NYSBA FALL 2008

Perspective

A publication of the Young Lawyers Section
of the New York State Bar Association

Second Circuit Changes the Civil Rights Claim Game with Its Ruling in *Holcomb v. Iona College*

By Joseph M. Hanna and Jennaydra D. Clunis

Joseph Hanna

When Congress enacted Title VII of the Civil Rights Act of 1964, its primary intent was to create legislation that would prohibit employers from discriminating against individuals based upon race. Title VII provides, in relevant part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's race, color, religion, sex or national origin.*"[1] Although Title VII does provide the constitutional right to be free from racial discrimination, the original intent enacted by Congress did not address the issue of discrimination based upon an association with one of another race. The decision reached in *Holcomb v. Iona College* now appears to address this new theory of discrimination brought before the courts.

One has to question whether the Second Circuit's recent holding in *Holcomb v. Iona College*— that Title VII provides for a cause of action based on a claim of employment discrimination as a result of a person's association with one of a different race— departs from Title VII's statutory language and its legislative history. As claims under Section 1981 and the Age Discrimination in Employment Act (ADEA) are analyzed under the Title VII rubric**,** the ruling is likely to affect all future employment discrimination claims. This article will examine that issue in a five-step process. First, it will examine the facts of the *Holcomb* case. Second, it will examine the actual ruling of the Second Circuit. Third, it will review the legislative history of Title VII. Fourth, it will discuss the prior standard of interpretation by the courts of Title VII and, fifth, it will provide an analysis of the growing judicial tendency to expand causes of action in the discrimination realm.

Jennaydra Clunis

Facts

In 1995, Iona College hired Craig Holcomb, a Caucasian male, as an assistant basketball coach for its men's basketball team, the "Iona Gaels."[2] In 1998, Iona selected former NBA player Jeff Ruland,[3] a Caucasian male, as the team's new head coach.[4] Holcomb then became the "Associate Head Coach." Under Ruland's leadership, the team won the Metro Atlantic Athletic Conference (MAAC) in 1998, 2000 and 2001.[5] As a result, in each of those years, the Gaels earned a spot in the National Collegiate Athletic Association (NCAA) Men's Division I Championship Tournament.[6]

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Inside

A Message from the Section Chair

I am honored to serve as Chair for the Young Lawyers Section (YLS) of the New York State Bar Association (NYSBA) which houses the future of our organization in its members. Each of you has the potential not only in your careers but also in this great organization to serve as leaders for our honorable profession. One of the Young Lawyers Section's goals is to bridge the gap for attorneys and law students between law school and practice, and for young attorneys between different areas of practice. I would like to take this opportunity to encourage each of you to take full advantage of your membership in the Young Lawyers Section, which provides you with countless opportunities to enhance your career and become more involved in the future of our profession and society.

The biggest issue challenging young lawyers' involvement in professional organizations is time. With the pressures of a new career, which very often demands more hours than you have in the day as well as the responsibilities of a young family, many young attorneys shy away from Bar Association involvement, citing their reason as "no time." So, how do we manage our time? This is a question that is often posed to me by members or prospective members of our Section and Association. Being a mother of three and partner in my own law firm, I am certainly experienced in the issue of time management. First and foremost, it is about attitude, determination and knowing that you are capable of anything. Second, start small. You should take on a little at a time and gradually increase your activities. Third, remember that the best life is a balanced life. Whether you are single or married, or married with children, you need to make time for yourself. Take an hour a day and do something you enjoy doing. Whether it's reading a book, going to the gym or playing a sport, you need to make sure you don't give up the things that make you feel good, and be sure to turn off your cell phone during this time. If you are a parent, try to make sure that the time you spend with your family is focused on them, not work. Taking business calls or returning e-mails is not quality family time. While there are always emergencies, if you try to focus on this goal, you will improve your family time. That is not to say that you should not work from home, but if you plan to do so, make sure you do not consider that "family time." Once you are able to accomplish this life balance, you will find that you feel better about yourself, you are more productive at work and, therefore, you have more time.

"The Young Lawyers Section is the place where you can take advantage of some of what your profession has to offer you outside of the office."

The next question I am often asked is: Why should young attorneys spend their free time involved in Bar Association activities? The short answer to that question is "because you are the future." Being involved in the Bar Association allows you to work toward improving and / or changing the practice of law in many ways. It provides you with an avenue for professional growth outside of your firm or organization and with opportunities to socialize with colleagues. There are also opportunities for you to lobby for or against legislative amendments or changes, and to work on committees that address specific legal issues. The Bar Association can provide you with avenues to effectuate the changes you seek or find necessary to better the laws and our profession. You can express your opinions through the submission of articles to the *State Bar News*, *Perspective*, *In-Touch* and other Sections' publications, or you may choose to offer to speak at Continuing Legal Education courses. Also, through working with other attorneys, you may grow your practice through referrals and networking. The Young Lawyers Section is the place where you can take advantage of some of what your profession has to offer you outside of the office.

The YLS hosted two new events in 2008. First, in July, the Young Lawyers Section, working with NYSBA President Bernice Leber, was responsible for organizing a membership-drive boat cruise in New York City on the Spirit of New York, in conjunction with eight other NYSBA Sections. The boat cruise invited young and new attorneys as well as law students to attend this free event and encouraged them to join the membership of NYSBA and its sections. In addition to searching for its own new members, the Young Lawyers Section encouraged many of its existing members to join other substantive sections to increase their participation and involvement in the NYSBA. The event was a smashing success, with more than 530 attorneys in attendance. It provided opportunities for its attendees to meet many of those in the leadership ranks of NYSBA as well as network with other young and more seasoned attorneys in their areas of practice.

Second, at the 2008 NYSBA Annual Meeting, the YLS held its presentation of the Outstanding Young

Lawyer Award during a cocktail reception co-hosted by the YLS and the Law Student Council. The reception was a great success, with more than 100 attorneys and law students in attendance. The event was also attended by the 2007-2008 NYSBA President, Kate Madigan, the NYSBA 2008-2009 President, Bernice Leber, several members of the NYSBA Executive Committee, the Chair of the NYSBA Membership Committee, Claire Gutekunst, and several members of the Membership Committee.

"You are the future of the legal profession and I hope you will share your ability, determination and ideas with the Young Lawyers Section."

The attorneys in attendance had the opportunity to mingle with the YLS Executive Committee and Officers as well as the leaders of NYSBA and its membership. Both of these events were such great successes that we have decided to run them annually. Therefore, our next Reception and presentation of the Outstanding Young Lawyers Award will be this January 2009 at the NYSBA Annual Meeting.

I look forward to meeting each of you at one of our Section's many events or programs in the coming year. You are the future of the legal profession and I hope you will share your ability, determination and ideas with the Young Lawyers Section. We are waiting to hear from you.

Sherry Levin Wallach

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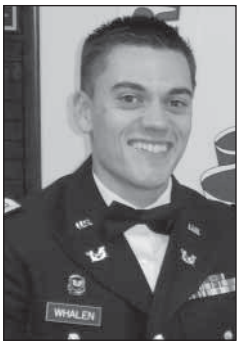
A Guide to the Servicemembers Civil Relief Act for Non-Military Attorneys

By James Whalen



This article will discuss key protections afforded to servicemembers under the Servicemembers Civil Relief Act (SCRA, or the "Act"). At the time of this article's publication, more than 170,000 Army Reserve personnel have been mobilized in support of the Global War on Terror since September 2001, and more than 26,000 are currently serving on active duty.[1] Given the large number of Reserve personnel already called to active duty and those likely to be mobilized in the future, it is increasingly likely that practitioners living far from military installations may be faced with issues concerning the Act. This article is designed to introduce the Act's protections to non-military attorneys who may be confronted with these issues.

The military is divided into two components. The Active Component (AC) consists of those who serve full-time on active duty as their primary occupation. The Reserve Component (RC) generally consists of those who serve in the military in a part-time capacity. The RC is divided into two categories: the Reserve, which is federally controlled, and the National Guard, which is the historical descendant of the colonial militia. State governors control their states' National Guard unless those units are called into federal service.

Enacted in 1940, the Soldiers' and Sailors' Civil Relief Act was amended in December 2003 and renamed the Servicemembers Civil Relief Act.[2] The purpose of the Act is to provide civil protections for servicemembers serving on active duty and RC members mobilized on active duty. The term "servicemember" is defined as a member of the Armed Forces, serving under Title 10 of the U.S. Code.[3] For members of the National Guard, SCRA protections will also apply when called to active duty by the President or Secretary of Defense for more than 30 consecutive days under Title 32 of the U.S. Code for the purpose of responding to a national emergency declared by the President and supported by federal funds.[4]

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SCRA protections apply no later than an individual's entry onto active duty.[5] For RC members ordered to active duty, some protections apply immediately upon the members' receipt of their active-duty orders.[6] SCRA provisions in some cases apply to dependents, who are defined as the servicemember's spouse, the servicemember's child,[7] or an individual for whom the servicemember is providing more than one-half of the individual's support.[8] The SCRA applies to all federal proceedings, and applies to all U.S. states and territories, and the political subdivisions therein.[9] The Act applies to any civil judicial or administrative proceeding in any court or agency subject to the Act's provisions, but does not apply to criminal proceedings.[10] The Act also applies to civilian citizens serving with the Armed Forces.[11] Furthermore, if a servicemember exercises any right under the Act, such exercise shall not negatively impact future financial transactions by the servicemember.[12]

A quick note regarding New York State law. Article 13 of the Military Law codifies the New York State Soldiers' and Sailors' Civil Relief Act. Many of these provisions mirror the protections available under the SCRA, such as the maximum-rate-of-interest provision contained at Military Law §323-a. A practitioner should be aware of these provisions in addition to the SCRA; however, this article focuses on the SCRA, not on Military Law Article 13.

