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Labor and Employment Law Journal

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of the New York State Bar Association

Inside

Message from the Outgoing Section Chair

By Seth H. Greenberg

"And do as adversaries do in law, Strive mightily, but eat and drink as friends."

The Taming Of The Shrew, Act 1, Scene 2

Professionalism and collegiality are hallmarks of the legal bar. They are also the signature characteristics of a bar association, and are the reasons why many of us joined. Our Section has thrived because we foster relationships among our members. CLE programs, academic periodicals, and vendor discounts may be among the extra benefits members receive. But the real value of our Section is the professional community it creates, our group think approach to the law and legal practice, and the personal friendships that develop from active participation.

As Section Chair, I have sought to re-energize our committee system and to explore different ways to grow our membership. If bar associations, and our Section in particular, are to remain relevant in 2018 and beyond, I believe we must always keep our focus on what we were looking for originally when we joined NYSBA. Younger and newer attorneys may not care about the insurance discounts that come along with bar association membership (though they should). Rather, they want mentorships, networking, and writing opportunities, the same benefits we sought when we first joined and what we continue to seek as more experienced attorneys. Law students and newly admitted attorneys want to be integrated into our committee work now. And we must embrace this energy and take risks, as risky as a group of lawyers can be at least.

At our last Executive Committee meeting, I issued the same challenge to our Section's leadership that motivator Sean Corville issued to me and my friends when we ran our first Tough Mudder (a 10 to 12-mile obstacle course team challenge)—"When was the last time you did something for the first time?" It is the same challenge I issue to all of you. Whether you are a law student, newly admitted attorney, or more experienced practitioner, I urge you to: Show up! Volunteer! Mentor! Serve on a committee! Write! Network! Organize a program! And, yes, make lifelong friends! Along the way, I promise you

continued on page 4

Message from the Incoming Section Chair

By Cara E. Greene

Robert F. Kennedy said, "Lawyers have their duties as citizens, but they also have special duties as lawyers. Their obligations go far deeper than earning a living as specialists in corporation or tax law. They have a continuing responsibility to uphold the fundamental principles of justice from which the law cannot depart." As busy labor and employment law practitioners, it is easy to become so focused on the work that is on our desks (or computer screens) that we lose sight of our broader role in society. Active participation in the Labor and Employment Law Section reacquaints us with that role and provides us with tools to serve both our clients and society.

The mission of the New York State Bar Association is consistent with Kennedy's vision—attorneys who serve their clients and the broader good. The mission of NYSBA is (1) to cultivate the science of jurisprudence; (2) to promote reform in the law; (3) to facilitate the administration of justice; (4) to elevate the standard of integrity, honor, professional skill and courtesy in the legal profession; (5) to cherish and foster a spirit of collegiality among the members of the Association; (6) to apply its knowledge and experience in the field of law to promote the public good; (7) to promote and correlate the same and similar objectives in and among the bar organizations in the state of New York and in the interest of the legal profession and the public; (8) and to uphold and defend the Constitution of the United States and the Constitution of the state of New York.

NYSBA's mission is fulfilled in our Section through excellent CLE programming; networking opportunities; monitoring of legislation; skills training for new attorneys; diversity fellowships; and public interest efforts, among other things. I encourage you to take full advantage of all that the Section has to offer—join a committee, sign up for a CLE or webinar, write an article for the *Journal*, participate in our online community, and come to beautiful Montreal, Quebec, October 12-13, 2018 for our Fall Meeting. Then take what you have learned back to your practices and use it to both help your clients and keep society moving forward.

Thank you for the opportunity to serve as your chair this coming year.

Cara E. Greene

Table of Contents

continued from page 2

that your business will grow and you will have a more personally fulfilling legal career.

Over the course of the last year, our Section has focused on many initiatives. We continue to produce timely and insightful CLE programs. This journal, along with our other publications, offers great analyses of important legal topics. Our website has valuable resources and our online *Communities* platform affords members the ability to push information out and to seek input from thousands of practitioners in the labor and employment community throughout the State. We continue to sponsor law school and trial academy programs. Our Executive Committee members are becoming more engaged in the national and state conversations directly impacting workplace matters, influencing the legislative priorities of NYSBA. Diversity and leadership development remains a top priority, including a renewed focused on mentoring. We are in the early planning stages of an arbitration academy program that we hope will debut in 2019. And we are expanding our networking opportunities every chance we can.

This Spring 2018, the Labor and Employment Law Section has planned and/or is co-sponsoring:

- Complimentary Webinar: *Legal & Practical Considerations in Mediating Wage and Hour Cases* (go to our Section's website at www.nysba.org/laboremployment).

Recent Spring 2018 Labor and Employment Law Section events or co-sponsored events:

- Young Lawyers Section Trial Academy: April 4th – 8th (Cornell Law School, Ithaca).
- *The Taylor Law @ 50:* May 10th – May 11th (The Desmond Hotel, Albany).
- *Employment Law for the General Practitioner and Corporate Counselor:* June 4th (Manhattan, also available live via webcast) and June 14th (Albany).

Plus, this baseball season, the Section intends to host networking/membership events at Mets and Yankees games (yes, you read correct!). Section members will have the chance to attend the games at no charge!

Don't miss out on our many great programs and so many opportunities! Join the Section now and, if you are already a member, become more active.

Finally, it has been a great privilege and honor to serve as Section Chair this past year. I am extraordinarily grateful to all members of the Executive Committee for their dedication and service. Thank you to Section Secretary Monica Skanes for all your help and for agreeing to wear multiple "hats" on the EC. To Beth Gould, our Section Liaison, there are no words to express how much I, and the entire Section, appreciate all of your dedication and service to our Section. Thank you! You have been integral to our successes and always the voice of reason—we will dearly miss you! We wish Beth all the best of luck as she moves on to her next venture. I look forward to working with our Chair-elect Cara Greene and all of you to do my part in continuing to improve upon Section services and benefits.

With great appreciation,
Seth Greenberg
Section Chair

2018 Annual Meeting Retrospective

Our Annual Meeting took place January 25-26, 2018 in midtown Manhattan. On Thursday afternoon, three of our committees hosted special programs. In its annual tradition, the Committee on Labor Relations hosted the Regional Directors from the National Labor Relations Board's three New York State Regional Offices in its program *Up Close and Personal with the NLRB*, where they were also joined by the NLRB's General Counsel. The ADR Committee presented *FLSA Claims—A Plaintiff and Management Perspective on How to Effectively Mediate These Claims*, where panelists examined differences in forums, opening statements and their efficacy, pet peeves of practitioners, class action issues, and settlement concerns unique to FLSA cases. In *Something Funny Happened on the Way to Litigation: Court and Agency Sponsored Mediation*, the EEO Committee presented a discussion of court and agency-annexed mediation, focusing not just on the nuts and bolts of each program, but also the similarities and differences, and what they are doing to improve chances of an early settlement. A thank you to EC member Jill Rosenberg and her firm, Orrick, for hosting Thursday's event.

On Friday, the Section's annual business meeting, CLE program, and luncheon were held at the New York Hilton. Topics covered at plenary sessions included: *Key Issues Relating to the Art (and Science) of the Settlement*; *Changes on the Front End: Revolutions and Evolutions in Hiring Practices*; *and Avoiding Ethical Traps in Sexual Harassment Investigations*. There were also breakout workshops related to ERISA, "Off-the-Clock" Litigation, Motion Practice in Arbitration, and Labor Relations Issues in Higher Education.

Our keynote luncheon speaker was Gillian Thomas, Esq., Senior Staff Attorney, ACLU Women's Rights Project, and author of *Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work*. Every registrant of the Annual Meeting, whether or not he or she attended the luncheon, received a copy of this great book. Ms. Thomas' speech was timely and provided some great legal and anecdotal stories that help put our current climate in the appropriate context.

A big "thank you" to our program co-chairs, moderators, speakers, and sponsors for making this program a huge success! I hope you can all join us at our many other networking Section's Fall Meeting in Montreal, from October 12-14, 2018.

Message from the Co-Editors

By Colin M. Leonard and Laura C. Monaco

We are pleased to bring you the Summer 2018 edition of the New York State Bar Association's *Labor and Employment Law Journal*. Within this edition, you will find engaging commentary on various issues, including free speech concerns as applied to public and private sector employees, legal developments relating to punitive damages under the New York City Human Rights Law and an overview of the threats employers face with regard to critical technologies in the workplace.

Arbitration matters are also addressed in this issue, including in the non-union and union environments. Parental leave remains a hot topic and an article addresses the matter from a national perspective.

For those interested in employment discrimination practice, a review of the book *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality* presents an engaging overview of the author's concerns on the state of the law in this area. Finally, we end the issue with a return of the "Ethics Matters" column, which serves as a good test for each of us to be mindful of the myriad ethical issues that arise in the labor and employment law practice area.

Colin Leonard

Laura C. Monaco

Our authors come from a variety of specialties and backgrounds—law school and postgraduate students, a retired law firm partner, union and management attorneys, a law professor and an arbitrator/mediator.

The richness of our Section is on full display. Enjoy!

We are introducing with this issue a new "Section Spotlight" feature, which will provide insight into one or more of our Section's members. This month, we provide detail regarding three of our Section's Diversity Fellows—Carlos Torrejon, Jalise Burt and Nina Martinez. The Labor and Employment Law Section has always had a rich diversity of viewpoints and opinions among its members, which is a core strength of the Section. Our Diversity Fellows program recognizes those members who practice in the Labor and Employment Law area and make our Section even stronger with their diverse backgrounds.

If you know someone who should be highlighted in the Section Spotlight feature, please contact Colin Leonard (cleonard@bsk.com) or Laura Monaco (lmonaco@ebglaw.com).

Section Spotlight

Spotlight #1: Carlos Torrejon

My name is Carlos Torrejon and I am class of 2014 from Rutgers Law School—Newark. I am a labor and employment associate at Fox Rothschild LLP, resident in its Morristown, NJ office. Prior to joining Fox, I was a Field Attorney with the National Labor Relations Board, Region 28, sub-regional office in Albuquerque, NM. As such, a large part of my practice revolves around traditional labor.

I became a Diversity Fellow when a colleague of mine (a former Diversity Fellow himself) suggested I apply and put me in contact with Jill Rosenberg and Wendi Lazar. The Diversity Fellowship is a great opportunity to meet other practitioners in the field—whether seasoned attorneys who have seen it all or newer attorneys (like myself) who are still gaining experience—and build long lasting relationships. Additionally, the Section encourages Diversity Fellows to become more involved and participate in Annual Meetings through CLE and plenary events that we are allowed to conduct. The Section's 2017 Annual Meeting was the first time Diversity Fellows were given this responsibility and this plenary was one of the best ones that weekend (though, admittedly, I am a little biased!). Moving forward, I have no doubt that the next plenaries and/or CLE events put on by the Diversity Fellows will be amazing.

In sum, I would recommend this fellowship opportunity to anyone!

Spotlight #2: Jalise Burt

Jalise Burt is an associate at Outten & Golden LLP, and a member of the firm's Class Action Practice Group. Prior to joining O & G in 2017, Ms. Burt clerked for the Honorable Ronald L. Ellis, United States Magistrate Judge for the Southern District of New York. As an Equal Justice Works Fellow at the New York Civil Liberties Union, Ms. Burt represented individual students facing suspensions and advocated for school climate and discipline reform at the state and local levels. Ms. Burt received her J.D. from the Georgetown University Law Center (GULC) in 2014 and her B.A., cum laude, from the University of Florida in 2011. While at GULC, Ms. Burt was the Managing Editor for the *Georgetown Journal of Law* and *Modern Critical Race Perspectives* and a student attorney in the Juvenile Justice Clinic. Ms. Burt is excited to be a Diversity Fellow because of the unparalleled opportunities to be connected to other members in the Section. Ms. Burt looks forward to continued involvement in the Section and especially the Section's efforts to bring diverse perspectives to its CLEs, advocacy efforts, and publications.

Spotlight #3: Nina Martinez

Nina Martinez is an associate at Outten & Golden LLP and a member of the firm's Class Action Practice Group. Prior to joining the firm in 2017, Ms. Martinez served as a Skadden Fellow at the New York Legal Assistance Group where she developed the Employment Mediation Project. Ms. Martinez received her B.A. from the University of Florida in 2010, an M.S. in Elementary Education from Hunter College in 2012, and her J.D. from the University of Pennsylvania School of Law in 2015. During law school, Ms. Martinez worked as a law clerk with the office of the General Counsel at the U.S. Equal Employment Opportunity Commission, the Regional Solicitor of the U.S. Department of Labor, and the employment department of the nonprofit organization *Make the Road New York*.

Quelled Speech: The Inconvenience of First Amendment Freedom of Speech

By Onya Brinson

In this time when it appears that freedom of speech in any arena is becoming a precious commodity, let us revisit the first Amendment's freedom of speech clause. It reads as follows: "Congress shall make no law… abridging the freedom of speech."[1] This guaranteed right sounds simple enough: Congress shall never pass a law abridging an American citizen's right to freedom of speech. However, as in many parts of the United States Constitution, it is never that simple. This is especially true in the context of freedom of speech rights in the workplace.

The Supreme Court long ago decided that the first Amendment applies to federal, state, and local public sector employees. Initially, the first Amendment only barred the federal government from abridging speech rights. It was not until the Supreme Court used the incorporation doctrine, where portions of the Bill of Rights are deemed to apply to states, that it was determined that states similarly must not abridge the freedom of speech rights of its citizens.[2]

The evolution of freedom of speech for public sector employees has gone from expansive to narrow, rather than the other way around. In this circumscribed view, employees have seen their freedom of speech rights limited, while employers have been afforded almost unlimited latitude in determining what speech is permitted in the workplace and what speech is not. Freedom of speech for private sector employees is only guaranteed depending upon jurisdiction, but the tests for public and private sector employees often mirror each other. In some jurisdictions, private sector employees enjoy more speech rights than public sector employees under the first Amendment.

This article will not only compare and contrast freedom of speech rights for public and private sector employees, but it will also consider upcoming issues before the Supreme Court and pressing legal questions that still linger for public and private sector employees regarding speech. The objective of this article is to understand the privileges and limits of freedom of speech, and how it has become a right that even the courts struggle to apply.

Freedom of Speech in the Public Sector

Supreme Court Justice Oliver Wendell Holmes, Jr. wrote, "[a]n employee may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[3] Justice Holmes, who famously carved out the "clear and present danger" exemption to freedom of speech as an absolute right,[4] held public sector employees to a similarly high standard.

Onya Brinson

For several decades, American jurisprudence subscribed to Justice Holmes's view that no one has a constitutional right to employment. Thus if one wanted to keep their job, there are many things they will not be allowed to say. For example, the Supreme Court has stated in prior cases that it is important to quell speech to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in public service."[5] The Supreme Court ruled that it is constitutional to prohibit members of groups that advocated the overthrow of government from teaching in public schools.[6] Similar cases often gave employers the unfettered ability to curtail employee speech based on what the employer preferred to tolerate.

First Amendment freedom of speech jurisprudence began to change course in the 1950s and 1960s. The Supreme Court started to view freedom of speech as a more fundamental right, beginning to replace classical freedom of speech precedent under which the employer could determine, with few restrictions, what constituted protected speech in the workplace. Ironically, the shift toward more freedom of speech protection for public sector employees began not with employment cases but with freedom of speech and press cases. In one such case, two businessmen were convicted of sending sexually obscene materials through the mail, violating federal and state laws against lewd and lascivious materials.[7]

The two businessmen filed a lawsuit alleging that the state and federal obscenity laws violated their first Amendment freedom of press and freedom of speech rights. While the Court ruled that the plaintiffs' convictions under the statutes should stand since obscenity was not constitutionally protected, the Supreme Court was not finished. The Supreme Court made a larger point: that the practice of narrowly viewing the first Amendment freedom of speech clause might be coming to an end. Justice Brennan wrote the following:

> The freedom of speech… guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without pre-

> vious restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*… Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period*.[8]

The Supreme Court followed this "broadened conception of liberties" with another freedom of speech and press case several years later.

At this point, there had been very few cases challenging the classic employer view of freedom of speech in the workplace. Little did the Supreme Court know, the issue was about to be front and center.

Employees' Freedom of Speech Rights Based on Freedom of Press

In 1968, The Supreme Court created a new first Amendment freedom of speech test with the *Pickering* case.[9] In this case, an Illinois board of education terminated a public school teacher because he published a letter in newspaper criticizing the board's allocation of school funds for athletic and educational programs. The teacher sued the board of education, alleging violations of his first Amendment freedom of speech rights.

The *Pickering* case was pivotal because there was a clash between employer-controlled speech rights and the broadened first Amendment freedom of speech rights in the context of freedom of the press cases. The Supreme Court ruled that the board of education violated the appellant's freedom of speech rights because the allocation of school funds is a matter of public importance. "The public interest in having free and unhindered debate on matters of public importance—the core value of the free speech clause of the first Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have … knowledge of their falsity or with reckless disregard for their truth or falsity."[10]

The Supreme Court also made clear in a prior case that statements relating to matters of public concern made by a public sector employee are protected speech even made only to a nominal supervisor.[11] The Supreme Court was not only creating a new freedom of speech test for public sector employees by integrating freedom of press cases, but also sending a message to public sector employees that they did not have to publish or make a public announcement for their speech to be protected. As long as the public sector employee raised issues of public concern, absent intentional or reckless falsehoods, the Supreme Court considered it protected speech. However, a loophole allowed an employee's speech to fall out of protection when there was an adequate justification for not protecting the speech based on the employer's needs. The Supreme Court would soon widen that loophole in a sweeping way.

Public Concern Test Shifts

In 1983, the Supreme Court granted certiorari in a case involving a New Orleans assistant district attorney who expressed dissatisfaction about being reassigned to a new unit. The assistant D.A. then created a questionnaire asking fellow D.A.s for their thoughts on an office transfer policy, office morale, level of confidence in supervisors, and whether employees felt pressured to work on political campaigns.[12] District Attorney Harry Connick, Sr. terminated the appellant's employment because he believed that the assistant D.A. attempted to create mutiny in the office.

Connick had many of the same elements that were categorized as protected speech in *Pickering*: (1) the appellant raised matters of public interest, such as pressure to work on political campaigns; (2) the concerns she raised would not necessarily have interrupted the operation of the District Attorney's office, but were an irritant to the District Attorney insufficient to declare speech unprotected. The Supreme Court ruled that the appellant's speech was not protected because most of her speech, with one "exception," was about internal office matters, not issues of public concern. This was stunning since the Supreme Court had never created a litmus test for how many matters of public concern constituted protected speech. In *Connick*, the Court created a quasi-numerical test by saying that the "content, form and context of a given statement, as revealed by the whole record" determined whether speech was a matter of public concern.[13]

"The issue that made Garcetti *even more vexing is that the Court did not create a framework to determine the scope of employment for public sector employees, and it discounted the use of job descriptions in analyzing whether a public employee's speech was a part of his or her official job duties."*

In *Connick*, the Supreme Court appeared to attach far more importance to an employer being able to maintain a harmonious work environment than to the right of a public sector employee to address matters of public concern. The Court wrote: "One hundred years ago, the Court

noted the government's legitimate purpose in [promoting] efficiency and integrity in the discharge of official duties, and [in] maintaining proper discipline in the public service."[14] The Court continued with a quote from Justice Powell in a prior freedom of speech case:

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency.[15]

It could certainly be argued that the way in which a district attorney's office operates is a matter of public concern since it has the power to decide who to prosecute for criminal offenses and sentencing determinations. This is especially true since district attorneys are elected by the voters. However, the Supreme Court reduced these matters to mere office problems and began moving the Court back to greater employer deference.

