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Message from the Section Chair

By Seth H. Greenberg

I write this message, my first as Section Chair, in the aftermath of Hurricanes Harvey, Irma, and Maria, and the recent bloodshed in Las Vegas, the worst mass shooting in recent U.S. history. Our thoughts and prayers are with all those impacted by these events. Crises like these put the daily "chaos" of our lives in perspective and force us to prioritize what is most important. They also remind us of the value of organizations like our own, voluntary state bar associations that are committed to helping those in need and to contributing thoughtful analyses to the discourse on matters of public concern. Information about how you can assist in the hurricane relief effort can be found on NYSBA's website homepage. Also accessible from the website is a 2013 report from State Bar's Task Force on Gun Violence and a commitment by the Association to support bi-partisan legislation and other strategies for keeping guns out of the hands of violent people. The sympathy and support of NYSBA and its members for those most in need make me very proud of my involvement and re-energizes my commitment to the Association and this Section.

The Labor and Employment Law Section, now more than 40 years old and a membership of more than 2,000 strong, is, in my own non-biased assessment, the best and most accomplished Section in the entire Association. It has become this way as the result of the dedication and hard work of scores of practitioners and neutrals in the field who have taken on leadership roles. I want to thank our entire Executive Committee for all that you do: to promote and maintain the practice of labor and employment law, to examine the possibilities of improvement and reform, to disseminate and exchange ideas, and to further the education of the Bar and the public, all central tenets of our mission. On behalf of everyone, I want to acknowledge and thank immediate past Section Chair Sharon Stiller and former Section Secretary Molly Thomas-Jensen for all of their work over the past year. Their contributions have only made our Section even more vibrant. I also want to welcome our new Secretary Monica Skanes and Chair-Elect

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Cara Greene, both of whom I have and will continue to work with closely for the benefit of the Section.

A few additional notes of appreciation are also in order, though by no means is this an exhaustive list of individuals to whom we owe a debt of gratitude—to Allan Bloom, outgoing Managing Editor of the *Journal*, for all of his time and effort in putting together many fantastic issues; to Colin Leonard and Laura Monaco, who have graciously agreed to take over for Allan as co-Managing Editors of our *Journal* (and who did a great job on this, their first issue); to our CLE Co-chairs Alyson Mathews, Robert Boreanaz, and Abigail Levy, who did another amazing job in planning our Fall Meeting; and to our unbelievable and awesome staff at NYSBA, with special shout-outs to Section Liaison Beth Gould and Meetings Representative Cathy Teeter, both of whom are integral to our operations.

There are so many things our Section does well—too many to list here. From CLE programs and webinars to diversity and leadership development, our Section has set the bar high and is often consulted for best practices and "how to" tips. As I have said many times before, I believe the strength of our Section lies within its committees which, through the outstanding leadership of our chairs, fulfill the Section's mission and goals. During my term as Section Chair, I hope our Section's value can be further enhanced by a renewed emphasis on committee work. Through our committees, we can continue to deliver great educational and networking programs, re-tool and re-energize our mentoring programs—both with new attorneys and with new arbitrators—and double our efforts in diversity and leadership development. I am hopeful we can also finally begin the planning process toward a trial/arbitration academy and take a more active role in advocating on issues and topics involving legislative and regulatory items. When we do all of these things, when our committee system is running well, Section membership will grow, become even more diverse, and we will be able to attract active labor and employment law practitioners to be our future leaders.

I encourage all Section members to join a committee, write an article for our *Journal*, speak at a CLE program, participate at a networking event, become a mentor, and help us weigh in on issues of importance. I hope you all enjoy reading this issue of the *Journal* and perhaps even learn something you may not have known previously. I look forward to seeing you all at a Section event soon. As always, I welcome your comments and suggestions concerning our Section. You can contact me at sgreenberg@gbglawoffice.com or (516) 570-4343.

2017 Fall Meeting Retrospective

Our Fall Meeting took place October 20-22, 2017, at The Sagamore in Bolton Landing, New York. The topics discussed were fascinating, the materials were substantive, and the speakers offered invaluable insight into their subject areas. Mother Nature also played an important role, giving us beautiful weather that made the outdoor cocktail hour and our networking events (e.g. golf and a boat ride on Lake George) even more pleasurable. Our dinner speaker featured the Honorable Paul Feinman, the recently confirmed Associate Judge on New York's Court of Appeals, who offered us insight into approaching appeals. Judge Feinman even attended portions of our educational program, offering compliments to our panelists for their grasp of the law and practice advice. We were also thrilled to have NYSBA's President-Elect Michael Miller join us for the entire weekend, offering support for our Section's programs and encouragement for the continued success of our many efforts and initiatives.

The educational component of our Friday program featured plenary sessions on Independent Contractors and the "Gig Economy—A Developing Story and Backlash Discrimination: National Original and Religious Discrimination in the Age of ISIS". There were also breakout workshops covering topics involving arbitration, immigration, and retaliation. On Saturday, we were regaled by a panel presenting "You're Fired? The Current and Future Status of Labor and Employment Law at the Federal, State and Local Levels Under the Trump Era", and we were reminded about (and offered advice on) "Ethically Dealing with Difficult Clients". The sessions were interactive and engaging.

We were also fortunate to have a number of first and second time attendees join us for the Fall Meeting, including several of our diversity fellows. Our Section's Diversity Fellowship Program seeks to attract emerging leaders and increase the diversity of our Section's membership. Each two-year fellow is encouraged to attend our meetings and participate in all Section activities. Fellowship grants include payment of Section dues, Fall and Annual Meeting registration fees, and certain lodging/travel expenses. Each fellow is also paired with a member of the Section's Executive Committee who will act as a mentor, discussing leadership and professional opportunities among other issues important for encouraging the fellow's future (and increased) participation in the Section. Our 2017-2019 Diversity Fellows are: Onya Brinson, Esq. (New York City Housing Authority); Jalise Burt, Esq. (U.S. Magistrate Judge Ronald Ellis, Southern District of New York); R. Alexander Cardenas, Esq. (U.S. Department of Labor's Office of the Solicitor); and Nina Martinez, Esq. (New York Legal Assistance Group's Employment Mediation Project).

I hope you can all join us at our Section's Annual Meeting in New York City on January 26, 2018, and at our next Fall Meeting in Montreal, from October 12-14, 2018.

Seth H. Greenberg

Message from the Editors

By Colin M. Leonard and Laura C. Monaco

We are pleased to bring you this Fall 2017 edition of the *Labor and Employment Law Journal*. After five years of outstanding stewardship of the *Journal* from Allan Bloom, we are honored to serve as the next editors. Our goal is to publish thoughtful, written work from across the labor and employment law spectrum. As Allan wrote in the Spring edition of the *Journal*, the strength of our Section is in its diversity of viewpoints. Whether you are a practitioner (on the union or management side), a judge, arbitrator or mediator, a government official, or an academic, we all have a common objective to advance scholarship in the labor and employment law area. With each edition, we will strive to deliver such diverse and thoughtful opinions from voices throughout our practice area.

Colin Leonard

Laura C. Monaco

We thought it would be useful for readers to understand the process for getting an article published in the *Journal*. Typically, articles are submitted for consideration in final or near final form. However, we also field queries from writers who have developed only a written outline and we will work with them on a timeline for delivering a final product. As you can see from the articles in this edition, they vary in length. But all articles submitted to us contain appropriate legal citations from the author. Once submitted, as editors, we review and revise the articles as necessary for publication. Our objective is to get an article submitted in the upcoming edition of the *Journal*, which is typically published three times each year. Additional detail regarding the *Journal's* publication and editorial policies are on page 74 of this edition. And of course, feel free to reach out to either of us if you want to discuss any aspect of the publication process or if you have an article for consideration.

We hope you enjoy reading this edition of the *Journal*. Many thanks to the authors and the NYSBA staff who handle all of the many details in bringing this edition to print. And to Allan Bloom, for his countless contributions to the *Journal* and our Section over the years.

How Do You Spell P-A-I-D F-A-M-I-L-Y L-E-A-V-E? An Exploration of New York's Paid Family Leave Act

By Theresa Rusnak

In April 2016, Governor Andrew Cuomo signed into law the Paid Family Leave Act (PFL or the Act), which will provide paid family leave to New York employees. Employers covered by the New York State Disability and Workers' Compensation Laws will have to comply with the Act.

After two sets of proposed regulations were released and submitted for public comment, the Workers' Compensation Board issued final regulations on PFL on July 19. 2017.[1]

Even with the final regulations, it is difficult to predict exactly how PFL will impact New York's employees and employers. However, large-scale change is inevitable. From conflicts and overlap with other laws, such as the federal Family and Medical Leave Act (FMLA) and New York Disability laws, to questions about insurance implementation, arbitration or collective bargaining, the Act will add a new layer of complexity to the already complex process of administering the myriad employee leave and benefit laws that govern the workplace. This article provides an overview of the Act, and highlights some of the key areas of confusion and concern that may stand in the way of the smooth administration of the new law.

Perplexing Phased-in Implementation

PFL has two main facets: amount of leave and payment during that leave. Each will be implemented in a series of phases, gradually increasing from January 1, 2018 to January 1, 2021.

Starting in 2018, an employee will be eligible for up to eight weeks of PFL,[2] which will be paid at 50 percent of the employee's average weekly wage[3] or 50 percent of the state average weekly wage (SAWW). The Department of Labor adjusts the SAWW yearly, each year on March 31. The current SAWW is $1,305.92.[4] Using that number, the maximum weekly payment for an employee taking leave in 2018 would be roughly $650. However, once that amount increases on March 31, 2018 (and each year thereafter), the maximum benefit level will increase as well.

In 2019, an employee will be eligible for up to 10 weeks of leave,[5] paid at 55 percent of the employee's average weekly wage rate or the SAWW, whichever is less.[6] For 2020, the 10 weeks will remain constant, but the percentage of weekly wage will increase to 60 percent.[7] Finally, in or after 2021, an employee will have 12 weeks[8] available at 67 percent of their average weekly wage or SAWW, whichever is less.[9]

Abundant Available Leave

Employees will be able to use PFL in three situations: 1) to bond with a new child, 2) to care for a family member with a serious health condition, [10] and 3) to address a military exigency.[11]

PFL can be taken after the birth, adoption or foster placement of a child in the home.[12] The purpose of the leave is to bond with the new child, and can be taken by any parent regardless of gender. The leave can be taken up to one year after the child's birth or placement.[13] Since PFL will be available January 1, 2018, leave can be taken for children that were born or placed in 2017.[14]

> *"Since the final regulations have been released, insurance companies, employers and employees can begin to prepare in earnest for Paid Family Leave to begin in a few months."*

PFL also provides leave for employees to care for a family member with a serious health condition.[15] "Serious health condition" has the same definition under PFL as under FMLA, [16] but the definition of "family member" differs. FMLA defines "family member" as a parent, spouse or child, while PFL expands this to also include grandparents, grandchildren and domestic partners. Like under FMLA, however, an employee taking leave under PFL to care for a family member must do so within a reasonable geographical proximity to that family member.[17] Notably, there are no restrictions on employees traveling to the family member to fulfill this requirement.

Interesting Insurance Implications

Unlike FMLA, which is administered by employers, PFL is administered primarily through disability insurance carriers. Existing disability carriers in the state are required to cover the PFL under the Act starting in January 1, 2017.[18] Employers that are covered by a disability insurance policy will automatically be covered for the purposes of PFL starting on the first of the year, whether or not the employer has paid additional premiums for this purpose.

As the primary administrator, the insurance carrier will determine whether an employee receives PFL. The carrier will receive an employee's request for leave[19] and appropriate paperwork certifying the need for the leave and then make the decision regarding the grant of the leave. With the primary responsibility for requests and certifications placed on the insurance carrier, the regulations largely remove the employer from the leave process. This creates a challenging situation for employers who must manage staffing and attendance, but have not role in approving the leave. Notably, the insurance carrier has 18 days to approve or deny a benefit—long after the time off has already been taken, in many circumstances. It becomes even more challenging and confusing when FMLA is also involved. The regulations provide that when PFL is taken for a reason covered by FMLA, the two types of leave will run concurrently.[20] However, because the employer, and not the insurance carrier, administers FMLA, there may be times when the two entities differ regarding the necessity of the leave, creating confusion for the employee.

Diverse Days Off

Employees can take their available PFL leave on an intermittent basis, with a single day being the shortest possible increment of leave time.[21] For each day of intermittent leave, an employee must provide notice to the employer that the leave will be taken.[22] When an employee does not provide notice, the carrier or self-insured employer can withhold payment until the employee submits a request for payment together with the date of leave, as long as it is within thirty days of the leave.[23] As noted above, the insurance carrier has 18 days to approve or deny the request.[24] Interestingly, the lack of appropriate notice does not expose the employee to permanent repercussions. It does not prevent the employee from taking the leave, nor does it allow the employer to discipline the employee for doing so. In fact, it does not even permanently withhold payment for those days taken. This leaves the employer and the insurance carrier with little recourse when notice requirements are not followed, which will be felt most acutely in cases of intermittent leave.

Flummoxing FMLA Issues

PFL and FMLA can be taken concurrently, provided that the reason for taking the leave applies to both laws. However, even when the qualifying reason applies, there are several practical problems that can arise.

First, the qualification dates for some employees may differ for PFL and FMLA, which could prevent the two types of leave from running together. A full-time employee becomes eligible for PFL leave after 26 weeks of work, with no minimum hours requirement.[25] However, employees only become eligible for FMLA after 12 months and 1,250 hours of work.[26] When a new employee takes PFL, the employee may not yet be eligible for FMLA.

Second, differences in look-back periods between the two laws could prevent PFL and FMLA from running concurrently, and also result in employees taking back-to-back leave. PFL is provided on a rotating 52-week look-back period.[27] However, FMLA can be provided using a variety of methods: calendar year, fiscal year, date from first leave and/or rolling basis.[28] Given these different methods, it is possible that an employee might be entitled to first take joint PFL/FMLA leave, and then take FMLA again within the same short period of time. For example, think of an employer who gives FMLA leave based on the calendar year 12-month period, starting on January 1 of each year. An employee of that employer then takes in late November joint PFL and FMLA leaves to care for a child with a serious health condition. However, come January 1, the PFL leave is exhausted and cannot be taken again for another 52 weeks, but the FMLA leave is renewed and can be taken again. In this situation, an employee could end up taking 24 weeks of consecutive leave, between the two laws.

Absence of Arbitration Remedies

Disputes regarding the grant or denial of PFL are submitted to arbitration.[29] However, as of right now, the remedies for incorrectly granted or incorrectly denied leave are unclear. For example, suppose an employee is denied leave by the carrier, and the employee appeals. Then, the arbitrator decides in favor of the employee getting the leave. It is likely that in between those two decisions, a number of days or weeks may have gone by, and the time the employee requested for the leave is long since passed. Given the time delay, does the employee in the example take leave right after the arbitrator's decision? Is the employee in some way compensated or the carrier/employer punished for the leave that he could have taken at the appropriate time but did not? The opposite situation is also possible: the carrier grants leave and the employer (if the employer indeed has such a right), disputes that decision and proceeds to arbitration. During that time, the employee takes the leave he requested. Then, at arbitration, the arbitrator denies the leave. What are the consequences for the carrier and employer? The only provision in the regulations regarding remedies mandates that arbitration awards be paid to the prevailing party within 10 days of the filing of the decision before beginning to accrue interest.[30]

Furthermore, it is worth mentioning that the section on arbitration in the final regulations does not have a provision detailing the parties that can appeal a decision regarding a claim for benefits. Within the arbitration section as a whole, the insurance carrier, self-insured employer, and employee are mentioned as various parties. However, employers that are not self-insured are not explicitly included as a party that may file for arbitration. Interestingly, the Board received a comment on this topic after the releases of the first set of proposed regulations, and in response stated that there was nothing in the regulations prohibiting an employer from making an appeal.[31] However, the Board declined to change either the second set of proposed regulations or the final regulations to include the employer, leaving the right to arbitration for employers likely, but not guaranteed. [32]

Muddled Mandatory Subjects of Collective Bargaining

PFL will need to be administered in many workplaces where unions represent employees and collective bargaining agreements are in place.

Perhaps the main issue with PFL and collective bargaining is which, if any, parts of the Act are mandatory subjects of bargaining. Generally, employers and unions cannot collectively bargain to replace an existing law. However, within the law itself, there may be discretionary provisions that are mandatory subjects of bargaining.[33] At this time, it is not clear what the National Labor Relations Board or the New York Public Employment Relations Board would consider to be a discretionary provision of the PFL.

For employers that already have collective bargaining agreements in place, the regulations state that the only way a collectively bargained agreement can supplant the statutory leave requirement is if the agreement provides leave benefits "at least as favorable" as those under the Act.[34] The regulations further elucidate that benefits may be deemed "at least as favorable" if: "the aggregate benefits…are equivalent to or greater than the family leave benefits" and the "cash family leave benefits meet the minimum requirements under subdivision (e)."[35] Based on this loose definition, it is unlikely that many, if any, currently collectively bargained agreements would meet this standard, leaving the employer required to implement the insured benefit with all the protections of the Act. This is an area of the law that will have to be developed through arbitrations and court cases, and will therefore take time to be fully explored.

Intricate Interactions with Other Paid Leave Policies

PFL, along with interacting with FMLA, will also have to share space with employer-provided paid leave policies, such as paid time off and paid vacation.

The regulations state that an employer can offer the employee the option to use paid leave before using PFL, but the employer does not have to offer this option, and cannot mandate it.[36] If the employer offers the option, and the employee exercises it, the leaves will run concurrently. In that situation, the employee would be paid the employee's full salary for the vacation time, before finishing the rest of the leave with PFL pay. For those days that overlap, the employer can request reimbursement from the carrier to defray some of the cost.[37]

However, the analysis becomes more complicated when employers are also subject to FMLA. The regulations provide that an employee's accrued paid leave can be applied against the PFL time "in accordance with the provisions of the FMLA."[38] Under FMLA, an employer can mandate that an employee use paid time off or vacation days concurrently with the FMLA leave.[39] Yet, FMLA also provides that employers cannot have their vacation or paid time off policies run concurrently with other types of *paid* leave, such as disability or workers' compensation.[40] There is an argument that PFL is similar to disability and worker's compensation, because it is paid leave that is not paid by the employer. If this is the case, then PFL could not run concurrently. The regulations have an internal contradiction in this regard.

Likely Levels of Employee Contributions

Although PFL coverage can be funded by employees, employers can choose to bear the cost of PFL. [41] In this situation, employees would maintain the same rights to leave and benefits as employees that do contribute. If an employer initially covers the cost of PFL, but then decides to use employee contributions, it may do so. However, the regulations prohibit an employer from retroactively charging its employees for past coverage costs.

However, if an employer does decide to collect contributions from its employees, these contributions will be in the form of weekly deductions from employee paychecks.[42] This money is then remitted by the employer to the insurance carrier (or is maintained by a self-insured employer) to cover the cost of benefits.

On June 1, 2017, the New York State Department of Financial Services set the maximum employee contribution at 0.126% of an employee's average weekly wage, up to and not exceeding 0.126% of the SAWW.[43] Using the 2016 SAWW, the maximum deduction is $1.65 per week for 2018. Both the annual maximum deduction and the statewide average weekly wage change every year. The insurance premium is set at the same exact amount per employee, with the intent that the payroll deduction will exactly match the premium payment. Employers may begin to collect these deductions at any time, [44] but all surplus deductions must be returned to employees.[45]

Your Plan for Full-Time and Part-Time Employees

PFL covers both full-time and part-time employees. An employee is considered full-time when he or she works more than 20 hours a week, and part-time when he or she works less than 20 hours a week.[46] Full-time employees become eligible for leave after 26 consecutive weeks of work.[47] These part-time employees will become eligible to take PFL after working 175 days preceding the first full day the leave begins.[48] There is no minimum hours requirement that either or full or part-time employees must meet before becoming eligible.

Some seasonal or part-time employees may waive PFL coverage. An employer must give its qualifying employees the waiver option, although the employee chooses whether to use it.[49] A temporary or seasonal employee, one who will not even meet the 175 days of working within a 52-week period, can sign a waiver exempting them from coverage.[50] Notably, this is not the same as mandating that an employee who does not work 175 days in a 52-week period looking back from the date of the leave cannot receive PFL. If that were the case, the 175-day coverage would be mathematically impossible for part-time employees. Therefore, if the employee desires PFL after 175 days of working for the employer, the leave must be granted, regardless of how many of those 175 days were within a 52-week look-back period.

Lateral Link to Disability Laws

PFL is intended to complement existing statutory disability benefits, providing benefits for leaves that would not be covered under the state's Disability Benefits Law. Since they are intended for different purposes, the two types of benefits cannot be collected at the same time. [51] However, there is a combined limitation for the two types of leaves: no more than 26 weeks of combined PFL and disability leave can be taken in a 52 week period.[52]

While the two types of leaves are for distinct purposes, they will come together in the maternity leave situation, creating the opportunity for birth mothers to take lengthy partially-paid maternity leaves. A birth mother typically takes six to eight weeks of disability leave for her own recovery. Since this time is for her own disability, it can be taken under the Disability Benefits Law without using any PFL time. Once that period of disability ends, the woman can take advantage of her eight (and eventually 12) week PFL benefit, ultimately creating a maternity leave of as much as 18-20 weeks when the leave is fully implemented. (If the employer is also covered by the federal FMLA, the FMLA leave will run concurrently for the first 12 weeks, since FMLA can be used concurrently with both DBL and PFL.) This would make the average time off after giving birth about 17 weeks, for New York women after the year 2021.

Exceptional Exemptions

Generally speaking, PFL broadly applies to any private New York State employer[53] with more than one employee, and those who are covered by the Workers' Compensation Law.[54] Significantly, public employers are not covered. The Workers' Compensation Law defines "public employer" as the state, a political subdivision of the state, a public authority, or any other government agency or instrumentality thereof.[55] These employers can opt into PFL coverage (as many have done for disability coverage) but are not required to do so.

However, certain types of employees, even if they are employed by covered employers, are exempt from the law and employers need not provide PFL (or DBL) coverage. This includes livery driver, black car driver, farm laborer, ministers, and jockeys.[56] Independent contractors are also not covered.

There is yet another category of employees that are excluded from the law: "person[s] engaged in a professional or teaching capacity in or for a religious, charitable, or educational institution."[57] As the language states, this exemption only applies to those teachers and professionals working for those three types of entities. Moreover, the definition of professionals may be narrowly drawn to include learned and creative professionals, as it is under the wage and hour laws.[58]

This exception could have several ramifications. First, these institutions may be already optionally covering their professionals and teachers under the disability law, even though the law does not technically require them to do so. If this is the case, the institution may decide take a second look at that coverage before adding PFL.

However, even if the institutions elect to discontinue coverage for their professionals and teachers, they will still have to purchase it for the rest of their employees that do not work in those capacities. As noted above, the exemption only applies to "a person engaged in a professional or teaching capacity," which means it does not apply to all the other employees that these institutions routinely and necessarily employ. This could lead to a confusing situation where some employees have the right to take substantially more leave than others.

Finally, many of these professionals and teachers may be represented by unions, which surely will have strong opinions on whether the disability coverage should be discontinued or not, and whether those professionals should be covered by PFL. This decision will certainly be subject to mandatory bargaining.

Abstract Notice Announcements

The PFL regulations set forth a number of notice requirements, both for employees and employers. On the employee side, the notice requirements are the same as under FMLA: "an employee must provide the employer with at least 30 days advance notice before leave is to begin if the qualifying event is foreseeable."[59] If the leave is foreseeable, and the employee does not provide adequate notice, the carrier may file a partial denial of the family leave claim for a period of up to 30 days from the date the notice is provided. If, however, "30 days advance notice is not practicable…notice must be given as soon as practicable."[60] This also applies to each individual day or period of days taken for intermittent leave.[61] The employee must inform the employer of the dates of the leave, or risk the carrier withholding payment. The regulations provide that an employer can waive the 30-day notice requirement, but are silent on whether the intermittent notice requirement can be waived.[62] The content of the notice shall be "sufficient" to "make the employer aware of the qualifying event and the anticipated timing and duration of the leave."[63]

An employer must also provide an employee with several types of notices. First, employers must notify their employees of their rights under PFL. The regulations obligate an employer to place a poster in the workplace, as well as inform their employees through a handbook or separately written policy.[64] Furthermore, when an employee initially notifies the employer that he or she seeks leave, the employee "need not expressly assert rights under PFL or even mention family leave."[65] The regulations place the burden on the employer to seek further information from the employee to determine whether paid family leave is being sought by the employee.

Moreover, employers are also required to inform employees when their PFL leave has been concurrently designated as FMLA leave.[66] If an employer fails to provide this notice, it loses the right to have the leave run concurrently with FMLA.[67] On the other hand, if an employer designates FMLA leave for a reason also covered by PFL, informs the employee of this, and the employee still declines to apply for payment, the leave period will counted against the employee's maximum leave duration.[68]

Vexing Variations for Self-Insured Employers

Employees also have the option to self-insure their employees for PFL, but must have done so by September 30, 2017.[69] Employers who have not previously self-insured for disability leave must apply to the Chair of the Workers' Compensation Board for approval.[70]

Self-insured employers must follow all of the same regulations as insurance carriers, including the same criteria for determining whether leave should be granted or appealed. Self-insured employers must file annual reports to the Workers' Compensation Board, which include information on the number of eligible employees, the amount of covered payrolls, the number of employees who received benefits, the amount of benefits paid, the amount of employee contributions, and the estimate amount of employee contributions in the upcoming year.[71]

Self-insured employers are required to deposit into a Workers' Compensation fund in an amount that will be determined by the Chair of the Workers' Compensation Board. Self-insured employers will likely have to obtain lines of credit from a bank or surety company in order to be able to make these deposits.[72] The regulations set forth minimum deposit requirements for self-insured employers, ranging from a $10,000 deposit for employers with fewer than eight employees to a $50,000 deposit for employers with 2965 employees or more.[73]

Effective Employer Penalties

The regulations set forth a penalty structure for non-compliant employers. Particularly, if an employer does not provide coverage under the Act, "a penalty shall be imposed on the employer, not in excess of a sum equal to one-half a per centum of the employer's weekly payroll for the period of such failure, and a further sum not in excess of 500 dollars."[74] Penalties are also imposed for employers that discriminate or retaliate against employees for using PFL, under Section 120 of the Workers' Compensation Law.[75] Penalties are reviewable by the Bureau of Compliance of the Workers' Compensation Board upon the employer's request within three days of the date of the penalty.[76]

Since the final regulations have been released, insurance companies, employers and employees can begin to prepare in earnest for Paid Family Leave to begin in a few months. For insurance companies, this will consist of crafting PFL policies and adding them as a rider to existing DBL policies. Employers, in turn, will have PFL riders automatically added to their DBL policies, but must take steps to ensure payroll deductions are properly taken, craft new PFL policies, revise existing leave policies, and refine their internal leave and attendance-tracking processes to account for the added complexity of the PFL benefits. Although no one can exactly predict PFL's overall impact, every party affected by the regulations should begin to consider how they will be affected. This is as "simple" as remembering how to spell P-A-I-D F-A-M-I-L-Y L-E-A-V-E.

Endnotes

1. The regulations are available at the New York State Workers' Compensation website, at http://www.wcb.ny.gov/PFL/pfl-regs-text-revised.jsp.
2. Paid Family Leave Act Regulations, Laws, Regulations and Decisions: Workers' Compensation Board § 358-3.1(e)(3)(i).
3. *See id*. § 358-3.1 (e)(2)(i). Average weekly wage is calculated by determining the average wage of the eight weeks of employment immediately preceding the first week of the leave. *See id*. § 355.9(a)(2).
4. *See* New York State Average Weekly Wage, Workers' Compensation Law § 2(16), available at https://labor.ny.gov/stats/avg_wkly_wage.shtm.
5. *See supra* note 2, § 358-3.1 (e)(3)(ii).
6. *See id*. at § 358-3.1 (e)(2)(ii).
7. *See id*. at § 358-3.1 (e)(2)(iii).
8. *See id*. at § 358-3.1 (e)(3)(iii).
9. *See id*. at § 358-3.1 (e)(2)(iv).
10. PFL is not available for an employee to care for his or her own serious health condition. *See id*. § 380-2.5(g)(4).
11. *See id*. at § 380-2.3.
12. *See id.* at § 380-2.2.
13. *See id*. at § 380-2.2(b).
14. *See id*. at § 380-2.7.
15. *See id*. at § 380-2.1.

16. It is an "illness, injury, impairment, or physical or mental condition that involves: inpatient care in a hospital, hospice or residential health care facility; or continuing treatment or continuing supervision by a health care provider." *Id*. § 355.9(a)(16).

17. *See id*. § 380.2.1(a).

18. *See id*. at § 380-7.1; § 380-7.7.

19. New York has released a form, called PFL-1, for this purpose. However, the form does not have to be used, and a carrier must accept all forms of reasonable requests for leave. See id. § 380-5.1.

20. The employer must designate the leave as FMLA before it can run concurrently with PFL. *See id*. § 2.5(g)(1).

21. *See id*. at § 380-2.5(g)(5).

22. *See id*. at § 380-3.1(c).

23. *See id*. at § 380-4.1(b).

24. *See id*.

25. *See id*. § 380-2.5. For employees whose "nature of the employment" includes breaks, such as semester breaks, the period of 26 consecutive weeks will be tolled during those periods of absence. *Id*. § 380-2.5(a)(3).

26. *The Family and Medical Leave Act*, United States Department of Labor, Wage and Hour Division, available at https://www.dol.gov/whd/regs/compliance/1421.htm.

27. *See supra* note 2, § 355.9(a)(8).

28. Fact Sheet #28H: 12-month period under the Family and Medical Leave Act (FMLA), United States Department of Labor, available at https://www.dol.gov/whd/regs/compliance/whdfs28h.pdf.

29. *See generally supra* note 2, § 380-9.

30. See *supra* note 2, § 380-5.4(f)

31. Comments were submitted to the Workers' Compensation Board noting this discrepancy: "The Board received a comment stating that the employer should have the ability to appeal a decision. There is nothing in the regulations as written that prohibits an employer from filing for arbitration regarding a paid family leave claim." *See* Assessment of Public Comment, Paid Family Leave, available at http://www.wcb.ny.gov/PFL/pfl-assessment-public-comment.jsp.

32. *See id*.

33. This is the case with FMLA, where provisions of the law have been held to be subjects of collective bargaining, such as notice requirements (*Woodman v. Miesel Sysco Food Serv. Co.*, 254 Mich. App. 159, fn 7 (Mich. Ct. App. Nov. 26, 2002)) and arbitration (*14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1469 (2009)).

34. *See supra* note 2, at § 380-2.9.

35. *Id*. at § 358-3.1(d)(1) & (2). Subdivision (e) sets forth the provisions on amount of leave (eight to twelve weeks) and payment for the leave (50 percent to 67 percent of the employee's weekly wages, up to the state-wide average weekly wage) on an increasing scale.

36. *See id*. at § 380-6.2(a). "The actual reimbursement amount may be computed after family leave is complete." *Id*.

37. *See id*.

38. *Id*. at § 380-6.2(c).

39. 29 C.F.R. §§ 825.207(b).

40. 29 C.F.R. § 825.207(d): "Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave." *Id*.

41. *See supra* note 2, at § 380-361.1(g).

42. *See id*. at § 380-2.4(d).

43. *Decision on Premium Rate for Family Leave Benefits and Maximum Employee Contribution for Coverage Beginning January 1, 2018*, New York State Department of Financial Services, available at http://www.dfs.ny.gov/insurance/r_other/dec_prem_rate_flb_06012017.pdf.

44. *See supra* note 2, at § 380-2.4(d).

45. *See id*. at § 380-7.2(b)(3).

46. *See id*. at § 380-2.5(a) and (b).

47. *See id*. at § 380-2.5(a)(1).

48. *See id*. at § 380-2.5(b).

49. *See id*. at § 380-2.6(a).

50. *See supra* note 2, at § 380-2.6. The employer cannot mandate that a temporary or seasonal employee waive PFL; the employee must make the decision. *See id*.

51. *See id*. at § 380-2.4(c). Interestingly, although days taken off for vacation or other paid time off count towards the 52 week eligibility period for PFL, time on disability leave does not. *See id*. § 380-2.5 (e).

52. *See id*. at § 380-2.5(f).

53. This includes employers headquartered outside of New York, but who have employees who work in the state and are required to be covered under New York disability laws.

54. 12 N.Y.C.R.R. §355.4(a).

