The College of Labor & Employment Lawyers

Fall 2002 Newsletter
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COLLEGE LEADERSHIP PREPARES TO CHANGE

As the year 2002 comes to a close, so does the term of our current president, Stephen Pepe, who will be succeeded by Robert Dohrmann. In addition, the terms of six members of the Board, including four past presidents, will expire thus setting in motion a changing of the guards of phenomenal proportion. The Board of Governors has selected six outstanding individuals to replace those departing members: Lonny Dolin and Mary Anne Sedey as the plaintiff representatives, Barry Kearney as a neutral representative for government officials, Kathy Krieger will be the union replacement and Maurice Wexler and Gloria Portela will be the management replacements. Short biographies and pictures are on page 3 of this newsletter.

INTRODUCING ROBERT DOHRMANN - THE COLLEGE'S NEXT PRESIDENT

Robert M. Dohrmann, a founding Governor and Fellow of The College of Labor and Employment Lawyers has been elected to serve as the seventh president. A member of the governing board of the College since 1996, he currently serves as vice president. He will begin his term on January 1, 2003, succeeding Stephen Pepe.

Robert M. Dohrmann

President-elect Dohrmann practices in Los Angeles, California as a member of the law firm of Schwartz, Steinsapir, Dohrmann and Sommers. He is a 1962 graduate of the University of Southern California School of Law, and was admitted to the California bar in 1963. Since then he has specialized in the representation of unions, individual workers and employee benefit plans, primarily in litigation. In 1997, he was elected Chair of the Section of Labor and Employment Law of the American Bar Association. He had previously served the Section as a Council member from 1986 to 1994 as well as Co-Chair of the Committee on State and Local Government Bargaining and Employment Law and as Co-Chair of the Publications Committee. In addition, he was Chair of the Labor and Employment Law Section of the Los Angeles County Bar Association in 1982-83, as well as its annual Labor Law Symposia in 1982 and 1984. He also served as president of the Industrial Relations Research Association in 1986-87.

During the coming year, it is his hope that the College will continue its work toward increasing diversity in gender and ethnicity among its members. Insofar as it is consistent with that objective, President-elect Dohrmann will expand the membership of the standing committees which could benefit from greater involvement of the Fellows such as the Video History and Annual Lecture committees. He welcomes the call of CEELI (Central European and Eurasian Legal Initiative), an ABA sponsored program, to seasoned lawyers to assist nations emerging from various forms of totalitarian governments in pursuing transition to a democratic form of government.

Mr. Dohrmann intends to continue the effort of the Board to make certain that credentials for each circuit are standardized and uncomplicated, in order to facilitate the work of the Circuit Credentials Committees. Throughout the coming year, he plans to seek the ideas and suggestions of the Fellows, both through the newsletter and the College website, to fulfill his objectives. He hopes to continue in the tradition established by his predecessors, while personally paying tribute to the talented and devoted Stephen Pepe, who served as the sixth president of the College with great distinction.

PRESIDENT'S PERSPECTIVE

By Stephen P. Pepe

The Board has received many oral and written comments from the Fellows concerning the membership of the College and the desire that we continue to maintain its high standards.

It has been my distinct privilege and honor to serve as the President of the College during this year, as well as a wonderful way to conclude one's career. As my term draws to an end, I thought it would be appropriate to review where the College has been and where it is going in the future.

Annual Induction Dinner. We had one of our most successful induction dinners this year in August at the ABA Annual Meeting. The Board of Governors has reviewed the format of the dinner and we will make some slight modifications in the program but will follow the pattern that was set this year. As many of you are aware, next year's ABA Meeting is in San Francisco and the Board is investigating and looking for an appropriate venue for our 2003 induction dinner, to be held on Sunday, August 10, 2003.

College Membership. The Board has received many oral and written comments from the Fellows concerning the membership of the College and the desire that we continue to maintain its high standards. As some of you may be aware, the College of Trial Lawyers limits its membership to one percent of the members of the bar in each state, which would obviously include non-trial lawyers. Other honorary organizations such as Phi Beta Kappa and Order of the Coif use percentage limitations to ensure high standards. After discussing and debating this at our October meeting, the Board has concluded to limit the membership by Circuit to five percent of the members of the American Bar Associations' Labor and Employment Law Section for that circuit. The only exception we have made is for the D.C. Circuit where we have placed that limitation at ten percent since many of the government lawyers do not join the ABA Labor and Employment Law Section and those who are serving temporary appointments in the government maintain their membership in their home state bar association. In any event, no more than ten percent of the members of the College can be inducted in any one year. Presently, we have approximately 600 Fellows so that would place a limitation of 60 for 2003. On average, the circuits currently run between two and three percent of the membership of the ABA section. So the five percent rule will provide for sufficient growth in the future.