This trend continued in another case where the Supreme Court ruled that even matters of public concern were not protected speech if they were made "pursuant to their official duties."[16] This was almost a death knell to public sector freedom of speech rights because prior to *Garcetti v. Ceballos*, public sector employees' speech was still protected where the matters were of public concern, if the speech was not outweighed by the employers' interest in regulating speech.[17] The issue that made *Garcetti* even more vexing is that the Court did not create a framework to determine the scope of employment for public sector employees, and it discounted the use of job descriptions in analyzing whether a public employee's speech was a part of his or her official job duties.[18] The only guidance the Court gave was essentially no guidance at all: "that the proper inquiry is a practical one."[19]

Some circuits have faithfully followed *Garcetti* in using the "chain of command" test, under which speech connected to an employee's job is unprotected.[20] However, other circuits have been left grappling with how to apply *Garcetti* in distinguishing "official duties speech" and "citizen speech." Some circuits have tried to carve out narrow exemptions to *Garcetti* while trying to follow it at the same time.

In the Second Circuit case *Matthews v. City of New York*, a police officer informed his superior that he opposed an arrest quota policy "mandating the number of arrests, summons and stop and frisks that police officers must conduct."[21] As a result of his comments, the officer claimed that he was subject to a series of adverse actions including denial of overtime, receipt of punitive assignments, and negative performance evaluations.

The Second Circuit used the *Pickering/Connick/Garcetti* hybrid freedom of speech test as to "whether the employee spoke as a citizen on a matter of public concern." This test has two subsections: "(1) whether the subject of the employee's speech was a matter of public concern, and (2) whether the employee spoke 'as a citizen' rather than solely as an employee."[22] If the answer to both questions was yes, the last part of a *Pickering* analysis would be "whether the relevant government entity 'had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer.'"[23]

The Second Circuit determined that the plaintiff's speech did not concern what he was "employed to do." The speech addressed a precinct policy and was "neither part of his job description nor part of the practical reality of his everyday work."[24] The Second Circuit went further, stating that when public sector employees' duties "do not involve formulating, implementing, or providing feedback on a policy that implicates a matter of public concern … he or she speaks as a citizen, not as a public employee." The Second Circuit stayed within the *Garcetti* framework in emphasizing that the plaintiff's speech was not within his official job duties. However, the Second Circuit gave employees a potential way to circumvent the *Garcetti* test. It permitted employees to talk about matters of public concern that were indirectly related to their job functions, but not a part of their essential job functions.

This still opens the *Garcetti* framework to many questions about freedom of speech. Are invalid search warrants, or the operation of a district attorney's office any less matters of public concern because the person who made the statement is an employee who had an official duty to raise these concerns? How does a court begin to evaluate whether an employee's speech is within his or her job duties, or citizen speech that is protected without an essential roadmap such as job descriptions? Do employees lose their ability to speak out about office issues that may be of public concern once they clock in at work? The Supreme Court seems to think so. It appears as though federal circuits will either continue to apply the *Garcetti* framework or, as in *Matthews,* continue to carve out as exemptions for the employee.

Public Education Freedom of Speech

The Supreme Court has always viewed freedom of speech for teachers and students through a similar lens. The Court has said that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the school house gates."[25] Part of the confusion is that the Supreme Court often defers to local school boards on educational issues.[26] Due to the lack

of direction given by the Supreme Court, the Second Circuit, as well as other courts, has grappled with the question of whether there should be a stricter standard of limiting speech, as is the case in many circuits for public school teachers, or whether more deference should be afforded to teachers that mirrors students' speech. In the first case that granted students freedom of speech, the Supreme Court said that students' speech could be limited "in light of special circumstances of the school environment."[27]

The test became more refined when the Supreme Court ruled that students' speech could be regulated in three circumstances: when it is (1) school-sponsored, (2) "offensively lewd and indecent," "or (3) likely to cause substantial and material disruption of school activities."[28] The Second Circuit found the following to be unprotected student speech: drawing stick figures in sexual positions, and threatening teachers and students.[29] The decisions surrounding student speech are the courts' attempt to balance the restriction of speech while affording education officials great latitude in curtailing speech that is deemed inappropriate. It appears as if the courts are attempting to sanitize the learning environment so that children will be protected as much as possible from potentially harmful speech.

Because of this, many circuits have applied the students' free speech test to the other individuals who spend even more time in class than students: teachers. There is ambiguity regarding teachers because the Supreme Court has never removed instructional speech "from its presumptive place within the ambit of the 1st Amendment."[30] However, the Court has never "held that the 1st Amendment applies to a teacher's classroom speech."[31] The Second Circuit extended the Supreme Court's legal standard for student speech to that of teachers' instructional speech in a case involving a guest lecturer at a school who was barred by the Board of Education from showing a film that involved nudity to 10th grade math students.[32]

The Second Circuit followed the *Hazelwood* test, declaring that the school's decision was "reasonably related to a legitimate pedagogical concern" because nudity was "entirely unnecessary to illustrate…scientific phenomenon."[33] While the Second Circuit gives wide latitude to school boards to determine what teacher speech is protected, it still finds teachers' classroom speech to be protected under certain circumstances. Other circuits have taken a much more restrictive view, finding that instructional speech is not protected under the first Amendment because teachers do not raise matters that are of public concern when adhering to a school-based curriculum.[34]

Many teachers belong to unions. Therefore, sometimes there are speech rights that may not be protected by the first Amendment, but may well be protected depending on what kind of collective bargaining agreement a union has negotiated on behalf of their respective members. A unionized teacher may also have additional speech rights under Section 7 of the National Labor Relations Act, which allows "the right to self-organization, to form, to join, or assist labor unions …"[35] In a recent Second Circuit decision, the court ruled that an employee engaged in protected speech even when using curse words to describe an employer because he was organizing his fellow colleagues to unionize.[36] However, it is important to note that the protected "speech" in Section 7 usually involves collective action and generally does not protect an individual employee.

The fact that the issue of whether teachers have freedom of speech rights has not reached the Supreme Court is telling. Whatever the test may turn out to be, it is unlikely the courts will remove the great deference they have given school boards to determine what speech is protected in an educational environment. It is also important to note that speech that is deemed discriminatory in the workplace is unprotected for both private and public sector employees under Title VII of The Civil Rights Act of 1964.[37]

Freedom of Speech Union Fees

For the 2017-2018 Supreme Court term, an old but very familiar legal question rears its head: whether public sector non-union members' payment of agency shop fees violated the first Amendment freedom of speech clause. This is a question that the Supreme Court has battled for decades. The first Supreme Court case that dealt with this issue was *Abood*.[38] In *Abood*, the Supreme Court held that while public sector employees cannot be forced to join unions, they can be obligated to pay for the benefits they receive from collective bargaining, such as vacation days, health benefits, tenure provisions, and so on. Under an alternative approach, non-union members reaping the benefits of collective bargaining would be "free-riders."[39]

The *Abood* case also distinguished employee benefits from political speech. The Supreme Court said that non-union members are not required to pay for unions' political activities with which they disagree because to do so would compel the speech of the employee. Justice Stewart wrote for the Court:

> For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections.[40]

The issue of agency shop fees and the freedom of speech clause came back to the legal forefront with the *Friedrichs* case.[41] The Ninth Circuit Court of Appeals ruled

against the plaintiffs and it appeared that the plaintiffs might prevail on appeal to the Supreme Court. However, while the case was being decided Justice Scalia died resulting in a 4-4 split that allowed the Ninth Circuit's decision to stand.

This issue is again before the Supreme Court in *Janus*.[42] Unlike *Abood*, the Court is not distinguishing between political speech and collective bargaining issues, it is conflating these two issues and determining whether any agency shop fees for public sector non-union employees violate their freedom of speech rights. If the Supreme Court answers this question in the affirmative, would non-union employees still be permitted to enjoy the benefits of collective bargaining when it does not come out of their paycheck? What kinds of effects might this have on low wage earners vs. higher salaried bargaining units? Can it really be argued that the benefits of collective bargaining for vacation days and tenure provisions are "compelled speech" if the non-union employee in the bargaining unit enjoys the benefits of the union's collective bargaining agreement? While no one will know the answers to these questions until after the Supreme Court announces its decision, it is clear that every public sector union in the country is planning for a potential fallout from *Janus*.

Private Sector Freedom of Speech Rights

If you wondered what first Amendment freedom of speech protections are afforded private sector employees, you would be correct to conclude that they have none. We have recently witnessed the limits of freedom of speech protections for private sector employees in the current political climate. For example, the company Top Dog terminated an employee who marched in support of white nationalism in protesting the removal of Confederate General Robert E. Lee's statute.[43] Another example is that government contractor Akima LLC terminated an employee for "flipping the bird" at President Trump's motorcade.[44]

However, depending on what state or municipality you reside in, there may be protections against terminating a private employee on the basis of speech. New York has codified some employee-based protections for speech. For example, New York bars retaliation for off-duty "recreational activities," including, among other things, "reading and the viewing of television, movies, and similar material." New York courts have treated "recreational activities" such as arguing about politics at a social function, and participating in a vigil for a man killed because he was gay as protected speech.[45]

There are many critical areas of "recreational speech" that are still undefined, and an employer can still terminate the employee if the speech is deemed to "create a conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interests."[46] Further, it is puzzling that while New York's statute protects "legal, recreational activities outside of work hours, off the employer's premises and without use of the employer's equipment or other property …" certain activities that fit this description have been defined by New York courts as unprotected speech. For example, a federal court found that dating is not a protected "recreational activity" under New York's statute, and participation in "after-work celebrations with fellow employees" is also not protected speech.[47] New Yorkers may not find much solace in New York's speech protections since the statute does not include activities such as picketing in protest or support of certain causes.[48]

"Trump's call for firing Hill and Kaepernick raises interesting employment law questions in the context of speech. Because Hill and Kaepernick have private employers, there is no first Amendment freedom of speech protection here."

Connecticut is one of the few states that has codified the same protections for private sector employees' speech as that of public sector employees, barring employment discrimination based on any "exercise… of rights guaranteed by the 1st Amendment."[49] However, Connecticut courts have held that this protection does not apply to decisions to deny tenure, although denial of tenure may at times result in expiration of an employee's contract which often leads to termination.[50] Colorado and North Dakota also have codified protections for private sector employees against termination for lawful, off-duty activities unless these activities create a conflict of interest with the employer.[51]

These statutes, and others like them, do give some protection to private sector employees from outright termination for speech and other off-duty activities. However, these statutes still permit the overriding question to be whether the employer determines speech is in conflict with business interests. While these statutes do not require an "official duties" test as is carved out in *Garcetti*, they still allow an employer to limit a substantial amount of speech by giving employers unilateral discretion to decide what constitutes potential dangers to their business interests.

Federal Agents' Interference With Private Sector Employees

Perhaps two of the most interesting private employee speech matters deal with sports and President Trump. The National Football League (NFL) football player Colin Kaepernick filed a union grievance against the NFL demanding a right to work, and accusing the NFL of "collusion" in alleged efforts to blackball him

for his #TakeaKnee protest to highlight police brutality and racial injustice in America.[52] President Trump called for the firings of both Kaepernick and an ESPN anchor, Jemele Hill, who called him a "white supremacist" and suggested that any person who disagreed with Dallas Cowboys owner Jerry Jones's threat to suspend players who followed Kaepernick's lead and got down on one knee during the National Anthem could stop supporting businesses that advertised with the Dallas Cowboys.

Trump's call for firing Hill and Kaepernick raises interesting employment law questions in the context of speech. Because Hill and Kaepernick have private employers, there is no first Amendment freedom of speech protection here. Since the NFL provides union representation, Kaepernick has taken the route of filing a grievance against the NFL for alleged collusion, which means team owners conspiring to keep him out of the league.

There is another perplexing legal question in these scenarios about a president calling for the termination of employers with whom he has political disagreements. There is a codified prohibition to keep Congress, the President, and other federal authorities from influencing an employment decision or employment practice of a private entity "solely on the basis of partisan political affiliation."[53] The opinions of Hill and Kaepernick about police brutality and the NFL's stance on the #TakeaKnee protests seemingly qualify as being in agreement with certain political groups like Black Lives Matter and others that have expressed similar concerns.

However, the Supreme Court has ruled that government speech can "promote a program, espouse a policy, or take a position. In doing so, it represents its citizens and it carries out its' duties on their behalf."[54] While the Supreme Court has ruled that government speech does not have to be viewpoint neutral, it has also ruled that a government official cannot compel legal suppression of citizen speech in a case where a state commissioner targeted booksellers of "obscene" material for possible prosecution.[55] If a president decided to bring to bear federal law enforcement against public sector employees who spoke out on issues of public concerns that were unrelated to their official job duties, this would be a violation of the first Amendment.

While there is little evidence that this would happen, there are very few influences that are as major as when the President of the United States not only comments on an issue, but suggests that a private sector employee be terminated because of the employee's view of that issue. Though there may be no direct evidence of a causal connection between Hill's ESPN suspension or Kaepernick's being black balled and President Trump's words, it certainly would make for an interesting legal case.

Future of Freedom of Speech

The Supreme Court does not offer a clear scheme to follow to determine when speech is protected for public sector employees and in what context. Thus, circuit courts have been left to try and carve out their own road map for protecting public sector employees. States very often try to mirror something approaching a federal litmus test for private sector employees, but they often end up deferring to the employers' interests rather than creating more speech rights for employees. While there must be a certain amount of employer deference for workplace speech, the uncertainty of not knowing what is within the scope of an employee's official job duties and what he or she can comment on as a citizen creates a chilling effect in a society where workplace issues can easily become matters of public concern.

Endnotes

1. U.S. Const. amend I.
2. *Gitlow v. N. Y.*, 268 U.S. 652 (1925).
3. *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).
4. *Schenck v. United States*, 249 U.S. 47 (1919). The Supreme Court later added "fighting words" that are used to incite violence and hatred as unprotected by the First Amendment in *Chaplinsky v. N.H.* , 315 U.S. 68 (1942).
5. *Connick v. Myers*, 461 U.S. 138 (1983) (quoting *Ex Parte Curtis*, 106 U.S. 371 (1882)).
6. *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952); *see Garner v. Los Angeles Bd. of Public Works*; *Public Workers v. Mitchell*, 330 U.S. 75 (1947); *United States v. Wurzbach*, 280 U.S. 396 (1930).
7. *Roth v. United States*, 354 U.S. 476 (1957).
8. *Id* (emphasis added).
9. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).
10. *Id.*; *see N. Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968).
11. *Id.*; *Garrison v. La.*, 379 U.S. 64 (1964); *Wood v. Ga.*, 370 U.S. 375 (1962).
12. *Connick*, 461 U.S. at 138.
13. *Id*.
14. *Connick*, 461 U.S. at 138; *see Ex Parte Curtis*, 106 U.S. at 373.
15. *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring).
16. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
17. *Kramer v. N.Y. City Bd. of Educ.*, 715 F. Supp. 2d 335 (E.D.N.Y. 2010).
18. Thomas Keenan, *Circuit Court Interpretations of* Garcetti v. Ceballos *and the Development of Public Employee Speech*, 87 Notre Dame L. Rev. 841 (2013).
19. *Garcett*i, 547 U.S. at 410.
20. *Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007) (per curiam) (quoting *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983)); *Haynes v. City of Circleville*, 474 F.3d 357, 364 (6th Cir. 2007). *see also Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007) ("The content of an employee's speech—though not determinative—will inform the threshold inquiry…"). *See Decoittis v. Whittemore*, 635 F.3d 22, 32 (1st Cir. 2011) ("To determine whether such speech was made pursuant to official job responsibilities, the Court must take a hard look at the context of that speech."); *Mercado-Berrios v. Cancel-Alegria*, 611 F.3d 18, 26 (1st Cir. 2010) ("The relevant inquiry under *Garcetti* thus has two basic components—(1) what are the employee's official responsibilities? and (2) was the speech at issue made pursuant to those responsibilities?—both of which are highly context-sensitive); *Foley v. Town of Randolph*, 598 F.3d

1, 7 (1st Cir. 2010) ("More critical to our analysis is the context of Foley's speech.").

21. *Matthews v. City of N. Y.*, 779 F.3d 167 (2d Cir. 2015); *see also* Floyd Abrams, *Free Speech and Civil Liberties in the Second Circuit*, 85 Fordham L. Rev. 11 (2016).
22. *Id.*; *Garcetti* , 574 U.S. at 410 (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, *Will Cty.*, 391 U.S. 563, 568 (1968)); *see also Jackler v. Byrne*, 658 F. 3d 225, 235 (2d Cir. 2011) (citing *Garcetti*, 547 U.S. at 420-22).
23. *Id.*; *see also Lane v. Franks*, 134 S. Ct. 2369 (2014) (quoting *Garcetti*, 547 U.S. at 418); *Pickering*, 391 U.S. at 568.
24. Abrams, *supra* note 21.
25. *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969).
26. *Id.*; *Evans-Marshall*, 428 F.3d at 237 (citing *Hazelwood Sch. Dist. v. Kulheimer*, 484 U.S. 260, 267 (1988); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973); *Sweezy v. N. H.*, 354 U.S. 234, 255 (1957)); *see also Lee v. York Cty. Sch. Div*., 484 F.3d 687, 695 (4th Cir. 2007) (affirming public schools' wide discretion "to regulate speech that occurs within a compulsory classroom setting"); Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning*, 58 Am. U.L. Rev. 1285, 1289 (2009).
27. *Tinker*, 393 U.S. at 506.
28. *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. at 273 (determining that schools may regulate "school-sponsored" speech "so long as their actions are reasonably related to legitimate pedagogical concerns"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (recognizing broad school authority to restrict "offensively lewd and indecent speech"); *Tinker*, 393 U.S. at 506-07, 514 (holding that student speech may be restricted if it causes "substantial disruption of or material interference with school activities").
29. *R.O. v. Ithaca City Sch. Dist*., 645 F.3d 533 (2d Cir. 2011); *Wisniewski ex rel. Wisniewski v. Bd. of Educ*., 494 F.3d 34 (2d Cir. 2007).
30. *Kramer v. N. Y. City Bd. of Edu*c., 715 F. Supp. 2d 335 (E.D.N.Y. 2010) (citing *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist*., 428 F.3d 223, 229 (6th Cir. 2005).
31. *Id.*; *see also Evans-Marshall*, 428 F.3d at 235 (Sutton, J., concurring).
32. *Silano*, 42 F.3d at 722-23; *see also Evans-Marshall*, 428 F.3d at 236 (Sutton, J. concurring) (citing as examples of this approach: *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993); *Silano*, 42 F.3d at 724; *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir. 1998); *Miles v. Denver Pub. Sch*. 944 F.2d 773 (10th Cir. 1991)).
33. *Id*.
34. *Edwards v. Cal. Univ. of Pa*., 156 F.3d 488, 491 (3d Cir. 1998) (concluding "that a public university professor does not have a 1st Amendment right to decide what will be taught in the classroom"); *Boring v. Buncombe Cty. Bd. of Educ*., 136 F.3d 364, 368 (4th Cir. 1998) (en banc) (limiting *Hazelwood* standard to cases of student speech); *Kirkland v. Northside Indep. Sch. Dist*., 890 F.2d 794, 798 (5th Cir. 1989) (holding that teacher speech attains "protected status if the words or conduct are conveyed by the teacher in his role as citizen and not in his role as an employee of the district" (original emphases)). *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Tex Rev. of L. & Pol. 295 (2012).
35. 29 U.S.C. §§ 151-169 (2018).
36. *NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2d Cir. 2017).
37. Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e (2018).
38. *Abood v. Detroit Bd. Of Educ*., 431 U.S. 209 (1977).
39. *Id.*
40. *Elrod v. Burns*, 427 U.S. 347, 356-57 (1976).
41. *Friedrichs v. Cal. Teachers Assoc.*, 136 S. Ct. 1083 (2016).
42. *Janus v. AFSCME, Council 31*, 138 S. Ct. 54 (2017).
43. Jessica Guynn, *Top Dog worker in Berkeley loses his job after he's outed as Charlottesville Protestor*, USA Today (Aug. 15, 2017), https://www.usatoday.com/story/tech/2017/08/15/top-dog-worker-loses-job-after-being-outed-charlottesvilleprotestor/569487001/.
44. Gregg Re, *Woman Fired After Flipping Off Trump's Motorcade*, Fox News (Nov. 7, 2017), http://www.foxnews.com/us/2017/11/07/woman-fired-after-flipping-off-trumps-motorcade.html.
45. *Cavanaugh v. Doherty*, 243 A.D.2d 92, 100 (N.Y. App. Div. 1998) (treating an allegation that plaintiff was fired "as a result of a discussion during recreational activities outside of the workplace in which her political affiliations became an issue" as covered by the statute); *El-Amine v. Avon Prods*., *Inc*., 293 A.D.2d 283 (N.Y. App. Div. 2002) (affirming denial of summary judgment in a § 201-d(2) case apparently brought based on plaintiff's "involvement in a vigil for Matthew Shepard, the gay college student who was brutally murdered in Laramie, Wyoming" (quoting Jennifer Gonnerman, *Avon Firing*, Village Voice, Mar. 2, 1999)).
46. N.Y. Lab. Law §201-d (McKinney 2011).
47. *Hudson v. Goldman Sachs & Co*., 283 A.D.2d 246 (N.Y. App. Div. 2001) ("romantic relationships are not protected 'recreational activities'"); *State v. Wal-Mart Stores, Inc*., 207 A.D.2d 150 (N.Y. App. Div. 1995) ("dating is entirely distinct from…recreational activity") (internal quotations marks omitted); *But see id.* at 153 (Yesawich, J., dissenting) (arguing that dating should be protected).
48. *Kolb v. Camilleri*, No. 02-CV-0117A(Sr), 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1 , 2008) ("Plaintiff did not engage in picketing for his leisure, but as a form of protest. While the Court has found such protest worthy of constitutional protection, it should not engender simultaneous protection as a recreational activity akin to 'sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.'").
49. Conn. Gen. Stat. § 31-51q (2012).
50. *Avedisian v. Quinnipac Univ*., 387 Fed. Appx. 59, 60 (2d Cir. 2010); *McIntyre v. Fairfield Univ*., 34 Conn. L. Rptr. 219 (Conn. Super. Ct. 2003); *Douglas v. Bd. Of Trs*., No. CV 950372571, 1999 WL 240736, at *2 (Conn. Super. Ct. Apr. 8, 1999).
51. Colo. Rev. Stat. Ann. § 24-34-402.5(1) (West 2012) (enacted 1990); N.D. Cent. Code Ann. § 14-02.4-03,-08 (West 2011).
52. Selena Hill, *Colin Kaepernick's Lawyer to Move Forward in Legal Proceedings in Right to Work Suit*, Black Enterprise (Jan. 8, 2018), http://www.blackenterprise.come/colin-kaepernicks-right-work-suit/.
53. 18 U.S.C. § 227 (2018).
54. *Walker v. Tex. Div., Sons of Confederate Veterans*, *Inc*., 135 S. Ct. 2239 (2015).
55. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

