

# Employment & Labor Relations Law



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## A Changing Perspective: Transgender Discrimination under Title VII

By Daniel E. Harrell

Transgender discrimination—once a less prevalent theory in employment discrimination circles—has become increasingly visible in recent years based on an upsurge in interest, publicity, litigation, and proposed legislation related to the issue. While transgender discrimination claims are not novel, courts nonetheless grapple with how to assess these claims in light of the literal language of Title VII, which does not specifically provide protection for transgender individuals. Because issues involving gender dysphoria, also known as transsexualism,

continue to arise in the employment realm and are becoming more widespread, employers and their counsel need to understand the current state of the law on transgender discrimination to avoid inadvertent liability when faced with transgender discrimination issues.

### Defining Gender Dysphoria or Transsexualism

One common question for employers dealing with a transgender discrimination dispute for the first time is: What exactly is gender dysphoria or transsexualism?

Simply stated, gender dysphoria and transsexualism are terms applied to people who identify themselves as, or desire to live as or be accepted as, members of the gender opposite to that assigned to them at birth. The Seventh Circuit Court of Appeals has recognized the following definition of transsexualism:

Transsexualism is a condition that exists when a physiologically normal person (i.e., not a hermaphrodite—a person whose sex is not

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## The Impact of *Gross*: Is It Too Much to Stomach?

By Anthony M. Rainone

On my birthday this past year, the U.S. Supreme Court decided *Gross v. FBL Financial Services, Inc.*,<sup>1</sup> which held that the Age Discrimination in Employment Act (ADEA), unlike Title VII, does not provide a cause of action for mixed-motive age discrimination. Although this decision was not first on my wish list, it was a welcome decision for employers. The U.S. Supreme Court reiterated an old rule of statutory construction. That is, Congress's intent is expressed in the plain language of the

statute. That rule's continued validity may be debatable in more humorous legal circles (if there is such a thing) given the admission by several elected officials that they have not read some of the legislation adopted over the past few years. But what is not debatable is that less than a year later, *Gross*'s reach may not stop with the ADEA. Left open by the *Gross* decision is the continued viability of the *McDonnell Douglas* burden shifting to ADEA claims.

In its 1989 *Price Waterhouse v. Hopkins* decision,<sup>2</sup> the Supreme Court addressed

the allocation of the burden of persuasion in mixed-motive cases under Title VII. A mixed-motive claim under Title VII arises when the employee alleges an adverse employment action occurred because of both permitted and prohibited considerations (i.e., "mixed-motives"). If the employee could show that illegal discrimination under Title VII was a motivating or substantial factor for the adverse action, the burden of persuasion then shifted to the employer to show it would have taken the

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# Chairs' Column



**Arley Harrell**



**Jeremy Sosna**



**Kimberly Stith**

The Employment and Labor Relations Law Committee has been busy preparing for Advanced Planning Leadership (AP Leadership), which has been ongoing since fall 2009 and culminated in an intensive all-day conference in conjunction with the Section Annual Conference in New York City. We wish to single out and thank Celina Joachim, who assumed a leadership role in work leading up to the AP Leadership conference. The AP Leadership process was made available to a select number of chosen

committees that have demonstrated a dedication to Section goals, and who applied for additional intensive training on improving delivery of services to committee members. A three-year action plan has been evolving as a part of this process and has been modified, and hopefully improved, through a series of in-person meetings with the Section leadership, as well as your subcommittee chairs and committee cochairs.

Many of your committee leaders and members attended the Section Annual Conference at the Hilton Hotel. Events began on Wednesday, April 21, 2010, and included a lunch on Thursday, April

22, with committee members. We thank those of you who attended.

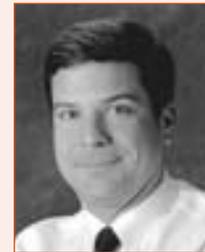
We wish to recognize Todd Sorensen, who has been instrumental in creating a LinkedIn group for the committee, which may be accessed via the committee website or by navigating to [www.linkedin.com/groupRegistration?gid=2479785](http://www.linkedin.com/groupRegistration?gid=2479785). We currently have 425 members active in our LinkedIn group. Todd was appointed in fall 2009 to be cochair of the website subcommittee, along with Celina Joachim, and his enthusiasm and energy have been a great asset for the committee. Todd attended the Editors' Symposium in Chicago in October 2009 and has been a springboard of new direction and improvement for member services.

The committee is always looking for new and enthusiastic leaders, and for any of you with such aspirations, please feel free to contact your committee cochairs or subcommittee cochairs to volunteer. Many of the leaders of the Section of Litigation and the American Bar Association have worked their way up through the committee structure. We will state that from experience, this service is a great opportunity for networking, learning the latest developments in the field of practice, and making lifelong friends throughout the United States and often beyond those borders.

Please continue to visit the Committee's website at [www.abanet.org/litigation/committees/employment](http://www.abanet.org/litigation/committees/employment) to keep up to date on hot topics and articles from the newsletter, as well as other developments in your committee. Thank you for your participation, and we look forward to meeting with you in person at some upcoming ABA event.

**Arley Harrel, Jeremy Sosna,  
and Kimberly Stith**

## Message from the Editors



**William C. Martucci**



**Brian Koji**

We are once again excited to bring you an issue of interesting and useful articles in this edition of the *Employment and Labor Relations Law* newsletter. In our initial article, Daniel E. Harrell explores the theories and changing legal landscape underlying claims of

transgender discrimination. He reviews the courts' traditional reluctance to recognize claims of transgender discrimination, while aptly noting the various theories gaining traction more recently. These recent cases, Harrell illustrates, highlight another developing area of law of which the labor-and-employment practitioner must be cognizant.

In "The Impact of *Gross*: Is It Too Much to Stomach?", Anthony M. Rainone analyzes the U.S. Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.* In *Gross*, the Court held that, to prevail under the ADEA, the plaintiff must show that age discrimination was the "but for" cause of the challenged employment action. Rainone walks through the ramifications of the *Gross* decision, which include the inapplicability of traditional mixed-motive claims.

