

# Employment & Labor Relations Law



AMERICAN BAR ASSOCIATION

Section of Litigation

Summer 2009

Vol. 7 No. 4

## Beyond 50 Employees and 33 Percent: Advanced WARN Issues

By William J. Simmons

In this economic environment, employers and their counsel likely know the basic principle underlying the Worker Adjustment and Reemployment Notification Act (WARN)—if an employer with 100 or more employees effects a plant closing or mass layoff, as defined by the act, affected employees and certain governmental entities are entitled to 60 days' notice prior to the layoff. Generally, WARN defines a plant closing as a permanent or temporary shutdown of a single site of employment

that results in an employment loss for 50 or more employees. A mass layoff, in contrast, is defined as a reduction in force that is not the result of a plant closing and results in a layoff of 50 or more employees, which encompasses at least 33 percent of the workforce, or a layoff of at least 500 employees regardless of the percentage of the workforce affected. Of course, the devil is in the details, and with WARN, the details are far from clear.<sup>1</sup>

Labor and employment practitioners should be aware of the ambiguities

contained within WARN's provision and strive to proactively address such concerns as part and parcel of any mass layoff or plant closing strategy.

### A Plant Closing Without the Plant Actually Closing

Although WARN's mass layoff provision typically gets more attention, employers and their counsel must remember that WARN also applies if at least 50 employees are laid off due to a "plant closing,"

*Continued on page 3*

## Employment Investigations: Selecting an In-House or Outside Investigator

By Cherie L. Silberman

Most prudent employers are aware that when their company is faced with a harassment or other workplace complaint, the company must conduct a prompt and thorough investigation. What is less obvious, however, is that developing a strategy on how to proceed in the investigation is one of the most important parts of the investigation process. Once the company is aware that it must conduct an investigation, the first decision is whether an outside firm should conduct

the investigation or whether the company should investigate the complaint itself. This decision may ultimately determine whether the employer may be found liable if the complaint later develops into a lawsuit.

In determining who will investigate an employee complaint or other allegation of wrongdoing, an employer must weigh several factors. The employer should consider the necessity of conducting a prompt, thorough, and independent investigation, and the need to ensure the investigation is

perceived as such. In addition, the employer must evaluate the need for confidentiality, cost-effectiveness, and time efficiency. Of course, the individual or team conducting the investigation must possess the ability to bring specialized expertise and credibility to the investigation, as well as to gain the respect and trust of the accused, accuser, and witnesses involved in the alleged incident. Further, the concerns of attorney-client privilege and compliance with the

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# Chairs' Column



Ann Marie Painter



Kimberly G. Stith

As cochairs of the Employment and Labor Relations Committee, we have the privilege of working with some incredibly talented and dedicated individuals, and as the ABA Section of Litigation year comes to a close, there a number of people we would like to thank in particular. **Bill Martucci** and **Brian Koji** have worked tirelessly over the last three years to edit and supervise the publication of the excellent newsletters that our members receive each quarter. Each newsletter is filled with timely and useful information on topics relevant to our practice as labor and employment litigators, and both gentlemen have set high standards for the publication as it grows in the future. **Celina Joachim** and **Jonathan Shiffman** have been instrumental in bringing life to our committee's website and providing our members with helpful practice tips and commentary on key developments in the law this past year. **Susan Lonowski**, **Darryl McCullum**, and **Teresa Bult** have brought their substantial creative and organizational skills to the task of proposing, developing, and presenting programs for committee members at the Section Annual Conference, the ABA Annual Meeting, and through the Section's Distance CLE program.

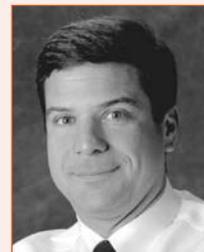
Cutting-edge and highly practical CLE programming for its members is a hallmark of the ABA Section of Litigation, and you

may continue to expect the same high-level programming in the coming year. Growing our membership and becoming more responsive to our committee members' needs for litigation-oriented CLE and in-depth analysis of employment/labor litigation issues has been the goal of our Membership Subcommittee this year, and **Aaron Ford** has brought his considerable dedication and enthusiasm to this effort. Finally, we would like to express a special thanks to **Cathy Beveridge** of Fowler White who has taken on the considerable task of completing the update to the ABA's Employment Litigation Handbook. We appreciate very much everyone's contribution and investment of time and talents to the committee's activities this year and to its future development.

As this newsletter goes to press, the Senate has recently confirmed Judge Sonia Sotomayor to be the first Hispanic justice on the Supreme Court. Judge Sotomayor received the ABA's highest recommendation, and many see her confirmation as a turning point in our country's efforts to further embrace racial equality. As many commentators have noted, Judge Sotomayor's presence on the bench may not alter the ideological balance of the Court, but, certainly, her positions on labor- and employment-related cases will be eagerly anticipated by practitioners on both sides of the issues. Given the Court's recent decision in *Ricci v. DeStefano* and suggestions that Congress may consider amending Title VII for the first time since 1991, the next 12 months should be full of important judicial and legislative developments that could alter the face of labor and employment litigation for years to come. We look forward to being one of your "go to" sources for commentary, insight, and practical advice on these issues as they unfold. As always, we encourage you to visit the committee's website at [www.abanet.org/litigation/committees/employment](http://www.abanet.org/litigation/committees/employment) as often as possible to check for updates on hot topics, schedule of events, and articles from the newsletter, as well as web-only materials.

**Ann Marie Painter**  
**Kimberly G. Stith**

## Message from the Editors



William C. Martucci



Brian Koji

This summer issue highlights the dynamic and complicated nature of the employment litigation and labor relations field. The articles address a variety of issues that arise with some frequency for practitioners.

The lead article, entitled "Beyond 50 Employees and 33 Percent: Advanced WARN Issues," by William Simmons, addresses many WARN issues that are often considered, but not carefully analyzed. For example, among the several critical issues that should be examined by employers contemplating a reduction in force are matters involving a plant closing without the plant actually closing as such; the maze of contract, temporary, and part-time workers and how they are to be accounted for in connection with the application of WARN; when temporary layoffs become permanent; and reductions in work hours as "employment losses" within the meaning of WARN. As Mr. Simmons notes, in the context of WARN, the devil is often in the details, and the details are often far from clear.

The topic of employment investigations is carefully reviewed by

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# Employment & Labor Relations Law

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*Employment & Labor Relations Law* (ISSN: 1937-3406) is published by the ABA Section of Litigation, 321 N. Clark Street, Chicago, IL 60654. The views expressed within do not reflect the views of the American Bar Association, the Section of Litigation or the Employment and Labor Relations Committee.

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## Advanced WARN Issues

*continued from front cover*

even if the adversely affected employees do not compose more than 33 percent of the workforce. In instances where a whole factory or office is shut down, WARN's applicability is often obvious. However, the concept of a "plant closing" under WARN is more broad. It applies to not just the permanent shutdown of an entire facility, but also the permanent or temporary shutdown of one or more "facilities or operating units" within a single site of employment.<sup>2</sup>

The term "operating unit" refers rather amorphously to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the employment site. The Federal Register comments published with the WARN regulations indicate that the term "operating units" includes assembly lines, departments, and shifts with specific and distinct work functions from other shifts. However, the fact that a group of workers merely perform similar job functions will not alone qualify them as an operating unit.<sup>3</sup>

Further adding to the complexity of the issue is the fact that, as long as an "effective cessation of production or the work performed by a unit" has occurred, a qualifying "plant closing" nonetheless occurs even though some employees remain working in the unit.<sup>4</sup> It is unclear what quorum of employees must remain in the unit or what portion of the work previously performed by the unit must continue, such that a "plant closing" has not occurred.

### *The Maze of Contract, Temporary, and Part-Time Workers*

Part-time, contract, and temporary workers present other interesting WARN issues. WARN is clear in excluding part-time employees from the initial mass layoff or plant-closing determination.