Default Judgments

Section 520 of the Act protects servicemembers against default judgments by requiring a plaintiff to file an affidavit with the court stating whether or not the defendant is in the military service, or whether the plaintiff cannot determine the defendant's military status.[13]

The party filing the affidavit must perform due diligence to satisfy the requirements of § 520. Simply assuming that an individual is not in the military based on visual observations is insufficient.[14] A proper investigation must be conducted to determine an individual's military status, and the affidavit must set forth the factual basis for the investigator's conclusion that the respondent is not in the military service.[15]

If the court determines that the defendant is in military service, the court shall grant a stay for at least 90 days if the court determines that:

1. there may be a defense and the defense cannot be presented without the defendant being present; or

2. after due diligence, counsel has been unable to locate the defendant or determine if a meritorious defense exists.[16]

If a servicemember returns home to discover that a default judgment was entered against him or her during their active service or within 60 days of their release from active duty, the servicemember can petition the court to reopen the judgment. Such petition must be filed within 90 days of the member's release from active duty and must demonstrate that:

1. the servicemember was materially affected by reason of military service in making a defense; and

2. the servicemember has a meritorious or legal defense to the action.[17]

Stay of Proceedings

Section 522 of the Act permits a servicemember to apply for a stay of a civil proceeding when the member receives notice of the action or is within 90 days of having been released from active duty.[18] A servicemember may apply for a stay by communicating to the court via letter or some other method the manner in which their military service materially affects the servicemember's ability to appear and provide a date when the member will be able to appear. The servicemember must also provide the court with a letter from the member's commanding officer stating that the member's military service prevents appearance and that leave from the military is not authorized for the member to appear.[19]

Upon application by the servicemember, the court shall grant a stay of at least 90 days, though a court may also grant a stay on its own motion.[20] There is no requirement in the Act that the communications to the court be in any particular form. A memorandum or letter would be acceptable or, given the circumstances, it would appear that an electronic communication may be acceptable.

"There are bills pending in Congress to amend the SCRA to provide protection for mobilized servicemembers with child custody arrangements, though no such amendment has yet passed either house."

As previously noted, if granted, the stay must be for a period of at least 90 days. In many cases, after 90 days the servicemember will still be deployed overseas. If a stay is set to expire and the servicemember is still deployed, the member can petition the court for an additional stay based on the member's continued inability to appear in the action.[21] The court may either grant an additional stay or deny the request, though a denial requires the court to appoint an attorney to represent the servicemember in the action.[22] An application for a stay under this section does not constitute an appearance for jurisdictional purposes or a waiver of any procedural or substantive defense, including for lack of personal jurisdiction.[23]

There are bills pending in Congress to amend the SCRA to provide protection for mobilized servicemembers with child custody arrangements, though no such amendment has yet passed either house.[24] The proposed legislation would prevent a court from ordering a change in a child custody agreement that existed on the date of a parent's mobilization, though a court may order a temporary change if clear and convincing evidence exists that it is necessary for the best interest of the child. Once a deployed parent returns home, if a motion is made to amend a custody agreement, the proposed legislation would prohibit a court from considering a parent's mobilization in determining the best interest of the child.[25]

Stay of Execution of Judgments/ Attachments

Upon determining that a servicemember is materially affected by reason of military service in complying with a court judgment or order, the court may stay the execution of any order or judgment on its own motion or shall do so upon the servicemember's application.[26] In so doing, the court shall vacate or stay an attachment or garnishment of property, money or debts in the possession of the servicemember or a third party, whether before or after judgment.[27] The stay provisions are applicable during the period of military service or within 90 days after release from active duty.[28]

Codefendants

In an action against multiple defendants, if one of the defendants successfully applies for a stay under the Act, the plaintiff may continue to proceed against the remaining defendants with the Court's approval.[29]

Statute of Limitations

During a servicemember's period of military service, the statute of limitations for any actions by or against the servicemember is tolled, with the exception of federal Internal Revenue laws or regulations.[30]

Maximum Rate of Interest

Perhaps the most well-known protection under the Act is the interest rate limitation. Any obligation or liability bearing interest incurred by the servicemember prior to entering active duty is capped at an interest rate of 6% during the servicemember's service on active duty.[31] Any debt incurred by the servicemember after entering active duty is not subject to this protection. The creditor shall lower the servicemember's interest rate to 6% for all pre-active duty service debts as of the date the servicemember enters active duty.[32]

The servicemember is entitled to this reduction as a matter of law, provided the member provides the creditor with a copy of his or her mobilization orders within 180 days after the member's release from active duty.[33] Best practice for the servicemember is to provide the creditor with a copy of the mobilization orders as soon as received, preferably before the soldier has deployed overseas.

If a creditor believes that a servicemember has incorrectly availed himself of this protection, a creditor's only recourse is to seek relief in court. The creditor bears the burden of proof to demonstrate to the court that the servicemember's ability to pay is not materially affected by the member's military service.[34] It is important to note that the creditor's only recourse if it doubts whether a servicemember is materially affected is to seek relief in court. The creditor is required under the Act to lower the interest rate to 6% as soon as the member provides a copy of the mobilization order. The creditor is not permitted to challenge the servicemember on its own and determine whether the servicemember's ability to pay is materially affected; such a judgment is left solely to the court.

As for what constitutes "materially affected," this is necessarily a fact-specific inquiry. An unemployed single soldier with no dependents may discover that being mobilized is a financial windfall, and his financial ability to pay his debts is actually enhanced. However, an increase in pay for a mobilized servicemember, on its own, is not necessarily dispositive. For example, as a result of mobilization, there may be increased child-care costs due to the mobilized parent's absence, or the remaining parent may be forced to work fewer hours (at a reduced salary) to compensate for the military parent's absence. There may also be new costs to place an elderly loved one in assisted living, as the mobilized servicemember can no longer care for the loved one. Given so many individual variables, what constitutes "materially affected" will necessarily be determined on a case-by-case basis.

Evictions

Section 531 of the Act generally prohibits an eviction or distress against a servicemember or the servicemember's dependents during a period of military service, except by court order.[35] To qualify for this protection, the premises must be occupied or intended to be occupied primarily as a residence and the monthly rent must not exceed $2,400 as of 2003, adjusted for inflation.[36] Courts have a great deal of latitude with respect to stays of eviction. A court may grant such a stay on its own motion, and shall grant such a stay upon motion by or on behalf of a servicemember whose ability to pay the agreed rent is materially affected by military service.[37]

"Given so many individual variables, what constitutes 'materially affected' will necessarily be determined on a case-by-case basis."

The statute requires the court to grant a stay for 90 days unless, in the opinion of the court, "justice and equity require a longer or shorter period of time" in which to grant a stay.[38] The Act also permits a court to adjust the obligation under the lease to preserve the interests of all parties.[39] Landlords are not without some potential form of protection, though it is limited. If a stay is granted under this section, the court may grant the landlord such relief as equity may require.[40]

Installment Contracts for Purchase or Lease

This provision of the Act protects servicemembers who enter into preactive duty contracts for the purchase of real or personal property, including a motor vehicle, or the lease or bailment of such property.[41] Once a servicemember enters active duty, the contract may not be rescinded or terminated for breach of contract occurring before or after the active service, nor may property be repossessed, without a court order.[42] It is important to note that this section does not prohibit the repossession of property or rescission or termination of such contracts; what it required is that the party attempting to enforce these remedies seeks and obtains a court order first.

Mortgage and Trust Deeds

This provision applies only to obligations on real or personal property owned by a servicemember that originated before the servicemember's entry onto active duty, and is secured by a mortgage, trust deed or other security.[43] In an action by the holder to enforce the obligation, the court may stay the proceedings on its own motion and shall stay the proceedings upon application by the servicemember if the member's ability to comply with the obligation is materially affected by military service.[44] This provision applies to actions filed during the member's period of active service, or up to 90 days after the member's release from active duty.[45]

The court may stay the proceedings for a period of time it deems appropriate, and the Act permits the court to adjust the terms of the obligation.[46] Holders of such obligations should take careful note of this section's requirements. A sale, foreclosure or seizure of the property described in this section shall be invalid if it occurs without a court order and occurs within the member's period of active service or 90 days after release from active duty.[47]

Termination of Leases

This protection applies to lease terminations for both premises and motor vehicles. With respect to leases for premises, the provision applies to leases of premises occupied or intended to be occupied by a servicemember or the member's dependents for residential, professional, business,

agricultural or similar purpose that was entered into by the servicemember before entering active service.[48]

With respect to motor vehicles, this provision applies to leases entered into by a servicemember for use or intended use by the member or the member's dependents for personal or business use.[49] The lease must have been entered into before the member's entry onto active duty, the member must enter active duty while the terms of the lease have not yet been satisfied, and the member must receive active duty orders for a period of 180 days or more.[50]

For both types of lease, the lessee may terminate the lease by delivering to the lessor written notice of such termination and a copy of the servicemember's mobilization orders.[51] In the case of a motor vehicle, the lessee must also return the vehicle within 15 days of delivery of the written lease-termination notice.[52] For leases of premises in which rent is paid monthly, termination is effective 30 days after the first date on which rental payment is due following receipt of the notice of termination.[53] For motor vehicle leases, termination is effective following delivery of the termination notice and return of the vehicle.[54]

Storage Liens

During a servicemember's period of active service or up to 90 days after release from active duty, the holder of a lien on the property or effects of a servicemember may not foreclose or enforce the lien without first obtaining a court order.[55] The court may grant a stay of the foreclosure or enforcement proceedings on its own motion, and shall do so on application by the servicemember if the member's ability to comply with the obligation is materially affected by military service.[56] The court may stay the proceeding for a period of time it deems necessary, and may adjust the obligation if necessary to preserve all parties' interests.[57]

Health and Life Insurance

Section 541(1)(A) provides that an insurer may not decrease coverage or require additional premiums based on the member's military service or limit or restrict coverage based on an activity required by military service.[58] Section 544 of the Act provides that a servicemember's life insurance policy shall not terminate or lapse due to non-payment of premiums during the insured's period of active service and up to two years after release from active duty. The total amount of life insurance coverage protected by this section is currently $400,000, which is the Servicemembers' Group Life Insurance (SGLI) maximum limit.[59]

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Section 594 of the Act provides that a servicemember called to active duty is entitled to reinstatement of health insurance coverage that was in effect the day before such active military service commenced and was terminated during the period of active service.[60] To qualify for this protection, the servicemember must apply for reinstatement within 120 days after release from active duty.[61]

Professional Liability Insurance

Section 593 of the Act provides protections for medical and legal personnel mobilized to active duty. This section provides that a medical or legal professional who carries professional liability insurance (i.e., malpractice) will continue to be covered by the insurance carrier for claims filed during the period of active duty, even if the insurance premiums are not paid during the active duty period.[62] Servicemembers who wish to suspend their insurance coverage during an active duty period shall do so in writing, and insurance carriers shall not charge premiums during a period of suspended coverage.[63] Pursuant to section 593(c), servicemembers may reinstate their coverage within 30 days of their release from active duty.