Onya Brinson, Esq. has been an employment law attorney for the past three years. Onya is Assistant General Counsel at District Council 37 AFSCME, AFL-CIO where she represents union members on a range of labor and employment matters. Onya has also published several articles published on many different topics involving employment discrimination law.

Ethics Matters

By John Gaal

Q I have been asked by a former law school classmate from out of state to serve as "local counsel" on a litigation matter that she is handling. It involves an area of the law that I am not really familiar with, but I don't really expect to have any substantive responsibility and am only "lending" my name to her pleadings so that she can satisfy the requirement for local counsel involvement. Given these circumstances, do I need to have any ethical concerns in helping her out?

A You sure do, although if you set up the arrangement appropriately you can certainly limit your exposure. For starters, lawyers who serve as "local counsel" are subject to all of the same ethics rules that apply to any other lawyers. In other words, you do not get a pass simply because you are designated as "local counsel." However, as outlined in a 2015 ethics opinion issued by the Committee on Professional Ethics of the Association of the Bar of the City of New York ("Committee"), Formal Opinion 2015-4, there are steps you can, and should, take to protect you and your firm in these circumstances.

The most important step is to enter into an explicit agreement, preferably directly with the client, which limits the scope of your representation in accordance with everyone's expectations, rather than simply rely on the ambiguous designation of "local counsel." Indeed, it is your obligation to communicate clearly with the client any limitations on the scope of your representation. To be effective, those limitations must be both reasonable and agreed to by the client through an informed consent. In the absence of doing so, you are at risk of sharing full responsibility with your former classmate for the conduct of the matter (e.g., responsibility for the substance of pleadings, meeting discovery and other deadlines, etc.), even though you are not expecting to play any substantive role in how the matter is handled. (Of course, in addition to entering into an explicit, written agreement with the client outlining your responsibilities, you must comply with any requirements imposed on local counsel by applicable court rules.)

Limited scope representations, such as "local counsel" arrangements, are permitted under Rule 1.2(c) of New York's Rules of Professional Conduct ("Rules"). While these arrangements do not allow a lawyer to avoid their ethical obligations, as explained by the Committee, they can "narrow the universe within which those ethical obligations apply, by limiting the lawyer's role in the matter and specifying the tasks she is expected to perform." Needless to say, in connection with those tasks, which are identified as falling to you in your local counsel role, you are expected to act competently and diligently, and to communicate appropriately with the client about relevant developments (see Rules 1.1, 1.3 and 1.4).

The Comments to Rule 1.2 recognize a number of reasons why a client may wish to limit the scope of representation, not the least of which is to control costs. Specifically in the context of a local counsel arrangement, the Committee recognized that a limited representation approach can satisfy the client's interest in having the bulk of legal services provided by the non-admitted, out-of-state lawyer of their choice without incurring the cost of duplicating the role of lead counsel with a locally admitted lawyer.

As noted, to be effective, a limited scope arrangement must carry the client's "informed consent." Informed consent, generally, requires making sure that the client understands the material advantages and disadvantages of the proposed course of action. See Rule 1.0(j) and Comment 6. In the context of a limited scope arrangement, this more specifically means "disclos[ing] the limitations on the scope of the engagement and the matters that will be excluded," as well as the "reasonably foreseeable consequences of the limitation." Rule 1.2, Comment 6A. Formal Opinion 2015-4 highlights some of the client risks that may need to be explained. For example, while an agreement that limits local counsel's role to only appearing at routine status conferences may result in cost savings for the client, the client is not getting a second pair of eyes to substantively monitor lead counsel's conduct. Simi-

Ethics Matters is provided by the Ethics and Professional Responsibility Committee of the Labor and Employment Law Section. The Committee is pleased to mark the return of this column after a several year hiatus and we hope to continue it on a quarterly basis. Specific columns are authored by various members of the Committee. If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact either Co-Chair of the Committee, John Gaal at jgaal@bsk.com, or Jae Chun at jchun@friedmananspach.com.

larly, if local counsel is only reviewing the legal analysis contained in lead counsel's work, and not independently verifying the underlying facts, the client is again losing the benefit of that second pair of eyes. In the particular circumstances, those may be reasonable offsets to the cost savings, but a lawyer entering into a limited scope engagement with a client has an obligation to make sure that the client understands those trade-offs.

While the preferable way to secure this informed consent is through communication directly with the client, the Committee has concluded that "given the long-standing, customary practice of lead counsel acting as intermediary between local counsel and the client, we believe a written agreement between local counsel and lead counsel may fulfill the requirements of Rules 1.2(c) and 1.5(b), provided lead counsel obtains the client's 'informed consent' to that arrangement."

Although the Rules provide substantial latitude in allowing limitations on the scope of representation, those limitations must nonetheless be reasonable. "[A]n agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation." Rule 1.2, Comment 7. The Committee's Opinion goes on to provide some examples of reasonable, and unreasonable, limitations:

- It may be reasonable for local counsel to file a pro hac vice motion on behalf of an out-of-state lawyer in a large litigation and not perform any other work on the case once that out of state lawyer is admitted;
- Local counsel may reasonably limit her representation to reviewing the legal argument in a summary judgment motion prepared by lead counsel, assuming all factual representations to be accurate, and exclude any obligation to verify factual information (although even then local counsel may not ignore obvious factual inaccuracies);
- Local counsel may not agree to sign her name to a complaint prepared by lead counsel and file it with the court, even though she believes the claims are not supported by the facts, because she may not "exclude by agreement" her ethical obligation to not file frivolous claims;
- Local counsel may not agree to circumvent ethical rules requiring candor to the court or third parties, nor other relevant court rules (e.g., if court rules require counsel appearing at a court conference to have "knowledge" of the case, local counsel appearing at those conferences must have sufficient knowledge to satisfy that court rule, regardless of the terms of any limited scope engagement).

John Gaal

Also, because a lawyer has an obligation to keep a client informed of any developments relating to that representation, Rule 1.4(a)(3), a limited scope engagement by local counsel should be clear on who will have the communication obligation with respect to the covered tasks. While the Opinion recognizes that local counsel can rely, generally, on lead counsel's representation that relevant information is communicated with the client, local counsel may not completely abdicate that communication responsibility and, at a minimum, if local counsel knows or has reason to know, that lead counsel is not providing required communications to the client, local counsel must take steps to remedy that situation.

Serving as "merely" local counsel does not, in itself, absolve you of considerable ethical obligations. If you are considering serving as local counsel in a matter, you should carefully review Formal Opinion 2015-4. Not only do you have an ethical obligation to understand what you may and may not do in the context of such an engagement, but you should adequately understand, and appropriately limit, your own exposure.[1]

Endote

1. If your involvement in the matter will result in a fee share arrangement with other counsel, instead of your own direct fee arrangement with the client, you must make sure you understand the requirements of Rule 1.5(g), which imposes very specific obligations in the context of fee sharing arrangements.

John Gaal is Of Counsel at Bond, Schoeneck & King, PLLC and Co-Chair of the Section's Committee on Ethics and Professional Responsibility.

New York Court of Appeals Establishes Lower Threshold for Punitive Damages Under NYCHRL

By Anshel Joel "AJ" Kaplan and Howard M. Wexler

Introduction

AJ Kaplan

Punitive damages are appropriate under the New York City Human Rights Law where the defendant's actions amount to recklessness or willful or wanton negligence, or where there is "a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." So held the state's Court of Appeals in *Chauca v. Abraham*,[1] resolving a long-undecided issue at the request of the Second Circuit.

Background

In November 2010, after being terminated while on maternity leave from her role as a physical therapy aide, Veronika Chauca (Chauca) sued her former employer, Park Management Systems, LLC., and two supervisory employees, in the Eastern District of New York for pregnancy discrimination under Title VII, the New York State Human Rights Law, and the New York City Human Rights Law (NYCHRL).[2] At trial, over Chauca's objection, the district court declined to provide a punitive damages instruction, finding that Chauca had failed to introduce any evidence that the employer had intentionally discriminated with "malice" or with "reckless indifference" to her protected rights—the standard under Title VII.[3]

"As a result, the court held, there must be some heightened standard for punitive damages, and a finding of liability cannot by itself automatically support a jury charge pertaining to punitive damages."

After receiving a jury award of $60,500 in compensatory damages, Chauca appealed, arguing that, with respect to her NYCHRL claim, the district court erred in using the Title VII standard for punitive damages. She argued that the City law, which mandates that its provisions be "liberally" construed and analyzed "separately and independently" of federal law, calls for a more lenient, pro-plaintiff approach—specifically, that a punitive damages jury instruction is appropriate and necessary upon any finding of liability, regardless of whether the employer discriminated with malice or reckless indifference.[4]

Howard M. Wexler

The defendants argued, on the other hand, that the district court was correct, and that the standard for punitive damages under NYCHRL mirrors that of Title VII, just as the Second Circuit held in *Farias v. Instructional Sys., Inc.*[5]

In November 2016, the Second Circuit, after concluding that neither the statute nor case law provided sufficient guidance as to the appropriate standard, certified the following question to the New York Court of Appeals: "What is the standard for finding a defendant liable for punitive damages under the [NYCHRL]?"[6]

New York Court of Appeals Analysis

On certification, the New York Court of Appeals, in a 6-1 decision,[7] took a middle ground. Regarding Chauca's argument, it noted that punitive damages and compensatory damages are conceptually different, finding that the former, unlike the latter, are intended to address "gross misbehavior" or conduct that "willfully and wantonly causes hurt to another."[8] As a result, the court held, there must be some heightened standard for punitive damages, and a finding of liability cannot by itself automatically support a jury charge pertaining to punitive damages.[9]

As to the defendants' argument, the court explained that during the intervening years since *Farias*, New York City had twice amended the NYCHRL out of concern that the statute was being too strictly construed, cautioning courts that similarly worded federal statutes may be used as interpretive aids only to the extent that they are viewed "as a floor below which the City's Human Rights Law cannot fall, rather than a ceiling above which the local law cannot rise," and only to the extent that those decisions may provide guidance as to the "uniquely broad and remedial purposes of the local law."[10] Against this backdrop, the Court of Appeals held that the punitive damages standard must be less stringent than the one imposed by Title VII.

Turning to statutory construction to interpret the appropriate standard, the Court of Appeals noted that the "starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" and "when a word having an established meaning at common law is used in a statute, the common law meaning is generally followed."[11]

Howard M. Wexler is a Partner and Anshel Joel "AJ" Kaplan is an Associate in Seyfarth Shaw LLP's New York City office and are members of the firm's Labor & Employment Law Practice Group.

The Court then held that "punitive damages" is a legal term of art that has an established meaning under New York common law,[12] under which punitive damages are appropriate in cases with "conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard," as proclaimed in its decision in *Home Ins. Co. v. Am. Home Prods. Corp*.[13] Explaining that this standard requires neither a showing of malice nor awareness of the violation of a protected right, the Court concluded that it therefore adhered to the New York City's liberal construction mandate while at the same time remaining consistent with the language of the NYCHRL.[14]

Closing the Loop

In March 2018, having received definitive guidance from New York's highest court on its certified question, the Second Circuit issued a brief, four-paragraph, per curiam decision. Vacating the district court's judgment and remanding the matter for further proceedings, the Second Circuit held that because the Court of Appeals had "expressly rejected the application of the [Title VII] standard for punitive damages … the district court did not apply the proper standard in declining to submit the question of punitive damages to the jury."[15]

"The decision thus serves as a further reminder that employers in New York City should adopt and enforce strong anti-discrimination policies, train their employees on avoidance of discriminatory and harassing behaviors, thoroughly investigate internal complaints of such behavior, and swiftly discipline those who transgress."

Implications

The Court's decision now makes clear that the standard for punitive damages under the NYCHRL is broader, and more plaintiff-friendly, than under Title VII. (The New York State Human Rights Law does not permit punitive damages at all.) While punitive damages will not be available in every NYCHRL case where an employee prevails, the plaintiff will be entitled to a jury instruction on punitive damages whenever there is evidence that the defendant acted with "malice" or with "reckless indifference" to the plaintiff's protected rights, or when the defendant's actions amount to "a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard."

As a practical matter, the standard foreshadows that trial courts may issue punitive damages charges more frequently than in the past. As argued by the New York City Law Department in its amicus brief, which urged the court not to tie the standard to Title VII's: "[T]he very same evidence that establishes liability in a given case may well warrant punitive damages. For example, if a jury finds that an employee has been fired because of his or her race, it will be quite difficult for a defendant acting in the year 2017 to claim that there is no basis to conclude that it was acting with at least reckless disregard or gross negligence toward the employee's rights or toward the possibility that it was causing harm based on a protected characteristic."

The decision thus serves as a further reminder that employers in New York City should adopt and enforce strong anti-discrimination policies, train their employees on avoidance of discriminatory and harassing behaviors, thoroughly investigate internal complaints of such behavior, and swiftly discipline those who transgress. Juries throughout the five boroughs will be waiting to punish them through damages awards if they fail to do so.

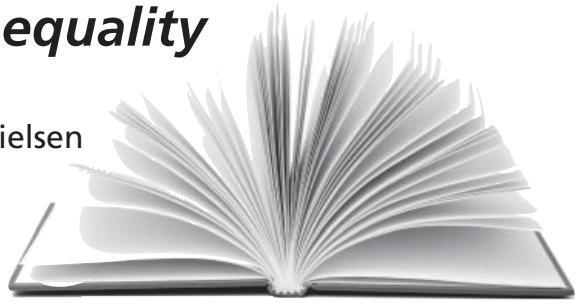
Endnotes

1. 30 N.Y.3d 325 (2017) [hereinafter, *Chauca Certification*].
2. *Chauca v. Abraham*, 841 F.3d 86, 88-89 (2d Cir.), *as amended* (Nov. 8, 2016) [hereinafter, "*Chauca I*"], *certified question accepted*, 28 N.Y.3d 1108, 68 N.E.3d 76 (2016), and *certified question answered*, 30 N.Y.3d 325, 89 N.E.3d 475 (2017).
3. *Chauca I*, at 89.
4. *Chauca I*, at 88.
5. 259 F.3d 91 (2d Cir. 2001).
6. *Chauca I*, at 95.
7. The one dissenting justice argued that the NYCHRL entitles a prevailing plaintiff "to a punitive damages charge whenever liability is proved, unless an employer has adopted and fully implemented the antidiscrimination programs, policies, and procedures promulgated by the Commission on Human Rights, as an augmentation to compensatory damages." *Id*. at 333.
8. *Chauca Certification*, at 331.
9. *Id*. at 332.
10. *Id*. at 332-33.
11. *Id*. at 330-31.
12. *Id*. at 331.
13. 75 N.Y.2d 196, 203-04 (1990).
14. *Id*. at 333.
15. *Chauca v. Abraham*, No. 15-1720, 2018 WL 1352351, at *1 (2d Cir. Mar. 16, 2018).

Book Review: *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality*

(The University of Chicago Press 2017)

Authors: Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen
Review by Vivian Berger



If I had a friend whom I wished to discourage from suing her past or present employer for discrimination, I would urge her to read *Rights on Trial*.[1] A better antidote to litigation romanticism[2] in this domain would be hard to find.

It is no secret to anyone knowledgeable in the field that employment plaintiffs have a very difficult row to hoe,[3] and the authors replow this familiar terrain in depth. Yet their analysis goes much further. As opposed to many other academic writers in the field who tend to focus on implicit bias and structural deficiencies, they posit that conscious, even blatant, prejudice continues to pervade the workplace. No less disturbing is their overriding thesis, aptly signaled by the volume's subtitle, which they have dubbed the central paradox of antidiscrimination law: far from dismantling barriers to equal employment opportunity, it perpetuates inequality even as it purports to remedy it.[4] That is so even though all of the involved parties share a commitment to the ideal of civil rights (or, in any event, talk the talk).

"In addition to fleshing out through stories the facts known at least to insiders about employment rights litigation, ROT recounts some less available data."

Having issued this stinging indictment, like prosecutors they amass their evidence in support. It derives mainly from a mixed-methodology study of a random sample of employment civil rights cases filed in seven geographically diverse federal courts[5] from 1988-2003. The team of authors supplements these data with 100 far-reaching interviews of plaintiffs, defendants and counsel, most of which were recorded and can be listened to on the book's web site. The addition of literally human voices to what might otherwise have been a dry statistical compendium enlivens and enriches the reader's experience. Conversely, the anchor of hard facts lessens the risk that the book's conclusions were heavily skewed by sample bias introduced by an interview response rate of only 51 percent. The combined numbers-and-narrative approach makes for generally easy reading by varied audiences, marred only occasionally by the intrusion of sociologese[6] and superfluous repetition of points.