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Part-time employees are those who are "employed for an average of fewer than 20 hours per week or who ha[ve] been employed for fewer than 6 of the 12 months preceding the date on which notice is required." In determining whether an employee has worked an average of fewer than 20 hours per week, the most recent 90-day period should generally be used.<sup>5</sup>

The paradigm temporary worker, who is hired only for a specific task of defined duration, is not an affected employee entitled to notice under WARN.<sup>6</sup> Similarly, "[c]onsultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not 'affected employees' of the business to which they are assigned."<sup>7</sup>

Confusion in implementing WARN often arises from the fact that initial WARN calculations for mass layoffs and plant closings are not determined on the basis of "affected employees," but rather on the basis of counting how many employees (excluding any part-time employees) have experienced an employment loss. One could argue that contract employees who have worked with the employer for over six months and for an average of at least 20 hours a week may be included in the initial WARN calculations, even though they are not entitled to benefits under WARN.

The regulations direct that even genuine temporary employees are to be counted in WARN calculations, although they are exempt from its notice provisions.<sup>8</sup> A literal interpretation of WARN could lead to strange results, where most, but not all, of the workers who experience an employment loss in a given event are contract workers or temporary workers who have worked with the employer for a sufficient amount of time to avoid being designated "part-time employees." This could mean WARN would be triggered on the basis of the terminations of workers who are not entitled to any benefit under the act, thereby affording, perhaps unexpectedly, a nominal number of other employees notice and back pay remedies.

A visual summary of treatment of these workers under WARN can be found on the following page.

## Treatment of Contract, Temporary, and Part-Time Workers under WARN

Type of Employee	Included in Calculation of Whether Employer is Covered under WARN? <sup>9</sup>	Included in Mass Layoff/ Plant Closing Calculation as "Employee who has experienced an employment loss"?	Included in Mass Layoff/ Plant Closing Calculation in Total Employee Headcount?	Entitled to Notice and Back Pay in Case of Violation?
Regular employee, worked less than six months in past year or less than 20 hours average in past 90 days	No, exempt as "part-time employee"	No	No	Yes
Regular employee, worked at least six months in past year or at least 20 hours average in past 90 days	Yes	Yes	Yes	Yes
Contract employee, worked less than six months in past year or less than 20 hours average in past 90 days	No, exempt as "part-time employee"	No	No	No
Contract employee, worked at least six months in past year or at least 20 hours average in past 90 days	Possibly, with good arguments they should not be.	Possibly, with good arguments they should not be.	Possibly, with good arguments they should not be.	No
Temporary employee (assigned to a specific project with specific end date), worked less than six months in past year or less than 20 hours average in past 90 days	No, exempt as "part-time employee"	No	No	No
Temporary employee (assigned to a specific project with specific end date), worked at least six months in past year or at least 20 hours average in past 90 days	Yes	Yes	Yes	No

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### Temporary Layoffs That Become Permanent

Employers in this uncertain economic climate may lay off workers with the initial intention that the layoffs will be temporary, in hopes that in a few months business will improve and the workers will return to work. Layoffs originally intended to be temporary might also be combined with concurrent permanent layoffs. Unfortunately, in some cases, these layoffs are later extended or made permanent, which may result in unexpected WARN consequences.

Temporary layoffs of fewer than six months are not an “employment loss” under WARN, and thus employees who are only temporarily laid off are not entitled to the WARN notice.<sup>10</sup> It follows that such temporarily laid-off employees are not counted as employees experiencing a job loss when determining whether a “mass layoff” or “plant closing” has occurred.

However, it is important to note that if a layoff that was originally intended as temporary extends beyond six months, the layoff becomes an “employment loss” unless the extension is caused by business circumstances not reasonably foreseeable at the time of the initial layoff *and* notice is given at the time it becomes reasonably foreseeable that the extension beyond six months will be required.<sup>11</sup> The regulations clarify that the “employment loss” is imputed retroactively to the date of the temporary layoff’s commencement.<sup>12</sup> Such retroactive imputation of employment losses may significantly impact an employer’s earlier WARN calculations. Thus, employers who make temporary layoffs permanent must be sure to recalculate potential WARN applicability accordingly.

As a bit of comfort to employers faced with such a scenario, some courts have held that employees who were initially on temporary layoffs that later become permanent are not entitled to back pay under WARN, where the retroactive inclusion of their numbers now triggers a WARN event well after the fact when aggregated with later permanent layoffs.<sup>13</sup>

### Reductions in Work Hours as Employment Losses

Employees suffer an “employment loss” for purposes of determining WARN applicability if their hours of work are reduced by more than 50 percent during each month of any 6-month period.<sup>14</sup> That concept sounds simple until the employer actually attempts to discern whether any particular employee falls under this provision.

First, an employer must determine the employee’s baseline “hours of work.” If the employee has always had a fixed hourly schedule of eight hours per day, for instance, then the hours of work baseline will be that figure. However, if the employee has a varying schedule, it becomes much more difficult to determine the baseline hours of work. Here the employer could average the employee’s hours over an appropriate time frame, such as the prior 90 days or six months, as those are popular measuring sticks within the statute. Nevertheless, this concept appears untested under current case law.

An employee who works overtime presents different issues in applying the concept. If the employee has been permitted to voluntarily take overtime hours in the past, it is unclear whether the 50 percent reduction threshold is measured based on the actual time the employee has worked, or the time the employee was required (as opposed to offered) to work on his or her regular schedule. There will also be issues with employees who historically choose to work overtime only intermittently, as described above with employees who have varying work schedules. It would seem inappropriate to have the employer subjected to WARN simply because it eliminates voluntary overtime and/or reduces a work schedule to, for instance, 30 or 35 hours per week. A rule presuming a 35- or 40-hour baseline workweek might be preferable, but no guidance is provided in the regulations or case law.

Second, there is the concept of a work hours reduction “for each month of any 6-month period.” Again, at the margins, the concept is easy—an hourly employee normally scheduled for 40 hours of work per week is now scheduled for 19 hours of work per week, continuously for six

months. However, this apparently allows an employer to schedule an employee for his or her full work hours one month, and not schedule him or her at all the next month, on and off (i.e., rolling furloughs), without triggering WARN, notwithstanding that, in the aggregate, the hours of work performed over the six-month period may have been reduced by over 50 percent. This result stems from the fact that the employee’s work hours must be reduced by over 50 percent in “each month” of the period.<sup>15</sup>

Thus, WARN appears to encourage employers to be creative in structuring the work schedules of their employees, presumably to avoid more damaging permanent layoffs. Such an approach, though, should be thoroughly vetted to ensure WARN compliance.

### Pay in Lieu of Notice—How Much is 60 Days’ Worth?

Employers may need to assess the cost of 60 days’ pay under WARN, whether in the context of contemplating providing 60 days’ pay in lieu of notice or assessing litigation costs.

Although in most jurisdictions employers need only pay employees for the days they would have actually worked in the 60-day period, some jurisdictions require payment of the employee’s regular rate for a full 60 calendar days, at least in the case of full-time employees.<sup>16</sup> Of course, employees must also be provided with the value of their benefits under any ERISA-covered plans for the same period.<sup>17</sup> Depending upon the jurisdiction and circumstances, employees may even be eligible to recover scheduled overtime for the period.<sup>18</sup>

This issue becomes increasingly muddled where part-time employees are involved. Although “part-time employees,” as defined by WARN, are not included in initial WARN calculations of applicability, they are likely included in the notice and back pay provisions.<sup>19</sup> Thus, although it is likely that individuals who worked only a few days a week would not be entitled to a full 60 calendar days of pay, it is at least possible that a court could hold to the contrary.<sup>20</sup> This consequence may significantly complicate an employer’s decision-making when assessing WARN costs.

### Remembering State Law

Finally, it is important that employers determine the potential effects of state laws as early as possible in planning a reduction in force, as local requirements could counsel a different approach.

