Using the word "fraud" was going overboard, but as long as she was talking with the government and not a newspaper, perhaps it is reasonable for her to express her concerns to a public agency, and to let them sort it out. She has not necessarily impeded the company's business, except perhaps indirectly by provoking an investigation. We will be dealing with the issue of "good faith" shortly.

4. In this scenario I am trying to suggest the problem about which many employers bitterly complain. An employee can invent a cause of action out of thin air by reporting something, anything, just before he gets the expected pink slip. This employee never got around to blowing the whistle in the formal sense–he just mentioned the problem to other employees. As we will see later on, the problems this presents might explain the courts' recent tendency to deny protection to "internal" whistleblowers whose action is not so easily validated.

5. If the company's managers do not care that the company is being robbed (perhaps because they're all robbing from the company), can she make it her own personal mission to care? At some point, her action is not only annoying, it's a misuse of the time for which the company pays. Moreover, if a secretary treats the officer for whom she works with such distrust, the relationship has probably become unworkable. In support of the employee, one might argue that she is seeking to protect the interests of the public (shareholders, creditors), and she might be an incipient whistleblower under the new Sarbanes Oxley Act.

Austin v. Healthtrust, Inc.

Key facts: Austin had been a nurse for a hospital owned by the defendant for about fifteen years when she noticed that another nurse (Adam) appeared to be under the influence of drugs. Austin then learned that the other nurse had been distributing prescription medication to patients without authorization from a physician. Austin informed her supervisor (Lilly) of the problem. The supervisor told Austin to keep the information to herself.

Evidently, the supervisor took no action against Adam. Instead, he subjected *Austin* to "extreme scrutiny." Eventually, he fired Austin (the supervisor's explanation, if any, is not disclosed in the court's opinion). Afterwards, Austin learned that the supervisor and Adam were "family" friends.

Austin sued the hospital for wrongful discharge in retaliation for reporting the other nurse's possible drug use and mishandling of prescription medication. The trial court granted the hospital's motion for summary judgment and dismissed Austin's claims. The court of appeals affirmed. Austin appealed to the Supreme Court of Texas.

Decision: Affirmed. The Legislature's active lawmaking and protection for employee whistleblower activity makes the court's invention of its own new causes of action unnecessary and inappropriate.

1. **Legislative Activity: Protected Conduct Laws**. Austin asked the court to recognize a private whistleblower cause of action in cases in which the conduct or activity that was reported would have "a probable adverse effect upon the public." The court found that endorsing such a cause of action would be "unwise," because the Legislature has declined to create such a cause of action.

> a. In the eight years since the court last rejected a similar request, the Legislature has enacted several whistleblower laws, each of specific application and not of general application.
>
> b. The Legislature recently failed to enact a proposed law that would have created broad whistleblower protection for all private sector employees. (Public sector employees are already protected by their own law in Texas.)
>
> c. The Legislature has followed a more specific, category by category approach, in which it protects particular types of employees who report particular types of violations. Examples: public employees reporting violations of the law, physicians reporting other physicians to the State Board of Medical Examiners, nursing home employees who report abuse or neglect of a nursing home resident, and employees who report violations of various state hazardous chemical laws.

2. **Statutes Nearly Protecting Austin**. The Legislature has also enacted statutes that address the same type of whistleblowing Austin alleged in this case.

> a. One statute prohibits retaliation against a registered nurse such as Austin who makes a report *to the Board of Nurse Examiners* about another nurse for causing or risking harm to a patient. Austin did not allege a cause of action under this statute. However, she also did not allege that she filed a report with the Board of Nurse Examiners. (But remember, her supervisor allegedly ordered her to keep it quiet.)
>
> b. Another statute prohibits retaliation against for any hospital employee who reports illegal activity. This statute appeared to cover Austin's situation. Unfortunately for Austin, this statute was not in effect at the time the hospital discharged her. The statute "nevertheless is another factor this Court must consider in determining whether to create a broader common-law cause of action."

3. **Other Employee Protections**. The court also noted all the other statutes the Legislature has enacted to protect employees, including the Texas version of Title VII, and laws

prohibiting discrimination on the basis of union membership, workers' compensation claims, and a variety of other criteria.

4. **Preference for Legislative Action**. The Legislature's enactment of these specific statutes represent a careful balancing of competing interests and policies, reflected in limited coverage and purposes, divergent remedies, and varying procedural requirements. Unlike the Legislature, a court cannot craft details like statutes of limitations for rules of employee protection.

a. If the Court created a general cause of action, "it would in large part eviscerate the specific measures the Legislature has already adopted."

b. "While we are not bound by the Legislature's policy decisions when we consider whether to create a common-law whistleblower action, 'the boundaries the Legislature has drawn do inform our decision.'"

5. Justice Gonzalez concurred, because he agreed "that the facts of Lynda Gail Austin's discharge ... do not provide the appropriate situation for us to broaden the exceptions to at-will employment.... However, such a compelling situation may present itself in the future, and when it does, it will be incumbent on this Court to ... carry its 'burden and the duty of amending [the law of employment at will] to reflect social and economic changes.'"

Observations:

The Texas court's *Austin* decision represents the opposite of the Oregon court's decision in *Benaitis*. Had Austin actually pleaded the nurse whistleblower protection statute, she would have presented an even better test of the court's strict approach to the law. For example, the statute protects a nurse who actually files a report with the right agency, but if a supervisor interfered with Austin's intent to file a report by warning her, or by preemptive discharge, would the court recognize a cause of action?

Garcetti v. Ceballos

Key facts: Ceballos was a deputy district attorney. During the time relevant to this proceeding he served as calendar attorney for the district attorney's office for Los Angeles County. In this position, he exercised some supervisor authority over other attorneys.

A defense attorney called Ceballos about a pending case to inform Ceballos of a motion to challenge a warrant, to complain about the inaccuracy of the affidavit supporting the warrant, and to urge Ceballos to investigate the matter. Ceballos did investigate, determined that the affidavit contained misrepresentations, informed his supervisors, and prepared a disposition memorandum. There was a meeting about the matter that included Ceballos, his supervisors, and members of the sheriff's department including the affiant. The meeting became "heated." Ceballos' supervisor decided to proceed with the prosecution pending the court's resolution of the defense counsel's challenge to the warrant.

At the hearing on the warrant, the defense called Ceballos as a witness, and he testified about his observations about the warrant. Nevertheless, the court rejected the challenge to the warrant.

After this matter, the district attorney's office reassigned Ceballos from the calendar deputy position to a trial deputy position, transferred him to another courthouse, and passed him over for promotion. He sued the county and his supervisors under Section 1983 on the grounds that they had retaliated against him because of his exercise of First Amendment rights. The district court granted the defendants' motion for summary judgment on the ground that Ceballos' memorandum was pursuant to his employment duties and was not protected by the First Amendment. The Ninth Circuit reversed, holding that the memorandum was protected by the First Amendment. The defendants appealed.

Decision: Reversed. Speech pursuant to job duties is not protected by the First Amendment.

1. Under *Pickering*, the First Amendment protects a public employee from employer retaliation because of the employee's speech if the employee was *speaking as a citizen*. If so, the public employer must prove a justification for treating its employee differently from other citizens speaking their minds. If not, the First Amendment offers no protection against the employer's retaliation.

2. The majority explained its overall objectives in First Amendment jurisprudence in the public employment context:

> a. ***Preserving the employer's interest*** in efficient functioning. Public employees accept certain employment-related limits on their freedom. Just like private sector employers, public employers have a need for efficient performance of their mission, and efficiency requires some control over their employees' words and acts. A public employee's unrestricted speech might contravene public policy or impair the functions of his employer agency.
>
> b. ***Preserving the employee's First Amendment rights***. The employee does not abandon all his rights by entering public employment. He still has a right to speak *as a citizen* about matters of public concern. Moreover, the public has an interest in receiving well-informed views of public employees in civic discourse.

3. Did Ceballos speak "as a citizen" when he wrote a memorandum attacking the affidavit supporting the warrant?

a. He expressed himself in the office, not publicly, but this fact was not dispositive. Some employee speech within the workplace is still speech "as a citizen."

b. His memo addressed a "subject matter of Ceballos' employment," but this fact was not dispositive. A public employee might speak as a citizen with regard to a matter of public interest concerning employment conditions.

c. The controlling factor was that he wrote the memo pursuant to his duty as a calendar attorney. Because he was speaking pursuant to his duty, he was not speaking as a citizen.

4. A rule that speech is not "as a citizen" if it is "pursuant to duty" achieves the right balance between the employer's interests, the employee's rights, and the public's needs.

a. Public employees remain free to speak as citizens. Thus, subject to *Pickering* balancing, Ceballos could still express his views to the public outside the performance of his duties.

b. The Court's rule serves the employer's need to insist that employee communications are accurate and promote the employer's mission, and that employee communications are not inflammatory or misguided.

c. Extending First Amendment protection to Ceballos' speech would result in intrusive and permanent federal judicial supervision of communications of and between public officials in the course of official business.

d. A public employer that values free employee discussion of agency business and management can promote such discussion by the creation of internal policies and procedures. Moreover, whistleblower laws and civil service laws protect employees from retaliation for exposing wrongdoing.

e. Ethical rules and the constitutional rights of criminal defendants are another check against misconduct by supervisors of a public attorney.

Observations:

1. On remand, the lower courts will have to consider the possibility of illegal retaliation on the basis of speech other than the memorandum. Perhaps the county retaliated because of Ceballos' testimony.

2. The Court's assurance that employees like Ceballos will be protected by local whistleblower and civil service laws is a bit shaky. There are still many local government

employees without civil service protection, and whistleblower protection under local law is still very uneven.

3. The fact that the Court relied on the existence of whistleblower laws to diminish the need to protect Ceballos is one very good reason courts err by applying the "pursuant to duty" exception or its variations to local whistleblower laws. If both the First Amendment and local whistleblower law are subject to the same qualification, local government employees are truly without any protection at all for uncovering and reporting wrongdoing.

Wichita County, Texas v. Hart

Key facts: The plaintiffs Hart and Williams were deputies in the sheriff's department for the defendant county. They told an investigator for the district attorney's office and an FBI agent that they believed the Sheriff had broken the law. Two days after the Sheriff learned of the plaintiffs' conversation with the district attorney's office, he discharged them.

Hart and Williams sued the county for discharging them in violation of the Texas Whistleblower Act, an act which protects public employees of the state or local governments. The jury rendered a verdict in favor of the plaintiffs, and the court of appeals affirmed. The county appealed to the Supreme Court of Texas.

Decision: Reversed. The trial court had erred in denying the county's motion to transfer venue, which was reversible error. But there were other important issues of law between the parties, and in remanding the case for retrial the Court addressed these issues "in the interest of judicial economy."

1. **The Good Faith Requirement**. The Act grants protection to a state or local government employee "who in *good faith* reports a violation of law to an appropriate law enforcement authority." The trial court instructed the jury that "A report of a violation of law may be in good faith *even though it is incorrect*, as long as the belief is *not unreasonable*." This instruction provoked two issues between the parties.

a. The county agreed that a whistleblower might be acting in good faith even if he erred in believing that the law prohibited the conduct he reported, but the county argued that a factfinder should consideration the education and experience of the particular employee, and that some employees should be held to a higher standard of knowledge than others. The plaintiffs favored a single objective standard of reasonableness for all employees.

b. The county further argued that an employee could not be acting in good faith if he was motivated by spite, malice, jealousy or personal gain. The plaintiffs argued that motivation was irrelevant.

2. **Objective v. Subjective**. In answering these questions, the court referred to the U.S. Supreme Court's decision regarding good faith as a basis for official immunity in an action under §1983 in *Wood v. Strickland*. There, the Court held that "good faith" included elements of both objective and subjective good faith. "The official himself must be acting sincerely and with a belief that he is doing right, but an act ... can[not] be ... justified by ignorance or disregard of settled, indisputable law."

a. The Texas court concluded that *Wood*'s balancing of public and private concerns was also appropriate in defining "good faith" in the whistleblower context.

b. While the purpose of the Whistleblower Act is to protect whistleblowing employees, public employers still must have the right to discipline employees who make *intentionally* false or objectively *unreasonable* reports.

c. Courts of other jurisdictions have not reached any consensus about the relevance of motivation of a whistleblower who actually believes he is reporting a violation of the law.

3. **The Combined Standard**. The court defined "good faith" to mean "(1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience."

a. Thus, "an employee motivated almost entirely by malice when making the report may honestly, though falsely, believe that a violation of law has occurred." In other words, "The fact that an employee harbors malice toward an individual should not negate the Whistleblower Act's protection."

b. However, regardless of motivation, the Act will protect the employee whistleblower "only if a reasonable person with the same level of training and experience would have made the report."

Observations:

Some whistleblower laws make a virtue of self-serving action. The False Claims Act, for example, authorizes a potentially substantial reward for a plaintiff who brings a qui tam action against a contractor for fraud against the federal government. 31 U.S.C. §3729 et seq.

Burlington Northern and Santa Fe Ry. v. White

Key facts: The employer hired White in 1997 and started her at a forklift position. Within a few months she complained internally about sex discrimination in the Maintenance of Way Department. Then she filed an EEOC charge alleging retaliation because of her internal complaints. In particular, she alleged her supervisor had reassigned her to less desirable work. Two months later she filed a second EEOC charge, alleging retaliation because of her first EEOC charge. In particular, she alleged her supervisor had subjected her to special monitoring. After the second EEOC charge, her supervisor suspended her for insubordination. The employer eventually reinstated White with backpay as the result of her internal grievance, but White still filed a third EEOC charge alleging that the suspension was in retaliation for her second EEOC charge.

White sued on the grounds of retaliation in violation of Title VII., and she prevailed in a jury trial. The Sixth Circuit affirmed. The employer appealed.