Nomination Process. The Board also reviewed the nomination form and again responding to comments and suggestions from the Fellows, we have simplified the nomination form and taken many of the questions that were asked of the nominator and moved them to the nominee since they called for information that was more appropriate for the nominee to supply.

Stephen P. Pepe

You should have received a copy of the new form. We would also urge you to nominate qualified individuals from those areas which are underrepresented such as plaintiff attorneys, union attorneys, government and neutrals as well as women and those of color. In addition to making the nomination process more user friendly, we will provide a form for references to complete in an effort to standardize the information we receive from these people. One of the new requirements is going to be that each nominee needs to supply at least two references who are adversaries and two references who are either government officials, judges or neutrals.

Board of Governors' Membership. This year, six of our Governors have finished their second term and will be finishing their service on the Board. We greatly appreciate the effort and hard work of Vicki Lafer Abrahamson (plaintiff); Harold Datz (government official); John Irving Jr. (management); Donald McDonald (union); Charles Powell III (management); and Richard Seymour (plaintiff). We are all indebted to them for the service and leadership they have provided to the Board during their terms and we will miss their counsel and judgment.

Bob Dohrmann has provided great assistance and wise counsel as our Vice President. I know he will make an outstanding President and he has already established an ambitious schedule of Board meetings for 2003. The College is in very capable hands. On a personal note, after practicing labor and employment law for 35 years, I will follow John Adams' example and become a full time farmer on February 1, 2003.

MEET THE NEWEST MEMBERS OF THE BOARD OF GOVERNORS

Lonny Dolin: After practicing law in Vermont, Ms. Dolin joined the law firm of Harris Beach & Wilcox in Rochester, New York as a trial attorney. She became a member of the firm in 1988. In 1993, she founded her own firm, Dolin Thomas & Solomon, LLP. to concentrate her trial practice in employment-based litigation and ERISA enforcement law. She is currently on the Council of the ABA's Labor and Employment Law Section and previously served as Co-Chair of that Section's National CLE/Institute and Meetings Committee and Annual Meeting Program Committee. Ms. Dolin, who was inducted as a Fellow of the College of Labor and Employment Lawyers in 1998, is an active member of NELA and NELA/NY and has been a frequent lecturer for the ABA, the Law Education Institute, NELA and for numerous community and not-for-profit agencies in upstate New York.

Lonny Dolin

Barry Kearney: Mr. Kearney is a career employee with the National Labor Relations Board. Since 1995, he has been Associate General Counsel for the Division of Advice. He is responsible for providing legal advise to the Agency's Regional Directors on the full range of issues arising under the National Labor Relations Act with particular emphasis on novel or complex issues and injunction and appellate litigation. He was inducted as a Fellow in 1999.

Maurice Wexler

Kathy Krieger: Ms. Krieger, a partner in the D.C. firm of James & Hoffman, has practiced labor and employment law for more than 25 years, representing labor unions, individuals and non-profit organizations throughout the country in litigation and other matters arising under a wide range of federal, state and local laws. Since 1996, Ms. Krieger's responsibilities have included serving as an Associate General Counsel to the AFL-CIO. From 1988 until 1996, Ms. Krieger was General Counsel of the United Brotherhood of Carpenters and Joiners of America. Between 1979 and 1988, Ms. Krieger represented the Carpenters Union as staff attorney and Associate General Counsel. Previously, Ms. Krieger had litigated for the federal government as an attorney with the Appellate Court Branch of the National Labor Relations Board.

