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Reinstatement and Returning to Work: What the ADA Has to Say[1]

By Susan Ritz[2]
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Your client has just been out on a disability leave and wants to return to his or her job. Can the employer require your client to provide a doctor's note clearing the employee to return to work? The answer is "it depends."

The ADA and its regulations provide very specific limitations on what medical information employers may request. These regulations subdivide into three categories: acceptable pre-employment inquiries;[3] employment entrance examinations;[4] and examination of employees.[5] This article will focus on the third category.

The ADA specifically provides at 42 U.S.C. §12112(d)(4)(A) that:

> A covered entity shall not require a medical ination and shall not make inquiries of an mployee as to whether such mployee is an ndividual with a disability or as to the nature or severity of the disability, unless such mination or inquiry is shown to be job-related and onsistent with business ecessity.

This is amplified by the regulations, which state at 29 C.F.R. §1630.13(b) that:

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1 This paper is written as of March 22, 2013. It is intended for educational purposes only and should not be construed as, or relied upon for, legal advice.

2 This article was initially prepared in connection with PLI's Employment Discrimination Law & Litigation 2013 program on June 20, 2013.

3 42 U.S.C. §12112(d)(2); 29 C.F.R. §1630.14(a).

4 42 U.S.C. §12112(d)(3); 29 C.F.R. §1630.14(b).

5 42 U.S.C. §12112(d)(4); 29 C.F.R. §1630.14(c).

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With the momentum we achieved and the credibility we built with legislators last year, both bills are within reach this year. However, it will require professional advice. Last session we relied on our lobbying firm, Malkin & Ross, and we came very close to success. We will need their advice again. To make this a reality, we are asking that each member contribute just One Billable Hour, at his or her regular billing rate, to our efforts. Without your contributions we are not going to get this done.

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> Except as ermitted by 1630.14, it is unlawful for a covered entity to require a medical ination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

29 C.F.R. §1630.14(c) in turn provides:

> A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

The interpretive appendix to 29 C.F.R. §1630.14(c) amplifies this regulation as follows (in relevant part):

> This rovision permits ployers to make inquiries or require medical inations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.

Together, the statute, regulations and guidance make clear that the ADA's prohibitions on discrimination include both medical examinations and inquiries. Therefore, whether an employer can lawfully make an inquiry of a returning employee depends on whether the examination or inquiry is: (1) job-related and (2) consistent with business necessity.

The EEOC's Enforcement Guidance on Disability-Related Inquiries and Medical Examination of Employees Under the Americans with Disabilities Act (ADA) ("Enforcement Guidance"), http://www.eeoc.gov/policy/docs/guidance-inquiries.html, addresses this point specifically in at least two different ways. First, it defines "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or health." (citation omitted). The Enforcement Guidance appears to adopt the Guidance on Pre-employment Questions and Medical Examinations in listing the following factors that should be considered to determine whether a test (or procedure) is a medical examination:

> (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task ; (6) whether the test normally is given in a medical setting; and, (7) whether medical equipment is used (citation omitted).

The Enforcement Guidance further provides that:

> In many cases, a combination of factors will be relevant in determining whether a test or procedure

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is a medical examination. In other cases, one factor may be enough to determine that a test or procedure is medical.

Medical examinations include, but are not limited to, the following:

• vision tests cted and analyzed by an ophthalmologist or optometrist;

• blood, urine, and breath analyses to check for alcohol use;

• blood, urine, saliva, and hair analyses to detect disease or genetic markers (*e.g.*, for conditions such as sickle cell trait, breast cancer, Huntington's disease);

• blood pressure screening and cholesterol testing;

• nerve tion tests (*i.e.*, tests that reen for sible erve age and bility to jury, such as carpal tunnel syndrome);

• range-of-motion tests that measure muscle strength and motor function;

• pulmonary function tests (i.e., tests that measure the capacity of the ungs to hold air and to ove air in and out);

• psychological tests that are designed to identify a mental disorder or impairment; and,

• diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI). (citation omitted).

There are a **number of cedures and tests employers may require that generally are not considered medical examinations**, including:

• tests to determine the **current illegal use of drugs**;

• **physical agility tests**, which measure an employee's ability to perform actual or simulated job tasks, and **physical fitness tests**, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure);

• tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;

• **psychological tests** that measure personality traits such as honesty, preferences, and habits; and,

• polygraph examinations (citations omitted).

Second, the Enforcement Guidance poses and answers the following question:

17. May an employer make disability-related inquiries or require a medical examination **when an employee who has been on leave for a medical condition seeks to return to work**?

Yes. If an employer has a reasonable belief that an employee's **present** ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition, the employer may make disability-related inquiries or require the employee to submit to a medical examination. Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work. Usually, inquiries or examinations related to the specific medical condition for which the employee took leave will be all that is warranted. The employer may not use the employee's leave as a justification for making far-ranging disability-related inquiries or requiring an unrelated medical examination.

Example A: A data entry clerk broke her leg while skiing and was out of work for four weeks, after which time she returned to work on crutches. In this case, the employer does not have a reasonable belief, based on objective evidence, either that the clerk's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition. The employer, therefore, may not make any disability-related inquiries or require a medical examination but generally may ask the clerk how she is doing and express concern about her injury.

Example B: As the result of problems he was having with his medication, an employee with a known psychiatric disability threatened several of his co-workers and was disciplined. Shortly thereafter, he was hospitalized for six weeks for treatment related to the condition. Two days after his release, the employee returns to work with a note from his doctor indicating only that he is "cleared to return to work." Because the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat due to a medical condition, it may ask the employee for additional documentation regarding his medication(s) or treatment or request that he submit to a medical examination.

Further Guidance can be found in the EEOC's Questions and Answers: Enforcement Guidance of Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), EEOC Questions and Answers - Enforcement Guidance. http://www.eeoc.gov/policy/docs/qanda-inquiries.html

May an employer ask disability-related questions or require a medical examination when an employee who has been on leave for a medical condition wants to return to work? (Question 17)

• Yes, if an employer has a reasonable belief that an employee's **present** ability to perform essential functions will be impaired by a medical condition or that he or she will pose a direct threat because of a medical condition.

• Any inquiries or examination, however, must be limited in scope to what is needed to determine whether the employee is able to work.

Viewing all these materials together, it appears that an employer must have a

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legitimate concern about the employee's ability to perform the essential functions of the job upon return from work before the employer may inquire further or demand a medical examination. Therefore, a standard rule that requires all employees returning from a disability leave to provide return to work authorization would appear to run afoul of these regulations and guidances. Employers must be careful to assure that if inquiries or examinations occur, they are narrowly tailored to the circumstances.

Employees have succeeded in enforcing this aspect of the ADA. A brief review of Court of Appeals case law demonstrates that the Courts of Appeals appear to unanimously agree on certain principles: (1) that a person need not demonstrate that s/he has a disability in order to enforce the medical examination/inquiry provisions of the ADA, and (2) that the burden of proof is on the employer to show business necessity for the medical examination/inquiry.