In her article "Nuts and Bolts of Ethics in Employment Litigation," Francis Rojas discusses the practitioner's responsibilities regarding e-discovery issues. Rojas poses a bevy of questions confronted by each attorney as he or she navigates the complicated web of e-discovery concerns, including

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## Transgender Discrimination under Title VII

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clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex. This discomfort is generally accompanied by a desire to utilize hormonal, surgical, and civil procedures to allow the individual to live in his or her preferred sex role.<sup>1</sup>

Psychologists and psychiatrists typically diagnose such people as having a gender-identity disorder if the person exhibits such a preference for a period of more than two years. Notably, a common misconception is that transsexualism is related to, or is affected somehow by, sexual orientation. Sexual orientation, however, is not a factor at all. To the contrary, the sexual orientation of a person with gender dysphoria is irrelevant as long as that person identifies with a gender other than his or her own.<sup>2</sup> Although courts remain reluctant to provide protection for transsexuals as a class, discrimination problems arise in this realm based on an employer's reaction to, and potential bias or discrimination against, any person who fails to conform to stereotypical norms for his or her particular gender.

### Transgender Discrimination and Employment Law

Courts traditionally have avoided holding that transsexuals constitute a protected class under Title VII. Accordingly, transgender discrimination is not prohibited per se under the current state of employment law. However, many courts have been willing to interpret issues involving transsexuals as implicating gender discrimination, thereby providing protection for transsexuals under Title VII irrespective of the lack of per se classification under the statute. Recent decisions have further indicated

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that transsexuals may enjoy protection from discrimination under Title VII as a protected class even if the literal language of the statute does not include transsexualism. Additionally, the issue of bias against transsexuals in the employment arena already has received attention from, and is on the radar of, Congress—meaning that significant change is possible, if not probable, during the Obama administration. Even though a change in the law seems likely in the near future, to understand fully the contours of transgender-discrimination issues, one must assess the varying approaches courts have applied historically.

### The Traditional View—No Protection under Title VII

The issue of transsexualism first appeared in the context of employment discrimination in the late 1970s and early 1980s. One of the first decisions involving transgender discrimination was the Ninth Circuit's 1977 decision in *Holloway v. Arthur Andersen*, in which the Ninth Circuit determined that transsexuals are not members of a protected class.<sup>3</sup> Like *Holloway*, many early transgender-discrimination decisions focused on whether discrimination occurred because a person was a transsexual, as opposed to whether discrimination was based on gender. For example, in *Ulane v. Eastern Airlines, Inc.*,<sup>4</sup> the Seventh Circuit overturned a district court's finding that Title VII protects transsexuals from discrimination. In the underlying decision, the district court determined that, while the Title VII term "sex" does not include "sexual preference," it does include "sexual identity." Therefore, the district court determined that Title VII's prohibition against discrimination on the basis of sex included a prohibition of transgender discrimination.<sup>5</sup>

The Seventh Circuit disagreed, however, holding that "[w]hile we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals, and that the district court's order on this count must be reversed[.]"<sup>6</sup> The Seventh Circuit instead recognized that transsexualism is not a traditional characteristic protected under the plain language of Title VII, such as race or national origin, and attacked the district

court's determination that transsexuals received protection under Title VII's prohibition against discrimination based on gender. While the Seventh Circuit agreed with the district court that "the term 'sex' as used in [Title VII] is not synonymous with 'sexual preference[,]'" the court of appeals disagreed with the district court's finding that the term "sex" in Title VII includes "sexual identity." While the district court determined that "'sex is not a cut-and-dried matter of chromosomes,' but is in part a psychological question—a question of self perception; and in part a social matter—a question of how society perceives the individual," the Seventh Circuit disagreed and held that Title VII's prohibition against discrimination on the basis of "sex" does not include a prohibition against discrimination on the basis of "sexual identity."

In doing so, the Seventh Circuit specifically focused on Congress's intent when it passed Title VII and whether Congress intended a broad and liberal interpretation of the term "sex," so as to include transsexualism within its bounds. The Seventh Circuit found that it did not, explaining its rationale by stating:

In our view, to include transsexualism within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. . . . If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline on behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.<sup>7</sup>

The Seventh Circuit thus refused to incorporate "sexual identity" into the definition of "sex" under Title VII.

The *Ulane* decision is a good example of how courts initially viewed issues of transgender discrimination under Title VII. Like the *Ulane* court, when this issue first appeared, the majority of courts were opposed to expanding Title VII to prohibit discrimination on the basis of gender identity.<sup>8</sup> In recent years, however, this reluctance has subsided considerably. Instead, modern courts appear more apt to adopt a theory under which liability for transgender discrimination turns on whether a person is discriminated against because he or she does not conform to gender stereotypes.

### The Modern View—Prohibition of Sex-Stereotyping

A significant change in how courts view the issue of discrimination against transsexuals arose after the U.S. Supreme Court recognized that discrimination based on "sex-stereotyping" falls within the ambit of Title VII. In *Price Waterhouse v. Hopkins*,<sup>9</sup> a female senior manager was denied partnership because she was perceived to be too masculine for a woman candidate. Specifically, the Court recognized that Hopkins was advised that "to improve her chances for partnership . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"<sup>10</sup> The Court ultimately found that "[i]n the specific context of sex stereotyping, an employer who acts on the basis that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>11</sup> Thus, the *Price Waterhouse* decision stands for the proposition that people who are discriminated against because they do not conform to the traditional stereotypes for their particular gender are protected under Title VII's prohibition of discrimination based on gender. Numerous federal courts have subsequently followed the *Price Waterhouse* theory in various contexts.<sup>12</sup>

Based on *Price Waterhouse*, a number of courts adopted the sex-stereotyping theory in transgender-discrimination cases, recognizing that this theory overrides the traditional view set forth in cases like *Ulane*. For example, in *Smith v. City of Salem*,<sup>13</sup> the Sixth Circuit determined

that sex stereotyping protects transsexuals against discrimination under Title VII. The Court reasoned:

After *Price Waterhouse*, an employee who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.<sup>14</sup>

Relying on this reasoning, the Sixth Circuit further held that "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."<sup>15</sup> Accordingly, in *Smith*, the Sixth Circuit determined that a transsexual's claim of discrimination based on the fact that he or she acted in a manner not conforming to his or her gender's stereotypical norms qualified as discrimination within the ambit of Title VII's prohibition.