In New York, for example, the required notice period under the State Worker Adjustment and Retraining Notification Act<sup>21</sup> is 90 days rather than 60, and the act applies to employers with 50 employees who are laying off at least 25. As a consequence, more employers are covered under state laws such as the one enacted by New York. Even where otherwise covered by WARN, employers covered by more expansive state laws may have to be prepared to issue notices even farther in advance of layoffs or closings.

Likewise, California's "mini-WARN" act does not specifically exempt temporary layoffs of six months or fewer from its calculations of whether a "mass layoff" of 50 or more employees has occurred.<sup>22</sup> Instead, California defines a "mass layoff" as a layoff during any 30-day period of 50 or more employees at a covered establishment, and defines "layoff" as "a separation from a position for lack of funds or lack of work." Thus, employers planning layoffs of fewer than six months may have to consider whether they will nevertheless trigger California's act.

Additionally, while there are exceptions to WARN's notice requirements for a faltering company, unforeseeable business circumstances,<sup>23</sup> or natural disasters, some state laws do not explicitly provide for such exceptions. For instance, New Jersey's Millville Dallas Plant Closing Law,<sup>24</sup> does not include any exceptions for unforeseeable business circumstances or faltering companies attempting to obtain credit. Therefore, to prevent against potential legal liability, employers in states such as New Jersey may have to consider the potentially devastating effect of issuing notices of a prospective plant closing dependent on their ability to obtain credit.

In addition to state administrative penalties, which may be assessed on top of any federal liabilities, employers also may face significantly stiffer state law remedy provisions. For instance, under New Jersey

law, an employer that fails to satisfy the notice requirements even by one day may be liable for severance to the aggrieved employee in the amount of one week of pay for every year the employee has worked for the company.

Approximately 4.1 million workers lost their jobs from February 2008 to February 2009. In that climate, WARN and related state-law lawsuits are likely to increase in the foreseeable future. As such, it is of paramount importance for employers considering reductions in force to conduct a thorough analysis of WARN's applicability and consequences—an analysis that must necessarily consider complex issues well beyond the 50-employee and 33-percent rules.

### Endnotes

1. 29 U.S.C. § 2101.
2. 29 U.S.C. § 2101(a)(2).
3. 20 C.F.R. 639.3(j); *See, e.g.*, Pavao v. Brown & Sharpe Mfg. Co., 844 F. Supp. 890, 895 (D.R.I. 1994); *Finley v. M.W. Kellogg Co.*, No. H-96-0314, 1998 U.S. Dist. LEXIS 23506 (S.D. Tex. Mar. 26, 1998); *cf. Kephart v. Data Sys. Int'l, Inc.*, 243 F. Supp. 2d 1205, 1218 (D. Kan. 2003) (holding there were genuine issues of material fact as to whether group of employees constituted an "operating unit").
4. 20 C.F.R. 639.3(b).
5. 29 U.S.C. § 2101(a)(8); 20 C.F.R. 639.3(h).
6. 20 C.F.R. 639.5(c).
7. 20 C.F.R. 639.3(e); *Administaff Cos. v. N.Y. Joint Bd., Shirt & Leisurewear Div.*, 337 F.3d 454, 458 (5th Cir. Tex. 2003); *Dupree-Crockett v. Franklin Mint*, 2006 WL 237507, 2006 U.S. Dist. LEXIS 3496 (E.D. Pa. Jan. 30, 2006); *Bradley v. Sequoyah Fuels Corp.*, 847 F. Supp. 863 (E.D. Okla. 1994).
8. *See* 20 C.F.R. 639.3(a)(3), (c)(2); *See Adames-Milan v. Centennial Commc'ns Corp.*, 500 F. Supp. 2d 14, 22 (D.P.R. 2007) (stating that because terminated temporary contract employees did not work fewer than six months, they were not "part-time employees" and thus were counted for mass layoff calculation purposes).
9. This chart only makes reference to the primary method of determining a covered employer under WARN. There is an alternative test, pursuant to which an employer is covered if it has 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime. 29 U.S.C. § 2101. Under that test, every category of employee herein would be included.
10. 29 U.S.C. § 2101(a)(6).
11. 29 U.S.C. § 2102(c).
12. 20 C.F.R. 639.4(b).
13. *See* *Graphic Commc'ns Intern. Union, Local 1B v. Bureau of Engraving, Inc.*, 2003 WL 21639146 (D. Minn. July 7, 2003); *cf. Allen v. Sybase, Inc.*, 468 F.3d 642 (10th Cir. 2006) (holding that although "mass layoff" occurred by aggregating several sets of layoffs in 90-day period, plaintiffs were not entitled to summary judgment, because if employer did not anticipate any additional layoffs at the time of the first layoffs, employees in the first layoffs may not qualify for benefits under WARN).
14. 29 U.S.C. § 2101(a)(6).
15. *Cf. USW v. Ainsworth Engineered, Inc.*, 2008 WL 4857905, 2008 U.S. Dist. LEXIS 91541 (D. Minn. Nov. 10, 2008) (holding WARN's hours of work reduction provisions cannot be used to turn layoffs of fewer than six months into qualifying "employment losses").
16. *Compare* *Carpenters Dist. Counsel v. Dillard Dep't Stores*, 15 F.3d 1275 (5th Cir. 1994) and *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797 (8th Cir. 1998) to *Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139, 150 (3d Cir. 1998); *see also Long v. Dunlop Sports Group Americas, Inc.*, 506 F.3d 299 (4th Cir. 2007) (holding there was no violation of WARN where employer gave notice of plant shutdown on date of shutdown but thereafter continued to pay employees regular salary and benefits for next 60 days).
17. 29 U.S.C. § 2104(a)(1); *see also* *Washington v. Aircap Indus.*, 860 F. Supp. 307 (D. S.C. 1994); *UMW Int'l Union v. Martinka Coal Co.*, 45 F.Supp.2d 521, 530 (N.D. W.Va. 1999).
18. *UMW v. Eighty-Four Mining Co.*, 159 Fed. Appx. 345, 348 (3d Cir. 2005); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1157 (9th Cir. 2001).
19. *Solberg v. Inline Corp.*, 740 F. Supp. 680 (D. Minn. 1990).
20. *See* *United Steelworkers v. N. Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993) (declining to address this issue).
21. N.Y. LABOR LAW § 860 *et. seq.*
22. CAL. LABOR CODE § 1400 *et. seq.*
23. *See* *Gross v. Hale-Halsell Co.*, 554 F.3d 870 (10th Cir. 2009) for a recent application of WARN's unforeseeable business circumstances exception and *In re APA Transp. Corp. Consol. Litig.*, 541 F.3d 233 (3d Cir. 2008) for a recent application of the faltering company exception.
24. N.J.S.A. § 34:21-1 *et. seq.*

# Tweet, Tweet, You're Fired

By Patty A. Wise

“Comments Heard In, Around, and Consequent to the Company Christmas Party Last Evening”  
 “The Proper Way to Hate a Job”  
 “Reasons the Asian Database Administrator is so F#@\*ing Annoying”

These blog entries and others led to the termination of graphic designer Heather Armstrong, for violating her company's zero-tolerance policy for “negativity” in her anonymous blogging on dooce.com. Her discharge was the genesis of the term “dooiced,” referring to termination for inappropriate online communications related to employment.

“Save us White Boy!”  
 “What I wouldn't give to draw a little Hitler mustache on the chief negotiator.”

These blog entries caused another employee's reassignment and a subsequent lawsuit. The employee claimed that the employer's reassigning of her was retaliation for protected First Amendment activity. And “gripe sites,” such as the former f---edcompany.com even encourage employees to complain about workplaces.

Employers are increasingly using blogs and other online social networking tools to further public relations, marketing, and recruitment of employees. Although blogging may have benefits for employers, these stories show why more employers are beginning to take note of the legal risks of employee blogging.