An early case addressing these issues came from the Ninth Circuit. In *Indergard v. Georgia-Pacific Corporation,*[6] the Ninth Circuit reversed a grant of summary judgment to the employer where a returning employee had been subjected to a two-day physical capacity evaluation ("PCE") that included range of motion and muscle strength tests, measuring of heart rate and breathing after a treadmill test. The PCE also included a broad inquiry into the plaintiff's medical history. Indergard failed the test, and was fired from her position as a Consumer Napkin Operator, which was her job prior to the leave.

Applying much of the above-quoted regulations and guidances, the court scrutinized all the details of the PCE and concluded that it qualified as a medical exam. It held:

> The purpose of the PCE may very well have been to determine whether Indergard was capable of returning to work. The substance of the PCE, however, clearly sought "information about [Indergard's] physical or mental impairments or health," *see EEOC Enforcement Guidance*, and involved tests and inquiries capable of revealing to GP whether she suffered from a disability. Therefore, we hold that the PCE was a medical examination under *42 U.S.C. § 12112(d)(4)(A)*.[7]

In addition, the Ninth Circuit endorsed the Magistrate Judge's view that the standard to establish business necessity is "quite high" and held that defendant would not be entitled to summary judgment because it "'failed to show that the PCE was limited to the essential functions' of Indergard's prior positions." *Id.* at 1052, 1058 (citations omitted).

In performing its analysis, the *Indergard* Court relied on a Second Circuit case, *Conroy v. New York Dep't of Corr. Serv.*,[8] which the Ninth Circuit found instructive. In *Conroy*, the Second Circuit held that:

> an employer's policy that all employees returning from sick leave provide a medical certification that included a "brief general diagnosis that is 'sufficiently informative as to allow [the Department of Correctional Services] to make a determination concerning the employee's entitlement to leave'" was "sufficient to trigger the protections of the ADA under [*42 U.S.C. §12112(d)(4)(A)*]" because the general diagnosis "may tend to reveal a disability."[9]

In *Conroy*, the Second Circuit further held that an employee need not meet the definition of disabled in order to have standing to challenge an employer's requirement of providing medical certification upon return from a leave. The Court held:

> We agree with our sister circuits that a plaintiff need not prove that he or she has a disability unknown to his or her employer in order to challenge a medical inquiry or examination under 42 U.S.C. § 12112(d)(4)(a). In contrast to other parts of the ADA, the statutory language does not refer to qualified individuals with disabilities, but instead merely to "employees." 42 U.S.C. § 12122(d)(4)(A). Moreover, we agree with the Tenth Circuit that "it makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability." We also note that EEOC enforcement guidance supports this interpretation. See Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), (EEOC, July 27, 2000), available at http://www.eeoc.gov/docs/guidance-inquiries.html.[10]

The Second Circuit recently cited *Conroy* with approval in *Margherita v. FedEx Express*, an unpublished summary order.[11]

Before *Indergard*, the Third Circuit, applying the standard set forth in 42 U.S.C. §12112 (d)(4)(A), held that an employer established the "business necessity" element of the ADA's standard for post-employment medical examinations where it was undisputed that the employer's supervisory employees had a concern about the safety of their other employees, and given the unusual behavior of plaintiff.[12]

The Sixth Circuit, in *Lee v. City of Columbus*,[13] expressly disagreed with *Conroy* and held that the requirement that an employee provide a general diagnosis – or even less specific statement regarding the nature of an employee's illness – is not tantamount to an inquiry as to whether such employee is an individual with a disability or as to the nature or severity of the disability. The Court further held that the policy was lawful because it applied to all employees, whether or not they were disabled.

That same circuit recently struggled with the concept of what constitutes a medical examination and reversed a grant of summary judgment for defen-

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6 582 F.3d 1049 (9th Cir. 2009).

7 Id. at 1056 (footnote omitted).

8 333 F.3d 88 (2d Cir. 2003).

9 Indergard, supra, at 1056 (citation omitted).

10 Conroy, supra, at 94-95 (citation omitted).

11 2013 U.S. App. LEXIS 2620 (2d Cir. Feb. 7, 2013).

12 Ward v. Merck & Company, Inc., 226 Fed. Appx. 131 (3d Cir. 2007) (non-binding and non-precedential opinion).

13 636 F.3d 245 (6th Cir. 2011).

President's Column

By Joshua Friedman
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I was elected by the Board as the new President of NELA/NY beginning January. After five years with Darnley Stewart at the helm, a hard working Board, and some fantastic Committees, NELA/NY is stronger than it has ever been. We have more members than ever before—412 at last count—and we are still growing. New members are already participating on the Listserv and on committees. New members are also coming to the CLE's. Many new members are from the Not For Profit world, and their contributions are invigorating our bar association. I am looking forward to getting to know all of our new members!

NELA/NY has a new address, and a dedicated office for our Executive Director, at 39 Broadway, Suite 2420, New York, NY 10006. Thanks to Board member Doris Traub, who was kind enough to sublet space. Thanks also to Darnley and her firm for allowing us the use of their space for so long.

All of our committees, Amicus, Communications, Conference, E-Discovery, Fund Raising, Gender Discrimination, Judiciary, Legislative, New Lawyers, NELA Nites, and NELARS have been enormously productive. You can find their webpages on our website (nelany.com), under About NELA/NY. If you would like to join one of the Committees, just email the chair, they can all use more help!

January held some challenges for us. One of them was that our new Executive Director resigned, after only four weeks on the job. Fortunately, Alix Ford, who was brilliant as our Interim Executive Director, stepped up once again to act as our Interim ED, while we conduct a search for a new ED.

In 2013, through the efforts of a super hard working Legislative Committee, and a terrific lobbyist, we came very close to getting an attorneys fees bill, and a meaningful whistleblower statute, passed in Albany. This year we are going to build on the momentum we created, and make an all out push to get this legislation passed.

We ask that each NELA/NY donate just One Billable Hour toward this effort. We believe that the effort and money we put toward this goal will pay for itself many times over. With a meaningful whistle blower statute, we will finally be able to help potential clients who have been retaliated against for opposing illegality. With an attorney's fees available under the NYS Human Rights Laws, there will be people whom we can now help, such as victims of sexual orientation discrimination, many of whom we could not help before. We ask that all of you please go to our website, which will link you to a donations page, and contribute One Billable Hour. ■

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dants, in the context of a demand that plaintiff undergo psychological counseling.[14]

The Seventh Circuit in *Coffman v. Indianapolis Fire Dept*.,[1155] apparently assumed that fitness for duty examinations qualified as medical examinations and went on to examine whether there was a business necessity for a psychological examination. The Circuit held that the defendant fire department met the business necessity test where there was a backdrop of two firefighter suicides in the preceding months, the plaintiff's well-being was essential not only to her safety but to the public at large, and multiple firefighters had expressed concern that Coffman did not seem like herself.