Conclusion

As more and more Reserve component servicemembers are called to active duty, it is increasingly likely that attorneys who normally have no dealings with the military will be forced to deal with provisions of the SCRA. Attorneys should keep in mind that the cornerstone of laws such as the SCRA is to "protect military service personnel . . . in civil actions . . . and to insure that those in active military service are able to meet fully the defense needs of America."[64]

Endnotes

1. U.S. Army Reserve 100th Anniversary Fast Facts, http://www.armyreserve100th.com/fast_facts.php (last visited Aug. 4, 2008).
2. The SCRA is codified at 50 U.S.C. App. §§ 501 *et seq*. Public Law 108–189 amended and renamed the SCRA in 2003.
3. 50 U.S.C. App. § 501(2)(a)(i). For purposes of the SCRA, the Armed Forces include members of the Army, Navy, Air Force, Marine Corps and Coast Guard.
4. *Id*. at § 501(2)(a)(ii).
5. *Id*. at § 501(3).
6. *Id*. at § 506(a). In this scenario, if an RC member receives an order on 1 November 2008 ordering him or her to active duty for 365 days beginning 1 January 2009, some protections may begin to apply immediately on 1 November.
7. A "child" is defined in 38 U.S.C. § 101(4).
8. 50 U.S.C. App. § 501(4).
9. *Id*. at § 502.
10. *Id*. at § 502(b)
11. *Id*. at § 504. In the current conflicts, this provision would most frequently apply to contractor personnel serving with deployed servicemembers, as well as civilian employees of other

agencies, such at the State and Justice Departments.

12. *Id.* at § 508. This section is intended to ensure that servicemembers, particularly those in the RC, are not discriminated against as a result of their military service. *See* §508(5), which prohibits a creditor or credit reporting agency from identifying a customer as a member of the RC based on his or her exercise of a right under the Act.

13. 50 U.S.C. App. § 520(1). Thanks to a new Web site from the Department of Defense, it has become much easier to determine whether an individual is on active duty. The Defense Manpower Data Center (DMDC) has created a site whereby a user can enter personal identifying information to determine whether an individual is on active duty. *See* Defense Manpower Data Center Servicemembers Civil Relief Act Search , https://www.dmdc.osd.mil/scra/owa/home (last visited Aug. 4, 2008). In addition, under § 582 of the Act, a party may petition the Secretary of Defense regarding an individual's military status. Once a request is received, the Secretary shall issue a certificate containing the appropriate information to the requesting party, which shall be considered *prima facie* evidence of an individual's military status.

14. *Heritage East-West, LLC v. Chi Won Chung et al.*, 6 Misc.3d 523 (N.Y.C. Civ. Ct., Queens Co., 2004). In this case, the petitioner simply assumed that respondents were not members of the military based on factors such as advanced age.

15. *Id.* The court went on to determine that petitioner conducted no such investigation and had in fact submitted six false affidavits of military service. The court fined the petitioner's attorney a total of $6,000 for filing the false affidavits.

    See also MBNA America Bank, N.A. v. Nelson, 15 Misc.3d 1148 (N.Y.C. Civ. Ct., Richmond Co., 2007), in which the Court found that the military affidavit requirement at § 521 for default judgments also applied to confirmation of arbitration petitions when the respondent did not appear. "A judgment confirming the arbitration award is no less potent, and has no less effect than would any other default judgment of this Court and, as such, all of the reasoning for requiring non-military affidavits in the face of default are equally applicable in a confirmation of arbitration in which the debtor makes no appearance and does not file any response papers with the Court." *Id.* at 8.

16. 50 U.S.C. App. § 521(d).

17. *Id.* at § 521(g). This second prong, requiring the servicemember to demonstrate a meritorious defense, can be the more difficult hurdle. It is not simply enough for the servicemember to demonstrate being materially affected; rather the servicemember must demonstrate a defense worthy of the court's reopening the default judgment.

18. *Id.* at § 522(a). This protection applies only to servicemembers, not their dependents. *See Jusino v. New York City Housing Auth.*, 255 A.D.2d 41 (App. Div., 1st Dep't, 1999).

19. *Id.* at § 522(b). The author recognizes that while the SCRA was drafted with the intent to protect servicemembers, the potential exists for wily military members to use this section to their advantage. A servicemember facing a civil lawsuit may volunteer for a mobilization with the intent of staying the civil proceedings during the active duty period. In an age of 12- to 15-month deployments, such a stay can be quite burdensome and costly to the non-military litigant.

20. *Id.*

21. 50 U.S.C. App. § 522(d).

22. *Id.* at § 522(d)(2).

23. *Id.* at § 522(c).

24. *See* S.1658, 110th Congress (2007) and H.R.6048, 110th Congress (2008).

25. *Id.*

26. 50 U.S.C. App. at § 524(a). *See Palisades Acquisition V, LLC v. Ibrahim*, 12 Misc.3d 340 (N.Y.C. Civ. Ct., N.Y. County 2006) in which the Court required a nonmilitary affidavit for a joint bank account tenant to determine if there was any material effect that would warrant staying execution or vacating garnishment.

27. 50 U.S.C. App. § 524(a).

28. *Id.* at § 524(b).

29. *Id.* at § 525(b).

30. *Id.* at § 526. In addition to the servicemember, the statute of limitations is tolled with respect to any actions by or against the servicemember's heirs, executors, administrators or assigns.

31. *Id.* at § 527(a). Based on years of briefing the SCRA to Army Reserve soldiers, it is the author's opinion that this is by far the most well-known provision of the Act, as well as the most frequently used provision by mobilized soldiers.

32. 50 U.S.C. App. § 527(b)(2). If a servicemember enters active duty on 1 January 2009 carrying an existing mortgage with an interest rate of 7%, the member is entitled to have the rate lowered to 6%. However, if prior to deploying overseas but after the 1 January date, the servicemember enters into a second mortgage with an interest rate of 7%, the member is not entitled to lower the rate to 6%. If a member were to appoint a third party as his or her agent through a Power of Attorney to execute such a transaction during the active-duty period, the member would still not be able to enjoy the 6% interest rate cap as the debt was incurred after the servicemember entered active duty. The key point is that to qualify for the interest rate reduction, the debts must have been incurred prior to entry onto active duty.

33. *Id.* at § 527(b)(1).

34. *Id.* at § 527(c).

35. *See Sec'y of Housing & Urban Dev. v. McClenan*, 2004 NY Slip Op 51085(U) (N.Y.C. Civ. Ct., Queens Co. 2004). In this case, the respondent was an RC member who had previously been mobilized stateside following the Sept. 11, 2001, terrorist attack and was currently identified for mobilization to Iraq. The Court in this case found that the petitioner had failed to adequately determine the respondent's military status. One of the issues in the case was the respondent's military status, which the petitioner questioned, but which service the Court found to be obvious. In fact, the Court found that the petitioner's attorney "continued to dispute in bad faith that the respondent is in the military. . . . He arrogantly denied and strenuously disputed that the respondent is a member of the military. He argued that the military uniform and identification was not authentic. . . . Although Mr. Battista (petitioner's attorney) made this bald face accusation, he could not produce any evidence or witness to show there was any contradiction of the respondent's military status. The combination of all of the above shows great disrespect to persons in the United States military." *Id.* In addition, the Court found that the warrant of eviction against the respondent had not been properly served and stayed the eviction proceeding.

36. 50 U.S.C. App. § 531(a)(1). Section 301(a)(2) of the Act sets forth the method by which the housing price inflation adjustment is calculated.

37. *Id.* at § 531(b)(1).

38. *Id.* at § 531(b)(1)(A).

39. *Id.* at § 531(b)(1)(B).

40. *Id.* at § 531(b)(2). As a practicing Judge Advocate, this provision elicits emotional responses on both sides of the issue. There are many soldiers who rent, particularly those who are young and junior in rank, and who will seek to take advantage of the protections this section provides. On the other hand, there are many soldiers who are landlords themselves, and are aware of the

difficulties that can arise in attempting to evict tenants. A typical briefing on the Act will often lead to many passionate conversations off-line regarding both sides of this matter.