Emerging Web 2.0 facilities are user-created, interactive, and user-generated. The very name reflects the more interactive and collaborative aspects of this new generation of technological advances that are vastly different from the more static Web 1.0 technology. These interactive

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and collaborative advances, however, may lead to increased potential liability for employers. Legal risks include possible claims of libel and defamation, trade disparagement, copyright infringement, harassment, discrimination, retaliation, disclosure of proprietary information, and damage to an employer's goodwill. The number of lawsuits filed against bloggers has increased exponentially in recent years. Bloggers may even take out an insurance policy—called BlogInsure—to guard against potential liability.<sup>1</sup>

Employers must balance the risk of liability for an employee's online conduct with the employee's privacy. Lawyers should advise employers to draft policies that address the online conduct of employees. Such precautions are even more important if the employer maintains its own blog or Internet forum, or encourages its employees to engage in online social networking. And as with all policies, uniform enforcement is critical. This article outlines some of the legal issues presented by blogging and online social networking activities, and suggests policies to minimize the risk of liability.

## The Current Landscape of Blogs and Online Social Networks

An online social network is an Internet community of people who construct biographical profiles and create lists of other people in the community with whom they share a connection.<sup>2</sup> Other people may then view the profile and connections. Besides MySpace and Facebook, other networking sites such as LinkedIn, Plaxo, and Flickr are quickly gaining popularity. Social networks can even be used in virtual communities such as *Second Life*.

The term “blog” has earned a place in Merriam Webster's Online Dictionary, which defines it as “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.”<sup>3</sup> More advanced technology includes “micro-blogging.” Twitter is the best example of

this platform.<sup>4</sup> Twitter utilizes peer-to-peer rather than broadcast communication. By using simple message service (SMS) protocol, a user can send updates of up to 140 characters to members of peer groups.<sup>5</sup> Arguably, the peer-to-peer method would make these messages (known as “tweets” on the Twitter service) more similar to private email and voicemail messages; if such messages are not transmitted on an employer's system, they are not generally thought to be of concern to employers.

**The number of lawsuits filed against bloggers has increased exponentially in recent years.**

However, the micro-blog platform, which facilitates rapid texting via cell phones, results in near-instant public dissemination. The news of the Hudson River plane landing and the recent earthquake in China were publicly known before reported by the media because of initial Twitter messages.

Large organizations use Twitter to educate the public about their products and services. Examples are Cisco Systems, Jet Blue, H&R Block, Sun Microsystems, and Whole Foods Market.<sup>6</sup> Over 3,000 people subscribe to Whole Foods' tweets about promotions, new items, and product recalls. Whole Foods uses Twitter for promotional activities. For example, in the “Tweet of the Day” program, the chosen tweet may be awarded a \$25 Whole Foods gift card.<sup>7</sup> Scottsdale, Arizona's police department uses Twitter to inform the public of crime, road closures, and other safety

issues.<sup>8</sup> Also, the Los Angeles Fire Department uses Twitter to send out wildfire updates.<sup>9</sup> This second-by-second broadcasting, to exponentially increasing groups of receivers, can result in exactly the kind of public dissemination that would cause an employer legitimate concern.

Issues may arise even if employees do not belong to an online social network or use Twitter. Internet users often leave comments on message boards. Many sites, such as cars.com, allow consumers to post reviews.<sup>10</sup> Such dissemination of opinions also occurs on sites concerning hotels and many other products and services. Wikis—the first cousin of the blog—pose

## Discipline of an employee could be interpreted as retaliation for engaging in protected speech.

additional problems. The most well-known wiki is the online encyclopedia Wikipedia, which allows Internet users to edit an entry's information. Although these sites may benefit consumers, they can pose the same problems for employers as online social networks and blogs.

**Defamation, Harassment, and Threats** “Cybersmearing”—libel and defamation that occurs online—is a key concern for employers. An employer could find itself defending its employee's unauthorized postings against claims of defamation, harassment, or trade disparagement.

Of course, employers must prohibit harassment in the workplace. Employers may also be liable for off-duty conduct, and so must ensure that employees are prohibited from harassing other employees in any work-related environment. In *Blakely v. Continental Airlines, Inc.*,<sup>11</sup>

the New Jersey Supreme Court held that Continental Airlines had a duty to prevent defamatory and harassing statements made by its pilots in an online forum if the company benefited from its employees' use of the forum.

The court held that employers have a duty to stop co-employee harassment “in settings that are related to the workplace” if the employers know or have reason to know that harassment is taking place. The court reasoned that

severe or pervasive harassment in a work-related setting that continues a pattern of harassment on the job is sufficiently related to the workplace that an informed employer who takes no effective measures to stop it, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser.

The *Blakely* court noted that the employer benefited from activity that occurred online because it gave employees access to information on certain benefits and increased operational efficiency. The court analogized Continental's online forum to a company bulletin board and concluded that it had “little doubt” that if the messages were posted on a company bulletin board, such messages would be considered part of the workplace setting. The court did not require employers to monitor employees' private email; it required only monitoring of a work-related setting.<sup>12</sup>

The decision in *Blakely* underscores that if an employer maintains a blog or other online forum, the employer must monitor its usage and prohibit harassment. If the employer does not maintain its own blog or online forum, it should still clearly prohibit online harassment. Most employers already have an anti-harassment policy and a policy prohibiting threats of violence; both should reference online conduct.

Conversely, employers may find themselves in a position where they must prosecute a defamation suit. A company might seek to prevent a competitor from posting false information about the quality

of its products or services. Online postings could also harm a company's goodwill.

In *Varian Medical Systems, Inc. v. Delfino*,<sup>13</sup> two former employees posted derogatory messages about their former employer and its executive employees on Internet bulletin boards. The employees accused the employer of lies, hallucinations, mental illness, incompetence, harassment, discrimination, and stalking. The employees also implied that another employee had sex with her supervisor to obtain her job. In their defense, the former employees argued that no one would take an outrageous anonymous posting on the Internet seriously. The court disagreed, holding that the employees' accusations were libelous.

**The Communications Decency Act** Often, the writer of a potentially libelous statement may be anonymous or judgment-proof. In those cases, some plaintiffs have attempted to hold the facilitator of the communication liable. The server or a blog owner may be alleged to be the facilitator.

Courts, however, have roundly defeated these attempts based on the Communications Decency Act.<sup>14</sup> This act immunizes providers or users of interactive computer services from any cause of action that would make them liable for publishing information provided by a third-party user of the service. Blog owners are not liable for defamation on the basis of comments made by others. This is known as the *Zeran* rule.<sup>15</sup> The act does not, however, apply to intellectual property infringement.<sup>16</sup>

The consequences mandated by this act are unsatisfactory to some courts. For example, the California Supreme Court noted in *Barrett v. Rosenthal*<sup>17</sup> that it could not sanction the blog facilitator. “[R]ecognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.”<sup>18</sup> Even if the facilitator knows that the information or speech is unlawful, such knowledge is “not

enough to make it the service provider's own speech."<sup>19</sup>

Employers that maintain blogs or online forums should guard against copyright and trademark infringement. The Communications Decency Act will not insulate them from liability for copyright and trademark infringement that occurs on company-maintained blogs.

### Online Social Networking and Discrimination Claims

If an employer discovers that an employee has engaged in objectionable communications online, then discipline is appropriate. As always, employers should exercise caution and do so uniformly. The discipline could serve as the basis of a discrimination claim if the employer treats similarly situated employees differently.

One prominent case involved a Delta Airlines flight attendant who maintained a blog that included pictures of herself in the Delta uniform.<sup>20</sup> Delta fired her because the pictures were too revealing. The employee sued Delta for gender discrimination and alleged that male employees posted online pictures of themselves in the uniform while engaging in more objectionable conduct. Before taking adverse action against an employee based on online conduct, an employer must ensure that other employees are not engaging in similar online conduct, and strive to treat all similarly situated employees uniformly.

### Online Social Networking and Retaliation Claims

Public employers must also be aware that an employee's online communications—no matter how objectionable—may involve protected speech. An employer's discipline of an employee could be interpreted as retaliation against the employee for engaging in protected speech.