55. N.Y. Work Comp L. § 212-B (2016)

56. *See supra* note 2. at § 355.2(c)(8), (9) & (10).

57. *Id*. 355.2(c)(4).

58. *Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA),* United States Department of Labor, https://www.dol.gov/whd /overtime/fs17d_professional.pdf.

59. *See supra* note 2 at § 380-3.1(a).

60. *Id*.

61. *See id*. at § 380-3.1(c).

62. This may have implications for collective bargaining as well; if the notice requirements can be waived, this suggests that they are a discretionary subject under the Act, and may therefore be subject to bargaining.

63. *See supra* note 2, § 380-3.2(a).

64. *See id*. at § 380-7.2 (e); Section 380-7.2 (a)(1) and (2).

65. *See id*. at § 380-3.2(b).

66. *See id*. at § 380-2.5(g)(1).

67. *See id*. at § 380-2.5(g)(2).

68. *See id*. at § 380-2.5(g)(3).

69. *See id*. at § 361.1(f).

70. *See id*. at § 361.1 (a).

71. *See id*. at § 361.4(a) & (b).

72. These institutions also have to follow the PFL regulations. *See id*. at § 361.3 (c) & (d).

73. *See id*. at § 376.1(c).

74. *Id*. at § 380-7.2(d).

75. *See id*. at § 380-8.2.

76. *See id*. at § 380-7.9.

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The Accelerating Evolution of Title VII's Treatment of Sexual Orientation Discrimination

By Geoffrey A. Mort

Introduction

When the 1964 Civil Rights Act was passed, the statute prohibited sex discrimination in an amendment that added just three words, "because of sex," to the provision in Title VII prohibiting employment discrimination.[1] These three words, of course, provided little useful guidance to lawyers and litigants seeking to challenge what they believed to be sex discrimination in the workplace. During the years immediately after Title VII's passage, the Equal Employment Opportunity Commission failed to take the Act's ban of sex discrimination seriously, and moved slowly to address the early charges in this area that were filed.[2]

However, under pressure from the National Organization of Women and some of its own female staff attorneys, the EEOC began to deal more assertively with sex discrimination complaints and issued rulings in favor of such plaintiffs as flight attendants contesting no-marriage policies.[3] Very few people during Title VII's first two decades of existence, however, suggested that the statute's prohibition of sex discrimination extended to discrimination against gays and lesbians based on their sexual preferences, or sexual orientation discrimination.

In the half century since Title VII's passage, however, the law in this area has changed significantly, particularly since 2015. Indeed, following the U.S. Supreme Court's decision in *Obergefell v. Hodges*[4] legalizing same-sex marriage, some have ventured that we are on the cusp of having sexual orientation discrimination banned by federal law in much of the United States.[5]

This article discusses developments during the past two years, and particularly in 2017, that have moved the country closer to that point. For the first time, a federal circuit court of appeals has found that Title VII prohibits sexual orientation discrimination,[6] and another may be on the verge of doing so. These and other cases suggest that the traditional notion that Title VII's prohibition of sex discrimination applies only to discrimination on the basis of gender, and not sexual orientation, may soon become a thing of the past.

Ulane and Early Sexual Orientation Cases

The first major federal circuit case to address the question of whether Title VII covers sexual orientation discrimination was *Ulane v. Eastern Airlines, Inc.*[7] In deciding that Title VII does not prohibit discrimination based on sexual orientation, the *Ulane* court's reasoning was twofold: (1) the court stated that the "phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men,"[8] and (2) "[i]f the term sex as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."[9]

The second notion in particular was to become commonplace in the many subsequent circuit court decisions that arrived at the same conclusion as *Ulane.* In the years after *Ulane*, nearly every circuit court of appeals in the country decided that sexual orientation discrimination is not covered by Title VII.[10]

Supreme Court Decisions Cast Doubt on the Narrow Reading of Title VII

Two Supreme Court decisions over a nine-year span for the first time gave limited protection against workplace discrimination against gay and lesbian employees. The first is *Price WaterHouse v. Hopkins*,[11] where the Supreme Court found sex stereotyping to be a form of gender discrimination under Title VII. Although the plaintiff in *Price WaterHouse* was a female executive who was denied promotion because she did not conform to her male superiors' stereotypes about how women should dress and behave, some courts and attorneys realized that the decision could be used to combat workplace discrimination against gays and lesbians.[12] As discussed below, sex stereotyping discrimination as defined in *Price Waterhouse* increasingly became a preferred theory on which to challenge sexual orientation discrimination under Title VII.

The second Supreme Court decision is *Oncale v. Sundowner Offshore Services.*[13] In *Oncale,* the court recognized same-sex harassment as sex discrimination. The employee in *Oncale* was not gay, but was harassed by male co-workers who regarded him as insufficiently masculine. Thus, the rationale of *Oncale* could be used by gay employees subjected to harassment because of their appearance or behavior so long as they did not attribute the harassment to being gay. The reluctance of the lower federal courts to extend *Oncale* to discrimination based on one's status as a gay man per se created a paradox recognized by a number of courts[14] that in most circuits remains unresolved to this day. As the Seventh Circuit in *Hamm v. Weyauwega Milk Products, Inc*.[15] observed five years after *Oncale*, "the absurd conclusion follows that the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals."

Oncale, which in a sense was also a sex stereotyping or gender norm discrimination case, may have provided the impetus for one circuit to forthrightly apply its holding to gays and lesbians. In *Rene v. MGM Grand Hotel, Inc.*,[16] the Ninth Circuit found that a gay male employee harassed and taunted by co-workers for having feminine traits successfully pleaded a claim of sex discrimination under Title VII. *Rene* opened the door, albeit slowly, to a growing number of courts applying sex stereotyping principles in cases of sexual orientation discrimination.

"Second Generation" Sexual Orientation Discrimination Cases: Continued Reliance on Congressional Inaction as a Rationale

After *PriceWaterhouse* and *Oncale,* all but one of the circuit courts still continued to find that sexual orientation discrimination is not prohibited by Title VII. The Second Circuit so held in *Simonton v. Runyon*,[17] where it pointed out that "we are informed by Congress's rejection, on several occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences."[18] Failure by Congress to amend Title VII to specifically include the words "sexual orientation" was cited in *Ulane*, has been employed by a majority of other circuits to justify not construing Title VII to cover sexual orientation discrimination, and was relied on by the Second Circuit five years after *Simonton* in *Dawson v. Bumble & Bumble.*[19] Although the court in *Dawson* acknowledged that "it is often difficult to discern when [a plaintiff] is alleging that… adverse employment actions allegedly visited upon her by [her employer] were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these,"[20] it then announced that "[a] gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII."[21] During the next decade, the "bootstrap" language would be used repeatedly by courts seeking to resist the use of sex stereotyping theory by plaintiffs allegedly subjected to sexual orientation discrimination.

The Second Circuit, of course, was not alone in continuing to follow *Ulane* after the *PriceWaterhouse* and *Oncale* decisions. The Sixth Circuit emphatically did so in *Vickers v. Fairfield Med. Center*:[22] "recognition of [the gay plaintiff's] claim would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation under a sex stereotyping theory [would be prohibited] if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." And, in *Etsitty v. Utah Transit Authority,*[23] the Tenth Circuit also rejected *PriceWaterHouse's* application to sexual orientation discrimination.[24]

District Courts Look Anew at Sexual Orientation Discrimination

Notwithstanding the near unanimity of the Circuit courts on the question of whether Title VII covers sexual orientation discrimination, a number of district courts have found the argument that "because of sex" does not encompass discrimination based on sexual preference to be illogical. Such decisions provided an underpinning to later circuit court cases that questioned the traditional reasoning on this issue.[25]

In *Boutillier v. Harford Pub. Sch.,*[26] the court allowed a lesbian teacher's sex discrimination case to proceed where the only evidence of her sexual orientation was that she was married to a woman, holding that the plaintiff "has set forth a plausible claim that she was discriminated against based on her nonconforming gender behavior."[27] The court in *Koke v. Baumgardner*[28] found a Title VII sexual orientation discrimination claim to be meritorious and cited to language in *Simonton* that an argument that sexual orientation discrimination can be perceived as discrimination based on sexual stereotypes was "substantial."[29]

Yet another district court decision that deviated from the circuit court "second generation" decisions was *Terveer v. Billington.*[30] The district court in *Terveer* denied a summary judgment motion where the plaintiff alleged that the defendant denied him promotions and created a hostile work environment because of his failure to conform to male sex stereotypes, basing his nonconformity solely on his status as a gay man. *See alsoVideckis v. Pepperdine University.*[31]

Hively v. Ivy Tech: The Seventh Circuit Recognizes Sexual Orientation Discrimination as Discrimination Per Se

In the fall of 2016, a Seventh Circuit panel heard an appeal from a district court decision dismissing the sexual orientation claim of a lesbian former community college professor who had been denied promotions and later terminated. In *Hively v. Ivy Tech Community College,*[32] the court reluctantly affirmed the district court on the grounds that, as a panel, "we must adhere to our prior precedent,"[33] i.e., *Ulane.* In doing so, however, the panel expressed grave reservations about the continued viability of *Ulane,* stating that "it seems unlikely that our society can continue to condone a legal structure in which employees can be fired… and otherwise discriminated against solely based on who they date, love or marry."[34]

All but inviting an *en banc* rehearing, the court criticized traditional case law on sexual orientation discrimination for creating a "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."[35] On October 11, 2016, the Seventh Circuit set aside the panel's ruling that Title VII does not protect against sexual orientation discrimination because of *Ulane* and granted *sua sponte* an *en banc* rehearing.

En banc oral argument took place at the end of November 2016, and the full Seventh Circuit court issued its decision on April 4, 2017.[36] The court held that Title VII prohibits sexual orientation discrimination, stressing the "commonsense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."[37] The court further found that there is no difference between a gender nonconformity claim and a straightforward sexual orientation claim. In a concurrence, Judge Posner stated that what he called "judicial interpretative updating"[38] meaning revisiting and reinterpreting an existing statute, even where the reinterpreted version is not consistent with what Congress may originally have intended, is sometimes warranted and was clearly called for in *Hively.*

Is the Second Circuit Following in *Hively*'s Footsteps?

No fewer than four district court decisions holding that Title VII does not prohibit sexual orientation discrimination have been appealed to the Second Circuit in the last year: *Zarda v. Altitude Express,*[39] *Christiansen v. Omnicom Group, Inc.,*[40] *Cargian v. Breitling USA*[41] and *Magnusson v. County of Suffolk.*[42] *Zarda*, *Christiansen* and *Cargian* all resulted in affirmances based on *Simonton*, although a majority of the panel in *Christiansen* issued a concurrence suggesting that the entire Second Circuit should reconsider the issue *en banc.* Motions for an *en banc* rehearing were made in all three cases, and granted in *Zarda.* Oral argument was held on September 26, 2017.

Of course, the fact that the Second Circuit agreed to rehear *Zarda en banc* suggests that the court may be inclined to find that Title VII covers sexual orientation discrimination and thus become the second circuit to reach this conclusion. A number of *amicus* briefs have been filed, including one by the U.S. Department of Justice arguing against any expansion of Title VII to include sexual orientation discrimination.[43]

Conclusion

Regardless of what the Second Circuit decides in *Zarda*, *Hively* has created a split in the circuits that almost certainly will be resolved in the Supreme Court. Speculation as to the outcome of future Supreme Court cases is notoriously unreliable, particularly when the composition of the Court may change during the next few years. Certainly, there is reason to believe that the societal shift in favor of gay rights and greater acceptance of gays and lesbians suggest that extending the protection of federal anti-discrimination law to sexual orientation is only a matter of time. Particularly during the last three years, as discussed above, there has been considerable movement among the federal courts in that direction.

Nevertheless, should another conservative justice be appointed to the Supreme Court, the outcome of a case involving Title VII's coverage of sexual orientation discrimination is anything but assured. This is certain to be an issue that the legal community and the public at large will follow with rapt attention in the months and years to come.

Endnotes

1. 42 U.S.C. §2000e-2(a).
2. Gillian Thomas, Because of Sex 4 (2016).
3. *Id*.
4. 135 S. Ct. 2584 (2015).
5. Twenty-two states now prohibit sexual orientation discrimination in employment in both the public and private sectors, and another twelve ban it in the public sector.
6. 853 F.3d 339 (7th Cir. 2017).
7. 742 F.2d 1081 (7th Cir. 1984).
8. *Id.* at 1085.
9. *Id.* at 1087.
10. *See, e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Hopkins v. Baltimore Gas & Elec. Co.,* 77 F.3d 33 (4th Cir. 1996); *U.S. Dept. of Housing & Urban Dev. v. Federal Labor Relations Authority,* 964 F.2d 1 (D.C. Cir. 1992); *Blum v. Gulf Oil Co.*, 597 F.2d 936 (5th Cir. 1979); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989).
11. 490 U.S. 228 (1989).
12. *See, e.g., Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997) (male employee who wore earring and was called "fag" or "queer" made sufficient allegation of gender-based sex stereotyping discrimination to defeat summary judgment).
13. 523 U.S. 75 (1998).
14. *See, e.g., Centola v. Potter,* 183 F. Supp. 403, 408 (D. Mass. 2002) ("the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear").
15. 332 F.3d 1058, 1067 (7th Cir. 2003).
16. 305 F.3d 1061 (9th Cir. 2002).
17. 232 F.3d 33 (2d Cir. 2000).
18. <u>Id</u>. at 35.
19. 398 F.3d 211 (2d Cir. 2005).
20. *Id.* at 217.
21. *Id.* at 212.
22. 453 F.3d 757, 764 (6th Cir. 2006).
23. 502 F.3d 1215 (10th Cir. 2007).
24. Sex Stereotyping with respect to sexual orientation has gradually gained acceptance. As of mid–2017, only three circuits, the Fourth, Sixth and Tenth, were either undecided or continued to reject the theory.
25. Of considerable significance is the EEOC's 2015 decision in *Baldwin v. Foxx,* EEOC Doc. 0120133080 (July 15, 2015). In *Baldwin,* the EEOC found that Title VII's "because of sex" language covers sexual orientation discrimination. The Commission found that sexual orientation discrimination is discrimination *per se,* and also embraced sex stereotyping and associational discrimination as grounds upon which discrimination based on sexual preference could be challenged. The Commission stated that "'[s]exual orientation' cannot be defined or understood without reference to sex." Some courts thereafter followed *Baldwin's* reasoning in finding sexual orientation discrimination to be barred by Title VII. *See, e.g., Isaacs v. Felder Services, LLC,* 143 F. Supp. 3d (M.D. Ala. 2015).
26. 2014 U.S. Dist. LEXIS 134919 (D. Ct. Sept. 25, 2014).
27. *Id.* at *2.
28. 2016 U.S. Dist. LEXIS 1979 (S.D.N.Y. 2016).
29. *Simonton* at 37.
30. 34 F. Supp. 3d 100 (D.D.C. 2014).
31. 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (finding that "the line between sex discrimination and sexual orientation discrimination… does not exist, save as a lingering and faulty judicial construct").
32. 830 F.3d 698 (7th Cir. 2016).
33. *Id.* at 718.
34. *Id.*
35. *Id.* at 714.
36. 853 F.3d 339 (7th Cir. 2017).
37. *Id.* at 351.
38. *Id.* at 353.
39. *Zarda v. Altitude Express, Inc.*, No. 10 cv 04334 (E.D.N.Y. 2015).
40. 167 F. Supp. 3d 598 (S.D.N.Y. 2016).
41. 2016 U.S. Dist. LEXIS 139206 (S.D.N.Y. Sept. 29, 2016).
42. 2016 U.S. Dist. LEXIS 64897 (E.D.N.Y. May 17, 2016).
43. Michael D. Shear and Charlie Savage, *White House Lands 3 Punches Against Gay Rights in One Day*, N.Y. Times July 28, 2017, at A1.

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When Well-Intentioned Statutes Collide

By Katie L. Birchenough

On September 13, 2016, the United States Court of Appeals for the District of Columbia tipped its hat to the Old Boys Club in a decision that continues to affirm the fact that women are second-class employees. Against the backdrop of the nation's employment policies that disparage women, including discriminatory hiring practices, unequal pay, and outdated maternity leave laws, the D.C. Circuit confirmed that it is perfectly okay for a woman to be sexual harassed in the workplace—so long as she is sexually harassed by her coworker on the picket line. In its decision, *Consolidated Communications v. NLRB*,[1] the D.C. Circuit affirmed the National Labor Relations Board's (NLRB or "Board") finding that an employer's two-day suspension of an employee who sexually harassed a female non-striking employee while striking outside of the employer's facility was a violation of the striking employee's Section 7 rights.[2] While Judge Patricia A. Millett tried to save face by authoring a strongly worded concurrence[3] warning the Board of the need to change this sentiment, the Circuit ultimately stood down and deferred to the Board's discretion on the matter.[4]

Not only is the D.C. Circuit's affirmation of the Board's decision based on faulty grounds, it creates severe practical hurdles for employers who are tasked with concurrent obligations to protect employees' rights to engage in concerted activities under the National Labor Relations Act (NLRA or the "Act") and to prevent sexual harassment in the workplace pursuant to Title VII of the Civil Rights Act ("Title VII").[5] It also sends a strong message to women that when it comes to the conditions of the working environment of a female worker, their rights are second to those of their male counterparts, once again dismantling any hope that women can attain equal footing in the workplace.

Background

Consolidated Communications ("Consolidated Communications" or "Company") is a Delaware telecommunications company located in Illinois that provides telephone, television, and broadband services to both residential and commercial customers in several of the surrounding Midwest states in addition to parts of Texas and California.[6] Certain employees of Consolidated Communication are represented by the International Brotherhood of Electrical Workers Local 702 (IBEW or "Union") including technicians, customer service representatives, and repair, warehouse and facilities employees.[7] In late 2012, in anticipation of the expiring collective bargaining agreement (CBA), the company and union entered into a series of negotiations.[8] But when negotiations stalled over pension and health care issues, the union called for a strike based on bad faith bargaining by the company.[9] During the strike, Consolidated Communications filled the vacancies with replacement workers.[10] While the strike lasted a little under a week,[11] Consolidated Communications received several written and verbal reports regarding alleged misconduct by striking employees, including those of Eric Williamson who "grabbed his crotch as a hostile gesture directed at" female non-striking worker Tara Walters who was trying to report to work one morning amidst the frenzy of activity involved in the strike.[12] After meeting with each employee individually, Consolidated Communications suspended four employees without pay pending an investigation into the allegations and eventually confirmed certain disciplinary actions, including a two-day suspension for Williamson.[13] The union objected to the company's disciplinary actions toward the striking employees and filed a charge for unfair labor practice against the company.[14]

Finding of the Administrative Law Judge

Upon review, Administrative Law Judge Arthur J. Amchan (ALJ) found that Williamson had engaged in misconduct "by grabbing his crotch and making an obscene gesture directed at [non-striking employee] Tara Walters."[15] However, the ALJ credited the General Counsel's finding that the misconduct was not serious enough to "deny [Williamson] the protection of the Act."[16] In the alternative, the ALJ also provided that "the General Counsel may prove that although misconduct occurred, it was not serious enough to warrant the level of discipline imposed."[17] The ALJ ultimately found that "Williamson's gesture did not justify his [two-day] suspension" because when he grabbed his crotch, this act was not accompanied by a threat of rape or other bodily harm.[18] Apparently feeling the need to justify his findings, the ALJ went on to state that "Williamson's gesture [could not] be legitimately characterized as 'sexual harassment' [because i]n Title VII cases, a plaintiff generally cannot prevail on the basis on a single incident not involving physical contact."[19] The ALJ was further convinced by the apparent lack of any previous application by the employer of its sexual harassment policy to a single incident not involving physical contact.[20] According to the ALJ, this factor weighed heavily against justifying Williamson's two-day suspension.[21] Ultimately, because Williamson's suspension was made on the basis of two separate incidents—the crotch grabbing incident and a separate unrelated incident which was found not to have occurred—the ALJ concluded that the suspension based on both events was unwarranted.[22]

D.C. Circuit's Finding

The D.C. Circuit Court affirmed the Board's finding that while Williamson "did engage in misconduct by grabbing his crotch and making an obscene gesture, toward Walters…the actions were not sufficiently egregious to warrant suspension."[23] The Circuit continued stating,

> [t]he Board, in fact, acknowledged that Williamson's gesture was "totally uncalled for, and very unpleasant," but nonetheless concluded that his actions could not *objectively* be perceived "as an implied threat" of the kind that would coerce or intimidate a reasonable employee from continuing to report to work during the strike….Given the rough-and-tumble nature of picket lines and the fleeting nature of Williamson's offensive misconduct, we cannot conclude that the Board erred in its assessment of the objective impact of this particular conduct in this instance.[24]

Judge Millett opted to write separately "to convey [her] substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes [which] have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace."[25] Judge Millett then provided a lengthy and illustrative list of "[t]he sexually and racially disparaging conduct that Board decisions have winked away," finding that this pattern "encapsulates the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status."[26] Recognizing that strikes and picket lines can arouse intense feelings that lead to strong words, Judge Millett suggested the need to draw a line at words that sexually or racially degrade coworkers, as these words are categorically different, noting that "[c]onduct that is designated to humiliate and intimidate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment. Full stop."[27]

Two Statutes; Two Different Standards

Both the National Labor Relations Act and Title VII of the Civil Rights Act of 1964 were enacted to accomplish similar objectives and generally work in concert with the other to accomplish these goals protecting certain classes of workers, assisting in the improvement of working conditions, and balancing power among different parties. An issue arises, however, when two coworkers, each with specific rights derived from the separate statutes that are administered under two separate federal agencies and interpreted by differing standards, come into conflict with the other while at work.

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Striking Employees Rights Under Section 7 of the NLRA

Under the NLRA, whether unionized or not, employees have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[28] The purpose of Section 7 of the Act, from which employees derive their right to engage in concerted activities, was to provide a means for which equality in the bargaining power between employers and employees could be achieved.[29] However, the Act also provides employees with a choice to engage in concerted activities, specifying that employees "have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment."[30] An employer cannot "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]."[31] Therefore, an employer will be found to have committed an unfair labor practice if "(1) the employer *knew* of the concerted nature of the employee's activity; (2) the concerted action was *protected* under the [Act]; and (3) the employer's adverse action was *because of,* or motivated by, the protected, concerted activity."[32] In addition, "an adverse employment action on an employee who engages in concerted, protected activities may violate [the Act] even if the employer has not exhibited anti-union animus."[33]

Furthermore, when employees engage in concerted activities by striking for economic reasons, employees are entitled to reinstatement of their former or substantially equivalent position upon an unconditional offer to return to work.[34] However, an employer may refuse to reinstate a former striking employee if the employer has a good-faith belief that the striking employee engaged in strike misconduct that may reasonably tend to coerce or intimidate other employees in their Section 7 rights i.e., the non-striking employee's right to refrain from striking.[35]

A large body of case law has been built around the meaning of concerted activities.[36] However, even when an employee engages in concerted activities, not all such concerted activities are immune from discipline.[37] An employer's imposition of reasonable discipline, including refusal to reinstate employees for such misconduct, does not constitute an unfair labor practice.[38] While it is true that the expansive scope of Section 7 has never been read without qualification, there are no real legislative guidelines as to what encompasses "protected" and "unprotected" concerted activity, and so this line-drawing task has been left to the Board and the courts.[39] Decisions by the Board and the courts have offered limited line-drawing analysis but rather accept that employees are not protected when their conduct either (1) violates the law; or (2) "is so fundamentally contrary to the dictates of the employment relationship as to warrant characterization as 'indefensible,' or 'reprehensible' or 'disloyal.'"[40] Therefore, concerted activities will fall outside the protections of Section 7 under the "means/objective test" if the activity's "objective is contrary to the terms or spirit of the National Labor Relations Act or allied federal legislation" and may include instances where the concerted activity violates criminal or tort laws of the state.[41]

Non-Striking/ Replacement Worker Rights

First, the National Labor Relations Act protects employees in the private sector regardless of their union affiliation.[42] This includes employees who choose to refrain from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection.[43] Because of this reach, the Board is charged with protecting the rights of all employees covered under the Act.[44]

Additionally, employees working for an employer that employs more than 15 workers are protected from sexual harassment, considered a form of sex discrimination under Title VII.[45] The policy behind enacting Title VII was to prohibit discrimination based on certain protected traits and "'to encourage informal conciliation and to foster voluntary compliance' through 'the creation of antiharassment policies and effective grievance mechanisms.'"[46] When the concept first arrived in the 1980s, the idea that sexual harassment could be categorized as sex-based discrimination was highly controversial.[47] While the Supreme Court was able to provide legitimacy to the idea that sexual harassment was a form of sex-based discrimination,[48] 30 years later, society still struggles to identify what actions constitute sexual harassment.[49] For example, to prove a prima facie claim of sexual harassment by a coworker under a hostile work environment claim, an individual claiming he or she was sexually harassed must demonstrate: (1) the individual was a member of a protected group; (2) the individual was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of the individual's employment; and (5) the employer knew or should have known of the harassment but did not take prompt remedial action.[50] Notably, in order to determine whether the sexual harassment affected a term, condition, or privilege of the individual's employment, the court must inquire as to whether the harassment was both *objectively and subjectively* abusive."[51] Additionally, the court must look to the totality of the circumstances, including whether the harassment was frequent *or* severe; physically threatening or humiliating, as opposed to merely offensive; unreasonably interfered with work performance; and/or undermined the plaintiff's workplace competence.[52]

Moreover, employers are encouraged to actively prevent and rectify any instance of potential sexual harassment in the workplace.[53] Proactive measures taken by the employer to reduce any instance of gender discrimination are strongly promoted by the Equal Employment Opportunity Commission (EEOC) because they prevent the workplace from becoming "permeated with 'discriminatory intimidation, ridicule, and insult,'" that if left uncured could lead to such pervasive and severe atmosphere as to trigger a violation of Title VII.[54] Indeed, an employer who has a sound sexual harassment policy, and takes immediate corrective measures when notified of an incident that may rise to the level of sexual harassment faces lessened liability under Title VII.[55] The EEOC provides that employers should instate a sexual harassment policy and establish an adequate complaint and investigation process.[56] Further, the EEOC emphasizes that "[a]n employer should correct harassment that is clearly unwelcome regardless of whether a complaint is filed" and further states that an employer is not prohibited from taking interim measures such as placing the alleged harasser on non-disciplinary leave.[57]

Issues Arise in the Application of Competing Standards

The ALJ's finding that Williamson's conduct was "unpleasant" but not serious enough to warrant a two-day suspension was contrary to standards set under both the NRLA and Title VII, as well as accompanying case law. Specifically, the ALJ found that Williamson's act of grabbing his crotch as he yelled at a non-striking female employee trying to report to work was a single act which was not accompanied by an *objective* threat of bodily harm.[58] The ALJ's use of an objective standard to determine an implied threat of bodily harm is derived from *Clear Pine Mouldings*,[59] a case in which "strikers carried clubs, tire irons, baseball bats and ax handles"[60] while making verbal threats to non-striking employees.[61] The standard under *Clear Pine Mouldings* takes into account "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[62]

While the *Clear Pine Mouldings* standard is useful in analyzing general threats from striking employees, the standard is completely contrary to the standard used for evaluating behavior that is sexually threatening in nature. At the outset, gestures and language used towards a certain subsection of the population because of the targeted population's gender are decisively different than those used universally amongst the sexes. Take, for example, the classic use of the middle finger to convey disgust with a "scab" or replacement worker. Inherently, this gesture is not chosen because of the receiving party's gender, nor does it convey a gender-specific message. Conversely, grabbing one's crotch, imitating masturbation, or calling a female worker a "whore" is calculated towards a subsection of the population based on the receiving party's gender and is derogatory *because of* the receiving party's gender.[63]

Additionally, the objective standard derived from *Clear Pine Mouldings* allows a male ALJ to infer what would be reasonably threatening to a woman in a particular situation. Some may argue that a sexually explicit gesture alone is objectively threatening to a woman regardless of the context—a striker need not elevate this threat by accompanying his obscene gesture with threats of rape, sodomy, or other bodily harm.

"However, an employee's attempt to couch his concerns about the conditions of employment in sexual slurs to insult women should not be deemed protected."

Moreover, the objective standard does not include the additional subjectivity standard used under Title VII claims.[64] Title VII claims require the fact finder to analyze whether the harassment is both objectively *and subjectively abusive*.[65] While what properly encapsulates this subjective standard is the question of debate among circuits courts,[66] there is no doubt that a subjective analysis must be made.[67] By opting not to conduct a subjective inquiry as to the effect Williamson's action had on non-striking employee Walters, the ALJ could not have sufficiently guaranteed that the conduct did not qualify as sexual harassment. The record from the administrative hearing lacks any inquiry into whether Walters subjectively viewed the gesture as sexually abusive (i.e., unwanted), the decision saying only "[w]hile his gesture was totally uncalled for, and very unpleasant, it is difficult to see how it could have been perceived as an implied threat of violence or even future mistreatment (whatever that means) or have discouraged Walters from continuing to report to work during the strike."[68] The only reference to a possible subjective inquiry is the ALJ's statement noted that while Walters mentioned the incident to fellow coworkers, she did not immediately report the incident to management until the next day when she was asked by her supervisor if she wanted to report the incident.[69] Walters affirmatively did so.[70] Without any inquiry into how Walters perceived the gesture, the ALJ could not have possibly had the means to properly determine the effect the gesture had on Walters.

The ALJ further concluded that the single act alone is not sufficient, noting that "a plaintiff generally cannot prevail [in a Title VII claim] on the basis on a single incident not involving physical contact."[71] The statement oversimplifies the issue and disregards the standards set forth by case law for a claim of sexual harassment under hostile work environment jurisprudence.[72] While many single-act hostile work environment claims have ultimately been dismissed, this does not create an automatic disqualification just because the act occurred one time.[73] The fact finder must still go through a full five-part analysis of the claim to determine if the single act is severe enough to warrant liability under Title VII.[74] While there are many reasons as to why a court may want to keep this five-factor analysis open for individuals bringing a sexual harassment claim, one of the main factors supporting such an avenue is that each claim for sexual harassment will be unique from the next. Each circumstance will be different as will the plaintiff's reaction to the sexual conduct. A woman who has been a victim of rape, child sexual abuse or domestic violence may have a different reaction to the sexual conduct than others and such reaction may appear extreme to the trier of fact without any context.[75] Additionally, a woman may have a different reaction based on the environment she is in. One who feels necessary to compete with men and be "one of the guys" may have a different reaction to certain conduct invoked by her male coworkers.[76]

By using the objective standard under *Clear Pine Mouldings*, but not considering the subjectivity standards required under a Title VII analysis, the ALJ endorsed and provided immunity to actions that could otherwise be in violation of federal and state sexual harassment laws. This endorsement is counter to the notion that decisions by the Board and the courts have explicitly found that acts in violation of the law are not afforded the protection of the NLRA. Had the ALJ conducted an appropriate test under Title VII, the outcome may have been different. It seems superfluous to speculate, however, because even if the sexually explicit gesture by Williamson was found not to violate any federal or state laws, the more obvious failure of the ALJ's decision was that it lacked any consideration of whether the gestures by Williamson were "so fundamentally contrary to the dictates of the employment relationship as to warrant characterization as 'indefensible,' or 'reprehensible' or 'disloyal.'"[77]

The Board's decision to step in over the employer disciplinary decision and reinstate an employee who has made sexually explicit gestures towards another female employee under the guise of protecting the striking employee's right to engage in concerted activity is inherently destructive to the employment relationship between the employer and its employees. First, speech in the workplace is much more limited than the constitutional right of free speech that Americans have become accustomed to and are not governed by the same standards as public free speech.

Additionally, while it must be recognized that striking workers are given somewhat of a "free for all" while on strike, the NLRA is limited in the type of speech it protects—when such speech relates to the terms and conditions of employment. Of course, much of the speech used while picketing or striking will directly coincide and relate to the employee's terms and condition of employment. However, an employee's attempt to couch his concerns about the conditions of employment in sexual slurs to insult women should not be deemed protected.

"Furthermore, due to the current political context it appears the Supreme Court will not have a majority to overturn the D.C. Circuit's opinion."

Finally, regardless of whether language is protected or not, both the union and the employer have an interest in reducing language used by employees to sexually harass other coworkers. The IBEW, for example, recognizes this in its own sexual harassment guidance documents, which emphasize that:

> [s]exual harassment is one of the most corrosive influences that can infect the workplace. It can divide the bargaining unit and pit workers against each another. It can destroy the promise of effective labor/management cooperation when power is wielded in a sexually manipulative and dehumanizing manner. Sexual harassment is illegal discrimination based on sex and has no place in a healthy work environment.[78]

Therefore, like Judge Millett in her concurring opinion, the IBEW also recognizes that certain actions are categorically different when the words or conduct are aimed at a specific individual because of the individual's gender.