41. 50 U.S.C. App. § 532(a).
42. *Id.*
43. *Id.* at § 533(a).
44. *Id.* at § 533(b).
45. *Id.*
46. 50 U.S.C. App. § 533(b).
47. *Id.* at § 533(c).
48. *Id.* at § 535(b)(1). This section also applies to active-duty (full-time) members who enter into a lease and thereafter receive orders for a permanent change of station (PCS) move for a period of 90 days or more.
49. *Id.* at § 535(b)(2).
50. *Id.* For active duty members, this provision also applies to motor vehicle leases when the member, after entering into a lease, thereafter receives PCS orders to move outside the continental United States (OCONUS) or to deploy with a military unit for a period of at least 180 days.
51. 50 U.S.C. App. § 535(c)(1)(A).
52. *Id.* at § 535(c)(1)(B).
53. *Id.* at § 535(d)(1). For leases of premises in which rent is not paid monthly, termination is effective on the last day of the month following the month in which the termination notice was delivered. *Id.* In addition, any rents or lease amounts paid in advance by the lessee for a period after the effective date of the termination shall be returned by the lessor within 30 days of the effective date of the termination. *Id* at § 535(f).
54. *Id.* at § 535(d)(2). In the case of motor vehicle leases, the lessor may not impose any sort of early return fee or penalty, but any sort of tax, title or registration fee, or any provision of the lease regarding excess wear, use and mileage that would otherwise by owed by the lessee shall be paid by the lessee. *Id* at § 535(e).
55. *Id.* at § 537(a). This section refers to a lien for the storage, repair or cleaning of a servicemember's property or effects. *Id.* at § 537(a)(2).
56. 50 U.S.C. App. § 537(b).
57. *Id.*
58. This section requires that the life insurance policy have been in effect for at least 180 days prior to the member's entry onto active duty.
59. 50 U.S.C. App. § 542(c). The section states "$250,000, or an amount equal to the SGLI maximum limit, whichever is greater." At the time of the Act's amendment in 2003, the SGLI limit was $250,000. As of 1 September 2005, the maximum was raised to $400,000. *See* Department of the Army Memorandum regarding change in SGLI Maximum Coverage, http://www.hqda.army.mil/MPSC/SGLI3.doc (last visited Aug. 4, 2008).
60. *Id.* at § 594(a).
61. *Id.* at § 594(d).
62. 50 U.S.C. App. § 593(a)(2).
63. *Id.* at § 593(b).
64. *Citibank v. McGarvey*, 196 Misc.2d 292, 298 (N.Y.C. Civ. Ct., Richmond Co. 2003).

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Don't Sign That Yet! What Your Client Needs to Know Before Signing a Power of Attorney

By Zachary Dubey

Now that the members of the baby boomer generation are on the brink of retirement, planning for the golden years is more important than ever before. Estate and long-term care planning is becoming more frequent and widespread today, and because of that it is important to understand potential problems that can arise from not-so-careful planning.

The Power of Attorney (POA), one of the most basic legal instruments (both for the attorney to prepare and for clients to understand), is almost always prepared in conjunction with a person's estate plan and is often present even in cases where no estate plan exists. As more people rely on Power of Attorney due to its use as a simple and practical tool for managing one's personal financial and / or business affairs, the POA brings with it the ability to steal, siphon off and misappropriate the principal's assets under the guise of "acting in the principal's best interests."

This article serves to highlight some of the inherent problems with the Power of Attorney in order that lawyers can better educate the client-principal of the ramifications of execution. This way the client can make a more well-informed decision as to whom to grant attorney-in-fact status, and how best to structure the content of the document. Education up front will hopefully prevent problems from arising down the road.

Non-Durable vs. Durable: What's the Difference?

There are two types of POAs: non-durable and durable.[1] The non-durable POA grants attorney-in-fact status[2] to the agent upon execution but becomes revoked by operation of law upon the principal's incompetence or death.[3] The non-durable POA is generally used to give an agent authority for a fixed period of time or for a specific transaction (e.g., real estate closing that the principal cannot attend), but may be used as an estate-planning tool as well.

Second, there is the durable POA, which grants the agent attorney-in-fact status upon execution but remains in effect in the event the principal becomes incompetent (though it does expire upon the principal's death).[4] It is precisely this aspect of the durable POA that makes it "durable." The fact that this power survives incompetence is what protects the principal's assets by allowing someone to manage them when the principal cannot. Yet this is also the feature that, if abused by the agent, can do the most damage to the principal at a time when the principal may be powerless to know of the abuse and to stop it.

When Does the POA Take Effect?

The next aspect of which to be aware is the point at which the POA becomes effective. There are two possibilities. The default rule is that a POA, whether durable or non-durable, becomes effective upon execution by the principal.[5] The second possibility is the "springing POA," which (again whether durable or non-durable) is designed to take effect only upon the occurrence of an event specified in the POA document.[6] This could be, for example, incompetence (i.e., dementia, Alzheimer's disease, lapsing into a coma).

A benefit of the default POA is that, since it takes effect immediately upon execution, the principal is protected as soon as he becomes incapacitated. This is true even if that happens, for example, as a result of a car accident on the way home from his lawyer's office that same day. On the other hand, this feature of the default POA also means that as soon as the principal executes the POA, the agent can drive over to the bank and withdraw money from the principal's account.

A benefit of the springing POA is that it delays the time period in which the agent has the opportunity to access the principal's assets until the "springing" event takes place. This automatically shortens the window in which the agent is able to act improperly. On the other hand, with the springing power of attorney comes the problem of being able to revoke the document. A revocation is legally sufficient only if made in writing or if the document is physically destroyed (or other conduct inconsistent with the power), and of course, death of the principal.[7] This revocation may be virtually impossible for the principal to accomplish once the triggering event occurs (e.g., if the triggering event is lapsing into a coma, etc.).

Another potential problem with the springing POA is determination of the triggering event itself. Let's say that the event is diagnosis of the principal with a certain disease. The principal's doctor diagnoses the disease but a family member who is not the designated agent disagrees and takes the principal to a different doctor who disputes the diagnoses of the first doctor. This has litigation written all over it, especially if the agent takes legal action under the authority granted him / her pursuant to the power of attorney.

Other Potential Pitfalls

Although there is no "official" power of attorney document,[8] many practitioners use the statutory form that contains many of the same standard clauses.[9] One of the powers

granted to the agent is the power to "make gifts" limited to $10,000, and estate and elder law practitioners often expand the gift-giving clause. Once this power is established, the principal has given legal authority for the agent to take assets of the principal and give them away to others, including, perhaps, to the agent himself.

While the intent of the principal may be to make sure that a relative (think grandchildren) receives gifts that the principal would normally make, or to make sure that the principal's gross estate has been reduced through "gifting," this is a power with broad exposure to misuse by the agent.[10]

Consider the following hypothetical case:

An 80-year-old man grants a durable, non-springing POA to his daughter in 1998. The two get into a fight and the old man tells her the POA is revoked and that he doesn't ever want to speak to her again. In fact, just to be on the safe side, the old man revokes the POA in writing and sends it to her, to his bank and his lawyer. The old man's assets are now safe, right?

Now consider this: Today, the old man (who has subsequently given a POA to his son, who has made new investments, including opening an account at a different bank) has dementia, cannot remember much of the last 50 years of his life (never mind what assets he owns and where he keeps them), and has not spoken to the daughter in the last 10 years. The son, who has been handling his father's financial and personal affairs, goes to the bank and finds that the account he set up for his father containing several hundred thousand dollars has been closed, a check made out to his father was sent to the father, and all of this was done by the account holder's "power of attorney." "Who?" the son asks. "I'm the POA." "Sorry sir," says the bank manager, "but your sister came in and presented us with a POA executed by your father, and also signed an affidavit that the POA was in full force and effect."

This all-too-common situation illustrates the inherent dangers of the POA, even when the principal thinks he has taken all necessary precautions to prevent its abuse. Although properly revoking the document was a smart move taken by the principal, clearly it was not enough to protect him.

How to Protect the Principal

In light of the discussion above, it is clear that the attorney preparing the POA must educate his client on its potential for abuse prior to signing the document. All hope is not lost, however, as certain precautions can be taken to reduce the risks. Simply stated, here are some of them:

1. Only choose a trusted family member or close friend to be the agent.
2. Have the Principal keep the POA in his/her possession. Tell the agent where it is in case of an emergency, but do not give him/her possession right away. This reduces the time period in which the agent has the ability to access the Principal's assets.
3. Include a clause requiring the agent to account to a third party every year or so. The knowledge that someone will be reviewing the agent's actions should serve to reduce the temptation to act inappropriately. Be sure to inform the third party of this clause.
4. Narrow the scope of the gift clause, or eliminate it entirely. You can tailor the clause however you feel is appropriate. Examples include: Prohibiting the agent from making gifts to himself/herself; limiting gifts to certain family members/friends only; or placing a cap on the amount of gifts permitted to be made within a certain time period. Any of these restrictions should reduce the ability of an agent to act improperly.
5. You can name more than one agent to act at a time. You can require them to act "TOGETHER" or "SEPARATELY." Consider naming two agents and requiring them to act together in order that they can each act as a "check" on the other's actions.

Wherever a document provides for the "human element," there will always be the potential for abuse. However, by incorporating a few small changes into the POA you will greatly reduce that potential and will hopefully save yourself and your clients from having to deal with any major problems in the future.

Endnotes

1. N.Y. General Obligations Law § 5-1501 *et seq*.; NYS Office of the Attorney General Web site: www.oag.state.ny.us/seniors/pwrat.html.
2. The terms "attorney-in-fact" and "agent" are interchangeable.
3. N.Y. General Obligations Law §§ 5-1505 *et seq*.
4. *Id*.
5. N.Y. General Obligations Law § 5-1506.
6. *Id*. at § 5-1506(1).
7. 2A N.Y.Jur.2d Agency § 76; N.Y. GENERAL OBLIGATIONS LAW § 5-1504(4); *Ferrentino v. Dime Sav. Bank of New York, F.S.B.*, 159 Misc.2d 690, 606 N.Y.S.2d 554 (Suffolk Co. 1993).
8. N.Y. General Obligations Law § 5–1501(1) ("No provision of this article shall be construed to bar the use of any other or different form of power of attorney desired by the parties concerned.").
9. N.Y. General Obligations Law § 5-1501.
10. *In re Estate of Ferrara*, N.Y.3d 244 (2006).