In *Richerson v. Beckon*,<sup>21</sup> a teacher sued her school district alleging retaliation for engaging in protected First Amendment speech. Richerson had been assigned a position that required her to spend half of her time as a teacher and half of her time in a coaching and mentoring role, where she was to maintain a peer relationship with other teachers and give non-evaluative and confidential advice. Richerson

also served on an interview committee to select a replacement for her prior position.

Richerson openly blogged about the replacement that the school district hired, describing him as a "smug know-it-all creep" and calling him "mighty white boy." One entry was titled "Save us White Boy!" She discussed the interview committee proceedings and noted that she disagreed with "Boss Lady 2.0's" decision to hire the new employee. She also criticized the teachers' union, stating "What I wouldn't give to draw a little Hitler mustache on the chief negotiator."

After the school district became aware of the blogs, it reassigned Richerson to full-time teaching duties. The district reasoned that her blog compromised her ability to perform duties as a confidential and non-evaluative mentor. Richerson filed suit alleging retaliation for engaging in protected speech.

The court analyzed the blog under the public concern test.<sup>22</sup> Public employees may engage in protected speech depending on whether the speech impairs discipline or control by superiors; disrupts coworker relations; erodes close working relationships premised on personal loyalty and confidentiality; interferes with the speaker's performance of his or her duties; or obstructs routine office operations.<sup>23</sup>

The court held that the online conduct would present "severe difficulties" in the proposed mentoring relationship. The court seemed surprised at the school board's failure to impose punishment, calling the employee's behavior salacious, mean-spirited, racist, and sexist. The comments "far exceeded normal standards of decency," and had no relevance to matters of public concern. As a result, the court granted summary judgment to the school district. Although the employer was ultimately successful in this litigation, the case suggests that an employer should carefully evaluate online communication to ensure that it does not include protected speech.

Employees may also seek protection for "concerted activity" for "mutual aid or protection" in communications regarding wages, hours, and working conditions. It is not yet clear how much protection the National Labor Relations Act (NLRA)

would provide in this regard. In the *Register Guard* case, the National Labor Relations Board favored management and found that the NLRA does not mandate access to employers' email systems for union-organizing communications.<sup>24</sup> An Italian labor union recently organized the first ever virtual protest in *Second Life*. The virtual protest included picket lines and protest kits for all interested avatars.<sup>25</sup> Employees disciplined for such activities may contend that they were engaging in protected conduct.

Title VII also prohibits employers from retaliating against an employee because he or she opposed any discriminatory practice or because the employee was involved in investigations or proceedings under Title VII. Other claims of retaliation could arise if an employee engages in protected speech under the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Earned Retirement Income Security Act, the Fair Labor Standards Act, or Family Medical Leave Act (FMLA).<sup>26</sup> For example, an employee's complaint on a blog that the employer is not properly allowing sick leave could implicate the FMLA. An employer that disciplines this employee may be accused of retaliation. Lawyers should advise their clients to closely analyze whether the online communication contains any protected speech.

### Access to Protected Information

Another potential advantage of Internet and online social networks is that employers may use them to analyze job applicants. However, employers may not access or consider information that the law prohibits in making employment decisions. The employee's online profile may contain protected information about age, marital status, familial status, or religious affiliation. The employer's knowledge of this information could give ammunition to a discrimination claim by a denied applicant. One possible solution is to have a non-decision-maker perform the search and report only the non-protected information to the decision maker. Employers should also consider discussing any information that would preclude employment with an applicant, to verify authenticity.

### Disclosure of Proprietary Information

Employees should never divulge trade secrets or other proprietary or confidential information in online communications. Misuse of company logos and trademarks is also of concern to employers. Employers should update their confidentiality policies, employment agreements, and noncompetition agreements to address online social networks and peer-to-peer broadcasting technology such as Twitter.

**The policy should advise that any online communication could quickly be broadcast to millions of readers.**

Two risks arise in this area. First, there is the possibility that trade secret, proprietary, or confidential information will be disseminated. Second, an unauthorized disclosure that becomes widely disseminated may result in the loss of trade secret status. Prohibition of such communications and prompt, effective action to address any unauthorized disclosures are necessary responses by employers in these situations.<sup>27</sup>

### Monitoring Employees' Communications

To reduce these legal risks, some employers may wish to monitor employees' electronic communications. This is advisable in many situations, but monitoring poses its own set of legal issues. Monitoring can implicate privacy issues and the Electronic Communications Privacy Act of 1986,<sup>28</sup> which prohibits the interception of transmissions of electronic data by computer. The act, which applies to private entities as well as the government,<sup>29</sup> expressly allows for the recovery of civil damages.<sup>30</sup> Monitoring of electronic

communications is permissible *after* the communications are sent.<sup>31</sup> Also, an employer may monitor communications if there is a legitimate business purpose or if the employee consents.<sup>32</sup>

### Drafting Policies to Prevent Problems

Lawyers should assist employer clients in drafting clear policies that address blogging, micro-blogging, and other online conduct. Such policies should address all technology, including instant messaging and social network sites. Employers should assess the unique characteristics of their workforce, environment, industry, competitors, and markets.

An employer's policy should advise that any online communication could quickly be broadcast to millions of readers. The content may also continue to circulate for years, even after revisions by the original author. Defamation, harassment, and other negative conduct must be prohibited. The policy should state clearly that users of employer-owned resources (including computers, laptops, cell phones, and PDAs) should have no expectation of privacy, nor an expectation of privacy in stored or deleted files. Employees should be advised that email and Internet use on the company's systems will be monitored. The policy should also advise all employees that all communication systems, employer-owned or -issued equipment, or data, in whatever form, belong exclusively to the employer and may be used only for legitimate business purposes of the employer. The employee should sign an acknowledgment of receipt of the policy. Employers must also enforce the policy uniformly to prevent accusations of discrimination. Lawyers should also monitor state law in this rapidly changing area. State laws differ widely on the extent to which an employer may regulate an employee's off-duty conduct.

All policies regarding online communications should clearly prohibit offensive or harassing communications or threats related to employment in any way. These prohibitions should also be part of an employer's policies prohibiting discrimination, harassment, retaliation, and threats of violence. Further policy considerations include:

- whether the policy should address "anonymous" communications
- whether the policy should include both broadcast and peer-to-peer formats
- whether prohibiting instant messaging or texting is necessary or desirable
- whether permission or pre-approval for Intranet postings is required
- whether permission or pre-approval for the use of quotations, tag lines, icons, logos, etc., is required for email messages, either internal or outbound
- whether limitations on the use of electronic devices or ear buds is advisable; for example, during meetings or while driving
- whether the issue of blogs and other Internet postings should be addressed in settlement and severance agreements with former employees

For blogging in particular, employers should consider the following:

- whether to prohibit non-work related blogging while at work or on work time
- whether to address blogging outside of work, being cautious not to overreach, and being mindful of applicable state laws
- what other applicable policies, such as confidentiality, should be included in materials about blogging
- whether or when to limit use of the employer's name or logo, and a prohibition of online conduct that could damage the employer's business or reputation

An employer should consider all of these issues when developing and enforcing policies, to reduce the risk of liability.

### Endnotes

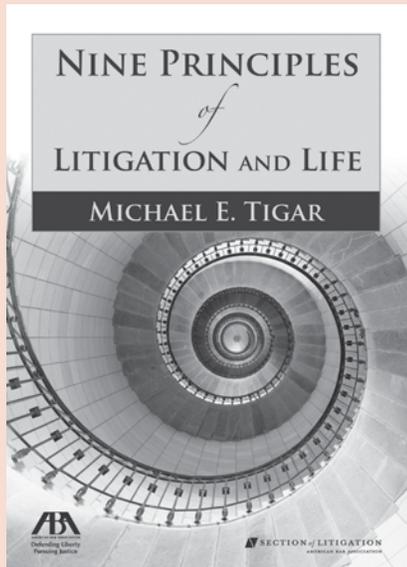
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## You're Fired

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5. Jodi Mardesich, *Business Uses for Twitter*, Inc., Jan. 17, 2009, <http://technology.inc.com/networking/articles/200809/twitter.html>.