Where Do We Go from Here?

Man May Work from Sun to Sun, but a Woman's Work Is Never Done

One of the largest questions remaining is what are women to do when confronted with sexual harassment by a striking co-worker? Short of civil disobedience, there doesn't seem to be much that can be done without either guidance on the issue by the EEOC, a change in the Board's interpretation, or a systemic change in the way the county views women. Without significant systemic change likely to occur anytime in soon, employees are better off trying the enact change from within. Employees would benefit from union representation that acknowledges and prevents sexual harassment during strikes and from employers who have strong sexual harassment policies that are consistently enforced. Employees should demand both. Creating this environment is not only important for the existing morale of employees, but is also crucial for creating a foundation for an existing environment that when reviewed by an administrative body or court is held to those higher standards specifically because the employer had a history of vigorously enforcing its own sexual harassment policies.

Additionally, women are free to pursue other causes of action based on state law. Many states will have a cause of action under their human rights laws (or equivalent) for employees alleging workplace sexual harassment.[79] There may also be certain circumstances that provide women with a cause of action against the striking employee grounded in state tort law. Threat of suit or a pending litigation may in some circumstances lead to negotiations or mediation of the issue by an independent arbitrator.

"Damned if You Do, Damned if You Don't Conundrum" Employer Protections

The decision in *Consolidated Communication* has obvious and severe ramifications for women looking to gain equal footing in the workplace. The decision also has serious implications on an employer who must maintain the rights of *all* of its employees—not just those who have engaged in concerted activity by striking. By preventing an employer from taking remedial action when he or she is notified of a sexual harassment complaint, the *Consolidation Communications* decision relieves the employer of liability in this particular workplace context, but also creates severe uncertainty for an employer who is tasked with instituting remedial measures under Title VII. How is the employer to know in the moment that a sexual harassment claim is reported, that the Board will have a contrary view as to what constitutes sexual harassment several months down the road after the ALJ reviews the sexual harassment conduct in the context of an unfair labor practice claim? Of course, where the sexual harassment claim is so severe as to withstand the objective standard test under *Clear Pine Mouldings* the employer would be free to discipline the striking employee. However, for more subtle conduct that still has a profound effect on the non-striking employee, the circumstance under *Consolidated Communications* suggest that to avoid being brought up on an unfair labor practice, an employer should refuse to allocate punishment towards the striking employee regardless of whether the employer could do so under its own employment policies. In the end, the decision provides a free pass to employers who would not otherwise want to institute discipline in this context, despite the federal mandate under Title VII to do so in other contexts, and prohibits those employers who are willing to prescribe discipline for this certain type of behavior from doing so.

Furthermore, due to the current political context it appears the Supreme Court will not have a majority to overturn the D.C. Circuit's opinion.[80] It is also a strong possibility that the makeup of the Board will not move toward one of inclusion of women's rights in the workplace.[81] Given this political reality, it is in the best interest of the employer to negotiate a thoughtful CBA which includes provisions that prohibit striking employees from engaging in certain behaviors that may violate an employer's sexual harassment policy or may otherwise discriminate against other employees on the basis of gender or race.

As a general matter, it has been held that an employer wishing to prevent employees from engaging in certain concerted activities, is free to negotiate a provision in the CBA.[82] For instance, no-strike provisions in a collective bargaining agreement will remove a strike, normally a protected concerted activity, from the veil of protection of the Act.[83] But this provision is only enforceable while the CBA is still in effect. Generally, an expired CBA remains in effect throughout negotiations until a new agreement is reached.[84] However, in the private employer context, if parties negotiate to impasse, the terms of the CBA will no longer bind the parties.[85] Therefore, it would be in both parties' interest to not only include an "anti-harassment during strike" clause, but also specify and agree that the clause will continue after expiration of the CBA. This provision would be governed by general contract principles and should be enforced by the courts.[86] The question is, of course, whether a union would agree to any provision that would continue after expiration of a collective bargaining agreement. While a union may balk at a blanket prohibition that would limit its members from expressing themselves, it should be willing to accept a reasonable tailored provision that limits certain types of specific behavior.[87] In fact, the IBEW, which represented the striking employees at Consolidated Communication, has an in-depth policy on sexual harassment in the workplace that acknowledges,

> [w]e want not only our IBEW members but all workers around the globe to be valued and respected as human beings, as well as for their knowledge, skills and abilities. The Declaration of the IBEW commits each one of us to fight for "human justice, human rights, and human security," which includes the commitment to work together to end sexual harassment.[88]

The other option for the employer is to ensure that the employer has an appropriate and clear sexual harassment policy and has a history of consistent enforcement of such policy. The ALJ in *Consolidated Communication* appeared to take issue with the fact that the employer had not previously instituted discipline under the sexual harassment policy based on a single act that did not involve physical conduct.[89]

Additionally, when disciplining an employee for violations of a sexual harassment policy, the employer should explicitly state that the employer is basing the discipline on the violation of the sexual harassment policy. If the discipline is based on a violation of the sexual harassment policy and some other action while striking, the employer would be wise to separate or otherwise distinguish the discipline. In *Consolidated Communications*, the employer suspended Williamson for two-days based on both the violation of the sexual harassment policy and because of another action that was eventually found not to have occurred.[90] Ultimately, because the employer did not specify separate discipline for the two actions, the entire disciplinary action was deemed to have violated the NLRA.[91]

In the end, all parties involved— employers, unions, and union and nonunion employees—benefit from a healthy working environment where employees are free to express their displeasure with their working conditions while at the same time remain free from gender discrimination while at the workplace. Being cognizant of the realities women face on a daily basis while at work is the first step towards the creation of policies that ensure equality is met. Unfortunately, until elected officials and judges are able to understand the plight of women who are objectified and constantly subjected to unwanted harassment purely because of their sex, the duty to inform, demand, and push for equality for all falls to the legal field. It is the legal field that will be tasked with bringing actions and challenging laws or decisions that continue to affirm the notion that women are second-class employees.

Endnotes

1. *Consol. Communs., Inc. v. NLRB.*, Nos. 14-1135, Consolidated with 14-1140, 2016 U.S. App. LEXIS 16702 (D.C. Cir. Sep. 13, 2016).
2. *Id.* at *43.
3. *Id.*
4. *Id.*
5. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).
6. *See Corporate Governance*, *Articles of Incorporation*, Consolidated Communication, http://ir.consolidated.com/corporate-governance-document.cfm?DocumentID=6914 (last visited Nov. 5, 2016); *Investor Relations*, Consolidated Communication, http://ir.consolidated.com/ (last visited Nov. 5, 2016).
7. *See Consol. Commc'n d/b/a Ill. Consol. Tel. Co.*, ALJ Ruling No. 14-CA-094626 et al. at *3 (N.L.R.B. Nov. 19, 2013); *Workers Strike at Matton-Based Consolidated Communications*, Herald & Review, (Dec. 8, 2012), http://herald-review.com/business/local/workers-strike-at-mattoon-based-consolidated-communications/article_0fbaa13c-40ed-11e2-8ba8-001a4bcf887a.html.
8. *See Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *3; *Workers Strike at Matton-Based Consolidated Communications*, *supra* note 7.
9. *See Consol. Communs., Inc.*, at *3; *Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *3; *Workers Strike at Matton-Based Consolidated Communications*, *supra* note 7.
10. *See Consol. Communs., Inc.*, at *3.
11. *See id.* at *4.
12. *See id.*; *Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *17, 18.
13. *See Consol. Communs., Inc.*, at *4.
14. *See id*. at *5.
15. *Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *21.
16. *Id.*
17. *Id.* (emphasis added).

18. *Id.* at *21–22.

19. *Id.* at *22 n.21 (internal citations omitted).

20. *See id*. at *22.

21. *See id.*

22. *See id.*

23. *Consol. Communs., Inc*., at *19–20.

24. *Id.* at *20 (citing *Allied Indus. Workers v. NLRB*, 476 F.2d 868, 879 (D.C. Cir. 1973)) (emphasis added).

25. *Id.* at *43–44 (Millett, J., concurring).

26. *Id.*

27. *Id.*

28. 29 U.S.C. § 157 (2016) ("Rights of employees as to organization, collective bargaining, etc.").

29. *See* 29 U.S.C. § 151 (2016) ("Findings and declaration of policy"); *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962) ("[T]he policy of the Act [is] to protect the right of workers to act together to better their working conditions.").

30. 29 U.S.C. § 157.

31. 29 U.S.C. § 158(a)(1) (2016) ("Unfair labor practices").

32. *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 835–36 (5th Cir. 1991). Additionally, an employer found to have committed a Section 8(a)(1) violation may also be subject to liability under Section 8(a)(3). *See* 29 U.S.C. § 158(a)(3) (2016).

33. *Reef Indus., Inc.*, 952 F.2d at 836.

34. *See Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *18; *Am. Baptist Home of the West d/b/a Piedmont Gardens & Serv. Em. Union, Union Healthcare Workers-West*, ALJ Ruling No. 32-CA-025247 (N.L.R.B. Aug. 24, 2016).

35. *See Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *18; *Am. Baptist Home of the West*, ALJ Ruling No. 32-CA-025247. Upon review, once the employer establishes that reinstatement was denied based on a good-faith belief that the actions of the striking employee reasonably tended to coerce or intimidate other employees in their section 7 rights, the burden shifts to the General Counsel to show that the misconduct was not serious enough to deny the striking employee protection of the Act. *See id.* In the alternative, the General Counsel may prove that although misconduct occurred, it was not serious enough to warrant the level of discipline imposed. *See id.*

36. *See e.g., NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (employee seeking to have assistance of his union representative during investigatory interview); *Brewton Fashions, Inc. v. NLRB*, 361 F.2d 8 (5th Cir. 1966), *cert denied*, *Brewton Fashions, Inc. v. NLRB*, 385 U.S. 842 (1966) (right of employee to wear union insignia or pins); *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, (5th Cir. 1981) (refusal of pipefitters to comply with order to leave shelter during rain shower and return to work involving use of electrical equipment on dock that extended into Mississippi River); *NLRB v. Brown*, 546 F.2d 690 (6th Cir. 1976) (conduct of two employees, in discussing wages of other employees and behalf of each other concerning personal wages with employer).

37. *See* Robert A. Gorman, Matthew W. Finkin, & Timothy Glynn, *Cox & Bok's Labor Law: Cases and Materials*, 562 (16th ed. 2016).

38. *See Nat'l Conference of Fireman and Oilers v. NLRB*, 145 F.3d. 380 (D.C. Cir. 1998).

39. Gorman, *supra* note 37, at 562.

40. Gorman, *supra* note 37, at, 562–63 (citing *Aroostook Country Reg'l Ophthalmology Ctr v. NLRB*, 81 F.3d. 209 (D.C. Cir. 1996)).

41. *Id.* at 563.

42. 29 U.S.C. § 152(2) (2016); *see also Rights We Protect*, Nat'l Labor Relations Bd., https://www.nlrb.gov/rights-we-protect (last visited Nov. 5, 2016) ("The National Labor Relations Board protects the rights of most private-sector employees to join together, with or without a union.").

43. 29 U.S.C. § 157.

44. *See* 29 U.S.C. §§ 152(2), 157; *see also Consol. Communs., Inc*., at *49 (Millett, J., concurring).

45. 24 U.S.C. § 2000-e (2016).

46. *Twelfth Annual Review of Gender & Sexuality Law: Employment Law & Health Care Access Chapter: Sexual Discrimination Claims under Title VII of the Civil Rights Act of 1964*, 12 Geo. J. Gender & L. 577, 578 (2011) (hereinafter *Twelfth Annual Review*). Interestingly, it is alleged that the word "sex" was added to the Act at the last minute by Representative Howard W. Smith, a segregationist Southern Democrat who opposed the federal civil rights legislation. Critics say the last minute addition was Smith's attempt to kill the bill. *See the Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, Nat'l Archives, https://www.archives.gov/education/lessons/civil-rights-act (last updated Oct. 19, 2016).

47. *Twelfth Annual Review*, *supra* note 46, at 589–90.

48. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

49. A recent example that highlights the confusion surrounding what constitutes sexual assault, sexually harassment, and other sexually invasive behaviors is the leaked footage of 2016 Presidential Nominee Donald Trump's remarks regarding *Days of Our Lives* actress *Arianne Zucker.* Trump is heard on a recording as stating "I better use some Tic Tacs just in case I start kissing her. You know, I'm automatically attracted to beautiful—I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything.…Grab 'em by the pussy. You can do anything." *Transcript: Donald Trump's Taped Comments about Women*, N.Y. Times, (Oct. 8, 2016) http://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html. *See also* Alicia Adamczyk, *Donald Trump's 'Locker Room' Talk Would Get Average Worker Fired*, Fortune (Oct. 9, 2016, 10:35 PM), http://fortune.com/2016/10/09/donald-trumps-locker-room-talk-would-get-average-worker-fired/ (quoting Maya Raghu, director of workplace equality at the National Women's Law Center) ("This is not mere 'locker room talk.' If similar comments were made in the workplace 'it could be considered sexual harassment, and the employer could be held liable.'").

50. *See Twelfth Annual Review supra* note 46, at 592.

51. *See id.*

52. *See id.*

53. *See* 29 C.F.R. § 1604.11(f) (2016) ("Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.").

54. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB*, 477 U.S. at 65).

55. *See* 29 C.F.R. § 1604.11(d) (2016) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

56. *See Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors*, U.S. Equal Emp't Opportunity Comm'n, https://www.eeoc.gov/policy/docs/harassment-facts.html (last modified Apr. 1, 2010).

57. *See id.*

58. *See Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *21.

59. *See Clear Pine Mouldings, Inc. & Int'l Woodworkers of America, Local No. 3–200, AFL-CIO*, 268 N.L.R.B. 1044 (N.L.R.B. 1984).

60. *Id.* at 1045.

61. *See id.*

62. *Id.* at 1046.

63. *See* Mary E. Becker, *How Free Is Speech at Work?*, 29 U.C. Davis L. Rev. 815, 831–32 (1996) (sexual harassment has "the purpose and effect of putting a group…back in their subordinate place and outside the economic territory of the harassers.").

64. *See* Informal Discussion Letter from Carol R. Miaskoff, Assistant Legal Counsel, Equal Emp't Opportunity Comm'n (Sept. 11, 2015), https://www.eeoc.gov/eeoc/foia/letters/2015/title_vii_harassment_09_11.html (addressing whether Title VII is in conflict with the NLRA in light of the ALJ's decision in *Consolidated Communication*).

65. *See Harris*, 510 U.S. at 21–22(1993); *supra* note 51 and accompanying text.

66. *See* Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 Ala. L. Rev. 733, 750 (2002).

67. *See id.* ("That conduct must be unwelcome to be actionable is clear; what constitutes unwelcome conduct is not.").

68. *Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *22.

69. *See id.*

70. *See id.*

71. *Id.* at *22 n.21.

72. *See* 29 C.F.R. § 1604.11(a) (2016) ("[P]hysical conduct of a sexual nature constitute sexual harassment when…such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."); *Hayden v. Atlanta Newspapers, Div. of Cox Enters.*, 534 F. Supp. 1166, 1178 (N.D. Ga. 1982) ("[Plaintiff's] claims of sexual harassment fall far short of the egregious conduct present in Bundy. However, in light of the evidence presented by the parties on this issue, the court finds that a factual dispute exists as to whether the Company's employees' conduct constituted sexual harassment. Thus, it is not possible on summary adjudication to determine if [Plaintiff] has established a prima facie case of sex discrimination. Accordingly, [Defendant's] motion for summary judgment on [Plaintiff's] allegation of sexual harassment will be denied, and the case will proceed to a trial on the merits.").

73. *See* 29 C.F.R. § 1604.11(b) (2016) ("In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis."). *See also Webb v. Or. Steel Mills, Inc.*, U.S. Dist. LEXIS 9348, at *12–13 (D. Or. July 1, 2001) ("The Ninth Circuit has placed a high standard for granting motions for summary judgment in employment discrimination cases. The nonmoving party need produce very little evidence to survive summary judgment in a Title VII case, because the ultimate question is one that is most appropriately left to the jury upon a full record. Defendant asserts that plaintiff's sexual harassment claim should fail as a matter of law because the conduct she alleges is not sufficiently severe or pervasive enough to create an actionable hostile work environment. Although the court is allowed to consider the perspective of a reasonable person in plaintiff's position, the court should focus its attention on the perspective of the plaintiff herself.").

74. *See* 29 C.F.R. § 1604.11(b).

75. *See Brackett v. Peters*, 11 F.3d 78, 81 (7th Cir. 1993) ("It has long been the rule in tort law (the 'thin-skull' or 'eggshell-skull' rule) not only that the tortfeasor takes his victim as he finds him, but also that psychological vulnerability is on the same footing with physical. If for example the victim is predisposed to schizophrenia, and the tortfeasor inflicts a minor injury which precipitates the schizophrenia, he is liable for the entire consequences even though they were both highly unlikely and unforeseen."). *See also* Lisa Bloom, *Gretel Fights Back: Representing Sexual Harassment Plaintiffs Who Were Sexually Abused as Children*, 12 Berkeley Women's L.J. 1 (1997).

76. *See Carr v. Allison Gas Turbien Div., General Motors Corp.*, 32 F.3d 1007, 1011 (7th Cir. 1994) (holding that a female coworker did not welcome her coworkers' harassing conduct despite her use of "unladylike" behavior because when the circumstances were viewed in context, it was obvious that her use of vulgar language was an effort to be "one of the boys.").

77. *See supra* note 40 and accompanying text.

78. *The IBEW Stands Against Sexual Harassment. A Guide for Defining, Recognizing and Confronting Sexual Harassment in the Workplace*, 18 (2005), http://www.ibew.org/Portals/31/documents/CivicCommunity/Form%206305.pdf.

79. *See, e.g.*, Cal. Gov't Code § 12940 (West 2016); Colo. Rev. Stat. § 24-34-402 (2016); 775 Ill. Comp. Stat. Ann. 5/2-102 (2016); Ind. Code Ann. § 22-9-1-2 43 (2016); Kan. Stat. Ann. § 44-1009 (2016); Mass. Ann. Laws ch. 151B, § 4 (2016); PA. Stat. Ann. § 955 (West 2016); N.J. Stat. § 10:5-12 (2016); N.Y. Exec. Law § 296 (McKinney 2016); Tex. Lab. Code Ann. § 21.051 (2015); Wash. Rev. Code Ann. § 49.60.030 (2016).

80. Interestingly, Judge Millett was listed among President Obama's short list candidates for Supreme Court nomination as a replacement to Justice Antonin Scalia. *See Potential Supreme Court Nominees*, N.Y. Times, http://www.nytimes.com/interactive/2016/02/14/us/politics/potential-supreme-court-nominees.html (last updated Mar. 1, 2016). Her confirmation to the D.C. Circuit in 2013 took the Senate seven months; she was confirmed with a 56–38 vote. *Id.*

81. *See* Jacob Gershman, *Trump Poised to Reshape Labor Board, Lawyers Say*, The Wall Street Journal (Nov. 14, 2016, 2:11 PM), http://blogs.wsj.com/law/2016/11/14/trump-poised-to-reshape-labor-board-lawyers-say/ ("The election of Donald Trump is likely to mean big changes for the National Labor Relations Board, which could begin to roll back the Obama administration's agenda of expanding employee and union rights, according to employment litigators."); Chris Isidore, *Trump Will Remake Agency That Ruled Against His Vegas Hotel*, CNN Money (Nov. 17, 2016, 4:15 PM), http://money.cnn.com/2016/11/17/news/companies/trump-hotel-labor-dispute/index.html. ("[Trump] will get to fill two vacancies right away. And he will get to fill a third spot in December 2017, when the term of Republican Philip Miscimarra ends. The terms of the two current Democratic members expire in 2018 and 2019. That means Trump may end up being able to fill all five spots on the board. On top of that, Trump will be able to appoint a new NLRB general counsel in October 2017.").

82. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984) (citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956)).

83. *See id.*

84. *See Laborers Health & Welfare Tr. Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988).

85. *See id.* at 543 n.5.

86. *See, e.g., Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991).

87. *The IBEW Stands Against Sexual Harassment*, *supra* note 78, at 18.

88. *Id.*

89. *See Consol. Commc'n*, ALJ Ruling No. 14-CA-094626 et al. at *22 n.21.

90. *See id.* at *22.

91. *See id.*

Rights Without Remedy: How Major League Baseball's Collective Bargaining Agreement Denies Even the Game's Biggest Stars a Legal Remedy Under the Theory of the Duty of Fair Representation, and Why This Is Not a Swing and a Miss

By Miller Lulow

On May 15, 2016, Texas Rangers Second Baseman Rougned Odor punched Toronto Blue Jays Outfielder Jose Bautista so squarely in the jaw that the blow knocked Bautista's helmet and sunglasses clean off of his head. In order to appreciate why Odor swung at Bautista in the top of the 8th Inning of a game in mid-May, we must rewind the clock to the early evening of October 14, 2015. In order to appreciate why such an event would arise from a Major League Baseball (MLB) game in the first place, and how such an event can invoke a legal issue involving the union's duty of fair representation, we must take that clock apart completely.

Entering the bottom of the 7th Inning of Game 5 of the American League Divisional Series, the Toronto Blue Jays were trailing the Texas Rangers 3–2.[1] Luck, however, would be on Toronto's side, as Texas would make two errors in the inning and Toronto would tie the score at 3; setting up an opportunity with two runners on base and two outs, for the prolific power hitter, Jose Bautista.[2] Bautista sent one of Texas Pitcher Sam Dyson's 97-mile-per-hour pitches blistering into the upper deck at the Rogers Centre, setting the raucous Toronto fans ablaze.[3] Bautista, consumed by the emotion of the moment, stood at home plate for a second, shifted his gaze from the ball in flight, to the middle of the field, to the right field foul line, before demonstrably flipping his bat—as if in disgust—and beginning his trot around the bases.[4]

The crowd was in hysterics: fans ran onto the field, threw beer and garbage onto the field, and roared at the tops of their lungs.[5] Toronto Designated Hitter Edwin Encarnación stood near home plate, gesturing to fans to settle down.[6] Sam Dyson mistook Encarnación's actions as being crowd-enticing and confronted Encarnación.[7] As the two bumped chests, both teams' benches and bullpens came running onto the field.[8] Dyson was quoted after the game[9] as taking exception to Bautista's bat flip, and sports media dove into a debate about the ethics of bat flipping.[10]

The two teams did not meet again until early in the 2016 season, again in Toronto, and that series transpired without incident.[11] Next, the teams met for a weekend series in Texas, when blood heated to a boil in the top of the 8th Inning on May 15.[12] With Texas leading 7–6, their pitcher was Matt Bush and the Toronto batter leading off the inning was Jose Bautista.[13] The first pitch—a 96-mile-per-hour fastball—hit Bautista on his massive protective elbow guard.[14] The home plate umpire immediately positioned himself between Bautista and Bush to prevent the altercation he foresaw, but Bautista calmly dropped his bat, and walked to first base.[15]

Two batters later, with one out in the inning, Toronto First Baseman Justin Smoak hit a groundball to Texas Third Baseman Adrian Beltre.[16] Beltre threw the ball to Second Baseman Rougned Odor, who in turn threw the ball to first base to attempt to complete the double play.[17] However, Odor's throw went bouncing harmlessly into right field, some 30 feet from his target, because as he threw the ball, he was collided into by a late, high-sliding Bautista.[18] When Bautista stood up, Odor immediately confronted him.[19] Bautista did not back down, and Odor connected with a hook that would make Joe Frazier proud.[20] Immediately, every Blue Jay and Ranger in the stadium was on the field; they had themselves a brawl.[21]

Miller Lulow was born and raised in Manhattan, and lived a dual music/baseball life from age 3 through the completion of his undergraduate studies at SUNY Purchase College, where he majored in Jazz Studies, and was named to the ABCA/Rawlings Division III All-Region team in 2013. After playing one season of independent league baseball in Taos, NM, Miller discovered a desire to study the law while working for a non-profit youth baseball organization. Upon his arrival at St. John's University School of Law, he immediately sought the guidance of the legendary Prof. David Gregory, taking a great interest in labor and employment law.

Introduction

So-called "benches clearing brawls" have a strange place in the tradition of America's Pastime—they represent the ultimate manifestation of bad blood and are almost always spawned by a violation of one of baseball's "unwritten" rules. Such altercations look bad for everybody involved, including MLB, and the Major League Baseball Players' Association (MLBPA). In fact, the two sides have collectively bargained to an agreement regarding disciplinary action for "just cause" conduct, and "conduct materially detrimental or materially prejudicial to the best interests of Baseball…"[22] However, the MLBPA, as the exclusive bargaining representative of MLB Players, has a list of responsibilities it must undertake in the best interests of its employees. One of these responsibilities is to represent appeals of league disciplinary action taken against Players—called grievances—and the right to assert a grievance is conferred upon the Players by the Collective Bargaining Agreement (CBA).[23] Subsequent to the May 15, Toronto-Texas brawl, 14 players and coaches were disciplined by MLB.[24] Both Bautista and Odor filed grievances.[25] Their grievances were represented by the MLBPA, as per Appendix A of the CBA.[26]

Appendix A of the CBA, which covers the procedural rules of grievance hearings, provides that "[a] Player or Players may be accompanied by a representative of the Players Association who may participate in the hearing and represent the Player or Players. Any other Party may be accompanied by a representative who may participate in the hearing and represent such Party."[27] This language is sufficiently vague, and thus can be interpreted in multiple ways.

Through a strict literal interpretation, this language can be read as saying that the MLBPA *may accompany* a Player in their grievance hearing, and further that they *may participate and represent* the Player. Through a broader interpretation, this language can be read as inferring that Player representation may be provided by the MLBPA, at the exclusion of all other potential representatives. Compare the second sentence—"Any other Party may be accompanied by a representative who may participate in the hearing and represent such Party"—to the first sentence: "a Player…may be accompanied by a representative *of the Players Association* who may participate in the hearing and represent the Player or Players."[28] In other words, a broad interpretation of this language infers that a Player does not enjoy the same freedom to hire outside counsel as "any other Party" does.

Depending on the interpretation of Appendix A, a case such as Bautista-Odor could involve the MLBPA; the Players' own legal team; or a combination thereof, representing each player in his respective appeal. In point of fact, under Appendix A, a Player is fully entitled to hire his own outside counsel.[29] However, in any circumstance in which the MLBPA is a party to the Player's representation, what results is a conflict of interest for the MLBPA. With the MLBPA opposing MLB's disciplinary action against two players who fought each other, the MLBPA's message is, effectively: *These two players, who fought each other on the field, do not deserve their respective punishments.*

Also, even though the MLBPA is obeying its legal duty of fair representation by representing the Bautista-Odor grievances, it is further conflicting itself by arguing to reduce a "just cause" suspension[30] for conduct-fighting on the field-that the MLBPA and MLB as collective bargaining counterparts are working together to attempt to eradicate.[31] This conflict of interest can be fodder for an argument that perhaps the MLBPA was not looking out for the best interests of the Player in a given case, and if that is so, the question of fair representation arises.

On the other hand, if the MLBPA is not a party to the Player's representation, it could also be exposing itself to a claim, under the theory of breach of the duty of fair representation, brought by a Player who loses his grievance, simply because the MLBPA was not a party to his grievance representation. Whether such a Player would have a meritorious claim is not entirely clear, but any claim against the MLBPA for breach of the duty of fair representation is detrimental in some way or another.

In order to reduce the conflict of interest between the MLBPA and its bargaining counterpart, MLB, and to insulate the MLBPA from potentially damaging lawsuits under a theory of breach of the duty of fair representation, the two bargaining sides should renegotiate the language of Appendix A of the CBA to explicitly provide that should the Player decide to employ his own, outside counsel for a grievance, the Player will waive his right to a potential legal recourse under the theory of fair representation.

This article proceeds in four parts. Part I will first provide a brief historical context of Baseball's unwritten rules and their role in the Bautista-Odor incident. Part I will then examine the MLB grievance process and analyze a historic example of the conflict of interest, and duty of fair representation issues-primarily by examining the Alex Rodriguez arbitration of 2014.

Part II will examine the history of the duty of fair representation doctrine and provide the current status of that legal duty and the burden of proof on the plaintiff in such cases. Part III with then apply the legal doctrine discussed in Part II to the Bautista-Odor facts, and the Alex Rodriguez facts, in an analysis of the legal merits of hypothetical claims of breach of the duty of fair representation that any of those Players might bring.

Finally, Part IV will propose new language to be inserted in the relevant portion of Appendix A of the CBA. The new language will reduce vagueness, and be beneficial to all parties involved. Part IV will further explain several of the beneficial factors, as well as address potential counterpoints to the suggested language.

The Unwritten Rules

The game of baseball has a very wide range of unwritten rules.[32] Some unwritten rules seek to govern game strategy, while others concern game etiquette.[33] While the range of substance in these rules may be wide—from "[p]lay for a tie at home; play for a win on the road" to "no showboating allowed"—the unwritten rules share a common foundation: tradition. America's Pastime is inescapably rooted in tradition; look no further than the 7th Inning Stretch.[34] Like traditions such as the 7th Inning Stretch, all of baseball's unwritten rules are passed down through the generations. Whether in the form of a parent teaching a child about the taboo act of mentioning the phrase "no-hitter" while a no-hitter is in progress,[35] or a coach teaching a player the strategic advantages or drawbacks to hitting behind a runner at first base, the unwritten rules are passed on from one lover of the game to another. While these rules will not be found in the annual edition of the *Official Rules of Baseball*, they exist tangibly, and have for as long as the game has been played.[36]

The Evolution of the Brawl

There is one unwritten rule that lays the foundation for the connection between the unwritten rules and brawls: "If one of your players gets hit by a pitch, you retaliate in kind."[37] Like most unwritten rules, this rule does not come with a time stamp, an indication of its date of inception, but it has been an accepted practice for decades.[38] A logical consideration of the circumstances giving rise to such a rule would include that perhaps, in the early to mid-1900s, pitchers did not throw as hard as they do today.[39] This difference in velocity may be due in part to the fact that human beings today are bigger, taller, and stronger than those from that era. Another factor could be that pitchers did not *try* to throw as hard then as they do now.[40] Considering these factors, it is likely that being hit by a pitch in the early 1900s did not hurt quite as much. The harder pitchers began throwing, the more being hit by a pitch started hurting, and the more necessary retaliation began to be.

At times, the dispute ends after the first batter gets hit. Other times, a second batter is hit (or there is an attempt made to hit a second batter.[41] If this happens, the dispute becomes one-sided—one team has two shots to the other team's one—and the team that has been hit twice feels slighted. Perhaps at this point one team should walk away from potential conflict, and move on.