Although the rationale of *Smith* has been criticized by some courts,<sup>16</sup> a number of courts appear to adopt the logic of applying the *Price Waterhouse* sex-stereotyping theory to discrimination against transsexuals where there is a factual basis for such a determination.<sup>17</sup> While this approach requires plaintiffs to allege a more specific factual component—that he or she is being discriminated against because he or she does not conform to a particular gender stereotype, as opposed to simply being discriminated against because he or she is a transsexual—this approach typically provides protection for transsexuals under Title VII without determining that transsexuals qualify as a *per se* protected class.

### *Schroer v. Billington*—Potential Protected Status

In a fairly recent district court decision out of the District of Columbia, a court insinuated that transsexuals may constitute

a protected class, falling within the definition of “sex” under Title VII, even though previous courts have failed to interpret Title VII as such. In *Schroer v. Billington*,<sup>18</sup> the court followed the logic of *Smith* and applied the *Price Waterhouse* sex-stereotyping theory to determine that an employer discriminated against a transsexual in violation of Title VII. Additionally, the court concluded that “[the plaintiff was] entitled to judgment based on the language of the statute itself.” In doing so, the court noted that, by carving out the term “transsexualism” as falling outside of Title VII’s protection, courts have allowed their focus on that label to blind them to the statutory language itself, which prohibits discrimination on the basis of sex. To the extent that the defendant refused to hire the plaintiff after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery, the court held that the defendant literally was discriminating against the plaintiff on the basis of sex.<sup>19</sup>

The court then addressed two recent bills introduced in the House of Representatives that would have banned employment discrimination on the basis of both sexual orientation and gender identity, noting that the House did not enact either bill. While the court recognized the potential interpretation that the failure of these bills meant that the House did not intend for sexual orientation and gender identity to fall within the protections of Title VII, the court pointed out another interpretation of these failures as equally tenable—that the new bills were unnecessary because sexual orientation and gender identity already fall under Title VII’s protections.<sup>20</sup> While *Billington* was not decided on the basis that transsexualism qualified as a basis for a protected class, it strongly insinuated such a premise. Nonetheless, it seems highly unlikely that *Billington* will cause a notable shift in the law without any further legislative enactment. *Billington*’s importance, though, should not be understated. While, 20 years ago, courts nearly unanimously avoided the premise that Title VII protected transsexuals as a class from discrimination, *Billington* demonstrates a willingness by modern courts to stray from that earlier

approach. Only time will tell whether the theory described in *Billington* was one court’s aberration or foreshadowing of the change to come.

#### Potential for Legislative Change

As noted in *Billington*, as of September 2008, the House of Representatives had already seen a number of bills in recent years that would ban employment discrimination on the basis of transsexualism. In fact, a proposal known as the Employment Non-Discrimination Act has existed in various versions since the mid-1970s, and a version of the Employment Non-Discrimination Act has been introduced in every session of Congress since 1994. Although this proposal has yet to gain sufficient acceptance in either house of Congress to achieve enactment, this proposal may represent the growing call for change to Title VII to explicitly provide protection for transsexuals.

In addition to these proposed bills, on June 26, 2008, the House Subcommittee on Health, Employment, Labor, and Pensions held a hearing on the issue of transgender discrimination—the first ever congressional hearing exclusively on this issue. Notably, the need for change in the existing law to fully address this issue received supportive feedback from committee members. Caution as to the language of any bill was deemed necessary, however, specifically on issues such as notice of gender transformation to existing employers and shared facilities. Ultimately, no immediate action was taken based on this subcommittee hearing.

Recently, in June and August of 2009, an updated version of the Employment Non-Discrimination Act was introduced in both the House of Representatives and the Senate, respectively. According to Senator Jeff Merkley of Oregon, who introduced the bill in the Senate, “[i]t’s certainly possible that [the Employment Non-Discrimination Act] could be passed by year’s end[.]”<sup>21</sup> In addition to Senator Merkley’s aspirations, the Employment Non-Discrimination Act has received considerable support from President Obama. Prior to his election, President Obama indicated not only that he intended to “help usher through an Employment

Non-Discrimination Act and sign it into law” but also that his goal was to get the strongest possible bill signed into law, a bill that would be transgender-inclusive.<sup>22</sup> Accordingly, a strong push for the passage of the Employment Non-Discrimination Act is likely in the near future. The ultimate question is whether the final version of such a bill would be transgender-inclusive or not.

#### Avoiding Transgender Discrimination

Considering the indefinite state of federal law on transgender discrimination, many employers, and counsel representing employers, likely wonder how they can avoid transgender-discrimination issues. The

**This proposal may represent the growing call for Title VII to provide protection for transsexuals.**

answer is quite simple. Approaching employment decisions involving transgender individuals as if these people were a protected class under Title VII will protect employers from potential liability. Just as race, sex, or religion should not be determinative factors in making employment decisions, employers also must refuse to consider a person’s gender identity as a factor. In doing so, employers will protect themselves from Title VII liability regardless of where the law on transgender discrimination stands in their particular jurisdiction at that time. Moreover, if an employer ensures that employment decisions are based on legitimate, nondiscriminatory reasons, it also will forestall liability. Accordingly, although transgender discrimination is treated differently from other Title VII issues in the case law, employers can protect themselves by approaching this issue as if it were a typical Title VII issue.

Additionally, employers and their

counsel should follow the developing trends in this area of the law because the law on transgender discrimination has changed significantly over the past 30 years and continues to change. To avoid potential liability in this realm, employers should continue to educate themselves on this issue and to keep their eyes open for developments through either case law or legislative enactments.