Much of the picture drawn by this comprehensive analysis will not surprise my litigator and neutral colleagues, as opposed to my hypothetical friend. As previously noted, *ROT* rehearses the many daunting challenges that plaintiffs confront. Already injured by their negative experience on the job (typically, ending in termination), which originally spurred them to seek relief, these ex-employees often undergo physical and emotional problems, financial hardship, and marital discord. Such stresses may lead to drug or alcohol abuse that only aggravates the situation. They have difficulties getting and paying for counsel, with whom they typically have worse relations than employers do with their attorneys. They suffer betrayal by former co-workers who fail to support them or, even worse, testify, and (in their view), lie on behalf of the company. Adding insult to injury, the game is rarely worth the candle. Most employees feel pressured to accept what they regard as inadequate settlements,[7] but if they hold out, they are likely to incur pre-trial dismissal or defeat at trial. Among other things, the authors found that plaintiffs lose on summary judgment 57 percent of the time; of the few tried cases (only 2 percent of total filings), they prevail on a mere 33 percent.[8]

Even those few who objectively win may feel that they lost. Consider, for example, the case of Sam Grayson, a successful policeman who started to endure mysterious, debilitating physical symptoms. After Grayson had exhausted his sick and vacation time, the city, unwilling to continue to pay him or furnish health benefits, refused to grant him light duty. Unable to pay his living expenses and his mortgage, he was forced to resign in order to access the $20,000 in his pension fund. Eventually his lawsuit settled for $100,000, well above the median amount. Nonetheless, he stated in his interview: "I didn't want the money. I wanted my job back." In hindsight, Grayson was unsure he would do the lawsuit again. "It's just that personally, it took its toll on my life."[9] Not only did he not obtain reinstatement, he also had to work in a different field for much less money and was forced to declare bankruptcy. Further, he believed that the city had behaved dishonestly during the litigation. He, thus, experienced dissatisfaction with both the result and the process: a putative winner, he still regarded himself as a loser.

Vivian Berger

In addition to fleshing out through stories the facts known at least to insiders about employment rights litigation, *ROT* recounts some less available data. For instance, I was unaware (though not exactly shocked to learn) that African-Americans were much less likely than whites to have lawyers: of the *pro se* litigants in the case sample, 75 percent were black. Not content with simply setting out the numbers, the authors commendably try to tease out the possible grounds for this racial effect: lack of information or connections, financial costs, distrust of (mainly Caucasian) attorneys, and the potential for lawyer bias in screening and selecting clients. They conclude, sadly, by noting the irony that those most affected by discrimination may be the least likely to have the resources to mount effective challenges in court predictably, the unrepresented fare dramatically worse than the counseled.[10] *ROT* also documents how much of a positive difference collective action makes to employees and the resulting negative influence of the tiny number of group actions. Ninety-three percent of claims are mounted by a single plaintiff; the same percentage allege only disparate treatment claims rather than advancing broader-based disparate impact charges. The EEOC, moreover, brought only 57 systemic cases in 2014. To be sure, one would surmise that banding together aids plaintiffs. Yet the degree of value added by doing so may surprise others (as it did me). It raised the chances of winning at trial from three in ten to 50-50. *ROT's* detailed treatment of these topics amply documents the authors' conclusion that "[by] far the most significant effects on outcome are legal representation and collective legal mobilization."[11]

"The deep divisions between the sides will, therefore, almost surely preclude finding win-win, common sense ways to improve the system of employment civil rights litigation."

On a meta-level, the book describes how employment law and practice perpetuate on-the-job inequality while nominally seeking to redress it.[12] According to the authors, a law's capacity to disrupt illegitimate workplace hierarchies is undermined by three intertwined factors, all of which tend to disadvantage plaintiffs relative to employers and attorneys: structural asymmetries in power in workplaces and the courts; the adversarial nature of the conflict; and the individualization of the dispute.[13] At the outset of litigation, employees articulate three goals: "compensation, vindication, and organizational change." "[E]mployers have parallel, if reversed, goals: they pursue cost avoidance ... , vindication, and preservation of organizational patterns without legally mandated change."[14] The typical sole, discharged and impecunious worker is much worse positioned than his former employer to realize these aims.

While I have already rehearsed many of the reasons for this imbalance, one phenomenon, which both causes and enhances the parties' mutual rancor—thereby fueling legal hostilities that differentially harm plaintiffs—deserves specific mention here. That is the role of stereotypes of members of protected groups. *ROT* gives useful, detailed illustrations of these. A non-exhaustive listing includes images of blacks as "*uppity, lazy* or *stupid, dangerous* or *violent* (for males) and *bitchy* (for women)";[15] and of people with disabilities as "*faking it* or *not really disabled*, *unable to work*, and *abnormal.*"[16] The authors make a persuasive case that such stereotypes prevail in the workplace and are reinforced in litigation, the latter through a dynamic process involving both employers' and legal actors' active reliance on them and the legal system's neglect when it fails to address or remediate them.[17] Who among us is so pure that we have never, even unconsciously, relied on invidious group labels? *ROT* performs a service by stressing the ubiquity of this problem, even in the area of law and practice most taxed with its eradication.

Two final points. First, while the writers strive to be fair and evenhanded, they concededly "foreground plaintiffs' perspectives."[18] And although they disclaim the ability, based on their data, to judge the merits of particular cases, some might view the book as biased toward employees. If nothing else, the authors never really explain what they mean by terms like *illegitimate* workplace hierarchies.[19] For instance, certain of their comments imply that they regard white male predominance in company management as a key de-legitimating factor. My own take is that irrespective of whether one leans pro-employer or pro-employee, *ROT's* empirical findings and personal narratives make the book well worth reading. Those who dislike its perceived slant can ignore that and focus on the useful factual content.

Second, like many systemic critiques, *ROT* does much better at describing the disease than prescribing a cure. The kinds of approaches proposed as fixes for the problems presented include subsidizing civil representation, increasing funding for the EEOC, more broadly publicizing data on workplace inequality, enlarging the number of collective cases, revitalizing affirmative action, and encouraging worker mobilization (other than through traditional unions).[20] Worse, from the authors' vantage, business interests strongly press for countermeasures like reining in the EEOC, shifting fees and costs to plaintiffs, increasing grants of summary judgment, and end-running around courts through forced

arbitration. The deep divisions between the sides will, therefore, almost surely preclude finding win-win, common sense ways to improve the system of employment civil rights litigation.[21] Damning with faint praise, *ROT* concludes: "Perhaps its most important contribution is that it provides a venue for voices challenging illegal discrimination, even if it does not often provide significant remedies."[22]

To close, as I opened, with my hypothetical aggrieved friend, I would advise her: Don't go to court unless you absolutely have to. Try to agree with your adversary to give mediation a shot first. Not only will mediation give you a more meaningful voice than court, it will also maximize your chances of obtaining some relief soon rather than spending years of your life chasing, and likely not finding, justice. I would then offer to lend her my copy of *ROT*.

Of course, the book does not extol, and in fact fails even to address, mediation. So I might have to recommend additional readings to my friend. But *ROT* surely serves as Exhibit A for the sad proposition that employment civil rights litigation holds much less promise for aggrieved employees than they have been led to hope for and believe.

Endnotes

1. For ease and economy, I will refer to the book by the acronym ROT.
2. *See generally* Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 Cornell L. Rev. 1159, 1172-73 (1995).
3. *See, e.g.*, Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. Pa. J. Lab. & Emp. L. 487, 498-503 (2003).
4. ROT 261.
5. These were in Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia and San Francisco. After some winnowing, the team ended up with 1,788 cases; for some analyses, they utilized only the 1,672 closed ones. ROT 20-21.
6. E.g., use of such terminology as "The Reinscription of Ascriptive Hierarchies Through Law" (ROT 268) to describe the book's core thesis, *see supra* text at note 4, does not enhance a lay reader's experience. *See also id.* at 11 ("*reinscription"*is defined as "the processes by which the ascriptive hierarchies that the law is intended to disrupt are reified and rearticulated through law in the workplace and in court"*)* (emphasis in original). However, in the main, the book is written in plain English. And lawyers are hardly paragons of virtue at avoiding intrusive legalese.
7. ROT reports that the median settlement was $30,000 to $40,000 for a late settlement (one occurring after a denial of summary judgment). *Id.* at 63. In today's dollars, a $30,000 settlement in 1995, approximately the midway point of ROT's database, would be worth $48,793. See http://www.in2013dollars.com/1995-dollars-in-2018?amount=30000. This is hardly an immense amount; when one considers that many plaintiffs get nothing at all, roughly one-third of that figure would usually go to counsel, and plaintiff's share would be subject to taxes.
8. These findings accord very well with those in my studies of the federal courts in New York City. *See* Vivian Berger, *Winners and Losers: Employment Discrimination Trials in the Southern and Eastern Districts of New York: 2016 Update*, 42 NYSBA Labor & Emp. L.J. 39, 39-40 (Spring 2017) (of 2004-10 filings, 30 percent of those cases tried to verdict resulted in a plaintiff victory); Vivian Berger, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits* (*Summary Judgment Benchmarks*) (with Michael O. Finkelstein & Kenneth Cheung), 23 Hofstra L. & Emp. L.J. 45, 51-53 (2005) (data from PACER for filings in 2000 and 2001 showed a 54.6 percent loss rate of plaintiffs on summary judgment motions).
9. ROT 204-05.
10. *Id.* at 129. *Pro se* plaintiffs have dramatically higher levels of dismissal, lower rates of settlement, and higher rates of loss on motions for summary judgment than plaintiffs who have lawyers throughout their cases. *Id.* at 112. With respect to the latter, *cf.* Berger, *Summary Judgment Benchmarks*, at 58 (almost 84 percent of plaintiffs facing motions for summary judgment were defeated).
11. ROT 68.
12. *See supra* text at note 4 and note 4.
13. ROT 18.
14. *Id.* 208.
15. *Id.* 229 (emphasis in original).
16. *Id.* at 243 (emphasis in original).
17. *Id.* at 226.
18. *Id.* at 23.
19. *See supra* text at note 13 and note 13 (emphasis supplied).
20. ROT notes that unions did not help plaintiffs much in their sampled cases. *Id.* at 274. It is well known that unionization is on the decline. Where unions still exist, many may wield quite little clout.
21. *Id.* at 273.
22. *Id.* at 279-80. Similarly, the writers emphasize their own role in "giv[ing] voice to the plaintiffs who have pursued their rights, as well as the lawyers who represented them and the defendant representatives who opposed them." *Id.* at 278.

Vivian Berger, Esq. is the Nash Professor of Law Emerita at Columbia Law School. She has conducted hundreds of mediations since the mid-1990s and been designated an Advanced Practitioner in employment mediation, her focus, by the ACR.

Employee Threats to Critical Technologies Are Best Addressed Through a Formalized Insider Threat Risk Assessment Process and Program

By Brian G. Cesaratto and Robert J. Hudock

Brian G. Cesaratto

Robert J. Hudock

The pace of innovative technology in financial services and other industries is accelerating. Firms are investing heavily to develop the next cutting-edge applications that will drive future growth. Industry efforts have expanded the "attack surface" of these new technologies to dishonest employees and other malicious insiders. As the scope and criticality of these information systems increase, there is a corresponding increase in the number of employees and other insiders (e.g., a vendor or service provider's workers) who have or may seek to gain access for a financial motive or other illegitimate purposes. To best protect against insider threats, firms should develop an insider threat program comprised of workforce management policies and procedures and technical controls that specifically consider insider risks from employees and trusted business partners' workers. A formalized and targeted risk assessment process is the best way to ensure the most effective combination of personnel measures and technical controls to counter the insider risks faced by the firm and its industry.

"The government alleged that following a negative performance review and after being advised that he would not be receiving a compensation increase, the engineer used his work computer to download over 800 files and folders from a restricted network drive he had access to as a member of the engineering team."

By definition, "insiders" already have authorized access to a firm's systems and the information contained therein. They have been issued credentials (e.g., usernames, passwords) authorizing their electronic access. A malicious insider is a current or former employee, third party contractor or other business partner who has or had authorized access to the firm's network, systems or data and intentionally exceeds or misuses that access in a manner that negatively affects the confidentiality, integrity or availability of the firm's information or information systems. In other words, insiders are already inside the proverbial castle walls and have access to the "keys to the kingdom."

Insider risks involve different considerations than the risks posed by external hackers because of the insiders' trusted access. The risk assessment process, consequently, needs to focus internally by anticipating the actions that employees may take to exfiltrate trade secrets or otherwise do harm and the corresponding protective measures to counter the threats posed. The most effective approach for examining those threats is to treat each user or group of users not as trusted users, but as potentially malicious actors, and then design appropriate defensive strategies.

Successful strategies to counter malicious insider behavior ultimately depend heavily on personnel and legal departments working closely with their IT counterparts. Personnel policies and programs must closely support the system related controls implemented to protect against insider threats (e.g., robust workplace monitoring policies should be in place to support a data loss prevention/deep packet inspection program). Personnel departments, moreover, are often the first line of defense because they are the "eyes and ears" of the organization, and often the earliest to become aware of employee issues posing a cyber security risk to vital trade secrets (e.g., current drug or alcohol use, financial and credit troubles, disgruntlement).

For firms looking to protect their key technologies, the sophisticated methods that employees will utilize to unlawfully acquire key software and other electronically stored trade secrets is chilling. Recent cases provide representative examples of insider risks and the corresponding need for a formalized insider risk assessment program. Indeed, within the last year, in separate criminal matters, two computer engineers were arrested by federal authorities and charged with alleged attempted theft of trade secrets comprised of a proprietary computer code used to run the trading platforms of their respective financial services employers.[1] The risks posed by employee and other insider theft of employer technology in financial services and other industries is not new,[2] but the

stakes for firms in taking appropriate protective measures to prevent exfiltration are escalating as the technologies become ever more important to the future bottom line.

For example, in *United States v. Sazonov,*[3] the government alleged that the defendant software engineer stole critical information related to the firm's trading platform designed to analyze data and automatically implement trading strategies. The engineer allegedly logged into the firm's system and then logged into the software repository storing the platform's source code, copying the source code into a pdf file and then encrypting the file. The engineer had an additional unique log-in identifier and password to gain access to the software repository (i.e., he was a privileged user). He used steganography (which is a sophisticated method of hiding data) to conceal pieces of the source code in unencrypted form into otherwise outwardly innocuous documents and files. He allegedly exfiltrated both the encrypted and unencrypted files he had created through separate emails to an external email account he had set up under a fictitious name. He also allegedly used an "old school" method to steal the source code, printing out portions of the stolen files from his work computer and physically carrying the copies out of the office.

Similarly, the indictment of a former engineer who was part of a team working on developing cutting edge concealment fabric technology for a clothing manufacturer further highlights the sophisticated measures insiders will use to steal trade secrets. The government alleged that following a negative performance review and after being advised that he would not be receiving a compensation increase, the engineer used his work computer to download over 800 files and folders from a restricted network drive he had access to as a member of the engineering team. The engineer then allegedly transferred the files to external hard drives and other storage media he attached to his work computer, including confidential information related to the technical fabrics being developed.[4]

Firms are, therefore, well served by utilizing a formalized vulnerability and risk assessment process to identify insider threats to the confidentiality, integrity, and availability of their most critical technologies and systems and to address the specific risks. A formalized risk assessment process is a well-recognized best practice. New York State registered or licensed financial services firms are required to conduct vulnerability assessments biannually and risk assessments on a periodic basis.[5] Federal Trade Commission regulated financial institutions are also required to conduct risk assessments relevant to safeguarding non-public customer information.[6] The National Association of Insurance Commissioners has adopted a model cybersecurity law requiring a formalized risk assessment process.[7] NIST and ISO guidance also provide for periodic risk assessments.[8] An insider threat risk assessment should be part of the firm's overall risk assessment process.

In conducting an insider threat risk assessment, firms should identify their critical information systems and the supporting hardware and interconnected communication systems. The job roles associated with those key systems—i.e., any insider who by virtue of his or her job position will be granted access to trade secrets and critical data—should be identified. In particular, managerial and other roles that permit privileged access to the systems should be pinpointed (e.g., database or network administrators, super users, domain administrators, software developers). Comprehensive functional job descriptions relevant to the access to critical data and technologies should be developed detailing the interactions between the employee and the information. A map, chart, or other graphical representation of the systems and insiders should be made so that the organization can thoroughly understand the interconnectivity of personnel and key systems.

The current level and strength of existing physical, administrative, and technical controls should be identified. An essential task is to determine if the principles of least privilege and separation of duties are being followed and enforced. For each identified role, the firm should ensure that the employee has only the level of access required to accomplish the job responsibilities and nothing more. It should examine whether critical functions are dispersed between two or more employees. Similarly, the firm should determine whether there are policies and procedures in place to enforce these principles.

What Employers Should Do Now to Combat Insider Threats

- Conduct a vulnerability assessment identifying reasonably anticipated insider threats. A vulnerability is any weakness in systems, security procedures, controls, policies or procedures or implementation that could be exploited by an employee or other insider.[9] The capability to cause exfiltration or unavailability of key information for each job position should be identified and evaluated.
- Next, conduct a well-documented risk assessment to assess the likely impacts (i.e., probable losses) that may result from an exploitation or attack involving the vulnerability, depending on the level of existing insider controls or those that are planned.
- Consider whether to add to or strengthen your insider threat controls consistent with the risk, firm's business needs, risk tolerance, and a cost-benefit analysis. Usually, for high-impact "critical" systems containing trade secrets, the full range of available, most protective physical, administrative, and

technical insider threat controls, consistent with applicable law, should at least be considered.

- Plan and implement a "defense in depth," selecting the proper combination of technical controls and workforce management practices and policies pursuant to a well-thought-out strategy of risk reduction. Consider, for example, a combination of enhanced background and credit checks, enhanced offer letters and onboarding procedures, electronic system monitoring, rigorous mobile device and remote access management, protective provisions in vendor contracts (e.g., requiring background checks), encryption, multi-factor authentication, human resources data/event logging (e.g., poor performance reviews/other indicia of employee disgruntlement), employee training (e.g., training in cyber security policies or recognizing potential attacks like phishing attacks), logical and physical separation of workforce users, periodic penetration testing, decrypting encrypted communications for monitoring to prevent exfiltration, and/or technical controls disabling external media (e.g., blocking access by employees to file-sharing cloud-based websites (like Dropbox), or disabling usb/external hard drive/printer functionality).
- Implement comprehensive acceptable use, access control, workforce monitoring and formalized employment termination/resignation policies and procedures because they are a "must have" for an effective "defense in depth" against insider threats. The policies and procedures should include measures to address well-recognized cyber security risks posed by workers: excessive consumer debt, dishonesty, poor judgment, gambling, criminal behavior, addiction or outside activities that pose a security risk.
- Monitor, log and maintain evidence of deviations from normal baselines across system usage and work habits.
- Comply with applicable law, such as the Fair Credit Reporting Act and the New York City Stop Credit Discrimination in Employment Act, which regulates consumer credit and background checks.[10]
- Put in place a written formalized incident response plan in case an insider threat materializes. This should include the processes and procedures to investigate the incident and mitigate damage. The plan should be tested through table-top exercises and should be a key component of the firm's efforts.
- Ensure that vulnerability and risk assessments of insider threats are conducted periodically and as financial services and other technologies evolve.