However, what often happens is an overflow of emotion—and subsequently an overflow of players—as the entirety of the slighted team will come charging out onto the field, hooting and hollering, looking for a fight.[42] The team that has gotten the extra shot in will react in kind, and then there will be 50 people on the field, some standing around attempting to diffuse the tension, others attempting to restrain the players who have begun brawling with each other.[43]

Over the years, as players became more talented, baseball gained popularity on a global stage, and the stakes became significantly raised, the list of reasons to start a brawl expanded. Now, the slightest hint of a "dishonorable" action can be enough to light that previously described fuse.[44] An example of a dishonorable action is the bat flip, such as Jose Bautista's emotional reaction to his home run in the 2015 ALDS.[45] When Bautista stood at the plate and admired his majestic home run, and then tossed his bat into the air, half of the baseball world was in awe; the other half was furious.[46] This is arguably the hottest topic of debate between the old-school players grounded in the tradition of America's Pastime, and the new kids on the block—the group of players attempting to usher in a hip, fun, exciting iteration of the game.[47]

The Conflict of Interest Potentially Giving Rise to the Claim

It does not take much to start the fire and wind up with a brawl, and after the dust settles, MLB takes disciplinary action. Article XII of the CBA provides that "…a Player may be subject to disciplinary action for just cause by his Club, the Senior Vice President, Standards and On-Field Operations or the Commissioner."[48] Following the Bautista-Odor brawl, Bautista was suspended one game by MLB; Odor was suspended eight games.[49] Both players appealed their respective suspensions; a right conferred upon them by Article XI(C)(1)(a) of the CBA:

> Any Player who believes that he has a justifiable complaint regarding such discipline may, within 7 days of his receipt of written notification of the discipline, appeal in writing to the Executive Vice President, Administration, if the discipline was imposed by the Senior Vice President, Standards and On-Field Operations, or to the Commissioner, if the discipline was imposed by him, for a hearing.[50]

Grievance arbitrations are conducted in an informal manner, intended to be exercises in problem solving, rather than classic litigious disputes.[51] However, the format of most grievances follows the standard of general legal practice.[52] The parties present their arguments, including evidence "as they desire and…such additional evidence as the Panel Chair may deem necessary to an understanding and determination of the dispute."[53] For grievances wherein the Player *loses* a just cause suspension appeal for conduct the MLBPA and MLB are working together to eradicate, it is not unreasonable to expect the Player, who identifies the conflict of interest, to feel as though he was deprived of the most zealous advocacy possible.[54] However, whether the Player's feelings are based in even a modicum of factual truth is irrelevant, as the barrier of truth is not enough to stop a Player from instituting a federal lawsuit against the MLBPA for breach of duty of fair representation.[55]

The A-Rod Case

Perhaps the most high-profile grievance arbitration in the history of the CBA, the case of Alex Rodriguez, provides an illustrative example of the potential consequences described above.[56] A polarizing figure in the history of baseball, Alex Rodriguez was the subject of heavy scrutiny for the better part of a decade, regarding his alleged use of performance-enhancing drugs (PED) and violation of MLB's Joint Drug Prevention and Treatment Program (JDA).[57] As set forth in the brief preamble, the JDA was established "by agreement of the Office of the Commissioner of Baseball and the [MLBPA]…to…deter and end the use of Prohibited Substances by Players…"[58]

In August, 2013, MLB concluded its nearly eight-month Biogenesis investigation by suspending 13 players for violating the JDA.[59] Twelve of the 13 players were suspended 50 games each, and all of those players accepted their suspensions.[60] Rodriguez was suspended an MLB-record 211 games; a compound suspension under the JDA for "…his use and possession of numerous forms of performance-enhancing substances…over the course of multiple years" *and* under the CBA for "…attempting to cover-up his violations of the [JDA] by engaging in a course of conduct intended to obstruct and frustrate [MLB's] investigation."[61]

Rodriguez filed a grievance,[62] alleging, among other claims, that his suspension was without just cause, and was "wholly inappropriate when compared to those given other Players with alleged ties to Biogenesis and Bosch."[63] The MLBPA joined Rodriguez's appeal, claiming that if any discipline was indeed warranted, the 211-game suspension was disproportionate and unprecedented.[64] Frederic Horowitz, the independent arbitrator, agreed upon by MLB and the MLBPA and appointed in June, 2012, upheld Rodriguez's suspension, but reduced the duration of the suspension to 162 games.[65]

Following Arbitrator Horowitz's decision, Rodriguez filed a lawsuit in the Southern District of New York, suing both MLB and the MLBPA.[66] In his suit, Rodriguez sought, among other things, "…to hold MLBPA responsible for its breaches of the duty of fair representation owed to Mr. Rodriguez prior to and during the Grievance process" by alleging the MLBPA failed "to intervene to stop the continuous leaking of prejudicial information" about Rodriguez; that the MLBPA failed "to stop the abusive investigative tactics taken by MLB and its investigators to obtain evidence against Mr. Rodriguez."[67] The complaint further alleged that the MLBPA made public statements "falsely declaring Mr. Rodriguez's guilt and stating that he should accept a suspension and resolve the Grievance at issue all, of course, without Mr. Rodriguez's consent…"[68] The case never made it to trial, however, as Rodriguez quietly dropped his suit.[69]

The Duty of Fair Representation

Although not codified under federal law, the duty of fair representation arises from the concept of exclusive representation in collective bargaining.[70] The U. S. Supreme Court first recognized the existence of the duty of fair representation in *Steele v. Louisville & N. R. Co.* when it held that the Railway Labor Act of 1926, in providing for collective bargaining through representatives imposed a duty upon those representatives to act on behalf of all the employees.[71]

Synthesizing the Duty of Fair Representation

In *Steele*, a member of the Brotherhood of Locomotive Firemen and Enginemen sued his union to enjoin enforcement of agreements made by the union and the employer that were deliberately discriminatory against black union members.[72] The Brotherhood

> …purporting to act as representative of the entire craft of firemen, without informing the Negro firemen or giving them opportunity to be heard, served a notice…[which] announced the Brotherhood's desire to amend the existing collective bargaining agreement in such manner as ultimately to exclude all Negro firemen from the service.

The Court held that the Railway Labor Act of 1926 imposed upon the "statutory representative of a craft at least as exacting of a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."[73] The Court reasoned that the "fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents."[74] The Supreme Court's decision in *Steele* has been described as "very progressive," because it recognized race-based employment discrimination 20 years before Title VII.[75]

The Supreme Court later reaffirmed the duty of fair representation recognized in *Steele*, in the 1954 case of *Ford Motor Co. v. Huffman*.[76] In *Huffman*, a class of complainants alleged that their positions on the defendant Ford's seniority roster had been lowered because of certain provisions in the collective bargaining agreement that gave additional seniority to employees who had pre-employment military service, in addition to the post-employment military service required to be credited by the Selective Service and Training Act of 1940.[77] The plaintiffs further alleged that their bargaining representative had exceeded its authority by agreeing to the bargaining provisions that caused the plaintiffs their alleged injury.[78] The court held that the provisions were valid, and that the bargaining representative had not breached its duty of fair representation.[79] Before ruling against the plaintiff class, the Court reaffirmed the duty recognized by *Steele*: "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents."[80] The Court also added some elements to the duty that helped insulate the bargaining representative from potential liability, including that the representative act in good faith.[81]

The Court would further expound upon the good faith element in *Vaca v. Sipes*.[82] The action was originally brought as a class action in Missouri state court, and at trial, the jury awarded the employee compensatory and punitive damages, but the trial court judge set aside the jury verdict and ruled in favor of the employer on the ground that state court did not have jurisdiction in such a matter.[83] In *Vaca*, the class representative alleged he had been fired in violation of the existing collective bargaining agreement.[84] The employee had a complicated medical history, and was discharged as a result of his poor health, despite being declared fit to work by a doctor.[85] The employee further alleged that his union had "'arbitrarily, capriciously and without just or reasonable reason or cause' refused to take his grievance with [the employer] to arbitration under the fifth step of the bargaining agreement's grievance procedures."[86]

The Court held that the union had not breached its duty, and set forth a three-pronged test for determining when a union might, in fact, breach the duty of fair representation. The Court held that a breach of the duty occurs "*only* when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[87] The Court reasoned that an individual employee does not possess "an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement."[88] The Court relied in part on statutory interpretation of the Labor Management Relations Act in further reasoning that "[i]n providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration."[89]

The *Vaca* test was upheld by the Court in *Air Line Pilots Ass'n, Intern. v. O'Neill*, wherein the Court held the *Vaca* test applied to "all union activity."[90] In *O'Neill*, a class of airline pilots had gone on strike because their employer had unilaterally lowered their wages after filing for Chapter 11 restructuring.[91] During the strike, the pilots' union authorized striking pilots to submit bids for the employer's job openings; however, the employer challenged the striking pilots' bids in court, refusing to award any jobs to striking pilots.[92]

At this point, the union negotiated a deal with the employer. The deal provided an end to the strike, the disposition of the pending litigation, and the reallocation of the jobs the employer had refused to award to striking pilots.[93] However, the deal specifically provided that the first 100 "captain" jobs would be awarded to pilots that had not been on strike.[94] The striking pilots then sued their union under the theory of breach of the duty of fair representation for bargaining for, and accepting, a deal that allegedly "arbitrarily discriminated" against striking pilots.[95]

After upholding *Vaca*, the Court held that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' [citation omitted] as to be irrational."[96] The Court was instructive with regard to whether the union's actions were irrational:

> A settlement is not irrational simply because it turns out *in retrospect* to have been a bad settlement. Viewed in light of the legal landscape at the time of the settlement, [the union's] decision to settle rather than give up was certainly not illogical. At the time of the settlement, [the employer] had notified the union that all of the [sic] bid positions had been awarded to working pilots and was maintaining that none of the strikers had any claim on any of those jobs. Given the background of determined resistance by [the employer] at all stages of this strike, it would certainly have been rational for [the union] to recognize the possibility that an attempted voluntary return to work would merely precipitate litigation over the right to the [sic] bid positions… there was certainly a realistic possibility that [the employer] would not abandon its bargaining position without a complete settlement.
>
> At the very least, the settlement produced certain and prompt access to a share of the new jobs and avoided the costs and risks associated with major litigation.[97]

How the Duty of Fair Representation May Be Breached

The burden on the party that must show arbitrary, bad faith, or discriminatory actions is high.[98] It is possible to overcome the burden. In *Breininger v. Sheet Metal Workers Intern. Assoc.*, the Union "operate[d] a hiring hall through which it refer[ed] both members and nonmembers of the union for construction work."[99] Under this system, if an employer needed a new employee, it contacted the Union, and if the employer did not request a specific employee by name, the Union started at the top of its list of employees and worked its way down until it had fulfilled the employer's requirements.[100] The employee who brought the action alleged that the Union refused to honor an employer's specific "requests for his services and passed him over in making job referrals."[101] The employee further alleged that the Union had breached its duty of fair representation by acting arbitrarily, discriminatorily, or in bad faith, by passing him over and instead favoring a class of employees that had been in favor of the current business manager.[102]

The Supreme Court overruled the Sixth Circuit, which held the employee failed to show the Union breached its duty of fair representation because he failed to allege his employer breached the CBA.[103] The Supreme Court held that the employee *had* stated a claim of breach of the duty of fair representation, in the case of a Union taking on additional obligations to its members by actively taking part in the hiring/recruitment process: "[I]f a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly *increases* rather than *decreases*."[104] In order to determine whether the MLBPA could ever potentially be liable under the theory of breach of the duty of fair representation, this article will take the facts and circumstances from first the Bautista–Odor incident, and then the Alex Rodriguez case, and apply them to the legal framework set forth in the *Steele*, *Huffman*, *Vaca*, and *O'Neill* cases.

Analyzing the Duty of Fair Representation Through the Baseball Lens

The burden on the plaintiff to show a breach of the duty of fair representation is very high.[105] First and foremost, the plaintiff must be a member of the union they are suing.[106] Suppose that the Bautista–Odor fight had taken place in the minor leagues, and that neither Bautista nor Odor had ever accrued any Major League experience. In such an example, the MLBPA owes no duty to either player, because neither are members of the Union. It is also possible to distinguish *Breininger*, since neither the Bautista-Odor, nor Rodriguez cases deals with the MLBPA assuming a role in the hiring/recruitment process of its members. By definition, the Players have already obtained a job, and in neither of these contexts is the concept of free agency involved.[107]

Next, seemingly the simplest element, the plaintiff must establish is the existence of the duty. "When a labor organization has been selected as the exclusive representative of the employees in a bargaining unit, it has a duty…as the exclusive representative of the employees in the unit, to represent all members fairly."[108]

Although it may seem simple enough to prove, this is the element that this article will analyze closest, to suggest how the MLBPA and MLB can reword Appendix A of the CBA to prevent claims of breach of the duty of fair representation from ever arising. In order to do this, however, this article concedes the mere existence of the duty, which is implicit in section 9(a) of the National Labor Relations Act, resulting from the MLBPA acting as the exclusive bargaining representative for the players, for the purposes of the analysis.[109] Next, the plaintiff must satisfy the *Vaca* test, and prove the union's conduct toward the plaintiff was arbitrary, discriminatory, or in bad faith.[110]

Bautista–Odor Analysis

As previously mentioned, Jose Bautista and Rougned Odor were suspended one game, and eight games, respectively, for their roles in the incident.[111] For the sake of analysis, imagine that Bautista was so furious with the result of his grievance that he decided to bring an action against the MLBPA, alleging that the MLBPA had breached its duty of fair representation.

Under *Vaca*, Bautista must prove that the MLBPA acted arbitrarily, discriminatorily, or in bad faith toward him.[112] As instructed by *O'Neill*, the MLBPA's actions will only be considered arbitrary if, in light of the factual and legal circumstances at the time of the MLBPA's actions, the MLBPA's behavior was so far beyond reasonable as to be considered irrational.[113] In addition to the Bautista facts being distinguishable from the facts in *O'Neill*, it would appear to be difficult to show that the MLBPA acted irrationally.[114] Without knowing the details of the Bautista grievance hearing—which are confidential until released by MLB and the MLBPA—it cannot be said that the MLBPA acted irrationally; the MLBPA made no actions that deviated from the standard operating procedure of such grievances.

Imagine, however, that the MLBPA met with Bautista before the grievance arbitration to discuss Bautista's concerns about the matter. During this meeting, Bautista stressed he committed no wrong in sliding the way he did, and certainly no wrong in the ensuing altercation because it was Odor who hit Bautista first. Upon returning to the office, the MLBPA discovered it had been double-booked for the date and time of the Bautista arbitration, and realized there would be no time to make up the date because the ensuing time period conflicted with the time the MLBPA required all hands on deck in preparation for the renegotiation of the CBA.

Assume, then, that the MLBPA withdrew the grievance, until further notice, so that it could allocate the appropriate amount of time to its efforts. The MLBPA subsequently rescheduled the arbitration for two months later, the arbitration was then held, and Bautista's one-game suspension was upheld, effective immediately. This, however, would be the final game of the regular season, and the Blue Jays, in a tie for the final playoff spot, and without their star power hitter, Bautista, would lose the game. Bautista, understandably incensed by the result, then sued the MLBPA for breaching its duty of fair representation by arbitrarily discriminating against him when it indefinitely postponed his grievance process. It would likely result that the MLBPA did *not* breach its duty, however, as it's motive was not to discriminate against Bautista, but that in rescheduling Bautista's arbitration for a time during which the MLBPA could devote its full efforts, the MLBPA actually acted in *good* faith.[115]

Further, without knowing the confidential details of these grievances, it cannot be said that the MLBPA acted either discriminatorily, or in bad faith, in its handling of the grievance matters. However, after the grievance decisions were issued, Bautista was quoted as saying: "I can't say that I agree with it. Apparently [Odor] either has friends in high places, [the Texas Rangers do], or [Odor] did a really good job of convincing them of something."[116] While Bautista's quote may seem like an accusation of wrongdoing, the MLBPA's actions would need to reach the level of acting with "improper intent, purpose, or motive" that defined "bad faith," according to the Second Circuit.[117] The Second Circuit further held that bad faith "encompasses fraud, dishonesty, and other intentionally misleading conduct."[118]

Whether or not Bautista is able to survive a motion to dismiss by alleging nonconclusory facts that, if taken as the truth, would state a claim to relief that is plausible on its face,[119] or further survive a motion for summary judgment by raising a genuine issue of triable fact,[120] his claim against the MLBPA will have lasted long enough to cost the MLBPA and MLB time, money, and bad publicity.

A-Rod Analysis

In order to analyze the merits of Alex Rodriguez's hypothetical claim of breach of the duty of good faith, we must first consider the well-digested legal principle that federal courts may only vacate an arbitrator's decision under very unusual circumstances.[121] By comparison to the Bautista case, less conjecture is required in analyzing the merits of a hypothetical claim under the theory of breach of the duty of fair representation asserted by Alex Rodriguez, since he in fact asserted such a claim against the MLBPA subsequent to Arbitrator Horowitz's ruling on Rodriguez's grievance.[122] In support of his complaint, Rodriguez alleged the MLBPA "completely abdicated" its responsibility to him by:

> …[f]ailing to intervene to stop the continuous leaking of prejudicial information concerning Mr. Rodriguez and the Grievance by MLB and its officials; failing to stop MLB's commencement of a sham lawsuit in Florida solely aimed at obtaining evidence to be used against MLB players like Mr. Rodriguez; and failing to stop the abusive investigative tactics taken by MLB and its investigators to obtain evidence against Mr. Rodriguez. To make matters worse, MLBPA even went so far as to make public statements to the media, through its Executive Director, falsely declaring Mr. Rodriguez's guilt and stating that he should accept a suspension and resolve the Grievance at issue—all, of course, without Mr. Rodriguez's consent and without even consulting with him.[123]

Rodriguez further alleged that the MLBPA's actions were "arbitrary, capricious and taken in bad faith."[124] One example of bad faith is "the absence of honest purpose and judgment or the presence of hostility or discrimination."[125] Certainly, allegations such as: "MLBPA determined early on that it did not want to 'take on' MLB over the alleged use of PES by Mr. Rodriguez," and "This inaction by MLBPA created a climate in which MLB felt free to trample on Mr. Rodriguez's (and indeed all players') confidentiality rights," *if true*, might amount to bad faith conduct on the part of the MLBPA.[126] However, as previously described in the *Bautista* analysis, Rodriguez's allegations must amount to nonconclusory facts that, if taken as the truth, would state a claim to relief that is plausible on its face, in order to survive a motion to dismiss.[127] Additional facts that may be included in the MLBPA's hypothetical answer to the complaint are that Rodriguez's own legal representatives were allegedly engaged in settlement negotiations with MLB, but the settlement was not substantial enough to be to Rodriguez's liking.[128]

If Rodriguez's claim could make it to the discovery stage of litigation, the cost of the litigation, in time and money, would become immense.[129] In point of fact, the longer such a litigation dragged on, the more money, time, *and* publicity it would cost all parties involved.[130] Perhaps the cost may even reach a point where the best alternative for the MLBPA would be to settle the dispute. Chances are Rodriguez may not be seeking money damages, though, as he is the highest-earning baseball player in history.[131] It is highly likely, therefore, that Rodriguez would be seeking at least an injunction—preventing the enforcement—if not an outright reversal of the arbitration decision. In a world where arbitration decisions were overturned more frequently, perhaps Rodriguez would have a case, based on the fact-driven analysis of arbitrary, discriminatory, or bad faith conduct. To reiterate the most salient point, however, the existence of such a litigation alone would be damaging enough to the MLBPA and MLB.

Solution: Reword Appendix A

The relevant language of Appendix A, "[a] Player or Players may be accompanied by a representative of the Players Association who may participate in the hearing and represent the Player or Players" should be reworded to eliminate vagueness and make explicit that the Player's right to pursue a legal remedy under the theory of the duty of fair representation will be waived, should the Player decide to forgo the MLBPA, and appoint outside counsel as his representative in his grievance matter. The proposed change to Appendix A would read as follows:

> A Player or Players may be accompanied by a representative of the Players Association who may participate in the hearing and represent the Player or Players. Alternatively, a Player or Players may be

accompanied by any other representative of the Player's or Players' choosing who may participate in the hearing and represent the Player or Players. If the Player or Players should choose to be represented by any representative other than that provided by the Players Association, the Player or Players will accordingly waive their right to pursue recourse, in Federal Court, in the event of any outcome of the grievance for which a Player or Players may ordinarily wish to pursue such recourse.

A potential argument against this language may be that it is abdicating the MLBPA's responsibility to its union members by insulating the MLBPA from potential liability. This argument falls short, however, because the MLBPA would only be insulating itself from liability in the event the Player, on their own accord, decides specifically to hire a representative other than the MLBPA for their grievance. In such a case, the Player has chosen to remove the MLBPA from the representative role, to place the MLBPA in a more remote capacity. If Players are free to make their own choice as to whom they would like to represent them, it would be inequitable to blame the MLBPA for an unfavorable outcome, let alone hold the MLBPA potentially liable for that outcome.

Mutually Beneficial to All Parties

The main reason for the change is that it is mutually beneficial to all parties involved, and would seemingly be easily agreed upon during the collective bargaining process. The MLBPA would stand to benefit for all of the reasons described above. As for MLB, there is no reason MLB would not agree to this change, because not only does it not hurt MLB, it benefits MLB. In his federal lawsuit, Rodriguez sued both the MLBPA and MLB under the CBA, seeking to have Arbitrator Horowitz's ruling vacated.[132] However the majority of Rodriguez's claim pertained to the MLBPA's actions—or the alleged lack thereof—and its breach of the duty of fair representation.[133]

If the Rodriguez case happened under the proposed change to Appendix A, Rodriguez would be without remedy as against the MLBPA. While this would still leave MLB vulnerable to a claim, Rodriguez would not be able to sue MLB under the CBA, as the MLBPA would be a necessary party to such a lawsuit. Therefore, Rodriguez, if still intent on suing MLB, would have to pursue alternative theories under which to sue MLB, of which there may be few to none.

It may not be altogether difficult to obtain the Players' consent to having this added language collectively bargained for because it gives them the freedom of choice. It would stand to reason that the vast majority of Players would choose to be represented by the MLBPA, for a number of reasons. For one, the MLBPA would provide the representatives most capable of providing the best advocacy, since MLBPA representatives deal exclusively with these matters. As superlative as any outside counsel may be, the simple fact is they do not have the experience operating under the MLB CBA that the MLBPA representatives do. Another reason so few Players would choose outside counsel is the personal out-of-pocket cost to them. Not every MLB Player has the financial resources that Alex Rodriguez has.[134]

Conclusion

In sum, the proposed language change to Appendix A is simple, eliminates vagueness, provides assurance to the MLBPA and MLB, and is beneficial to all parties involved in the collective bargaining process. With the rate at which Players are disciplined by MLB in today's practice, it remains a possibility that players who feels they were treated particularly unfairly would decide to assert such a claim.

The proposed language for Appendix A of the CBA could be inserted the next time the CBA is renegotiated, in December of 2020. Given the current state of labor law as a whole, and specifically the burden of proof required to show a breach of the duty of fair representation, it is never a bad idea to tighten up vague language.

Additionally, it cannot hurt to add a provision to the CBA that all sides would agree upon, and that would be so mutually beneficial. Until such a time a time, it is important that the bargaining counterparts let baseball be baseball: let there be epic bat flips, rivalries, and unwritten rules.

Endnotes

1. *Bautista's Bat Flip in Game 5 ALDS Is One for the Ages*, Fox Sports (Oct. 14, 2015, 7:18 PM), http://www.foxsports.com/mlb/story/toronto-blue-jays-jose-bautista-bat-flip-texas-rangers-game-five-alds-postseason-101415.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. David Schoenfield, *From the Bat Flip to the Brawl: Why Blue Jays-Rangers Became Epic*, ESPN (Oct. 6, 2016), http://www.espn.com/blog/sweetspot/post/_/id/74528/from-the-bat-flip-to-the-brawl-blue-jays-rangers-rematch-will-be-epic.
8. *Id.*
9. *Id.*
10. *Compare* Mike Axisa, *Don't Like Bat Flips? Too Bad, Because MLB Is Promoting Them*, CBS Sports (Ot. 15, 2015), http://www.cbssports.com/mlb/news/dont-like-bat-flips-too-bad-because-mlb-is-promoting-them; *with* Andrew Marchand, *Goose Gossage: Bautista a 'Disgrace', Baseball Ruined by 'Nerds'*, ESPN (Mar. 11, 2016), http://www.espn.com/mlb/story/_/id/14943065/goose-gossage-rips-jose-bautista-toronto-blue-jays-nerds-ruining-baseball. *See*

also, Tim Kurkjian, *The Unwritten Canon, Revealed*, ESPN (last updated Mar. 10, 2016), http://www.espn.com/mlb/story/_/id/10964445/mlb-baseball-confusing-contradictory-unwritten-rules.

11. Schoenfield, *supra* note 7.
12. *Id*.
13. *Id*.
14. Video clip: *Bautista Gets Hit by a Pitch*, http://m.mlb.com/video/topic/6479266/v700925283/tortex-bautista-plunked-by-bush-in-the-8th, at 0:03.
15. *Id.* at 0:07.
16. Video clip: *Blue Jays, Rangers Get Into Wild Melee*, *contained within,* Schoenfield, *supra* note 7.
17. Video clip, *id.*, at 0:04.
18. *Id.* at 0:05.
19. *Id.* at 0:27.
20. *Id.* at 0:30.
21. *See generally, id.*
22. *See* 2012–2016 Collective Bargaining Agreement between Major League Baseball and the Major League Baseball Players' Association (hereinafter CBA), Article XII.
23. *See generally*, CBA, Article XI.
24. *See* Big League Stew Staff, *Rougned Odor Gets Eight-Game Suspension for Blue Jays-Rangers Brawl*, YAHOO! (May 17, 2016, 6:27 PM), http://sports.yahoo.com/blogs/mlb-big-league-stew/mlb-hands-down-suspensions-in-blue-jays-rangers-brawl-144946908.html25 *See Rougned Odor Gets 8-Game Suspension for Punching Jose Bautista*, ESPN (May 18, 2016), http://www.espn.com/mlb/story/_/id/15577350/rougned-odor-texas-rangers-suspended-8-games-punching-toronto-blue-jays-jose-bautista.
26. *See* CBA, Appendix A.
27. *Id*.
28. *Id.*
29. An example of this, to be discussed in greater detail in Part I(C) of this article, is the Alex Rodriguez Arbitration of 2014, wherein Rodriguez hired his own team of outside counsel to represent him, forgoing the representation provided by default by the MLBPA.
30. Per Article XII, Sections A–B of the CBA, a Player may be disciplined for "just cause" for "…conduct that is materially detrimental or materially prejudicial to the best interests of Baseball including, but not limited to, engaging in conduct in violation of federal, state or local law."
31. *See generally*, *id.* MLB and the MLBPA have collectively bargained to eradicate conduct that is materially detrimental to the best interests of baseball. Although the CBA does not explicitly enumerate on-field fights, this is clearly conduct the two sides are seeking to eradicate as Players who fight are subject to discipline. *See also*, Bob Nightengale, *Blue Jays-Rangers Brawl Shows MLB Can't Legislate Emotions on the Field*, USA Today (May 16, 2016, 9:00 AM), http://www.usatoday.com/story/sports/columnist/bob-nightengale/2016/05/15/mlb-rangers-blue-jays-brawl-jose-bautista-rougned-odor-bat-flip/32612599.
32. *See generally*, Kurkjian, *supra* note 10; Baseball Digest, *The Book of Unwritten Baseball Rules*, (1986), http://www.baseball-almanac.com/legendary/liunwrit.shtml; Dirk Hayhurst, *A Major League Pitcher's Guide to Baseball's Bullshit Unwritten Rules*, DEADSPIN (June 3, 2014, 2:43 PM), http://deadspin.com/a-major-league-pitchers-guide-to-baseballs-bullshit-unw-1585433770. For a compendium of Unwritten Rules and attributable sources, *see Unwritten Rules of Baseball*, http://bfc.sfsu.edu/cgi-bin/unwritten.pl?Unwritten_Rules_of_Baseball.
33. *See, e.g.*, *Never Show Up an Opposing Pitcher After Hitting a Home Run Off Him* in *Unwritten Rules of Baseball*, http://bfc.sfsu.edu/cgi-bin/unwritten.pl?Never_show_up_an_opposing_pitcher_after_hitting_a_home_run_off_him._-Baseball.
34. *See* Michael Aubrecht, *7th Inning Stretch – A Historical Perspective*, Baseball Almanac, http://www.baseball-almanac.com/articles/7th_inning_stretch.shtml
35. Outside the purview of this article, the unwritten—really, the unspoken—rule of abstaining from mentioning a no-hitter while one is currently in progress, is deeply rooted in superstition. Baseball players and fans alike seem to believe that to merely mention the existence of a no-hitter is to jinx the completion of the feat itself. This is carried on to such an extreme that some baseball *broadcasters* may even abstain from mentioning that a pitcher has not yet allowed a hit up to the current point in the game. *See* Alyson Footer, *No-Hitters Present Quandary for Broadcasters*, http://m.mlb.com/news/article/47396364/no-hitters-present-quandary-for-broadcasters/.
36. Kurkjian, *supra* note 10.
37. *See generally*, Kurkjian, *supra* note 10 (describing many different circumstances which may result in a batter being hit by a pitch). *See also*, Adam Felder, *Battering the Batter*, The Atlantic (May 5, 2015), http://www.theatlantic.com/entertainment/archive/2015/05/no-more-battering-the-batter/391991.
38. *See, e.g.*, Kurkjian, *supra* note 10 (describing Stan Williams keeping track of the players he needed to "get" in the 1960s); Felder, *supra* note 37.
39. *See, e.g.*, Jayson Stark, *The Age of the Pitcher*, ESPN (June 15, 2012), http://www.espn.com/mlb/story/_/id/8048897/the-age-pitcher-how-got-here-mlb (discussing an increase in average velocity from just 2005–2012, "We hear this from hitters all the time: Pitchers throw harder now. Much harder. And not just some of them. Practically all of them—other than maybe R.A. Dickey. So we set out to determine: Is that true? We started by consulting with our friends from Inside Edge, who have charted virtually every pitch in the big leagues since 2005. They verified that average fastball velocity has been rising steadily since then, from 90.2 miles per hour in '05 to 91.2 mph in each of the past two seasons. And that's a more eye-opening number than it might appear on the surface—considering more than 600 men took the mound in major league games last season.") *See also* Jonah Keri, *The Tommy John Epidemic: What's Behind the Rapid Increase of Pitchers Undergoing Elbow Surgery?*, Grantland (Mar. 10, 2015), http://grantland.com/the-triangle/tommy-john-epidemic-elbow-surgery-glenn-fleisig-yu-darvish (acknowledging that pitchers today throw harder than ever, "What about velocity? We have a generation of pitchers throwing harder than ever before."). *Compare* Dave Davies interview with Jeff Passan, *Injuries Increase as Pitchers Throw Harder, Faster and Younger*, NPR (Mar. 31, 2016, 2:02 PM), http://www.npr.org/2016/03/31/472541597/injuries-increase-as-pitchers-throw-harder-faster-and-younger (noting that the first MLB pitcher to undergo successful Ulnar Collateral Ligament replacement surgery, Tommy John did not throw very hard, "Tommy John was a sinkerballer, and he never threw particularly hard, you know—normally around 82 or 83 miles per hour.") *with* Jeff Sullivan, *The Most Startling Trend in Baseball*, Fangraphs (Nov. 15, 2013), http://www.fangraphs.com/blogs/the-most-startling-trend-in-baseball (noting that in 2013, 25.5% of all MLB relief pitchers **averaged** 95 MPH with their fastballs [emphasis added]); *and* Travis Sawchik, *MLB Pitchers Setting Velocity Records, Altering the Balance of Power*, Trib Live (Mar. 29, 2014, 9:00 PM), http://triblive.com/sports/mlb/5423918-74/mph-velocity-cole (noting, "In 2008, the average major-league fastball registered 90.9 mph. Last season [2013], the average fastball reached 92.0 mph.).
40. Since the systematic cataloging of all pitches thrown in professional baseball did not begin until the mid-2000s, the only basis for assessing the difference in velocity between "now and then" is word-of-mouth. *See* Bill James, *The Mighty Fastball*, ESPN (June 15, 2004), http://www.espn.com/mlb/news/story?id=1822135 (discussing that the rules of baseball, in its early days, forced pitchers to throw slower: "The rules of baseball, in its infancy, discriminated against throwing the ball hard. This understates the fact; the rules deliberately tried to keep the

pitchers from throwing the ball too hard. The basis of the game was the interaction between fielders and hitters; the pitcher was not supposed to upset the apple cart by striking people out or walking them.").

41. *Id.*

42. *See, e.g.*, Jason Foster, *The 20 Ugliest, Weirdest and Most Entertaining Baseball Brawls Since 1976*, Sporting News (June 26, 2016), http://www.sportingnews.com/mlb/list/best-baseball-mlb-fights-brawls-video-braves-padres-yankees-orioles-cardinals-reds/1unaj2dmn721dq7pla6kjm1n/slide/1.

43. *Id*.

44. "A brawl like Sunday's didn't need to happen, but it was practically preordained from the moment Bautista hit his home run six months ago." Jon Tayler, *Bautista, Odor at Fault in Brawl, but MLB Culture Bears Blame Too*, Sports Illustrated (May 16, 2016), http://www.si.com/mlb/2016/05/15/rangers-blue-jays-brawl-jose-bautista-rougned-odor-punch.

45. *Id*.

46. *Compare* Axisa, *supra* note 10; *with* Marchand, *supra* note 11; *and* Kurkjian, *supra* note 10.

47. Outside the context of this article, one of the current issues MLB is addressing is how to appeal to a younger audience. Some, including Commissioner Rob Manfred, believe that bat flips are good for the rejuvenation of baseball. *See, e.g.*, Axisa, *supra* note 10.