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Stress Reactions and the Young Lawyer

By Sheldon Siporin

An Efficient Lawyer

When I was only a few years out of law school, I assisted a hard-working lawyer, let's call him John. I found John impressive because he was one of the most efficient lawyers I had ever seen. He could draft affirmations while talking on the phone to a judge's law clerk. He ate lunch at his desk, often just a cold can of tuna fish, and never let the time go by without completing a project. When John went to court on a motion or conference, he dragged a heavy briefcase along so that he could review paperwork during his waiting time. My work ethic seemed pale in comparison to John's multi-tasking, and I strove to be more like him. One day I accompanied John to court. As he was red penciling a contract with one ear cocked for the calendar call, I noticed that he was flushed and sweating. He complained that his back hurt. Later, he called me into his office, blurting out that he felt like he was "having a nervous breakdown." Looking back now, I realize that John was suffering from the effects of stress. I don't know if he ever actually had a breakdown because I left after a few months. But I did learn years later that John had been disbarred. The exact circumstances are unimportant, but that stress was a likely contributing factor seems clear.

Lawyers and Stress

It's been known for a long time that law is an unusually high-stress profession, with resulting adverse emotional impact. For example, well-known research done at John Hopkins University in 1990 found that, of the 104 occupations studied, lawyers were the most likely to suffer stress-related depression.[1] In a University of Chicago study examining 157 general practice attorneys, researchers found that there was a significant relationship between lawyers' stress experience and their complaints of strain symptomatology.[2]

The Young Lawyer

The relationship between legal practice, stress and depression may appear early in your legal training. For example, Ruth Ann McKinney notes that "it is no secret that law school is a breeding ground for depression, anxiety, and other stress-related illnesses."[3]

Prof. Susan Daicoff of Florida Coastal School of Law, author of "Lawyer, Know Thyself," cites studies by Benjamin et al. which found that, by the end of the first year of law school, depression incidence in students rose to 32%, compared with 9-10% prior to law school.[4] By the end of the third year of law school, incidence peaked at 40%, and apparently never returned to pre-law school levels. Are law students increasingly depressed simply because they dislike law school? Or are they depressed as a result of stress-induced anxiety? Perhaps the two are too intermingled to dissect.

How do law students handle stress and depression? One way to handle anxiety or depression is to "self-medicate," that is, drink alcohol or take drugs. According to the ABA, studies indicate that lawyers engage in higher-than-average drug and alcohol abuse, affecting from 15 percent to 18 percent of the profession, compared with 10 percent of the general population.[5] Is this common among law students? A 1993 American Association of Law Schools survey of 3,400 law students at 19 schools found that 3.3 percent of law students said they needed help to control their substance abuse, and approximately 12 percent said they abused alcohol during law school.[6] As of 2003, the ABA reported no evidence of improvement. Recently, a Listserv was developed by the ABA Commission on Lawyer Assistance Programs (CoLAP) to provide a confidential e-mail vehicle for law students who want to get, or stay, clean and sober while in law school.[7] The phenomenon of the "impaired attorney" is now common knowledge, and Bar Association programs to assist these attorneys proliferate. The NYSBA even has an ongoing column in the *State Bar News* on this topic.

Why attorneys are prone to stress and depression

The profession

Law practice is replete with deadlines, hidden technicalities, fluctuating workloads, contentious adversaries, arbitrary judges, finicky clients and assorted malpractice traps for the unwary. Any of these can trigger a stress reaction. For example, I recall one supervising attorney who couldn't sleep after missing a filing deadline.

The lawyer personality

In my experience (contrary to popular belief), not all attorneys are alike. However, Prof. Daicoff believes that lawyers tend to share certain personality traits, intensified by law school, that make them more susceptible to stress. These include:[8]

1. low interest in people, emotional concerns, and interpersonal matters;
2. less humanitarianism;
3. cold and quarrelsome, and less warm and agreeable;
4. extroversion and sociability;
5. masculinity (including argumentativeness, competitiveness, aggression, and dominance);
6. high need for achievement based on an external or internal standard of excellence (includes competitiveness);
7. Myers-Briggs dimension of "Thinking" vs. "Feeling" (approach to making decisions).

Judge for yourself whether you share one or more of these traits.

Perfectionism, Paranoia and Incivility

Law demands a high level of competitiveness, assertiveness and rule-based advocacy. Thus, lawyers who strive for excellence assume these qualities. Psychologist Amiram Elwork suggests that "perfectionism" is rewarded in law school, along with "justifiable paranoia."[9] Further, young lawyers accept the culture of their firms, which may be perfectionist or pervaded by what Elwork terms "justifiable paranoia" or suspicion of adversaries. Perfectionism and paranoia can induce stress and anxiety. Failure to achieve perfection may result in depression.

Uncivil civil practice—Lack of civility between attorneys also contributes to stress. As noted by attorney Brunson Bills in his excellent article on civility and the young lawyer, associates follow the example set by senior counsel.[10] If contentiousness is the rule, they follow it. I recall one aggressive counsel whose nastiness and inordinate insistence on "rulings" extended a deposition interminably, with negative impact on all parties present.

The associate dilemma

Edward Fennell, in a February 2007 article in the *Times Online*, pointed to the vicious cycle young associates face where "the best quality work is done at the top firms. To do it you must buy into the whole package." The whole package includes a lifestyle of not only perfectionism, but of 10- or 12-hour days when a "torrent of work pours in." The result: stress and burnout.

What is this thing called stress?

Perhaps you have felt "under stress" during law school or when taking the Bar exam. You are not really "under" anything. You are experiencing an internal reaction to external events. The *stress reaction* is an evolutionarily developed hyperactivation of your body to meet a challenge or potential threat.

The bear in the woods

For example, as you stroll in the forest a giant grizzly bear pounces from behind a bush. Your brain sees the bear as a threat, triggering the stress reaction. The pituitary gland is alerted, activating the adrenal glands to release adrenalin into your bloodstream. Adrenalin has widespread effects, raising glucose (sugar) levels in your blood, elevating your blood pressure, accelerating your heart rate, increasing muscular tension, and producing quick, shallow breathing. Along with this, cortisone levels are elevated, which causes your immune function (e.g., white cell count) to decrease. Your body is ready to escape or to fight the bear. Even if you're Jet Li, you won't last long in a fight with a grizzly. Escape is the more effective option. After escaping, your body function returns to normal. And so, the stress reaction has survival value.

Your bear of a managing attorney

As a young attorney, instead of a bear, you may perceive a managing attorney as a potential threat—she can fire you, cut your bonus, or force you to work weekends. The mere sight of this gal (or guy) may trigger the stress response. Just as you couldn't fight the bear, you cannot vanquish your managing attorney (not if you value your job). But, unlike the bear, escape from the managing attorney is not possible. And so your heart rate, blood pressure and sugar levels not only elevate, but remain elevated. And this is not healthy.

Cognitive and psychological effects

Physiological changes in our bodies have effects on our brains and emotions. According to researchers Lyle E. Bourne, Jr. and Rita A. Yaroush,[11] during stress processes including perception, attention, memory, decision-making, problem solving and response execution are candidates for degradation. Actual physical changes in your neural responses are caused by activity of neurotransmitter-like substances. For example, cortisol has been associated with depression. Research on animals suggests that stress affects the dopaminergic system, associated with mood and motivation.[12] Stress effects on brain neurotransmitters such as serotonin and noradrenergic systems have been found, along with other monoamine and peptidergic systems.

Stress and illness

According to the National Institute of Occupational Health and Safety,[13] studies suggest that stress may raise cardiovascular risk, increase the likelihood of back and upper extremity musculoskeletal disorders, precipitate or aggravate psychological disorders, and even set the stage for injury at work. Stress-mediated decreases in immune function may make you more prone to illness.

Recognizing stress

In the daily flow of work, you may not always recognize that you are under stress. For example, you may become used to a feeling of being "hyper" or "edgy" and think this is normal. Feeling relaxed may actually seem abnormal. I usually realize that I have been under stress when I find myself unusually fatigued after going home. The fatigue is due to ongoing muscle tension and is also caused by the drop in stress elevated blood sugar levels (like the sudden exhaustion you feel after eating a lot of candy). Other commonly accepted signs and symptoms of stress may include:

- Muscle tension and stiffness
- Diarrhea or constipation
- Nausea, dizziness
- Insomnia
- Chest pain, rapid heartbeat
- Weight gain or loss
- Skin breakouts (hives, eczema)
- Loss of sex drive

- Frequent colds
- Headaches or backaches

Awareness

To deal with stress, you must become aware of when you have a stress reaction and what has triggered it. This may require some personal homework or reflection. Dr. Elwork advises attorneys to keep a daily written stress log. Perhaps this sounds silly, or maybe you think you have no time to do this. Well, do you have a few minutes before retiring at night to jot down a few notes about your work day? Is your health worth this small investment of time? If not, you might at least make some mental notes.

Personal stress triggers

Stress can be caused by external or internal factors. Other then the red, bloated face of your managing attorney, what causes your stress response? Maybe it's an approaching deadline, an angry confrontation in court, a pile of work dumped on your desk, an adverse judge's ruling, a poor performance evaluation, an irritating co-worker, or a badgering client. What is stressful to one person may not necessarily be stressful to another. In part, your reactions may be related to developmental or personal factors. Even that grizzly bear may not trigger a stress reaction in everyone. For example, Peter Parker would not be unduly concerned, and Clark Kent even less so.