Endnotes

1. *See* Press Release, U.S Attorney's Office for the Southern District of New York, *Software Engineer Arrested for Attempted Theft of Proprietary Trading Code from His Employer* (Apr. 13, 2017) (https://www.justice.gov/usao-sdny/pr/software-engineer-arrested-attempted-theft-proprietary-trading-code-his-employer); Press Release, U.S Attorney's Office for the Southern District of New York, *Computer Engineer Arrested for Attempted Theft of Proprietary Trading Code from His Employer* (Apr. 7, 2017) (https://www.justice.gov/usao-sdny/pr/computer-engineer-arrested-theft-proprietary-trading-code-his-employer).
2. *See* Press Release, Patrick J. Fitzgerald, U.S. Attorney, *Former CME Group Software Engineer Indicted for Theft of Globex Computer Trade Secrets While Allegedly Planning Business to Improve Electronic Trading Exchange in China* (Sept. 28, 2011) (https://www.justice.gov/archive/usao/iln/chicago/2011/pr0928_01.pdf).
3. *United States v. Sazonov*, No. 1:17-cr-00657 (SDA), 2018 U.S. Dist. LEXIS 25943 (S.D.N.Y. Feb. 16, 2018).
4. *See United States v. Seoung Jeon*, No. 1:14-MJ-00054 (D. Del. 2015).
5. *See* 23 NYCRR 500.
6. *See* 16 C.F.R.§ 314.
7. *See* Press Release, National Association of Insurance Commissioners, *NAIC Passes Insurance Data Security Model* (Oct. 24, 2017) (http://www.naic.org/Releases/2017_docs/naic_passes_data_security_model_law.htm); Brian G. Cesaratto, *Model Cyber Security Law Pending Final Action by National Association of Insurance Commissioners*, Epstein, Becker & Green, P.C. (Oct. 19, 2017), https://www.technologyemploymentlaw.com/cyber-security-and-insider-threat-management/model-cyber-security-law-pending-final-action-by-national-association-of-insurance-commissioners/.
8. *See* ISO/IEC 27001: 2013; NIST SP 800-53r4.
9. National Institute of Standards and Technology, *Glossary: Vulnerability*, U.S. Dep't of Commerce (2018), https://csrc.nist.gov/Glossary/?term=2436#AlphaIndexDiv.
10. 15 U.S.C.§ 1681; N.Y.C. Admin. Code § 8-107.

Epstein Becker Green is an official Carnegie Melon University Software Engineering Institute Partner (SEI) and licensed to provide official SEI services in insider threat vulnerability assessments to organizations worldwide.

Brian G. Cesaratto is a member of the firm in the Litigation and Employment, Labor & Workforce Management practices, in the New York office of Epstein Becker Green. His practice focuses on cybersecurity and data privacy, computer and electronic data misappropriation, breach and forensics, technology and software licensing, internal investigations and litigation. Mr. Cesaratto is a Certified Information Systems Security Professional (CISSP).

Robert J. Hudock is a member of the firm in the Health Care and Life Sciences practice, in the Washington, DC, office of Epstein Becker Green. Mr. Hudock's practice covers data breach and response, national security law, cybersecurity, and global privacy and data security. Mr. Hudock is a Certified Information Systems Security Professional (CISSP) and Certified Ethical Hacker (CEH).

The National Labor Relations Board Arbitral Deferral Under *Babcock*

By Dean L. Burrell

According to Section 8(a)(3) of the National Labor Relations Act, it is an unfair labor practice for an employer to discriminate in hiring or tenure of employment to encourage or discourage union membership. For example, an employer is prohibited from imposing discipline in retaliation against a shop steward for filing grievances.

Dean L. Burrell

The facts that give rise to an unfair labor practice charge may also give rise to a grievance under the just cause provision of the parties' collective bargaining agreement. The National Labor Relations Board must then decide whether to defer its unfair labor practice processes to the contractual grievance proceeding. The Board balances the goals of fostering arbitration and the voluntary resolution of disputes with the protection of an employee's right to be free from retaliation for engaging in union activities.

"For the Board to defer the arbitrator again must be explicitly authorized to rule on the accompanying alleged unfair labor practice either by contract or express agreement."

In *Babcock and Wilcox*,[1] the NLRB made significant changes in its standards for when it will defer Section 8(a)(3) unfair labor practice charges to the contractual grievance and arbitration process. Prior to *Babcock,* the Board's standard for deferring to an arbitration award ("post-arbitral deferral") considered: 1) whether all parties agreed to be bound by the arbitrator's decision; 2) whether the arbitration procedures were fair and regular; 3) whether the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and 4) whether the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act. The burden was on the party *opposing* deferral (typically the union or the Board General Counsel) to prove that the deferral criteria were *not* met.[2]

While *Babcock* retains the first two prongs of the existing standard (all parties agreed to be bound to the grievance procedure and its procedures were fair and regular), the new test now imposes the burden of proof on the party *seeking* deferral to arbitration— generally the employer. The party seeking deferral must show: 1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; 2) the arbitrator was presented with and considered the unfair labor practice issue or was prevented from doing so by the party opposing deferral (generally the union); and 3) Board law reasonably permits the award.[3]

The party seeking deferral establishes the arbitrator was "explicitly" authorized to decide the unfair labor practice issue by showing relevant language exists in the contract, or the parties expressly authorized the arbitrator to decide the unfair labor practice in addition to the contractual grievance such as via a side letter. It will no longer suffice that the facts presented during the arbitration hearing are relevant to both the alleged contract violation and unfair labor practice. Now the party seeking deferral must establish the arbitrator identified the unfair labor practice issue and explained why the facts do or do not support a violation.[4] The arbitrator must expressly find the discipline was not in retaliation for the grievant's protected activity.[5]

The final prong of the new standard, that Board law must "reasonably permit the award," is a higher standard than whether the award was "clearly repugnant" or "palpably wrong." Though the arbitrator may reach a different result than the Board, the award will not be disturbed if it constitutes "a reasonable application of the statutory principles governing NLRB decisions." The Board will not consider the case anew or engage in a *de novo* review of the award. It will defer even where the arbitral remedy differs from Board policy, such as in the deduction of unemployment compensation from backpay.[6]

The NLRB also applies its new standard to whether a Section 8(a)(3) charge can be deferred to the arbitration process before the arbitration hearing is held and an award issues ("pre-arbitral deferral"). For the Board to defer the arbitrator again must be explicitly authorized to rule on the accompanying alleged unfair labor practice either by contract or express agreement. The Board reasoned that it will not defer to an arbitration *process* that does not meet the new standard, when it would not defer to an ensuing arbitration *award* resulting from that process.[7]

Babcock extended the new post-arbitral deferral standard to voluntary settlement agreements between union and management reached via the grievance-arbitration process. That new test requires: 1) a showing that the parties intended to settle the unfair labor practice; 2) the

unfair labor practice was addressed in the settlement agreement; and 3) Board law reasonably permits the settlement agreement.[8]

Again, for voluntary settlements the NLRB will not expect the statutory issues to necessarily be addressed by an arbitrator in the same manner as they would have been decided by an administrative law judge. Instead, the Board now considers: 1) whether the charging party, respondent and any of the alleged discriminatees agreed to be bound; 2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation and the stage of the litigation; 3) whether there has been any fraud, coercion or duress by any of the parties in reaching the agreement; and 4) whether the charged party (generally the employer) has a history of unlawful conduct, or has breached prior settlement agreements resolving unfair labor practice disputes.[9]

"In United States Postal Service *an employee was terminated after supposedly inadvertently recording a pre-disciplinary meeting on his phone despite being told not to, in violation of an express Postal Service regulation."*

Typically, a new NLRB standard applies to all cases pending before the Board. But in *Babcock* the Board concluded this would be unfair because the parties had relied on the prior standard when negotiating existing collective bargaining agreements. Accordingly, where the current collective bargaining agreement permits arbitration of unfair labor practice issues or the parties have expressly authorized the arbitrator to consider the unfair labor practice, the Board will find that the parties agreed to be bound— the first element of the new deferral standard. Conversely, where such language does not exist the new standard shall not apply until the contract expires or unless the parties enter into an agreement to present a specific statutory issue to arbitration.[10]

General Counsel Memorandum 15-02 (February 10, 2015) provides greater detail on when to apply the prior standard, and when the new *Babcock* standard to deferral of an arbitration award applies 1) the prior standard applies if the arbitration hearing occurred on or before the issuance of *Babcock*; 2) *Babcock* applies if the underlying contract from which the grievance arose was executed after the issuance of *Babcock*; 3) where the relevant collective bargaining agreement was executed pre-*Babcock* but the arbitration hearing was post-*Babcock*, the applicable standard will be based on whether the arbitrator was explicitly authorized to decide the statutory issue.[11] The old standard applies when the grievance arose under an expired pre-*Babcock* contract in the absence of explicit authorization to the arbitrator.[12]

Not surprisingly, Board and Administrative Law Judge Decisions (ALJD) adjudicated shortly after *Babcock* focused on whether to apply the old or the new standard. For example, in a subsequent unrelated matter also involving Babcock and Wilcox, the NLRB concluded the former standard should be used since the new case was pending at the time of the issuance of *Babcock.*[13] Another ALJD addressed the proper standard for deferral to an award dated after the issuance of the new standard and contract expiration where the arbitration hearing was conducted pre-contract expiration. The ALJD applied the older standard deferring to the award because the grievance had arisen under the former contract, which did not contain a provision authorizing consideration of the statutory issue, and the parties did not explicitly authorize the arbitrator to decide the unfair labor practice.[14] Other cases similarly ruled that the older standard would be utilized in the absence of a specific clause in the contract, or where the case was pending at the time of *Babcock's* issuance.[15]

A body of law has begun to develop pursuant to unfair labor practice charges filed since the issuance of *Babcock*, and with the expiration of then current contracts. Cases note that as an affirmative defense the Region's refusal to defer an unfair labor practice charge to arbitration can be raised during the unfair labor practice trial before the Administrative Law Judge, and is appealable to the Board. In *Columbia Memorial Hospital* the Administrative Law Judge cited *Babcock* for the proposition that as an affirmative defense the employer's attempt to raise deferral after the unfair labor practice trial had closed was untimely.[16]

A similar determination was reached in evaluating whether to defer to a settlement agreement in *Richfield Hospitality.*[17] In addition to concluding that he could not consider deferral as a defense to an unfair labor practice proceeding when the settlement agreement had not been raised in the employer's answer to the charge or during the unfair labor trial, the Administrative Law Judge also ruled that the settlement agreement did not meet deferral standards where the grievant was not a party to the settlement, the Board General Counsel could not be a party since the charge had not been filed at the time of the settlement, and the employer had failed to implement the settlement agreement by not removing discipline from the grievant's file raising the concern that the settlement was repugnant to the Act.[18]

In *United States Postal Service* an employee was terminated after supposedly inadvertently recording a pre-disciplinary meeting on his phone despite being told not to, in violation of an express Postal Service regulation.[19] The arbitrator overruled the discharge and ordered the grievant to return at a specific date and time. When the grievant refused, he was given a second notice of removal for failing to comply with the arbitrator's award. The unfair

continued on page 31

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continued from page 26

labor practice charge claimed that the Postal Service regulation prohibiting recording violated Section 8(a)(1) of the Act. Applying *Babcock,* the Administrative Law Judge concluded that deferral to the arbitration award was not appropriate because the arbitrator did not consider whether the Postal Service rule constituted an unfair labor practice, and whether the grievant was discharged in retaliation for engaging in protected activity or conduct. Ultimately, the employer rule was held to violate the Act and a separate compliance proceeding was recommended to determine whether the grievant's refusal to return to work foreclosed reinstatement.[20]

"The long-term impact of Babcock *remains to be seen."*

This decision is compelling for two reasons. First, because while *Babcock* applies to Section 8(a)(3) violations, here it was applied to an independent Section 8(a)(1) claim. Second, the arbitrator had overruled the removal—arguably reaching the correct result though not through an unfair labor practice analysis— yet the Administrative Law Judge declined to defer to the award.

Navopache Electric Cooperative, Inc. also applied *Babcock* to ascertain whether deferral was appropriate in a Section 8(a)(1) allegation of an overly broad employer rule, stating that employees report to the general manager on personnel matters and do not have access to the Board of Directors.[21] The Administrative Law Judge declined to defer to the grievance and arbitration procedure in the absence of an explicitly contractual term authorizing the arbitrator to decide the alleged unfair labor practice, and also found deferral to be inappropriate because the policy applied to all employees, many of whom were not union members. No caselaw was cited for this proposition, which arguably runs counter to Section 8(b)(1)(b), which prohibits unions from deciding the member of management with whom they'll bargain.[22]

The GC Memorandum instructs the Regions to submit to the Division of Advice cases where the Region would issue a complaint because of an insufficient remedy in the arbitration award, *including cases where the award fails to provide a notice posting*. This is significant because notice postings are not discussed in *Babcock* and generally are not imposed in arbitration awards. Anecdotally, avoidance of a notice posting is why employers often prefer to settle through the contractual grievance procedure rather than with the NLRB, since the Board requires a notice posting when settling a Section 8(a)(3) charge.[23]

The long-term impact of *Babcock* remains to be seen. Clearly, to ensure deferral the parties must decide whether to expressly incorporate Section 8(a)(3) rights in successor contracts—language prohibiting employers from retaliating against employees engaged in union activity, for example. Arbitral remedies will now be subject to heightened scrutiny by the Board. It is still too soon to see whether *Babcock* decreases the number of voluntary grievance settlements, since the Board General Counsel has indicated it may take a closer look at agreements without notice postings, and employers may be unwilling to voluntarily settle grievances if a notice is required. Finally, because the parties' representatives and even the arbitrators may not be attorneys they may lack the requisite knowledge to address the increased application of Board law in arbitration awards, leading to even greater use of lawyers with ensuing higher costs.

Endnotes

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2. *Olin Corp.*, 268 NLRB 573 (1984).
3. *Id.* at 5.
4. *Id.* at 5-6.
5. *Id.* at 8-9.
6. *Id.* at 7-8.
7. *Id.* at 12-13.
8. *Id.* at 13.
9. *Id.* at n.37, citing *Independent Stave*, 287 NLRB 740, 743 (1987).
10. *Id.* at 13-14.
11. The General Counsel will also apply *Babcock* where the grievance arose under a contract that automatically renewed post-*Babcock*_ when the parties did not attempt to reopen negotiations, or a post-*Babcock* agreement to extend an expired contract for a specific term, unless that extension is temporary until a successor contract is completed. In that instance *Babcock* applies if the arbitrator was explicitly authorized to consider the unfair labor practice. *Id.* at n. 41.
12. *Id.* at 9-10.
13. *Babcock and Wilcox*, 363 NLRB No. 50, n. 1 (2015).
14. *Howard Industries,* Case 15-CA-131447, JD(ATL)-19-15, 2015 NLRB LEXIS 731 (September 24, 2015); adopted 365 NLRB No. 96 (2017).
15. *Murray American Energy, Inc.*, Cases 06-CA-148388, 06-CA-149117, JD-26-16, 2016 NLRB LEXIS (April 5, 2016); *Mercy Hospital,* Case 18-CA-155443, Case 18-CA-163045, JD-39-16, 2016 NLRB LEXIS 330 (May 6, 2016); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016).
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Dean Burrell is an Arbitrator and Mediator based in Morristown, New Jersey. An earlier version of this article originally appeared in *New Jersey Bar Labor and Employment Quarterly.*

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Representation and Reputation: The Old and New Variables of Arbitration

By Emily Little

"Do I believe in arbitration? I do. But not arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion," stated Samuel Gompers, the founder and first President of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). The Federal Arbitration Act (FAA) of 1925 designed a new method to settle disputes that bypassed the need for litigation. Although there is not an actual definition given in the FAA,[1] a general popular understanding is that arbitration is the mutual act between two parties in a dispute wherein both agree to hand over authority to a neutral third-party who forms a legally binding resolution. Arbitration gradually became an alternative resort to litigation throughout the 20th century as courts attempted to diminish backlog within the justice system.

Over two dozen statutes regulating working conditions were instituted by Congress during the time period of 1963-1993, which led to the "litigation explosion" in US courts.[2] Through court mandates and collective bargaining agreements, arbitration became the new popular method of solving disputes in the workplace. By the turn of the century labor arbitration decreased dramatically with the fall of unionism and as a result employment arbitration began to rise dramatically.[3]

"Employers continue to use the economic circumstances of the employee as a power advantage in the actual execution of an arbitration agreement."

Labor arbitration contrasts with employment arbitration in terms of the representation available to the employee. During the process of labor arbitration, a union representative is present in the hearing and is responsible for defending the rights of the employee, but during employment arbitration, there is neither a union representative nor any assurance of a legal counsel to defend the interests of the employee. Justice during an arbitration hearing must include ensuring a balance within the power dynamic between the employer and the employee, in regards to the resources and impartiality available through the process.

Going Into Battle Unarmed: The Individual vs. the Corporation

Arbitration agreements between employees and employers are increasingly becoming a common element in the workplace. A 2011 study determined that 83 percent of Fortune 1000 companies have used arbitration[4] in their workplace to settle a dispute.[5] Surprisingly though, many employees are unaware of the actual implications involved with an arbitration clause in an employment contract, specifically the procedural rights that are relinquished in cases that fall into the hands of an arbitrator rather than a judge.[6]

Emily Little

The Agreement Enigma

So why are so many employees signing these agreements they don't understand? The answer to the "agreement enigma" lies in individual psychological tendencies and economic survival. The psychological process known as representative heuristic is quite relevant in this context as it is the act of forming a judgement on an entire event based on a few experiences that are not an efficient representation of the whole.[7] This is often the case in the agreement enigma as many potential employees view their relationship with their future employer based on the few interactions that have taken place between them and therefore often view the employment forms they receive as falling within both parties' best interests.

The growing number of employment contracts including an arbitration clause is influencing the economic freedom of employees. As arbitration becomes an inescapable part of workplace, the economic power of the employer is significant as the labor supply is consistently higher than the demand. The power of the paycheck is the leading cause of the agreement enigma because employees are forced to accept the arbitration as a part of the new social contract in the workplace. Failure to agree to arbitration directly leads to failure to obtain employment, which is a societal norm for economic survival.

Some scholars may argue that arbitration is not necessarily always binding, and this is partly true. In most non-promulgated arbitration cases, the employees are often in a higher position regarding skill level and therefore can negotiate the terms of the arbitration agreement because of the low supply and high demand for these workers.[8] The employees who do not fall into this category of high-skilled workers are considered by employers to be replaceable and thus the terms of the employment contract is at the discretion of the employer.

The Salary Effect

Employers continue to use the economic circumstances of the employee as a power advantage in the actual execution of an arbitration agreement. In many high-supply careers, mandatory arbitration is implicit as is a lower salary. Low salaries in many cases breed disaster for the win rates among employees in arbitration. A study[9] conducted by Cornell Professor Alex Colvin concerning employment arbitration cases found that 82.4 percent of the plaintiffs in the sampled cases received salaries that fell under the $100,000 threshold.

Interestingly, but not surprisingly, the salary of an employee has a significant effect on both the win rate and the amount awarded to the plaintiff.[10] Only 22.7 percent of plaintiffs with salaries under $100,000 won in the arbitration process, whereas employees with salaries over $250,001 won 42.9 percent of cases in arbitration.[11] In addition, for the former employees the mean award was a mere $19,069 and for the latter employees with bigger pockets the mean award totaled to 165,671.[12] What is it that these bigger pockets could purchase in an arbitration hearing that could make such a substantial difference in the win rate?

First, the fees associated with arbitration can be quite costly to the plaintiff, ranging from $7,138 to $11,070 for cases that continue without settlement to a final award.[13] Fortunately, it may seem at least, 97 percent of employers pay all the arbitration fees.[14] The monetary costs associated with an arbitration hearing for an employee therefore often only involve the legal costs for the employee's own defense.[15]

"An arbitrator's employment therefore is not based on the views of the average employee, but rather is contingent upon acceptance by an employer as that determines the opportunity for repeat business."