Decision: Affirmed. Title VII's prohibition against retaliation applies to any materially adverse action.

1. The court surveyed the different approaches lower courts had taken to the question what it means to "discriminate" in violation of Title VII's anti-retaliation provision.

    a. Some courts hold that only a "materially adverse" change in terms and conditions of *employment* can be unlawful retaliatory discrimination.

    b. Some courts hold the provision applies only to "*ultimate employment* decisions," such as termination or denial of promotion.

    c. Some courts hold the provision applies to any materially adverse action (employment-related or otherwise), in the sense that it would dissuade a reasonable employee from making or supporting a charge of discrimination.

2. A retaliation complainant need not prove that the employer's allegedly adverse action was employment related.

    a. Title VII's substantive provision prohibiting race, sex, etc. discrimination states that is unlawful to "discriminate ... with respect to [an employee's] "terms, conditions or privileges of employment." However, the anti-retaliation provision makes it unlawful to "discriminate," period, without the same further qualification.

    b. There is a good reason for giving the term "discriminate" a broader meaning in the anti-retaliation provision. In prohibiting race, sex, etc. discrimination, Congress's objective was to prevent discrimination in the workplace. In prohibiting discriminatory retaliation, Congress sought to prevent employer interference with enforcement of the law. There are many ways an employer can interfere by retaliation with regard to matters outside the employment. The court cited as an example the case of an employer's allegedly false criminal charges against an employee.

3. A complainant must show that the alleged adverse act was materially adverse, in the sense that it would dissuade a reasonable employee from making or supporting a charge of discrimination.

a. Title VII's anti-retaliation provision protects only against injury or harm.

b. The materially adverse standard will separate the significant from the trivial. EEOC complainants are not immune from petty slights or minor annoyances. Title VII is not a general civility code.

c. The standard is objective, depending on the "reasonable" employee's likely response.

d. On the other hand, the standard is stated in general terms and is not limited to specific, pre-determined types of job actions. It requires consideration of the circumstances of the workplace, the work, and the parties, rather than identification of specific pre-determined types of adverse job actions. A change in schedule that is a minor annoyance to one employee might be materially adverse to a mother with young children.

4. The jury could reasonably find that the adverse actions alleged by White were materially adverse.

a. Being reassigned to a different task, even without any change in pay or job level, could be materially adverse. Among other things, the evidence showed the new work was "more arduous and dirtier" and less prestigious.

b. The 37-day suspension could be materially adverse even though the employer reinstated White with backpay. White had to live for 37 days without pay. Moreover, recovering damages in a Title VII lawsuit after having already received backpay is not redundant. White was entitled to compensatory damages.

Observations:

The outcome in this case depends at least in part on a close reading of statutory text, which might be different in other retaliation or whistleblower statutes. Still, the Court's reasoning in this Title VII case appears to have a considerable following among lower courts applying an assortment of other anti-retaliation provisions, whistleblower statutes, and public policy based wrongful discharge doctrines.

C. Alternative Job Security Schemes

Cleveland Bd. of Educ. v. Loudermill

Key facts: This is a consolidation of two separate cases. In one, a school board discharged Loudermill, a security guard, for failing to admit or disclose his felony record in reply to a direct question in his job application. As a classified civil servant under Ohio law, Loudermill was subject to discharge only for cause. The school district did not allow Loudermill an opportunity to respond to a charge of "dishonesty" before it dismissed him. However, after his discharge Loudermill exercised his right to hearings before a "referee" (who recommended reinstatement on the grounds that Loudermill may have believed his felony conviction was only a misdemeanor) and then a civil service commission, which upheld his discharge.

Although Loudermill could have sought judicial review in the state courts, he turned instead to a federal court, alleging that the school district's action terminating him *before* conducting a fair hearing deprived him of liberty and property interests in his job without due process. The district court dismissed Loudermill's complaint for failure to state a claim on which relief could be granted.

The other case involved Donnelly, a bus driver discharged by another school for failing an eye examination. As in *Loudermill*, the school district terminated Donnelly first, then granted him his right to a civil service commission hearing. Donnelly was more successful. The commission granted reinstatement, but without backpay. He also sued in federal court (evidently for the backpay), but the district court dismissed his complaint.

The court of appeals reversed, holding that the plaintiffs had stated viable claims. The employers petitioned the Supreme Court for writ of certiorari.

Decision: Court of Appeals affirmed. Cased remanded for further proceedings.

1. **What Does Due Process Require?** The employee plaintiffs were entitled to due process *before* their terminations if they had property interests in their respective jobs.

a. Property interests are not created by the Constitution but by some independent source such as state law.

b. As classified civil service employees under Ohio law, the plaintiffs were entitled to continued employment unless they were discharged for "misfeasance, malfeasance, or nonfeasance." By virtue of this Ohio law, the plaintiffs had property rights in continued employment.

2. **Qualified Property Interests**? The defendants argued that the law that created the property interests also conditioned and qualified those interests by setting out the procedure for enforcement of such property rights. The Court partly agreed and partly disagreed.

a. *Arnett v. Kennedy*: "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, [an employee] must take the bitter with the sweet."

b. However, in *Vitek v. Jones*, the Court seemed to reject *Arnett* by saying that minimum procedural requirements for due process are a matter of *federal* law, and the states are not free to diminish these minimum requirements.

c. "While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

3. "**What Process Is Due**?" In these cases, due process required a fair hearing *before* the terminations took effect.

a. An essential principle of due process is that notice and opportunity for hearing must precede a deprivation of life, liberty, or property.

b. The importance and value of this rule requiring a *pre*-termination hearing are clear in employment cases like these.

(1) The consequences of termination are severe. Termination deprives a person of the means of livelihood, and finding new employment elsewhere may take time, and prospective employers will question the circumstances under which he left his last employment.

(2) Allowing the employee an opportunity to present his side will be of aid to the employer in reaching the right decision, and "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect."

(3) Allowing an employee an opportunity to respond before termination need not impose significant administrative burden or intolerable delay.

(4) Pending a disciplinary decision based on a more complete understanding of the facts, the employer will continue to have the benefit of the employee's services.

(5) The employer has an interest in avoiding unnecessary or unfair dismissal. Otherwise, the employer may lose a qualified employee and bear the burden and expense of training a new one, and the terminated employee may end up on the welfare rolls.

(6) If the employee's continued presence creates a significant hazard, the employer can suspend the employee with pay.

4. **What Is a Fair Hearing**? The fair hearing can be "something less" than a full evidentiary hearing.

a. The requirements of a pre-termination hearing vary according to the nature of the interests involved and the nature of subsequent proceedings the government provides.

b. It is important in this case that Ohio law entitled the plaintiffs to a full post-termination administrative hearing with subsequent judicial review.

c. In a case like this, the pre-termination hearing is only to serve as an initial check against mistaken decisions, i.e., a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support termination.

5. **Essential Requirements**: At a minimum, due process requires notice and an opportunity to respond.

a. **Notice** means oral or written notice in advance of the charges, and some explanation of the evidence.

b. **Opportunity to respond** must include a chance to present reasons, either in person or in writing, why termination is inappropriate or wrong.

c. "To require more than this ... would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

Observations:

Loudermill also asserted that the school district had deprived him of a liberty interest, but the Court held in a footnote (n. 13, omitted from the reproduction of this case), that he had failed to plead an essential element–publication. The liberty interest an employee has in his reputation is addressed below, in connection with defamation.

United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.

Key facts: Cooper was a machine operator for Misco. Cooper's terms of employment were defined by a collective-bargaining agreement that provided for dispute resolution by binding arbitration. The agreement also provided that the company had the right to make "rules and regulations regulating the discipline or discharge of employees," subject to a requirement that discharge would be for "cause." The union could challenge the fairness and necessity of the company's rules by demanding arbitration, but a challenged rule remained in effect until an arbitrator's decision rejecting the rule. One of the company's long established rules provided for the discharge of any employee bringing or consuming narcotics or controlled substances on company property, or reporting for work under the influence.

During the weeks before his discharge, Cooper, who operated a particularly dangerous machine, had twice been cited for deficient performance. It was only one day after his second reprimand that police searched Cooper's home and discovered a substantial amount of marijuana. The police also placed Cooper's car under surveillance. After observing suspicious activity by Cooper and two other men in the company parking lot, the police arrested Cooper while he was sitting in the back seat of another person's car. There was marijuana smoke in that car, and there was a lighted marijuana cigarette in the front-seat ashtray. The police also searched Cooper's car and found marijuana "gleanings." Cooper eventually pleaded guilty to a charge of marijuana possession in his home, but there may have been a plea bargain because the prosecutor did not pursue a charge based on Cooper's possession of marijuana in his car.

Three days after his arrest, Cooper told the company he had been arrested for possession of marijuana at his *home*, but he said nothing about the marijuana gleanings found in his car. The company eventually learned that Cooper had actually been arrested in the company parking lot, in a car with a marijuana cigarette. On this basis (allegedly possessing and using marijuana on company property), it discharged Cooper.

Cooper filed a grievance and the matter proceeded to arbitration. Only five days before the arbitration hearing, the company made a new discovery, that the police had found marijuana in Cooper's own car in the company's parking lot. The company attempted to use this newly discovered evidence as part of its case against Cooper, without having disclosed the evidence to the union in advance.

The arbitrator held that the company did *not* have cause to discharge Cooper. Among other things, the arbitrator held that Cooper's presence in the *back*seat of a car and a burning marijuana cigarette in the *front*-seat ashtray were insufficient to prove that Cooper *used or possessed* marijuana on company property. The arbitrator refused to consider the newly acquired evidence that police had discovered marijuana gleanings in Cooper's own car.

The company filed an action to vacate on the grounds that the arbitration award was contrary to public policy. The district court agreed with the company and vacated the award. The Court of Appeals affirmed. The union petitioned for writ of certiorari.

Decision: Reversed. The lower courts should have upheld the arbitrator's award.

1. **The Arbitrator's Preeminent Role**. When an employer and union agree to resolve disputes by arbitration, the courts have only a limited role in reviewing an arbitrator's decision.

> a. Federal policy favors settling labor disputes by private settlement, and by arbitration where the parties have agreed to arbitration. This policy would be undermined if courts had the final word in deciding a dispute.
>
> b. It is for the arbitrator to interpret the contract. "The arbitrator may not ignore the plain language of the contract," but a court cannot reject his interpretation simply because it disagrees. As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," a court must ordinarily uphold and enforce the award.
>
> c. It is for the arbitrator to make the findings of fact. A court may not reject an arbitrator's findings of fact simply because it disagrees.
>
> d. The arbitrator decides what remedies are appropriate for a breach, and "courts have no authority to disagree with his honest judgment in that respect."

2. **Why Deference to Arbitrator Is Important**. The Court listed reasons why adherence to the rule of limited judicial review is so important.

> a. Judicial interference impedes the speedy resolution of grievances by private settlement.
>
> b. Arbitration is "part and parcel" of collective bargaining. Through grievance and arbitration procedures, the "supplementary rules of the plant" (i.e., the common law of the shop) evolve.

3. **Standard of Review**: In sum, even if a court is convinced that the arbitrator has committed *serious* error, it must not reject his decision "as long as the arbitrator is even *arguably* construing or applying the contract and acting within the scope of his authority."

4. **Application: Fact Finding**. The company argued and the lower courts agreed that the arbitrator committed "grievous error" in his findings of fact, but Justice White found that the arbitrator's decision fulfilled the minimum standards described above.

a. "[I]mprovident, even silly, factfinding is claimed," but "this is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts."

b. The company argued and the lower courts agreed that the arbitrator erred in refusing to consider the discovery of marijuana gleanings in Cooper's own car, but Justice White found that the arbitrator was acting within his authority in this regard.

(1) Except to the extent that the parties have limited his authority by agreement, it is for the arbitrator to resolve issues about the rules of procedure and evidence.

(2) In any event, it was not unreasonable for the arbitrator to exclude this evidence, because the company failed to notify the union in advance that it would present this evidence, and it is not unusual for arbitrators to refuse to consider facts that were not known to an employer when it discharged an employee.

(3) Justice White added that the arbitrator's exclusion of the "after-acquired" evidence in *this* arbitration might not foreclose the Company from relying this evidence as a basis for discharging Cooper.

5. **Application: Interpretation**. The company argued that it had reserved a right in the contract to discharge any employee found in violation of certain rules, including the drug policy, and that this provision barred Cooper's reinstatement or award of backpay. The Court rejected this argument. If it was indisputable that Cooper violated the rule, **the proper course would be to *remand*** the case to the arbitrator for his definitive construction of the contract regarding the necessity of discharge.

6. **Public Policy As a Limit**? The company argued that reinstating Cooper under the circumstances would be contrary to public policy. The Court disagreed.

a. True, a court may refuse to enforce an arbitrator's award that is contrary to public policy, which is a variation of the rule that a court may deny enforcement of a contract that violates the law or public policy.

b. It is also true that public policy is for the courts to determine.

c. However, the public policy exception requires a court to find an "explicit" policy" that is "well defined and dominant." The policy must be ascertainable from laws and legal precedents, and not from "general considerations of supposed public interests."

d. The idea that a person who uses drugs should not be reinstated to a position requiring the handling of hazardous equipment may be "firmly rooted in common sense" or “general considerations,” but this is not the sort of “explicit” and “well defined and dominant” policy required for application of the public policy exception.

e. In any event, the evidence of marijuana gleanings in Cooper’s car did not compel the conclusion that he used drugs on the job. It was for the arbitrator to decide what to infer from this and other evidence.

f. Even if the arbitrator had determined that Cooper had used marijuana at the workplace, it was still for the arbitrator to decide the extent to which plant safety might be endangered by Cooper’s reinstatement. The Court noted in this regard that the arbitrator did not require Cooper’s reinstatement in the same job he held before his discharge. The award required reinstatement in *any* job for which Cooper was qualified.