In *Wisbey v. City of Lincoln, Nebraska*,[16] the Eighth Circuit held that the employer bears the burden of proving business necessity. However, defendants met that burden because, as a dispatcher, Wisbey played an essential role in emergency functions and her position required her to be present to answer calls and alert at all times. People's lives are often at risk and a dispatcher's ability to focus and concentrate at all times is essential to adequate job performance, the Court held. The implication in Wisbey's FMLA application that she suffered from conditions affecting her concentration and motivation reasonably gave the City pause with respect to whether Wisbey could continue as an emergency dispatcher. In short, the fitness for duty exam provided the City with a legitimate means of resolving the matter by allowing the City to ascertain whether she was fit to return to a position under the same working conditions that allegedly caused her illnesses.

In *Harrison v. Benchmark Electronics Huntsville, Inc*.,[17] the Eleventh Circuit agreed with the other circuits, albeit in the context of a pre-employment inquiry, that a plaintiff need not demonstrate that s/he has a disability in order to bring a claim to challenge testing.

Conclusion

As the foregoing shows, NELA members should remain attuned to these potential violations of the ADA. It may be necessary to remind employers' counsel that this is a growing area of concern that will require a fact-intensive and sensitive treatment by employers and the counsel advising them. ■

14 Kroll v. White Lake Ambulance Authority, 691 F.3d 809, rehearing, en banc denied by Kroll v. White Lake Ambulance Auth., 2012 U.S. App. LEXIS 23953 (6th Cir. Nov. 8, 2012).

15 578 F.3d 559 (7th Cir. 2009).

16 612 F.3d 667 (8th Cir. 2010), abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031, 1042-43, 1058 (8th Cir. 2011).

17 593 F.3d 1206 (11th Cir. 2010), rehearing, en banc, denied by Harrison v. Benchmark Elecs, Inc., 401 Fed. Appx. 520 (11th Cir. Fla. 2010).

A Bill to Expand Our Toolbox: A 8045 - Securing Wages Earned Against Theft "SWEAT"

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Even as New York's minimum wage goes up to $8.00 an hour and the movement for a higher minimum grows, many employers avoid paying even the existing rate, as NELA lawyers are well-aware. Worse, we have all seen particularly exploitative employers hide or transfer their assets when facing litigation. In too many instances, by the time our clients are awarded a judgment, there are few, if any, assets to be found. A coalition[1] of worker centers, community organizations, and legal services providers have put forth a new legislative proposal that will update New York law to help workers with wage claims[2] ensure their employers will pay once workers are awarded a judgment. State Assembly Bill No. 8045, called "SWEAT: Securing Wages Earned Against Theft" was introduced by Assemblywoman Linda Rosenthal on June 17, 2013[3] and will be reintroduced this session. NELA-NY has endorsed the bill.

The proposal amends four sections of existing New York law, each of which is discussed further below. First, the proposal creates a wage lien for all workers by expanding New York's mechanics' lien law, which currently allows construction workers to put a lien on property they worked on if their wages are not paid. Second, the proposal amends New York civil procedure laws allowing attachment of assets when workers can show a likelihood of success on the merits of their wage claims. Finally, the proposal amends New York's business corporation law to eliminate impediments to holding primary shareholders personally liable for unpaid wage judgments, and proposes a similar remedy in the limited liability company law.

(1) Wage Lien

Currently, New York's mechanic's lien law allows workers in the construction industry to file a lien on the property on which they worked if they were not paid for that work. The lien gives the employee a claim against the property on which the employee worked that makes it more difficult for the owner of the property to sell it until the worker is paid the wages he or she is owed. However, New York's mechanic's lien provision is outdated and of limited use in the era of subcontracting, since workers often need a remedy against the contractors employing them, not the owner of the property.

To provide a more expansive pre-litigation remedy for wage theft, a growing number of states[4] have created a "wage lien" which gives workers from all industries the right to file a claim against the property of their employers, including real estate and personal property, in the amount of their unpaid wages. With the SWEAT bill, New York law will be amended to give this same right to all workers with unpaid wage claims.

Key Points of Proposed Legislation

- Amends New York Lien Law to create a wage lien that may be filed by all workers who present claims for unpaid wages and liquidated damages under New York Labor Law. The wage lien would allow a claim against the property of an "employer" as defined under New York Labor Law, including real property (i.e., an individual employer's home) or fixtures "upon which the employee performed work, furnished materials, or furnished work" (i.e., a business's kitchen fixtures), or personal property (i.e., an individual employer's automobile).
- Expands the time period—currently eight months[5]—in which the worker can file a lien to any time during the progress of the work, or within six

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1 Current list of organizations that have endorsed the Act: Adhikaar, Asian American Legal Defense and Education Fund, Brandworkers, Center for Popular Democracy, Chinese Staff & Workers Association, CUNY Law School Labor Coalition, Damayan Migrants Workers Association, Domestic Workers United, Downtown Independent Democrats, El Centro del Inmigrante, Flushing Workers Center, Harlem Community Nutritional Services Agency, Hunger Action Network, Jews for Economic and Racial Justice, Labor-Religion Coalition of NYS, Latino Justice PRLDEF, Legal Aid Society, MFY Legal Services, Mount Vernon United Tenants, National Mobilization Against Sweatshops, National Employment Lawyers' Association - NY Chapter, New Economy Project, New Immigrant Community Empowerment, National Lawyers Guild - NYC, Safe Horizons, Sepa Mujer, UAW Region 9-A, Urban Justice Center, Workers Justice Project.

2 For the purposes of the proposed legislative changes, "wage claims" refer to claims of unpaid, minimum, overtime, and spread-of-hour wages, stolen tips, retaliation, liquidated damages, and attorneys' fees and costs under the New York Labor Law and the Fair Labor Standards Act.

3 The full text of the bill is available at http://open.nysenate.gov/legislation/bill/A8045-2013.

4 *See, e.g.*, Alaska Stat. §§ 34.35.435, 34.35.440 (providing workers a "first lien" without monetary cap or time limit, if filed within 90 days after work performed); Wis. Stat. § 109.09 (providing workers a priority lien on all real and personal property of a debtor-employer for wages earned within past six months). *See also* H.B. 1130, 2013 Leg. (Md. 2013), and S.B. 758 2013 Leg. (Md. 2012) (passed Mar. 26, 2013 and awaiting signature) (providing workers a lien for unpaid wages on any real or personal property of the employer in-state, and entitling prevailing worker to attorneys' fees and court costs).

See e.g., H.B. 1130, 2013 Leg. (Md. 2012), and S.B. 758, 2013 Leg. (Md. 2012) (to be codified at Md Code Ann., lab. & empl. §§ 3-1101-1110) (providing workers a lien for unpaid wages on any real or personal property of the employer in-state, and entitling prevailing worker to attorneys' fees and court costs). *See also* Alaska Stat. §§ 34.35.435, 34.35.440 (providing workers a "first lien" without monetary cap or time limit, if filed within 90 days after work performed); Wis. Stat. § 109.09 (providing workers a priority lien on all real and personal property of a debtor-employer for wages earned within past six months).