Some scholars like Samuel Estreicher claim that employees are provided with an advantage in that an arbitration hearing is a much more feasible financial option than litigation. Estreicher claims that through this process plaintiffs are better able to attain justice because the costs of litigation are much higher and only those employees with monetary means can pay the legal representation fees and the court fees needed to seek proper justice.[16] This argument is simply too narrow as it does not take serious consideration of the legal fees associated with a non-union employee defense team needed during an arbitration hearing to stand a chance against the employer. Legal defense attorneys for employees are not paid for by the employer and, as such, there exists an extreme imbalance of power in the ability for the plaintiff to present his or her case against the much more experienced defense team representing the employer.

Emily Little is a postgraduate research student of law at the University of Cambridge where she is analyzing the European Pillar of Social Rights. She served as the Eleanor Emerson Fellow at Cornell University in 2016-2017 where she began her graduate studies in industrial and labor relations. After completing research in the UK, she will be returning to the U.S. to continue her studies in the field of labor relations.

Arbitration: The Judicial Substitute Failure

A main argument of Estreicher is that legal costs are associated with both arbitration and litigation, but at least with arbitration there would be an actual mode of justice available to all employees. Once again, Estreicher's point of view is too narrow as it omits the fact that there is the option in court for a public defender as well as other distinctions that make arbitration far less of a justice-seeking approach than provided by the courts.

To begin, an arbitrator is neither required to be a trained, legally educated judicial officer nor is he or she required to apply the rules of evidence as in litigation.[17] The discretion and judgement of the arbitrator toward the plaintiff's claims is the exclusive and final determinant of a case in that an appeal is not part of the arbitration process.[18] To be sure, an arbitration process does not have to involve the judgement of an official educated in the national or state laws, the standard rules of evidence in court do not apply in this setting, and if a disagreement with an award arises there is no method for appeal and thus no legal review of a process that is supposed to provide justice, but yet does not follow the standard rules of our justice system.

In the article "Against Settlement" author Owen Fiss discusses the importance of a judge's role in providing justice and a balance of power between the parties. Fiss argues that a judge has the ability to counteract the power advantage of a corporation's legal defense in court through presenting his or her own witnesses and others to present in the trial as amici.[19] This type of assurance of a balance of power is less likely in an arbitration hearing where the corporation is not only paying for the fees the arbitrator charges, as stated earlier, but also selecting the arbitrator for the hearing.

The Selection Process

Employers often have an advantage in their selection of an arbitrator because many self-represented employees are not aware of which arbitrator to choose, so the decision tends to lie in the hands of the employer. Some scholars may argue that arbitrators in employment arbitration

are chosen from an ethically approved non-profit organization like the American Arbitration Association (AAA) and therefore impartiality is a guarantee in the process. It is important to understand that although an arbitrator may be approved by AAA, there is still a possibility of an arbitrator favoring in a biased manner one party over another because of the confidentiality of awards and the difficulty involved in proving the arbitrator ruled unfairly.

If an employee feels that an arbitration award is skewed in favor of the employer, then the employee's only option is to bring the issue to court.[20] As stated earlier, many employees in an arbitration proceeding tend to have lower salaries and hence likely cannot afford representation for the arbitration hearing or the legal defense team required to adequately argue in court the impartiality of the arbitrator.

"As for reputation, the arbitrator must be held to stricter enforcement measures to ensure ethical conduct."

Therefore an arbitrator does not face a grave threat of ethics charges because the likelihood of an arbitration award being questioned in court is very slim and the confidentiality of the awards creates a barrier for whistleblowers (who are not part of either party) to bring the case to the attention of the public. An arbitrator's employment therefore is not based on the views of the average employee, but rather is contingent upon acceptance by an employer, as that determines the opportunity for repeat business.

The Repeat Player Effect: Systematization of Corporate Wins

A popular theory that has captured the attention of many arbitration scholars is known as the repeat player effect. Essentially this theory suggests that arbitrators tend to rule in favor of the employer in employment arbitration cases because of the power the employer holds in potentially re-selecting the arbitrator to settle future disputes in the workplace.[21] Many studies have focused on the repeat player theory and there seems to be a pattern that has emerged.

The Data

From a study[22] completed in 1997 by Lisa Bingham the repeat player effect certainly took hold of the results in that only 16 percent of employees won in employment arbitration involving a repeat player employer.[23] A similar study,[24] conducted between 2003-2013, found that only 19.1 percent of employees in arbitration cases won. In the same study, 65-68 percent of employers in the cases were repeat players and the mean number of cases brought by these employers to arbitration totaled 63 cases.[25] The low percentage of win rates among employees and the high rate of repeat arbitration employers points to the very real potential of the repeat player effect being more of a fact than a theory.

Analyzing the usage of precedent citations by employers during the arbitration process also presents an interesting argument that could support the repeat player effect. A study conducted by UNC law professor W. Mark Weidemaier samples a series of publicly released AAA arbitration awards that show a high percentage of employment arbitrators cite judicial precedence in their awards. In this specific study, 98.7 percent of the employment arbitration awards included a judicial precedent, but only 1.3 percent cited a previous arbitration award.[26] In an arbitration hearing why would most arbitrators cite judicial precedent and almost never a previous arbitration award? In the study, Dr. Weidemaier proposes that arbitration awards are not viewed with the same legitimacy as judicial precedent.[27] There may be a bigger reason, though, behind this hidden precedence than a dearth of legitimacy.

The Power of Interpretation

Many arbitration hearings are now settling statutory rights disputes, which used to only be considered the territory of the court system. As stated earlier, the arbitration arena is quite different from that of the litigation arena in terms of discovery and rules of evidence within the process. Given this leniency, it seems plausible that arbitrators could in fact be interpreting judicial precedence in a way that favors the employer in a particular case. This could also explain why arbitration awards are often not cited because the arbitrators could be molding the interpretation of the judicial precedent to fit each individual case to benefit the employer's argument.

So, it could very well be that arbitration awards are not utilized because the language used in such documentation is so specific whereas legal reasoning is often left very broad in order to be relevant to future cases and thus allow for new interpretations to be easily formed. The lack of citing arbitration awards and the confidentiality associated with the awards provides an avenue for arbitrators to appease employers by not maintaining any sort of consistency in their rulings. This is not to say that an arbitrator will engage in unethical behavior, but rather one should note the relative ease that the system currently provides for a neutral to engage in unchecked partiality, except in cases where money is not a deficient resource for the plaintiff.

Conclusions

The imbalance of power between the plaintiff and defendant in the process of employment arbitration disturbs the pursuit of justice. At the start of the arbitration boom in the middle 20th century the employees and employers

were often on an even playing field as both parties were represented by a legal counsel who understood the procedures and the expectations of the arbitration process. An employer had a legal defense team that could stand toe with toe with the union representative defending the employee. Now representation is no longer guaranteed and it is becoming more evident that the arbitration system is not up to par with the same justice system in which the courts reside, which guarantees both a fair trial and a public defender.

In the current climate of low union density and subsequently low representation for employees, the arbitration process has become somewhat of a tool for the elite corporate class. Corporations are now able to more easily impose their power on their employees while ensuring that employment practices are no longer constrained by the same measures of fairness and responsibility as is still practiced in the less common labor arbitration proceedings. Fairness in the arbitration system must be restored in order to maintain legitimacy by both parties.

Arbitration must begin to be reformed by lessening the monetary impact affecting the parties' representation and reputation in the proceedings. Representation should be guaranteed to the plaintiff as would be provided in the court system. If arbitration is to replace the courts, then it must do so without retracting the rights granted to individuals by the court system. Arbitration should replace the courts as a substitute rather than act as a diluted clone.

As for reputation, the arbitrator must be held to stricter enforcement measures to ensure ethical conduct. A system of checks and balances should be imposed in the arbitration system in terms of creating an appeal process for the parties. The current appeal process in arbitration is only available to those parties with the monetary resources to seek an appeal. This is very disconcerting and should be remedied by requiring the corporations who apply mandatory arbitration to provide a peer-review board.

A peer-review board would include a selected number of rank-and-file co-workers who would be chosen at random and remain as unknown by either party throughout the process. Their ultimate job would be to review the case and the award given by the arbitrator and render their own decision in the case, which would be the only step of the appeal process. This type of system would continue to be less expensive and less timely than the courts while also involving the input of the plaintiff's peers much like a jury in a court case. Justice and legitimacy should be the benchmarks of the arbitration system, and in order to provide both these elements the arbitration system must begin to emulate the court system through guaranteed representation and impartiality in decision-making.

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Family and Medical Leave Act: The Need for a Uniform Policy in the United States

By Priyanka Verma

Introduction

Priyanka Verma

Being a new parent is an important responsibility. And for parents who are forced to take unpaid family leave, the situation becomes more challenging. The United States is the only industrialized country in the world that does not require employers to provide employees paid family leave.[1] Instead, large employers are required to provide up to 12 weeks of unpaid leave pursuant to the Family and Medical Leave Act (FMLA). According to the U.S. Department of Labor, only 13 percent of American women receive any paid leave through their employer.[2] About 60 percent of the U.S. workforce is covered by the FMLA,[3] which grants mothers and fathers a right to unpaid parental leave, but not paid leave.[4] Paid parental leave is essential for employees who want to spend time with their family and bond with their children. Many big companies, like Google, have come up with an improved policy to support their employees who are working parents.[5]

"Some argue that becoming a mother is a choice, and others should not have to pay for it. But women should not be forced to choose between having children, working full time, or leaving work and putting a financial strain on their family."

This article will discuss the need for a more uniform parental leave policy. First, a brief history of the FMLA will be presented, along with a critique and some potential solutions to make the FMLA more efficient. Then, a short analysis of what is being done at the state level, followed by a discussion of the failed legislation by Congress for paid parental leave. Finally, the factors comprising an ideal uniform policy for paid parental leave will be examined.

Problems and Potential Solutions to Improve the FMLA

In 1993 Congress passed the FMLA, requiring employers to provide 12 weeks of unpaid leave for certain reasons, such as the birth or adoption of a baby, caring for a family member with a serious health condition, or the employee's own serious health condition.[6] The purpose of this statute was to ease the burden of balancing work and family issues.[7] Studies suggest that most Americans work for employers who do not offer paid parental leave.[8] According to the U.S. Department of Labor, "only thirteen percent of men who took parental leave [in 2012] received pay compared with twenty-one percent for women."[9] Even if parents can afford unpaid leave, their workplace may pressure employees not to exercise their right to leave.[10]

There are problems with the FMLA. It creates inflexibility, especially for employees who want to spend time with either their sick family members or their children. A large percentage of the population is not protected by statute.[11] In addition, there is no coverage for employees who work in a place with fewer than 50 employees.[12] Further, because FMLA only provides for unpaid leave, many workers who are entitled to leave cannot afford to take it.[13] Moreover, the list of reasons for which employees are entitled to leave is very narrow. The leave provision that allows time off for a new child covers biological, adopted, and foster children, as well as stepchildren and legal wards.[14] The list does very little to help parents deal with day-to-day work/family conflicts.[15] Additionally, women make up the overwhelming majority of those who take FMLA leave for the birth of a child or to care for a sick family member. Men should be encouraged take FMLA leave as well.[16]

Employers complain about employee abuse and the difficulty of administration of the serious health condition provision of the statute.[17]

Other arguments against paid parental leave may be that the FMLA stands for parental leave and nothing more is needed. The FMLA clearly states that when workers must leave for medical or family reasons, they can come back to work without the fear of losing their job. However, it is unpaid and does not cover all workers. Many women in lower paying jobs do not qualify. Another argument against paid leave is that it is a huge burden to a woman's employer and the company should not pay for extended absences for workers who are not contributing. That is not true. In 2011, California's Center for Economic and Policy Research found that 91 percent of businesses with paid leave policies reported positive benefits or no effect.[18]

Some argue that becoming a mother is a choice and others should not have to pay for it. But women should not be forced to choose between having children, working

full time, or leaving work and putting a financial strain on their family. This is something that many women cannot afford to do so. It may be argued that if there is paid maternity leave, it would likely increase the wage gap. However, it is incorrect to say that if a woman wants an employer to pay for her maternity leave, she should agree to a lower salary. The 12 to 18 weeks that a woman is gone do not affect her performance and growth.[19] In fact, the current unpaid maternity leave process does a lot to widen the wage gap. Experts estimate that with every child a woman has, her wage goes down by four percent.[20] Some question whether paid parental leave must be federally mandated, arguing it should be left to individual companies or states to work it out. This issue affects both men and women across the nation. Half the workforce is female, but, according to the Department of Labor, only 12 percent of women have paid maternity leave.[21] Lack of maternity or even paternal leave may stigmatize workers—specifically mothers—make them less desirable hires.

Some potential improvements to the FMLA include lowering the number of employees an employer must employ that triggers the protection of the Act.[22] Companies can consider decreasing or eliminating the one-year and 1,250 hours of work requirement that triggers coverage.[23] Further, companies could consider allowing at least 12 weeks of parental leave.[24] Companies should also try to expand the list of individuals for which an employee can take leave to provide care,[25] and the reasons for which an employee can qualify for FMLA leave.[26] Finally, the FMLA should provide paid leave, not just unpaid leave.[27]

Parental Leave at the State Level

At the state level, California, New Jersey, and Rhode Island require some form of paid parental leave,[28] while in New York a law requiring paid parental leave took effect in January 2018.[29] It covers 50 percent of a worker's average wages for up to eight weeks—the longest period of time covered by a state leave policy.[30] This leave policy covers 67 percent of a worker's average wages for up to 12 weeks, fully twice as long as any of the current state policies.[31] New York imposes a cap on the money paid out to workers each week, and the leave payments will be funded by an employee payroll deduction.[32]

"A 2000 study by the Department of Labor found that among workers who reported that they needed FMLA leave but did not use it, 78 percent said it was because they could not afford to take unpaid leave."

Priyanka Verma received her JD from the Maurice A. Deane School of Law at Hofstra University where she was a Child and Family Advocacy Fellow. She received her BA from Adelphi University, magna cum laude.

In December 2016, the District of Columbia passed one of the nation's most generous paid family leave bills. In a 9-4 vote, the D.C. City Council voted for the Universal Paid-Leave Amendment Act, which gives eight weeks of leave to new parents, six weeks for caring for a gravely ill family member, and 2 weeks for personal sick leave.[33] This paid leave program is funded by a new business tax that would raise $250 million a year to cover costs.[34] Federal employees would not be covered, but residents of Virginia and Maryland who work in D.C. would be covered and self-employed workers could choose to opt in.[35] When the employees take leave, their pay comes from a citywide pool.[36] Workers will get 90 percent of their pay back, up to 1.5 times the minimum wage (equivalent to $46,800 in 2020, when the minimum wage reaches $15.00/hour).[37] Any amount over that would be paid back at 50 percent, capped at $1,000 per week.[38]

Failed Parental Leave Legislation

A campaign for federal legislation to mandate paid parental leave has been unsuccessful.[39] In addition, calls for legislation requiring paid parental leave have grown in recent years, with President Obama proclaiming his support for such reforms.[40] In 2013, Senator Kirsten Gillibrand and Representative Rosa DeLauro proposed the Family and Medical Insurance Leave Act ("Family Act").[41] This law would provide up to 12 weeks of paid leave each year to qualifying workers for the birth or adoption of a new child, the serious illness of an immediate family member or a worker's own medical condition.[42] Workers would be eligible to collect benefits equal to 66 percent of their typical monthly wages, with a capped monthly maximum amount of $1,000 per week.[43] This bill is modeled on already existing programs in California, New Jersey and Rhode Island that created self-sustaining funds to ensure workers could earn a portion of their wages for up to 12 weeks of leave.[44] This Act would have created a shared fund to make paid leave affordable to all employers.[45] This would be the third time Gillibrand and DeLauro introduced the FAMILY Act.[46] It also went before Congress in 2013 and 2015.[47] In the last session, the bill was read twice in the Senate and was referred to the Committee on Finance, but got no further.[48] In the House of Representatives the bill got as far as the Subcommittee on Social Security.[49] A bill like this could have passed if there is board-based bipartisan support for paid family and medical leave. However, with a divided Congress, that is difficult.

The Ideal Policy

Implementing strong parental leave policies have significant business and social benefits.[50] For the employer, such policies can result in greater employee loyalty and productivity, successful recruitment efforts, increased employee retention, and enhanced client satisfaction and retention and business development.[51] Strong parental leave policies also have important social benefits, such as fostering parent-child bonding and promoting equality in the workplace.[52]

Parental Leave Should Be Partially Paid for by Employers

A 2000 study by the Department of Labor found that among workers who reported that they needed FMLA leave but did not use it, 78 percent said it was because they could not afford to take unpaid leave.[53] The paid parental leave scheme in California can serve as a model for paid leave reform. In 2002, California enacted the Paid Family Leave Program (PFL) to provide workers with up to six weeks of leave per year to bond with a new child or care for a seriously ill family member.[54] During those six weeks, employees receive approximately 55 percent of their wages from the state's temporary disability insurance program[55] which is funded by a 1.2 percent employee payroll tax.[56] Both New Jersey and Washington have adopted a scheme similar to California.[57] Paid leave can help low income and single family households better cope with the necessary family and medical leave.[58] Since these types of paid leave schemes are funded by an employee payroll tax,[59] they impose no direct monetary costs on employers and have relative low costs overall.[60] However, there might be a drawback from Congress when it comes to allocating funds in the federal budget for state-level programs, especially now.

"Another study indicates that infants with a father acting as their primary caregiver are typically 6 to 12 months ahead of their peers in problem solving capabilities."

Another proposal that companies, states or even Congress can follow is the Family Leave Insurance Act of 2007 (FILA), proposed in 2007 by Senator Christopher Dodd in the Senate, but not enacted.[61] It would have established a federal insurance fund to provide eight weeks of paid family and medical leave to employees for the conditions permitted by the FMLA.[62] FILA established ways for those employers not covered by the FMLA to take advantage of FILA by allowing them to participate voluntarily.[63] FILA determines the amount of paid leave allowed based on annual income. It granted employees of covered employers with "an annual income of not more than $20,000" full salary compensation while on leave.[64] From that point, the percentage of pay decreases, ending with "an employee with an annual income of more than $97,000" receiving 40 percent of "the daily earnings of an employee with an annual income of $97,000."[65]

Companies can even try to put forth a flex plan, where a percentage of the employee's salary is set aside for paying medical bills. This plan can also include a reduced work-from-home schedule that will pay an employee some money during the leave and lighten the employer's work.

It Is for Women (Regardless of Marital Status), Men and Adoptive Parents (Applies to All Employees)

It might be helpful to enforce parental, as opposed to maternity, leave. This eliminates the gender gap and forces employers to treat women and men alike. The period immediately following the birth of a child or the adoption of a child is a critical in shaping both men's and women's perceptions of parental competence and determining long-term division of childrearing responsibilities.[66] Limiting paid leave to mothers perpetuates the unacceptable stereotype notion that only women can or should care for children. Fathers, non-birth moms in same-sex partnerships, two-dad families, and adoptive parents, are all equally in need of adequate time to care for and bond with their newborn and ill family members.

"There have been calls for improving parental leave. Companies can lead the way in instituting parental leave policies which are at odds with the country's lack of mandatory parental leave."

Nearly 25 million American workers provide care for an elderly family member or friend who needs help with basic personal needs and daily activities.[67] Nearly one in three American households care for an adult with a chronic disease or disability.[68] The United States provides very few benefits for long-term care of the elderly other than limited means-tested benefits for the poor.[69] Companies could consider letting their employees work remotely.