48. CBA, Article XI, Section C(1)(a).

49. *See Rougned Odor Gets 8-Game Suspension for Punching Jose Bautista*, ESPN (May 18, 2016), http://www.espn.com/mlb/story/_/id/15577350/rougned-odor-texas-rangers-suspended-8-games-punching-toronto-blue-jays-jose-bautista.

50. CBA, Article XI, Section C(1)(a).

51. CBA, Appendix A.

52. CBA, Appendix A, § 6. *Order of Proceedings*.

53. *Id*.

54. *See, e.g.*, A-Rod Case, *infra.*

55. The duty of fair representation will be examined in greater detail below.

56. The Alex Rodriguez case *alone* is substantial enough to be the subject of its own article. As such, this article will only discuss the relevant facts that gave rise to Rodriguez's eventual federal claim of breach of the duty of fair representation, against the MLBPA.

57. *See, e.g.*, *A-Rod: I've Never Used Steroids*, CBS News (Dec. 13, 2007), http://www.cbsnews.com/news/a-rod-ive-never-used-steroids; Bryan Hoch, *Rodriguez Reveals He Cheated, Lied*, MLB.com (Feb. 10, 2009), http://m.mlb.com/news/article/3811116; Jay Weaver, *Alex Rodriguez's DEA Confession: Yes, I Used Steroids from Fake Miami Doctor*, Miami Herald (Nov. 5, 2014, 9:37 AM), http://www.miamiherald.com/sports/mlb/article3578762.html; Christian Red, et al., *Alex Rodriguez's Hall of Fame Numbers Overshadowed by Career of Lying, Bullying Over Steroid Use*, N.Y. Daily News (Aug. 8, 2016, 1:26 AM), http://www.nydailynews.com/sports/baseball/yankees/alex-rodriguez-career-overshadowed-steroid-scandals-article-1.2741694.

58. *See* Major League Baseball's Joint Drug Prevention and Treatment Program, http://mlb.mlb.com/pa/pdf/jda.pdf.

59. A full list of suspended players can be found at http://sports.yahoo.com/blogs/mlb-big-league-stew/biogenesis-scandal-mlb-suspends-13-players-including-rod-190720911.html.

60. *Id*.

61. *See*, Steve Adams, *Rodriguez Appeals 211-Game Suspension*, MLB Trade Rumors (Aug. 7, 2013, 3:33 PM), http://www.mlbtraderumors.com/2013/08/major-league-baseball-suspends-alex-rodriguez-for-211-games.html.

62. Rodriguez also sued MLB, and Commissioner Bud Selig, in New York Supreme Court. 25 No. 10 Westlaw Journal Entertainment Industry 1. MLB removed to federal court. *See* Richard Vanderford, *Major League Baseball Bunts A-Rod Lawsuit to Federal Court*, LAW360 (Oct. 7, 2013, 7:00 PM), http://www.law360.com/articles/478806/major-league-baseball-bunts-a-rod-lawsuit-to-federal-court. The case remained until Feb. 7, 2014, when Rodriguez abruptly dropped both that suit as well as his additional suit, which challenged his suspension. *See* Pete Brush, *A-Rod Abruptly Drops Suit Over Drug Probe and Suspension*, LAW360 (Feb. 7, 2014, 6:57 PM), http://www.law360.com/articles/508308/a-rod-abruptly-drops-suits-over-drug-probe-and-suspension?article_related_content=1.

63. *See* Complaint, at 62, *Rodriguez v. MLB*, (S.D.N.Y. 2014) (hereinafter "A-Rod Complaint"), *available at* http://online.wsj.com/public/resources/documents/ARODMLB01132014.pdf.

64. *Id.*

65. *Id.* at 76. Horowitz concluded that MLB had proved, by a burden of clear and convincing evidence, that just cause was present to suspend Rodriguez for the entire 2014 season, and 2014 playoffs for his violation of the JDA, and for two attempts to obstruct MLB's Biogenesis investigation.

66. *See* Paul Hagen, *A-Rod Files Suit in Effort to Overturn Ban*, MLB.com (Jan. 14, 2014), http://m.mlb.com/news/article/66540960/alex-rodriguez-sues-mlb-mlbpa-to-overturn-suspension.

67. *See* A-Rod Complaint, *supra* note 63, at 2.

68. *Id.* at 3.

69. *See*, Steve Eder, *Rodriguez Drops Suit Against Baseball and Union*, N.Y. Times (Feb. 7, 2014), http://www.nytimes.com/2014/02/08/sports/baseball/rodriguez-to-drop-lawsuits-against-baseball-selig-and-union.html.

70. *See* Mitchell H. Rubenstein, *Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration*, 42 U. Mich. J. L. Reform 517, at 522.

71. 323 U.S. 192, at 199 (1944). "But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rightsof the minority of the craft, without imposing on it any duty to protect the minority." *See also*, 45 U.S.C.A. § 152. "

72. *Id.* at 196–97.

73. *Id.* at 202.

74. *Id*.

75. Rubenstein, *supra* note 70, at 524.

76. 345 U.S. 330 (1954).

77. *Id.* at 331–32.

78. *Id.* at 332.

79. *Id.* at 341–42.

80. *Id.* at 338.

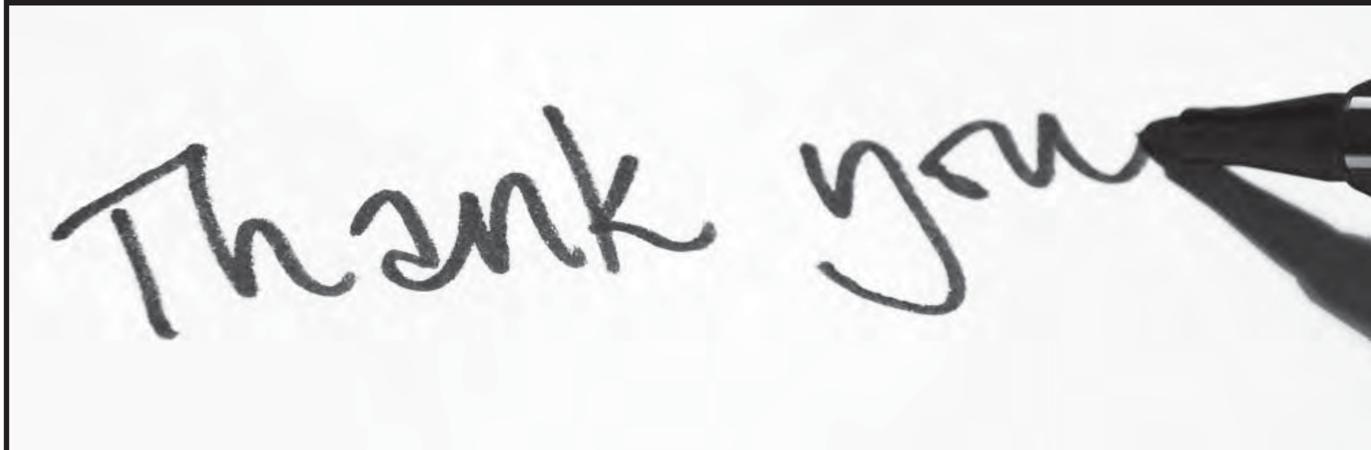
81. *Id.* at 337. ("Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any.") *Id.* at 337–38. ("Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.") *Id.* ("The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.").

82. 386 U.S. 171 (1967).

83. *Id.* at 173. The Missouri trial court judge held the National Labor Relations Board had jurisdiction. *Id.* The United States Supreme

Court reversed the Missouri Supreme Court, holding that the state court *did* have subject matter jurisdiction, although federal law controlled. *Id*.

84. *Id*.
85. *Id.* at 175–76.
86. *Id.* at 173.
87. *Id.* at 190 [emphasis added].
88. *Id*. at 191.
89. *Id*.
90. 499 U.S. 65, at 67 (1991).
91. *Id.* at 68.
92. *Id.* at 69.
93. *Id*.
94. *Id.* at 70.
95. *Id*.
96. *Id.* at 78 (quoting Huffman, *supra* note 76, at 338).
97. *Id.* at 79-81.
98. Rubenstein, *supra* note 70.
99. 493 U.S. 67, at 71 (1989).
100. *Id*.
101. *Id.*
102. *Id.* at 72.
103. 849 F.2d 997 (1988).
104. 493 U.S. 67, at 89 (1989).
105. Rubenstein, supra note 70.
106. It is important to make this distinction because the natural consequence of this element is that minor league baseball players, who do not become members of the MLBPA until they reach the Major League level, are without remedy as against the MLBPA for actions the MLBPA takes that minor leaguers believe are injurious to them.
107. Outside the purview of this note, it is interesting to ponder whether a situation analogous to *Breininger* could ever arise with the MLBPA. The closest parallel in Baseball to the *Breininger* "hiring hall" is free agency. In free agency, Players are permitted to test the open market, and obtain, if possible and/or preferable to that player, the highest salary available for their services. *See generally Flood v. Kuhn*, 407 U.S. 258 (1972). Player Agents, not the MLBPA, are responsible for representing the Players in this stage, and in order to be an Agent, you must be certified by the MLBPA. *See* MLBPA Agent Certification, *Frequently Asked Questions*, MLBPA, https://registration.mlbpa.org/FAQ.aspx. Hypothetically, it seems possible that a Player who feels inadequately represented in free agency by his agent could claim a breach of the duty of fair representation against the MLBPA for certifying that agent. In such a case, the *Breininger* standard would certainly come into play.
108. *See Marquez v. Screen Actors Guild, Inc*., 525 U.S. 33, at 44 (1998). Subsequent to *O'Neill*, the Supreme Court decided *Marquez*, and *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009). Both cases upheld the *Vaca* test.
109. 29 U.S.C.A. § 159.
110. Vaca, *supra* note 82.
111. *Supra* note 25.
112. *See supra* notes 82–86 and accompanying text.
113. *Supra* notes 90–96 and accompanying text.
114. The two cases are distinguishable because the Bautista case deals with a union representing a member in his grievance appeal whereas the *O'Neill* case deals with a union reaching a deal with the employer.
115. *See, e.g.*, *DeLucca v. Nat'l Edu. Assoc. of R.I.*, 102 F. Supp. 3d. 408, at 414–15 (holding as a matter of law that it was not a breach of its duty of fair representation for the Union to temporarily withdraw Plaintiff's arbitration).
116. *See Rougned Odor Gets 8-Game Suspension for Punching Jose Bautista*, ESPN (May 18, 2016), http://www.espn.com/mlb/story/_/id/15577350/rougned-odor-texas-rangers-suspended-8-games-punching-toronto-blue-jays-jose-bautista.
117. *Spellacy v. Airline Pilots Ass'n Intern*, 156 F.3d 120, at 126 (1998).
118. *Id.*
119. *Ashcroft v. Iqbal*, 556 U.S. 662, at 678 (2009).
120. Fed. R. Civ. P. 56.
121. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). At the time, pundits predicted that Rodriguez had no chance of winning his lawsuit against the MLBPA; however, those predictions were grounded in the principle that arbitration awards are rarely vacated, *not* that Rodriguez had a meritless claim under the theory of the duty of fair representation. *See, e.g.*, Lester Munson, *No Chance A-Rod Will Win in Court*, ABC News (Jan. 11, 2014), http://abcnews.go.com/Sports/chance-rod-win-court/story?id=21500316; Steve Eder, *How Arbitration Worked, and What Happens Next*, N.Y. Times (Jan. 10, 2014), http://www.nytimes.com/2014/01/11/sports/baseball/q-and-a-alex-rodriguezs-suspension-appeal.html?_r=0; Ronald Blum, *Odds Against Alex Rodriguez in Federal Court*, YAHOO! (Jan. 11, 2014, 10:54 PM), http://sports.yahoo.com/news/odds-against-alex-rodriguez-federal-231651256--mlb.html.
122. *Supra* notes 69–76 and accompanying text.
123. *See* A-Rod Complaint, at 3, *supra* note 63, "Allegation 4."
124. *Id.* at 4, "Allegation 5."
125. *Freeman v. O'Neal Steel, Inc.*, 609 F.2d 1123, at 1128 n. 9 (5th Cir. 1980).
126. *See* A-Rod Complaint at 5, *supra* note 63, "Allegation 5."
127. *See Spellacy*, *supra* note 117.
128. *See* T.J. Quinn, *Source: A-Rod Reps Talk Settlement*, ESPN (Aug. 1, 2013), http://www.espn.com/espn/otl/story/_/id/9526910/alex-rodriguez-representatives-negotiating-possible-settlement-lengthy-suspension-according-source.
129. *See generally* Emily C. Gainor, Note, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. Rev. 1441 (2011).
130. *Id*.
131. *See* Cork Gaines, *The 25 Highest-Paid Major League Baseball Players of All Time*, Business Insider (May 6, 2014, 8:07 PM), http://www.businessinsider.com/highest-paid-mlb-players-all-time-2014-5. In fact, as a result of Arbitrator Horowitz's decision that suspended Rodriguez for the entire 2014 season, Rodriguez lost out on the $22.1 million he would have been paid in salary that season. *Id.*
132. *See* A-Rod Complaint, at 1, *supra* note 63.
133. *See generally* A-Rod Complaint, *supra* note 63.
134. *See* Gaines, *supra* note 131. Rodriguez was eventually sued by one of his outside counsel. *See* Teri Thompson, et al., *Alex Rodriguez Sued by Lawyer Over $380,000 in Unpaid Legal Fees*, N.Y. Daily News (July 15, 2014, 1:17 PM), http://www.nydailynews.com/sports/i-team/alex-rodriguez-sued-lawyer-380k-unpaid-legal-article-1.1866604. The attorney, however, eventually dropped the suit. *See, e.g.*, Michael O'Keeffe, *Law Firm Who Sued Alex Rodriguez Over Unpaid Legal Fees Withdraws Suit*, N.Y. Daily News (Nov. 24, 2014, 11:02 PM), http://www.nydailynews.com/sports/i-team/law-firm-suing-alex-rodriguez-unpaid-fees-withdraws-suit-article-1.2022660; Michael O'Keeffe, *Yankees' Alex Rodriguez Settles Lawsuit Over Legal Fees*, N.Y. Daily News (Nov. 17, 2015, 12:58 AM), http://www.nydailynews.com/sports/baseball/yankees/yankees-alex-rodriguez-settles-lawsuit-legal-fees-article-1.2437318.


Thank you

ADA Reasonable Accommodations and the Interactive Process for Individuals with OCD

By Michael V. Gigante

Introduction

*I sometimes picture these unfortunates as men and women being pecked to death by predatory birds. The birds are invisible—at least until a psychiatrist who is good, or lucky, or both, sprays them with his version of Luminol and shines the right light on them—but they are nevertheless very real. The wonder is that so many OCDs manage to live productive lives, just the same. They work, they eat (often not enough or too much, it's true), they go to movies…and all the time those birds are there, clinging to them and pecking away little bits of flesh. (*Stephen King, *Just After Sunset)*

This article will examine reasonable accommodations and the interactive process under the federal Americans with Disabilities Act (ADA) for individuals with obsessive-compulsive disorder (OCD). First, the article will provide an overview of the ADA, discussing reasonable accommodations and the interactive process. Second, the article will discuss OCD, including how OCD symptoms affect job performance and reasonable accommodations for individuals with OCD. Third, the article will discuss two circuit court cases in which employees with OCD requested reasonable accommodations. Finally, the article will conclude with closing remarks on OCD and its effect on the workplace.

The Americans with Disabilities Act

Overview

Title I of the federal Americans with Disabilities Act (ADA) prohibits private employers and other entities from discriminating against "qualified individuals with disabilities" in employment.[1] The law generally covers employers with 15 or more employees.[2] An "individual with a disability" is someone who has a physical or mental impairment that substantially limits one or more major life activities (such as concentrating and working); has a record of such an impairment; or is regarded as having such an impairment.[3] A "physical or mental impairment" is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems; or any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[4] Federal regulations provide numerous examples, stating that it should "easily" be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: major depressive disorder, bipolar disorder, post-traumatic stress disorder, *obsessive-compulsive disorder* (OCD), and schizophrenia substantially limit *brain function*.[5] The types of impairments described may substantially limit additional major life activities not explicitly listed.[6]

A "qualified" individual with a disability is someone who meets legitimate skill, experience, education, or other requirements of a position that he or she holds or seeks, and who can perform the *essential* functions of the position with or without "reasonable accommodation."[7]

Reasonable Accommodations

If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer is obligated to consider whether the person could perform these functions with a "reasonable accommodation."[8] A "reasonable accommodation" is an adjustment to a job or work environment that enables a qualified applicant or employee with a disability to participate in the application process, perform essential job functions, or enjoy rights and privileges available to nondisabled employees.[9]

Employers must reasonably accommodate known disabilities of a qualified applicant or employee if they would not impose an "undue hardship" on the employer's business.[10] Reasonable accommodation may include, but is not limited to:

- Making existing facilities accessible to and usable by disabled persons;
- Job restructuring, modifying work schedules, or reassigning to a vacant position;
- Acquiring or modifying equipment;
- Adjusting or modifying examinations, training materials, or policies; and
- Providing qualified readers or interpreters.[11]

Accommodations vary with the needs of the applicant or employee.[12] For example, an employee with diabetes may need regularly scheduled breaks to eat properly and monitor blood sugar and insulin levels, or an employee with cancer may need leave for radiation or chemotherapy treatments.[13] Not all people with disabilities (even with the same disability) require the same accommodation.[14]

However, an employer is not obligated to provide a reasonable accommodation if it imposes an "undue hardship," which is an action requiring significant difficulty or expense in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.[15] An employer does not have to lower quality or production standards to make an accommodation, and an employer generally does not have to provide a reasonable accommodation unless a disabled individual has asked for one.[16]

The Interactive Process

When an individual decides to request accommodation, the individual or his or her representative must inform the employer that he or she needs an adjustment because of a medical condition.[17] Employers are not necessarily required to provide the requested adjustment.[18] A request for reasonable accommodation is the first step in an interactive process between the person and the employer.[19] The process should identify the precise limitations resulting from the disability and potential reasonable accommodations to overcome them.[20]

The employer may choose among reasonable accommodations provided that the chosen accommodation is effective.[21] Thus, as part of the interactive process, the employer is permitted to offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier.[22]

The duty to provide reasonable accommodation is ongoing.[23] Certain persons require only one reasonable accommodation, while others need multiple.[24] Others may need one accommodation for a period of time, and then another type of accommodation later.[25] An individual is entitled only to those accommodations necessitated by a disability and that provide an equal employment opportunity.[26]

An employer is obligated to consider each request for reasonable accommodation and determine: (1) if the accommodation is needed; (2) if needed, whether the accommodation would be effective; and (3) if effective, whether providing the accommodation would impose an undue hardship.[27] If an accommodation turns out to be ineffective and the disabled employee remains unable to perform an essential function, the employer is obligated to consider whether there would be an *alternative reasonable accommodation* that would not pose an undue hardship.[28] If there is no alternative accommodation, then the employer is obligated to attempt to reassign the employee to a vacant position for which he or she is qualified, unless doing so would cause an undue hardship.[29]

OCD in the Workplace

What Is OCD?

Obsessive-compulsive disorder (OCD or the "disorder") is a chronic, long-lasting, mental, anxiety disorder in which someone has uncontrollable, reoccurring thoughts ("obsessions") and behaviors ("compulsions") he or she feels the urge to repeat over and over.[30] Individuals with OCD may have obsessions, compulsions, or both.[31]

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"Obsessions" are repeated thoughts, urges, or mental images causing anxiety.[32] Common symptoms are fear of germs; unwanted forbidden or taboo thoughts regarding sex, religion, and harm; aggressive thoughts towards other people or self; and having things symmetrical or in perfect order.[33] "Compulsions" (sometimes called "rituals") are repetitive behaviors an individual with OCD feels the urge to do in response to obsessive thoughts.[34] Common compulsions are excessive cleaning and handwashing; ordering or arranging things in a particular way; repeatedly checking on things, such as if a door is locked or that an oven is off; and compulsive counting.[35] OCD symptoms can come and go, ease over time, or worsen over time.[36] People with OCD generally:

- Cannot control the thoughts or behaviors, even when the thoughts or behaviors are recognized as excessive.
- Spend at least an hour a day on the thoughts or behaviors.
- Do not get pleasure when performing the behaviors or rituals, but may feel brief relief from anxiety that the thoughts cause.
- Experience significant problems in daily life due to the thoughts or behaviors.[37]

Some people with OCD also may have a tic disorder.[38] Motor tics are sudden, brief, repetitive movements, including eye blinking or other eye movements, facial grimacing, shoulder shrugging, or head and shoulder jerking.[39] Common vocal tics may include throat-clearing, sniffing, or grunting.[40]

Perhaps the most common obsession-and-compulsion cycle in popular imagination is the obsession of germs and contamination, coupled with the compulsion of excessive cleaning and handwashing to alleviate the anxiety caused by such obsession—a form of OCD made famous by actor Leonardo DiCaprio's portrayal of filmmaker Howard Hughes in *The Aviator*. While fear of germs and excessive handwashing may be the most popular image of OCD, it certainly is not the only form of obsessions and compulsions that individuals with OCD suffer from. For a more complete list of common obsessions and compulsions, readers may visit the International OCD Foundation's website.[41]

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___ Wage and Hour (LABR4600)

___ Workplace Rights and Responsibilities (LABR1900)

Fred Penzel, Ph.D, explains that OCD is chronic (like having asthma or diabetes)—one can get it under control and become recovered but, at present, *there is no cure*.[42] OCD is probably genetic in origin and not within current reach to treat at that level.[43] Things that individuals have to do to treat it are really controls, and if they do not learn to effectively make use of them throughout life, they run the risk of relapse.[44] If individuals do not use the tools provided in cognitive/behavioral therapy or if they stop taking medication (in most cases) they will soon find themselves hemmed in by symptoms again.[45]

How OCD Symptoms Affect Job Performance

The ways in which OCD symptoms, with their varying obsessions and compulsions, can affect job performance are nearly limitless. An individual with OCD who has an obsession with germs may perform compulsions to clean himself or herself for hours each day, including excessive showering and handwashing. These compulsions can cause an individual to be late to work or to take long bathroom breaks at work to perform such compulsions. However, the ability of OCD symptoms to interfere with an individual's work performance is not limited to a fear of germs.

> *"JAN explains that common workplace problems for employees with OCD that may require reasonable accommodation include attendance or punctuality issues, the ability to meet deadlines or stay organized, and problems maintaining concentration or managing distractions."*

OCD's unwanted, intrusive thoughts can easily interfere with an individual's ability to concentrate at work. An employee may often be distracted by irrelevant thoughts, causing him to make repeated errors on detailed or complex tasks.[46] Similarly, an individual with an obsession with perfection or a fear of making mistakes may spend hours of each workday rereading or rechecking his or her work countless times. A person with a religious obsession and fear of offending God may feel the need to pray constantly to prevent harm to oneself or other terrible consequences. Or an individual with an obsessive fear of unlucky numbers or colors may try to completely avoid all instances of those numbers or colors, making it difficult for the individual to do any work in which he or she comes into contact with those numbers or colors. While there are countless ways that OCD can interfere with one's job performance, there are also many ways that employers can accommodate individuals with OCD.

Reasonable Accommodations for Individuals with OCD

The Job Accommodation Network (JAN), a service of the U.S. Department of Labor's Office of Disability Employment Policy that provides a free consulting service on workplace accommodations,[47] has created a publication outlining job accommodations for people with OCD.[48] JAN explains that common workplace problems for employees with OCD that may require reasonable accommodation include attendance or punctuality issues, the ability to meet deadlines or stay organized, and problems maintaining concentration or managing distractions.[49] The following is an overview from JAN of some of the job accommodations that may be useful for people with OCD:

Attendance/Punctuality Issues:

- Allow flexible leave.
- Provide flexible start-times.[50]

Meeting Deadlines/Staying Organized:

- Assign time-intensive projects with a clearly stated deadline and have the employee acknowledge and commit to that deadline.
- Provide mentoring and strategic follow-up with the employee about the progress of assignments.
- Mentor and coach via direct observation.
- Have the employee make daily to-do lists and check items off as they are completed.
- Have the employee keep a web-based calendar for automatic updates and reminders and a visual (hard copy) calendar at the workstation.
- Maintain a parallel calendar or reminder file for the employee's deadlines and forward reminders, deadlines, and prompts associated with workflow.
- Provide a model for task management.
- Provide ongoing feedback and direction about the progress of pending assignments.[51]

Maintaining Concentration/Managing Distractions:

- Reduce distractions in the work area.
- Provide space enclosures or a private office.
- Allow for the use of white noise or environmental sound machines.
- Allow the employee to play soothing music.
- Increase natural lighting or provide full spectrum lighting.
- Plan for uninterrupted work time.
- Allow for frequent breaks.

- Restructure the job to include only essential functions.[52]

Case Law

Let us examine a few examples involving reasonable accommodations and the interactive process under the ADA for individuals with OCD.

Humphrey v. Memorial Hospitals Association

Facts and Procedural Background

In *Humphrey v. Memorial Hospitals Association*,[53] plaintiff-appellant Carolyn Humphrey worked for defendant-appellee Memorial Hospitals Association (MHA) as a medical transcriptionist until her termination. Humphrey's transcription performance was excellent and exceeded MHA's standards for speed, accuracy, and productivity.

However, Humphrey experienced problems getting to work on time (or at all) due to her obsessive rituals. She would wash and brush her hair for up to three hours each day, dress very slowly, repeatedly check and recheck for papers she needed, and pull out strands of hair and examine them closely. Her obsessive thoughts and rituals made it difficult to arrive to work on time. When she realized that she was late, she would panic and become embarrassed, making it even more difficult for her to leave the house and get to work.

Due to Humphrey's tardiness and absenteeism, MHA gave her a disciplinary warning, requiring her to call her supervisor if she was going to be late or absent. Humphrey's mental obsessions and peculiar rituals worsened, her attendance record and call-in rate did not improve, and she received another disciplinary warning. Humphrey saw a psychiatrist, who diagnosed her with OCD. The psychiatrist sent a letter explaining the diagnosis to MHA's nurse and saying that he believed they could treat the problem but that it might take a while. He believed that Humphrey would qualify under the ADA and wanted to see her continue to work, but if it was proving to be a major personnel problem, he said Humphrey may have to take some time off until they could get the symptoms better under control.

Humphrey met with MHA's nurse and Humphrey's supervisor to review the psychiatrist's letter. What happened at the meeting was disputed. MHA contended that Humphrey rejected the leave of absence alluded to in the doctor's letter, but Humphrey said she was never offered a leave of absence and never rejected one, saying that she wanted to keep working.

MHA's nurse told Humphrey that she could have an "accommodation" that would allow her to keep working. The nurse suggested, as an accommodation, that Humphrey have a friend or family member drive her to work, but Humphrey said it would not be feasible. The nurse next offered a flexible start-time arrangement in which Humphrey could begin work any time within a 24-hour period on days on which she was scheduled to work and asked her whether any other accommodation would be desirable, asking her to submit any additional requests for accommodation in writing.

Humphrey accepted the flexible start time arrangement, but she continued to miss work. No one from MHA broached the subject of modifying the accommodation during the period. Humphrey sent the nurse an e-mail message asking for a new accommodation because the then-current one seemed to be failing. Humphrey said she would be able to put in more hours and be more productive if she was able to work from home as other transcriptionists were doing.

The nurse denied Humphrey's request for work-at-home accommodation due to Humphrey's disciplinary warnings for tardiness and absenteeism. The nurse did not suggest an alternative accommodation or indicate that MHA would be receptive to reassessing its arrangements to accommodate Humphrey in light of the apparent failure of the flexible work schedule. Instead, she said it was departmental policy that if someone was involved in any disciplinary action, he or she was ineligible to be a home-based transcriptionist.

Humphrey had an evaluation indicating that were it not for her ailment, she would have been a model employee. The only negative ratings were related to the problems caused by the interference of her symptoms and the accommodation of flexible start time. Her evaluation stated that her unscheduled absences were not acceptable, and advised that correcting her attendance problem was a major goal. During a meeting with another supervisor to discuss her evaluation, Humphrey again raised the issue of working at home, but was told that she would have to be free of attendance problems for one year before she could be considered for an at-home transcriptionist position. Neither Humphrey nor the supervisor suggested a medical leave of absence at the meeting.

Humphrey was absent additional times and was fired. MHA's reason for the termination was Humphrey's tardiness and absenteeism. Humphrey said that after learning of her termination, she went to the nurse's office and asked for a leave of absence instead of losing her job, but that the nurse refused and told her that she had had her chance at accommodation. The nurse denied that Humphrey requested a leave of absence on the day of her discharge, and MHA conceded that it would have granted the request if Humphrey had asked for a leave of absence prior to her termination, as MHA had a policy of permitting medical leaves of absence to disabled employees.

Humphrey sued MHA for violation of the ADA and its California counterpart, the Fair Employment and

Housing Act (FEHA). The district court granted MHA's motion for summary judgment on the theory that MHA had satisfied the duty to reasonably accommodate Humphrey's disability, finding it dispositive that Humphrey was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently. Humphrey appealed, contending that MHA violated the ADA and the FEHA by failing to reasonably accommodate her OCD and by terminating her because of that disability.

Qualified Individual with a Disability

MHA argued that Humphrey was not *disabled* for purposes of the ADA because she was not substantially limited in one or more of her major life activities. The Ninth Circuit noted that "caring for oneself" is a major life activity and that an impairment substantially limits a person's ability to care for himself or herself if, due to the impairment, a person is significantly restricted as compared to the average person in the general population in performing basic activities such as getting up in the morning, bathing, dressing, and preparing and obtaining food.

The facts were undisputed regarding Humphrey's ability to care for herself. It took Humphrey significantly more time than the average individual to accomplish the basic tasks of washing and dressing. The process of washing and brushing her hair alone could take several hours, and she at times would prepare for work from eight in the morning until five or six in the evening. On one OCD screening test, Humphrey was rated as taking three times as long as most people to shower, wash her hands, dress, and handle or cook food.

MHA argued that even if Humphrey's ritualistic behaviors caused her to take more time to complete basic activities than the average person, she was not disabled under the ADA because her OCD did not prevent her from accomplishing those activities. However, the Ninth Circuit noted that the ADA addressed *substantial limitations* on major life activities, not utter inabilities. The court stated that an impairment "substantially limits" one's ability to carry out a major life activity if, because of the impairment, he or she is *significantly restricted* as to the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity; an individual who has a physical or mental impairment causing him to take inordinately more time than others to complete a major life activity is substantially limited as to that activity under the ADA. There was no dispute that Humphrey fell within that category. Accordingly, the court stated, in determining whether Humphrey was disabled for purposes of the ADA, the question was not whether she was substantially limited in her ability to care for herself, but whether she had OCD, and, if so, whether her OCD was the cause of her limitation.

MHA next argued that Humphrey was not *qualified* for the medical transcriptionist position within the meaning of the ADA. It was undisputed that Humphrey had the skills, training, and experience to transcribe medical records. MHA contended that Humphrey's inability to show up for work and to notify her employer when she would be absent rendered her not otherwise qualified under the ADA because regular and predictable attendance was an *essential function* of the position. The court noted that Humphrey was a "qualified individual" under the ADA so long as she was able to perform the essential functions of her job "with or without reasonable accommodation." Either of two potential reasonable accommodations might have made it possible for Humphrey to perform the essential functions: granting a leave of absence or allowing her to become a home-based transcriptionist. The Ninth Circuit stated that a leave of absence for medical treatment may be a reasonable accommodation and that where a leave of absence would reasonably accommodate an employee's disability and permit him or her, upon his or her return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA.

MHA contended that Humphrey was not otherwise qualified because the results of the leave of absence were speculative. However, the court noted that the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation; as long as a reasonable accommodation available to the employer could have *plausibly* enabled a handicapped employee to adequately perform his or her job, an employer is liable for failing to attempt that accommodation. The psychiatrist's statements that Humphrey's condition was treatable and that she might have to take some time off until they could get the symptoms better under control were sufficient to satisfy the minimal requirement that a leave of absence could plausibly have enabled Humphrey adequately to perform her job.