### Endnotes

1. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 n.3 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.5x (3d ed. 1980)).
2. A number of other classifications are commonly mischaracterized or incorporated under the general umbrella of transsexualism, including, for example, transvestitism and cross-dressing. These classifications maintain their own distinct definition, however, separate entirely from that of transsexualism.
3. See *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977); see also *Ulane*, 742 F.2d at 1081 (in which the Seventh Circuit addressed the same issue).
4. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).
5. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821 (N.D. Ill. 1983).
6. *Ulane*, 742 F.2d at 1084.
7. *Id.* at 1086.
8. See *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (refusing Title VII protection to transsexuals); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (same); *Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978) (same).
9. 490 U.S. 228, 251 (1989).
10. *Hopkins*, 490 U.S. 234–35.
11. *Id.* at 250.
12. See, e.g., *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001), cert. denied, 534 U.S. 1155 (2002) (recognizing a Title VII claim when a harasser is acting to punish noncompliance with gender stereotypes).
13. 378 F.3d 566, 573 (6th Cir. 2004).
14. *Id.* at 574 (emphasis supplied).
15. *Id.* at 575.
16. See, e.g., *Etstitty v. Utah Transit Auth.*, No. 2:04CV616, 2005 WL 1505610 at \*4-\*6 (D. Utah June 24, 2005), *aff'd*, 502 F.3d 1215 (10th Cir. 2007) (“There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman.”).
17. See, e.g., *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. CIV 02-1531-PHX-SRB, 2004 WL 2008954 (D. Az. June 3, 2004).
18. 577 F. Supp. 2d 293 (D.D.C. 2008).
19. *Billington*, 577 F. Supp. 2d at 306–308.
20. *Id.* at 308.
21. Andrew Harmon and Michelle Garcia, *ENDA Possible By Year End*, Advocate.com, www.advocate.com/News/Daily\_News/2009/08/04/ENDA\_Possible\_By\_Year\_\_39;s\_End/, (last visited September 24, 2009).
22. Kerry Eleveld, *Obama Talks All Things LGTB with the Advocate*, Advocate.com, www.advocate.com/News/Daily\_News/2008/10/23/Obama\_Talks\_All\_Things\_LGBT\_With\_The%c2%a0Advocate/ (last visited September 24, 2009).

## Editors' Message

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the preservation of evidence, spoliation issues, technological challenges, and the like.

Finally, in her article entitled “‘Zubulake Revisited’ Causes a Reaction,” Thérèse P. Miller reviews Judge Shira Scheindlin’s recent decision in *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec., LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). In particular, Miller analyzes the Court’s difficult task of defining negligence, gross negligence, and willfulness in the e-discovery context and offers thoughtful insight on the e-discovery obligations that the Court’s decision places upon practitioners.

As always, we continue to encourage your submission of articles to the committee’s newsletter and website ([www.abanet.org/litigation/committees/employment](http://www.abanet.org/litigation/committees/employment)). Please feel free to contact us if you are interested in contributing or if you would like to become more active in any of the committee’s activities. We appreciate your interests and look forward to working with you in the future.

**William C. Martucci  
and Brian Koji**

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# Nuts and Bolts of Ethics in Employment Litigation

By Francis Rojas

**Y**ou are now dealing with a new case, which brings up several nuanced issues. Your client demands an inexpensive solution to electronic discovery. The U.S. Supreme Court has noted the importance of discovery in the litigation context. “The need to develop all relevant facts in the adversary system is both fundamental and comprehensive . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all facts, within the framework rules of evidence.”<sup>1</sup>

If lawyers ignore electronic information, they risk the imposition of sanctions, disciplinary actions, or malpractice claims.<sup>2</sup> This is a concern given that most law firms and lawyers do not have a handle in electronically stored information.<sup>3</sup> The American Bar Association’s Model Rules of Professional Conduct make clear that attorneys must perform legal services with competence, diligence, faithfulness, good judgment, and have a duty to not obstruct access to, destroy, or conceal evidence (paper or electronic) that has potential evidentiary value.<sup>4</sup>

Ever since the *Zubulake* decision sanctioning parties for electronic discovery, courts have made clear that lawyers must keep on top of preservation procedures, spoliation, searches, and production and format of documents.<sup>5</sup> In the litigation context, this means that lawyers must tread carefully and have direct and repeated conversations with their clients, especially because electronic discovery can be altered or destroyed inadvertently or intentionally.<sup>6</sup>

The first question should always be: Does your client have a duty to preserve evidence? Depending on your jurisdiction, this duty may arise if it is (1) “reasonably anticipated,”<sup>7</sup> (2) “pending, imminent, or reasonably foreseeable,”<sup>8</sup> or (3) “pending or impending.”<sup>9</sup>

When providing instructions to your

client, it is as important to have a plan as it is to understand what you are looking for. As soon as you believe a triggering event has occurred, it is then your first duty, as counsel for your client, to advise your client of preservation obligations. The following instructions you should keep in mind as soon as that preservation duty becomes evident:

- Given the nature of the litigation, what documents would be relevant?
- Talk to IT.
- Does your client have an existing preservation policy?<sup>10</sup>
- How regularly are documents (including electronic information, such as handhelds, BlackBerry devices<sup>11</sup>, iPhones, archives, backup tapes<sup>12</sup>, emails, CD-ROMs, floppy disks, microdisks, magnetic tapes, flash drives, voice mails, cache, Internet, temporary files) destroyed?
- Do you need to tell the IT department to stop destroying certain backup tapes?
- Can the IT department safeguard the relevant information?
- How much would it cost to safeguard documents?
- Get to know the backup and archive sources.
- How is data stored by your client?
- Does your client have a daily backup server used for daily non-emergencies, which would make the data accessible?
- How can you retrieve the information? How would it be preserved?
- How much would it cost to restore documents?<sup>13</sup>
- Does your client use a virtualization server or a cloud-computing server? If so, do you have any privilege-waiver concerns? Do you know how the data is disposed of and at what frequency? Can you verify these procedures? Do you know where the data is being stored? Do you have any concerns regarding how international law would affect your case and the production of documents?
- Plan for unforeseeable situations.
- Who are the key employees in the litigation?<sup>14</sup>
- Do these employees have access to destroy or alter evidence?<sup>15</sup>
- Do not reformat the computer or delete the unallocated space.<sup>16</sup>
- Provide detailed instructions.
- Send a preservation letter to all key employees, instructing them about their obligation to preserve documents.<sup>17</sup>
- Explain what kind of documents should be preserved (BlackBerry data, emails, virtualization or cloud-computing servers, etc.)
- Explain who should be contacted to handle queries or concerns. Often having one clear point person will reduce the amount of confusion.
- Get to know the evidence.
- Follow up with key personnel and the safeguarded documents.
- Find out the practices and policies of the company with respect to the documents.
- Find out the particular practices of the employees. It is a best practice to assume that employees will use the necessary tools to do their jobs effectively. For example, employees may commonly use instant messaging when discussing work matters with other employees across the building.
- Oversee the search and the documents produced.<sup>18</sup>
- Take reasonable steps after an inadvertent disclosure.<sup>19</sup>
- Federal Rule of Evidence 502(b) provides that an inadvertent disclosure “in a federal proceeding or to a federal office or agency” is not a waiver if the holder “took reasonable steps to prevent disclosure” and “promptly took reasonable steps to rectify the error.”
- Cooperation with other parties.<sup>20</sup>