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11. 751 A.2d 538 (N.J. 2000).

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13. 113 Cal. App. 4th 273 (Cal. App. 2003), *rev'd on other grounds*, 106 P.3d 958 (Cal. 2005).

14. 47 U.S.C. § 230.

15. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

16. *Parker v. Google, Inc.*, 422 F.Supp.2d 492 (E.D. Pa. 2006).

17. 40 Cal. 4th 33 (2006).

18. *Id.* at 40.

19. *Universal Comm. Sys. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) (also stating that “Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content”).

## From the Editors

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Cherie Silberman in an article entitled “Employment Investigations: Selecting an In-House or Outside Investigator.” This thoughtful article reviews a number of key aspects of an investigation, including the selection of an experienced investigator, the importance of objectivity, the implications of the Fair Credit Reporting Act in this context, preservation of attorney-client privilege, and the essential need for conducting a prompt investigation.

The ever-emerging new technology that continues to change the global communication network and the American workplace is addressed by Patty Wise in “Tweet, Tweet, You're Fired.” Ms. Wise covers a number of key points in connection with this growing area, including the current legal landscape of blogs and social networks; concerns with respect to “cybersmearing” and the implications for defamation, harassment, and threats; the Communications Decency Act; online social networking and discrimination claims; and a host of other issues. In addition, the author provides

20. *Simonetti v. Delta Airlines Inc.*, No. 5-cv-2321 (N.D. Ga. 2005).

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24. *The Guard Publishing Company, dba The Register Guard*, 351 NLRB No. 70 (2007).

25. Rick Smith, *Virtual Solidarity: IBM Workers to Launch Strike in Second Life*, LOCAL TECH WIRE, Sept. 22, 2007, [http://localtechwire.com/business/local\\_tech\\_wire/news/story/1849345/](http://localtechwire.com/business/local_tech_wire/news/story/1849345/).

26. PATRICIA A. WISE, UNDERSTANDING AND PREVENTING WORKPLACE RETALIATION,

concrete suggestions for the development of an effective policy.

In the complicated area of electronic discovery, Michael Swarz, in the article “Don't Get Left Behind: Why Leveraging Electronic Discovery in Employment Proceedings Matters,” provides a number of practical insights in dealing with electronic discovery matters in the employment context.

Finally, the question of punitive damages and their application in the employment context is addressed by Melissa Yoon in “Navigating Punitive Damages in the Wake of *Exxon Shipping Co. v. Baker*.” Ms. Yoon highlights the recent recognition of due process limitations in the punitive damage award context and provides an analytical framework in evaluating punitive damage awards. In this regard, the applicability of the recent *Exxon* case by the Supreme Court is analyzed and discussed with respect to its potential applicability to the employment arena.

As always, your comments and articles are welcome. This newsletter is sent with the hope that you are in good health and spirits during this summer time.

**Bill Martucci**  
**Brian Koji**

4–6, (Thompson Publishing Group 2007) (2000).

27. See *DVD Copy Control Assoc. v. Bunner*, 116 Cal. App. 4th 241 (2004).

28. 18 U.S.C. § 2511.

29. *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979); *United States v. Burroughs*, 564 F.2d 1111 (4th Cir. 1977), *overruled on other grounds by United States v. Steed*, 674 F.2d 284 (4th Cir. 1982).

30. 18 U.S.C. § 2520.

31. *Eagle Inv. Sys. Corp. v. Tamm*, 146 F.Supp.2d 105 (D. Mass. 2001).

32. *Simmons v. Sw. Bell Tel. Co.*, 452 F. Supp. 392 (W.D. Ok. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979).

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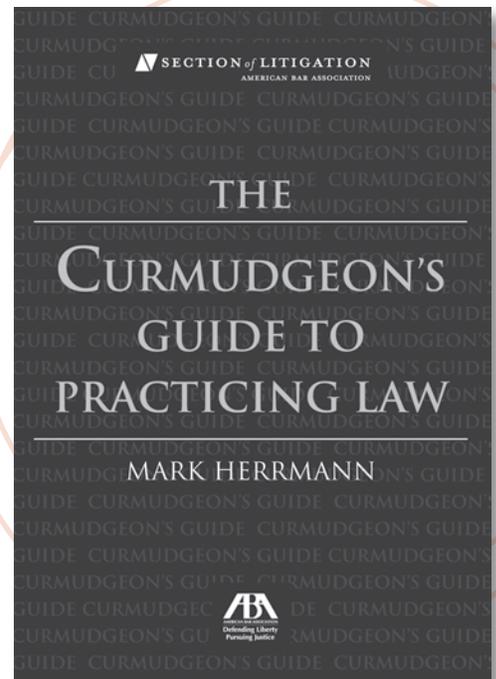
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# Don't Get Left Behind: Why Leveraging Electronic Discovery in Employment Proceedings Matters

By Michael Swarz

To put it mildly, electronic discovery (e-discovery) is a subject that has recently attracted a tremendous amount of consideration in both the corporate and legal sectors. E-discovery can be simply described as the procedure that occurs when a party to litigation asks for data from the opposing side that was generated, stored, or preserved in an electronic configuration. Electronically stored information (ESI) spans from email to text and database files to audio systems and beyond. Surely, to enumerate all possible ESI formats would be exhaustive.

As it relates to employment proceedings, e-discovery is certainly not on the outside looking in. Quite the contrary, it is well at home in this arena of the law. In fact, the seminal e-discovery case, *Zubulake v. UBS Warburg LLC*,<sup>1</sup> revolved around workplace harassment and discrimination. E-discovery plays such a pivotal role in employment litigation particularly because both employee and employer alike depend so heavily on email and computer for communication and productivity. Thus, effectively leveraging e-discovery is frequently a *sine qua non* to pinpointing hard to find ESI in employment cases. This is true no matter which side one is on, whether seeking evidence against the employer or attempting to invalidate the employer's charges.

## Rule Number One: Think, Think, Think Before You Hit "Send"

The ESI most prevalent in employment proceedings is email. More than half of all ESI data produced in e-discovery is somehow connected to an email, a phenomenon that makes perfect sense. Both employee and employer are considerably more relaxed when using email and will

communicate thoughts that likely would never have been transmitted in person or even by telephone. When contrasted against other modes of communication, it is clear that email has evolved into the workplace medium most likely to produce harmful and damaging comments about superiors and colleagues.

Nonetheless, once the "send" button has been selected, there is no going back. A copy of the email will forevermore belong to someone else and can be relevant for future discovery. What can happen to it next? That copy can be printed, forwarded, or saved. In essence, it becomes fixed in time, and deleting it at this point will do no good. One should not erroneously believe that once an email has been deleted, damaged, or destroyed that he or she is out of the woods, unable to be tracked and monitored.

Once email and other electronic records are created, e-discovery may enter employment litigation in full force. Forensic personnel and e-discovery consultants are frequently able to locate the electronic evidence thought to be deleted, to prove or disavow the charges. When gathered, if the e-data is unflattering—such as when evidence of discrimination, harassment, or other illegality is shown—the data will often make or break a case. Taking steps to ensure a thorough and seamless electronic data collection will become critical to the fledgling employment case.

## Next Time, Head This Off at the Pass (With a Thorough Data-Retention Policy)

Abuse of the discovery process as it relates to ESI may result in substantial sanctions. These sanctions may be invoked, among other reasons, if a party does not comply with a good faith, reasonable data-retention policy. Data that is destroyed in accordance with an established data-retention policy will often be considered adequate proof of good faith. Having a proper data-retention plan in place can spare costly litigation.