The court also discussed another reasonable accommodation that could also serve to render Humphrey a "qualified individual." The court stated that there was at least a triable issue of fact as to whether Humphrey would have been able to perform the essential duties of her job with the accommodation of a work-at-home position. It stated that working at home is a reasonable accommodation when the essential functions can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer. Regular and predictable performance of the job was an essential part of the transcriptionist position, but physical attendance at the MHA offices was not an essential job duty; in fact, MHA permitted some of its medical transcriptionists to work at home. MHA denied Humphrey's application for a work-at-home position because of her disciplinary record, but the Ninth Circuit stated that it would be inconsistent with the purposes of the ADA to allow an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated. Thus, Humphrey's disciplinary record did not constitute an appropriate basis for denying her a work-at-home accommodation. Although the psychiatrist was less optimistic about Humphrey's working at home than he was about a leave of absence, Humphrey had submitted sufficient evidence to raise an issue of fact as to whether she could perform the job with the accommodation of a work-at-home position because her OCD interfered primarily with her ability to leave her house in the morning. A reasonable jury could conclude, the court stated, that if Humphrey was relieved of the stress of having to leave her house, she could perform her transcriptionist duties and thus was "qualified" under the ADA.

Hence, the court held that MHA was not entitled to summary judgment on the issue of whether Humphrey was a "qualified individual with a disability" for purposes of the ADA.

Breakdown of the Interactive Process

The Ninth Circuit next examined whether MHA was obligated to suggest a leave of absence or to explore other alternatives in response to Humphrey's request for a work-at-home position, or if it was Humphrey's burden to make an express request for a leave of absence before she was terminated. The court concluded, as a matter of law, that if Humphrey was a qualified individual with a disability, MHA had an affirmative duty under the ADA to explore further methods of accommodation before terminating Humphrey.

The Ninth Circuit first noted that once an employer becomes aware of the need for accommodation, the employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. The court stated that the duty to accommodate is a *continuing* duty not exhausted by one effort. An employer must consider each request for reasonable accommodation, and if a reasonable accommodation turns out to be ineffective and the disabled employee remains unable to perform an essential function, the employer must consider whether there would be an *alternative reasonable accommodation* that would not pose an undue hardship. Thus, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or when the employer is aware that the initial accommodation is failing and further accommodation is needed.

When MHA received the psychiatrist's letter diagnosing Humphrey with OCD, MHA properly initiated the interactive process by arranging a meeting to discuss possible accommodations. The psychiatrist's statement that he wanted to see Humphrey continue to work, but that if it was proving to be a major personnel problem, she may have to take some time off until they could get the symptoms better under control, alerted MHA to the possibility that any initial arrangement that kept Humphrey on the job might not be effective and that a leave of absence might ultimately be necessary to accommodate her disability. In fact, it was MHA's position, disputed by Humphrey, that MHA explicitly offered her a leave at one meeting, and that it was Humphrey who decided that flexible scheduling was the better choice. Even assuming that Humphrey turned down the leave of absence in favor of a flexible start-time arrangement, the court stated, her attempt to perform her job functions by means of a less drastic accommodation did not forfeit her right to a more substantial one upon the failure of the initial effort.

By the time of one of Humphrey's annual performance reviews, it was abundantly clear to MHA that the flexible start time accommodation was not succeeding; Humphrey had accumulated a number of unreported absences, and her evaluation stated that her attendance record was unacceptable. At this point, MHA had a duty to explore further arrangements to reasonably accommodate Humphrey's OCD.

Humphrey realized that the accommodation was not working, and she requested a work at home position. When it received the request, MHA could have either granted it or initiated discussions with Humphrey about other alternatives. Instead, MHA denied her request without suggesting any alternative solutions or exploring with Humphrey the possibility of other accommodations. Rather than fulfill its obligation to engage in a cooperative dialogue with Humphrey, the nurse suggested that the matter was closed. The court stated that an employer fails to engage in the interactive process as a matter of law when it rejects the employee's proposed accommodations by letter and offers no practical alternatives. MHA's rejection of Humphrey's work-at-home request and failure to explore with Humphrey the possibility of other accommodations, once it was aware that the initial arrangement was not effective, constituted a violation of its duty regarding the mandatory interactive process.

The court stated that given MHA's failure to engage in the interactive process, liability was appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible. Ordinarily, whether an accommodation would pose an undue hardship is a factual question; in this case, however, MHA had conceded that granting a leave of absence would not have posed an undue hardship. MHA had a policy of granting leaves to disabled employees, and admitted that it would have given Humphrey a leave had she asked for one at any time before termination. The court rejected MHA's position that Humphrey was not entitled to a leave of absence because she failed to ask for one before she was fired, instead stating that MHA was under a continuing duty to offer a reasonable accommodation.

Accordingly, the court held as a matter of law, if Humphrey was a qualified individual with a disability, that MHA violated the ADA's reasonable accommodation requirement.

"The policy specifically stated that unscheduled absences or repeated tardiness made it difficult for teammates to do their jobs and serve guests."

The *Humphrey* case is a poignant example of the issues and accommodations concerning individuals with OCD that can arise in the workplace, and it demonstrates various obligations under the ADA. The plaintiff exhibited classic symptoms of OCD such as repeated cleaning and checking, and these rituals interfered with her job performance by causing her to be late to or absent from work. In discussing whether Humphrey was a *qualified individual with a disability* under the ADA, the Ninth Circuit noted that the ADA addressed *substantial limitations* on major life activities, not utter inabilities, and that there was at least a triable issue of fact as to whether Humphrey would have been able to perform the essential duties of her job with the accommodation of a work-at-home position (and thus was *qualified*). Accommodations discussed for Humphrey's OCD included a flexible start time (which failed), leave of absence, and work-from-home arrangement. Finally, the court discussed an employer's continuing obligation to engage in the interactive process, an obligation extending beyond the first attempt at accommodation and continuing when the employee asks for a different accommodation or when the employer is aware that the initial accommodation is failing and further accommodation is needed.

Earl v. Mervyns, Inc.

Facts and Procedural Background

In *Earl v. Mervyns, Inc.*,[54] plaintiff-appellant Debra Earl worked as a Store Area Coordinator for defendant-appellee Mervyns, Inc. ("Mervyns"). One of Earl's principal responsibilities was preparing her department for the store's opening in the morning, which involved obtaining cash for her registers, stocking merchandise, arranging displays, and ensuring that the department was properly equipped to run during the day. When Earl was scheduled to work, she was the only Area Coordinator in her assigned department.

Mervyns' punctuality policy had a three-step corrective action plan that applied to employees who had received a certain number of punctuality infractions; after the third step, the employee could be discharged. Earl began arriving to work late and received her first documented warning. According to Mervyns, Earl temporarily controlled her tardiness and was removed from documented warning. Her tardiness recurred, however, and she was again placed on documented warning. Earl then informed Mervyns' management that she was suffering from OCD, and that this condition was the cause of her tardiness. She brought in documentation from her doctor stating the same. Earl was placed on the third step of the corrective action policy after being late several additional times. Mervyns offered to permit Earl to "clock in" up to 15 minutes ahead of her scheduled shift and receive appropriate overtime pay, which other employees were not allowed to do. Earl requested that she be allowed to "clock in" at whatever time she arrived, without reprimand, and be permitted to make up that time at the end of her shift. Mervyns rejected this request as unreasonable, but offered to schedule Earl on the afternoon or evening shift at her request. Earl was late additional times, and was suspended and then terminated for tardiness. Earl's husband attended Earl's exit interview in her stead and delivered a request for Earl's disability leave.

Earl sued Mervyns, alleging claims pursuant to the ADA and the Family and Medical Leave Act. Mervyns moved for summary judgment. The district court granted summary judgment in favor of Mervyns, and Earl appealed.

Disability Claim

The parties did not dispute that Earl had a disability for purposes of the ADA; rather, the issue was whether she was "qualified" under the ADA. The court noted that an individual is "qualified" if he or she, with or without reasonable accommodation, can perform the essential functions and job requirements of the position the person holds. "Essential functions," the court explained, are the fundamental job duties of a position that a disabled individual is actually required to perform. Earl admitted that without an accommodation she could not arrive at work punctually on a regular basis, regardless of the shift for which she was scheduled.

The court concluded that punctuality was an essential function of Earl's job as Store Area Coordinator. Mervyns placed a high priority on punctuality. Its policy handbook contained a detailed punctuality policy and Mervyns implemented a comprehensive system of warnings and reprimands for violations of the policy. The policy specifically stated that unscheduled absences or repeated tardiness made it difficult for teammates to do their jobs and serve guests. Mervyns also consulted Earl more informally on several occasions about the consequences of her repeated tardiness. Furthermore, unlike other jobs that could be performed without regard to a specific schedule, the tasks of Earl's job had to be performed daily at a specific time. If Earl was tardy in the morning, her area would not be ready for the usual influx of morning customers. If she was tardy in the afternoon or evening, the Area Coordinator from the previous shift would be forced to work a longer shift. These problems were exacerbated by the relatively small number of area coordinators in Mervyns' store. Earl therefore could not perform the essential functions of her job without an accommodation.

> *"Fortunately, thanks to various agencies and case law, we have clear guidance on how OCD sufferers can be accommodated in the workplace, and the interactive process proves crucial to finding suitable accommodations for such individuals."*

The court next analyzed whether any reasonable accommodation by Mervyns would have enabled Earl to perform this function. The Eleventh Circuit noted that the burden of identifying an accommodation that would allow a qualified employee to perform the essential functions of his or her job rests with that employee, as does the ultimate burden of persuasion with respect to showing that such accommodation is reasonable. Where a plaintiff cannot demonstrate reasonable accommodation, the employer's lack of investigation into reasonable accommodation is not important. Before an employer has a duty to show undue hardship, the plaintiff first must show a reasonable accommodation exists.

Earl's psychiatrist testified that there was nothing Mervyns could have done to help Earl arrive at work on time. In addition, Earl admitted she was unable to arrive at work on time even when scheduled for an afternoon or evening shift. The only accommodation Earl identified was to allow her to clock in at whatever time she arrived, without reprimand, and to permit her to make up the missed time at the end of her shift. Based on these facts, the court said, Earl had not met her burden of identifying a reasonable accommodation. The court noted that the use of the word "reasonable" as an adjective for the word "accommodate" connotes that an employer is not required to accommodate an employee in any manner in which the employee desires. Additionally, an employer is not required by the ADA to reallocate job duties to change the essential functions of a job. A request to arrive at work at any time, without reprimand, would in essence require Mervyns to change the essential functions of Earl's job, and thus was not a request for a reasonable accommodation. According to the court, Mervyns was therefore under no duty to engage in an interactive process or to show undue hardship.

The Eleventh Circuit concluded that Earl's failure to identify a reasonable accommodation was fatal to her ADA claim. Because she could not, even with a reasonable accommodation, perform the essential functions of her job, she was not a "qualified" individual under the ADA, and her ADA claim failed.

The *Earl* case contains important lessons for both employers and individuals with OCD requesting accommodations. Being "qualified" means that an individual can perform the essential job functions with or without reasonable accommodation. The court specifically noted that an employer is not required to accommodate an employee in any manner in which the employee desires, and an employer is not required to reallocate job duties to change the essential functions of a job. In the case, Earl failed to identify a reasonable accommodation and could not, even with a reasonable accommodation, perform the essential functions of her job; thus, she was not "qualified."

Conclusion

This article opened with a Stephen King quote that likened living with OCD to being pecked to death by invisible, predatory birds that are "very real." Needless to say, OCD is a devastating disorder that interferes with all aspects of the lives of those who suffer from it. The disorder is chronic and, at present, there is no cure. Whether it is causing an individual to be late, preventing him or her from concentrating, or something else, OCD can substantially affect job performance. According to the International OCD Foundation, it is estimated that about 1 in 100 adults—or between 2 to 3 million adults in the United States—currently have OCD.[55] Thus, many workplaces across the country have employees suffering from the disorder, and it is of vital importance to know how such individuals can be accommodated to assist them with their jobs. Fortunately, thanks to various agencies and case law, we have clear guidance on how OCD sufferers can be accommodated in the workplace, and the interactive process proves crucial to finding suitable accommodations for such individuals.

Endnotes

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ERISA's Church Plan Exemption: The Tragedy of St. Clare's Underfunded Pension Plan

By Kimberly Livingstone

Introduction

With the enactment of the Employee Retirement Income Security Act's (ERISA) in 1974, Congress created legislation with the intent to protect the interests of employees enrolled in employer-sponsored pension plans. However, with the enactment of the 1980 amendments a deviation from the legislature's original intent was created.

The 1980 amendments declared that employee pension plans established by religious institutions and maintained by religious institutions or religious affiliated agencies were exempt from the Act's regulations.[1] Under ERISA, employer-sponsored benefit plans are subject to the following mandates: vesting requirements, funding rules, and fiduciary responsibility provisions.[2] ERISA benefit plans require employers to bear the entire investment risk and to cover the cost of any underfunding that results from inadequate investment or poor investment choices.[3] However, church plans are exempt from such ERISA protections. Thus, employees participating in an unregulated church plan face potential financial hardships if the plan becomes insolvent.

For more than three decades, courts have interpreted the church plan exemption as any employee benefit plan that represented the employees of a religious institution. This vague interpretation of church plans led to the development of the *Lown* test. In *Lown,* the Fourth Circuit Court established a three-prong test to determine the validity of a church plan on a case-by-case basis.[4] The factors of the *Lown* test included: "(1) whether the religious institution plays any official role in the governance of the organization; (2) whether the organization receives [financial] assistance from the religious institution; and (3) whether a denominational requirement exists for any employee or patient/customer of the organization."[5] Coupled with the IRS's interpretation, the court held that employee benefit plans established and/or maintained by church agencies were valid church plans if the church controlled or participated in the agency's corporate governance.[6] For years, the Fourth Circuit's interpretation was emphasized as the proper method for analyzing the validity of church plans.

However, in 2015, a new wave of litigation determined that control by a church did not grant church agencies the statutory right to establish a church plan.[7] In *Kaplan,* the Third Circuit Court analyzed the plain meaning of the statute and held that "legislative history indicated that [church] agencies were precluded from establishing church exempt plans."[8] According to the interpretations of the courts, plans maintained by church-affiliated agencies and initially established by the church were valid church plans.[9] Any plan not initially established by the church itself would be subject to ERISA regulations.[10]

As the Supreme Court gears up to decide whether the Circuit Court's interpretation of the statute was correct, another church plan case readies itself for litigation. In 2016, retirees of the St. Clare's Retirement Income Plan ("Plan"), received notification that the Plan was nearly insolvent.[11] In 2008, St. Clare's Hospital, a church affiliated agency, closed its doors due to financial hardships. Despite its closure the pension plan continued to exist.[12] This defined benefit (DB) plan was established by St. Clare's pension board ("St. Clare's Corp.") in 1959.[13] For several years, the Plan functioned as an ERISA-regulated pension plan.[14] However, once the church plan exemption took effect, St. Clare's ceased complying with ERISA regulations.[15] The validity of this exemption, St. Clare's Corp. would argue, was affirmed in a 1992 IRS Ruling Letter.[16] After the Hospital's closure, St. Clare's Corp. continued to act as the Plan's main fiduciary.[17] While St. Clare's Corp. monitored the Plan's assets; the board utilized the administrative services of Prudential Retirement. Prudential Retirement's responsibilities included the management and investment of the Plan's assets.[18] In spite of the watchful eye of St. Clare's Corp, the experienced professionals at Prudential Retirement, and a $28 million HEAL grant provided by the New York State Health Department, the Plan will still be insolvent by 2024.[19] Within the next seven to eleven years, 1,100 St. Clare's retirees will face potential financial ruin caused by the mismanagement of the unregulated and underfunded church plan.[20]

However, under the analysis set forth by the Circuit Courts, *St. Clare's* DB plan would not qualify as a church plan because (1) St. Clare's pension plan was established by the hospital's pension board and not the church itself; and (2) St. Clare's 1992 IRS Ruling Letter affirming the organization's church plan status lacks the power of persuasion and authority based upon the court's argument that the IRS interpreted the statutory language incorrectly. Furthermore, if the Supreme Court reversed the interpretations of the Circuit Courts, St. Clare's pension plan would still not qualify as a church plan under the *Lown* test. As expressed by the Albany Catholic Diocese the church did not maintain control over the hospital's corporate governance.[21] The Diocese would argue that the church lacked control over the hospital because it did not provide hospital funding or participate in hospital's business decisions. Thus, a court would likely determine that

St. Clare's did not maintain intimate associations with the Catholic Diocese and would not qualify as a church plan.

Therefore, this article will provide a brief overview of the broad application of ERISA and the narrow exceptions provided by the 1980 amendments. Specifically, a section of the article will define the scope of ERISA, the construction of the church plan exemption, and how the courts have applied judge made law to the church plan problem. Another section will discuss the Circuit Court's recent the legal analysis and interpretation of church plans. Another section will discuss St. Clare's underfunded pension plan and the potential legal remedies the former employees may explore under ERISA. Specifically, this section will discuss the reasons for which St. Clare's pension plan is not a church plan. Lastly, this article will conclude the discussion on the ERISA church plan exemption and how the exemption will likely be applied in the future.

A Brief Overview of ERISA's Church Plan Exemption

The Scope of the ERISA Enforcement

With the enactment of the Employee Retirement Income Security Act's (ERISA), Congress intended to preempt all state regulations pertaining to employer-offered pension and health benefit plans. By providing all-encompassing language in the statute, Congress provided the federal courts with jurisdiction over all claims within the specific area of law.[22] Under ERISA, the broad regulation subjects any employee pension benefit plan, fund, or program created and maintained by an employer and/or employee organization to vesting requirements, funding rules, and fiduciary responsibility provisions.[23] In regards to pension plans, ERISA regulates plans that are either defined-benefit plans or defined-contribution plans.[24] "A defined-benefit plan consists of a pool of assets…where the employee, upon retirement, is entitled to a fixed periodic payment."[25] The asset pool may be funded by either the employer or employee or by a combination of both.[26] However, the employer bears the entire investment risk and must cover any underfunding that resulted from inadequate investment or poor investment choices.[27] Additionally, the Department of Labor has recognized that certain plans, funds, and programs are not employee pension benefit plans.[28] However, to the extent that such "plans, funds, and programs are employee welfare benefit plans, they will be covered by ERISA but will be exempt from the participation, vesting, and funding requirements."[29] Despite the overreaching hand of ERISA, lobbyists advocating for religious institutions persuaded Congress to incorporate an exemption for employee benefit plans established and maintained by religious and religious affiliated organizations.[30]

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Church Plans Defined

With the implementation of this exemption, churches began to develop "church plans" that were not subject to ERISA's vesting and funding requirements. Pursuant to 29 U.S.C.A. § 1003(b)(2), a church plan is an employee benefits plan, fund or program established and maintained by a tax-exempt church.[31] A church plan that is maintained by a service provider on behalf of the church, whose principal purpose is the administration or funding of a plan, does not defeat the church plan status.[32] Furthermore, retirement benefit plans for employees of church-affiliated agencies are also exempt from ERISA if those agencies are controlled by or associated with a church.[33] However, a church plan does not include a plan:[34]

> (1) established and maintained primarily for the benefit of employees, or their beneficiaries, of a church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses; or (2) if less than substantially all of the individuals included in the plan are individuals described in the general definition of the term "church plan" or in the specific definitions of employees or their beneficiaries. ERISA's church plan exemption is not rendered inapplicable merely because the employee benefit plan at issue is structured similarly to other benefit plans that are covered by ERISA, or because the employer provides the employee with a summary plan description, because church plan status is a function of the nature of the institution that maintains the plan.[35]

To determine if an agency qualifies as a religious institution under ERISA's church plan exemption, the IRS released specific criteria it considers when responding to this question. Those guidelines include:

> (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature

> of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers.[36]

In determining whether a valid church plan exists the courts had routinely used these factors as an authoritative source in judicial decisions.

The Court's Understanding of ERISA Church Plans

Although, these factors are not dispositive they do provide courts with guidance in defining ERISA church plans.[37] However, despite this guidance a variety of court opinions have consistently focused on whether the church-affiliated agency was controlled by the church itself.[38] Relying on this standard, courts have substituted judge-made law for the plain meaning and intent of the statute. For example, in *Lown v. Cont'l Casualty Co.*, the case revolved around whether a church-affiliated hospital qualified for the ERISA church plan exception.[39] The court applied a three-prong test to determine that the church did not maintain control over the agency because the church ceased to provide funds to the hospital and no longer served on the hospital's board.[40] Thus, the hospital did not qualify for the church plan exemption.[41] For nearly a decade, the Fourth Circuit's standard was commonly used by courts to determine whether a church plan exemption applied to church agency benefit plans.[42] This standard became law of the land, until in 2015 the Third Circuit Court questioned the validity of the *Lown* decision.

Taking the Fight to the Supreme Court

In 2015, the Third Circuit Court implemented a change from years of *Lown* established precedent. The case of *Kaplan v. Saint Peter's Healthcare System*, has led to a church plan revolution, providing hope for countless employees who have suffered the loss of their retirement pension plans due to the misuse of this exemption.[43] Within the next year or so, the Supreme Court will resolve the question posed by *Kaplan, Stapleton,* and *Rollins*. Essentially, the Court must determine whether the church plan exemption applies to church agency pension plans or whether the exemption applies only to plans established by the church.[44] ERISA defines an exempt church plan as "a plan established and maintained by a church or by a convention or association of churches which are exempt from tax" under the Internal Revenue Code ("IRS").[45]

The Facts of the Matter: *Kaplan*, *Stapleton*, and *Rollins*

In *Kaplan*, Laurence Kaplan filed a punitive class action suit against his former employer St. Peter's Healthcare Systems alleging that St. Peter's failed to comply with various ERISA obligations.[46] The most serious allegation was that the plan was underfunded by more than $70 million.[47]

St. Peter's is a non-profit health care entity that runs a hospital where Kaplan worked for fourteen years prior to retiring.[48] St. Peter's is not a church, but it maintains intimate ties with the Roman Catholic Diocese.[49] These intimate ties include such acts as allowing the Diocese to appoint members to the hospital's Board of Governors, holding daily mass, and portraying devotional paintings throughout the hospital.[50] In 1974, St. Peter's established the a non-contributory defined benefit retirement plan, which "covers substantially all employees of St. Peter's hired before July 1, 2010."[51] Prior to ERISA's church plan amendment, St. Peter's complied with ERISA's vesting and funding regulations.[52] However, in 2006, St. Peter's applied to the IRS seeking a church plan exemption.[53] While the application was pending St. Peter's continued to pay ERISA-mandated insurance premiums.[54] In August 2013, during litigation, St. Peter's received a private Ruling Letter from the IRS affirming the plan's status as an exempt church plan.[55] Thus, St. Peter's filed a motion to dismiss, claiming that they were in fact exempt from ERISA.[56]

Shortly after *Kaplan* began another church plan case with nearly identical issues was brought before the Seventh Circuit Court. In *Stapleton*, the Plaintiffs, were former and current employees of Advocate with vested claims to benefits in Advocate's retirement plan.[57] The plaintiffs alleged that Advocate had not maintained its pension plan according to the standards set forth by ERISA. Moreover, the plaintiffs claimed that Advocate's failure to comply with ERISA, breached its fiduciary duty by:

> requiring an improperly long period of five years of service to become fully vested in accrued benefits; failing to file reports and notices related to benefits and funding; funding the plan at insufficient levels; neglecting to provide written procedures in connection with the plan; placing the plan's assets in a trust that does not meet statutory requirements; and failing to clarify participants' rights to future benefits.[58]

Advocate argued that as an affiliate of the church it evades liability under the church plan exemption.[59] Furthermore, Advocate claimed that if the court held its church plan exemption as void, than ERISA would be in violation of the First Amendment's principle of the separation of church and state.[60]

While these cases presented identical issues for the court's consideration, a third church plan case developed in the Nineth Circuit Court. *Rollins* presented a similarly situated case that correlated with the legal questions posed in both *Kaplan* and *Stapleton*. The case involved

Dignity Health, which described itself as a nonprofit corporation "intimately associated" with the Roman Catholic Church and "deeply Catholic both in organization and operation."[61] The Plaintiff filed a class action claiming that Dignity's retirement benefits plan failed to comply with ERISA-designated regulations.[62]

Upon hearing the legal issues arising from these three church plan cases the Circuit Courts provided nearly identical anaylsis.

The Courts' Consolidated Legal Analysis

The Circuit Courts began their analysis by identifying the arguments prior courts failed to evaluate when determining if an employee pension plan qualifies as an ERISA-exempt church plan. Those arguments included the plain meaning and construction of ERISA's church plan statute, the inadequate *Chevron* defense, and the Free Exercise Clause implications.

The Plain Meaning and Construction of ERISA's Church Plan Exemption Argument

The courts began their analysis with a thorough survey of the drafter's original intent behind the creation of the church plan exemption. When Congress enacted ERISA in 1974, § 3(33)(A) described a church plan as a plan "established and maintained…[f]or its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501[.]"[63] Although the 1980 amendments provided that church plans maintained by church agencies or service providers would still qualify as a church plan, the establishment requirement remained unchanged.[64] Church-affiliated agencies have argued that the amended statute applies regardless of who established it, as long as it is maintained by an entity that meets the requirements of § 3(33)(C)(i).[65] However, while dissecting the statutory language, the courts maintained that adopting such an argument would eliminate Congress' intent to include a "careful limitation[.]"[66]

Accordingly, the courts reasoned that if Congress desired to allow church agencies to establish employee pension plans that would qualify for the church plan exemption then Congress would have expressly included that language in the 1980 amendments.[67] In fact, the initial draft for the 1980 amendments included such language; however, when the amendment was enacted such language was intentionally omitted.[68] The courts interpreted this omission to mean that ERISA is a "remedial statute that should be liberally construed in favor of protecting the participants in employee benefit plans."[69] As illustrated in an amicus brief, church plans lack several of the ERISA protections.[70] These protections include fiduciary duties and minimum-funding protections.[71] To include plans established by church agencies would likely dispense adverse effects to a substantial amount of employees falling outside the scope of these ERISA protections.[72] For example, as of "2012 religiously affiliated hospitals accounted for seven of the country's ten largest non-profit healthcare systems."[73] Thus, the court determined that interpreting these plans as exempt from ERISA "would achieve quite the opposite" result than the plain meaning of the statute directs in construing "exemptions narrowly."[74]

To support their interpretation, the courts considered the legislative history surrounding the adoption of the 1980 amendments. Much of the legislature's discussion related to the fear that employee pension plans established by the church but maintained by church agencies would not be exempt from ERISA.[75] In other words, Congress feared alienating plans established by the church itself yet administered by church agencies.[76] After a full review of the legislative history, the courts concluded that the legislative history overwhelmingly supported the notion that Congress "did not intend to open up the exemption" to include pension plans established by church agencies.[77] Additionally, church-affiliated agencies argued that the IRS' Ruling Letters identifying the agency as a church plan were persuasive and authoritative.[78]

The IRS' Interpretation of the ERISA Church Plan Exemption in the 1983 Memorandum Lacked the Power of Persuasion

In 1983, the IRS released a memorandum acknowledging that religious-affiliated agencies maintaining non-church status, may have their employees covered by a church plan as if those agencies were churches themselves.[79] In discrediting, the importance of the IRS' memorandum, the court relied heavily on the Supreme Court's decision in *Christensen v. Harris Cnty*.[80] In *Christensen,* the Court held that an agency's opinion letter rendering an interpretation of an ambiguous statute lacked the force of law and an unpersuasive source.[81] Moreover, the Circuit Courts determined that the principle developed in *Christensen* applied to the IRS' memorandum because the documents were merely opinion letters and not an interpretation arising from a "formal adjudication[.]"[82] Furthermore, the IRS memorandum failed to consider the church establishment requirement of § 3(33)(A).[83] Thus, the Court reasoned that the IRS' memorandum and Ruling Letter lacked the power of persuasion because the IRS misinterpreted the statutory language.[84]

Lastly, the church-affiliated agencies attempted to throw a "Hail Mary" with its claim that ERISA was unconstitutional.

The Allegation That the Free Exercise Clause of the First Amendment Would Be Violated if the Courts Failed to Adhere to the IRS' Interpretation of the Church Plan Exemption Lacked Merit

The agencies argued that invalidating their constitutional claim would compel the IRS to determine on a case-by-case basis whether agencies are performing ample religious functions such that they can themselves be described as churches.[85] In response to this claim the courts determined that the argument lacked merit as the IRS routinely practiced this method prior to its 1983 memorandum.[86] According to the plain meaning of the statute church-affiliated agencies can avoid this IRS inquiry merely by having a church establish the employee pension plan.[87] Furthermore, the courts reasoned that it was not unconstitutional for Congress to distinguish between churches and church affiliated agencies.[88] The courts cited several instances where Congress in fact had applied provisions to churches without referencing church-affiliated agencies.[89] For example, in *Found*, the U.S. Court of Appeals held that it is a "generally accepted principle that Congress intended to distinguish between churches and other religious organizations."[90] Moreover, the Establishment Clause of the First Amendment "does not require the government to equalize the burdens (or the benefits) that laws of general applicability impose on religious institutions."[91] Therefore, failing to recognize employee benefit plans that are not originally established by a church would not violate the First Amendment as a church can "establish a church plan for any of its affiliated organizations."[92] The courts emphasized that the church plan exemption is available to all churches of any religion.[93]

The Ultimate Conclusion of the U.S. Circuit Courts

In conclusion, the three U.S. Circuit Courts held that employee benefit plans established by church affiliated agencies are not exempt from ERISA. This conclusion originated from the interpretation of Congress' intent for courts to apply the plain meaning of the statute. Moreover, the Circuit Courts denied the agency's *Chevron* defense implying that the IRS' interpretation in its General Counsel memorandum was persuasive and authoritative. Instead the courts reasoned that the IRS misinterpreted the statutory language and lacked the power of persuasion. Lastly, the courts reasoned that enforcement of the statutory language was not a violation of the First Amendment because the church plan exemption is a generally applicable law applied to all churches and religions. However, religious institutions have questioned the validity of the Circuit Courts' decision.

Thus, the Supreme Court consolidated the issues presented in the three cases and has granted certiorari.[94] While these issues are pending in the Supreme Court other similarly situated case are arising. Recently, a case has been developed in Schenectady, New York, where 1,100 retirees are facing the adverse effects of an underfunded church plan.[95]

The Woe of St. Clare's Hospital: Do Employees Have an ERISA Legal Remedy?

In 2006, Governor Pataki and the New York State Legislature created The Commission on Health Care Facilities in the 21st Century (i.e. the "Berger Commission" "to undertake an independent review of health care capacity and resources in New York State."[96] The Berger Commission issued numerous recommendations reducing "approximately 4,200 hospital beds statewide."[97] The commission illustrated that the plan would restructure nearly 50 hospitals and close approximately nine.[98]

St. Clare's Hospital Closes Its Doors

St. Clare's Hospital was among those hospitals affected by the implementation of this plan. St. Clare's was a Catholic-affiliated hospital that provided emergency and primary care services to Medicare and self-pay patients.[99] Providing these services to low-income patients eventually led to the hospital's insolvency.[100] At the time of the Berger Commission audit, St. Clare's suffered from a $27 million deficit, which was attributed to its unfunded pension plan.[101] In addition, St. Clare's possessed a $30 million deficit from its operating costs.[102] As St. Clare's would likely not be viable in the future, the Commission recommended that St. Clare's and Ellis Medical Center merge into one entity, resulting in an entity licensed for "300 to 400 beds."[103] To assist with the merger, the New York State Department of Health awarded a joint HEAL grant in the amount of $50 million to Ellis and St. Clare's.[104] Pursuant to the recommendations of the Berger Commission, $28 million would be allocated to St. Clare's underfunded pension plan, whereas the remaining $22 million would be allocated to St. Clare's outstanding debts.[105] As merger negotiations between Ellis and St. Clare's neared completion, the hospital suddenly closed its doors.[106] Upon its closure, St. Clare's assets transferred to a handful of creditors and were eventually transferred to Ellis in 2012.[107]

A Plan Defined: "St. Clare's Hospital Retirement Income Plan" Continues Its Existence

At the time of the hospital's closure in 2008, "St. Clare's Hospital Retirement Income Plan" ("Plan") continued to exist through St. Clare's pension board ("St. Clare's Corp.").[108] This defined benefit (DB) plan was established by St. Clare's Corp. in 1959.[109] Prior to the ERISA amendment of 1980, the Plan functioned as an ERISA regulated plan.[110] However, once the church plan exemption became effective, St. Clare's ceased complying with ERISA regulations.[111] The validity of this exemption, St. Clare's Corp. would argue, was affirmed in the 1992 IRS Ruling Letter.[112] After years of maintaining the Plan, St. Clare's Corp. eventually retained the administrative services of Prudential Retirement.[113] Prudential Retirement's responsibilities included the management and investment of the Plan's assets, while St. Clare's Corp. acted as the oversight committee.[114] Despite the watchful eye of the pension board, the experienced professionals at Prudential Retirement, and the $28 million HEAL grant provided by the Health Department; the Plan will still be insolvent by 2024.[115] Within the next seven to 11 years, 1,100 St. Clare 's retirees will face potential financial ruin caused by an unregulated and underfunded church plan.[116]

However, in light of the recent court findings, St. Clare's pension plan has been inaccurately classified as a church plan. Similarly, to the Circuit Court cases, St. Clare's pension plan was established by the hospital's pension board and not the church itself. Although, use of Prudential Retirement was authorized by the statute, failure to adhere to the establishment requirement renders the Plan subject to ERISA. Furthermore, based on the courts' rulings, St. Clare's 1992 IRS Ruling Letter affirming the hospital's church plan status would lack the power of persuasion because (1) the IRS' interpretation was based on a misreading of statutory language and (2) the IRS' Ruling Letters lacked authority as they were not based on formal adjudication.