Over the years Ms. Krieger has written for a variety of legal and labor publications and has been active in labor and adult education, teaching courses and seminars for workers and labor leaders, as well as community volunteers. She is a past Council Member of the ABA's Section of Labor and Employment Law, a former member of the Board of Directors of the AFL-CIO Lawyers' Coordinating Committee, and former Presidential appointee to the NLRB Advisory Committee. Ms. Krieger attended University of Michigan Law School and then New York University School of Law, where she received her J.D. in 1977. She is a 1974 graduate of Yale University. Ms. Krieger is a member of the New York and District of Columbia bars and lives in Washington, D.C. with her husband and two children.

Gloria Portela: Ms. Portela is a mediator and a partner in the Houston office of Seyfarth Shaw, and was one of the founding Fellows of the College. She is a director of Bowne & Co., Inc. and vice-chair of the Board of Directors of the University of St. Thomas. She has just completed two terms on the Council of the ABA's Section of Labor and Employment Law. A native of Havana, Cuba, Ms. Portela came to the United States in 1961. She received her B.A. degree *magna cum laude* from Loyola University of Chicago in 1973 and her J.D. from Northwestern University School of Law in 1976.

Gloria Portela

Mary Anne Sedey: Ms. Sedey has represented plaintiffs in employment litigation in St. Louis,

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Missouri for twenty-six years. She was President of the National Employment Lawyers Association from 1995 to 1998, has served on its Board for nine years, and began the St. Louis chapter of NELA more than ten years ago. She has been a member of the Executive Board of the Missouri Association of Trial Attorneys, and was the Vice-Chair of the Missouri Bar Labor and Employment Committee for a number of years. She was elected a Fellow of the College of Labor and Employment Lawyers in 1996. Currently, she is a partner in the firm of Sedey & Ray, P.C. She and her partner Jon Ray are co-counsel for a nation-wide class of women in the sex discrimination class action recently settled with Rent-A-Center, Inc. for forty-seven million dollars and extraordinarily broad affirmative relief.

Mary Anne Sedey

Maurice Wexler: Mr. Wexler concentrates his practice in litigation. He has experience in labor and employment and general corporate law, representing employers in a broad variety of issues relating to labor and employment. Mr. Wexler is admitted to various federal district courts, the Courts of Appeal for the 5th & 6th Circuits and the U.S. Supreme Court. He is a frequent speaker on topics relating to the law of employment discrimination. Mr. Wexler served as co-chairman of several chapters on discharge in *Employment Discrimination Law*, published by the Bureau of National Affairs and is the authorof "Defending Against Prevailing Plaintiff's Requests For Attorney's Fees In Equal Employment Law Cases" and "Defending Against Discovery in Civil Actions," *Tennessee Bar Journal*. Mr. Wexler is a member of the American, Tennessee and Memphis Bar Associations and the University of Colorado National Alumni Admissions Assistant Program. He served a three-year term as Chairman of the Liaison Division Committee on Equal Employment Opportunity Law of the ABA Section of Labor and Employment Law, with national responsibility for the Committee's activities with the Equal Employment Opportunity Commission, the U.S. Department of Labor, Office of Federal Contract Compliance Programs, the Civil Rights Division of the Department of Justice, and Senate and House Committees relating to labor and employment. Mr. Wexler received his B.S. in 1953 from the University of Colorado and his J.D. in 1963 from Loyola University. He serves as an adjunct professor at the University of Memphis School of Law (2000-2002) and was elected a Fellow in 1996.

Maurice Wexler

INDIVIDUALS MAY BE LIABLE FOR THE WAGES OF CORPORATE EMPLOYERS

By Judith Droz Keyes

Inducted as a Fellow of the College in 2001, Ms. Keyes is a management lawyer in the law firm of Morrison & Foerster LLP in San Francisco, California. The author wishes to acknowledge the assistance of Kendra Forsythe Barnes, also of Morrison & Foerster LLP, in preparing this article.

The basis for personal liability lies in this definition and in the expansive interpretation courts have given to it.

In a struggling economy, many companies face financial uncertainty and difficult payroll decisions. Management may withhold paychecks or cut corners with wages in hopes of reinvesting to keep the company afloat. Although most are aware that corporate entities face potential liability for noncompliance with federal and state wage laws, few would expect that corporate officers and managers also are at risk. But the fact is: an individual may be jointly and severally liable for unpaid wages if deemed an employer under the Fair Labor Standards Act ("FLSA") or a similar state statute.