When drafting the data-retention policy, practitioners should be mindful of all relevant regulatory and legal requirements regarding the applicable period to preserve the ESI and what type of data is being retained by the company. Ensure it thoroughly addresses email because, as emphasized above, most employment-

## Oops, What If I Already Sent That Email?

Now is the time to gather your troops. Whether initiating or responding to employment litigation, one should assemble a diverse, inter-disciplinary team. We suggest the following team members be consulted both prior to litigation to lay out strategy and, once litigation hits, to respond in kind:

- **Records Member.** This individual will aid the legal team with any physical, hard-copy records stored outside and within the business. The records member should ensure that all relevant data are properly preserved and stored in a secure location.
- **Compliance/Audit Professional.** This person assists with assessing which individuals and what data were involved in the case at hand as related to the information risk management procedures that were, or should have been, crafted by them. If no policy exists, their presence here will be to learn what to insert into future protocols to help minimize costly litigation in the future.

Michael Swarz, J.D. (mswarz@eclaris.com) is based in Los Angeles, California, where he serves as VP of Marketing and Operations for eClaris, Inc.

based e-discovery revolves around email. As such, each policy should address how long email should be preserved, where emails should be kept, and what email policies, if any, should be distributed to employees. Email monitoring may be included as well. Normally, liaising with financial personnel, IT, company employees, and legal counsel will be required. Of course, once created, the data-retention policy must be properly implemented and regularly monitored.

In employment matters, the universe of possible sanctions for improper destruction of pertinent data pursuant to

- **Counsel.** This person will assess the legality of the employment issues at hand during discovery and throughout the litigation. The attorney should have in-depth knowledge of the key facts being contested as well as all probable counterclaims, defenses, and any possible litigation emanating from a third party. With this knowledge, counsel must draft a thorough and enforceable litigation hold notice to be sent to the parties above.
- **IT Constituent.** This member must be able to pinpoint, gather, and safeguard all pieces of ESI as requested by counsel. Once all pertinent ESI has been accounted for, this person will need to safeguard it properly. Working closely with counsel, the IT member should carefully identify all data that might be relevant for the case at hand by focusing on all accessible ESI.
- Once assembled, the team will allow a business to take concrete steps needed to weigh the necessity to preserve data, deal with the shortcomings of any ESI data systems, and reduce any interruption to ongoing business operations.

a faulty, or nonexistent, data-retention policy is quite broad. In instances of egregious behavior, the punishment may be devastating. A fact-finder may reward attorney fees and other costs. Courts may also assume that the party that destroyed or damaged the ESI in question did so because it was harmful to their position. This adverse inference usually goes hand in hand with bad faith.<sup>2</sup>

However, a data-retention policy does not necessarily mandate the total security of all ESI at any and all costs. Courts have made it abundantly clear that both parties must only take reasonable steps to maintain ESI for trial. This is equally applicable whether the litigation is reasonably anticipated or actually pending. As a result, a well-constructed data-retention policy is essential to guaranteeing compliance with applicable preservation and production mandates and, at the same time, minimizing the loss of ESI when faced with probable litigation.

#### What Else Can I Do to Protect My Company?

Below are some suggested best practices to consider:

- **Look out for any retaliation allegations.** Retaliation claims account for many employment-based ESI decisions. Once an employee references harassment or discrimination, that reference will typically serve to put the company on notice of potential litigation, triggering its duty to preserve all relevant ESI.
- **Have an email training session.** Many employees are unaware that their emails can be produced during discovery and can be used to harm the company and potentially themselves during litigation. Even more personnel are likely under the impression that emails can be truly

erased just by clicking the “delete” button. Address these issues with your team and emphasize how and when emails can be damaging when taken out of context.

- **Back up data when terminating an employee.** Most businesses will expunge an ex-employee’s hard drive so his or her replacement can use the computer. Before wiping any ESI accessed by the ex-employee, first back up that data if there is reason to believe that it may be relevant to pending or potential legal claims.

In parallel to the above best practices, implementing an effective intra-company ESI communication strategy, akin to the collaboration that should occur when crafting the data-retention policy, is essential. Specifically, human resources (likely first to know about potential litigation from former and current employees) and IT (which will be charged with collecting and preserving pivotal ESI data) must be on the same page. This will allow businesses to minimize employment-related litigation, particularly in light of the new and ever-evolving electronic discovery rules.

Picture the plethora of emails and other ESI that your firm or clients will send and receive in just the time it has taken to read this article. Due to the nature and sheer volume of ESI, it is safe to say that e-discovery will substantially impact modern employment litigation for the indefinite future. Consequently, it is imperative that counsel and their clients act proactively to prepare for and adapt to this increasing complex facet of employment litigation. Do not be left behind.

#### Endnotes

1. 229 F.R.D. 422, 2004 WL 1620866 (S.D. N.Y. 2004).

2. See *Zubulake*, 229 F.R.D. 422.

# Navigating Punitive Damages in the Wake of *Exxon Shipping Co. v. Baker*

By Melissa M. Yoon

The Supreme Court has long expressed concern regarding punitive damages awards.<sup>1</sup> The imprecise and subjective criteria used to determine a theoretically appropriate measure of punitive damages and the widely disparate awards that result have generated innumerable appeals. As Justice Stevens stated in *Honda Motor Co. v. Oberg*,

[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.<sup>2</sup>

But only within the past 20 years has the Court recognized that excessive punitive damages awards potentially violate the due process clause of the Fourteenth Amendment. While the Court has crafted an analytical framework to assess whether a particular award passes constitutional muster, it has repeatedly refused to establish a mathematical formula to separate the constitutionally sound from the constitutionally infirm. Last year, however, the Court recognized a ceiling above which punitive damages—at least in maritime cases—may never be awarded.

On June 25, 2008, the Court issued its opinion in *Exxon Shipping Co. v. Baker*,<sup>3</sup> which ended protracted litigation arising out of the 1989 crude oil spill of the *Exxon Valdez* supertanker in Prince William Sound off the Alaskan coast. Vacating the remitted \$2.5 billion award of punitive damages, the Court held that an award of punitive damages in a maritime case

may never exceed the amount awarded in compensatory damages. The Court's opinion, although purportedly limited to the admiralty context, signals an increasing intolerance to the unpredictability of punitive damages awards and may operate to constrain punitive damages awarded in other contexts, including those awarded in certain employment law cases.

## Recent Recognition of Due Process Limitations

To give context to the Court's decision in *Exxon*, it is helpful to understand the roots of the Court's discomfort with excessive punitive damages awards.

Beginning in 1989, the Supreme Court suggested that punitive damages are likely constrained by principles of due process. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>4</sup> the jury awarded \$51,146 in compensatory damages and \$6 million in punitive damages. The petitioner challenged the punitive damages award on the grounds that it violated the excessive fines clause of the Eighth Amendment, the due process clause of the Fourteenth Amendment, and federal common law. The Court declined to "craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages,"<sup>5</sup> and held that the excessive fines clause has no application to punitive damages awards in civil cases between private parties. The Court suggested, however, that the due process clause may operate to constrain such awards:

There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme . . . but we have never addressed the precise question presented here: whether the Due Process Clause acts as a check

on undue jury discretion to award punitive damages in the absence of any express statutory limit.<sup>6</sup>

Nevertheless, the Court did not reach the issue, concluding that the petitioner had not raised the argument in the courts below or in its certiorari petition. The inquiry, therefore, had to "await another day."<sup>7</sup>

That day arrived two years later. In *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>8</sup> the Court first recognized that the due process clause limits a jury's discretion in awarding punitive damages. The Court refused to draw a "mathematical bright line" between the constitutional and the unconstitutional, or even shape standards to guide the imposition of punitive damages, but stated instead that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."<sup>9</sup> The Court left untouched the 4:1 ratio of punitive to compensatory damages awarded by the jury, concluding that the award did not lack objective criteria and, while "close to the line" of constitutional impropriety, did not cross that line.<sup>10</sup>

## The Court's Due Process Framework for Punitive Damages Awards

Five years passed before the Court established a framework for assessing the constitutionality of punitive damages awards. In 1996, the Court issued a 5-4 opinion in *BMW of North America, Inc. v. Gore*,<sup>11</sup> and, for the first time, invalidated a state court punitive damages award as unconstitutionally excessive. Writing for the majority, Justice Stevens pronounced three "guideposts" every court must consider when reviewing an award of punitive damages: the degree of reprehensibility of the defendant's conduct; the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and the difference between the punitive damages award and the civil penalties authorized or