FMLA leave should also be available to workers who need to care for grandparents, grandchildren, siblings, in-laws and domestic partners. There are a number of social reasons behind lack of paternal leave, such as employer and co-worker hostility, peer pressure, and the concept that women are more naturally suited to parenthood, regardless of their status as birth givers.[70] However, getting paid leave can induce more fathers to take parental leave. One estimate suggests that 20 percent more fathers would take parental leave if the FMLA provided six weeks of paid leave.[71] Many women surveyed in a report by the Human Rights Watch claimed that the presence of their partners would have immeasurably helped their

recovery from childbirth.[72] The study highlighted the struggles of women and stated that women are unable, either physically or emotionally, to handle the challenges of parenthood alone when first returning home from the hospital.[73]

Parental leave policies "are for the sake of babies who need loving care, and for the sake of their parents who need time to develop relationships with their babies."[74] A five-year study illustrates the importance of the bond between a newborn and its father, showing children from role-reversed families were more sociable and persistent in adaptive skills tests than children raised in traditional families.[75] Another study indicates that infants with a father acting as their primary caregiver are typically 6 to 12 months ahead of their peers in problem solving capabilities.[76] Also, men who take a more hands-on approach to parenting often report positive life-changing experiences that bond them to their children and deepen their sense of humanity.[77]

It Is at Least 12 Weeks

Taking 12 weeks off without the stress of lost income may help parents get rest and adjust to their new role at home. Less than six weeks makes it out of reach for low-income women, and employers need to make sure that women medically heal from the birth (need to account for medical complications from birth or recovery). Companies must realize that there might be serious health concerns regarding the newborn or other loved ones such as aging parents, young children, or spouses and partners. Caregiving work also falls disproportionately on women.

Conclusion

Parental leave has been a long-standing issue, especially in the United States. The U.S. is the only country among 41 nations that does not mandate any paid leave for new parents. According to the data compiled by the Organization for Economic Cooperation and Development (OECD),[78] the smallest amount of paid leave required in any of the other 40 nations is about two months.[79] The FMLA has failed to achieve a primary goal to establish true gender equality in the workplace and in the home.[80] There have been calls for improving parental leave. Companies can lead the way in instituting parental leave policies that are at odds with the country's lack of mandatory parental leave. This includes extending coverage to a wide array of employees and family members.

Endnotes

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8. Soc'y for Human Research Mgmt., 2014 Employee Benefits: An Overview of Employee Benefits Offerings in the U.S. 30 (Katya Scanlan ed., 2014), http://docplayer.net/157196-2014-employee-benefits-an-overview-of-employee-benefits-offerings-in-the-u-s-a-research-report-by-the-society-for-human-resource-management-shrm.html (estimating twelve percent). Estimates of the number of employers offering paid leave in the United States vary based on research methodology, including how "paid parental leave" is defined. Two recent studies suggest that 12 to 58 percent of employers in the United States offer paid parental leave to women, while only 12 to 14 percent offer paid parental leave to fathers; the statistics for women vary in large part based on whether disability leave for new mothers counts as "parental leave."
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13. 29 U.S.C. § 2612(c) (2006); *see* also Ann O'Leary, How Family Leave Laws Left Out Low-Income Workers, 28 Berkeley J. Emp. & Lab. L. 1, 45 (2007) (stating that 75 percent of employees reported not being able to afford to take leave). *See* Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 Mich. J. Gender & L. 113, 140-41 (1998) (stating that many cannot afford to take unpaid leave and this creates a disparity between those who can and cannot afford to take an unpaid leave).
14. *See* Jennifer Thompson, *Note, Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. Miami Bus. L. Rev. 77, 86-87 (2004).
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16. *See* Young, *supra* note 13 at 143 (stating that "the FMLA does little to … promote equal opportunity for women in the workplace"); Porter, *supra* note 11, at 379 (stating that the FMLA might actually harm "women because it has done nothing to change the leave-taking patterns of men and women").

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Abridgment of Employee First Amendment Rights: Bridging the Gap Between Employee Speech in the Public and Private Sectors

By Courtney Sokol

Introduction

Fifty years ago, in *Pickering v. Board of Education*, the Supreme Court of the United States determined that citizens do not surrender their First Amendment rights by accepting public employment.[1] But in 2006, in *Garcetti v. Ceballos*, the Court determined that speech by government employees, made within the scope of their employment, is not constitutionally protected.[2] This landmark decision dramatically overhauled the framework courts apply when analyzing First Amendment retaliation claims by employees, and made it virtually impossible for public employees to invoke First Amendment protections when speaking "pursuant to their professional duties."[3]

"The First Amendment jurisprudence controlling public employee speech is articulated by a trilogy of landmark decisions, which narrowly define free speech protections afforded to government actors."

Currently, the speech rights afforded to public sector employees are categorically different from those rights enjoyed by their private sector counterparts. In the private sector, the drafters of the National Labor Relations Act (NLRA or "the Act") embraced the spirit of the First Amendment and codified Section 7 of the Act to protect private sector employee speech pertaining to the terms and conditions of the speaker's employment.[4] The NLRA states, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[5] This provision has been interpreted to mean that private sector employees, under the protection of the NLRA, may speak freely to each other and to the public about the terms and conditions of their employment.[6]

Public sector employees do not enjoy the same freedoms as employees protected by the NLRA. *Garcetti* sets a dangerously high standard for government employees to overcome when bringing a First Amendment retaliation claim against their employer. Neil Gorsuch, the newest appointee to the Supreme Court, appears to agree that *Garcetti* poses an exacting burden.[7] In a Tenth Circuit opinion, Gorsuch stated, "*Garcetti v. Ceballos* … profoundly alters how courts review First Amendment retaliation claims."[8] In holding that an employee's conduct "fell sufficiently outside the scope of her office to survive even the force of the Supreme Court's decision in *Garcetti*," Gorsuch affirmed that "speech reporting the illicit or improper activities of a government entity or its agents is obviously a matter of great public import."[9] Justice Gorsuch's sympathy for employee First Amendment rights suggests that he will argue that speech of public import should be given greater protection.

Courtney Sokol

The First Amendment to the United States Constitution is supposed to stand as the formidable first line of defense against a public employer who is opposed to the free expression of ideas. However, *Garcetti* renders the First Amendment too feeble in protecting employee speech. This article argues that courts should narrowly interpret the hardline standard derived from *Garcetti*. Instead, the public employee speech doctrine should more closely mirror that of the private sector, where employees enjoy the ability to address their on-the-job grievances. Public sector employees are best situated to have informed opinions on the operations of government institutions and, accordingly, should enjoy the ability to speak about the terms and conditions of their public employment much like their private counterparts. Perhaps with the elevation of Neil Gorsuch to the bench, and with the support of Justice Sotomayor, who favors narrowing *Garcetti*, a majority of the Supreme Court will articulate a precise employee speech standard that more appropriately balances employee First Amendment rights with regard for the efficient operations of government institutions.

Employee Speech in the Public Sector

The First Amendment jurisprudence controlling public employee speech is articulated by a trilogy of landmark decisions,[10] which narrowly define free speech protections afforded to government actors. The current test requires courts to determine: (1) if an employee is

speaking as a private citizen or as a public employee, (2) if an employee is speaking on a matter of public concern, and (3) if the importance of the employee's speech outweighs the legitimate interests of the government, as an employer, in providing a public service.[11]

The seminal case on employee speech is *Pickering v. Board of Education of Township High School District*.[12] From this 1968 decision emerged what is referred to as the "*Pickering* Balancing Test" which guides courts to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[13]

In *Pickering*, a high school teacher was fired after writing an op-ed in the local newspaper, which criticized the school board's proposed tax increases.[14] The Supreme Court found that the teacher spoke on a matter of public concern and that his speech did not "impede his performance in the classroom" or "interfere with the regular operation of the school."[15] The Court therefore determined that the teacher was wrongfully terminated for engaging in protected speech.[16] The Court's decision rested on the importance of speech on matters of public concern and stated, "[t]he public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment."[17] However, speech must be weighed against the practical concerns of the government, as an employer, in providing a service free from unnecessary disruption to the public.[18]

The Supreme Court in *Pickering* also determined that statements by public officials on matters of public concern must be afforded First Amendment protection despite the fact that the statements criticized their superiors at their place of employment.[19] The Court noted that the "threat of dismissal from public employment is … a potent means of inhibiting speech."[20] Ultimately, *Pickering* stands for the proposition that a "public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."[21]

The Supreme Court subsequently clarified the scope of the employee speech doctrine in *Connick v. Myers*, where it held that the discharge of an assistant district attorney, who was fired for circulating a political questionnaire to her colleagues, did not violate the First Amendment.[22] The Court applied the *Pickering* Balancing Test and reiterated that test reflected both the historical evolution of public employee rights and the common sense realization that government offices could not function if every employment decision became a constitutional matter.[23] Specifically, the Court addressed whether the questionnaire was a "matter of public concern."[24]

"In Garcetti, *the Court addressed the question of First Amendment protection for a deputy district attorney who was fired for circulating a memorandum about his office's misrepresentations in a criminal affidavit."*

The *Connick* Court determined that the question of whether her speech was constitutionally protected turned on whether it was "public" or "private" in nature.[25] Ultimately, the questions posed by the employee to her colleagues were not a matter of public concern because the questions were not of public importance.[26] The Court said that the questionnaire, if released to the public, would not convey information relevant to public dialogue other than the fact that a single employee was upset with the status quo.[27] To presume that all private matters within a governmental agency are of public concern would mean that virtually every remark, and every criticism of a public official, would constitute a First Amendment grievance.[28] Though the Court said employers should be receptive to employee criticism, it affirmed that the First Amendment does not require a public office to be "run as a roundtable for employee complaints over internal office affairs."[29]

Finally, the Court further reasoned, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[30] The Court held that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, a federal court is not the appropriate forum to review a personnel decision taken by an agency in response to the employee's behavior.[31]

The decision in *Connick* refined the Pickering *Balancing* Test standard on employee speech protection into a two-part inquiry that courts refer to as the "*Connick-Pickering* Test."[32] First, a court must determine if the at-issue speech can be "characterized as constituting speech on a matter of public concern."[33] If the speech is a matter of public concern, then a court must determine if the interests of the employee as a citizen, in commenting upon

Courtney Sokol is a third-year law student at St. John's University School of Law. Ms. Sokol received the first place prize in the Dr. Emanuel Stein and Kenneth Stein Memorial Law Student Writing Competition for her work on this article. She would like to thank Professor David Marshall for his help and commitment to the labor and employment program at St. John's.

matters of public concern, outweigh the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[34]

Garcetti Minimizes Public Employee Speech Protections

In *Garcetti v. Ceballos*, the Supreme Court determined that speech by a government employee, if made pursuant to official duties, is not constitutionally protected, thus adding a hurdle for public employees to clear when asserting claims of First Amendment retaliation.[35] *Garcetti* requires a court to determine if the employee was speaking as a private citizen or as a government actor.[36] If the speaker is found to be a government employee, speaking pursuant to his or her official duties, the Constitution does not insulate the communication from employer discipline.[37] Plainly—an employee speaking pursuant to official duties is not protected under the First Amendment.[38]

In *Garcetti*, the Court addressed the question of First Amendment protection for a deputy district attorney who was fired for circulating a memorandum about his office's misrepresentations in a criminal affidavit.[39] The deputy first brought the inaccuracies in the affidavit to the attention of his supervisors.[40] Unsatisfied with their response, the deputy testified about the inaccuracies of the affidavit in court.[41] He was then transferred and denied a promotion.[42] The Court said whether or not the employee's communications were of public concern was not dispositive, but instead analyzed whether the communications were made pursuant to his job duties as a deputy district attorney.[43] The Court found that the employee wrote his memorandum as part of what he was specifically employed to do, and accordingly, the memo was written pursuant to his official duties.[44] His speech was, therefore, unprotected.[45]

The Court noted that a citizen who enters government service must, by necessity, accept certain limitations on his or her freedom.[46] Government employers need a significant degree of control over their employees' words and actions because, without such control, there would be little chance for the efficient provision of public services.[47] Further, public employees often occupy trusted positions in society and, when they speak out, their views may contravene institutional policies or impair the performance of governmental functions.[48] So long as they are speaking as citizens about matters of public concern, the only speech restrictions that they may face are those that are necessary for the efficient operations of their employer.[49]

Garcetti strengthened the power of the government in its role as an employer. The decision erodes employee protections because speech will be categorically unprotected, regardless of the speech's value, if the speaker is communicating in an official, on-the-job, capacity.[50] The *Garcetti* Court was sharply divided and the dissenting justices penned an extensive opinion on the deleterious effects of the majority ruling. Justice Souter, writing for the dissent, said "[o]pen speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. At the other extreme, a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee."[51]

The most troubling development arising out of *Garcetti* is the broad definition of an employee's official job duties. The Supreme Court instructed that the inquiry as to what constitutes an employee's "official duties" is a "practical one," but declined to define the term.[52] It cautioned against construing a government employee's official duties too narrowly, underscoring that formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform.[53] Listing a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.[54]

As a result of *Garcetti*, the majority of lawsuits brought by public employees alleging retaliation by their employers for their exercise of free speech have been won by the public employers.[55] Lower courts grant summary judgment in favor of employers at an unprecedented rate.[56] Circuit and district courts frequently find dismissal appropriate on the ground that employees do not pass the *Garcetti* prong of the test for Constitutional protection for employee speech.[57] Accordingly, if a public employee states her thoughts and opinions about her work, and her employer opposes such thoughts or opinions, she can be fired despite satisfying the public interest requirement in the *Pickering* Balancing Test.[58] Courts often will not even inquire whether speech is on a matter of public interest when an employee was speaking pursuant to official duties.[59] Taken together, the *Pickering-Connick-Garcetti* trilogy imposes a stringent standard for determining whether a public employee's speech is constitutionally protected.

Employee Speech in the Private Sector

Public and private employment are inherently different—as are the speech protections inherent to such employment. Private employment is predicated on the notion of "employment-at-will."[60] The logical assumption would be that private employees would be afforded less freedoms than their public counterparts—but *Garcetti* sets a paradoxically high bar for public employees. Conversely, the NLRA protects private employee speech relating to the terms and conditions of employment,[61] which is precisely the speech that *Garcetti* rejects.

The NLRA, enacted by Congress in 1935, governs the relationship between employers and employees in the private sector and guarantees basic employment rights to workers in the private sector."[62] Section 7 of the NLRA provides: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[63] Although Section 7 does not specifically define "concerted activity," the National Labor Relations Board ("the Board" or NLRB), an independent federal agency that enforces the NLRA, has concluded, in light of legislative history, that Congress intended Section 7 activity to mean "individuals united in pursuit of a common goal."[64]

Speech About Terms and Conditions of Employment Is Largely Protected

In the seminal private sector speech case, *NLRB v. Eastex*, the Supreme Court found that employees do not lose NLRA protection when they seek to improve terms and conditions of employment, or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.[65] In *Eastex*, the United Paperworkers Local attempted to distribute a union newsletter in non-working areas of an industrial plant.[66] The newsletter encouraged participation in the union and urged employees to contact their state legislatures to oppose the "right-to-work" statute.[67] Several union representatives were denied permission from management to distribute the paper.[68] The union then filed an unfair practice charge with the NLRB alleging that petitioner's refusal to allow employees to distribute the newsletter in nonworking areas of petitioner's property during nonworking time interfered with, restrained, and coerced employees' exercise of their Section 7 rights in violation of § 8(a)(1).[69]

"As previously discussed, in the years following Garcetti*, courts are left to end the First Amendment retaliation analysis where a public employee was speaking pursuant to their broad official duties."*

The NLRB found the distribution of the materials was protected by Section 7.[70] The Fifth Circuit Court of Appeals affirmed the Board's determination, holding that the protections of Section 7 should be interpreted to protect concerted activity concerning working conditions the employer had the power to control.[71] The Supreme Court found that the ban on distribution of the newsletter was unlawful and affirmed that "employees' appeals to legislators to protect their interests as employees are within the scope of [Section 7]."[72] The Court found that Section 7's protection for concerted activity included employee endeavors to improve terms and conditions of employment, or the well-being of workers.[73]

Under Section 8(a)(1) of the Act, an employer may not "interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights.[74] However, an employee's rights under Section 7 are not unlimited. The Supreme Court developed a three-prong test for determining when employee speech is protected.[75] Under this test, referred to as the "Jefferson Standard," employee disparagement of the employer is protected under Section 7 if it: (1) occurs in the context of an ongoing labor dispute; (2) is related to that dispute; and (3) is not egregiously disloyal, reckless or maliciously untrue.[76] These private sector speech restrictions are minimal in comparison to those under *Garcetti* in the public sector. Absent from the private sector analysis is the substance of the job duties of the speaker and the level of disruption caused by the speech—both of which are factors that weigh heavily in the public sector analysis under the current framework.

Convergence of Public and Private Employee Speech Doctrines Pre-*Garcetti*

Prior to 2006,[77] speech rights held by employees in the public and private sectors were more similar. The authors of Section 7 embraced the spirited debate on public employee speech protections and were influenced by First Amendment jurisprudence.[78] Congress responded to threats against organized labor in the courts with the Norris-LaGuardia Act of 1932 which recognized an employee's right to engage in concerted activity as a fundamental right of human liberty and freedom.[79] Tumultuous, and sometimes bloody, disputes erupted between workers attempting to unionize and employers seeking to restrict speech.[80] Finally, in 1940, the dissemination of information about industrial conditions by means of peaceful picketing was held to be protected by the First Amendment.[81]

During the same time period, Congress enacted the NLRA, including Section 7, which incorporated language from the Norris-LaGuardia Act.[82] The intent of Section 7 was to protect employees from undue interference from employers who were opposed to union activity.[83] Although at the time Section 7 was enacted, the Supreme Court had not yet declared labor handbilling and picketing to be constitutionally protected, an analysis of the legislative intent suggests that Section 7 guarantees are statutory replicas of First Amendment rights.[84]

The following similarities have been noted in the protection of employee speech in the private and public workplace: (1) the right to speak out about workplace issues may not be waived by a union, nor does a citizen give up speech rights by becoming a public employee; (2) speech is not libelous unless made with knowledge or reckless disregard of its falsity; (3) workplace speech

is protected if related to concerted activity (private workplace), or if it deals with problems of general interest to the employees at the workplace, and is publicly expressed (public workplace); (4) discharge for protected speech is not allowed; (5) speech may be just cause for discharge or other discipline if it interferes with production or discipline (private workplace), or causes substantial disruption (public workplace); (6) fighting words and disobedience of a direct order are disruptive and just cause for discipline; (7) the employer's property during nonworking time is a natural public forum for the communication of ideas among employees; and (8) wearing forms of silent symbolic speech will ordinarily be permitted during working time.[85] Further, the aforementioned "*Pickering* Balancing Test" has been appropriated to the private forum.[86]

"The Court held that truthful testimony by a public employee is citizen speech, not employee speech—even when the testimony relates to public employment or concerns information learned during that employment."

Protecting Public Employee Speech Post-*Garcetti*

Since *Garcetti*, workplace freedom of speech greatly differs based on whether an employee has accepted employment in the public or private sector. As previously discussed, in the years following *Garcetti*, courts are left to end the First Amendment retaliation analysis where a public employee was speaking pursuant to their broad official duties. In the private sector, by contrast, such speech, as it relates to terms and conditions of employment, would be protected under the NLRA. The *Garcetti* Court cited governmental efficiency as the primary policy reason for having restrictions on public employee speech. However, the Court failed to define "official duties," leaving lower courts with a confusing framework that threatens the ability of employees to publicize matters of public interest.[87]

Defining "Official Duties"

The question presented to the Court in *Garcetti* was "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties."[88] In the majority opinion, the Court uses the term "official duties" four times and the term "professional duties" twice. The Court explicitly declined to explain either term and stated, "[w]e…have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."[89] This can lead to inconsistent application in lower courts, warranting a clarification or definition by the Supreme Court.