The Basis for Personal Liability Under the FLSA. The FLSA establishes an employer's obligation to pay earned wages. Any employer not in compliance is subject to liability. The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

The basis for personal liability lies in this definition and in the expansive interpretation courts have given to it. Courts are quick to point out that the FLSA is remedial in nature and is intended to prevent employers from shielding themselves from liability for acts of their agents. *See Donovan v. Agnew*, 712 F.2d 1509 (1st Cir. 1983).

Economic Reality Test for Identifying Employers. Whether a particular individual is an employer under the FLSA is a question of fact that focuses on the amount of control he or she has over the workers in question. Courts apply an "economic reality test" in making the determination and examine the following factors: whether the individual (1) had the power to hire and fire employees; (2) supervised and controlled work schedules or conditions of employment; (3) determined the rate or method of payment; and (4) maintained employment records. All factors are considered in combination, and no one factor is dispositive. Generally speaking, courts find liable those individuals who had personal responsibility for making decisions about the conduct of the business that contributed to violations of the Act. *See Herman v. RSR Security Srvcs. Ltd.*, 172 F.3d 132, 139 (2nd Cir. 1999).

Significant Operational Control. Ownership interest helps to establish employer status but is not required. "[A]n individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-à-vis its employees" is an employer. *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir. 1983).

Judith Droz Keyes

Significant operational control of a corporation's day-to-day functions is also relevant. An individual who controls a corporation's financial affairs and can make compensation decisions may be personally liable. For example, preferring the payment of other obligations or retention of profits over the compensation of employees may lead to liability, as may making the decision to continue operating despite financial adversity and inability to fulfill payroll obligations. *See, e.g.*, *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 678 (1st Cir. 1998).

A corporate officer may be personally liable even when delegating to others the majority of employee decisions. In *Dole v. Elliot Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991), a payroll bookkeeper computed hours, overtime and commissions, and a general manager handled many of the day-to-day problems associated with the operation of the corporation. Nevertheless, the court held the chief corporate officer personally liable for wages on account of his ownership interest and ultimate control of employer functions.

Similarly, in *Sabine*, primary responsibility for the company's daily operation was delegated to an onsite manager, but the court concluded that that the non-owner secretary-treasurer was still personally liable for wage violations. The relevant factors included his role in making

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workforce decisions, transferring funds to meet payroll obligations, and indirectly controlling matters traditionally handled by an employer, such as payroll, insurance, and income tax matters. *Sabine*, 695 F.2d at 194-95.

Managerial Control. Personal liability is not limited to corporate officers. High level employees and others involved in layoff, overtime, and compensation decisions also are at risk. In *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324 (5th Cir. 1993), the court found an exotic dance club consultant jointly and severally liable for over $500,000 in unpaid wages even though he had no ownership interest, was not an officer, and did not exercise control of most day-to-day operations. The consultant's involvement included hiring and supervising some of the dancers, giving instructions to employees, and signing payroll checks.

Corporate officers may remain personally liable for unpaid wages even when the corporate entity files for bankruptcy.

Effects of Chapter 11 Bankruptcy. Corporate officers may remain personally liable for unpaid wages even when the corporate entity files for bankruptcy. In *Leonard v. McMorris*, 106 F. Supp. 2d 1098 (D. Colo. 2000), *cert. granted*, *Leonard v. McMorris*, 272 F.3d 1295 (10th Cir. 2001), defendants argued that there could be no personal liability under the Colorado Wage Act when the corporation is not subject to liability by operation of the bankruptcy code. The court disagreed, concluding that there is no bankruptcy exception to the imposition of personal liability upon corporate officers for unpaid wages due discharged employees. The explanation for this is rooted in policy: the risk of personal liability encourages corporate officers to pay appropriate wages while the corporation has the resources to do so and provides some recourse for employees when a corporate employer becomes insolvent. *Id.*, at 1109-10. The 10th Circuit has certified this issue for review.

Limitations on Liability. The courts' liberal application of the definition of "employer" does not mean that every supervisory employee is personally liable for unpaid or deficient wages. Courts have stopped short of placing liability on corporate officer and executive employees in the absence of evidence establishing control over the "purse-strings" or a personal role in making corporate policy or compensation decisions. *See*, *e.g.*, *Baystate*, 163 F.3d at 678.