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In summary, in the employment-litigation context, lawyers must keep their eyes and ears out for any potential situations that might adversely affect their clients. Given the state of the world of litigation as well as its globalization, attorneys must be prepared to answer and predict situations in the broad realm of electronic discovery. Following these points from the start will make sure that you accurately plan and envision any potential muddy situation before you get to the discovery stage.

### Endnotes

1. Taylor v. Illinois, 108 S.Ct. 646, 652 (1988).
2. POOLEY & SHAW, *What's There: Technical and Legal Aspects of Discovery*, 4 TEX. INTELL. PROP. L.J. 57, 60 (1995).
3. MICHAEL A. CLARK, *EDD Supplier Landscape, Electronic Discovery in Litigation Series*, October 28, 2004 (finding that not more than 25 percent of 200 law firms had the requisite knowledge and experience to handle electronic-discovery matters professionally); see also KROLL ONTRACK, *2009 ESI TRENDS REPORT* (Out of 461 IT professionals and in-house counsel polled, the vast majority of both groups said they had a document-retention policy (87 percent of U.S. companies, 80 percent of British ones), but far fewer had a policy specific to e-discovery readiness (46 percent and 41 percent, respectively); ASHBY JONES, *What a Mess!, For Corporations, Pileup of Electronic Data Could Be Trouble Waiting to Happen*, Nat'l Law J. (Dec. 2, 2002).
4. MODEL RULES OF PROF'L CONDUCT R. 1.1, Competence: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation." In addition, Comment to Rule 1.1 further clarifies and states that "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which a lawyer is subject." See also MODEL RULES OF PROF'L CONDUCT R. 1.3, 1.6(a), 3.1, 3.2, 3.3(a), 3.4(a), 4.4(b), and 8.4(c)-(d).
5. Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004); see also Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC., 05 Civ. 9016 (S.D.N.Y. Jan.

11, 2010); Qualcomm Inc. v. Broadcom Corp., 2008 U.S. Dist. LEXIS 911 (D. Cal. Jan. 7, 2008); Gordon Partners v. Blumenthal, 244 F.R.D. 179, 191 (S.D.N.Y. 2007).

6. United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1110-11 (9th Cir. 2008).

7. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003); Consol. Aluminum, Corp. v. Alcoa, Inc., 244 F.R.D. 335, 340 n.8 (D. La. 2006) (holding demand letter gave reasonable anticipation of litigation).

8. Phillips M. Adams & Assocs. v. V., 2009 U.S. Dist. LEXIS 26964 (N.D. Utah Mar. 30, 2009).

9. Danis v. USN Communs., Inc., 2000 U.S. Dist. LEXIS 16900 (N.D. Ill. Oct. 20, 2000).

10. See FED. R. Civ. P. 37(e) (safe harbor for routine operation in good faith).

11. Se. Mech. Servs. Inc. v. Brody, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009).

12. Kipperman v. Onex Corp., 2009 WL 1473708 (N.D. Ga. May 27, 2009).

13. Rodriguez Torres v. Gov't Dev. Bank of Puerto Rico, 2010 WL 174156 (D.P.R. Jan. 20, 2010) (holding restoration of emails was not accessible).

14. Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) (noting management must be informed of litigation hold).

15. Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC, 244 F.R.D. 614, 627 (D. Colo. 2007); Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 340 (D. La. 2006); Gen. Elec. Capital Corp. v. Lear Corp., 215 F.R.D. 637, 640-41 (D. Kan. 2003) (stating that key employees who are likely to have relevant electronic information should be contacted and the evidence should be preserved).

16. TR Investors, LLC v. Genger, 2009 Del. Ch. LEXIS 203 (Del. Ch. Dec. 9, 2009).

17. Pinstripe, Inc. v. Manpower, Inc., 2009 WL 2252131 (N.D. Okla. July 29, 2009) (holding some type of sanctions against defendant where warranted where the preservation letter was not distributed).

18. Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004).

19. D'Onofrio v. SFX Sports Group, Inc., 2009 WL 859293 (D.D.C. Apr. 1, 2009).

20. Mirbeau Geneva Lake, LLC v. City of Lake Geneva, 2009 WL 3347101 (E.D. Wis. Oct. 15, 2009); Mancía v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008).

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# “Zubulake Revisited” Causes a Reaction

By Thérèse P. Miller

It is not often a federal judge will subtitle her written order. Judge Shira Scheindlin in *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec. LLC*,<sup>1</sup> rightly subtitled her order granting sanctions: “*Zubulake Revisited: Six Years Later*.” *Zubulake*, a case with a series of five written opinions—the last of which was decided in July 2004—were the seminal decisions in e-discovery that are widely cited authority in discovery disputes.<sup>2</sup>

The *Zubulake* series helped inform the 2006 Amendments to the Federal Rules of Civil Procedure relating to electronically stored information (known as ESI to e-discovery practitioners or “data” to the rest of the world). Because of *Zubulake*, e-discovery practitioners have had a watchful eye on Judge Scheindlin ever since.

Judge Scheindlin wrote the book on e-discovery—literally. She wrote the book entitled *Electronic Discovery and Digital Evidence: Cases and Materials* (2009), in conjunction with the Sedona Conference. Incidentally, pages 147–49 of the book are cited as a reference in footnote 67 of the *Pension* opinion relating to litigation holds. It is no wonder that this opinion has caused a stir in the blogosphere recently.