5 The time period to file a mechanic's lien currently is four months in the case of construction work on a single family home. The time period to foreclose upon a lien is one year. N.Y. CLS Lien § 10.

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years after the final performance of the work.

- Creates an alternative right of action by the Commissioner of the New York Department of Labor or New York Attorney General to file a wage lien on behalf of claimants who prevail in an administrative determination.
- Permits multiple workers' wage claims to proceed together in any lien enforcement action.
- Entitles workers who prevail in a foreclosure action to attorneys' fees and costs. [6]

(2) Realistic Standard for Attachment of Assets for Labor Law Claims

Under current New York law a plaintiff in a lawsuit can attach[7] a defendant's property (*e.g.*, bank accounts, a house, or car, for example) prior to the resolution of the case (called "pre-judgment attachment") only under extremely limited circumstances, primarily where the defendant has committed a form of fraud. By contrast, Connecticut law allows pre-judgment attachment, regardless of the type of claim, if a plaintiff can show at a court hearing that she is likely to succeed in her claims.[8] The SWEAT bill would amend New York law to allow pre-judgment attachment in New York Labor Law cases using a similar standard as Connecticut.

The current standard for attachment[9] has been unworkable for low-wage workers. Even when the worker has met all the statutory criteria, including evidence of suspicious transfers, New York courts have denied attachment, finding that employers had other possible non-fraudulent motives.[10] For example, in a case involving nail salon workers who were members of Chinese Staff and Workers' Association, the judge refused to order an attachment even though the employers had explicitly threatened to shut down the salon because the workers filed wage claims, then sought to sell the salon, put their home up for sale, and transferred almost all of their cash assets.[11] After a jury trial in the Eastern District of New York, the court entered judgment for $474,011.43. However, the workers have collected only $60,000 because the employer was able to put all of their assets out of reach throughout the litigation just as they had threatened to do.

The prevalence and severity of wage theft and the vast difference in financial standing between most employers and their employees requires a different standard for attachment of assets in the context of a wages claim. The New York Labor Law becomes unenforceable when exploitative employers can simply dissipate their assets and deprive workers of the ability to recover wages they have already earned. This amendment will help ensure an employer is able to pay once a judgment has been issued.

Key Points of Proposed Legislation

Amends Article 62 of the N.Y. C.P.L.R. to create an exception to the attachment standard for Labor Law claims, such that:

- Attachment of an employer's property will be granted if there is a likelihood of success on the merits of the claim for wage claims.
- Once an employee makes the initial showing, the burden is shifted to the employer and an attachment is granted unless the employer can show that an attachment would be unjust. For example, an employer must show he or she would not be able to operate his or her business if attachment is granted.
- If an employer contests plaintiffs' motion for attachment, the court must hold a hearing within 10 days of plaintiffs' motion. If an employee obtains an attachment without notice to the defendant, an employee has within ten days of the levy to move to confirm the attachment.
- An accessible bond requirement is maintained for attachment in case of Labor Law claims.

(3)Making Business Corporation Law Section 630 a Real Remedy and Creating a Similar Remedy under Limited Liability Company Law

Under current New York Business Corporations Law ("BCL"), the ten largest shareholders of non-publicly traded business corporations are each personally liable for any unpaid wages, debts or salaries due to any of the corporation's employees if the corporation fails to satisfy a judgment against it.[12] This remedy is an important remedy for employees suing thinly capitalized corporations that are unlikely to satisfy a judgment. However, BCL section 630 currently contains limitations that unduly restrict employees' access to this remedy relating to the requirement to give notice to shareholders, and the employees' ability to access shareholder records and learn the identity of the

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6 *See* Del Code Ann. tit. 10, § 3912 (allowing prevailing plaintiffs in an action for the enforcement of a mechanics lien to recover reasonable counsel fees but not greater than 20% of the awarded principal and interest); Idaho Code Ann. § 45–513 (allowing courts to award to plaintiffs the costs of filing and recording the claim and reasonable attorneys' fees); Wash. Rev. Code Ann. § 60.04.141(3) (allowing courts to award to prevailing parties, whether plaintiffs or defendants, reasonable costs).

7 Under current New York law, if a court grants an order of attachment, a plaintiff seizes a defendant's property through the sheriff, who may actually take hold of the property. With real property, such as a house, the seizure entails the sheriff filing a notice of attachment with the county clerk, similar to a notice of pendency. N.Y. C.P.L.R. §§ 6215 and 6216.

8 Conn. Gen. Stat. §§ 52-278c, 52-278d. The Connecticut attachment statute was amended in 1994 to eliminate the provision at issue in the 1991 Supreme Court case, *Connecticut v. Doehr*, which allowed for *ex parte* attachment of real property without a showing of exigent circumstances.

9 New York law currently allows attachment of assets when "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts." N.Y. C.P.L.R. § 6201(3). In addition, a plaintiff must demonstrate that: (1) she has stated a claim for money judgment; (2) there is a probability of success on merits; and (3) the amount demanded from defendant is greater than the amount of all counterclaims known to plaintiff. *DLR Mortgage Capital, Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 318-19 (E.D.N.Y. 2009).

10 *See Bank of China v. NBM LLC*, 192 F. Supp. 2d 183, 186 (S.D.N.Y. 2002).

11 *See De Ping Song v. 47 Old Country, Inc.*, 2011 WL 3846929 (E.D.N.Y. 2011).

12 N.Y. Business Corporation Law § 630.

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shareholders.

Key Points of Proposed Legislation

- Eliminate the requirement that employees give written notice directly to each of the ten largest shareholders as a prerequisite to holding them liable. BCL § 630 currently provides an employee must give notice within 180 days from the last day of employment or he cannot invoke the protections of the section. However, the burden should be on the corporation to notify its shareholders of potential claims against them, and not on the employees, who may be unlikely to learn about their rights under the labor laws and the BCL within the current 180-day period, and who may have trouble learning the identity of the shareholders due to the corporation's refusal to provide such information.
- Clarify that the liabilities of the ten largest shareholders can include not only the wages due, but also any damages arising the corporation's failure to have paid those wages – i.e., liquidated damages, interest, attorneys' fees and costs awarded as part of a judgment.
- Eliminate the requirement that an employee first obtain an unexecuted judgment upon a corporation before pursuing claims against the liable shareholders, and allow employees, the Commissioner of Labor, and the Attorney General to immediately pursue claims against the ten largest shareholders.[13]
- Clarify in BCL § 624 that employees have the right to inspect the shareholder records so that they can identify the ten largest shareholders. Currently, although BCL § 630 refers to an extension of the 180-day notice period when an employee has requested to inspect corporate records pursuant to BCL § 624, section 624 itself only provides a right of inspection to other shareholders. Section 624(b) previously explicitly provided employees with a right of inspection, but that right was removed by amendment in 1997.[14]
- Revise the Limited Liability Company Law ("LLC") to create provisions that parallel BCL §§ 624 and 630, and would render the ten members of LLC's with the largest percentage ownership jointly and severally liable to their employees for unpaid wages. This would likely require amending N.Y. Limited Liability Company Law § 609, which contains provisions about liability of members. ■

13 The current three-step process of obtaining a judgment, attempting to execute upon it, and then initiating an entirely new litigation against the shareholders is unnecessarily cumbersome and inefficient. The employee should be allowed to file one lawsuit against the corporation and largest shareholders.