Observation

Quick, relatively inexpensive resolution of disputes without the cost and delay of judicial review proceedings, is part of the very foundation of collective bargaining. To keep it this way, the rule against judicial review must be nearly iron-clad. As a practical matter, this means that “just cause” is whatever an arbitrator deems it to be, within the extremely broad limits of authority laid down by the court.

D. Mitigating the Impact of Termination of Employment

Churchey v. Adolph Coors Co.

Key facts: Churchey’s discharge appears to have been the result of a series of mis-communications. Coors evidently believed Churchey had taken advantage of the situation and deceived the company in taking time off from work. Churchey maintained innocence of any intent to deceive.

These events began when Churchey’s doctor diagnosed her eye infection as conjunctivitis. In order to obtain more time off from work for her condition, Churchey then visited the company nurse, who confirmed Churchey’s conjunctivitis but instructed Churchey to return to work the next day. But Churchey’s condition worsened overnight, and she missed work the next day and visited a specialist who diagnosed her condition as maxillary sinusitis plus conjunctivitis, and instructed her not to return to work for at least another five days. This led to the first misunderstanding. Churchey told her supervisor about her own doctor’s recommendation (five days off from work) but not the company nurse’s earlier (and less informed) instruction (one day off from work). The company interpreted this as dishonesty on the part of Churchey.

At the company's instruction, Churchey visited a company doctor who made an error that led to a second misunderstanding. In contrast with the opinion of Churchey's own doctors, the company doctor believed Churchey was well enough to return to work *immediately*, but he evidently made an error in paperwork so as to show that Churchey was not to return to work for several more days. Churchey interpreted the paperwork to confirm what her own doctor had said. Thus, Churchey went home and did not report to work that day.

The company fired Churchey for unexcused absence and "dishonesty." There was no evidence that Coors ever disclosed or "published" to any other person that it had discharged Churchey for dishonesty. However, when Churchey looked for other employment, other employers wanted to know why Churchey had left her job with Coors. Churchey felt compelled to tell prospective employers that Coors had terminated her for "dishonesty," although she believed this charge was unfounded.

Churchey eventually sued Coors for defamation, among other things. The trial court granted summary judgment for Coors and dismissed Churchey's claims. Churchey appealed, and the court of appeals affirmed. Churchey appealed to the Supreme Court of Colorado.

Decision: Reversed. There were issues of fact, precluding summary judgment, with respect to Churchey's defamation claim. Churchey's theory of compelled self-publication may have satisfied the requirement of publication for a defamation claim.

1. **Was It True**? Coors denied that it was false to say that Churchey was dishonest, but the court held that there was an issue of fact in this regard.

a. Truth is an affirmative defense to an allegation of defamation, but Coors failed to show that the facts supporting its charge of dishonesty were indisputable.

b. For purposes of a motion for summary judgment, Churchey was entitled to the benefit of the doubt with respect to whether she intended to deceive.

2. **Publication**? Coors also denied that it had published its statement that Churchey was dishonest, but the court found merit in Churchey's theory of compelled self-publication.

a. Churchey began by arguing that publication can be *negligent*, rather than intentional, when a defendant takes an action "with knowledge that it is substantially certain" to result in a communication of the defamatory statement to a third person. Restatement (Second) of Torts §577, comment k. The court agreed.

b. Some courts of other jurisdictions have interpreted this idea of negligent publication in two ways pertinent to Churchey's claim.

(1) Some courts find publication if the defendant knew or could have foreseen that the plaintiff was *likely* to repeat the statement. The Colorado court believed this standard was too liberal, and "would impose unreasonable liability on defendants for harm they did not cause directly and would discourage some communications which, on balance, should be encouraged."

(2) Some courts find publication if the defendant knew or could have foreseen that the plaintiff would be *compelled* to repeat the defamatory statement. The Colorado court agreed that this was the proper approach. In this sort of case, there is a strong causal link between the actions of the defendant and the republication and damage, and republication is more foreseeable. There are at least two other reasons for this more limited approach:

(a) Usually, a plaintiff can avoid damage to reputation by declining to repeat the defendant's statement.

(b) Unfettered communication about job-related problems are important to employers and employees. In order not to unduly hinder such communications, courts should impose liability only for self-publication that was "compelled."

(3) Coors never submitted affidavits or other evidence on the issue whether it could have foreseen that Churchey would be *compelled* to repeat the defamatory statement. Therefore, summary judgment was inappropriate.

3. **Privilege**. Coors argued it had a qualified privilege to tell Churchey the reason for her termination. The court agreed that Coors had qualified privilege, but found an issue of fact whether Coors had exceeded this privilege.

a. Both the employee *and* his employer have interests in learning the reason for discharge and in avoiding mistakes, and these interests outweigh the harm that might result from the employee's knowledge of the reason.

b. Courts have recognized a qualified privilege for similar communications in the employment context, such as communications between corporate officers about employee conduct, and an employer's explanation of the reasons for an employee's discharge to other employees.

c. Therefore, an employer's communication to an employee about the reasons for discharge is subject to a qualified privilege.

d. However, Coors was not entitled to summary judgment based on qualified privilege, because Coors did not negate the possibility that it acted maliciously, knowing its charge against Churchey to be false, or proceeding with reckless disregard for the truth (the standard of malice for non-media defendants).

e. Indeed, there was sufficient evidence of malice to preclude a summary judgment in this case.

(1) Coors managers maintained that Churchey had violated an unexcused absence policy that evidently did not really apply to her situation;

(2) the managers failed to determine what constituted "dishonesty" under the personnel manual; and

(3) the managers failed to verify the facts by contacting Churchey or her doctors.

4. Justice Erickson concurred in part and dissented in part. He would have affirmed summary judgment with respect to defamation because of the lack of publication.

a. Restatement (Second) of Torts §577, comment k, does not support the compelled self-publication theory. The illustrations that accompany comment k include cases in which a defendant did not intend to publish, but his statement was heard or read by others because he spoke too loud, left his writing where others discovered it, or delivered it in a manner likely to be received by others in addition to the intended recipient. None of the illustrations deal with *self*-publication by the defamed person.

b. The more relevant provision for self-publication is Comment m, which states that if the defamed person transmitted the defamatory statement "*without an awareness*" of its defamatory nature, and if the defendant should have foreseen that such communication to a third party was likely, a court may deem this communication to be the equivalent of a publication by the defendant.

c. Churchey's publication could not be attributed to Coors under Comment m, because Churchey was *aware* of the defamatory nature of the statement when she communicated it to other persons.

Observations:

The court's opinion was not necessarily a victory for Churchey. Was she "*compelled*," or only "likely" to tell prospective employers she was discharged for dishonesty? Would a court expect her to conceal the reasons for her discharge if she could get away with it? Would it make any difference whether Coors had a policy not to reveal such information to prospective employers who might inquire? Was Coors required to inform Churchey of this policy, in order to avoid potential liability? Having endorsed compelled self-publication, the Colorado court didn't leave the trial judge with much guidance in applying this part of the doctrine.

If a court were to find that an employee in Churchey's position is typically "compelled" to repeat the former employer's accusation, the practical effect is similar to that of a negligent investigation claim, such as the one asserted in the *Mission Petroleum* case, *supra*. One difference is that compelled self-publication leaves an employer with a fairly high defensive wall in the form of qualified privilege, which is overcome not by proof of "negligence" but only by proof of malice.

Putnam v. Keller

Key facts: Putnam had been a music instructor at a community college for twenty nine years at the time of the events leading to this lawsuit. During the year immediately preceding these events, he became semi-retired but maintained a part-time position.

In January, 2001, the college informed Putnam that it was eliminating his part-time position. About the same time, the college's counsel also informed Putnam that the college was investigating his alleged misappropriation of school funds, alleged "inappropriate sexual overtones" in musical performances by a group Putnam had founded and directed, and the alleged "cult-like" practices of his performance group. The college's counsel told Putnam that he was banned from the campus for at least the next two and half years.

Putnam denied the allegations, but he was unsuccessful in persuading the college to lift the ban. He sued the college and some college officials, alleging, among other things, that the defendants had deprived him of a liberty interest without procedural due process, and also that the defendants' actions deprived him of substantive due process.

The defendants sought summary judgment on a number of grounds, including qualified official immunity. The court held that the defendants were entitled to official immunity with respect to the substantive due process claim, but not with respect to the procedural due process claim. The denial of the motion with respect to Putnam's procedural due process claim was grounds for an immediate appeal by the defendants, in accordance with a special rule for immunity defenses. Putnam cross-appealed with respect to the dismissal of his substantive due process claim.

Decision: Affirmed. The district court properly denied the qualified immunity defense as to Putnam's procedural due process claim, and it properly granted summary judgment based on qualified immunity as to the substantive due process claim. [Only the portions of the court's opinion dealing with liberty interest/procedural due process are included here.]

1. **Posture of the Case**. To overcome the defendants' qualified official immunity defense, Putnam needed to show an alleged violation of a *clearly* established constitutional right. He alleged a violation of a clearly established constitutional right to due process before the deprivation of a liberty interest in his reputation (stigmatization).

2. **Stigmatization**. An employee's liberty interest may be affected by an employer's stigmatizing accusation in connection with discharge, such as discharge for dishonesty, immorality, criminality, or racism. If an employer makes a stigmatizing accusation, the employee is entitled to a name-clearing hearing.

3. **Elements** of a claim based on the loss of a liberty interest by stigmatization without due process:

a. the plaintiff was stigmatized by allegations that resulted in his discharge.

b. the defendant made the allegations public; and

c. the plaintiff denied the allegations.

4. **Application**: Putnam satisfied these three elements sufficiently to avoid summary judgment.

a. **Stigmatizing allegations in connection with discharge**. The defendants contended that Putnam was discharged from his part-time position to accommodate the hiring of a full-time instructor, and not for any other reason. However, the court of appeals agreed with the district court that the defendants' accusations against Putnam implied dishonest, criminal and immoral behavior.

b. **Plaintiff's denial**. There was no dispute on this point. Putnam denied the charges.

c. **Publication**. Publication might be "in any official or intentional manner." The defendants maintained that the charges against Putnam were confidential and not published. However, Putnam submitted evidence suggesting that the accusations became known to other faculty, that the local sheriff and county attorney were shown the college's stay-away letter. This evidence was sufficient to avoid summary judgment on the issue of publication.

5. **Clearly Established** (for purposes of qualified official immunity)? The court cited *Board of Regents v. Roth*, in which the Supreme Court clearly held that a person was entitled to a hearing in such a case.

Observations:

1. One might view the stigmatization theory as a way to avoid a public employer's usual sovereign immunity defense to a common law defamation claim.

2. If the employee is employed at will, the right to a name-clearing hearing evidently does not prevent the employer from granting the hearing and then discharging the employee regardless of the outcome of the hearing. In fact, it is not clear whether the hearing must have an "outcome," unless the employee also has "just cause" protection under a contract or civil service law.

Problem

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The facts present a potential variation of the usual employee stigmatization claim. The school's report about Kunstler was mandated by state law. The effect is certainly stigmatizing. If the law fails to provide any opportunity for a name-clearing hearing, Kunstler may have grounds for a suit against the state to have the law declared unconstitutional. Her claim against the school will run into some difficulty on the issue of privilege, because the school was compelled by law to make the report.

Greenberg v. Director, Employment Sec. Dept.

Key facts: Checkbureau discharged Greenberg, a legal secretary, because of performance problems best described by the dissent.

There was a dispute whether Greenberg frequently failed to spell-check her work. Greenberg blamed a computer malfunction, but a supervisor verified that Greenberg's spell-checker was working properly.

Greenberg also frequently failed to mark court dates on the company's calendar, although this task was the "first priority" of her job. As a result, the company missed two court hearings.

Greenberg made repeated errors in billing clients, and these errors continued even after the company brought the problem to her attention. Finally, Greenberg had a record of absenteeism and tardiness, of unspecified seriousness.

After the company discharged Greenberg, she applied for unemployment compensation benefits. The agency granted benefits at the first level of administrative review, finding that her discharge was for reasons other than disqualifying misconduct. The company appealed to an appeal tribunal, which affirmed. The company appealed to the Board of Review, and the Board reversed, finding that Greenberg was guilty of disqualifying misconduct. Greenberg sought judicial review.

Decision: Reversed and remanded for a determination and award of benefits. Greenberg's unsatisfactory performance was not misconduct.

1. **Disqualifying Misconduct**. The statutory definition: (1) disregard of the employer's interest, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, or (4) disregard of the employee's duties and obligations to his employer.

a. This definition requires an element of intent on the part of the employee.

b. "Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence or good faith errors in judgment or discretion are not considered misconduct ... unless it is of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or an employee's duties and obligations."

2. **Application**. Greenberg's deficient performance did not constitute disqualifying misconduct under this definition.

a. Ordinarily, the question whether an employee's conduct was willful or unintentional is a fact question for the Board to decide.

b. Here, the Board's finding of misconduct was not supported by substantial evidence. The evidence showed that Greenberg was incompetent. The evidence did not show that Greenberg's conduct involved the sort of intentional conduct, as defined by the statute, that is grounds for disqualification.

3. Judge Cooper dissented. He believed the evidence supported the Board's finding that the instances of Greenberg's failure to follow instructions were sufficiently numerous to support a finding of misconduct.

Perry v. Gaddy

Key facts: Perry had worked for her employer for twelve years as a claims examiner and then as a claims processor, and her performance was "adequate" until the last two years. The company required an average "error" rate in processing claims of 3%, but during Perry's last two years, her average error rate was 3.7% and then 4.7%. In Perry's next to last performance evaluation, her supervisor stated that Perry had become relaxed or bored in her job. In Perry's last performance evaluation, her supervisor rated her performance as inadequate. The company terminated Perry after four more warnings for excessive errors.