Moreover, stock ownership alone does not establish employer status. In *Wirtz v. Pure Ice Company*, 322 F.2d 259 (8th Cir. 1963), the 8th Circuit declined to find the controlling stockholder personally liable because he had nothing to do with the hiring of employees or fixing their wages. However, the court indicated it might reach a different conclusion if there were "a combination of stock ownership, management direction and the right to hire and fire employees." *Id.* at 263.

California Law. California's definition of employer includes someone who employs or exercises control over the wages, hours or working conditions of any person. 8 C.C.R. § 11040. Although California appellate courts have yet to address the issue, California and federal law appear consistent. In *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1469 (C.D. Cal. 1996), the federal district court held that under California law, "employer" should be interpreted in a similar "liberal" fashion as under the FLSA given its remedial nature, thus subjecting corporate officers with employee control to liability.

Impact. Although the expansive interpretation of the definition of employer may seem alarming, the cases addressing the issue are few, suggesting that plaintiffs rarely sue corporate officers and high level employees for their wages. Nevertheless, given the fragile state of the economy and the demise of dot-com companies, the risk of personal liability should serve as a warning to those involved in employing others to respect applicable wage laws and to be conscious of the personal implications their corporate decisions may have.

"PEOPLE OF SIZE" MAY SEEK PROTECTION FROM WEIGHT DISCRIMINATION

By Peter A. Janus

A management lawyer, Mr. Janus is a partner in the law firm of Siegel O'Connor, Zangari, O'Donnell & Beck, PC in Hartford, Connecticut. He was inducted as a Fellow of the College in 1999.

Most of the weight discrimination cases have been litigated as complaints alleging disability discrimination or perceived disability discrimination.

In June of 2002, Southwest Airlines announced that they would be enforcing a policy of charging overweight passengers for a second ticket if they were unable to fit into one seat. One commentator has labeled this the "two-seat, two-cheek" policy. Individual rights activists have called the measure unfair. They also accuse the company of weight discrimination, or singling out heavy people, because taller individuals or pregnant women and mothers with infants do not have to pay for two seats. Southwest justifies its action on the basis that (1) it should be able to charge more for those people who occupy more than their normal, allotted space in the cabin, and (2) it is trying to protect the passengers who cannot enjoy their full seat because the other person is encroaching on it. Civil libertarians respond that the seats are too narrow for most of the population to begin with. The airline counters that it can't be held responsible for the fact that people are getting fatter these days. The argument could go on and on.

The Center for Disease Control and Prevention reports that over 60% of the American population is now classified as being overweight or obese. The medical definition of "obesity" is a body weight that exceeds 20% over the standard height-weight table. Severe or "morbid" obesity means that a person has a body weight more than 100% above the norm or more than 100 pounds over the optimal weight.

In the wake of this well-publicized event involving Southwest Airlines, employers may be asking themselves about what their legal obligations are to "people of size", and what potential liability there may be for claims of weight discrimination. For example, it is permissible to refuse to hire someone solely on the basis that the individual is overweight? Can a company reject an applicant because it considers a person's large size offensive and the job requires the employee to interact with the public? What should the employer do if an obese worker is being subjected to harassment by co-workers because of his or her excessive weight? Is it safe to assume that a person's size hinders their physical ability to do the job?

Most of the weight discrimination cases have been litigated as complaints alleging disability discrimination or perceived disability discrimination. In limited jurisdictions, the state or local laws specifically outlaw discrimination against people because of their weight. These include the Michigan Civil Rights Act and ordinances in San Francisco and Santa Cruz, California. The District of Columbia Human Rights Law includes, within the scope of its employment discrimination prohibitions, the category of "personal appearance."

Peter A. Janus

The EEOC regulations [Section 1630.2(j)], which were promulgated as interpretive guidance on the Americans with Disabilities Act, state that "except in rare circumstances, obesity is not considered a disability impairment." Courts also have ruled that obesity alone is not a physical impairment under the Rehabilitation Act of 1973. *See, Cook v. State of Rhode Island,* 783 F. Supp. 1569 (D. R.I. 1992). However, where a person with obesity, or morbid obesity, has an underlying or resultant physiological disorder, such as hypertension, asthma, degenerative arthritis, etc., which affects the body's systems including musculoskeletal, respiratory or cardiovascular, then the disorder is an impairment under the federal disability discrimination statutes. *See, Hazeldine v. Beverage Media,* 954 F. Supp. 697 (S.D. N.Y. 1997). Many of the state discrimination laws follow the same analytical path.