14 *See* L.1997, c. 449, § 37.

Sidebar: Have a New York wage-and-hour case in which you have been unable to collect? We need your story! The SWEAT Coalition is in the process of compiling data on collections problems in wage theft cases for a report that will illustrate the problem and show the need for the SWEAT bill. If you have a case from the past five years with New York Labor Law claims (even if there are other non-wage claims) for which you could not collect on a settlement or judgment, please contact Hollis Pfitsch at The Legal Aid Society at 212-577-3465. We'll ask a few simple questions and add your case to our data. You will not need to share any confidential information.

Second Circuit Weighs In on State Labor Law in Starbucks Case

By Rita Sethi
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On November 21, 2013, the Second Circuit in *Barenboim v. Starbucks*[11] upheld the district court's finding of summary judgment against a putative class action of baristas, or coffee servers, in their action to prevent shift supervisors from sharing in tip pools. Filed in 2008 in the Southern District of New York, the case sought to declare unlawful the practice of permitting shift supervisors to participate in the collection of customer tips that were aggregated and split evenly among baristas. District Judge Laura Taylor Swain had ruled in favor of Starbucks and its shift managers, and the baristas sought to prevent supervisory workers from taking a cut of their gratuity earnings.

In its review of the district court's decision, the Second Circuit encountered unresolved issues under Section 196-d of the New York Labor Law, which holds that employers and "those who are their agents or officers" are not allowed to share tips. In October 2012, the appellate court certified those questions to the New York Court of Appeals. Under Section 196-d, supervisors are generally considered agents and officers of the

See STARBUCKS CASE, next page

1 *Barenboim v. Starbucks Corp.*, ___ Fed. Appx. ___, 2013 U.S. App. LEXIS 23370 (2d Cir. Nov 21, 2013). See also, 698 F.3d 104 (2d Cir. 2012).

STARBUCKS CASE, from page 8

employer, and therefore ineligible for tips. The New York Court of Appeals found that under Section 196-d, service to patrons is more a critical factor in defining eligibility for the tip pool than supervisory duties.[22] However, when supervisory responsibilities become significant, a supervisor cannot be conflated with service staff and therefore cannot partake in the tip pool.

The test applied by the New York Court of Appeals to determine the extent of the employee's supervisory role is whether the supervisor possesses "meaningful and significant authority" over subordinates. Appropriate considerations "might include the ability to discipline subordinates, assist in performance evaluations or participate in the process of hiring or terminating employees, as well as having input in the creation of employee work schedules, thereby directly influencing the number and timing of hours worked by staff as well as their compensation."[33]

In its recent summary order in the wake of the New York Court of Appeals ruling, the Second Circuit employed the state judicial interpretation of its labor laws and applied it to the facts in *Barenboim*.[44] Analyzing the specific duties of shift supervisors at Starbucks and using the weighing test created by the New York Court of Appeals, Circuit Judges Ralph K. Winter, Reena Raggi and Debra Ann Livingston balanced the shift managers' supervisory responsibilities against their customer service responsibilities. The court concluded that the vast majority of what shift supervisors do is interact with and serve patrons, and that their authority over subordinates was circumscribed and limited to "assigning baristas to…positions during their shifts, administering break periods, directing the flow of customers… providing feedback to baristas about their performance" and the authority "to open and close stores, to change the cash register tills, and to deposit money in the bank." The sum of these managerial duties did not exceed their duties as wait staff. The Second Circuit rejected the baristas' argument that shift supervisors did satisfy three of the New York Court of Appeals' factors by coaching or critiquing their subordinates, advising managers about the baristas' performance, and arranging the schedules and breaks of the baristas. More dispositive than any of these singular responsibilities, the court held, was whether those job functions were more significant than those that they shared in common with baristas in serving customers. Additionally, the Second Circuit distinguished these particular managerial duties because they could not discipline baristas, they did not create the work schedule, and though they supervise the baristas, they ultimately perform the same tasks.

This ruling may cause New York labor lawyers to experience a surge of inquiries from businesses and workers about the legality of their tip-sharing policies. Tens of thousands of restaurant and retail establishments which solicit tips may have to revise or reconsider their policies in order to comply with *Barenboim*. Mushy and sloppy like Starbucks' oatmeal, this job-by-job weighing test only creates more uncertainty and extra effort for lawyers.

Principal Attorney Jeffrey E. Goldman, of the Law Offices of Jeffrey E. Goldman, lamented that, "Rather than clear the air, I think the Second Circuit has obscured the 'dividing' line between management and quasi-management."

Wage/Hour and discrimination counsel, and NELA-NY member, Marijana Matura of Shulman Kessler LLP agreed, saying that *Barenboim* would affect how her firm investigates and analyzes cases prior to asserting a NYLL 196-b claim by now requiring detailed descriptions of job duties instead of reliance on job titles. She said, "The Second Circuit's recent decision does not create a bright-line test for determining which supervisors can participate in a tip pool. Instead, it will require courts to examine NYLL 196-b claims on a case-by-case basis in order to determine which managerial responsibilities are 'substantial' enough to disqualify supervisors from participating in tip pools and which will permit participation under NYLL 196-b. The *Barenboim v. Starbucks* decision will also likely lead to varying decisions within the Circuit, and more headaches for attorneys who must now split hairs over each supervisory duty and the extent to which each is exercised by individuals who participate in tip pools."

The case sought to declare unlawful the practice of permitting shift supervisors to participate in the collection of customer tips that were aggregated and split evenly among baristas.

Time will tell if the *Barenboim* case will have a broad impact on New York labor law practice or whether it will be confined to only to a small subset of cases. Goldman optimistically opined: "I don't think the Starbucks case has much application outside of the context of Starbucks. It may have some application in other large food chains with rigid management structures in which the company carefully crafts a 'niche' quasi manager role." ■

2 *Barenboim v. Starbucks Corp*, 21 N.Y.3d 460 (2013).

3 *Id.*

4 As an interesting aside, the First Circuit did not rule the same way on this question and found instead that supervisors should not get to share in the tips. *Matamoros v. Starbucks Corp*., 699 F.3d 129 (1st Cir. 2012).

Big Changes Coming to New York Unemployment Insurance Law

By Christine Clarke
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New York Unemployment Insurance (UI) law is undergoing significant changes which will take effect on January 1, 2014. These affect, among other things, whether an employee can receive UI if she received a severance or a certain kind of pension, and whether an employee can requalify for unemployment insurance if she was denied in the past.