The imaginary bear

The problem with the stress reaction is that even neutral events can trigger it, if you perceive them to be threatening. For example, you are in the woods, you see a large brown shape loom amid green bushes, and you *think* it's a bear. You react with stress (heart rate increases, blood pressure rises, muscle tension increases) even though it's just a cow. Or, you are asleep in bed, and *dream* that a bear jumps out at you. You have a stress reaction, even though it's just you and your partner in the room. Likewise, a pile of work dumped on your desk is just a bunch of papers—unless you perceive it as a threat, and anticipate being fired or yelled at. Worry about events that may never happen causes stress as real as that caused by the teeth and claws of the grizzly.

Stress resilience: health, diet and rest

You probably know the benefits of a good diet, fitness and rest, and I won't detail these in this article. If you eat healthy food, drink plenty of water and get enough sleep, you will be more stress resistant. (Incidentally, recent studies tell us that lack of sleep impairs your cognitive functions and memory, which is bad for your legal work and can increase stress effects.)

Take a breath

One direct way to counter stress effects is to take a few minutes from your work day to do diaphragmatic breathing. This is simply taking slow, deep, belly breaths like babies do. Recall that the stress response causes quick, shallow breathing. Just slowing down your breathing sends signals to your brain and body that induce the relaxation response, a counter to stress.

Other interventions

There are a host of methods to counter stress, ranging from yoga and meditation, to herbal remedies (e.g., *Rescue*), to progressive relaxation and thought-defusing techniques, to stress balls and music. In some cases, individual psychotherapy may be helpful or indicated. The range of interventions is extensive, and a comprehensive discussion is beyond the scope of this article.

A few practical strategies

While it helps to keep a balanced lifestyle**,** there are a few useful strategies that may be especially well suited to help attorneys reduce stress reactions, whether they are associates or new solo practitioners. Most of these require a certain amount of self-awareness.

Practice Civility

Law becomes an infinitely more pleasant profession when you interact cordially with adverse counsel. Many of the best lawyers in town are gracious despite being fierce advocates. Usually, being unnecessarily contentious does not win cases, and may lose you professional courtesies (e.g., stipulated adjournments or extensions of time). Even if your managing attorney postures before adverse counsel, you don't have to adopt her style.

Attribution

Psychologists tell us that attribution style can affect your level of stress. Suppose you argue a case before a judge who rules adversely. If you attribute your loss to personal failings, you will likely feel upset and anxious. On the other hand, if you attribute the adverse ruling to the judge's opacity, you will walk away feeling quite differently. The choice of attribution is strategic. If you are a hardworking attorney, most likely the adverse ruling *was* due to external factors. Even if it wasn't, blaming yourself is not an effective strategy.

Problem-Solving Therapy

While the "lawyer personality" may tend to increase stress reactions, other attorney traits can help you cope with stress. Top psychotherapists, whether psychodynamic or cognitive, believe that you can use your strengths to deal with life challenges. Lawyers are typically strong at analytical thinking and problem analysis. Stress, despite its affective components, is just another life problem or is tied to problem situations. Accordingly, problem-solving approaches, such as those of psychologists Dzurilla and Nezu,[14] can be used to cope with stress. The key is to identify the problem, examine how you have reacted in the past, develop alternative solutions, and implement them. As with most things, self knowledge is important.

"Now What?"

As a recently admitted associate, I was often sent to cover last-minute "routine" motions or conferences. While these were supposed to be "slam dunks," sometimes things went awry. My supervising attorney often went berserk when I called to report this. I learned to respond by asking him, "Now what?" Surprisingly, this calmed both of us down, and forced us to think tactically. This worked so well because it emphasized the control we had over the situation. Stress is worse in situations where you feel that you have no control. Awareness of your power decreases stress.

Legal Setbacks

In practice, most legal setbacks are rarely irremediable. A default can be vacated, a bad decision may be reversed on appeal, and a poorly drafted Complaint may be amended. Even a deadline may be extended. Keeping this in mind helps reduce stress.

The problem of the too-heavy workload

What if you are assigned so much to do that you will have to work weekends for the next month to finish? This is a likely stress trigger.

Possible approaches:

1. **Prioritize:** What has priority, what time deadlines are involved? Can any be extended?
2. **Negotiate:** Can you persuade your managing attorney that this is too much even for a superhuman workhouse like yourself? (You may insist that, as a young associate, you dare not utter a word. Nonsense. A lawyer's stock in trade is advocacy and negotiation. If you can't advocate and negotiate on your own behalf, how can you assist your clients? This does not mean you'll get what you want. A psychotherapist may examine what emotional blocks keep you from being assertive. More simply, you may consider a class in assertiveness or read a good book on the subject.)
3. **Accommodate:** A brief can be a work of art, or it can cut to the chase and key on the legal heart. If time is limited, be less of a stylist and accommodate to time restrictions. If the outcome is imperfect, attribute this to the limitations of time, not to personal inadequacy.
4. **Explore options:** Are there any shortcuts to the legal research involved? Is there an old brief on the same topic? Can you recruit a colleague to help you? Or, maybe there's a less pressured job out there somewhere?
5. **Relax:** Take some slow, deep breaths and work down the pile a little at a time.

The point of problem solving is not to find the perfect solution but to identify options that make you feel less trapped and help decrease stress.

Conclusion

Some level of stress is inevitable in the legal profession and none of us escapes it entirely. Awareness is critical. If you can't find a work situation that fits your level of stress tolerance, you need to alter your environment and regulate your reactions. This includes use of problem-solving strategies, healthy coping techniques, and support systems Finally, don't hesitate to seek assistance if you need it, whether from a Bar Association-sponsored program or from a private therapist. Seeking help is not weakness but good legal strategy.

Endnotes

1. *Occupations and the Prevalence of Major Depressive Disorder (1990)*, Journal of Occupational Medicine, Vol. 32 at p. 1079.
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Second Circuit Changes the Civil Rights Claim Game with Its Ruling in *Holcomb v. Iona College*

(Continued from page 1)

In June 2000, Holcomb married Pamela Gauthier, an African-American woman.[7] In 2001, Ruland began a relationship with Iris Hansen, an African-American woman who was a friend of Gauthier.[8] Hansen and Gauthier often went to games and post-game functions together.

From 1998 to 2004, Ruland supervised three assistant coaches—Holcomb, Tony Chiles, who is African-American, and Rob O'Driscoll, the most junior of the three assistants, who is Caucasian and not in an interracial relationship.

In 2004, Iona fired Holcomb and Chiles, while retaining Ruland and O'Driscoll. On January 25, 2005, Holcomb commenced a Title VII action claiming that Iona College terminated his assistant coaching position because of his interracial marriage to Gauthier.[9] Of the five officers of Iona formally involved in the decision to end Holcomb's employment, Holcomb imputed improper racial motives to two: Shawn Brennan (the Director of Athletics) and Richard Petriccione (an Iona Vice President). Holcomb claimed that both Brennan and Petriccione had prior histories of racially questionable conduct, and he relied on those histories as support for his claim that the college's termination decision was based, at least in part, on the fact that his wife is African-American.

In building his case that he was fired for racial reasons Holcomb cited, among other things, Brennan's decision to bar Holcomb's wife and certain high school students, a majority of whom were African-American, from "Goal Club" events. The Goal Club is an Iona College alumni fundraising and social organization and is overseen by the Director of Athletics. Members of the Goal Club, most of whom are Iona alumni, pay an annual fee to the Athletics Department and in return are invited to attend special functions and parties.[10]

Iona asserted that it banned the high school students because it was concerned about violating NCAA recruitment regulations. Holcomb took the position that Brennan was attempting to limit the number of African-American people at the college's fund-raising events. As for Holcomb's wife, Brennan stated that wives were no longer welcome because they were neither donors nor alumni. In addition to his allegations about the Goal Club, Holcomb also relied on testimony that Brennan, after seeing some of the college team's African-American players wearing hip-hop style clothing, asked Ruland if he could "get these colored boys to dress like white guys on the team."[11]

Holcomb also presented affidavits and testimony that Vice President Petriccione was in the habit of making racially offensive comments. Holcomb claimed to have heard Petriccione say "everybody at Fordham thinks they have these good black kids, and Iona has n***ers."[12] A year later, when several African-American members of the Gaels basketball team were accused of stealing and selling telephone access codes, Petriccione allegedly told Holcomb that the basketball program needs to "keep [its] n***ers in line."[13]

Petriccione's comments, according to his colleagues, extended past members of the men's basketball program. He was said to have referred to a Nigerian employee at the Alumni Giving Office as a "jungle bunny" and an "African Princess."[14] When that staff member applied to his office for the position of Assistant Director of Annual Giving, he remarked, "What does she think she is, coming from a hut in Africa and thinking she can apply for this job?"[15]

The most striking of the allegations against Petriccione related directly to Mr. and Mrs. Holcomb. Holcomb had asked Petriccione if he had received the wedding invitation that Gauthier and Holcomb had sent him. According to Holcomb, whose claim was supported by a third party, Petriccione replied, "You're really going to marry that Aunt Jemima? You really are a n***er lover."[16]

On-the-Court Problems

On the court, Iona went from an impressive record of 74-50 from 1997 to 2001, to a lackluster record of 41-47 from 2001 to 2004.[17] The parties disputed the extent of the downturn, but it was clear that the college had serious cause for concern about the team's on-court results and off-court activities.

In late 2001, several players were discovered to have defrauded the college by buying books with book vouchers and then selling the books for cash.[18] Poor academic performance led to the dismissal of two starting players after the 2002–2003 season; two more were suspended for the same reason during the course of the 2003-2004 season.[19] In late 2003, the NCAA informed the college that it was investigating possible rules infractions by Iona's men's basketball players and coaches.[20] Ruland and O'Driscoll were interviewed in connection with the NCAA investigation. However, neither Holcomb nor Chiles was questioned.[21]

In March 2004, after the conclusion of the 2003-2004 basketball season, Brennan was asked, as Director of Athletics, to prepare a written report evaluating the men's basketball program, and to make recommendations for reform.[22] Initially, Brennan recommended three possible courses of action to shake up the team and get it back on track: (1) fire the entire

coaching staff, including Ruland; (2) fire all three assistant coaches; or (3) keep the current coaching staff in place.