The mere presence of a physical impairment due to obesity does not automatically mean that the employee is legally disabled. The person, in order to qualify as "disabled" under the various federal and state statutes, must be substantially limited, or be regarded as so limited, in one or more major life activities. The fact that an overweight person may need more rest, is unable to run very fast, has difficulty in walking long distances, can't completely bend or kneel, or has similar limits as a result of his or her excessive weight, may be insufficient to be considered as a substantial limitation of a major life activity. *See,*

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SOME SECOND THOUGHTS ON THE USE OF ARBITRATION TO RESOLVE EMPLOYMENT DISCRIMINATION CLAIMS

By Stephen W. Jones

Mr. Jones is a management lawyer and name partner in the law firm of Jack Lyon & Jones in Little Rock, Arkansas. He was inducted as a Fellow of the College in 2000.

When *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991) was issued, it was seen as laying the groundwork for the arbitration of employment discrimination claims, and that much anticipated result was realized in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). However, the anticipation may have been more exciting than the reality. In the decade between these cases, the landscape of employment discrimination law changed dramatically. While initially, arbitration was viewed as a panacea for the evils of litigation, such as run away jury awards and escalating discovery costs, the superiority of arbitration is not now so clear.

Many courts are now taking a narrow view of the definition of an "adverse employment action" under Title VII.

In the past decade, we have seen the federal courts develop a clear resistance to serving as a super personnel department charged with reviewing every disgruntled employee's claim against his or her employer. This has been especially dramatic under the *Americans with Disabilities Act* where the Supreme Court, and now the lower courts, have taken a very restrictive view of the definition of "disability". It is difficult to imagine a more technical position than that taken in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), where the Court held that, because the plaintiffs had 20/20 vision with glasses, they did not have a disability, and their employer, United Airlines, could not be required to allow them to wear those glasses as a reasonable accommodation which would permit them to satisfy the company's minimum vision requirements. This was merely the beginning of many decisions narrowly defining "disability".

This trend is not limited to the ADA. Many courts are now taking a narrow view of the definition of an "adverse employment action" under Title VII. Courts have ruled that involuntary transfers without a loss of pay, and changing duties from less to more onerous ones are not adverse employment actions, a necessary predicate to establishing a cause of action for employment discrimination. Thus, even though these actions might be racially motivated, they are not actionable because there is no adverse employment action. The scope of "hostile work environment" in harassment cases is coming under similar scrutiny.

As a result, summary judgment has become a potent weapon in the hands of the defense bar. The technical legal defenses, often used in such motions, however, are not well-suited to the arbitration process, where there has been a historic tendency of arbitrators to "split the baby". True, arbitrators are not likely to make large awards of punitive damages (although there have been exceptions), but, on the other hand, they are not likely to grant technical defenses based upon narrow definitions of the underlying statues or resolve unsettled issues of law. Nor do their decisions make controlling precedent, and, of critical importance, there is no effective mechanism for review and reversal of questionable determinations.

Stephen W. Jones

Furthermore, when one delves beneath the surface of "runaway jury awards", one usually discovers either egregious facts or surprising errors of litigation judgment. An objective viewpoint and good counsel can usually avoid those outcomes. Additionally, mediation and settlement are available as effective alternatives for limiting risk.

In addition, the number of shocking plaintiff results are far more limited than one would believe from reading news articles. After all, over 90% of lawsuits are resolved prior to trial either by way of motion or settlement. We should not allow the focus of the news media on the sensational to skew our decision-making.

In light of this trend, it is my belief that employers should carefully consider whether they want to give up the advantages of a federal court system with a growing antipathy to a continued flood of employment cases. This is especially true in light of the fact Republicans now control both the Congress and the Presidency, and are unlikely to amend the discrimination statutes to make them more favorable to plaintiffs as has happened at times in the past.

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Arbitration does enjoy the advantage of less publicity and a lower profile.