Severance:

In the past, whether someone received UI was generally unaffected by the receipt of severance pay, meaning that if an employer gave an employee a lump sum upon his separation, he could still receive benefits. This made sense, since severance pay is usually *not* meant to tide the employee over until he can find a new job, but is rather either (a) a recognition of years of service (kind of like a bonus that the employee only gets when he's fired) or (b) as consideration for signing a release (*i.e.*, they pay the employee in exchange for which he promises not to sue them). In neither case is the severance really meant to do what UI does – allow people to get by while they look for a new job.

Starting January 1, 2014, this will no longer be the case. Now, if an employee receives severance pay within 30 days of their termination, that severance pay is offset against UI. So let's say the employee would be entitled to $300/week of unemployment, but she receives $3,000 in severance within 30 days of her termination. Under the new changes, she would not be able to collect UI for 10 weeks. The calculation is done weekly, meaning that the severance pay is divided by the amount of benefits she *would* receive from UI each week, and the result is the number of weeks she's no longer eligible to receive UI.

One possible result is that terminated employees will simply refuse to sign releases in exchange for severance – after all, in this economy it's entirely likely that someone will have to spend months, if not longer, looking for work before finding a new job. If the severance payment is less than the UI someone expects to receive, there's really no benefit for an employee to sign away her rights. On the other hand, employees can request that their employer not pay out a severance payment until 30 days after their termination, which presumably would sidestep the UI issue.

The new law addresses, among other things, whether an employee can receive unemployment insurance if she received a severance.

Pensions:

Another significant change involves employer-contributed pensions. If an employee is receiving a pension from his last job (*i.e.*, the job in connection to which he's applying for UI), and the employer contributed to that pension, the UI will be reduced by the amount of pension the employee is receiving. If the employee and his former employer both contributed to the pension, then the Labor Commissioner will decide how much of the UI will be reduced by the pension payments.

Given how few jobs these days provide pensions to workers, and how little people can expect to get from Social Security, this is quite a blow to older workers. However, keep in mind that this reduction only applies to the first period of unemployment – if an employee is let go from job A, and job A gives her a pension to which her employer contributed, the UI is reduced by the pension amount. If she gets a new job, and are then let go from that job also, *then* the employee will be able to receive UI *and* the pension from job A without a UI reduction.

Disqualification:

If the employee was terminated for misconduct or quit his job voluntarily and without good cause, he cannot receive UI for that period. That's always been true. What's different now is that, in order to receive UI *in the future*, the employee has to (a) find a new job and (b) earn ten times the amount of weekly UI benefits you would otherwise receive (previously, the employee only had to earn five times the weekly UI).

This penalizes low wage workers more than others. Someone earning minimum wage for 40 hours per week is likely to receive about $145 per week in UI. Someone who is disqualified would thus have to earn $1,450 at a new job before he can requalify – that's about five weeks of full time work at minimum wage before the employee is eligible to receive future UI. Someone earning $200,000/year (and receiving the maximum benefit of $405 per week), however, would only have to work for a single week before requalifying.

The entire point of the penalty, of course, is to discourage people from quitting for no reason (or engaging in misconduct that gets them fired). While this makes a certain amount of sense, workers and the Department of Labor may disagree about what constitutes "good cause" for quitting. While employees might think that being unable to get along with your supervisor, or even being verbally abused by your supervisor, would constitute "good cause" for quitting, the UI board may or may not agree. ■

Second Circuit reverses summary judgment in Title VII retaliation case

By Stephen Bergstein
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The U.S. Court of Appeals for the Second Circuit has reversed summary judgment in a Title VII retaliation case that sheds further light on the ways plaintiffs can prove that management terminated their employment for pretextual reasons. The case also applies the Supreme Court's new standard governing the plaintiff's burden of proof in retaliation cases.

In *Kwan v. The Andalex Group*,[1] decided on Dec. 16, 2013, the plaintiff worked as vice president of acquisitions for a real estate firm. She was hired in April 2007 and was terminated on Sept. 26, 2008. While defendant argued that it terminated plaintiff for performance deficiencies, she claimed her termination was retaliatory, occurring about three weeks after she complained that she was treated differently from the men in salary and bonuses. After the district court granted summary judgment on the retaliation claim, plaintiff appealed. Finding that the jury may rule in plaintiff's favor on this claim, the Second Circuit remanded the case for trial.

Corporate Knowledge

The large body of Title VII case law in the Second Circuit leaves little room for uncharted territory. The court revisited some of these cases in *Kwan*. While the defendant argued that plaintiff did not make out a prima facie case of retaliation because the decision-maker did not know she had engaged in protected activity, the Second Circuit disagreed. "[A] plaintiff may rely on 'general corporate knowledge' of her protected activity to establish the knowledge prong of the prima facie case."[2] As plaintiff complained about discrimination to a corporate officer, "[t]his complaint was sufficient to impute to Andalex general corporate knowledge of the plaintiff's protected activity."[3]

The court explained the utility of the "general corporate knowledge" doctrine: "This case is a good illustration of why corporate knowledge is sufficient for purposes of a *prima facie* case of retaliation. If that were not true, a simple denial by a corporate officer that the officer ever communicated the plaintiff's complaint, no matter how reasonable the inference of communication, would prevent the plaintiff from satisfying her prima facie case, despite the fact that the prima facie case requires only a *de minimis* showing."[4]

The Second Circuit considers when an employer's shifting explanations support a finding of pretext in Title VII retaliation cases.

Shifting Explanations

Another line of cases allows the plaintiff to prove she was fired for pretextual reasons upon a showing that the employer has offered shifting, or inconsistent, reasons for her termination.[5] In *Kwan*, the Second Circuit further explored this theory. Prior to the litigation, defendant's lawyer stated that the business focus had changed and plaintiff was no longer suitable for the position. The letter also criticized plaintiff's job performance. When plaintiff next filed an Equal Employment Opportunity Commission charge, defendant's position statement in response to that charge again mentioned the company's new business focus. The introduction to that statement did not cite poor job performance, and the body of the position statement largely focused on the new business priorities, though it made "brief reference" to plaintiff's performance deficiencies.

As the Second Circuit wrote, "any fair reading of Andalex's Position Statement to the EEOC indicates that Andalex claimed that Kwan was fired primarily because its business focus had changed." However, in deposition, the company's chief financial officer said the company's business focus had already changed when plaintiff was hired. He said plaintiff was not fired because of the new business focus but because of poor job performance. But another member of management testified that "plaintiff's termination was the 'culmination of her poor performance and the fact that…our business model had begun to change.'" In the Second Circuit, defendant justified plaintiff's termination based on three discrete incidents of poor performance. Only one of those reasons was cited in the defendant's EEOC position statement.

Shifting explanations are among the ways that plaintiffs can challenge the defendant's proffered legitimate reason for the adverse action.[6] Over Judge Barrington Parker's dissent, the Second Circuit majority deemed management's various reasons for plaintiff's termination sufficiently distinct to support the inference that she was fired for pretex-

See TITLE VII, next page

1 —F.3d—, 2013 U.S. App. LEXIS 24838 (2d Cir. Dec. 16, 2013).