Perry applied for unemployment compensation benefits, but agency's ultimate decision, by an order of the Board of Review, was to deny benefits on grounds of misconduct in connection with the work. Perry appealed.

Decision: Affirmed.

1. **Misconduct**? The court reiterated the rule, *see Greenberg*, that poor performance due to "inability or incapacity, inadvertence, and ordinary negligence or good faith errors in judgment or discretion" is not misconduct. The alleged misconduct must involve "such degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations."

2. **Application**. The evidence showed misconduct, because Perry had the *ability* to perform but failed to do so.

a. She worked adequately for ten years and was even described by a supervisor as a "great asset" before the problems of her last two years.

b. Although Perry argued that she did not intend to harm to company's interest, the evidence sufficiently established "recurring negligence" proving "misconduct."

Observations:

1. Did the Arkansas court that decided these two cases act inconsistently in awarding benefits to one employee but not the other? The best explanation might be that Perry's employer had a highly objective measure of performance, and the record proved that Perry was able to do the work early in her career but not toward the end of her career.

2. How might an advocate have better presented Perry's case in the face of the employer's objective performance standards? Remembering that "incompetence" is not grounds for disqualification, perhaps it would have been better to explain possible causes of incompetence than to deny deficient performance. For some clients, however, this strategy may seem worse than the loss of benefits.

Matter of Francis

Key facts: The employer discharged claimant Francis after a record of alcohol abuse. Francis had been intoxicated at work, he suffered from "black-outs," and he was hospitalized on several occasions, once for a period of 28 days. Francis did not present "medical evidence" that he was an alcoholic, but the employer clearly regarded him as an alcoholic. Indeed, the employer attempted to enroll Francis in some self-help programs. At the hearing, Francis did not admit he was an alcoholic, but he did admit that he drank every day and that he needed counseling.

Francis applied for benefits. Evidently, the employer opposed the claim (one can imagine there were plenty of performance problems to support its opposition), but the agency found that Francis's problems were the result of "illness," not disqualifying misconduct.

Decision: Affirmed but remanded for further proceedings. The evidence supported the finding that Francis was ill by reason of alcoholism, and that this was the cause of his poor performance.

1. Francis's failure to admit that he was an alcoholic or present medical evidence of his condition did not preclude the Board from reaching that conclusion, based on other evidence.

2. However, the court remanded the case to the agency to determine Francis's "availability for, and capability of employment."

Observations: Catch-22. The same condition that excused Francis's problems at work might be cause for a different kind of disqualification: Unavailability or disability.

Wimberly v. Labor and Indus. Relations Com'n of Missouri

Key facts: Wimberly was an employee of J.C. Penney Company when she requested a leave of absence for pregnancy. In accordance with its policy, the company, granted Wimberly a "leave *without* guarantee of reinstatement." About a month after giving birth, Wimberly informed the company that she wished to return to work, but the company replied that there were no openings.

Wimberly applied for unemployment benefits, but the agency denied the claim on the grounds that Wimberly had resigned "voluntarily without good cause attributable to [her] work or to [her] employer." Wimberly sought judicial review of this decision, but the Supreme Court of Missouri affirmed the agency's decision. Wimberly petitioned for certiorari.

Decision: Judgment of Missouri Supreme Court affirmed. Missouri law did not unlawfully discriminate on the basis of pregnancy.

1. **Federal Requirements**. Federal law requires that "no person shall be denied compensation ... solely on the basis of pregnancy or termination of pregnancy." 26 U.S.C. §3304(a)(12).

2. **Alternative Interpretations**: The court described two opposing views of the meaning of this federal law.

a. **The law simply prohibits discrimination**. Missouri evidently argued that its scheme treated pregnant women the same as all other persons who leave work for reasons not *causally connected* to their work or their employer. For example, Missouri law disqualified persons resigning because of other types of temporary disabilities.

b. **Mandated Preferential Treatment**. Wimberly argued that §3304(a)(12) actually mandated *preferential* treatment for women who leave work because of pregnancy, and that a woman leaves work because of pregnancy is entitled to benefits as soon as she is available and able to work, regardless of a state's treatment of other similarly situated claimants.

3. **Court Adopts Nondiscrimination View**. The Court held that §3304(a)(12) prohibits discrimination. It rejected Wimberly's argument in favor of preferential treatment.

a. The language of §3304(a)(12) shows that Congress intended to prohibit States from singling out pregnancy for unfavorable treatment. It provides that compensation shall not be denied *"solely"* because of pregnancy.

b. The statute looks to the basis for the State's denial of benefits, not the claimant's reason for leaving work. For example, a State would violate the statute if it denied benefits to pregnant women but granted benefits to non-pregnant persons who were "similarly situated," because the "sole basis" for such a distinction would be pregnancy.

c. However, if a neutral rule incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group (e.g., temporarily disabled persons), the rule does not disqualify "solely on the basis of pregnancy."

d. Missouri law disqualified all persons who left work "for reasons not causally connected to the work or the employer." To apply this rule, it was not necessary to know if Wimberly was pregnant, only that she resigned for a reason having no causal connection to her work or her employer. Thus, her pregnancy was not the "sole basis" for her disqualification.

Observations:

1. As the Notes discuss, the FMLA might have provided Wimberly with reinstatement rights today, provided she had worked long enough and for enough hours, and had not already exhausted her FMLA leave for the year.

2. Federal law allows states some discretion in deciding how to deal with pregnancy and unemployment compensation benefits, provided a state does not "discriminate." The Missouri statute represents one approach. Others treat leave due to pregnancy like a voluntary resignation for "necessitous" cause and they grant benefits.

Local 1130, United Steelworkers of America v. U.S. Steel Corp.

Key facts: The union and some employees alleged that U.S. Steel had promised to keep a steel mill open if the union and employees helped to make the mill profitable. Nevertheless, the employer eventually closed the factory and laid off the employees. The union and employees sued the employer for failing to abide by its commitment, and for violating an alleged property interest of the community in the mill. The district court entered judgment against the plaintiffs and in favor of the company. The plaintiffs appealed.

Decision: Affirmed.

1. **Breach of Promise**. The employer's promises were hedged by a condition precedent: The mill must be profitable. This condition had not been fulfilled.

2. **Property Interest**. The court turned to the plaintiff's alternative argument, based on a theory of quasi-property or public policy. The court first quoted the district court's sympathetic comments about this theory during hearings on preliminary relief.

a. As a result of the company's investment in and operation of the mill, a community had formed, with the construction of schools, roads, and the drawing together of the "lives and destinies of the inhabitants of that community."

b. The district court wondered if "a property right has arisen from this lengthy, long-established relationship," and if "vested rights" had developed.

(1) Such a property right could not be protected by compelling the company to maintain operations at the mill.

(2) However, the property interest of the community and the employees might prevent the company from leaving the community "in a state of waste."

3. The district court initially issued a restraining order to prevent the company from closing the mill, but it ultimately rejected the property rights theory, dissolved the order and dismissed the plaintiffs' complaint. *See* United Steel Workers of America, Local No. 1330 v. U.S. Steel Corp., 492 F.Supp. 1 (N.D. Ohio 1980).

4. The court of appeals agreed that the property interests theory was without precedent. "In the view of this court, formulation of public policy on the great issues involved in plant closings and removals is clearly the responsibility of the legislatures of the states or of the Congress of the United States."

Observations:

The response of Congress to plant closings has taken two forms: (1) financial assistance, such as Trade Readjustment Allowance Benefits to employees affected by the relocation of manufacturing and other business activity to foreign nations, see p. 783; and (2) the WARN Act.

Wilson v. Airtherm Products, Inc.

Key facts: Airthirm (API) was engaged in the air conditioning and heating business. A competitor, Mestek, became interested in purchasing API's business, and it formed a subsidiary (ALLC) for the purpose of acquiring API. The agreement was between API and ALLC and it included ALLC's promise to offer employment to all API's employees. The agreement had an exhibit listing all employees by name.

For some reason the closing did not take place when scheduled. Several weeks later, API and ALLC executed an amended agreement with a new closing date and promising that ALLC would offer employment to certain described groups of employees The amended agreement also provided that ALLC would indemnify API for any liability under the WARN Act. API agreed to provide a WARN Act notice to the union, but ALLC was to approve the notice and would then indemnify APC against any liability.

About three days before the newly scheduled closing, ALLC informed API that it would hire "a substantial number" of current employees but would terminate "fewer than 50" employees. Compare the rules of WARN Act coverage. ALLC also gave API an Employment Application Schedule showing it would accept "applications" from API's employees over a three day period following the closing. The next day (two days before the closing), API notified the union it was about to sell the business, close the plant, terminate all employees, and make payments of contractual severance pay, API also provided the union with ALLC's job application schedule.

On the scheduled closing date for the agreement, API transferred ownership of the business to ALLC, terminated its employees and closed the plant. Over the course of the next month, ALLC did hire a "substantial number" of API's former employees.

Some of the employees who were not hired, together with a few of those who were hired, filed this lawsuit against API for failing to give the requisite notice under the WARN Act. The district court granted summary judgment for the employees. API appealed.

Decision: Reversed. The Act's "sale of business" provision relieved API of any duty to provide notice.

1. One effect of Section 2101(b)(1) is to make it clear that an employee is not to be regarded as "terminated" by the seller of a business if the sale does not actually result in an employment loss.

> a. The Act does not deal with "technical" terminations that occur simply because the seller of a business has ceased to be an employee's employer. Only a party actually causing employment loss because of a plant closing is required to give notice.
>
> b. As long as the employees are employed by the seller on the effective date of the sale, they will be regarded as the buyer's employees immediately after the effective date of the sale for purposes of WARN Act notice.
>
> c. Under Section 2101(b)(1), and under judicial precedent, the rule is the same whether the sale of a business occurs as a sale of assets or a sale of the business as a going concern. In the first case, there is a technical termination of employment by the seller. But in either case the important question for WARN Act purposes is whether there has been an employment loss.

2. Where a covered employment loss does occur (e.g., buyer does not hire enough of the seller's employees), the question is whether it is the buyer *or the seller* who owes the duty of notice.

> a. If the seller still employs the employees on the date of the sale, it makes sense to treat the employees as the employees of the seller on the next day, because the seller decides whether to employ any number of these employees.
>
> b. If notice was owed in this case, the duty to provide notice was owed by ALLC. API reasonably believed ALLC would continue employment of the employees. ALLC repeatedly assured as much.
>
> c. If a seller were required to give advance notice in such a situation, many employees might resign in advance of the sale, leaving the business without a workforce.

3. The court rejected the district court's suggestion that API had any duty to secure the future employment of its employees in order to avoid a duty of notice under the WARN Act. If the district court were correct, a seller being unable to guarantee continued employment by a third party would always need to give WARN Act notice, even if the buyer actually rehired all the employees.

Observations:

1. Why didn't the employees sue ALLC? Perhaps because ALLC did hire enough of the employees to avoid a "plant closing" or "mass layoff" within the meaning of the Act. On the other hand, the employees hoped the court would find that API had "terminated" all of them, causing a "plant closing" by selling the business to another party with a guarantee of continued employment.

2. The court emphasizes how reasonable it was for APC to believe ALLC would hire the employees, to the point of implying that the result might be different if APC knew ALLC would *not* rehire enough employees. This distinction might not really be necessary. Whatever the seller knows, one party or the other–usually the buyer–owes the duty of notice and bears the liability.

Chapter Nine
Protecting the Employer's Interests

A. Implied Employer Rights and Employee Duties

Jet Courier Service, Inc. v. Mulei

Key facts: Jet Courier provided air courier service to carry canceled checks between customer banks for rapid processing. In 1981 Jet had no office in Denver. It approached Mulei, then a manager for another air courier service in Denver. Mulei accepted employment with Jet in order to open a Denver office and manage Jet's Western Zone. The parties also agreed that Mulei would have autonomy over the Denver office.

Mulei was successful in his job but became frustrated about the lack of real autonomy. During the end of 1982, while still employed by Jet, Mulei began to plan the creation of a new company that would compete with Jet. In early1983, Mulei met with another business person and with Jet employees to discuss his idea for a new courier service. The new business actually formed on February 28, 1983, and Mulei was elected president at the first shareholders meeting.

On March 10, 1983, a week and a half after the formation of Mulei's new business, Jet learned of the new business and it fired Mulei. On that same day Mulei's business became operational and began to compete with Jet. Immediately, five of Jet's customers in Denver defected to Mulei's new courier service; three of the other four employees in the Denver office defected; and all of Jet's ground carriers in Denver defected. All of Jet's pilots in Denver quit or were fired. Jet maintained operations in Denver by a rapid and massive transfer of chartered aircraft, ground couriers and other resources from its other offices.

On the day he was fired, Mulei filed suit against Jet seeking unpaid compensation. Jet counterclaimed for breach of fiduciary duty, among other things, and it also sued some of Mulei's business associates. The district court awarded Mulei unpaid compensation, and it dismissed Jet's breach of duty of loyalty claim against Mulei. The court of appeals affirmed. Jet appealed to the Supreme Court of Colorado.

Decision: Reversed. Mulei may have breached his duty of loyalty to Jet.

1. **The Duty of Loyalty**. Section 387 of the Restatement (Second) of Agency provides that "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act *solely for the benefit of the principal* in all matters connected with his agency."

a. **Noncompetition**. The duty of loyalty includes a duty "not to compete with the principal concerning the subject matter of his agency." Restatement (Second) of Agency §393. Determining the limits of the duty not to compete requires a balancing of two considerations.

(1) "Fairness dictates that an employee not be permitted to exploit the trust of his employer so as to obtain an unfair advantage in competing with the employer in a matter concerning the latter's business."