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Further, while the federal courts are increasingly conservative in their view of discrimination claims, it is not clear they will be equally conservative in enforcing arbitration agreements. It is noteworthy that on remand of *Circuit City*, the Ninth Circuit declared that traditional principles of contract law apply to arbitration agreements and held the arbitration procedures used by Circuit City were unconscionable, and, therefore, unenforceable, 279 F.3d 889 (9th Cir. 2002), and the Supreme Court has denied certiorari. This leaves us with the prospect of spending our client's resources litigating the enforceability of arbitration agreements before we ever get to the factual or legal substance of their claims.

In a similar vein, the Court of Appeals of Washington recently ruled that it is contrary to public policy to allow an employee to waive his right to pursue a wrongful discharge claim in court and that an agreement to the contrary cannot be enforced. *Young v. Ferrell Gas, L.P.*, 106 Wash. App. 524 (2001). These cases suggest that we now face the chaotic potential of determining the enforceability of arbitration provisions on a state-by-state basis based uponeach state's rules regarding interpretation of contracts, unconscionability and public policy. This does not promise the kind of predictability that most corporate clients seek. It also does not suggest that there would be significant cost savings from using arbitration rather than the judicial system. This is especially true in light of the continued expansion of discovery in the arbitration process at the same time it is being limited by the imposition of the amendments to Rule 26 of the Federal Rules of Civil Procedure.

Arbitration does enjoy the advantage of less publicity and a lower profile. This is particularly important in harassment cases where the avoidance of embarrassment is often a more important factor than monetary exposure, especially when high level managers or executives are involved. However, whether this outweighs the other considerations discussed here is problematical.

It is not my intent to suggest that the judicial system is always superior to arbitration in resolving employment discrimination disputes. However, choosing between the two is far more complex than was originally contemplated when we were discussing arbitration in the abstract after *Gilmer*, rather than arbitration in practice after *Circuit City*.

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Bryant v. Troy Auto Parts Warehouse, 6 AD Cases 1474 (S.D. Ind.1997). Cases involving morbid obesity typically present infirmities or disorders, such as arthritis, heart condition or obstructive lung disease that qualify under this test. Some courts have ruled that, to the extent obesity is a transitory or self-imposed condition resulting from an individual's voluntary action or inaction, it would not be either a physiological disorder or handicap. *Cook v. State of Rhode Island, supra.*

Under the federal and state laws, an obese person with a "disability" may not be subjected to discrimination in their employment and with respect to the various terms, conditions and privileges of the workplace. These include, of course, hiring and termination decisions and freedom from harassment or a hostile work environment. Furthermore, disability discrimination can arise where an individual without disability impairment is regarded as being disabled under the law because of his or her obesity. There are three different ways that such discrimination can occur:

- The person may have an impairment that is not substantially limiting, but it is perceived by the employer to be limiting.
- The individual may have an impairment, which is only substantially limiting because of the attitudes of others toward the impairment.
- The employee may have no impairment at all, but the company regards him or her as having a substantially limiting impairment.

Under these circumstances and in dealing with obesity, prospective employers need to be especially cautious of their actions during the interviewing and hiring process. Negative assessments about an applicant's qualifications or general suitability for a position that are generated because of a dislike or distaste for the person's large size may turn into a claim and legal judgment of disability discrimination.

The unfortunate reality in our society at present is that people of size frequently encounter discriminatory attitudes and are denied opportunities in various aspects of their lives. At the same time it is important to recognize that obese workers are protected from discrimination under federal and many states' disability laws.

SPOTLIGHT ON FELLOWS

Fellow Norman Brand's latest book, *How ADR Works,* will be published in December 2002 by the Bureau of National Affairs. Mr. Brand was inducted as a Fellow in 1998, and practices in San Francisco, California.

Fellow Ron Dean received an award from the US District Court for the Central District of California Settlement Officer Program for most cases settled during the previous year. A solo practitioner, he is a plaintiff lawyer in Pacific Palisades, California, and was inducted as a Fellow in 1998.

Fellow Nancy Hoffman, was appointed to serve as a Commissioner on the ABA's Commission on Racial and Ethnic Diversity in the Profession in August 2002. This is an ABA Presidential appointment. Ms. Hoffman, elected a Fellow in the inaugural class of 1996, is a unionside lawyer at the Civil Service Employees Association in Albany, New York.