Additionally, the Albany Catholic Diocese has vocalized that the church did not maintain control over the hospital's corporate governance.[117] In fact, the CEO and President of St. Clare's hospital circulated an Employee Bulletin indicating the Plan was regulated by ERISA.[118] The Bulletin informed the staff that the "$63 million the Plan would receive was not enough to fully fund the Plan under the current ERISA rules."[119] As the facts and law of the matter demonstrate that St. Clare's pension plan is not a church plan, claimants would be able to pursue ERISA litigation against St. Clare's Corp. and Prudential Retirement.

Therefore, litigants may allege that St. Clare's Corp. and Prudential Retirement failed to comply with various ERISA obligations including funding requirements and a breach of fiduciary duties.

Potential ERISA Remedies

St. Clare's Failed to Comply with ERISA's Funding Requirements

According to ERISA's funding requirements for single employer DB plans, employers must fully fund the benefits that plan participants earn each year.[120] To determine whether a pension is fully funded, ERISA requires converting the future pension payments into the amount that would be needed today to pay off all liabilities at once.[121] This amount, which is referenced as "present value" of the plan's liabilitiesb is then compared with the value of the plan's assets.[122] An underfunded plan is a plan in which the value of the plan's assets falls below the present value of its liabilities.[123] "If a plan is underfunded, the plan sponsor must amortize this unfunded liability over a period of years."[124]

In 2008, St. Clare's pension plan maintained an approximate total of $63 million in both its guaranteed and investment accounts.[125] As the hospital came to a close, St. Clare's Corp.'s advisors provided new calculations and rendered new terms for the pension plan.[126] Those terms included the following: the retirees as of 2008 would receive their full benefits, employees who were eligible for retirement would be paid a reduced rate, and the remaining Plan participants would receive approximately ten cents on the dollar or less.[127] Additionally, St. Clare's Corp. modified the vesting terms of the Plan to eliminate provisions allowing full retirement benefits at the age of 55 with 30 years of service.[128] This provision was replaced with the Social Security retirement formula, which set forth that the normal retirement age ranged from 66 to 67 years of age.[129] Despite these changes, the actuaries informed St. Clare's Corp. that the Plan would still be underfunded.[130] In regards to the funding obligations of the pension board, St. Clare's Corp. maintained a duty to rectify the condition of the Plan's funding pursuant to ERISA.

Thus, St. Clare's Corp. would likely not be liable in future civil litigation if the board had either authorized the "close-out termination" set forth in the plan document or developed an aggressive investment strategy to fully fund the Plan in the proceeding future as set forth by ERISA funding requirements.[131] As neither of these options were elected the Plan's assets continued to dwindle and the Plan is nearly insolvent.

ERISA's Civil Enforcement Provision: St. Clare's Retirees Will Likely Receive Limited Remedies

ERISA-regulated plans that violate their statutory obligations are generally subject to the civil enforcement provisions of § 502(a).[132] Under ERISA § 502(a)(1)(B), Plaintiffs may recover benefits due to the participants of the plan; seek enforcement of their rights; or seek a "declaration to preserve a right to future benefits or an injunction to prevent a future denial of benefits."[133] Additionally, plaintiffs may only seek federal remedies for ERISA violations.[134] Unfortunately, these preemptive rights limit the amount of equity plaintiffs may receive.[135] Thus, compensatory and/or punitive damages would not be awarded by the courts in ERISA litigation.[136]

In recent years, the Supreme Court has held that "equitable relief" in the way of compensatory damages is not an authorized remedy under § 502(a)(3).[137] In *Mertens*, plan participants brought an action seeking monetary damages after the actuary of the plan failed to make proper "actuarial assumptions" when calculating the plan's assets.[138] This error essentially contributed to the plan's underfunding and eventually led to the denial of entitled retirement benefits.[139] The Court reasoned that "equitable relief" in ERISA litigation is "relief that was 'typically available in equity,' such as injunction, mandamus, or restitution."[140] Thus, *St. Clare's* plaintiffs would likely be able to seek equity relief in the form of an injunction to prevent a future denial of participant's retirement benefits.

Additionally, the plaintiffs would likely be able to pursue a restitution remedy, in which they would argue that the pooled assets in the investment and guaranteed accounts should be returned to the participants as the participants are the rightful owners of the Plan's assets.[141] In *Sereboff* the Court held that § 502(a)(3) provides a restitution award when the amount to be restored to the plaintiff are specific "funds or property in the defendant's possession."[142] The Court reasoned that identifiable amounts set aside in an investment account were subject to the principles of restitution under § 502(a)(3).[143] As St. Clare's contributions to the Plan were based on the employee's income it is likely that a court would reason, as it did in *Sereboff,* that the retirees owed a right to the identifiable funds located in the guaranteed and investment accounts.[144]

However, if the courts determine that an "equitable relief" is not available based on the Plan's violation of ERISA funding requirements, the Plaintiffs would likely succeed on a breach of fiduciary duties claim.

St. Clare's Corporation and Prudential Retirement Breached Their Fiduciary Duties Owed to the Plan's Participants and Therefore Are Liable

As a fiduciary of the Plan, St. Clare's Corp. maintained a duty to act in the best interests of the Plan participants. St. Clare's Corp.'s action of retaining Prudential Retirement as an experienced professional, with the duty of maintaining the fiscal health and investment strategy of the Plan, created Prudential's fiduciary duty to the Plan's participants. Under § 3(21)(A) of ERISA, a person is a fiduciary to the extent that the person:

> (1) exercises any discretionary authority or control with respect to the management of the plan or exercises any authority with respect to the management or disposition of plan assets; (2) renders investment advice for a fee or other compensation with respect to any plan asset or has any authority or (3) has any discretionary responsibility in the administration.[145]

As a plan fiduciary certain duties are owed to the plan participants such as a duty of loyalty.[146] Additionally, plan fiduciaries may be personally liable if the fiduciary breaches a responsibility, duty, or obligation under ERISA.[147]

According to § 404(a)(1) a plan fiduciary's duty of loyalty requires the fiduciary to act solely in the best interests of the plan participants with the "exclusive purpose" of providing benefits to participants and "defraying reasonable expenses of administering the plan."[148] In a Department of Labor informational letter released in 1998, the Department stated that "in choosing among potential service providers, as well as in monitoring and deciding whether to retain a service provider, the trustees must objectively assess the qualifications of the service provider, the quality of the work product, and the reasonableness of the fees charged in light of the services provided."[149] In St. Clare's, the failure of the pension board to implement the termination provision in the Plan document breached their duty to act solely in the best interests of the Plan participants because St. Clare's Corp. freely admitted that the Plan was underfunded and would likely become insolvent. Thus, St. Clare's Corp. continued the administration of the Plan despite the knowledge that the participants would suffer financial anguish in the future. Moreover, St. Clare's Corp. failed to monitor the quality of Prudential Retirement's work product, and the reasonableness of the fees charged in light of the services provided. This was apparent when participants discovered that for nearly eight years the Plan's investment strategy had not been properly maintained.[150]

Furthermore, Prudential Retirement violated its duty of loyalty owed to the Plan's participants when it (1) failed to properly invest the Plan's assets in an effort to fully fund the plan and comply with ERISA's funding requirements and (2) provided inaccurate actuarial calculations of the funding required to fully fund the Plan in the future.[151] These actions by Prudential Retirement are likely a substantial reason for the Plan's pending insolvency.

Therefore, a court would likely determine that St. Clare's Corp. and Prudential Retirement would be liable for a breach of fiduciary duties. Furthermore, the court may find that the individual agents of St. Clare's Corp. and Prudential Retirement are personally liable to the Plan participants if the plaintiffs are able to prove that their actions breached a responsibility, duty, or obligation under ERISA.[152] If the plaintiffs are successful in litigating their claims they may seek equitable remedies under § 502(a)(2).

Fiduciary Liability Under ERISA

Pursuant to § 502(a)(2) plaintiffs may seek relief under the civil enforcement provision for breaches of fiduciary duties.[153] This provision illustrates that when a fiduciary breaches its duties, the fiduciary could be liable to a plan for "any losses resulting from such breach and may be responsible for forfeiting to the plan any profits that have been made through the improper use of plan assets."[154]

In 2008, the Supreme Court held that § 502(a)(2) authorizes recovery of fiduciary breaches that impair the value of the plan's assets when the fiduciary's misconduct violates the "principal statutory duties" imposed by ERISA.[155] Those statutory duties "relate to the proper plan management, administration, and investment of fund assets."[156] In *LaRue,* the plaintiff brought an action under § 502(a)(2) in which he alleged that the "plan administrator breached his fiduciary duty by neglecting to properly follow…investment instructions."[157] The Court affirmed the award for the plan participants but it declined to decide "the extent to which section 409 may authorize recovery of extra-contractual compensatory or punitive damages from a fiduciary by a plan."[158] As previously mentioned, *St. Clare's* plaintiffs would likely be awarded equity relief under ERISA for St. Clare's Corp. and Prudential's breach of fiduciary duties. However, the courts would be reluctant to award compensatory or punitive damages, as the courts have been divided on whether punitive damages are covered under ERISA.[159]

Therefore, it is likely that *St. Clare's* plaintiffs would achieve a favorable ruling from the courts. However, *St. Clare's* retirees are likely to endure further injustice as federal remedies under ERISA would be minimal and would likely not reflect the justifiable award the retirees deserve.

Conclusion

In 1974, Congress created ERISA with the intent to protect the interests of employees enrolled in employer-sponsored pension plans and to ensure those employees received the benefits they were promised. Prior to the latest wave of litigation, retirees enrolled in illegitimate church plans routinely suffered adverse financial consequences when those plans became underfunded. With the Circuit Courts' recent interpretation employees enrolled in agency-established church plans finally have a chance to hold their employers accountable. After a thorough inquiry into the validity of agency church plans the courts concluded that a plan could not qualify as a church plan if the plan was not initially established by the church. The courts reasoned that construing the narrow exception in this way would dispense adverse effects to a substantial amount of employees, which deviates from Congress' original intent. Moreover, the Circuit Courts denied the agency's *Chevron* defense implying that the IRS' interpretation of church plans was persuasive and authoritative. Instead the courts relied upon the Supreme Court's decision in *Christensen v. Harris Cnty* to establish that an agency's informal opinion lacks authority in litigation.

Thus, the analysis set forth by the Circuit Courts would illustrate that St. Clare's defined benefit pension plan would not qualify as a church plan because the pension plan was established by the hospital's pension board and not the church itself. This failure to adhere to the establishment requirement of the statute renders the plan subject to ERISA. Furthermore, St. Clare's 1992 IRS Ruling Letter affirming the agency's church plan status would be deemed invalid because the IRS interpreted the statutory language incorrectly and the IRS' Ruling Letter was not authoritative. Furthermore, if the Supreme Court reversed the decisions of the Circuit Courts, St. Clare's pension plan would still not qualify as a church plan because it would not satisfy the elements of the *Lown* test. As demonstrated in *Lown*, the church must show some control or dominance over the agency's governance to establish that the agency is an extention of the church. The court reasoned that if the agency is an extention of the church, then the church plan exemption would apply. In *St. Clare's*, the Albany Catholic Diocese expressed that the church did not maintain control over the hospital's corporate governance because it did not participate in hospital business decisions and it did not provide hospital funding. Thus, under the *Lown* and *Kaplan* standards, St. Clare's pension plan would not qualify as a church plan.

In light of the impending insolvency of the Plan, it is essential for *St. Clare's* retirees that the Supreme Court affirms the Circuit Court's decision. If the Courts continue to interpret church plans in this way, St. Clare's retirees will be able to seek enforcement under ERISA. Through, the civil enforcement section of ERISA, St. Clare's plan participants would finally have an opportunity to maintain the pension benefits promised to them years ago.

Endnotes

1. George L. Blum, *Construction and Application of ERISA Church Plan Exemption*, 29 U.S.C.A. § 1003(b)(2), 10 A.L.R Fed. 3d Art. 5 (2016).
2. Suzanne K. Skinner, *The ERISA Church Plan Exception: Why The Lown Test Is Improperly Narrow*, 10 U. Pa. J. Bus. & Emp. L. 741(2003).
3. Blum, *supra* note 1, at § 2.
4. *Lown v. Cont'l Casualty Co.*, 238 F.3d 543, 548 (4th Cir. 2001).
5. *See Lown*, 238 F.3d at 548.
6. *Id.* at 548-549; *see also* I.R.S. Gen. Couns. Mem. 39,007 (July 1, 1983) (IRS released a memorandum acknowledging religious affiliated agencies that maintain a non-church status may have their employees covered by a church plan as if those agencies were churches themselves.)
7. *Kaplan v. Saint Peter's Healthcare Systems*, 810 F.3d 175, 175 (3rd Cir. 2015).
8. *Id.*
9. *Id.* at 180.
10. *Id.*
11. *Id.* at 180-81.
12. *Letter from Joseph F. Profit, President, St. Clare's Board of Directors, to Plan Participants, St. Clare's Retirement Income Plan*, pp. 1-8 (Mar.15, 2017) (on file with author) [hereinafter *St. Clare's Letter*] (Plan language indicates that the plan can be terminated at the discretion of St. Clare's at any time).
13. *St. Clare's Letter*, *supra* note 12, at 7; *see also* 60A Am. Jur. 2d Pensions § 15 (A DB plan consists of a pool of assets where the employee, upon retirement, is entitled to a fixed periodic payment.).
14. *Id.*
15. *Id.*
16. *Id.* at 7.
17. *Id.*
18. *Id.* at 8.
19. *Id.*
20. *Id.*
21. *In re Lally*, 112 A.D.3d 1099, 976 N.Y.S.2d 701 (3rd Dep't 2013) (*see* R. Pet.'s Br., Profit *Aff.* ¶ 190-194).
22. Skinner, *supra* note 2, at 744.
23. *Id.*
24. Blum, *supra* note 1, at § 2.

25. 60A Am. Jur. 2d Pensions § 15 (2017); *see also* 60A Am. Jur. 2d Pensions § 16 (2017). A defined-contribution plan is a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account and any income, expenses, gains and losses, and forfeitures of accounts of other participants that may be allocated to the participant's account.

26. *Id.*

27. *Id.*

28. 60A Am. Jur. 2d, Pensions § 46 (2017). For example, severance pay arrangements may be treated as employee welfare benefit plans, rather than as pension plans, under Labor Department regulations.

29. Blum, *supra* note 1, at § 3.

30. *See Kaplan*, 810 F.3d at 180.

31. 60A Am. Jur. 2d, Pensions § 53 (2017).

32. 29 U.S.C.A. § 1003(b)(2) (2017).

33. Skinner, *supra* note 2, at 747.

34. 29 U.S.C.A. § 1003(b) (2017). Note that plans exempt from ERISA are still regulated by state tort and contract law.

35. 29 U.S.C.A. § 1002 (2017).

36. Jerome Kurtz, *Comm'r, IRS, Address at P.L.I. Seventh Biennial Conference on Tax Plan*ning (Jan. 9, 1978), in Prentice-Hall Federal Taxes 54820 (Prentice-Hall 1978).

37. *Id.*

38. Skinner, *supra* note 2, at 748.

39. *See Lown* 238 F.3d at 548.

40. *Id.*

41. *See Lown* 238 F.3d at 549 (Three-part test includes, "(1) whether the religious institution plays any official role in the governance of the organization; (2) whether the organization receives [financial] assistance from the religious institution; and (3) whether a denominational requirement exists for any employee or patient/customer of the organization.").

42. *Id.*

43. *See Kaplan*, 810 F.3d at 176.

44. *Id.* at 178; *see also Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016); *see also Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016); *see also* 29 U.S.C.A. § 1002(33)(A) (ERISA defines an exempt church plan as "a plan established and maintained by a church or by a convention or association of churches which is exempt from tax under the Internal Revenue Code.).

45. *See Kaplan*, 810 F.3d at 177.

46. *Id*.

47. *Id*.

48. *Id*.

49. *See Kaplan*, 810 F.3d at 178.

50. *Id.* at 180.

51. *Id.*

52. *Id.*

53. *Id.* at 185.

54. *Id.*

55. *See Kaplan*, 810 F.3d at 186-187.

56. *Id.*

57. *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 522 (7th Cir. 2016).

58. *Id.* at 530.

59. *Id.*

60. *Id.* at 532.

61. *Rollins v. Dignity Health*, 830 F.3d 900, 911 (9th Cir. 2016).

62. *Id.*

63. *See Kaplan*, 810 F.3d at 180.

64. *Id.*

65. *See Kaplan*, 810 F.3d at 181; *see* 29 U.S.C. § 1002(3)(33)(c)(i) ("A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or (*continued)*, association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.").

66. *Id.* at 181.

67. *Id.* at 182.

68. *Id.*

69. *Id.* at 183; *see also IUE AFL–CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir.1986).

70. *Id.*; *see also* Nat'l Emp't Lawyers Assoc. & AARP Found. *Amicus* Br. at 11–19.

71. *Id.*

72. *Id.*

73. *See Kaplan*, 810 F.3d at 183; *see also* ACLU & Americans United for Separation of Church and State, *Amicus* Br. at 23.

74. *See Kaplan v. Saint Peter's Healthcare System*, No. 13-2941, 2014 WL 1284854, at *6 (D.N.J. Mar. 31, 2014).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. I.R.S., *Gen. Couns. Mem.*, 39,007 (July 1, 1983).

80. *See Kaplan*, 810 F.3d at 187; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

81. *Id.; quoting Christensen v. Harris Cnty.*, 529 U.S. at 587 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.")

82. *Id.; see also Chevron U.S.A. Inc. v. Nat'l. Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984) ("a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute.").

83. *See Stapleton*, 817 F.3d at 530.

84. *Id.*

85. *See Kaplan*, 810 F.3d at 186-187.

86. *See Kaplan*, 810 F.3d at 187.

87. *Id.*

88. *Id.*

89. *Id.*

90. *See Kaplan*, 810 F.3d at 187-188; *see also Found. of Human Understanding v. United States*, 614 F.3d 1383, 1389 (Fed. Cir. 2010).

91. *See Stapleton*, 817 F.3d at 531.

92. *Id.* at 531-32.

93. *Id.*

94. *See Stapleton*, 817 F.3d at 532.

95. Claire Hughes, *Employees of former St. Clare's Hospital face pension insolvency*, Times Union, (Jan. 10, 2017), http://www.timesunion.

com/local/article/Employees-of-former-St-Clare-s-Hospital-face-10848930.php.

96. David Sandman, *Comm'n on Health Care Facilities in the 21st Century Issues Recommendations to Reform Hospitals and Nursing Homes,* Press Release (Nov. 28, 2006), https://nyhealthcarecommission.health.ny.gov/docs/final/pressrelease.pdf.

97. NYS Comm'n. on Healthcare Facilities for the 21st Century, *A Plan to Stabilize & Strengthen N.Y.'s Health Care System*, pp. 180-182 (Dec. 2006), https://nyhealthcarecommission.health.ny.gov/docs/final/commissionfinalreport.pdf, [hereinafter *Berger Final Report*] (Berger Commission named after Stephen Berger the chair of the commission).

98. *Id.*

99. NYS Comm'n. on Healthcare Facilities for the 21st Century, *N'ern. Reg'l Advisory Comm. Final Report*, p. 9 (Nov. 10, 2006), https://nyhealthcarecommission.health.ny.gov/docs/final/appendix2-northernrac.pdf, (April 10, 2017) [hereinafter *N'ern. Reg'l. Final Report*].

100. *Id*. at 11.

101. *Id.*

102. *Id.* at 13.

103. *N'ern. Reg'l. Final Report*, *supra* note 99, at 13.

104. NYS Health Dep't. St. Health Comm'ner Reports, *Berger Comm'n. Measures Implemented* (July 2, 2008), https://www.health.ny.gov/press/releases/2008/2008-07 02_berger_commission_measures_implemented.htm.

105. *Berger Final Report*, *supra* note 97, at 182.

106. *Id.*

107. Schenectady Cnty. Clerk, *Lien Notice,* Doc. No. 2012-170 (Sept. 11, 2012).

108. *St. Clare's Letter*, *supra* note 12, at 6 (Plan language indicates that the plan can be terminated at the discretion of St. Clare's at any time.).

109. *Id.*; see also *supra* note 25 (A DB plan consists of a pool of assets where the employee, upon retirement, is entitled to a fixed periodic payment.).

110. *Id.*

111. *Id.*

112. *Id.*

113. *St. Clare's Letter*, *supra* note 12, at 7-8.

114. *Id.*

115. *St. Clare's Letter*, *supra* note 12, at 7.

116. *Id.*

117. *See In re Lally,* 112 A.D.3d 1099 (*see* R. Pet.'s Br., Profit *Aff.* ¶ 190-194).

118. *Id.*

119. *St. Clare's Letter*, *supra* note 12, at 7-8 (The letter includes a pension fact sheet describing St. Clare's Pension Plan).

120. Patrick Purcell, Cong. Research Serv., RL34443, *Summary of the Employee Retirement Income Security Act (ERISA),* 20 (2008), http://www.nccmp.org/resources/pdfs/other/Summary%20of%20ERISA.pdf (To determine "whether a defined benefit plan is fully funded, the contribution needed to fund the benefits that plan participants will earn in the current year, and the contribution to the plan that is required if previously earned benefits are not fully funded").

121. *Id.*

122. *Id.* at 22.

123. *Id.*

124. *Id.* at 22-23.

125. *St. Clare's Letter*, *supra* note 12, at 7-8 (Most of the funds were kept in the guaranteed account collecting low interest, as this account was used to pay participant benefits).

126. *St. Clare's Letter*, *supra* note 12, at 5.

127. *Id.*

128. *Id.*

129. *St. Clare's Letter*, *supra* note 12, at 5-6.

130. *Id.*

131. *St. Clare's Letter*, *supra* note 12, at 2 ("IT IS IMPORTANT TO REMEMBER THAT UNDER THE TERMS OF THE PLAN IT CAN BE TERMINATED AT THE DISCRETION OF ST. CLARE'S AT ANY TIME... if done we would follow a close-out termination payment scheduled which is provided in the plan document.").

132. *St. Clare's Letter*, *supra* note 12, at 6.

133. ERISA § 502(a); see also (29 U.S.C. 1132(a)); *see also* Patrick Purcell, Cong. Research Serv., RL34443, *Summary of the Employee Retirement Income Security Act (ERISA),* 37-38 (2008).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Mertens v. Hewitt Associates*, 508 U.S. 248, 255-256 (1993).

138. *Id.* at 256.

139. *Id.*

140. *Id.*

141. "Restitution" has been defined as "return or restoration of some specific thing to its rightful owner or status." Black's Law Dictionary 1315 (7th ed. 1999). It has been noted that restitution is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done." (citing John D. Calamari and Joseph M. Perillo, The Law of Contracts, § 9-23 at 376 (3d. Ed. 1987).

142. *Cf. Sereboff v. Mid-Atlantic Services*, 547 U.S. 356 (2006).

143. *Id.*

144. *St. Clare's Letter*, *supra* note 12, at 7.

145. *See* 29 C.F.R. § 2510.3-21, which provides guidance as to when a person shall be deemed to be rendering investment advice to an employee benefit plan.

146. Purcell, *supra* note 120, at 38.

147. ERISA § 409, 29 U.S.C. § 1109. (For a discussion of actions that may be brought under ERISA in the event of fiduciary breach, see the "Fiduciary Liability Under ERISA" section *infra*.).

148. *Id.*

149. U.S. Department of Labor, Employee Benefits Security Administration, Information Letter, July 28, 1998. [http://www.dol.gov/ebsa/regs/ILs/il072898.html].

150. *St. Clare's Letter*, *supra* note 12, at 7-8.

151. *Id.*

152. *Id.*

153. *St. Clare's Letter*, *supra* note 12, at 8.

154. ERISA § 409, 29 U.S.C. § 1109.

155. *Id.*

156. Purcell, *supra* note 120, at 40-41.

157. *LaRue v. DeWolff, Boberg & Assocs.,* 552 U.S. 248, 252 (2008).

158. *See Mertens v. Hewitt Assocs*., 508 U.S. 248 (1993) (in a dissenting opinion, Justice White observed that courts are split on whether punitive damages may be recovered under ERISA 502(a)(2)). *Mertens,* 508 U.S. at 273 n.6 (White, J., dissenting)).

159. *Id.*

Baseball Arbitration

By Theodore K. Cheng

The phrase "baseball arbitration" often generates blank stares and funny looks. It sounds as if it could be anything from a process used to resolve disputes over the ownership of baseballs to the title of an upcoming Kevin Costner movie. Admittedly, it sounds like some kind of mash-up of sports and law with no obvious connection. Baseball arbitration, however, has a well-defined and specific understanding. The term describes an alternative dispute resolution process that has further developed into a general arbitration technique. Perhaps even more surprising, it actually plays a role in mediations as well.

Arbitration is a private process for resolving disputes conducted by an impartial third-party decision maker.[1] Baseball arbitration, also known as "final offer arbitration," is a specific type of arbitration.[2] In baseball arbitration, each party submits a proposed monetary award to the arbitrator, sometimes referred to as a "final offer."[3] After conducting an evidentiary hearing, the arbitrator then issues an award limited to one of the final offers previously submitted by the parties.[4] The arbitrator lacks authority to make any modifications to those proposals.[5] In this kind of arbitration, the arbitrator's discretion, which ordinarily would be quite broad, is markedly circumscribed, limiting the arbitrator's ability to arrive at a final award.[6] In baseball arbitration, even if the evidence or the equities warrant, the arbitrator does not retain the discretion to issue an award outside of the parties' final offers.[7] Rather, the arbitrator's discretion in arriving at a final award is limited to choosing between the final offers submitted by the parties.[8]

There are significant advantages to employing baseball arbitration as a dispute resolution process. First, it fosters voluntary settlements by the parties before the evidentiary hearing and generally results in greater party satisfaction with the arbitration process due to the heightened degree of control parties could exercise in terms of making their proposals.

> When each party feels pressured to make a more reasonable offer, the parties are brought together toward a middle ground, which promotes settlement prior to an arbitration hearing…Although the purpose of final-offer arbitration is to avoid an arbitration hearing, it is the presence of the final-offer arbitration process that promotes good faith bargaining and drives the negotiations toward settlement, not the negotiations themselves…The parties not only save the time and expense of a hearing, but also seek a compromise in order to prevent the arbitrator from selecting the other party's final offer. The parties also benefit from avoiding the adversarial nature of a lengthy hearing.[9]

Because the parties know that an unreasonable offer or demand is less likely to be selected by the arbitrator as the final award, they are incentivized to make reasonable offers and demands to each other before submitting their final offers to the arbitrator.[10] As parties make reasonable offers and demands to each other, they evaluate what they receive from the other party and concomitantly reevaluate their own offer or demand in light of what they expect an arbitrator to award as the most reasonable one in the circumstances of the case.[11] In fact, in baseball arbitration, the arbitrator is obligated to select one of the final offers submitted by the parties irrespective of whether the arbitrator believes that one of them (or even both of them) is objectively unreasonable.[12]

For example, if a party takes the extreme approach of over-valuing its claims, rather than assessing them a reasonable value, it faces the significant risk that its final offer to the arbitrator will not be adopted, and that it will, in the end, receive nothing.[13] Similarly, if a party takes a "no pay" approach in the face of claims that may have some merit, it risks an award in favor of the other party who puts forward a more reasonable proposal, albeit favorable to it.[14] It is this final risk analysis of an "all or nothing" award that compels the parties to consider seriously the benefits of a negotiated settlement and the value submitted in their final offers to the arbitrator.[15]

In one variation of baseball arbitration called "night baseball arbitration," the final offers submitted by the parties are kept confidential even from the arbitrator.[16] Upon delivering the decision, the proposal that is mathematically closest to the arbitrator's decision is delivered as the final award.[17] More often than not, night baseball arbitration is chosen as a dispute resolution process only when the parties hold a strong belief about the reasonableness of their submitted proposals.[18]

As the name suggests, baseball arbitration is a method of dispute resolution that arose from the world of professional sports leagues and was pioneered in the context of arbitrating player-team salary disputes.[19] Generally, in Major League Baseball a player and team each submit a single number representing the player's proposed salary for the upcoming season to a panel of three arbitrators.[20] At the evidentiary hearing, the two sides submit a signed and executed agreement to the arbitration panel with a blank space left for the salary figure.[21] The player and team each also have the opportunity to present their case and a rebuttal to the panel, after which the panel chooses one of the two numbers as the player's salary.[22] The National Hockey League also employs a variation of this final offer arbitration process to resolve player-team salary disputes.[23]

The final offer technique established by sports leagues is now used in other contexts and works particularly well when the only real disputed issue is a subjective valuation such as pain and suffering from an injury. As a result, baseball arbitration is a useful means for resolving personal injury cases, employment and wage-and-hour disputes,[24] and commercial disputes or transactions where liability is not seriously contested in the context of garden variety breach of contract claims, book account cases, and collections matters.[25] Depending on the circumstances, baseball arbitration could also be utilized in more complex matters such as intellectual property or entertainment disputes if the real issue in dispute involves only lost sales or lost profits.

Based upon feedback from the international and domestic business community, the American Arbitration Association (AAA) and its international division, the International Centre for Dispute Resolution (ICDR), also created a specific set of supplementary rules called "Final Offer Arbitration Supplementary Rules," which took effect on January 1, 2015.[26] Also referred to as "Baseball Arbitration Supplementary Rules" or "Last Best Offer Arbitration Supplementary Rules," these rules embody and set forth the classic baseball arbitration dispute resolution process and can be used with the ICDR's International Arbitration Rules or other rules of the AAA.[27] The specific mechanics of the rules echo the advantages of baseball arbitration, noting that a

> key aspect of formalizing these rules was to better define and build a more complete and predictable final offer arbitration process. Many companies could simply insert a phrase that calls for final, baseball, or last best offer arbitration, but such abbreviated language necessarily omits many important considerations that are incorporated into these procedures. For example, these rules provide detail about when and how the final offer exchanges will be made so that no party can gain an unfair negotiating advantage. These rules also describe what the final offers should and should not include and when the tribunal can open the final offers. These rules essentially establish a final offer process framework from the first preliminary offer through final award.[28]

Although the rules do not specifically provide for variations from the classic baseball arbitration process, they permit the parties to modify the procedures by written agreement.[29]

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Baseball arbitration can also be used in the mediation context as an impasse-breaking technique. Like arbitration, mediation is a private process for resolving disputes conducted by an impartial third-party.[30] But unlike an arbitrator, a mediator facilitates negotiations and communications between the parties with the goal of assisting them in arriving at a resolution of their own making and does not serve as a decision maker.[31] In many mediations, regardless of subject matter, parties often negotiate over a monetary component to their potential resolution, transmitting offers and demands to each other, most times through the mediator.[32]

Those negotiations will ostensibly bring the parties' respective proposals closer together, but there may still be a gap.[33] That gap is often small enough that a potential resolution is in sight, but also large enough that the parties reach a possible impasse in their negotiations.[34] As a technique for closing this gap, the mediator could propose that the parties each provide the mediator with their final (or best and last) proposal and then agree to permit the mediator, perhaps after brief presentations of any evidence or argument about the contested issues relating to the monetary component, to choose between one of the parties' proposals, thereby resolving that portion of the overall resolution.[35] Thus, despite its seemingly inapposite nomenclature, baseball arbitration even has a role to play in the mediation context and serves as a potentially useful component in a mediator's toolbox.

Baseball arbitration has both a long history and tradition based in the professional sports leagues as well as applicability to many other modern arbitration and mediation disputes. As a result, it is a useful tool available for dispute resolution in a variety of contexts.