(2) However, society has an interest in economic competition.

b. **Preparation v. Competition**. Balancing the above concerns yields a rule that employees are privileged "to prepare or make arrangements to compete prior to leaving their employment.

(1) Thus, the issue was whether Mulei's activities violated the duty of loyalty or were legally permissible preparations.

(2) In particular, there were two types of activities by Mulei that might have violated his duties: (a) solicitation of Jet's **customers** for Mulei's competing business, and (b) solicitation of Jet's **employees** for Mulei's competing business.

2. **Solicitation of Customers**. The lower courts believed Mulei's pre-termination meetings with customers did not violate a duty of loyalty because his business was not yet operational. This Court rejected that reasoning.

a. Mulei was still subject to a duty of loyalty to act *solely for the benefit of Jet* in all matters connected with his employment.

b. The issue was whether Mulei's pre-termination meetings with customers involved solicitation, which would violate the duty of loyalty.

(1) The privilege to "prepare" to compete allows an employee to advise current customers of his intention to resign.

(2) The privilege does not allow pre-termination *solicitation* of customers.

c. The trial court's findings left it unclear whether Mulei's pre-termination meetings with customers involved solicitation. For this reason, it was necessary to remand the case for further proceedings on this issue.

3. **Solicitation of Employees**. The lower courts believed that Mulei's solicitation of employees did not violate his duty to Jet, because his solicitation did not cause any of these

employees to breach contracts with Jet (they were employees at will). Again, this court rejected the lower courts' reasoning.

a. Restatement §393 is inconclusive as to whether the lawfulness of employee solicitation turns on the solicited employee's breach of contract.

(1) Section 393 comment e: An "employee is subject to liability if, before or after leaving the employment, he causes fellow employees to *break their contracts* with the employer." (emphasis added).

(2) However, causing a breach of contract is just one *example* of a breach of duty of loyalty by solicitation of an fellow employee. The Restatement does *not* state that a breach a contract is necessary for finding of disloyalty.

(3) The Restatement provides this additional example: "a court may find that it is a breach of duty for a number of the key officers or employees to agree to leave their employment simultaneously and without giving the employer an opportunity to hire and train replacements."

b. This court listed the following factors for determining whether solicitation of fellow employees breached a duty of loyalty:

(1) The impact or potential impact on the employer's operations.

(2) Inducements the soliciting employee made to fellow employees to obtain their services for his business.

c. Thus, "an executive who leaves with her secretary, the mechanic who leaves with his apprentice, or the firm partner who leaves with associates from her department, would not give rise to a breach of the duty of loyalty unless other factors, such as an *intent to injure* the employer in the continuation of his business, were present."

d. Solicitation need not be successful in order to establish a breach of duty of loyalty. Rest. (2d) Agency §469 comment a.

e. The record and the trial court's findings were insufficient for this court to determine whether Mulei's solicitation of employees breached his duty of loyalty. Thus, the court remanded the case for further proceedings.

4. **Defenses**. Mulie argued, and the trial court agreed, that the success of Mulei's other efforts for Jet, and Jet's failure to make certain bonus payments, constituted defenses against Jet's breach of duty of loyalty claim. This court disagreed.

a. **Successful Performance**. Whether an employee breached his duty of loyalty depends on whether he acted *solely* for his employer's benefit in *all* matters connected with his employment. The fact that Mulei performed his tasks "efficiently and profitably" does not preclude a finding that he breached his duty by pre-termination solicitation of customers and employees.

b. **Jet's Breach**. Even if Jet's alleged nonpayment of bonuses was a material breach of the employment agreement, Mulei could have elected either to (a) *renounce* his authority and leave Jet's employ (but he clearly didn't do this); or (b) *continue* his employment, with the attendant duty of loyalty [presumably, Mulei could have reserved his right to claim additional compensation while continuing the employment]. Since Mulei did not resign, he was bound by the duty of loyalty until Jet discharged him.

5. **Unfaithful Servant Doctrine**. In fact, Mulei was ***not*** entitled to compensation or bonus payments for the period during which he was disloyal, because this court adopted a rule known in many other jurisdictions as the "unfaithful servant doctrine."

a. An employee is not entitled to compensation for services performed during the same period he was breaching his duty of loyalty. He loses his right to compensation even as to services he performed properly.

b. Mulei may recover compensation for periods during which he was not breaching his duty of loyalty "and for which compensation is apportioned in his employment agreement." In other words, if the company paid a weekly salary, he forfeited salary for any week during which he was disloyal, but is entitled to salary for any week during which he engaged in no disloyal acts.

c. Mulei earned a monthly salary and a quarterly bonus. On remand, the trial court must determine whether Mulei committed a disloyal act during any month for which he seeks unpaid salary, or during any quarter for which he seeks an unpaid bonus.

Observations:

1. Standing alone, the duty of loyalty limits an employee's conduct only up to the point employment terminates. After that, he is free aggressively to solicit his former employer's customers and employees with two qualifications (1) even after the termination of employment, he must not divulge trade secrets; and (2) he may have agreed to a contract that limits his post-employment activity. Both of these possibilities are addressed later in this chapter.

2. In some states, the unfaithful servant rule might clash with a payment upon discharge statute. State payment upon discharge statutes are described in Chapter Four (see in particular the *Meisel* case).

McElmurry v. Arkansas Power & Light Co.

Key facts: Bowman worked as a consultant (not necessarily as an employee) for AP&L on the installation, maintenance and operation of electrostatic precipitators at the White Bluff station. When Bowman began working on this project, the precipitator hoppers at White Bluff relied on the "K-ray system" to detect the level of fly ash.

AP & L was dissatisfied with the K-ray system. Bowman and an AP & L employee discussed the possibility of replacing the K-ray system with something else. They drew their idea for a replacement on a napkin (where all great ideas and transactions begin).

During a power outage at White Oak, AP&L took the opportunity to test the idea by installing Bowman's design on one hopper at White Bluff. The system was successful, and AP & L installed the new level detectors on the remaining precipitator hoppers at White Bluff. AP&L bore the costs of working drawings and materials for the new level detectors, and it bore all the costs of installation and testing for the new detectors.

Not long after AP&L began using the new level detector system, Bowman formed a new business, White Rivers Technology, Inc. (WRT), and a few months later he filed a patent application for the system. Bowman eventually assigned his patent rights to WRT.

In the meantime, AP&L continued to use Bowman's design not only at White Oak but at other facilities in its system. At first, this does not appear to have upset Bowman. In fact, when AP&L decided to install the system at another facility, Bowman's company WRT bid on the project. But WRT was not the low bidder, and AP&L awarded the project to another contractor.

Bowman or WRT might now have been annoyed for three reasons. AP&L was using his system; AP&L had employed someone else, not Bowman or his company, to install his system; and finally, when AP&L solicited bids on the project, it provided other potential contractors with specifications, possibly revealing Bowman's design.

WRT sued AP & L for patent infringement. The district court granted summary judgment for AP & L on the ground that AP & L had a "shop right" in the level detector. WRT appealed.

Decision: Affirmed. AP&L acquired a shop right with respect to Bowman's level detector, and none of AP&L's uses of the level detector exceeded the scope of its shop right.

1. **Definition and Source**. A shop right is an employer's right to use an invention patented by one of its employees without paying for it and without liability for infringement. Courts disagree about the basis for the doctrine and its limits.

a. Some courts characterize the shop right as an *implied license*, and for these courts the existence of the right depends on whether the employee's activities in developing the invention occurred on the employer's time at the employer's expense.

b. Other courts characterize a shop right as a form of *equitable estoppel*. For these courts, the existence of the employer's right depends on whether the employee, by his actions, consented or acquiesced to his employer's use of the invention, so as to estop him from asserting a patent right against his employer.

c. Some courts employ a *combined* "implied license" and "estoppel" approach. But whatever approach the courts take, a common element is that the doctrine is driven by considerations of equity and fairness.

2. **Totality of Circumstances**. This court chose a "totality of the circumstances" approach, requiring consideration on a case by case basis whether equity and fairness demand a finding that the employer has a shop right. Important factors include the circumstances surrounding the inventor's development of the invention, and his activities relating to the invention after its development.

3. **Application**. The district court did look at all the circumstances, and the facts supported its decision.

a. The district court relied on *Dubilier Condenser Corp.*, where the Court said: "Since the servant uses his master's time, facilities and materials to attain a concrete result, the latter is in equity entitled to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business."

b. The following facts in particular supported the district court's conclusion:

(1) Bowman developed his invention while working at AP & L.

(2) He suggested his invention to AP & L as an alternative to the K-ray system.

(3) AP & L installed the level detector on its precipitator hoppers at White Bluff and ISES with Bowman's consent and participation.

(4) All costs and expenses of testing and installing the system at these facilities were paid by AP & L.

(5) During these installations by AP&L, Bowman did not assert that AP & L was precluded from using the system without his permission or that AP & L was required to pay him for its use.

4. **Scope Exceeded**? WRT argued that AP & L exceeded the scope of its shop right when it "carelessly and casually disseminated the design and specifications of the patented device to private contractors," and that WRT's actions caused the patent to become "worthless," robbing Bowman of the "fruit of his labor." The court rejected this argument.

a. The mere dissemination of specifications did not constitute patent infringement. An owner of a patent right may exclude others from making, using or selling the invention, but AP&L merely disseminated information about the invention.

b. Disseminating specifications of the invention would not necessarily render the patent "worthless." The owner of the patent could still prevent persons other than AP & L from using the invention.

5. AP & L did not exceed the scope of its shop right by duplicating the level detector and continuing to use it in its business. AP & L's shop right was not limited to use of level detectors that AP & L itself had manufactured and installed. AP & L was also entitled it to procure the level detector from outside contractors.

Problem

p. 864

1. This problem was inspired by *Caputo v. Nice-Pak Products, Inc.*, 693 A.2d 494 (N.J. Super. A.D. 1997) (shop right bars quantum meruit) and *Kopin v. Orange Products, Inc.*, 688 A.2d 130 (N.J. Super. A.D. 1997) (shop right did not bar quantum meruit based on employer's alleged promise to reward any employee who made a profitable recommendation).

Employees sometimes claim a right to remuneration for ideas or inventions their employers use, especially if the employer has promised a reward, as an employer might do in an employee suggestion plan. Employers frequently resist enforcement on the basis that the promise is vague, particularly with respect to the amount of the reward. If reliance is clear, courts frequently go to extra lengths to find some basis for calculating the amount of the promised payment in these cases.

A shop right might bar an employee's claim for restitution, because the shop right is a right to use the invention in the employer's business without paying for it. However, an employee might be entitled to a reward if he can point to some promise that serves as an independent basis for the right to be paid.

In any event, Ace does not necessarily have a shop right here. Ace's encouragement is not the kind of material and financial support AP&L provided in the *McElmurry* case, and there is less evidence that Merlin acquiesced to Ace's substantial use of her invention without expectation of or demands for compensation. To the contrary, she may be able to argue that any use by Act was premised on the expectation of a raise, bonus or other reward.

2. Did Merlin breach her duty to Ace by giving the idea to a competitor? It might be cause to discharge her, if Ace needs cause, but that doesn't mean it can sue her. Merlin's conduct might *seem* disloyal. The Restatement definition of the duty of loyalty is "to act solely for the benefit of the principal in all matters connected with his agency." It's far from clear, however, that Ace employed Merlin in the "matter" of inventing or dealing with the resealable flap. A court might apply the corporate opportunities doctrine, which imposes a duty on officers and perhaps other highly placed employees not to deprive their employers of certain business opportunities. But Ace knew of the opportunity and was in no hurry to use it.

PepsiCo, Inc. v. Redmond

Key facts: PepsiCo (PCNA) and Quaker were fierce competitors in the "sports drink" and "new age drink" markets. PCNA was struggling to overtake Quaker in these markets.

Redmond was PCNA's General Manager for California, and in this position he had access to inside information and trade secrets.:

> (1) Redmond knew PCNA's secret "**Strategic Plan**, which was PCNA's strategy to compete against companies like Quaker in marketing, packaging, and distribution for the next three years.
>
> (2) Redmond knew PCNA's **Annual Operating Plan**, which contained PCNA's "highly confidential" marketing plans, promotional event calendars, and "pricing architecture"(the manner in which PCNA priced its product under different circumstances in different markets). Knowledge of pricing architecture would have enabled a competitor to anticipate PCNA's pricing moves and to underbid PCNA on a selective basis.
>
> (3) Redmond knew PCNA's "**attack plans**," which involved the allocation of extra funds to specific markets to support PCNA brands against the brands of competitors like Quaker.
>
> (4) Redmond knew PCNA's secret innovations for a **new delivery system** that PCNA hoped to use to gain an advantage over Quaker and other competitors in negotiations over retailer shelf space and merchandising. PCNA had invested millions of dollars in developing this new system.

Beginning in May, 1994, Quaker sought to recruit Redmond to defect to Quaker, mainly through the efforts of Uzzi, another former PCNA manager who was now the head of Quaker's Gatorade division. After several months, these discussions culminated on November 8, 1994 with a written offer by Quaker to employ Redmond as Vice President-Field Operations for Gatorade.

Redmond accepted the offer. But on the same day he accepted the offer, he represented to PCNA that he had an *unaccepted* offer from Quaker to become the *Chief* Operating Officer of the *combined* Gatorade and Snapple company. Redmond asked whether, in light of Quaker's "offer," he should continue to make calls on customers. PCNA instructed Redmond to continue these visits.

Two days after accepting the offer from Quaker (and evidently failing to obtain a better offer from PCNA), Redmond informed PCNA that he was resigning to accept Quaker's offer.

Less than a week later, PCNA filed suit against Redmond and Quaker, seeking a temporary restraining order to enjoin Redmond from assuming his duties at Quaker, and to prevent his disclosure of trade secrets or confidential information. The district court enjoined Redmond from assuming his position at Quaker for approximately the next six months, and from any use or disclosure of PCNA's trade secrets or confidential information. Redmond and Quaker appealed.