Fellow Greg Murray, a shareholder with the management labor and employment law firm of Vercruysse Metz & Murray PC, was selected to be included in the 2003-2004 edition of *The Best Lawyers in America* in the category of Labor and Employment Law (management). He joins his law partners and College Fellows, Robert Vercrysse, Virginia Metz and David Calzone, in this honor. Mr. Murray was elected a Fellow of the College in 1999.

Fellow W. Scott Railton was appointed Chairman of the US Occupational Safety and Health Review Commission by President Bush on August 6, 2002. Prior to this appointment, he was a partner at Reed Smith in McLean, Virginia. Mr. Railton was inducted as a Fellow in 1998.

Fellow Judith Vladeck, was one of five distinguished women lawyers who received the 12th Annual Margaret Brent Award at a luncheon held August 11th in Washington, DC. The award, named for the first woman lawyer in the United States, was established as part of the ABA's Commission on Women in the Profession and recognizes and celebrates the accomplishments of outstanding women lawyers. Ms. Vladeck is a partner in the New York firm of Vladeck, Waldman, Elias & Englehard PC. She was inducted as a Fellow in the inaugural class of 1996.

Fellow Warren Tomlinson postumuously received the Samuel S. Smith award for excellence in law practice management from the American Bar Association. Recipients are recognized for outstanding marketing, management, and leadership in the legal profession. Mr. Tomlinson passed away May 2, 2002, at his home in Vail, Colorado.

Our condolences are extended to the families of the following Fellows.

Fellow Clifford Oviatt passed away September 24th at the Hilton Head Island Medical Center, near his home in South Carolina. A nationally recognized labor relations attorney, Oviatt joined McGuireWoods in 1983 and served on the National Labor Relations Board from 1989 to 1993. Upon completion of his appointment to the Board, he returned to private practice as a senior partner in McGuireWoods' Washington office.

His practice focused on the representation of management in unionized and nonunionized operations throughout the United States. Inducted as a Fellow in the inaugural class of 1996, he was also a member of the Developing Labor Law Committee of the Labor Law Section of the American Bar Association. He was active in charitable organizations throughout his 40-year legal career. At the time of his death, he was the Senior Warden of the All Saints Episcopal Church on Hilton Head Island, and a trustee of the Ministering to Ministers Foundation, Inc., in Richmond, Virginia. He represented indigent clients through the Lowcountry Legal Clinic on Hilton Head and was a regular volunteer in the Hilton Head Island Meals on Wheels program for shut-ins. Interviewed by the Carolina Morning News last November on assisting less fortunate individuals, Oviatt said, "You do what you can do. I went into law to help people and I've been doing it ever since."

He is survived by his wife of 51 years, his 4 children, as well as 10 grandchildren.

Fellow Norton Come passed away March 15, 2002 at Sibley Memorial Hospital in Washington, DC. Serving as Deputy Associate General Counsel of the National Labor Relations Board, he had headed the Supreme Court Branch since 1960. He argued more than fifty cases before the Supreme Court between 1958 and 1987, and filed his last brief with the

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Supreme Court shortly before he died. A Board lawyer since 1948, he played a leading role in most of the cases that have defined modern labor law. Mr. Come was honored by President Clinton with a 1995 Presidential Rank Award of Distinguished Executive. Among his significant publications is *Federal Preemption Of Labor-Management Relations: Current Problems In The Application Of Garmon*, 56 Va. L. Rev. 1435(1970). He was inducted as a Fellow of the College in the inaugural class of 1996. A native of Chicago and graduate of the University of Chicago, he was an avid Cubs fan.

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In Belarus and Bulgaria, in particular, CEELI has been working on specific projects related to labor and employment law. In Belarus, CEELI started a Labor Law Initiative whose goal is to work with labor unions to develop the services offered to members. By improving representation the program seeks to increase membership in the unions. In addition, CEELI enhances cooperation between the unions and affiliated Legal Advice Centers.

In Bulgaria, CEELI has made significant progress in its efforts to lay the groundwork for the introduction of court-related and labor mediation in Bulgaria. CEELI's activities have included conducting a series of mediation awareness training for judges, organizing basic skills training for mediators, providing institution-building support to private mediator's associations, and assisting a Ministry of Justice ADR task force in developing more broad based policy reforms. In the labor area, CEELI provided substantial substantive and institution-building assistance to the newly created Labor Conciliation Institute.

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