The reluctance of the Supreme Court to define "official duties" has caused confusion in subsequent cases before the Court. In 2014, the question of whether sworn testimony at a corruption trial was citizen speech eligible for First Amendment protection was considered in *Lane v. Franks*.[90] In *Lane*, Petitioner Edward Lane was hired as a director for a statewide program that serviced underprivileged youth.[91] Lane conducted an audit of the program's expenses and concluded that Suzanne Schmitz, an Alabama State Representative on the program's payroll, failed to fulfill her duties to the organization.[92] Lane terminated the State Representative and twice testified, under subpoena, about his reasons for firing her.[93] Ultimately, Schmitz was convicted on three counts of mail fraud and four counts of theft concerning a program using federal funds.[94]

Subsequently, Lane's employment was terminated by respondent Steve Franks, who was the President of the state program.[95] Lane sued Franks in his individual and representative capacity, alleging that Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz.[96] The Supreme Court, in a unanimous opinion, agreed with Lane and held that he was entitled to First Amendment protection for his testimony.[97]

While the Court in *Lane* did not reject *Garcetti*, Justice Sotomayor's opinion provided a narrow interpretation of the precedent.[98] The Court held that truthful testimony by a public employee is citizen speech, not employee speech—even when the testimony relates to public employment or concerns information learned during that employment.[99] The Court said, "[i]n holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly…. It reasoned that, because Lane learned of the subject matter of his testimony in the course of his employment … *Garcetti* requires that his testimony be treated as the speech of an employee rather than that of a citizen. It does not."[100]

Notably, the *Lane* Court did not refer to Lane's job responsibilities as "official duties," the terminology used in *Garcetti*, but instead used the phrase "ordinary job responsibilities."[101] Perhaps the shift from the term "official duties" in *Garcetti* to "ordinary job responsibilities" in *Lane*, suggests that the Court intended to delineate between protected and unprotected speech as it pertains to the employee's role in the workplace.[102] Some commentators have noted, based on a textual reading of the two phrases, that *Lane's* "ordinary job responsibilities" phraseology narrows the scope of public employee speech left unprotected compared to *Garcetti's* "official duties" standard.[103] Nevertheless, the Court in *Lane* similarly failed to assign a definition to "ordinary job responsibilities." Because the Supreme Court is reformulating this standard without defining it, lower courts will likely

experience difficulty in applying it. Accordingly, the Supreme Court should articulate a uniform test to determine whether employee is speaking pursuant to "official duties" or pursuant to "ordinary job responsibilities" as to avoid the deprivation of First Amendment rights from public employee litigants.

Protecting Employee Speech on Terms and Conditions of Employment

Judicial treatment of public employee speech related to terms and conditions of employment should embrace the broad tolerance for private sector employee speech under the NLRA. Justice Sotomayor, in writing for the majority in *Lane,* said "[s]peech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," and that the same is true when speech concerns information related to or learned through public employment.[104] She affirmed that employees do not renounce their citizenship when they accept public employment and reiterated that the Supreme Court has often cautioned that public employers may not condition employment on the relinquishment of constitutional rights.[105] Speech on matters of public concern and speech on terms and conditions of employment are not mutually exclusive categories—employee speech is, to some degree, both.[106]

There is great societal value in encouraging public employees to talk about their job conditions. Government employees are often in the best position to know what the problems are in the agencies for which they work.[107] The most recent addition to the bench, Neil Gorsuch, has embraced a similar viewpoint to his sister Justice. Prior to his appointment, as a judge of the Tenth Circuit Court of Appeals, he showed sensitivity to First Amendment concerns in his opinions and "has [a] long and informed commitment to the First Amendment."[108] This is readily apparent from his majority opinion in *Casey v. West Las Vegas Independent School District*, which involved a school superintendent who was fired after encouraging the school board to comply with federal "Head Start" requirements.[109] At issue was whether Casey's statements were made as an employee or a citizen under the newly decided *Garcetti v. Ceballos*.[110] Ultimately, Judge Gorsuch, writing for a unanimous panel, held that Casey's duties included advising her superiors and instructing her subordinates, but that she acted as a citizen when she went around her superiors to complain to the state attorney general.[111]

The *Casey* decision illustrates the ability of jurists to circumvent the narrow constraints of the *Garcetti* ruling. Gorsuch noted that it had "long been established law…that when a public employee speaks as a citizen on matters of public concern to outside entities despite the absence of any job-related reason to do so, the employer may not take retaliatory action."[112] Further, Gorsuch affirmed that where an employee voices concerns outside of the normal chain of command, the speech is protected by the First Amendment.[113] The idea that employees are free to voice concerns about their employment is central to the safeguards of the NLRA. The Act has protected private employee speech for nearly a century, and we have yet to see our private sector crumble. This undercuts the merit of policy rationales in favor of restricted employee speech.

True—the efficiency of government institutions could be undermined by unduly disruptive employee speech, as noted in *Pickering* and its progeny. To avoid that result, the *Garcetti* rule should be narrowed to apply only to employees who are hired specifically to speak on behalf of the government agency and are tasked with delivering a particular viewpoint that is transparently governmental in origin.[114] Our government institutions can better serve the public if employees are given wide latitude to express their workplace concerns, an argument made both by Justice Sotomayor and then Judge Gorsuch. Moving forward, there is hope that the current bench will respect the *Garcetti* precedent, but rule favorably for employees who shed light on institutional wrongdoing. In doing so, the public employee speech doctrine would again more closely mirror that of the private sector.

Conclusion

The First Amendment is a pillar of American democracy and is meant to protect the free exchange of ideas in the metaphorical marketplace. *Garcetti* sets a dangerous precedent that stands to diminish the speech rights of public employees. The Supreme Court undermines the integral role of public officials in our constitutional system when it diminishes the watchdog function that government employees, who are often in the best position to inform the public about government work, serve.

The ideal goal upon which the *Pickering* Balancing Test was molded was to achieve "a balance between the [public employee], as a citizen, in commenting upon matters of public concern and interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[115] This is a balance that the private sector does well. Private sector employees, protected by Section 7 of the NLRA, may speak about the conditions of their employment without fear of retribution—and the United States economy has not collapsed due to disruption caused by such employee speech.

It is the job of the Supreme Court to clarify the freedom of speech doctrine post-*Garcetti.* Clarification of the doctrine will protect the fundamental First Amendment rights guaranteed to citizens under the United States Constitution by re-balancing the necessity of employee speech with the legitimate threat of disruption to public institutions.

Endnotes

1. 391 U.S. 563, 574 (1968).
2. 547 U.S. 410, 418 (2006).
3. *Id*. at 426.
4. 29 U.S.C. § 158.
5. 29 U.S.C. § 157.
6. *See Venetian Casino Resort, L.L.C. v. N.L.R.B.*, 484 F.3d 601, 606 (D.C. Cir. 2007) (explaining that the Supreme Court determined that Section 7 protects concerted activities for the broad purpose of mutual aid or protection as well as for the narrower purposes of self-organization and collective bargaining. The Court found that the "mutual aid or protection" clause extends Section 7's reach to include employee efforts to improve terms and conditions of employment or otherwise).
7. *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007).
8. *Id.* at 1325.
9. *Id*. at 1333, 1331.
10. *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 574 (1968), *Connick v. Meyers*, 461 U.S. 138 (1983), *Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006).
11. *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014).
12. 391 U.S. at 563.
13. *Id*. at 568.
14. *Id.* at 566.
15. *Id.* at 573.
16. *Id.*
17. *Id.* at 573.
18. *Id.* at 571.
19. *Id*. at 574.
20. *Id*.
21. *Connick*, 461 U.S. at 140.
22. *Id*. at 154.
23. *Id.* at 143.
24. *Id.* at 145.
25. *Id.* at 146.
26. *Id.* at 147.
27. *Id*. at 147–48.
28. *Id.* at 149.
29. *Id.*
30. *Id*. at 146.
31. *Id.* at 147.
32. *Kuchenreuther v. City of Milwaukee*, 221 F.3d 967, 973 (7th Cir. 2000).
33. *Id.*
34. *Id*.
35. *Garcetti*, 547 U.S. at 418.
36. *Id*.
37. *Id*. at 421.
38. *Id*. at 426.
39. *Id*. at 414–16.
40. *Id.* at 414.
41. *Id*. at 415.
42. *Id.*
43. *Id*. at 421.
44. *Id.*
45. *Id.* at 425.
46. *See id.* at 418; *see also Waters v. Churchill*, 511 U.S. 661, 671 (1994) (noting that the government as employer has far broader powers than does the government as sovereign).
47. *Garcetti*, 547 U.S. at 418.
48. *Id*.
49. *Id.*
50. *Id.* at 418.
51. *Id*. at 428 (internal citations omitted).
52. *Id.* at 424.
53. *Id.* at 424–25.
54. *Id.* at 425.
55. Sabrina Niewialkouski, *Is Social Media the New Era's "Water Cooler"? #notifyouareagovernmentemployee,* 70 U. Miami L. Rev. 963, 977 (2016).
56. *Id.*
57. *See Weintraub v. Bd. of Educ*., 593 F.3d 196, 203 (2d Cir. 2010) (holding that speech was not protected where it was "part-and-parcel" of the plaintiff's employment responsibilities); *Ross v. Breslin*, 693 F.3d 300, 308 (2d Cir. 2012) (holding that speech was not protected because it owed its existence to the plaintiff's official duties); *Hughes v. City of New York*, No. 15CIV5269AMDSIL, 2016 WL 3541545, at *10 (E.D.N.Y. June 23, 2016) (holding that attending a demonstration at the direction of one's employer indicates that the act was pursuant to official duties); *Stahura-Uhl v. Iroquois Cent. Sch. Dist.*, 836 F. Supp. 2d 132, 142 (W.D.N.Y. 2011) (noting that communicating with other teachers falls within official duties); *Gorum v. Sessoms*, 561 F.3d 179, 186 (3rd Cir. 2009) (holding that a professor's speech was within the scope of his employment when the professor used university resources); *Kiehle v. Cty. of Cortland*, 486 F. App'x 222, 224 (2d Cir. 2012) (holding that the employee did not testify as a private citizen on a matter of public concern; rather, she testified as a government employee—because she introduced herself as such).
58. *Id.*
59. *Id.*
60. Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 Conn. L. Rev. 1, 5 (2013) (noting that employment at will is the basic norm in private employment because it views the employer as owning the job with the property right to control the job and the worker who fills it).
61. Mary Becker, *How Free Is Speech at Work?*, 29 U.C. Davis L. Rev. 815, 842 (1996).
62. 29 U.S.C. § 151–69.
63. 29. U.S.C. § 157.
64. *Meyers Indus*., 268 NLRB 493 (1984).
65. *Eastex, Inc. v. N.L.R.B*., 437 U.S. 556, 565 (1978).
66. *Id.* at 558.
67. *Id.*
68. *Id*. at 561.
69. *Id.*
70. *Id*. at 574.
71. *Eastex, Inc. v. N.L.R.B*., 550 F.2d 198, 206 (5th Cir. 1977).
72. *Id.*
73. *Id.*

74. 29 U.S.C. § 158 (a)(1).
75. *NLRB v. Local Union No. 1229,* IBEW, 346 U.S. 464 (1953).
76. *Id.*
77. In 2006, the Supreme Court limited public employee speech rights in *Garcetti*.
78. Staughton Lynd, *Employee Speech in the Private and Public Workplace: Two Doctrines or One*, 1 Berkeley Journal of Employment & Labor Law 713.
79. *Id*.
80. *Id.* at 714.
81. *Id.*
82. *Id.* at 715.
83. *Id.*
84. *Id*.
85. *Id.* at 753.
86. *See McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 969 (9th Cir. 2010), quoting *Newspaper Guild, Local 10 v. NLRB*, 636 F.2d 550 (D.C.Cir.1980) (noting the D.C. Circuit required the Board to strike a balance "between an employer's freedom to manage his business in areas involving the basic direction of the enterprise and the right of employees to bargain on subjects which affect the terms and conditions of their employment").
87. *See Pickering*, 391 U.S. at 573 (noting the public interest in having free and unhindered debate on matters of public importance is a core value of the Free Speech Clause of the First Amendment); *see also Lane v. Franks*, 134 S. Ct. 2369, 2377 (noting that speech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people).
88. *Garcetti*, 547 U.S. at 413.
89. *Id*. at 424.
90. 135 S. Ct. 2369.
91. *Id.* at 2374.
92. *Id.*
93. *Id*. at 2375–75.
94. *Id*.
95. *Id.* at 2376.
96. *Id.*
97. *Id.* at 2383.
98. John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in Lane v. Franks*, 34 Hofstra Lab. & Emp. L.J. 243, 244 (2017).
99. *Id.*
100. *Id.* at 2379.
101. *Id.* at 2378.
102. Rumel, *supra* note 98, at 262.
103. *Id.* at 264.
104. *Lane*, 135 S. Ct. at 2377.
105. *Id.*
106. Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. Pa. L. Rev. 921, 933 (1992).
107. *Waters v. Churchill,* 511 U.S. 661, 674 (1994).
108. David L. Hudson, Jr., *Judge Gorsuch Shows Sensitivity to First Amendment Issues*, http://www.newseuminstitute.org/2017/02/15/judge-gorsuch-shows-sensitivity-to-first-amendment-issues/ (last visited Feb. 20, 2018).
109. *Casey*, 473 F.3d at 1325-27.
110. *Id.* at 1328-29.
111. *Id*. at 1329–33.
112. *Id.* at 1134–35.
113. *Id*. at 1135.
114. Niewialkouski, *supra* note 55, at at 984.
115. *Pickering,* 391 U.S. at 568.

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Section Committees and Chairpersons

You are encouraged to participate in the programs and on the Committees of the Section.
Feel free to contact any of the Committee Chairs for additional information.

Alternative Dispute Resolution
Ann Lesser
American Arbitration Association
120 Broadway, 21st Floor
New York, NY 10271-5643
lessera@adr.org

Andrew P. Marks
Dorf & Neslon
555 Theodore Fremd Ave
The International Corporate Center
Rye, NY 10580
amarks@dorflaw.com

Class Action
Troy L. Kessler
Shulman Kessler LLP
534 Broadhollow Road, Suite 275
Melville, NY 11747
tkessler@shulmankessler.com

Howard Mark Wexler
Seyfarth Shaw LLP
620 8th Avenue
New York, NY 10018
hwexler@seyfarth.com

Communications
James N. McCauley
701 West State St.
Ithaca, NY 14850
jmccauley@clarityconnect.com

Monica R. Skanes
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
mskanes@woh.com

Continuing Legal Education
Robert L. Boreanaz
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue
Suite 120
Buffalo, NY 14202-3901
rboreanaz@lglaw.com

Christopher A. D'Angelo
Michelman & Robinson, LLP
800 Third Avenue
24th Floor
New York, NY 10022
cdangelo@mrllp.com

Continuing Legal Education (continued)
Abigail Levy
NYC Office of Collective Bargaining
100 Gold Street, 4th Floor
New York, NY 10038
alevy@ocb.nyc.gov

Alyson Mathews
Lamb & Barnosky, LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
am@lambbarnosky.com

District Representatives
Seyfarth Shaw LLP
620 8th Avenue, 32nd Floor
New York, NY 10018-1618
mberger@seyfarth.com

Howard Mark Wexler
Seyfarth Shaw LLP
620 8th Avenue
New York, NY 10018
hwexler@seyfarth.com

Diversity and Leadership Development
Jill L. Rosenberg
Orrick Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019-6119
jrose@orrick.com

Molly Anne Thomas-Jensen
Public Advocate for the City of New York
1 Centre Street, 15th Floor North
New York, NY 10007
mollytj@gmail.com

Employee Benefits and Compensation
Stanley Baum
Cary Kane, LLP
1350 Broadway, Suite 1400
New York, NY 10018
sbaum@carykane.com

Ethics and Professional Responsibility
Jae W. Chun
Friedman & Anspach
1500 Broadway Fl 23rd
New York, NY 10036-4015
jchun@friedmananspach.com

Ethics and Professional Responsibility (continued)
John Gaal
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355
jgaal@bsk.com

Christopher A. D'Angelo
Michelman & Robinson, LLP
800 Third Avenue, 24th Floor
New York, NY 10022
cdangelo@mrllp.com

Cara E. Greene
Outten & Golden LLP
685 Third Avenue, 25th Floor
New York, NY 10017
ceg@outtengolden.com

Equal Employment Opportunity Law
David M. Fish
David M. Fish, Attorney At Law
3 Park Avenue, 28th Floor
New York, NY 10016-5902
fish@davidmfish.com

Loren Gesinsky
Seyfarth Shaw LLP
620 Eighth Ave
New York, NY 10018-1405
lgesinsky@seyfarth.com

Sarah Elizabeth Ruhlen
Satter Law Firm, PLLC
217 South Salina Street, 6th Floor
Syracuse, NY 13202
sruhlen@satterlaw.com

Finance
Sheryl B. Galler
275 West 96th Street
Apt. 7P
New York, NY 10025-6270
sbgesq@yahoo.com

International Employment and Immigration Law
Donald C. Dowling, Jr.
100 Avenue A
Apt. 3D
New York, NY 10009-6175
don.dowling@klgates.com

International Employment and Immigration Law (continued)
Patricia L. Gannon
Wormser, Kiely, Galef & Jacobs, LLP
825 Third Avenue
New York, NY 10022
pgannon@wkgj.com

Labor Arbitration
Sheila S. Cole
80 Huntersfield Road
Delmar, NY 12054
ss.cole@verizon.net

Timothy Scott Taylor
120 Shaker Road
Albany, NY 12211
timothytaylor1@mac.com

Howard Schragin
Sapir Schragin LLP
399 Knollwood Road, Suite 310
White Plains, NY 10603-1936
hschragin@sapirschragin.com

Labor Relations Law and Procedure
Allyson L. Belovin
Levy Ratner, PC
80 8th Ave Floor 8th
New York, NY 10011-5126
abelovin@levyratner.com

Legislation and Regulatory Developments
Joanne Seltzer
9 Heyward Lane
Rockville Centre, NY 11570
joanne.seltzer@gmail.com

Legislation and Regulatory Developments (continued)
Jonathan Weinberger
Law Offices of Jonathan Weinberger
880 Third Ave.
13th Floor
New York, NY 10022
jweinberger@verizon.net

Membership
Alyssa L. Zuckerman
Lamb & Barnosky LLP
534 Broadhollow Rd.
Suite 210
Melville, NY 11747
alz@lambbarnosky.com

New Lawyers
Jeremy Ginsburg
CSEA, Inc.
143 Washington Avenue
Albany, NY 12210
jeremy.ginsburg@cseainc.org

Public Sector Labor Relations
Nathaniel G. Lambright
Blitman & King LLP
Franklin Center
Suite 300
443 North Franklin Street
Syracuse, NY 13204
nglambright@bklawyers.com

Paul Jude Sweeney
Coughlin & Gerhart, LLP
PO Box 2039
Binghamton, NY 13902-2039
psweeney@cglawoffices.com

Technology in Workplace and Practice
Eric E. Wilke
CSEA, Inc.
143 Washington Avenue
Albany, NY 12210
Eric.Wilke@cseainc.org

Wage and Hour
Patrick J. Solomon
Thomas & Solomon LLP
693 East Avenue
Rochester, NY 14607
psolomon@theemploymentattorneys.com

Robert Whitman
Seyfarth Shaw LLP
620 8th Ave
New York, NY 10018-1618
rwhitman@seyfarth.com

Workplace Rights and Responsibilities
Dennis A. Lalli
Bond Schoeneck & King PLLC
600 3rd Avenue
22nd Floor
New York, NY 10016
Dlalli@bsk.com

Geoffrey A. Mort
Kraus & Zuchlewski LLP
500 5th Avenue
Suite 5100
New York, NY 10110-5199
gm@kzlaw.net

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