Maybe it was Judge Scheindlin and her two law clerks’ “close to three hundred hours resolving [the] motion” in this case, (at a measly blended hourly rate of \$30 no less), that made her dub the order “*Zubulake Revisited*.” But if *Pension*, originally issued on January 11, 2010, and amended for clarification on January 15, is supposed to be on par with *Zubulake*, litigants and counsel should stand at attention and take heed.

## It’s All about the Facts

The 88-page opinion focuses on conduct in discovery. Because of the plaintiffs’ conduct in this case, “there can be little doubt that some documents were lost or destroyed.” Judge Scheindlin discusses

“how to define negligence, gross negligence, and willfulness in the discovery context and what conduct falls in each of these categories.” She explains that “[c]ourts cannot and do not expect that any party can meet a standard of perfection.” “Conduct is either acceptable or unacceptable.” But, that “[t]he standard of acceptable conduct is determined through experience.” Whose experience? The court’s.

The court makes a judgment call by reviewing “the conduct through the backward lens known as hindsight.” In determining sanctions, the court uses “a gut reaction’ based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply.” So, with all this subjectivity, what is a litigant to do? Judge Scheindlin is clear that it is not clear. There is no definitive list of examples of acceptable conduct. “Each case will turn on its own facts and the varieties of efforts and failures is infinite.” So, ultimately, a litigant’s “failure to conform to this standard is negligent

even if it results from a pure heart and an empty head.”

## The Continuum of Fault

So how do we help our clients avoid the “pure heart” and “empty head” predicament? The solution is to look at examples of conduct (judicial “experience”) to see why courts are driven (by their “gut reactions”) to findings of unacceptable conduct in spoliation determinations. Conduct will fall along the *continuum of fault*: “[F]ailure to produce evidence occurs ‘along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality.’”

In the *Pension* case, Judge Scheindlin goes through some case-specific examples to give some guidance on the judicial-experience thought process. As Judge Scheindlin stresses, “[t]hese examples are not meant as a definitive list.” But, they are some examples of conduct failures identified by cases and where, according to Judge Scheindlin, such conduct falls along the continuum of fault, after the duty to preserve has attached:

CONTINUUM OF FAULT					
Negligence		Gross Negligence		Willfulness/Recklessness	
Failure to obtain records from all employees, as opposed to key players (*3)	Failure to issue a written litigation hold (*3)	Destruction of email or certain backup tapes (*3)	Intentional destruction of relevant records (*3)		
Failure to take all appropriate measures to preserve ESI (*3)	Failure to adhere to contemporary standards (*7)	Failure to collect records from key players (*3)			
Failure to assess the accuracy and validity of selected search terms (*3)	Failure to cease the deletion of email or to preserve the records of former employees that are in a party’s possession, custody or control (*3, *7)				
	Failure to identify all of the key players and to ensure that their electronic and paper records are preserved (*7)				
	Failure to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources (*7)				

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### Practice Tips from *Pension*

The opinion by no means only focuses on the tortious conduct of the parties in spoliation. In fact, Judge Scheindlin provides us with a few gems that can help litigants conduct themselves in an acceptable manner through discovery. Specifically, she provides some guidance on the timing of the duty to preserve (the trigger), content of written litigation-hold notices, how to prepare 30(b)(6) witnesses for deposition on procedures undertaken during discovery, and how to approach the preservation of backup tapes.

#### *Preservation Triggers and Spoliation Burdens*

Judge Scheindlin notes that a “plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.” She also asks the question: “Who then should bear the burden of establishing the relevance of evidence that can no longer be found?” *Pension* adopts the burden-shifting test that “[w]hen the spoliating party’s conduct is sufficiently egregious to justify a court’s imposition of a presumption of relevance and prejudice . . . the burden then shifts to the spoliating party to rebut that presumption.”

#### *Litigation-Hold Notice Standards and Reigning in Rogue Employees*

*Pension* provides guidance to parties in meeting the “standard for a litigation hold.” The timely *written* notice should:

1. “direct employees to *preserve* all relevant records—both paper and electronic”
2. “create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee”
3. contain an instruction to “immediately suspend the destruction of any responsive paper or electronic documents or data”

And with respect to employees, the directive in the notice should not place “total reliance on the employee to search and select what the employee believed to be responsive records without any supervision from Counsel.” Judge

Scheindlin notes “that not every employee will require hands-on supervision from an attorney.” However, attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important. The adequacy of each search must be evaluated on a case-by-case basis.

The requirement of employee supervision is a bit of a deviation from best practices. The Sedona Conference holds the position that: “The reasonableness of reliance on employees to follow directions must be assessed in the context of the particular facts and circumstances.”<sup>33</sup> The fact that note 68 was one of the corrections Judge Scheindlin added when she amended the *Pension* order may be an acknowledgment of the deviation this position takes.

Also, Judge Scheindlin’s second requirement to “create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee” has never been a requirement for reasonableness. Would this requirement then suggest that there is a “duty to collect-to-preserve” instead of preserving in place?

#### **Witnesses Should Be Prepared on Discovery Topics**

The opinion also addresses a litigant’s duty to adequately prepare knowledgeable witnesses with respect to discovery topics by ensuring they are prepared to know:

1. which files were searched
2. how the search was conducted
3. who was asked to search
4. what they were told
5. the extent of any supervision

As we can see, supervision by an attorney throughout the discovery process is a theme in *Pension*.

#### *Redundant Backup Tapes Do Not Need to Be Preserved*

And finally, on the subject of backup tapes, Judge Scheindlin is unequivocal in clarifying that it is “not requir[ed] that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (e.g., the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes.”<sup>34</sup> This is the business case for companies to use backup tapes only for purposes of disaster recovery rather than archiving.

#### Reaction to the Revisited

This opinion has already caused a stir in the e-discovery world. Will this case be cited and analyzed as Judge Scheindlin’s subtitle “*Zubulake Revisited*” foreshadows, in a similar manner to *Zubulake*? That remains to be seen. Rather than add clarity, the *Pension* opinion contributes to ambiguities of the law of e-discovery because its rationale shows us that the only certainty today is that the standard by which compliance will be measured tomorrow will be predominantly determined by the “gut reaction” of a judge in some future litigation. As Judge Scheindlin puts it (through the words of George Santayana), “[t]hose who cannot remember the past are condemned to repeat it.” Yet, what can be said of those litigants who did remember the past, and thought they had applied its lessons in good faith, only to have a judge later decide that the lessons learned were the wrong ones?