Several months later, Brennan submitted a new report, offering final proposals for consideration. This final report counseled against firing the assistant coaches.[23] Brennan suggested a fourth alternative, his preferred option: leave the coaching staff intact, place them on notice that there might be personnel changes as early as July if the situation did not improve, and impose as a condition of their continued employment a 25-point "strategic plan" to improve the program both on and off the court.[24]

Termination

After the issuance of Brennan's final report, the decision to terminate the employment of Holcomb and Chiles was reached in a conference involving the college's President and three Vice-Presidents. There was no formal vote; after a discussion, all four reached a collective decision. There was no justification given as to why O'Driscoll was retained and Holcomb and Chiles were fired.[25] Later, at his deposition, the Iona President, Brother Liguori, said that he felt that "more drastic action" was needed than that favored by Brennan.[26] Rob O'Driscoll was asked to stay, Liguori said, "as a connection to the rest of the program and also because the athletics director thought he was doing an adequate job which I specifically remember reading in Brennan's report."[27]

The Second Circuit noted that the record was equivocal as to whether Brennan had any role in the ultimate decision to fire Holcomb and Chiles and to retain O'Driscoll; the college maintained that the final determination was presented to Brennan as a *fait accompli*.[28] According to Brennan himself, however, he had, at some stage in the process, a face-to-face meeting with Brother Liguori, during which Liguori informed him that two of the assistant coaches would be fired.[29] Brennan then met with Coach Ruland and explained to him that Holcomb and Chiles were being terminated.

According to Brennan's meeting notes, he defended the decision fully during the meeting with Ruland.[30] When Ruland asked Brennan why Holcomb was chosen for termination, Brennan replied, "In *my* evaluation [Holcomb and Chiles] have not provided you the proper level of support that you and our basketball program need to be successful."[31]

Holcomb was asked to resign. When he refused, he was terminated by letter dated May 14, 2004.[32] Tony Chiles was also asked to resign and chose to do so at some point in May 2004.[33]

NCAA Violations

After the termination decisions were reached, the NCAA informed Iona of the results of its investigation, indicating that the men's basketball program was guilty of several "secondary violations" of the Association's rules, none of which related to the Goal Club.[34] The NCAA report attributed one of the violations to O'Driscoll, but blamed none on Holcomb or Chiles.[35]

District Court Decision and Appeal

Holcomb brought suit on January 25, 2005. After discovery, Iona moved for summary judgment. In support of its motion, Iona argued that Holcomb was removed from its staff as part of a necessary overhaul of a poorly performing team.[36] Further, Iona pointed out that the head coach, a Caucasian man, was not terminated despite *his* involvement with an African-American woman. The District Court granted Iona's motion.[37] The District Court's decision was based upon the familiar burden shifting principles set forth in the U.S. Supreme Court decision of *McDonnell Douglas Corp. v. Green*.[38] The Court found that Holcomb did establish a *prima facie* case of discrimination but found that the college had produced evidence of a non-discriminatory reason for its actions in terminating Holcomb. The District Court did not go any further. The Second Circuit, however, noted that the third prong of the *McDonnell Douglas* test was met by Holcomb, which would justify a denial of the summary judgment motion, i.e., that Holcomb had established genuine issues of material fact to merit his claim to rebut the presumption raised by the defendant that it had acted in a legitimate non-discriminatory manner.

In applying the *McDonnell Douglas* three-prong test, the Second Circuit reversed and found that there was an issue of fact with respect to whether the decision-makers were motivated by race in their decision to terminate Holcomb and Chiles.[39] Additionally, the Second Circuit, *sua sponte*,[40] determined "that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race."[41] Therefore, the Court recognized a new cause of action under Title VII based upon the claimant's relationship with another person of a different race—an "association claim."

The Second Circuit's decision to permit an association claim under Title VII not only affects the scope of Title VII of the Civil Rights Law, but the decision also can be applied to include association claims in Section 1981 and the Age Discrimination in Employment Act (ADEA)[42] cases as well. As analyzed below, there does not appear to be any support for this decision in Title VII's legislative history or legal precedent.

Brief Legislative History of Title VII

Title VII of the Civil Rights Act of 1964 was born out of the desire to create an even playing field in the workplace. For more than 20 years, civil rights leaders advocated for changes to federal fair employment practices law.[43] On June 19, 1963, President Kennedy sent his civil rights bill to Congress. President Kennedy implored Congress to revise the civil rights legislation with

respect to issues regarding both private and public employment.[44] President Kennedy stressed that "full and fair employment" was imperative in order for African-Americans to progress in areas of economic growth, job skills, and eliminating racial discrimination in employment.[45]

The road to enacting Title VII was long and, at times, contentious. A plethora of civil rights bills were created by various Senators and Representatives.[46] However, H.R. 405, entitled "A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age," became the nominal ancestor of Title VII of the Civil Rights Act of 1964.[47] The House identified that one of the "primary task[s] of Title VII is to make certain that the channels of employment are open to persons regardless of their races and that jobs in companies or memberships in unions are strictly filed on the basis of qualifications."[48] Eventually, the House amended the bill to include provisions on sex and national origin as a basis of discrimination.

The House passed the bill on February 10, 1964. "[T]he struggle in the Senate was titanic and protracted"[49] and lasted for several months. On July 2, 1964, the House officially adopted the Senate's amendments and transmitted the bill to the President for approval.[50] The President signed the bill into law on the same day.[51] Although Title VII was effective immediately, the provisions with respect to unemployment practices and their prevention became effective one year later.[52]

The Prior Standard of Strict Interpretation

There are two seminal cases in the history of Title VII association claims, *Ripp v. Dobbs Houses, Inc.*[53] and *Adams v. Governor's Comm. on Postsecondary Educ., No. C80-624A*.[54] The courts in *Ripp* and *Adams* strictly construed the statutory language of Title VII in reaching their holdings. In both cases, the plaintiffs sought relief under Title VII and Section 1981. Both courts rejected the plaintiffs' contentions that they had a valid cause of action under these statutes. In *Ripp*, the court found that a Caucasian employee could not bring an association claim based on his friendships with African-American employees. Likewise, in *Adams*, the court held that Title VII did not permit a Caucasian male to bring a cause of action on the grounds that he was discriminated against because of his wife's race.

In those cases, the courts focused on the dependent nature of the plaintiffs' claims. Title VII specifically states:

> [i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of **such individual's** race, color, religion, sex, or national origin.[55]

As such, the courts found that the plaintiffs could not sustain their claims.[56]

In interpreting Title VII, the *Ripp* and *Adams* courts found that a cause of action only existed for a person who was discriminated against because of his or her own race. The reason why those courts found that the association claim failed was because the complaint did not allege that the plaintiff's race and / or color was considered by the employer. Instead, the plaintiff claimed that his / her relationship with **another** person of different race and / or color motivated the employer. Thus, the plaintiff's claim was not tied to the allegedly injured party, but to the allegedly injured party AND another person. The courts in both *Ripp* and *Adams* found that it would go beyond the legislative intent of the statute to include a cause of action based on the plaintiffs' race and that of another person, and therefore the courts denied Title VII damages to the plaintiffs.

Congress's failure to amend Title VII to include an association claim further supports the positions taken by the courts in *Ripp* and *Adams*. Other discrimination statutes have included association provisions that specifically carve out a cause of action for people who associate with disabled individuals. For example, the Americans with Disabilities Act (ADA) states that "the term 'discriminate' includes— . . . excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."[57] A review of the legislative intent of the ADA clearly shows that

> one reason Congress included the association provision in the ADA was that Congress believed that employers should not be entitled to terminate or otherwise adversely affect the employment status of a qualified individual because of that individual's association or relationship with an individual with a particular illness and / or because of an employer's fear of that illness.[58]

Likewise, the Fair Housing Act[59] makes it illegal to discriminate against a renter or buyer because of the handicap of "any person associated with that buyer or renter."[60] However, Congress has not amended Title VII, the ADEA or 42 U.S.C. §1983 to include similar provisions. Thus, it appears that it has intentionally decided not to expand Title VII to include association claims. In *Holcomb*, the Second Circuit went beyond Congressional intent by finding that association claims are permitted under Title VII.[61]

Judicial Pattern of Expanding Discrimination Claims

Holcomb is a clear example of the judiciary's pattern of reaching beyond the statutory language to create a new cause of action under a discrimination statute. Other cases have attempted to reach beyond statutes in a similar fashion. In *Smith v. City of Jackson, Miss.*,[62] the Supreme Court held that the ADEA authorizes recovery in "disparate-impact" cases comparable to Title VII. In the majority opinion, the *Smith* Court relied on its decision in *Griggs v. Duke Power Co.*[63] to extend disparate treatment claims to ADEA cases.

In *Griggs*, the issue before the Supreme Court was:

> whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify [African-Americans] at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[64]

The Court reasoned that the purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[65] In support of its decision to extend disparate impact claims, the Supreme Court stated that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[66] Thus, the Court found that although the requirements seemed neutral on their face, the effect was to cause a disproportionate number of African-American applicants to be excluded from employment. As the Court believed this effect was contrary to the legislative intent, it agreed that the plaintiffs could proceed with a cause of action without establishing discriminatory intent.

"Unfortunately, by expanding the reach of a statute beyond the language in the statute, courts will leave employers vulnerable to future lawsuits without advance notice that their conduct is discriminatory."