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Endnotes

1. *Arbitration*, Black's Law Dictionary (10th ed. 2014).
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3. *Id.*

4. *Id.* at 4.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Benjamin A. Tulis, *Final-Offer 'Baseball' Arbitration: Contexts, Mechanics & Applications*, 20 Seton Hall J. Sports & Entmt. L. 85, 89 (2010).
10. *Id.* at 89.
11. *Id.*
12. *See id.* at 89-90.
13. *Id.* at 89.
14. *Id.*
15. *Id.*
16. "*What is Baseball Arbitration?"* (Jun. 9, 2011), http://www.arbitration.com/articles/what-is-baseball-arbitration.aspx.
17. *See id.*
18. *See id.*
19. *See* Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 Harv. J. Sports & Entmt. Law 105, 112 (2013) ("MLB salary arbitration employs a format commonly known as 'high-low arbitration' or 'final offer' arbitration. The player and team each submit a single number to the arbitrator. After a hearing during which the player and team each have the opportunity to make a presentation, the arbitrator chooses one of the two numbers as the player's salary for the upcoming season.").
20. *Id.* at 119.
21. *Id.*
22. *Id.*
23. *See* Daniel S. Greene, "National Hockey League Salary Arbitration: Hockey's Alternative Dispute Resolution," NYSBA Entertainment, Arts and Sports Law Blog (July 12, 2015), http://nysbar.com/blogs/EASL/2015/07/nhl_salary_arbitration_hockeys.html.
24. Baseball arbitration is, in fact, part of the New Jersey Employer-Employee Relations Act, which governs arbitration of certain public employee salary negotiation disputes. *See* N.J. Stat. Ann. § 34:13A-16.
25. The New Jersey State court system recently considered, but ultimately rejected, a final offer arbitration pilot program that was intended to study its impact on the courts' existent mandatory non-binding arbitration procedures. Recommendation from Glenn. A. Grant, Acting Administrative Director of the Courts, (Jan. 15, 2016). Only non-auto, non-Lemon Law personal injury cases were to be selected to participate in that pilot program. *Id.*
26. Int'l Ctr. Dispute Resolution, Final Offer Arbitration Supplementary Rules (2015).
27. *Id.*
28. *Id.* at 4.
29. *Id.* at 8.
30. Nat'l Inst. Trial Advocacy, The Art of Mediation § 1.2 (2nd ed. 2005).
31. *Id.*
32. *Id.*
33. *Id.* § 2.3.
34. *Id.*
35. This technique should not be confused with another impasse-breaking technique called a mediator's proposal, in which the mediator proposes a specific monetary amount to the parties and asks them to either accept or reject the proposal. *Id.* Only if both parties accept the proposal will the mediator announce to them that a resolution has been reached at the monetary amount in the proposal. Otherwise, an impasse is declared, at least as to that component of the resolution.

How Much Is Enough for a Fiduciary? How Much Does a Mutual Fund Company Have to Disclose in Its Mutual Fund Disclosures Under the Department of Labor's New Best Interest Contract Exemption for Funds Governed by *ERISA*?

By Rodgrick Hickman

Now that the Department of Labor has adopted new regulations for how financial institutions deal with retirement investors under the Employee Retirement Income Security Act of 1974, financial institutions have a lot of landscaping to do as it relates to disclosures. This article serves as a practical guide for anyone involved in the process of updating new rules as it relates to the new regulations.

The new rules come as no shock to most; they have been debated for some time. The rules define what a fiduciary is under ERISA and provide a Best Interest Contract Exemption. Because this is a complex matter, it is important that financial institutions and attorneys alike have a practical guide to advise them as their mutual fund disclosures are updated. This article will examine how existing disclosures address potential conflicts of interest and how they may fare under the new prohibition on misleading communications.

The Introduction of this article gives a detailed look at the new rules and how they have changed from the 1975 regulations. The first half of the article discusses the possible conflicts of interest that should be disclosed in mutual fund disclosures, while the second half of the article provides an analytical review of 15 different mutual fund disclosures and how they address conflicts of interest under the new rules.

Introduction

The Department of Labor (DOL) has adopted new regulations that set a new standard for how financial institutions deal with retirement investors under Employee Retirement Income Security Act of 1974 (ERISA).[1] Because "[t]he market for retirement advice has changed dramatically since the Department first promulgated the 1975 regulation," these regulations are both timely and necessary.[2] Since 1975, mutual fund managers, rather than large employers and professional money managers, have gradually become responsible for managing retirement assets such as IRAs and participant-directed plans, such as 401(k) plans.[3] These plans have supplanted defined benefit pensions.[4] The variety and complexity of financial products has also increased, creating a wider information gap between advisors and their clients.[5] Plan participants and IRA investors are often forced to rely on experts, such as fiduciaries, for advice.[6] However, plan participants and IRAs are unable to assess the quality of the advice or successfully guard against an advisor's potential conflict of interest. This challenge is particularly true for small investors who typically do not have financial expertise and cannot afford lower returns on their retirement savings.[7]

"The advisor is central to the exception functioning correctly and the firm's agreement to meet fundamental obligations of fair dealing and fiduciary conduct."

As the baby boomers enter into retirement, they are moving money from ERISA plans, where their employer has an incentive and a fiduciary duty to assist them in making sound investment choices, to IRAs where employers have no role in investment choice and poor investment choices are innumerable.[8] Because these trends were not expected in 1975, when the Department created the 1975 rule, their interpretation of fiduciary failed to address the current changes in the investment marketplace. In fact, the 1975 rule took a narrow view of who was considered a fiduciary.[9] At that time, 401(k) plans did not yet exist and IRAs had just recently been authorized.[10] Because of these numerous changes in the marketplace, the Department has made efforts to reevaluate and revise the rule. The DOL's new regulations have replaced the 1975 regulations. In the current regulation the new definition of fiduciary investment advice better reflects the "broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty."[11] With this change in landscape, common firm practices may now be prohibited, causing firms to rely on an exemption.[12] This, among other things, prohibits misleading communications regarding advisors' IRA-related compensation.[13] This article analyzes this prohibition in light of current broker-dealer disclosures.

The DOL's new rule redefines who is considered a "fiduciary" of an employee benefit plan under ERISA.[14] The regulation treats anyone who "provides to a plan, plan fiduciary, plan participant or beneficiary, or IRA… for a fee or other compensation, direct or indirect" as a fiduciary under ERISA.[15] The rule and related exemptions increase consumer protection for everyone involved, including participants, beneficiaries and IRA owners. Fiduciaries are generally restricted from receiving compensation from third parties and engaging in self-dealing in connection with IRAs. In this new ruling, broker-dealers and financial advisors would fall under fiduciaries and therefore are precluded from receiving compensation or engaging in self-dealing.

The DOL rules also include a "Best Interest Contract Exemption." This exemption "provide[s] conditional relief for common compensation, such as commissions and revenue sharing, that an adviser and the adviser's employing firm might receive in connection with investment advice to retail retirement investors."[16] ERISA generally prohibits "fiduciaries from receiving payments from third parties and from acting on conflicts of interest, including using their authority to affect or increase their own compensation, in connection with transactions involving a plan or IRA."[17] Many forms of compensation common in the retail market, such as commissions, 12b-1 fees and revenue sharing payments, violate these prohibitions when received by fiduciaries as a result of transactions involving dealings in assets that benefit the fiduciary. This exemption, in order to facilitate continued advice to investors and under conditions designed to safeguard the interest of investors, allows certain fiduciaries, including broker-dealers, to receive these various forms of compensation that, in the absence of an exemption, would not be permitted under ERISA.[18]

This exemption also protects the interests of participants and beneficiaries, as well as IRA owners.[19] Under the exemption, the firm and the advisor must acknowledge when either is acting as a fiduciary, adopt policies and procedures that will minimize the harmful impact of conflicts of interest, commit to impartial conduct, and disclose information on their conflicts of interest and the cost of their advice.[20] The advisor is central to the exception functioning correctly and the firm's agreement to meet fundamental obligations of fair dealing and fiduciary conduct. The advisor is also important in the firm's commitment to give advice in the customer's best interest and to avoid misleading statements; receive only reasonable compensation; and comply with federal and state laws governing the advice that is given.

"The fund usually pays a fixed commission to the broker-dealer that equals a percentage of the purchase amount. The broker-dealer, in turn, pays the selling firm a percentage of that amount."

The regulation mandates fiduciaries to have "specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards."[21] Therefore, any conflict of interest must be disclosed and fiduciaries must attempt to alleviate that conflict.

The best interest exemption requires that there be no misleading information.[22] The Advisor's and Financial Institution's statements about the Asset, fees, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, will not be misleading.[23] Many plan advisors are unfamiliar with what conflicts create a material conflict of interest and what must be disclosed.[24] Most of the current disclosures leave many conflicts concerning the compensation of broker-dealers and financial advisors, unexplained or undisclosed. The broker-dealer disclosures that I have reviewed would not have been subject to ERISA in the past but will be under the new rules.

My research will focus on current disclosures that apply to IRAs issued by financial institutions. I will explore the current ERISA disclosure requirements and the prohibition against materially misleading statements in the context of the best interest of the client exception. I will also examine whether the disclosures address or should address conflicts of interest. Once the areas of conflict have been identified, I will examine the level of disclosure required and offer guidance on what particular disclosures should look like. My focus will be on disclosure of fee plans in connection with mutual fund sales such as 12b-1 fees, revenue sharing fees and other forms of compensation for broker-dealers and financial advisors.

Types of Fee Arrangements

12b-1 Fees

12b-1 fees are defined as "fees paid by the fund out of fund assets to cover distribution expenses and sometimes shareholder service expenses."[25] The name "12b-1 fees" is derived from the Securities and Exchange Commission rule, which authorizes the funds to pay them.[26] "The rule permits a fund to pay distribution fees out of fund assets…if the fund has adopted a plan (12b-1 plan) authorizing their payment."[27] Some 12b-1 plans authorize shareholder service fees. These fees are paid for persons to respond to investor's inquiries and to provide information to investors about their investments. "If shareholder service fees are part of a fund's 12b-1 plan, these fees will be included in this category of the fee table."[28]

12b-1 fees differ by class.[29] Class A shares charge a front-end load (FEL), which is deducted from the initial investment.[30] Class A shares also charge a 12b-1 fee,[31] which is a fee that is deducted on an ongoing basis.[32] The 12b-1 fee pays for ongoing shareholder services provided by the broker-dealer. As a rule, 12b-1 fees are typically very close to and rarely exceed 0.25 percent of assets.[33]

In Class B shares the 12b-1 fee is typically 1.00 percent.[34] Class B shares impose a deferred sales charge that declines over time.[35] The fund usually pays a fixed commission to the broker-dealer that equals a percentage of the purchase amount. The broker-dealer, in turn, pays the selling firm a percentage of that amount.[36] The selling firm pays a part of the amount received to the financial advisor based on a payout grid.[37] For example, if an investor purchases $200,000 in Class B shares and a fund pays a 4.00 percent concession, the broker dealer would be paid $8,000 and the advisor would be paid about $3,200, assuming a typical 40 percent payout rate.

The 12b-1 fees associated with Class C shares are usually more comparable to Class B shares than Class A shares.[38] Class C shares do not have front-end fees and therefore, the 12b-1 fee is usually closer to 1.00 percent and continues over time.[39] The difference between Class C shares and Class B shares is that Class C shares do not convert to Class A shares over time and the fees continue indefinitely. Therefore, Class C shares are more beneficial to short-term investors but detrimental to long-term investors, unless the 1.00 percent is intended to represent ongoing investment advice.

"There is also a high likelihood that revenue sharing affects the payout for financial advisors."

12b-1 charges are always disclosed in the fee table near the front of the mutual fund prospectus. The charges are typically displayed as a percentage, not as a dollar amount. Disclosures also neglect to set forth the commission concessions paid to broker-dealers.[40] The disclosures usually only describe the amount paid to the broker-dealer from the FEL. This amount is often listed as either a "concession," a "gross dealer concession," (GDC) or a "dealer re allowance," and represents most of the total FEL.[41] However, funds also pay part of the 12b-1 fee to the broker-dealer, but this information is generally not disclosed. Mutual funds may disclose the amount of the 12b-1 fee concession to the broker-dealer and, to the extent that broker-dealers' payout grids are publicly available, the amount paid by the broker-dealer to the financial advisor can be determined.

Broker-dealers pay a portion of both the FEL and 12b-1 fees to financial advisors who are responsible for making the sales.[42] Most disclosures do not disclose the amount paid to financial advisors or the differential in payments that may result from the recommendation that the advisor makes. Broker-dealers give greater pay-out to advisors from certain funds. Hence, an advisor could very well recommend funds that give the highest payouts but are not in the best interest of the clients. A conflict of interest is created when a financial advisor can receive more money by recommending funds with a higher 12b-1 fee opposed to a lower one.

Commissions

Advisors are paid commissions for the sales they make. Commissions are paid from investments out of the FEL amount. The commissions that advisors receive are based on the type of funds sold. The typical FEL commissions range from 1.00 percent for short-term bond funds to 3.00 percent for bond funds to 5.00 percent for equity funds. In this article I will discuss conflicts arising out of commission payments.[43]

Breakpoints

Breakpoints (commission reductions) may also create a conflict of interest because advisors may manipulate investments to avoid reducing their commission. Investment amounts are typically counted across one fund complex.[44] As funds reach certain amount intervals, such as $25,000, $50,000 and $100,000, breakpoints are applied to reduce advisor commissions.[45] To avoid reducing their compensation, broker-dealers have an incentive to break up investments across numerous funds.

This creates a conflict of interest and many broker dealers and financial advisors deny investors the reductions that they are entitled to as a result of breakpoints by spreading their investments over multiple funds. Disclosures should identify this conflict by sharing how breakpoints operate. A proper disclosure should point out that broker-dealers would receive more compensation by spreading the investments over multiple funds but that the costumer would likely pay less in commissions if they invested in one fund or in one fund complex in order to meet higher breakpoints and reduce compensation.

Advisors could also increase their immediate commission by hundreds of dollars when recommending a diversified equity, bond, and cash funds in different fund complexes.[46] In effect the advisors could reasonably claim that the best fund in each asset class is offered by a different complex. However, the truth of the matter is that the advisor may be avoiding breakpoints in order to generate a higher commission. By investing in four or five funds in different complexes the advisor could increase the FEL concession in funds from 3.75 percent to 5.00 percent and hence increasing their commission by avoiding reductions.

Advisors can also generate higher commissions by recommending investments in riskier asset classes. Investments in riskier classes generally pay a higher FEL commission and advisors could double their compensation. Due to the fact that equity funds pay more than short-term bonds there is an additional financial incentive to recommend stock funds over bonds.

Revenue Sharing

Funds managed by fund companies that make sales-based payments out of their fees to broker-dealers, in addition to FEL and 12b-1 fees, are called preferred funds.[47] These sales-based payments are called "revenue sharing." Financial advisors usually sell only preferred funds.[48]

Mutual funds are permitted to pay for distribution activities under a 12b-1 plan and categorize the amounts as "distribution" fees on the fee table.[49] Yet a fund may pay substantially more for distribution services through the "management" fee than it pays in "distribution" fees.[50] Some fund companies appear to make distribution payments that represent more than half of the "management" fee. Fund companies are not required to tell shareholders how much of their fee is actually being used to promote its shares.[51] Companies are only required to include very vague and usually useless disclosures. The description of management fees, out of which the revenue sharing payments are made, is often mentioned many pages from the description for revenue sharing and varies greatly between different disclosures. These descriptions generally acknowledge that these payments create or may create a conflict of interest for the investor's financial advisor and do not attempt to sugarcoat the existence of this conflict. However, broker-dealer disclosures often misrepresent the financial incentives that these payments generate.

Revenue sharing may also be used to pay for education, training, travel and entertainment. Therefore, standard compensation may include payments as reimbursements for the cost of education and training events.[52] Unlike regular revenue sharing, the specific amount of the payment used for education and training is typically not disclosed.[53] This creates another potential conflict of interest because the educational and training events are likely to take place at resorts and include entertainment, creating a financial incentive to sell preferred funds that pay the highest revenue sharing rates.

Most disclosures make it seem as if education and training events provide no benefit to advisors at all; however, advisors have to earn the right to attend these events. It is clear from the fact that these trips are earned that both the broker-dealer and advisor receive some benefit. Ultimately, advisors would be more inclined to sell funds based on the potential travel opportunities.

There is also a high likelihood that revenue sharing affects the payout for financial advisors. However, this information is never disclosed. In fact most broker-dealers will tell you that revenue sharing does not "directly" affect an advisor's compensation. The term "directly" is a qualifier, which means there is probably some effect. This effect is also likely to create a conflict of interest.

Stocks Over Bonds

Another important area for potential conflict is the allocation of investments in stocks versus bonds. An advisor can also generate higher commissions by recommending investments in riskier asset classes.[54] Investments in riskier classes generally pay a higher FEL commission and advisors could potentially double their compensation.[55] Equity funds pay more than short-term bonds; therefore, there is a financial incentive to recommend stock funds over bonds.

"As previously discussed, funds are broken into classes and each class has different fees."

Investment funds are broken up and divided among stocks, bonds and short-term bond funds. Advisors may be paid higher commission based on the allocation of funds into equity funds than other funds. The general takeaway from such allocations is that funds invested more aggressively yield a higher payout for advisors. As one can imagine, the more aggressive an investment the more risky that investment is. An advisor could yield a higher commission by investing more funds into stocks. However, this may not always be in the investor's best interest. The broker-dealer also stands to make a better profit on more aggressively invested funds and therefore incentivizes the advisor to sell more stock funds. When funds are more aggressively invested everyone is a winner, except the investor.

An Assessment of How Current Disclosure Fees Would Stand in Light of the New Regulations

I reviewed 15 mutual fund disclosures from various financial advisors.[56] I divided the disclosures into three levels based on how they addressed the above mentioned conflicts: low level, mid-level, and high level. I identified the disclosures that were the general norm or mid-level disclosures in each conflicted area. These disclosures identified the conflicted area and hinted at the conflict but rarely made explicit mention of how it was a conflict. I also identified the superior disclosures or high level disclosures; these disclosures went a step further than the basic disclosures as they mentioned the conflict and explicitly pointed out that it was a conflict of interest. I also identified the disclosures that merely mentioned the conflicted areas; these were the low level disclosures. I further identified disclosures that made no mention at all of the conflicted areas of interest. Finally, I assessed whether the disclosures would be materially misleading under the best interest of the client analysis.

How the Disclosures Discussed the Difference in Classes

As previously discussed, funds are broken into classes and each class has different fees. Because of the fee breakdown among classes, some classes, particularly Class A, are better for long-term investments while Classes B and C are better for short-term investments. Therefore, it is important for disclosures to both give a breakdown in classes as well as inform investors of what class is good for their investment. The conflict in not disclosing this information is that an advisor could potentially be paid more by placing a short-term investment into Class A but this would not be beneficial to the investor and therefore creates a conflict of interest.

"Generally, most disclosures disclose the fact that advisors receive a portion of the 12b-1 fees."

When reviewing the mutual fund disclosures the basic disclosures mentioned the difference in classes and explained the fees generally assessed to each class. In fact 13 out of 15 of the disclosures generally informed investors of the different classes. Of the 13 disclosures that mentioned the different classes, 11 explained the difference in the fees assessed by each class. However, where the disclosures separate from low-level to mid-level disclosures is the discussion of which funds are better for which investment holding period. Only 7 of the 15 disclosures go into any kind of detail of when an investor should choose a certain class and the pros and cons of choosing that particular class. The mid-level disclosures generally read like this one:

> Typically, Class A shares have a lower expense ratio (total annual fund operating expenses as a percentage of the mutual fund's assets) compared to the other share classes of the same mutual fund, which means your ongoing costs may be lower than the costs associated with other share classes. [57]

Although the mid-level disclosure will likely satisfy the DOL standards, there were two disclosures that went even further and identified specific amounts and time frames of investments that were comparable to each class; these are considered high level disclosures. An example of a high level disclosure is:

> The principal considerations are the six of your investment and the anticipated holding period.
>
> Investors generally should purchase Class A Shares (the initial sales charge alternative) or Class B shares (the deferred sales charge alternative) if they expect to hold the investment over the long-term (typically, five years or more). Class C shares (the level sales charge alternative) are generally for shorter-term holding periods.
>
> Investors anticipating large purchases should consider Class A rather than Class B shares since the former typically offer sales charge discounts ("breakpoints") beginning at $25,000.[58]

How Disclosures Discussed 12b-1 as Compensation for Financial Advisors

The way in which financial advisors are compensated through 12b-1 fees is another area of possible conflict.[59] A portion of the front-end load fee and/or 12b-1 fees are used to compensate financial advisors. The amount of compensation received by financial advisors varies depending on the fund or the fund class an investor decides to purchase. Generally, most disclosures disclose the fact that advisors receive a portion of the 12b-1 fees. However, most disclosures do not state that advisors could receive substantially more or less by recommending one fund or fund class over another.

When reviewing the disclosures, 5 out of 15 did not make any reference to the fact that the financial advisors were receiving compensation from the 12b-1 fees. The low-level disclosures acknowledged that that their advisors were compensated from the front-end loads and/or the 12b-1 fees; however, these disclosures made no mention of the fact that advisors could be compensated more or less depending on the fund and fund complexes they sold to investors. Four of the disclosures fell into this category. The basic low level disclosure stated the following with some variations:

> Your financial advisor receives a percentage for the commission and also a portion of any ongoing service fees the mutual fund company pays to [Company Name]. The service fees are composed of 12b-1 fees or annual distribution fees that you pay to the mutual fund company. [60]

Because this conflict seems to carry an inherent disadvantage for investors it is likely that this low-level disclosure will not satisfy the DOL requirement. The mid-level disclosures not only stated that the advisors were compensated through 12b-1 fees but also mentioned that their advisors could receive more or less compensation depending on the fund and/or fund class they sold to the investors. Of the 15 disclosures reviewed four were in the mid-level class. The mid-level disclosures stated the following:

> [Company Name] and our Financial Advisors receive compensation when

> clients invest in mutual funds…The ongoing fees [Company Name] and your Financial Advisor may receive from the mutual fund company are based upon the amount of your investment held with the fund and are paid in consideration of the ongoing servicing and operational support provided.

However, there are two companies of the 15 that went above and beyond the mid-level disclosures by explicitly addressing the conflict. These high-level disclosures read as follows with some variation:

> Each time you purchase a mutual fund in a commission-based brokerage account, the fund family pays an amount to us as compensation based upon the amount of your investment and the share class you have selected…These payments are generally made by the fund's principal distributor from 12b-1 fee revenues charged against fund assets. Your financial advisor receives a portion of each of these payments…In addition, because fund's sales charges are different for their different share classes, the choice of share class can significantly affect the compensation of your Financial Advisor receives. These inherent mutual fund product pricing discrepancies present a conflict of interest for [Company Name] and our Financial Advisors when recommending purchases of funds and fund share classes.[61]

The high level disclosures not only mentioned that there was a difference in pay to advisors based on which fund or fund class they sold but also pointed out the conflict. This level of disclosure will likely satisfy the DOL standards.

It is important for financial advising companies to be careful in this area of disclosure. Of the 10 disclosures that mention the distribution of 12b-1 fees, eight also seemed to send the message that there was no conflict. The disclosures stated in some variation:

> [Company Name] policy sets a limit as to the maximum portion of dealer concessions, asset-based sales charges and/or service fees included in the Financial Advisors' compensation formula based on the share class and size of investment. The policy is intended to reduce potential conflicts of interest based on differential compensation among fund companies.[62]

This statement is potentially misleading. These statements dismiss the fact that the rest of the compensation goes to the parent company[63] and this in itself gives financial advisors an incentive to sell the funds that have a higher payout.[64] It further gives the illusion that the advisors would not be tempted to sell only funds or fund classes that reach the maximum compensation level or above even when a fund or fund class that is below the maximum would be better for the investor. These statements will probably be considered misleading under the DOL rules.

How Disclosures Discussed Breakpoints

Breakpoints are an area that could potentially foster several misleading provisions and create conflicts of interest. First, I reviewed the disclosures to determine whether they informed the investors that breakpoints were available and explained how breakpoints are achieved. Of the 15 disclosures 13 of the disclosures give at least a basic definition of breakpoints and explained how they were reached. The explanation of breakpoints only fell into two categories—mid-level disclosure and high-level disclosure—and there was not a great deal of variation between the two categories.

The mid-level disclosures generally stated the following:

> Your front-end charges may be reduced or eliminated as the amount of your investment with the mutual fund company increases above certain levels.[65]

These disclosures give a basic summary of what a breakpoint is and lets the investor know that they are available. For this portion of breakpoint disclosures this statement is likely satisfactory to explain what breakpoints are.

The high level disclosures state the same explanation as the basic disclosure but went further to say:

> Mutual funds typically offer multiple breakpoints, each at increasingly higher investment levels. Increasing your investment size, if you are able and willing to do so, can allow you to take advantage of higher breakpoints and further reduce sales charges you pay.[66]

The high level disclosures also included examples of breakpoints.[67]

The next area of potential conflict among breakpoints is multiple-fund families or diversification. As previously discussed, financial advisors can make substantially more money by breaking down an investor's investment and spreading it among multiple fund families and avoiding breakpoints.[68] Though this seems to be a major conflict of interest for advisors only five of the 15 disclosures mentioned the danger in diversifying or spreading investments over multiple families. Of the five that talk about the danger only three explicitly tell the investor that investing in multiple funds reduces their opportunity to qualify for breakpoints. However, one fund goes even a step further than just informing investors that diversification will reduce their opportunity for breakpoints by also stating that diversifying could "increase the cost of investing in the funds selected."[69] This is an area that will likely need further attention in order to align with the DOL standards.

How Disclosures Discussed Revenue Sharing

As previously discussed, revenue sharing is another area of conflict for disclosures. One of the areas looked into while reviewing the disclosures is whether they inform investors of revenue sharing and if they provide this information, does the disclosure further explain that some funds compensate significantly more than others, which would give an incentive to sell more of those funds? By giving financial advisors an incentive to sell more of that fund, a conflict of interest is created. Another area of interest is travel and entertainment as discussed above.

Of the 15 disclosures reviewed only seven make any mention of revenue sharing. Out of the seven that mentioned revenue sharing only two can be ranked as a high level disclosure. All seven disclosures mentioned that broker firms were paid by the fund companies to sell their specific funds. However, four of the disclosures only mention revenue sharing in passing by stating, "[c]ertain mutual funds may pay Edward Jones additional amounts known as revenue sharing payments, which are based on overall sales and/or assets on behalf of the fund or its fund family."[70] There were three disclosures that went into detail explaining what revenue sharing is and how it affects the decision of their advisors,

> [Company Name] seeks to collect a mutual fund support fee, or what has come to be called a "revenue-sharing payment," for marketing, training, operations and systems support…Revenue-sharing payments from Strategic Partners are in addition to sales charges, annual service fees (referred to as "12b-1 fees").[71]

One disclosure went even further and provided the areas of conflict in its disclosure.

> [Company Name] receives significantly more revenue-sharing from the families with the largest client fund sharing holdings at our firm. This fact represents a conflict of interest for [company name] to promote and recommend funds from those fund families rather than funds from families that in aggregate pay us less revenue-sharing.[72]

This disclosure will likely be safe under the DOL rules for both broker-dealer conflicts as well as advisors.

Of the seven disclosures that mention revenue sharing only five disclosures mention travel and education provided by fund companies. Of the five that mention travel and education only one disclosure disclosed that these trips may be an incentive for advisors.[73] Only one other disclosure states that these trips may influence their advisors to sell more of that fund (the fund that provided the trip). The worst of the disclosures explicitly stated, "Our Financial Advisors receive absolutely no additional compensation as a result of these revenue-sharing payments."[74] This statement is misleading because it neglects to mention that although trips are not monetary compensation, they are a form of compensation.

Conclusion

It is sure that the new regulations promulgated by the DOL will have a great impact on disclosure statements. Of the disclosures that were reviewed for this article, 13 of the 15, in one provision or another, would likely violate the DOL misleading provision. It is necessary that every mutual fund company take a good look at their disclosures to ensure they comply with the rules.

Endnotes

1. *See Fiduciary*, Black's Law Dictionary (9th Ed. 2009); Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016).
2. *Id*. at 20954.
3. *Id*.
4. *Id*. *See also Nat'l Ass'n for Fixed Annuities v. Perez*, 2016 U.S. Dist. LEXIS 153214, *33–34 (D.D.C. Nov. 4, 2016) (upholding the DOL regulation against challenge) ("As the Department once again emphasized, since 1975 individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans…have supplanted defined benefit pensions.").
5. *Id*.
6. *Id*.
7. *Id*.
8. 81 Fed. Reg. 20946, 20949 (Apr. 8, 2016). ("The consequences are growing as baby boomers retire and move money from plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs, where both good and bad investment choices are more numerous and much advice is conflicted.").
9. *See* John Barlow, *Department of Labor Final Rule on Fiduciary Investment Advice*, ABA Employment Benefits Newsletter (Mar. 15, 2017, 2:57:30PM), http://www.americanbar.org/content/newsletter/groups/labor_law /ebc_newsletter/2016/ebc_sum2016/page03.html.
10. *Id*.
11. 81 Fed. Reg. 20946, 20947.

12. *Id*.
13. *Id*.
14. *Id*.
15. 81 C.F.R. § 2510.3-2121(a)(2)(B) (i) A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA; (ii) A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.*, brokerage versus advisory); or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made, *Id*. The above section describes the type of advice that if given would classify the giver as a fiduciary.
16. 81 Fed. Reg. 20946, 20946–20947.
17. *Id*
18. *Id*.
19. *Id*.
20. *Id*.
21. 81 Fed. Reg. 20946, 21984.
22. *Id*.
23. *Id*.
24. *See* Lori Walsh, *The Costs and Benefits to Fund Shareholders of 12b-1 Plans: An Examination of Fund Flows, Expenses and Returns,* (undated), *available at* https://www.sec.gov/rules/proposed/s70904/lwalsh042604.pdf.
25. Sec. Exchange Comm'n, Fast Answers: Mutual Fund Fees and Expenses (Mar. 15, 2017 3:26:21), https://www.sec.gov/answers/mffees.htm.
26. *Id*.
27. *Id*.
28. *Id*.
29. *See* Mercer Bullard, Comment Letter on Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice (July 21, 2015), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00135.pdf.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. Walsh *supra* note 24.
35. *Id*.
36. Bullard, *supra* note 29.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. Bullard, *supra* note 29.
42. *Id*.
43. Walsh, *supra* note 24.
44. *Id*.
45. *Id*.
46. Bullard, *supra* note 29.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. Bullard, *supra* note 29.
52. *Id*.
53. However, these trips should be closed because many of them serve little educational purpose and incentivize the sale of certain funds.
54. Bullard, *supra* note 29.
55. *Id*.
56. For this section the 15 companies' disclosure statements that were reviewed will not be revealed by name; each disclosure statement has been assigned a number and the disclosure will only be identified by its assigned number. All disclosures are on file with the author.
57. Disclosure 9.
58. Disclosure 5.
59. *See supra* note 22–37.
60. Disclosure 4.
61. Disclosure 5.
62. Disclosure 6.
63. Some of the disclosures mention that it goes to the parent company but fail to mention any of the conflicts of interest that that compensation scheme creates.
64. Here you have an investment firm that stands to benefit from its financial advisors selling a certain fund; this will undoubtedly become the preferred fund of that particular investment company. This will then cause the managers and shareholders of that firm to push this particular firm. Further, this does not hurt the financial advisors because they have received maximum compensation. Therefore, the conflict is not necessarily with the financial advisor but with the managers and upper level executives. Promotions, office perks, and or any other non-monetary compensation could possibly be unofficially based on this principle.
65. Disclosure 4.
66. Disclosure 5.
67. Example "[A] mutual fund might impose a front-end sales charge of 5.75% for all investments less than $50,000, but reduce the charge to 5.25% for investments between $50,000 and $99,999, and further reduce or eliminate the front-end sales charge for even larger investments." Disclosure 5.
68. *See* supra note 39-41.
69. Disclosure 5; Disclosure 10 goes even further and states, "[d]iversification and systematic investing do not ensure a profit or protect against loss."
70. Disclosure 4 (other funds explanations varied greatly but generally expressed the same information).
71. Disclosure 1.
72. Disclosure 5.
73. Disclosure 6 ("From time to time [Company Name] may recognize certain Financial Advisors through promotional programs which include mutual funds. These program may reward Financial Advisors with compensation, including attendance to off-site locations and/or various employee training session that may be sponsored or co-sponsored by mutual fund companies whose funds [Company Name] make available.").
74. Disclosure 1.

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