2 *Id*. at *21 (citing *Gordon v. N.Y.C. Bd. of Educ*., 232 F.3d 111, 116 (2d Cir. 2000)).

3 *Id*. at *22 (citing *Reed v. A.W. Lawrence & Co*., 95 F.3d 1170, 1178 (2d Cir. 1996)).

4 *Id*. at *23.

5 *See*, *e.g*., *EEOC v. Ethan Allen*, 44 F.3d 116, 120 (2d Cir. 1994); *Schmitz v. St. Regis Paper*, 811 F.2d 131, 132 (2d Cir. 1987).

6 *Id*. at *28-29 (citations omitted).

TTITLE VII, from page 11

tual reasons, and that the jury may conclude that she suffered retaliation for complaining about discrimination. The court concluded, "Andalex's inconsistent and contradictory explanations for the plaintiff's termination, combined with the close temporal proximity between the Sept. 3 conversation and Kwan's termination, are sufficient to create a genuine dispute of material fact as to whether Kwan's Sept. 3 complaint of gender discrimination was a but-for cause of the plaintiff's termination."[7]

'But-For' Causation

While the Second Circuit did not break new ground in applying the "general corporate knowledge" or "shifting explanation" theories, its reasoning sheds further light on how these rules apply in Title VII retaliation cases. However the Second Circuit entered new territory on another element of the plaintiff's burden of proof: "but-for causation," articulated by the Supreme Court for the first time in retaliation cases in *University of Texas v. Nassar*.[8] Decided in June 2013, *Nassar* held that, to prevail, the plaintiff must show the employer's unlawful motive was the "but-for," or determinative, factor in her termination.[9] This holding rejected the more plaintiff-friendly standard that allowed the plaintiff to prevail if the employer's unlawful motive was a substantial or motivating factor in the adverse action. Under that test, the plaintiff could prevail if unlawful motive was one among several reasons for her termination. Prior to *Nassar*, the Second Circuit applied the "substantial or motivating factor" test.[10]

While *Nassar*'s new standard favors defendants, the question remains: How much evidence must the plaintiff proffer to avoid summary judgment in Title VII retaliation cases? In other words, how do we distinguish "but-for causation" from the "substantial or motivating factor" test?

In *Kwan*, the Second Circuit applied the "but-for" test in a published decision for the first time. Borrowing language from its "motivating factor" cases, the Second Circuit held that "[a] plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action. From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason."[11] This language suggests that the plaintiff's burden has not substantially changed from the Second Circuit's prior "substantial or motivating factor" test, at least on a motion for summary judgment.

The court confirmed this, stating: "'but-for' causation does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive."[12] Moreover, under traditional tort law, "a plaintiff's injury can have multiple 'but-for' causes, each one of which may be sufficient to support liability."[13] The court explained, "[r] equiring proof that a prohibited consideration was a 'but-for' cause of an adverse action does not equate to a burden to show that such consideration was the 'sole' cause."[14] The court added, [i] n this case, the parties have put forward several alleged causes of the plaintiff's termination: retaliation, unsuitability of skills, poor performance, and inappropriate behavior. The determination of whether retaliation was a "but-for" cause, rather than just a motivating factor, is particularly poorly suited to disposition by summary judgment, because it requires weighing of the disputed facts, rather than a determination that there is no genuine dispute as to any material fact. A jury should eventually determine whether the plaintiff has proved by a preponderance of the evidence that she did in fact complain about discrimination and that she would not have been terminated if she had not complained about discrimination.[15]

The Second Circuit applies the Supreme Court's recent decision in Nassar, which requires plaintiffs to prove "but for" causation in retaliation cases.

Parker's Dissent

Parker's dissent highlights an area of disagreement that has explicitly surfaced for the first time in the Second Circuit: whether plaintiffs in Title VII retaliation cases must show the employer's articulated reason for their termination was pretext for retaliation. In non-retaliation cases (*i.e*., failure to promote or wrongful discharge cases), pretext alone will not entitle the plaintiff to victory. The plaintiff must show pretext for discrimination. Under the totality of the circumstances test, the Second Circuit generally affirms summary judgment when the plaintiff only proffers evidence of pretext without additional evidence of discrimination, *i.e*., biased remarks from a decision-maker, a pattern of discrimination or a heavy showing of pretext.[16] The Second Circuit generally does not apply the "pretext-plus" standard in retaliation cases. However, Parker would do so. He explained:

> As we explained in *Schnabel v. Abramson,*[17] even where a plaintiff has demonstrated pretext, rather than simply applying a *per se* rule precluding summary judgment for the defendant, we must instead

See TITLE VII, next page

7 *Id*. at *25-26.

8 133 S.Ct. 2517 (2013).

9 *Id*. at 2526.

10 *See, e.g., Raniola v. Bratton*, 243 F.3d 610, 625 (2d Cir. 2001).

11 2013 U.S. App. LEXIS 24838, at *28-29 (citations omitted).

12 *Id*. at *26.

13 *Id*. at *26, n.5.

14 *Id*.

15 *Id*.

16 [16] *See*, Bergstein, "Pretext Plus in the Second Circuit: Where It's Been, Where It's Going," *New York State Labor and Employment Law Journal*, Fall 2010.

17 232 F.3d 83, 90 (2d Cir. 2000) (the author represented the plaintiff in *Schnabel*).

TTITLE VII, from page 12

employ a "case-by-case approach" and "examin[e] the entire record to determine whether the plaintiff could satisfy h[er] 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'" While *Schnabel* dealt with an age discrimination claim, this approach applies to retaliation claims as well. In conducting this "case-by-case" analysis, "[t]he relevant factors 'include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports [or undermines] the employer's case.'"[18]

Parker's approach would make it easier for defendants to win summary judgment in Title VII retaliation cases. In *Kwan*, the Second Circuit majority appeared to reject that approach, reasoning that the jury may find that plaintiff's *prima facie* case, along with the "inconsistent and contradictory explanations for the plaintiff's termination," constituted a but-for cause of the adverse decision.[19] This disagreement confirms that, 50 years after Congress enacted Title VII, experienced federal judges still disagree on how to apply this statute in routine cases. ■

18 2013 U.S. App. LEXIS 24838, at *40-41 (Parker, J., dissenting) (citing *James v. N.Y. Racing Ass'n*, 233 F.3d 149,156 (2d Cir. 2000)).

19 *Id*. at *25-26.

Ethical Implications of Cloud Computing and Whatnot[1]

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Many of us began practicing law in the age of typewriters and dictaphones. Clients wrote checks to pay our fees. We limited our marketing to doing committee work at the bar association and hoping for referrals. The Model Rules of Professional Conduct and the Lawyer's Code of Professional Responsibility evolved slowly to address recurring concerns in the typewriter-dictaphone age, when a locked file cabinet and the ability to think before speaking were all we needed to preserve client confidences.