The Supreme Court applied the same rationale to the ADEA, thus broadening the class of plaintiffs who could bring an age discrimination lawsuit. In support of its position, the Supreme Court stated that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[67]

In *Smith*, Justice O'Connor disagreed with the majority's finding that liability could be imposed upon an employer without proof of discriminatory intent. She found that "the ADEA's text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize such claims."[68] She argued that the statute expressly stated that the plaintiff must show discriminatory intent. Justice O'Connor relied on § 4(f)(1) of the ADEA. She noted that the section:

> clarifies that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based **on reasonable factors other than age**. . . ." 29 U.S.C. § 623(f)(1). This "reasonable factors other than age" (RFOA) provision "insure[s] that employers [are] permitted to use neutral criteria" other than age, EEOC v. Wyoming, 460 U.S. 226, 232-233, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), even if this results in a disparate adverse impact on older workers.

Thus, Justice O'Connor argued that a strict reading of the statute establishes that disparate treatment cases are inapplicable to ADEA claims.

Conclusion

Title VII was initially created to protect minorities who were denied employment opportunities because of their race, gender or national origin. Now, however, the courts have begun to expand discrimination claims to permit causes of action that are not expressly permitted in the statute. The Second Circuit has, in effect, rewritten Title VII to include claims in which the alleged discrimination is based upon the race of a person with whom the claimant is "associated." As the rise in interracial and same-sex dating increases, so does the likelihood that the courts will continue to expand the scope of Title VII to permit a broader array of association claims. Unfortunately, by expanding the reach of a statute beyond the language in the statute, courts will leave employers vulnerable to future lawsuits without advance notice that their conduct is discriminatory.

There does not seem to be a limit on the type of relationship that will

be deemed as an "association" under the statute. Under the *Holcomb* holding, a plaintiff can argue that he or she was discriminated against because of his or her "association" with anyone in a protected class. As a court examines § 1981, § 1983 and ADEA cases under the Title VII rubric, such a holding will have a significant impact on the social facets of employment discrimination. Employers must be aware that they can be held liable for conduct that is based on their employees' relationships.

Endnotes

1. 42 U.S.C. §2000e02(a) (emphasis added).
2. *Holcomb v. Iona College*, 521 F.3d 130, 132 (S.D.N.Y. 2008).
3. Jeff Ruland is an Iona alumnus who was twice an NBA All-Star. *See Id*. After a 2-28 win / loss record in the 2006–2007 season, Iona terminated Ruland from his head coach position. 1 MORE LOSS FOR RULAND: HIS JOB, *available at* http: / / www.nypost.com / seven / 03222007 / sports / 1_more_loss_for_ruland__his_job_sports_lenn_robbins.htm. Iona and Ruland reached a settlement agreement for the final two years of his contract. *See* Iona, Ruland Announce Settlement Agreement On Contract, *available at* http: / / www.iona.edu / Gaels / story.cfm?id=3313.
4. *Holcomb* at 132.
5. *See id*.
6. *See id*.
7. *See id*.
8. *See id*.
9. *See id.*
10. Throughout the period under consideration, the Goal Club routinely held pre-game or post-game receptions with the players and coaches of the men's basketball team.
11. *Holcomb* at 134.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 136.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. Brennan's report noted a "lack of team motivation," and stated that the Gaels were "consistently outperformed by teams with less talent." He found that there was "poor team and individual academic performance." The "number one problem" with the men's basketball program was "fundamental lack of discipline." *Id.*
23. To do so, Brennan stated, would be akin to "only . . . cutting off appendages to the issue while the core remains." *Id.* at 136.
24. *Id.* at 135. Brennan's report made no specific criticism of Holcomb, but did criticize the coaching staff as a whole. Brennan did specifically mention O'Driscoll and noted that he worked well with others across campus.
25. It is apparent Ruland was kept in his position largely based on financial reasons stemming from his eight-year, $300,000-a- year contract, making him the highest paid employee at Iona. *Id.* at 132.
26. *Id.* at 136.
27. *Id*.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* (emphasis added).
32. *Id.* at 136.
33. *Id.*
34. *Id.*
35. The report cited O'Driscoll for moving the personal belongings of one of the players from a dorm to O'Driscoll's garage.
36. *See Id* at 132.
37. __ F.Supp.2d __, 2006 WL 1982764 (S.D.N.Y. 2006).
38. 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).
39. __ F.3d __, 2008 WL 852129 (2d Cir. 2008).
40. Interestingly, whether Mr. Holcomb could commence an association claim under Title VII was not addressed in the lower court's decision. In fact, Iona did not contest whether Holcomb could seek relief under Title VII.
41. *Id.*
42. It should be noted that claims under section 1981, which pertain only to racial discrimination, are analyzed under the same rubric as Title VII claims. *Hayes v. Kerik*, 414 F.Supp.2d 193, 202 at FN 13 (E.D.N.Y. 2006). Accordingly, association claims have been argued in actions commenced under Section 1983.
43. *See* Title VII, *Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev 1260 (1967).
44. *See* Vass, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431 (1966) at p. 2.
45. *See id*. at p. 2.
46. *See id*.
47. *See id*.
48. *See id*.
49. *See id.*
50. *See id*.
51. *See id*.
52. *See id*.
53. 366 F.Supp. 205, 208-09 (N.D.Ala.1973).
54. 1981 U.S. Dist. Lexis 15346 at *8–9 (N.D.Ga. Sept.3, 1981).
55. 42 U.S.C. § 2000e-2(a)(1)(emphasis added).
56. In *Ripp*, the court found that the plaintiff lacked standing to bring a cause of action under Title VII because, in essence, his claim was that the African-American employees were bring discriminated against by their employer. *See Ripp*, 366 F.Supp. 205 at 209. The court held that "a white plaintiff cannot represent allegedly aggrieved blacks." However, in *Adams*, the court found that plaintiff failed to state a cause of action because Title VII and its legislative history do not indicate that a cause of action exists "for discrimination against a person because of his relationship to persons of another race." *See Adams*, 1981 U.S. Dist. LEXIS 15346, at *8–9. Courts have differed as to whether Congress intended a broad class of people to have standing under Title VII. Some courts believe that Title VII's use of the language "a person claiming to be aggrieved" shows a congressional intention to override all prudential standing limitations to bring a Title VII action. *See, e.g., Hackett v. McGuire Bros.*, Inc., 445 F.2d 442, 446 (3d Cir. 1971). Those courts apply the Supreme Court's analysis in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972), which found that Caucasian homeowners were considered "aggrieved persons" under the Fair Housing Act because discrimination against minorities affected the racial composition of their community.

    Other courts find that because Congress did not define the term "aggrieved" for Title VII purposes, unlike the Fair Housing Act, a plaintiff must be a "member of the class of direct victims of conduct prohibited by Title VII, that is, the plaintiff must assert his own statutory rights and allege that he, not someone else, has been 'discriminate[d] against . . . with respect to his compensation, terms, conditions, or privileges of employment because of [his] race, color, religion, sex or national origin'," *Childress v. City of Richmond*, 134 F.3d 1205, 1209 (4th Cir. 1998); *see*

also Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); *Patee v. Pacific Northwest Bell Telephone Co*., 803 F.2d 476 (9th Cir.1986) and *AFSCME v. County of Nassau*, 664 F.Supp. 64, 66 (E.D.N.Y. 1987).

57. 42 U.S.C.A. § 12112 (a)(4).

58. Rosenthal, Lawrence D., *Association Discrimination Under the Americans with Disabilities Act: Another Uphill Battle for Potential ADA Plaintiffs*, Hofstra Labor & Employment Law Journal, Vol. 22, No. 1, Fall 2004, *available at* SSRN: http://ssrn.com/abstract=640387.

59. 42 U.S.C.A. §§ 3601 *et seq*.

60. 42 U.S.C.A. § 3604 (f).

61. In allowing plaintiffs to commence association claims, it appears that many courts are following the lead of the administrative agencies which permit association claims. *See, e.g., Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (relying on several Equal Employment Opportunity Commission (EEOC) decisions in finding that "the EEOC, which Congress charged with interpreting, administering, and enforcing Title VII, has consistently held that an employer who takes adverse action against an employee or a potential employee because of an interracial association violates Title VII"). However, courts are not bound by administrative agency decisions. In fact, some courts have rejected the findings and recommendations of administrative agencies in interpreting discrimination statutes. *See e.g., Garcia v. Spun Steak Co*., 998 F.2d 1480, 1489 (9th Cir. 1993) (rejecting EEOC guideline providing that an employee meets *prima facie* case in disparate impact cause of action merely by proving existence of English-only policy because there was not support for that guideline under Title VII).

62. 544 U.S. 228, 232 (2005).

63. 401 U.S. 424.

64. *See id.* at 425–426.

65. *Griggs* at 429–430.

66. *See id*.

67. *Smith v. City of Jackson, Miss*. 544 U.S. 228, 234, 125 S.Ct. 1536, 1541 (2005); *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (*per curiam*).

68. *See id.* at 248.

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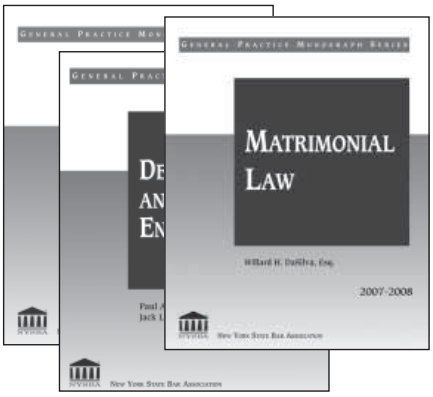

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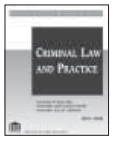

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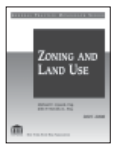

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ISSN 0743-6475 (print) ISSN 1933-8511 (online)

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