Decision: Temporary order affirmed. PCNA established a reasonable likelihood of prevailing on its claims, including its claim that Redmond's position at Quaker would inevitably result in his misappropriation of PCNA's trade secrets and confidential information.

1. **Trade Secret**. The defendants "reluctantly" conceded that PCNA's marketing and distribution plans were "trade secrets." Therefore, the central issue was whether there was an "actual or threatened misappropriation" justifying the district court's order.

2. **Misappropriation.** Under Illinois law a "misappropriation" is "the disclosure or use of a trade secret of a person without express or implied consent by another person who ... at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was ... acquired under circumstances giving rise to a duty to maintain its secrecy."

a. Redmond evidently conceded he understood the marketing and distribution plans were trade secrets, so his use or disclosure of this information would be misappropriation.

b. There appears to have been no serious dispute that PCNA was unable to prove an "actual" use or disclosure, so the next issue was whether evidence of a "threatened" use or disclosure supported an injunction against Redmond's employment with Quaker.

3. **Grounds for Injunction**: Illinois law clearly authorizes an injunction against "actual or ***threatened*** misappropriation. Cases applying this rule require proof that there is a "high degree of probability of inevitable and immediate ... use of ... trade secrets."

a. In addressing the question whether an injunction based on "threatened" or "inevitable" use or disclosure is proper, a court should be mindful of several interests that frequently pull in different directions:

(1) Encouraging invention and innovation.

(2) Promoting free competition in unpatented goods.

(3) Allowing workers freedom to pursue their livelihoods.

b. The tension between these interests is especially pronounced when a party seeks to prevent *threatened*, not actual misappropriation of a trade secret. [An injunction might prevent the former employer from pursuing his livelihood even when he has acted in good faith].

c. Earlier cases (*Teradyne*, *AMP*) agreed that a defendant's former employment in and learning of the plaintiff's business is not enough to justify an injunction against subsequent employment with a competitor.

4. **Application**. PCNA's proof was sufficient. It went beyond the mere facts of Redmond's former employment with PCNA, access to trade secrets, and current employment with a competitor.

a. Redmond possessed extensive and intimate knowledge about PCNA's strategic goals for 1995 in sports drinks and new age drinks.

b. In his new job, Redmond would have input in the way Quaker competed in pricing, costs, margins, distribution systems, products, packaging and marketing. His knowledge of PCNA's strategies would affect his decisions and recommendations. Redmond and Quaker would be able to anticipate PCNA's strategic moves and prepare in advance to respond.

c. The injunction was ***not*** just to prevent Redmond from using ***general skills and knowledge*** he had acquired on the job, but to prevent him from using or disclosing "particularized plans or processes developed by [PCNA] ... which are unknown to others in the industry and which give the employer an advantage over his competitors" (i.e.**,** ***trade secrets***).

5. Redmond and Quaker argued that Redmond's new job would not involve the use of trade secret information. The court rejected this argument.

a. The defendants: Redmond's initial duties would be to implement plans already adopted before his arrival.

—The court rejected this argument. Quaker's plans were not complete, were subject to revision, and might be affected by Redmond's knowledge.

b. The defendants: PCNA's plans are useless to Quaker's goal of integrating its delivery systems.

—This misses the point. PCNA did not fear that Quaker would copy PCNA's operations. PCNA feared that Quaker's understanding of PCNA's plans would enable it to plan its own strategy for competing against PCNA.

c. The defendants: Redmond had signed a confidentiality agreement *with Quaker* preventing him from disclosing "confidential information belonging to others," and he had signed the Quaker Code of Ethics, which prohibits "illegal or improper acts to acquire a competitor's trade secrets."

—The court: "Uzzi's actions in hiring Redmond and Redmond's actions in pursuing and accepting his new job demonstrated a lack of candor on their part and proof of their willingness to misuse PCNA trade secrets."

d. The defendants: Redmond promised at the hearing that if he faced with a situation that might involve use or disclosure of PCNA information, he would seek advice from *Quaker's* in-house counsel and would refrain from making the decision.

—Again, the court considered the past conduct of Redmond and Uzzi in rejecting this solution.

6. The order was not overbroad in temporarily barring Redmond's employment even for the purpose of managing the integration of distribution systems. Redmond's knowledge of PCNA's plans would inevitably shape his integration efforts, and he could not be trusted to avoid that conflict of interest.

Observations:

A frequently voiced criticism of the "inevitable disclosure" doctrine is that it has the same effect as the enforcement of a covenant not to compete, even if such a covenant was not part of the terms of employment. However, an injunction to protect trade secrets to prevent an inevitable disclosure is more focused than a court's enforcement of a covenant not to compete.

A trade secret and threatened misappropriation, and not just competition, are the basis for the injunction. Moreover, the court's opinion in *Redmond* suggests that Redmond's seemingly deceptive conduct was an important factor. A more dignified pattern of behavior might have shifted the balance in his favor.

B. Express Contractual Limits on Resignation and Competition

Med+Plus Neck and Back Pain Center, S.C. v. Noffsinger

Key facts: Noffsinger and Med+Plus agreed to a two-year term of employment. They also agreed that if Noffsinger terminated the contract before the end of the term, he would repay Med+Plus for the cost of training. Med+Plus's right to repayment was secured by a promissory note for $50,000, to be reduced by $2,083.33 for each month of completed employment. The balance was to be due upon Noffsinger's resignation at any time short of the full two year term. The court described this provision as a "liquidated-damages" clause.

It is unclear whether Med+Plus provided any real "training." Noffsinger had experience before coming to work for Med+Plus. In contrast, Med+Plus maintained that Noffsinger needed three hours of training a day to learn the "paperwork" during the first two months of employment. However, Noffsinger testified and other witnesses corroborated that Med+Plus gave Noffsinger very little training.

Ten months into the contract, Noffsinger resigned. Med+Plus sued for breach of contract and to enforce the liquidated-damages provision. The trial court held that Noffsinger had breached the agreement, but that Med+Plus had failed to prove damages and that the liquidated-damages provision was unenforceable as a penalty. Med+Plus appealed.

Decision: Affirmed. Med+Plus failed to prove damages, and the liquidated damages clause was unenforceable.

1. **Actual Damages**. Med+Plus did not prove any loss of profits or other damages.

a. In the employment context, the expectation measure of damages is ordinarily based on the extra cost of obtaining a replacement.

b. Additional consequential damages may be awarded if foreseeable at the time the parties entered into the employment contract.

(1) Such damages might include the cost of training a replacement.

(2) Such damages do not include lost profits unless the employer proves the employee's resignation caused the loss.

c. Consequential damages are not recoverable to the extent the employer could have avoided the loss (e.g., by hiring a replacement).

d. Med+Plus presented no evidence that lost profits were foreseeable or were caused by Noffsinger's resignation.

e. Med+Plus also failed to present evidence of its replacement costs.

2. **Liquidated Damages**. A liquidated damages provision is valid if (1) the amount it specifies was reasonable when the parties made their contract; (2) the amount bears some relation to the damages a breach might cause; and (3) the amount of damages would be difficult to prove.

a. A corollary: the clause must assess damages for a specific breach (otherwise, it doesn't "bear some relation" to breach).

b. If the provision is designed to penalize for nonperformance or to threaten against performance, it is invalid.

c. This clause failed the test. It did not compensate Med+Plus for training, because it assessed more damages for less training. If Noffsinger had resigned on the first day, Med+Plus's training cost would have been almost nothing, but the contract would require Noffsinger to pay $50,000. If Noffsinger had resigned just before the end of the last day after full training his liability under the liquidated damages provision would be $2,083 (or less).

Observations:

1. The larger problem with the parties' contract in this case might be the doubtfulness of the "training." Had Med+Plus provided even a very rough valuation of a real training program, a court might have been more willing to believe that the formula for liquidated damages made sense. The declining balance might have reflected Noffsinger's repayment by under-compensated services over time. Even then, however, Med+Plus would still need to explain why it charged the entire cost of training on the first day of employment.

2. If Med+Plus's objective was to prevent competitive activity by Noffsinger, and if Noffsinger was in fact competing against Med+Plus during the remainder of his two year term, the contract might have been the basis for a negative injunction. Thus, a term contract is one way for an employer to deal with the problem of post-employment competition. However, a term contract eventually ends, and an employer is then no better off than when an "at will" employee resigns and competes. Moreover, in order to persuade an employee to promise to serve for a specified term, an employer might have to promise not to discharge the employee except for cause during the term.

Central Adjustment Bureau, Inc. v. Ingram

Key facts: Central Adjustment Bureau (CAB) employed the three defendants as salespersons and collectors at a branch office of its nationwide debt collection business. For most clients, the primary factor in choosing a collection agency is the rate of return to the client. Personal contact between a client and an agency sales person can also be a factor.

Ingram began his job with CAB as a salesperson. A week after Ingram accepted employment and began to work, CAB insisted he must sign a covenant not to compete. After two weeks of resistence Ingram signed the covenant under threat of discharge.

Over the next nine years Ingram received promotions and raises that lifted him to the regional manager level, placing him in authority over a multi-state territory with the fifth highest salary in the company.

Defendants Goostree and Bjorkholm were lower level employees who, like Ingram, were not required to sign covenants until several days into their employment. Goostree alleged that he received no advance warning of the need for such a covenant.

The covenant provided, inter alia, that in the event of termination an employee "shall not compete within the United States"by working for or participating in a competing business, divulging trade secrets, or contacting any client "who has been a client ... of [CAB] during the term of employment."

After nine years of employment, Ingram resigned to begin a new credit collection business he had begun to form. Goostree and Bjorkholm followed Ingram within a few days. Ingram's "preparations" during his employment appear to have involved mainly permissible preparations (incorporating, obtaining licenses, opening bank accounts), except that he appears to have collected useful confidential information from CAB's offices. Ingram's new business, Ingram & Associates opened for business about a month after Ingram's resignation. He then actively solicited CAB customers.

CAB sought injunctive relief and compensatory damages. The lower court (the Chancellor) issued an injunction enforcing the convents, but only after reforming the covenants to make them "reasonable." The former employees appealed.

Decision: Affirmed. The covenants were valid agreements supported by consideration, and to the extent they were unreasonably broad, the Chancellor was warranted in reforming the covenants and enforcing the covenants as reformed.

1. **Basic Requirements**. Under Kentucky law, covenants not to compete are enforceable if reasonable in scope and duration, and if supported by adequate consideration.

2. **Consideration**: Is continued employment of an at-will employee adequate consideration?

a. Yes, case law in Kentucky supports the proposition that continued employment at will is sufficient consideration for a covenant that is part of the *original* employment agreement.

b. The court rejected the defendant employees' argument that a covenant is not the product of "free bargaining" unless the employer informs the employee of the necessity for the covenant during negotiations before employment begins. [The court does seem to say, however, that if "continued employment" is the only consideration, the employer must present the covenant at least "shortly" after the employment begins, perhaps to prevent the employer from waiting for a moment when it has particularly powerful leverage over the employee.]

c. The court described alternative theories for holding that a covenant signed after the beginning of employment at will might still be binding.

(1) Some courts find mutual promises to continued employment, forming a binding bilateral contract.

(2) Other courts treat a promise of continued "at will" employment as non-binding, but they enforce the covenant if the employer actually performed by continuing the employment. The Kentucky court found this theory to yield the best result.

d. Thus, if an employer obtains the covenant prior to, contemporaneously with or shortly after hiring an employee at will, the covenant is enforceable provided the employer renders "sufficient" performance (continued employment). Whether employment has continued for a sufficient or reasonable period depends upon the facts and circumstances of each case.

(1) One factor is the cause or manner of the employee's termination.

(2) Other factors include salary raises and promotions.

e. Here, the defendants' voluntary resignations occurred after sufficient employment to make their covenants binding.

3. **Reasonableness of Coverage and Duration**. A covenant's scope, in terms of its duration and the territory, must be no greater than necessary to protect the employer's legitimate business interests.

a. The nationwide scope of the covenants might have been too broad, but the defendants were in no position to complain because they were competing in the same territory in which CAB had employed them.

b. The two year duration of the covenants was unreasonable. If a client in the collection industry switches agencies to maintain a personal relationship, it does so immediately–not more than a year later. Also, clients regularly re-evaluate their agencies and switch for other reasons. Therefore, the Chancellor properly reformed the covenant to endure for only one year.

c. The restriction against solicitation of any client who was a company client during the defendants' entire employment was unreasonable. Therefore, the Chancellor properly reformed the covenant to prohibit only solicitation of the clients CAB was serving as of January 1, 1979 (two months before the defendants began to resign).

4. **Was It Appropriate to Reform**? The court agreed that the Chancellor had the authority to modify the covenants to make them reasonable, and to enforce the covenants as modified.

a. Some courts apply an "all or nothing at all" rule, either enforcing the contract as written or rejecting it altogether. One argument for this approach is that it avoids putting the court in the role of drafter for a contract the parties did not make.

b. The "recent trend" favors judicial modification, especially when, as here, the covenant provides for modification.

c. Variations on method of judicial modification:

(1) **The "blue pencil" rule**: An unreasonable restriction against competition may be modified and enforced if a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken. Criticism: It isn't always possible only to delete words and leave a provision that makes any sense. It elevates form over substance.

(2) **The rule of reasonableness**: Except in case of bad faith by the employer, a court will enforce a covenant to the extent *reasonably* necessary to protect the employer's interest.

d. The court adopted the rule of reasonableness. However, "if there is credible evidence to sustain a finding that a contract is deliberately unreasonable and oppressive, then the covenant is invalid."

5. Justice Brock dissented: The covenants were not bargained for, and lacked consideration. Moreover, modifying the agreement to make it "reasonable" will only encourage employers to draft oppressively, knowing a court will still enforce the reasonable limits of the covenant.