*Pension* may be seen as standing for the proposition that the concepts of “contemporary standards” and continuums of fault, in the context of the duty to preserve, are temporal, moving targets, that are as varied as the opinions of the many judges that may someday decide the issue. Leaving compliance to be measured by the subjective determination of future courts, as Judge Scheindlin seemingly advocates, means that today’s preservation decisions cannot be made with any degree of clarity or predictability. Those

*Continued on page 15*

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## Impact of *Gross*

*continued from front cover*

same action regardless of the discriminatory reasons.

In *Gross*, the Court held that this mixed-motive framework was unavailable in ADEA actions. The ADEA provides that “[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.”<sup>3</sup> In *Gross*, the Eighth Circuit construed that provision and held that direct evidence—not circumstantial evidence—consists only of the evidence that shows a specific link between the discriminatory animus and the adverse action. Absent direct evidence, the employee could not obtain a mixed-motive jury instruction. Rather, the jury should be instructed to decide whether the employee met the of proving that age was the determining factor for the adverse action.

On appeal to the Supreme Court, the parties in *Gross* framed the issue as whether the plaintiff must present direct evidence of discrimination to obtain a mixed-motive jury instruction in an ADEA VII case. The Court, however, took a different view, framing the issue as whether the burden of persuasion *ever* shifts to the employer defending a mixed-motive claim under the ADEA. In the end, the Court decided that due to the absence of statutory support, the burden of persuasion *never* shifts to the employer in a mixed-motive claim under the ADEA.

The Court found that Title VII and the case law thereunder materially differ from the ADEA. The Court discussed the 1989 birth of the mixed-motive instruction in *Price Waterhouse* and Congress’s subsequent Title VII amendments in 1991, which incorporated a mixed-motive claim under Title VII. The amendment authorized

discrimination claims where race, color, sex, or national origin was a “motivating factor” for an adverse employment action.<sup>4</sup> However, in those amendments, Congress also limited the remedies available for a successful mixed-motive claim.<sup>5</sup>

Significantly, Congress did not make similar amendments to the ADEA in 1991—even though Congress amended the ADEA contemporaneously. The Supreme Court, moreover, had never held that the *Price Waterhouse* burden-shifting framework applied to the ADEA. The Court wrote that it would not ignore the fact that Congress declined to amend the ADEA as it amended Title VII. Instead, the plain language of the ADEA prohibits an adverse action “because of” age, which the Court construed to require that age be the but-for cause of the adverse employment action. In the absence of a mixed-motive provision similar to Title VII, the Court refused to extend the ADEA by allowing a plaintiff to succeed by simply showing that age was a motivating factor, rather than the but-for cause.

The *Gross* decision strengthens the role statutory construction plays in limiting the protection of employment statutes to that for which Congress has expressly provided and nothing more. Therefore, the burden of persuasion in a mixed-motive claim under the ADEA is the same as in any other ADEA claim. That is, the employee must prove—by either direct or circumstantial evidence—that age was the but-for cause of the adverse action, not simply that it was a factor.

### What Remains of the *McDonnell Douglas* Burden Shifting

One important aspect of *Gross* is the majority’s footnote that the Court still has not decided whether the *McDonnell Douglas* burden-shifting framework employed in Title VII cases applies to ADEA cases. The Court noted that neither Title VII nor the ADEA addresses the *McDonnell Douglas* framework. And the absence of statutory support in the ADEA was the basis for the Court’s refusal to allow a mixed-motive claim under the ADEA.

Despite the uncertainty on this issue, the lower courts continue to apply the *McDonnell Douglas* burden-shifting analysis.

Following *Gross*, the Sixth Circuit in *Geiger v. Tower Automotive*<sup>6</sup> concluded that its precedent has long found *McDonnell Douglas* useful in analyzing circumstantial-evidence claims under the ADEA and stated it will continue to use *McDonnell Douglas* unless the Supreme Court rules to the contrary. Several other district courts have also continued to apply *McDonnell Douglas* to ADEA claims, in part because the parties in the cases have not disputed its continued application.

One court, however, modified the *McDonnell Douglas* test for ADEA claims in light of *Gross*. In *Bell v. Raytheon Co.*,<sup>7</sup> the district court stated it would not shift the burden to the employer to articulate

**The lower courts still apply the *McDonnell Douglas* analysis.**

a legitimate nondiscriminatory reason for an adverse action unless the plaintiff showed that age was the but-for cause of the adverse action. In *Bell*, the court found that the plaintiff could not establish that the adverse action was because of his age and, therefore, the burden never shifted to the employer in spite of the plaintiff establishing a prima facie claim of discrimination under the classic *McDonnell Douglas* test—namely, establishing that the adverse action occurred under circumstances giving rise to an inference of discrimination. Also, in *Woehl v. Hy-Vee, Inc.*,<sup>8</sup> in what can be interpreted as a “belt and suspenders” approach, the district court analyzed an ADEA claim both with and without the *McDonnell Douglas* burden shifting. The court concluded that the plaintiff could not establish but-for causation under either approach.

### Beyond the ADEA

Not surprisingly, *Gross* has already impacted several other federal employment laws, a trend that may very well continue. On the

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same date the Court decided *Gross*, the Sixth Circuit heard argument in *Hunter v. Valley View Local Schools*<sup>9</sup> involving the federal Family and Medical Leave Act (FMLA). The employee asserted a retaliation claim under the FMLA, arguing that her employer illegally considered her FMLA leave in deciding to place her on involuntary leave. The district court granted summary judgment for the employer, but the Sixth Circuit reversed.