Today, most of us have turned to software, some of it developed for specifically for lawyers, to handle such things as case management, accounting, generating documents, managing discovery, multimedia trial presentations and so on. Clients pay us with credit cards. We use social media in the hope of attracting clients and making our names known.

How have the rules evolved to address the concerns raised by emerging technology? This paper will define the technologies (for those of us minimally aware, or less, of how those technologies work), discuss what the ethical concerns are, and note the emerging trends in ethics law.

A. "Cloud Computing"

Most software, legal and otherwise, still follows the model we have become accustomed to: the user buys the software (more accurately, a license to use the software), then installs the software itself on a computer or network. Data created and used by the software are stored on the user's computer and often backed up to the firm's server. The vendor often supplies periodic updates and security patches to fix minor flaws or to make the software run smoothly with other software; the user downloads these patches. Other than the patches, the software remains the same. The user uses the software to create data. Every few years, the software is revised, and the user either pays for the upgrade (and buys a new license) or keeps using the old version.

The non-law world has been moving away from this model, which users and vendors agree has many drawbacks (beyond the scope of this paper). In recent years, a new software model has emerged: "cloud computing," a/k/a software as a service ("SaaS"). From the point of view of attorney ethics, SaaS is radically different from the traditional model.

Under the new technology, client confidences and attorney work product are stored in "the cloud" and not on the attorney's computers.

The SaaS user does not install the software on his/her computer or the law

See CLOUD COMPUTING, next page

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CLOUD COMPUTING, from page 13

firm's server. Instead, the user acceses SaaS by using a web browser and going to a website – every time s/he uses the software. This means that data (including, *e.g.*, client confidences and attorney work product) are stored in the vendor's data center rather than on the user's computers. SaaS is usually sold on a subscription basis, meaning that users pay a monthly fee rather than purchasing a license up front.

We are told that the traditional software-purchase model is fast becoming obsolete and will soon be all but completely displaced by SaaS.

Problems

Some or all of the data created by the lawyer is confidential information. Under the traditional model, the data resided in the lawyer's computer or server. Do we adequately protect client confidences when the data reside in the vendor's server? What happens to the data when the lawyer's relationship with the vendor ends?

Which Rules[2] are Implicated?

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b)[not relevant to SaaS].

Comments:

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[16] Paragraph (c) requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services

are utilized in connection with the representation. See also Rules 1.1, 5.1 and 5.3. However, a

lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

What is the Emerging Rule regarding SaaS?

A law firm may contract with a vendor of software as a service provided the risks that confidential client information may be disclosed or lost are effectively minimized. *E.g.*, in Proposed NC Formal Opinion 7 April 2010, the North Carolina Bar later referred the matter to subcommittee for further consideration of the meaning of "effectively minimized." It seems safe to assume that the meaning will continue to evolve in the coming years.

B. Electronic Communication with Clients

The ethical duty to preserve client confidences is reflected in and facilitated by its substantive-law cousin, the law of attorney-client privilege. From time immemorial, attorney-client communications have been protected by disclosure notwithstanding interception by an eavesdropper, so long as the attorney took the appropriate precautions, *e.g.*, closed the door. How do these concepts survive in the world of email, text messages and so on? How can we safeguard client confidences when using 21st-century communications media?

Problems

1. What happens when your client sends you an email brimming with confidential material from her office address, *i.e.*, plaintiff@defendant.com? Has she waived attorney-client privilege? What happens when you send her an email to client@gmail.com and she opens the email from her employer's computer? Does it make a difference if the employer has an email policy? What if the policy is seldom enforced?

2. Is client communication via email or text message protected?

Which Rules are Implicated?

Rule 1.6 Confidentiality Of Information (see above for statement of rule and comments)

Comments:

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

What Is the Emerging Rule Regarding Client Emails?

If the client uses the employer's computer system to send and receive email, and the employer's policy prohibits personal use of office computers, the client may have waived protection.[3]

See CLOUD COMPUTING, next page

2 Rules quoted herein are the New York rules. Precise rules, as well as interpretations that may or may not have the force of law, vary by jurisdiction.

3 *See, Scott v. Beth Israel Medical Center Inc.*, 847 N.Y.S.2d 436 (2007).

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If the client accesses a password-protected web-based account from the employer's computer, it is probably protected, notwithstanding the employer's prohibition on personal use of office computers.[4]

Presumably, no court would find a reasonable expectation of privacy where the purported expectation contradicts the provider's terms of service. See, e.g., Google Gmail License Agreement ¶ 7. Proceed from the premise that if the provider is not charging a fee, the provider most likely makes its money by mining the data and selling it to advertisers. ■

4 *See, Stengart v. v. Loving Care Agency, Inc.*, 201 N.J. 300, 990 A.2d 650 (2010).

New York City Enacts Pregnant Workers Fairness Act

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New York City has recently enacted an anti-discrimination law that will go a long way in prohibiting discrimination against pregnant workers. The Pregnant Workers Fairness Act amends the NYC Human Rights Law to require NYC employers with four or more employees to provide reasonable accommodations necessary because of pregnancy, childbirth or a related medical condition. The kind of accommodations that the new law requires NYC employers to give pregnant workers include frequent bathroom breaks, breaks to facilitate increased water intake, periodic rest for those workers who stand for long periods of time, assistance with manual labor and a period of recovery from childbirth.

If an employer does not provide a pregnant worker a needed accommodation, the worker may sue the employer for damages. In that situation, to escape liability, the employer will have to prove that the requested accommodation would pose an undue hardship (e.g. it would cost too much money or disrupt workplace operations), or that the pregnant worker, even with the requested accommodation, could not perform the essential function of the job. The kind of workplace modifications that pregnant workers need are usually fairly minor and inexpensive, so it is doubtful that employers will succeed in proving that the accommodation would pose an undue hardship.

The NYC law is important because currently federal and NY State anti-discrimination laws do not require employers to make reasonable accommodations for pregnant women. As a result, pregnant workers, deprived of job modifications that would allow them to continue to work through their pregnancy, have lost their jobs. Others have endangered their health by working while pregnant without some accommodation to their schedule or job duties. This is especially true for low-income employees like cashiers, who have to stand on their feet for long periods, or employees who have to lift objects as part of their job. The Pregnant Workers Fairness Act assures that pregnant workers do not have to choose between their health and jobs.

In addition to New York City's Pregnant Workers Fairness Act, seven states have laws that require employers to provide reasonable accommodations to pregnant women. The federal anti-discrimination law, Title VII, as amended by the Pregnancy Discrimination Act, prohibits discrimination because of pregnancy or a related medical condition, but it does not require employers to provide reasonable accommodations to pregnant workers, as the NYC law does. The U.S. Congress has left dead in the water a federal Pregnant Workers Fairness Act which would obligate employers to accommodate pregnant employees. The last time the bill was introduced neither the House nor the Senate even held a hearing to consider its merits. ■