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1. One way to bind an employee to a duty not to compete is by holding the employee to a term contract of employment. An employer may attempt a variation of this arrangement with an employee being laid off: The employee becomes a "consultant" for a term. The real purpose of the arrangement might be to pay the former employee for nothing but his avoidance of competition during the term of the contract. Even if the agreement doesn't expressly prohibit competition, the employer might rely on the duty of loyalty.

As a consultant, however, Brainard is likely to be an independent contractor, and it would not be unusual for a contractor to serve more than one employer, even if the employers are in competition with each other. Serving both employers simultaneously would not necessarily breach his contract with either one, unless one or both contracts prohibited service to a competitor. In any event, Brainard has a duty not disclose one employer's trade secrets to the other.

2. Employers sometimes try to avoid the limitations of judicial enforcement of covenants not to compete by designing a system of compensation that results in a forfeiture of deferred pay in the event of competition. Whether the forfeiture is valid depends on (1) whether it's an ERISA plan, and subject to that law's restrictions against forfeiture (not likely here, because it doesn't seem to meet the definition of a "welfare" or "pension" plan); or (2) whether the court applies the test for liquidated damages clauses, and whether the forfeiture satisfies the test.

C. Interstate Enforcement Problems

Advanced Bionics Corp. v. Medtronic, Inc.

Key facts: Medtronic, Inc. was a Minnesota corporation. It hired Stultz in Minnesota as a senior product manager in the "Neurostimulation-Pain Division." Stultz signed a covenant not to compete, promising that for two years after the termination of employment, he would not provide services to any person in connection a competitive product sold or intended for sale in any geographic area where Medtronic marketed the same type of product.

The agreement that included the covenant also provided that the agreement would be governed by the laws of Minnesota.

Day One: Stultz resigned from Medtronic and accepted employment in California with Advanced Bionics. Advanced Bionics hired Stultz as a director of business development to market its own spinal cord stimulation device. On the first day of Stultz's employment, Stulz and Advanced Bionics launched a preemptive strike against anticipated legal action by Medtronic. They sued Medtronic in a California court seeking a declaration that the covenant and choice of law provisions were void under California law (California law is comparatively hostile to covenants not to compete).

Day Two: Advanced Bionics and Stulz also applied for a TRO to enjoin Medtronic from taking action in any other court. The California judge delayed ruling on the TRO by one day to give Medtronics an opportunity to respond. He was unpersuaded by Stultz and Advanced Bionics' concern that Medtronic would take advantage of the opportunity to "race to court" in Minnesota. Medtronic gained additional time by immediately removing the action to federal court (erroneously pleading diversity) before the state court's hearing on the TRO.

Day Three: Having delayed any hearing on the TRO in California, Medtronic filed suit in Minnesota for breach of contract and tortious interference. It also obtained a TRO from the Minnesota court enjoining Advanced Bionics and Stultz from entering into employment, *and* enjoining them from taking any action in any court that would "prevent or interfere in any way with" the Minnesota court's determination of the issues relating to the covenant.

Day Ten (roughly): In California, the federal court remanded the matter to the state court, after finding no real diversity jurisdiction (Medtronic was a Minnesota company and Medtronic knew Stultz was still a Minnesota resident). The federal court found that Medtronic had removed the California action simply "to interfere with [the TRO] matter being heard").

Day Fourteen: With the California action back before the state court judge, Medtronic moved to dismiss or stay that proceeding on the ground the matter should be decided in Minnesota. The California judge denied the motion, finding a stay or dismissal would not serve the interests of substantial justice.

Day Twenty-Seven: The Minnesota court dissolved its TRO against Advanced Bionics and Stulz and replaced it with a preliminary injunction. The preliminary injunction continued the bar against Stultz's employment with Advanced Bionics. However, the preliminary injunction *omitted* any prohibition against the pursuit of proceedings in other courts.

Day Thirty-Two: Freed of any restraint by the Minnesota court, Stultz and Advanced Bionics sought and obtained the California court's order prohibiting Medtronic from taking any action in the Minnesota court or any other court with respect to the matter. In granting the order, the California court found there was a "substantial chance" that Medtronic would use the Minnesota court action to undermine the California court's jurisdiction. Medtronic appealed from this order.

Day Forty: Although the California order barred Medtronic from pursuing proceedings in other courts, the Minnesota court amended its preliminary injunction "purportedly *nunc pro tunc*," stating that its omission of a prohibition against further judicial action in California by Stultz and Advanced Bionics was an oversight. The amended order barred Stultz and Advanced Bionics from seeking any relief from any other court to stay, limit or restrain the Minnesota action (but the California court had already done this). The Minnesota court also ordered Stultz and Advanced Bionics "to move to vacate and rescind" the California TRO.

Shortly Thereafter: In California, Stultz and Advanced Bionics informed the court of the Minnesota order directing them to seek vacation of the California court's TRO. The California court refused. Meanwhile, the Minnesota court held a pretrial conference. Stultz and Advanced Bionics appeared, but Medtronic was absent with the explanation that the California TRO prohibited it from appearing. Eventually, the California court temporarily lifted its TRO temporarily to permit settlement negotiations in Minnesota and in California. The negotiations failed.

The California Appeal: Medtronic petitioned for writ of mandate in the Court of Appeal, seeking to continue trial. The Court of Appeal eventually held that the California trial court's TRO was necessary and proper, that the California courts should decide the validity of the covenant, and that the case should be decided under California law. Medtronic appealed.

Decision: Reversed. The California court should not have enjoined the Minnesota proceedings.

1. **The Power to Issue the TRO**: Medtronic argued that the lower California courts did not give sufficient weight to principles of judicial restraint and comity when they enjoined Medtronic from taking further action in other courts.

> a. The general rule is that "courts of this state have the same power to restrain persons within the state from prosecuting actions in either domestic or foreign jurisdictions which courts of equity have elsewhere." (*Spreckels).*
>
> b. California law bars such orders in certain situations, none of which apply to this case. But a court should use this power "sparingly" with due regard for principles of judicial restraint and comity.
>
> c. There is precedent for issuing a TRO when there are two or more actions involving the same matter, and the TRO is necessary to prevent a multiplicity of judicial proceedings. In those cases, however, the courts have sought to avoid "unseemly conflict" *between California* courts making contradictory awards. This case involves different states, making judicial restraint more important.

(1) The mere risk that one action may lead to a judgment that is res judicata in another action is not reason for an injunction.

(2) The possibility of an "embarrassing race to judgment" or inconsistent judgments "does not outweigh the respect and deference owed to independent foreign proceedings."

d. California's strong public policy against noncompetition agreements did not require the issuance of an order against the Minnesota and proceedings.

(1) California's public policy against noncompetition agreements is admittedly strong, and the agreement in question may be void under California law.

(2) Still, this policy did not justify the TRO in this case, particularly in view of "sovereignty concerns" that require restraint in issuing orders affecting proceedings in other states.

e. In addition, principles of comity, based on respect for laws and institutions of foreign jurisdictions, require sparing exercise of the power to enjoin parties in a court of another jurisdiction.

2. **The First-Filed Rule**: Advanced Bionics and Stultz argued that this rule provided an alternative reason to enjoin the Minnesota proceedings. According to this rule, "when two courts *of the same sovereignty* have concurrent jurisdiction, the first to assume jurisdiction over a particular subject matter ... takes it exclusively, and the second court should not thereafter assert control over that subject matter." But this rule was not designed to apply when the two courts are not of the same sovereignty.

3. **Bottom Line**: The California courts may not order the parties to desist from further proceedings in Minnesota. On the other hand, "[t]he Minnesota action does not divest California of jurisdiction, and Advanced Bionics remains free to litigate the California action unless and until Medtronic demonstrates ... that any Minnesota judgment is binding on the parties."

Chapter Ten
Resolution of Employment Disputes

A. Informal Adjustment of Rights and Claims

Lynn's Food Stores, Inc. v. U.S.

Key facts: The DOL investigated and determined that Lynn's had violated minimum wage and overtime requirements. After unsuccessful negotiations between the DOL and Lynn's to determine the amount of backpay and liquidated damages due, Lynn's made a direct offer to its employees to pay a total of $1000 in exchange for each employee's waiver "on behalf of himself (herself) and on behalf of the [DOL]" of any claim under the FLSA. Fourteen employees accepted and divided $1000 among themselves, and they signed waivers of claims that the DOL estimated to be worth more than $10,000. Lynn's then filed an action in district court seeking judicial approval of the settlement. The district court refused to approve the settlement. Lynn's appealed.

Decision: Affirmed. The settlement failed to satisfy the requirements of the FLSA.

1. **FLSA Provisions Non-Negotiable**. The FLSA is based in part on the view that there are often great inequalities in bargaining power between employers and employees. Therefore, its provisions are mandatory, and not subject to negotiation.

2. **Permissible Forms of Settlement of Claims**. There are *only* two ways for an employer to settle or compromise FLSA claims asserted by its employees.

a. **DOL Supervision**. Sec. 216(c) authorizes the Secretary of Labor to supervise payment and settlement of FLSA claims of employees. That didn't happen here.

b. **Court Approval**. If an employee files suit against an employer under §216(b), and they present a proposed settlement to the court, the court may scrutinize the settlement for fairness, and enter judgment based on the settlement. That didn't happen here.

3. **A Functional Equivalent**? Lynn's argued that the circumstances of its settlement, followed by its lawsuit for judicial approval, presented the same adversarial context as filing a lawsuit by employees followed by a settlement and judicial approval. However, the Supreme Court had rejected this argument nearly four decades earlier in *Brooklyn Savings v. O'Neil*.

a. In a lawsuit filed by employees against the employer, employees are likely to be represented by an attorney.

b. Settlement of an employee lawsuit against the employer is more likely to be a reasonable compromise of disputed issues and not a one-sided waiver of rights obtained by an employer's overreaching.

4. This case proves the need for these protective rules. The employees evidently did not consult with an attorney. Some did not speak English. They were evidently unaware that the DOL was trying to obtain payment on their behalf or that they had any rights under the FLSA. The employer suggested to employees that they were not really entitled to anything, and that only "malcontents" would demand more. [There is also the fact that the employees settled for $1,000, while the DOL estimated that their claims were worth $10,000.]

Oubre v. Entergy Operations, Inc.

Key facts: Oubre worked as a scheduler for Entergy. After she received a poor performance rating, Entergy gave her with a choice. Either she must improve her performance during the coming year, or she could accept a voluntary severance package now. Oubre chose the latter option. She signed a release of claims in exchange for six installment payments totaling $6,258.

The release did not comply with the OWBPA in three ways: (1) it did not give Oubre enough time to make her decision; (2) it did not allow Oubre seven days to change her mind after signing the agreement; and (3) it made no specific reference to claims under the ADEA.

Oubre eventually sued Entergy under the ADEA and state law for age discrimination. Oubre did not offer to return the $6,258 to Entergy. The district court granted summary judgment for Entergy on the basis that Oubre had ratified the defective release by failing to return the money. The Court of Appeals affirmed.

Decision: Reversed. An employee's failure to offer to return money received in exchange for a release that is defective under the OWBPA is not a ratification of the release.

1. **Common Law Contract Analysis**. Entergy offered traditional contract analysis of the problem, but the Court found that contract law did not necessarily support Entergy's position.

a. According to Entergy, a contract tainted by mistake, duress, or fraud is voidable at the option of the innocent party.

(1) **Ratification**. Before the innocent party can elect avoidance, she must tender back any benefits received under the contract. Failure to tender back ratifies the contract and makes it binding.

(2) **Equitable estoppel**. Equitable estoppel bars a party from shirking the burdens of a voidable transaction if she retains the benefits she received under it.

b. **The Court's Response**: The courts have not applied these rules consistently. Moreover, a person suing in equity to rescind a contract is not always required to restore the consideration at the outset of the litigation. In any event, the common law precedents do not consider the statutory requirements and purposes presented in this case.

2. **The OWBPA.** The act provides, "An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary.... [A] waiver may not be considered knowing and voluntary unless at a minimum" it satisfies listed procedural requirements, some of which were not fulfilled in this case.

a. The statute clearly states that an employee "may not waive" an ADEA claim unless the waiver satisfies the OWBPA's requirements.

b. The OWBPA protects older workers by imposing specific duties on employers who seek releases of age discrimination claims.

c. The OWBPA establishes new rules for evaluating waivers and releases and does not depend on traditional contract law.

d. Allowing the defense proposed by Entergy would frustrate act's purpose. A discharged employee may have spent the money the employer paid and he may lack means to tender it back to the employer. An employer might be tempted to risk noncompliance with the Act, knowing an employee will find it will be difficult to repay.

3. **Lingering Issues**. The Court decided only that Oubre could proceed with her ADEA claim without first repaying Entergy. It did not decide if she was entitled to keep the money.

a. The lower courts might still need to decide whether the employer may assert claims for restitution, recoupment, or setoff against an employee who sues for age discrimination after receiving money in return for a defective waiver.

b. The issue could be particularly complex because a waiver that is voidable as to an age discrimination claim under OWBPA might be valid as to other types of claims.

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In passing, one might note that unemployment compensation law typically considers severance payments in determining whether the right to benefits has begun. But Clame might still be looking for benefits after the appropriate waiting period for this amount of severance pay.

a. Local unemployment compensation law might say something about waivers of rights to benefits. Unemployment compensation is a lifeline for the unemployed. A court might be reluctant to allow an employer to negotiate waivers from this sort of protection. However, assuming local law provides no specific answer, there are a few arguments against the application of the waiver to Clame's right to unemployment benefits.

First, is Clame disqualified by virtue of having resigned? Not if the agency applies the doctrine of constructive discharge. If the company left him with no option to avoid layoff, this will likely be a constructive discharge.