**Gross has impacted several federal employment laws, a trend that may very well continue.**

The Sixth Circuit analyzed the language of the FMLA in light of *Gross*'s dicta that Title VII jurisprudence does not automatically control the interpretation of other employment statutes. The FMLA provides that “[i]t shall be unlawful for any employer to *interfere* with, restrain, or deny the exercise or the attempt to exercise, any right provided under [the FMLA].”<sup>10</sup> That language, on its own, did not appear to support a mixed-motive claim under the reasoning in *Gross*. But the court turned to the FMLA regulations, which state that the phrase “interfere” prohibits an employer from discriminating or retaliating against an employee “for having exercised or attempted to exercise FMLA rights.”<sup>11</sup> The regulation also states that “employers cannot use the taking of FMLA leave as a *negative factor* in employment actions. . . .”<sup>12</sup>

Contrary to *Gross*, the *Hunter* court held that mixed-motive claims were viable under the FMLA. In so holding, it relied upon the FMLA regulations prohibiting the employer from considering FMLA leave as a negative factor when

making employment decisions. Therefore, the Sixth Circuit will continue to apply the *Price Waterhouse* burden-shifting framework to FMLA retaliation claims. Because the employee had presented direct evidence that her use of FMLA leave was a motive for an adverse employment action, the burden of persuasion shifted to the employer to prove that it would have made the same decision absent the impermissible motive.

*Gross* has also been applied to reject a mixed-motive claim under the Jury Systems Improvement Act (Juror Act).<sup>13</sup> This federal law provides, “[n]o employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee’s jury service . . . .”<sup>14</sup> In *Williams v. District of Columbia*,<sup>15</sup> a guidance counselor claimed she was transferred to another school as a result of her four-month absence from work because of her service on a capital-case jury. Although the court found, after trial, that the plaintiff was credible and a testifying school representative was not, the court nonetheless held that, at best, the plaintiff presented a mixed-motive claim, which did not exist under the Jury Act in light of the *Gross* decision. The court compared the ADEA’s language (“because of”) and the Jury Act’s language (“by reason of”) and found them to mean the same thing (i.e., that the guidance counselor needed to show that her jury service was the but-for cause of her transfer). Although the court had no doubt that the jury service was a motivating factor for the transfer, there was no evidence that it was the but-for cause. Therefore, the court dismissed the claim.

#### **Price Waterhouse: Down but Not Out**

One often overlooked aspect of the *Price Waterhouse* decision is that, if an employer proves that it would have taken the same action in the absence of the discriminatory factor, it constitutes a complete bar to liability. But when Congress amended Title VII in 1991, it overruled this aspect of *Price Waterhouse*. Employers no longer had a complete bar to liability in a mixed-motive claim. Even if the employer established that the same action would have occurred absent the illegal factor, an employee would still

be entitled to recover attorney fees and certain limited declaratory and injunctive relief (excluding damages, reinstatement, hiring, promotion, or payment) if he or she established that an illegal consideration was a motivating factor.<sup>16</sup>

*Gross* left unresolved the case law applying the *Price Waterhouse* framework to employment statutes that were not amended when Congress amended Title VII in 1991. For example, some circuit courts have held that the 1991 Title VII amendments do not apply to section 1981, while the Ninth Circuit has held to the contrary.<sup>17</sup> As such, also unresolved is whether or not *Price Waterhouse*'s original decision, which includes an employer's absolute defense to liability in a mixed-motive claim, still applies to other employment statutes.

The Second Circuit had previously applied *Price Waterhouse* to section 1981 claims.<sup>18</sup> Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .”<sup>19</sup> One week after the *Gross* decision, the district court in *Hardy v. Town of Greenwich*<sup>20</sup> revisited the issue of whether the Title VII amendments or the *Price Waterhouse* decision still applied to section 1981 claims. Complicating this determination is the fact that section 1981's language is not remotely analogous to either Title VII or the ADEA.

In *Hardy*, several patrol officers claimed they were disciplined, demoted, and denied promotions because of their race, in violation of section 1981. The court, faced with several in limine motions before trial, found that the Title VII amendments did not apply to section 1981. Rather, the court found that Second Circuit precedent holds that *Price Waterhouse* still applies to section 1981 claims, in part because the but-for language in *Gross* does not exist in section 1981. The court, therefore, questioned whether *Gross* even applied. In the end, the district court found that the employer was subject to a mixed-motive claim but still had available to it an absolute defense to liability as set

forth in the *Price Waterhouse* decision.

Employers will hail the *Gross* decision as a well-reasoned decision that limits age-discrimination claims to that for which Congress has provided. Congress is free to overrule the Supreme Court by simply amending the statute to provide for a mixed-motive cause of action similar to Title VII. Unless and until that happens, however, employers have gained a valuable defense in the expanding arena of age-discrimination claims.

#### Endnotes

1. 129 S. Ct. 2343 (2009).
2. 490 U.S. 228, 109 S. Ct. 1775 (1989).
3. 29 U.S.C. § 623(a)(1) (emphasis added).
4. 42 U.S.C. § 2000e-2(m).
5. 42 U.S.C. § 2000e-5(g)(2)(B).
6. 579 F.3d 614 (6th Cir. 2009).
7. 2009 WL 2365454 (N.D. Tex. Jul. 31, 2009).
8. 637 F. Supp.2d 645 (S.D. Iowa 2009).
9. 579 F.3d 688 (6th Cir. 2009).
10. 29 U.S.C. § 2615(a) (emphasis added).
11. 29 C.F.R. § 825.220(c).
12. *Id.* (emphasis added).
13. 28 U.S.C. § 1875.
14. 28 U.S.C. § 1875 (emphasis added).
15. 646 F. Supp.2d 103, (D.D.C. 2009).
16. 42 U.S.C. § 2000e-5(g)(2)(B).
17. Compare *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n. 5 (3d Cir. 2009); *Mabra v. United Food and Commercial Workers Union Local Union No. 1996*, 176 F.3d 1357, 1357–58 (11th Cir. 1999) with *Metoyer v. Chasman*, 504 F.3d 919, 934 (9th Cir. 2007).
18. See, e.g., *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2d Cir. 1999).
19. 42 U.S.C. § 1981.
20. 629 F. Supp.2d 192 (D. Conn. 2009).

## "Zubulake Revisited"

*continued from page 11*

decisions, instead, will be judged innocent, negligent, grossly negligent and intentionally willful, on a case-by-case basis, through the subjective haziness of the judge's rearview mirror.

#### Endnotes

1. 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
2. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).
3. See *The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, July 2008.
4. (\*12 citing FRCP 26(b)(2)(B)).

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