Second, if Clame is not disqualified, is he barred from seeking benefits by virtue of the waiver? The waiver might bar his claims directly against the employer, but not his claim to an entitlement from the state. His unemployment compensation claim may impact the employer's experience rating, but it does not result directly in any liability for the employer.

b. Clame might be able to argue he is entitled to a pro rata portion of the bonus under local contract law (See Chapter Four). Will the waiver prevent him from asserting that argument in court? A court will likely to be more willing to uphold a waiver of a contract right than of right to public welfare benefits. However, the outcome may depend on the particular language of the waiver. The employer will argue that Clame is asserting a "claim," and the waiver applies to all "claims" arising out of the employment. One argument for Clame is that the "claim" did not accrue until the date the compensation was payable, which was probably sometime after the date of the waiver. In other words, the claim is subsequent to the waiver. Another argument is that "claim" is vague, and a court should favor a narrow meaning of the word. Employees might reasonably believe that waiving "claims" means waving tort and statutory claims. An employee might be surprised to learn the employer intended to rely on the waive to withhold accrued pay and benefits. If an employer wants such a waiver, it should draft clearly.

B. Overlapping Remedies and Proceedings

Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.

Key facts: Robbins & Myers terminated Guy, allegedly for failure to comply with leave of absence rules. Guy, whose employment was subject to a collective bargaining agreement, filed a grievance challenging her discharge. Over the course of nearly three months the union and employer processed her grievance. Not long after Guy's grievance was denied at the third step of the process (it is unclear why there was no demand for arbitration after that step), she filed a charge of race discrimination with the EEOC. At the time of these events, Title VII required that a charge must be filed within 90 days of the alleged discriminatory act. Guy was a few days late counting from the date of her discharge, but not counting from the denial of her grievance at the third step.

The EEOC issued a right to sue notice, and Guy filed a Title VII lawsuit against the employer. The district court granted the employer's motion to dismiss on the ground that Guy had failed to meet the 90 day deadline for filing an EEOC charge. Guy and the union appealed. The court of appeals affirmed. Guy and the union filed a petition for writ of certiorari.

Decision: Affirmed. The grievance proceedings had no effect on the running of the period of limitations for Guy's Title VII claim.

1. **Time Runs From the Date of Discharge**. Guy and the union argued the "unlawful employment practice occurred" when her grievance challenging her discharge was finally denied. Only then was her discharge "final." The Court rejected this argument. Guy was fired when the employer told her she was terminated, and she stopped working and ceased receiving pay and benefits.

2. **No Tolling**. The argument in favor of tolling was foreclosed by two earlier decisions.

> a. In *Alexander v. Gardner-Denver Co.*, the Court held that an arbitrator's decision was not binding on an employee seeking to pursue Title VII remedies in court, because Title VII rights and rights under a collective-bargaining agreement "have legally independent origins and are equally available to the aggrieved employee."
>
> b. In *Johnson v. Railway Express Agency*, the Court held that the filing of a Title VII charge with the EEOC did not toll the running of the statute of limitations for a claim under 42 U.S.C. §1981. Again, the Court emphasized the independence of Title VII remedies from other statutory or common law remedies.

3. **No Equitable Tolling**. The Court found no reason in precedent or policy to grant Guy the benefit of equitable tolling.

a. The Court distinguished a case in which a plaintiff had filed an FELA claim in the wrong court, and avoided a statute of limitations defense in the right court by asserting equitable tolling. Guy was asserting different claims (contract versus Title VII) in different forums.

b. Admittedly, if the time limits for Title VII or other statutory remedies are not tolled, a plaintiff might be pressured into initiating the alternative action sooner than is desirable. But this dilemma results from the plaintiff's advantage in having multiple remedies for the same wrong.

c. Congress has spoken with such precision in stating a 90 day time limit that there is no basis to excuse the limits where the "cost" of a plaintiff's slight delay is small.

4. **No Retroactive Application of Amended Time Limits**. Unfortunately for Guy, an amendment extending the time limit for an EEOC charge to180 days was too late for her claim.

Lingle v. Norge Div. of Magic Chef, Inc.

Key facts: Norge discharged Lingle allegedly for filing a "false worker's compensation claim." The union filed a grievance under a collective bargaining agreement, and an arbitrator ultimately ruled in Lingle's favor with an award of reinstatement and full backpay.

Lingle also sued Norge in a state court for violating a state law prohibiting an employer from retaliating against an employee for filing a workers' compensation claim. Norge removed the case to federal court (diversity), and the federal court dismissed Lingle's complaint on grounds of preemption. Lingle appealed, and the court of appeals affirmed. Lingle filed a petition for writ of certiorari.

Decision: Reversed. Federal collective bargaining law did not preempt Lingle's state law claim.

1. **Section 301 Preemption**. Section 301 gives federal courts jurisdiction over "suits for violation of contracts between an employer and a labor organization." Section 301 requires the application of federal law, not state law, in the interpretation of such agreements.

a. Section 301 preempts any claim under state law that depends on the interpretation of a collective bargaining agreement.

b. Example: In *Allis-Chalmers Corp. v. Lueck*, Section 301 preempted an employee's claim of bad-faith handling of a claim for disability benefits, because the terms of the collective bargaining agreement governed the manner in which a benefit claim would be handled and would have been relevant to an allegation that the claim was handled in a dilatory manner.

2. **Lingle's Retaliation Claim Not Preempted**. Section 301 did not preempt Lingle's claim because it could be resolved without any reference to, interpretation of, or application of the collective bargaining agreement.

a. The elements of a retaliation claim depend on the conduct of the employee and the conduct and motivation of the employer.

b. The employer's defense will involve proof of a non-retaliatory reason for the discharge. Again, this will not turn on the meaning of any provision of a collective bargaining agreement.

c. It is of no moment that a state court and an arbitrator will consider many of the same facts. For §301 purposes, a state-law remedy is "independent" of the collective bargaining agreement, and saved from preemption, if it does not involve the interpretation of the agreement.

3. **Cautionary Notes**:

a. **Calculating Damages.** "A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted, would stand."

b. **State Law Remedy Depending on Contract**. "It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by §301.

c. **What If the Agreement Waives the State Law Remedy?** "Whether a union may *waive* its members' individual, non-preempted state law rights, is, likewise, a question distinct from that of whether a claim is pre-empted under §301, and is another issue we need not resolve today."

Gottling v. P.R. Inc.

Key facts: Gottling sued her employer alleging it terminated her for refusing to maintain a sexual relationship with the owner. Gottling's *factual* allegations would have stated a claim for sexual harassment under the UADA, Utah's anti-discrimination law. However, Utah's law, like Title VII, defines "employer" as a person who employs 15 or more employees, and P.R. employed fewer than 15. Gottling therefore pleaded that P.R. wrongfully terminated her in violation of a public policy against sex discrimination.

The trial court granted partial summary judgment in favor of Gottling for the purpose of striking certain affirmative defenses by P.R. P.R. then sought interlocutory appeal in the Supreme Court of Utah.

Decision: Reversed. The UADA superseded Gottling's "public policy" claim.

1. **General rules of preemption**. When the common law conflicts with a statute, "the common law must yield."

a. Moreover, Utah law rejects the rule that statutes in derogation of the common law are to be strictly construed. Statutes are to be liberally construed with a view to achieve statutory goals and to promote justice.

b. Thus, a common law rule is invalid "if it intrudes into an area which the [l]egislature has preempted by comprehensive legislation intended to blanket a particular field."

c. The analysis regarding legislative intent in this regard is analogous to the U.S. Supreme Court's analysis for purposes of federal preemption of state law.

(1) Is there explicit statement of intent to preempt?

(2) Does the law's structure and purpose reveal implicit preemptive intent?

(a) Does it create a scheme "so pervasive as to make reasonable the inference that [the legislature] left no room for the [common law] to supplement it?"

(b) Alternatively, is it in "irreconcilable conflict" with the common law, so that compliance with both is impossible?

(c) Is the common law an obstacle to the purpose of the statute?

2. **Application**. The UADA shows an explicit legislative intention to preempt common law remedies for employment discrimination. The act provides: "The procedures contained in this section are the *exclusive* remedy under state law for employment discrimination based upon race, color, sex, retaliation, pregnancy, childbirth, or pregnancy-related conditions, age, religion, national origin, or disability."

a. **Exempt Employers**. The UADA is the exclusive remedy for "employment discrimination," and a small, exempt employer's "employment discrimination" qualifies as discrimination for this purpose.

b. **UADA Implicit Preemption**. Even without the explicit "exclusive remedy" provision, the UADA evidences implicit intent to preempt.

(1) The detailed administrative procedure and remedies for addressing discrimination claims "manifests the legislature's intent to completely blanket the field of employment law in Utah."

(2) "It would be illogical to suppose that the legislature intended to provide the benefit of this timely and cost-effective procedure to large employers while, at the same time, intending to subject small employers to a civil tort action in which they would be vulnerable to a longer statute of limitations, damages, attorney fees and, possibly, a jury trial."

(3) The legislature did not abrogate an existing right. "It simply indicated its intent to preempt the creation of a new one."

C. Arbitration as a Final Resolution of Statutory Claims

AT&T Mobility v. Concepcion

Key facts: This is not an "employment" case, but it has important implications for employment law. The Concepcions filed a class action on behalf of consumers harmed by AT&T's alleged false advertising. However, their consumer contract with AT&T required individual and not "class" arbitration, and barred judicial action. In effect, the Concepcions had waived their right to judicial class action. The California courts found this aspect of the contract was unconscionable. The U.S. Supreme Court granted AT&T's petition for writ of certiorari.

Decision: Reversed. A contract requiring arbitration in lieu of judicial action including class action is not necessarily unconscionable.

1. The FAA creates a federal policy in favor of arbitration, but a court may deny enforcement of an agreement to arbitrate. "upon such grounds as exist at law or in equity for the

revocation of any contract." In other words, an arbitration agreement may be invalidated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not based on a defense that applies only to arbitration

a. California law deems a clause like the one in this unconscionable.

b. Is this law a rule of general contract law? Or is it specific to arbitration?

2. One way of dealing with the above issue is to ask whether a court's displeasure with an arbitration agreement depends on the "uniqueness" of agreements to arbitrate.

a. The California rule appears to be based on displeasure with one feature of bilateral arbitration, which is the loss of class action judicial relief.

b. Arbitration would generally not be suitable for class action proceedings. The Court listed a number of reasons why arbitration is probably incompatible with class proceedings and relief. Indeed, if an arbitration were designed or ordered to proceed on a class basis, the result would usually be something other than "arbitration" as envisioned by Congress in enacting the FAA.

c. But the policy favoring arbitration values the rights of parties to design their own true bilateral arbitration procedure for reasons that include efficiency and avoidance of unreasonable expense.

3. In this case, the waiver of right to class action was not really oppressive and would not make the enforcement of rights impractical. The contract in this case included special substantial rewards to a plaintiff who achieved an arbitration award superior to AT&T's last offer.

Observations:

It appears possible even after this case that the a waiver of right to class (or an arbitrator's) class action could be unconscionable based on the circumstances of the particular case. For example, in some settings and under the terms of some contracts, the denial of a class or collective action might make it truly impractical to vindicate individual or class rights.

E.E.O.C. v. Waffle House, Inc.

Key facts: Baker agreed with Waffle House that "any dispute or claim" concerning his employment would be "settled by binding arbitration." The agreement was a condition of employment. However, after Waffle House discharged Baker from employment, he filed a charge with the EEOC alleging that his discharge violated the ADA.

The EEOC investigated the charge and filed suit against Waffle House. Baker was not a party to the case, but the EEOC's complaint alleged that Waffle House violated the ADA by a number of actions, including its discharge of Baker. The EEOC sought backpay, reinstatement, compensatory damages, and punitive damages for Baker.

Waffle House moved to stay the EEOC's suit and compel arbitration, or to dismiss the action. The District Court denied the motion. The Court of Appeals reversed. The EEOC sought review before the Supreme Court.

Decision: Court of appeals decision reversed. Baker's arbitration agreement did not bar the EEOC from seeking individual relief on his behalf.

1. **The EEOC's Enforcement Role**. Congress authorized the EEOC to exercise the same enforcement powers it possesses under Title VII when it is enforcing the ADA.

a. As a complaining party, the EEOC may bring suit to enjoin unlawful employment practices and to obtain reinstatement, backpay, and compensatory or punitive damages.

b. The Court's earlier decisions establish that the EEOC has "independent statutory authority" to vindicate the public interest, and that it does not merely stand in the shoes of the persons for whom it seeks remedies.

2. **The FAA and Policy Favoring Arbitration**. The FAA's purpose was "to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts."

a. However, "the FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a *nonparty*'s choice of a judicial forum."

b. The Court rejected the argument that permitting the EEOC to prosecute Baker's claim in court "would significantly trample" federal policy favoring arbitration.

(1) The EEOC files suit for only a small fraction of the charges employees file. (E.g., in 2000, the EEOC received 79,896 charges but filed only 291 lawsuits). Permitting the EEOC to seek victim-specific relief in those few cases where the employee has agreed to binding arbitration will have a negligible effect on the policy favoring arbitration.

(2) Given the unlikelihood of EEOC prosecution in any single case, allowing the EEOC to proceed in a case such as this is not likely to discourage employers from using arbitration.

(3) The court of appeals' solution, which was to distinguish between **victim-specific** relief (arbitration agreement bars the EEOC) and **injunctive** relief (no bar), is unfounded and impractical.

> (a) Some individual remedies like punitive damages serve the public interest.
>
> (b) Injunctive relief may be particularly for the benefit of the individual.
>
> (c) If an employee like Baker could seek only injunctive relief, there would be little incentive to file a charge with the EEOC, and the EEOC would be frustrated in its role as a monitor of discrimination.