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imposed in comparable cases.<sup>12</sup>

The most important of these factors, the Court indicated, is the reprehensibility of the defendant's conduct, which should be measured by considering whether:

- the harm caused was physical rather than economic
- the defendant's conduct amounted to negligence or intentional malice, trickery, or deceit
- the conduct evinced an indifference to or reckless disregard for the health and safety of others
- the target of the conduct is financially vulnerable
- the conduct was an isolated incident or involved repeated actions<sup>13</sup>

The absence of all of these factors suggests that the defendant's conduct is not "sufficiently reprehensible to warrant imposition" of a substantial punitive damages award,<sup>14</sup> and, as the Court recognized in a later decision, the fact that any one of these factors may weigh in favor of a plaintiff is not necessarily sufficient to sustain a substantial award.<sup>15</sup>

Although reprehensibility is the most important factor for assessing the constitutionality of a punitive damages award, the Court noted that the second guidepost—the ratio between the actual harm inflicted and the amount of punitive damages awarded—is the most often cited measure of an excessive award.<sup>16</sup> The jury in *Gore* awarded the plaintiff only \$4,000 in actual damages but \$4 million in punitive damages based on BMW's failure to disclose factory repairs made to a new car purchased by the plaintiff that amounted to less than 3 percent of the purchase price. On appeal, the Alabama Supreme Court remitted the punitive damages award to \$2 million, but even this amount yielded a staggering 500:1 ratio. BMW thus appealed to the U.S. Supreme Court, arguing that the remitted award violated the due process clause.

The Court agreed but, once again, refused to identify a ratio that would separate the constitutional from the unconstitutional. While it noted that

low awards of compensatory damages may properly support a higher

ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages[, or where] the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine,<sup>17</sup>

it suggested that a "breathtaking 500 to 1" ratio might never be constitutionally acceptable.<sup>18</sup>

The Court's third guidepost requires a reviewing court to compare the punitive damages award to the civil or criminal penalties that could be imposed for comparable misconduct. Reiterating language from Justice O'Connor's concurring opinion in *Browning-Ferris Industries of Vermont, Inc.*, Justice Stevens warned that a reviewing court must "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue."<sup>19</sup> Given that the maximum civil penalty for BMW's conduct amounted to \$2,000, an award of punitive damages 1,000 times that amount was excessive. Based on its evaluation of the award under all three guideposts, the Court concluded that the award was unconstitutional.<sup>20</sup>

After its decision in *Gore*, the Court again confronted the constitutionality of punitive damages awards in *State Farm Mutual Automobile Insurance Co. v. Campbell*, a bad-faith insurance action arising out of an automobile accident.<sup>21</sup> In *Campbell*, the jury awarded the plaintiffs \$1 million in compensatory damages and \$145 million in punitive damages. On appeal, State Farm argued that the punitive damages award violated the due process clause of the Fourteenth Amendment.

Once again, the Court declined to establish a ratio that would separate the constitutional from the unconstitutional. But Justice Kennedy, writing for the majority, stated for the first time a general numerical limitation on punitive damages awards: "Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>22</sup>

While the Court noted that ratios greater

than those that it had previously upheld "may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages,'" it also noted that the converse was true: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."<sup>23</sup>

The Court found the \$1 million of compensatory damages awarded in *Campbell* to be "substantial." The award

**The Court concluded that the \$145 million award of punitive damages was constitutionally excessive.**

consisted entirely of emotional distress damages and was intended to compensate the plaintiffs for the outrage and humiliation they experienced at the hands of their insurer. But given that punitive damages are designed, in part, to condemn conduct that generates such outrage and humiliation, the Court indicated that the award of punitive damages was likely cumulative. Applying the other *Gore* guideposts, the Court concluded that the \$145 million award of punitive damages was constitutionally excessive and should instead be "at or near the amount of compensatory damages." While the Court did not establish a definitive ratio to apply in all cases, it made clear that in many cases, a 1:1 ratio would likely be the constitutional maximum.<sup>24</sup>

#### The Supreme Court's Decision

With this history, the Supreme Court faced another challenge to punitive damages in *Exxon*. The facts of *Exxon* are well known.

In 1989, a supertanker carrying over 53 million gallons of crude oil from the Trans-Alaska pipeline to the lower 48 states ran aground on a reef off the coast of Alaska, spilling 11 million gallons of oil into Prince William Sound and causing one of the largest ecological disasters in U.S. history. Criminal and civil actions followed, and Exxon agreed to pay over \$1.3 billion in

**The Court made clear that in many cases, a 1:1 ratio would likely be the constitutional maximum.**

criminal fines, restitution, voluntary settlements, and payments to restore natural resources. Additional civil litigation brought by commercial fishermen, native Alaskans, and landowners was consolidated into one action. Exxon stipulated to its negligence and the resulting liability for compensatory damages. Trial was thus limited to liability for punitive damages and the amount of any damages to be awarded. The jury awarded \$507.5 million in compensatory damages and \$5 billion in punitive damages. On appeal, the Ninth Circuit ultimately reduced the award of punitives to \$2.5 billion. Exxon appealed to the Supreme Court, arguing, in part, that the punitive damages award was excessive as a matter of maritime common law. The issue was one of first impression.

Writing for the 5-4 majority, Justice Souter undertook a comprehensive discussion of punitive damages and pointed to numerous examples of states that impose limitations on the availability or amount of punitive damages in different types of actions. The Court noted, however, that “[d]espite these limitations, punitive damages overall are higher and more frequent

in the United States than they are anywhere else.”<sup>25</sup> Even so, the Court stated, studies of punitive damages awards have shown that the median ratio of punitive to compensatory awards has remained less than 1:1, indicating “an overall restraint and suggest[ing] that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter.”<sup>26</sup>

The “real problem,” the Court said, “is the stark unpredictability of punitive awards.” Citing a study of state court trials involving tort, contract, and property cases from three different years during the 10-year period from 1991 to 2001, the Court noted that while the median ratio of punitive damages awarded by juries in state civil trials was just 0.62:1, the mean ratio was 2.90:1, and the standard deviation was 13.81:1. This data indicated that “the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories.”<sup>27</sup> While such variation in awards “might be acceptable or even desirable if they resulted from judges’ and juries’ refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts,” the Court acknowledged that “nothing of the sort is going on.”<sup>28</sup> Rather, the widely disparate awards were merely the result of the “inherent uncertainty of the trial process.”<sup>29</sup> This unpredictability, the Court noted, is in tension with the deterrent purpose of punitive damages: “[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes’s ‘bad man’ can look ahead with some ability to know what the stakes are in choosing one course of action or another.”<sup>30</sup>

The Court noted that its response to these “outlier” awards to date was limited to defining constitutional standards that govern the imposition of punitive damages under state law. But the issue before the Court in *Exxon* concerned the then-undefined federal common law standard of excessiveness. Thus, the Court stated, its review did not consider the constitutionality of the punitive damages awarded in *Exxon* but rather “the desirability of

regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.”<sup>31</sup>

Despite the extensive analytical framework crafted through the Court’s due process jurisprudence, the Court refused to define any “verbal” standard of excessiveness, expressing doubt that “verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers.”<sup>32</sup> Rather, the Court held, the best insurance against unpredictable outliers is to peg punitive damages to the amount awarded in compensatory damages. Relying on the studies discussed earlier in its opinion, the Court held that a 1:1 ratio is a “fair upper limit” in maritime cases.<sup>33</sup>

#### The Applicability of *Exxon* in the Employment Law Context

Although *Exxon* arose in the context of maritime law, the Court’s decision is not necessarily limited to that context. The Court went to great lengths in its opinion to express its concern with the current regime of punitive damages in the United States, a regime that results in notoriously unpredictable awards (which, the Court admitted, do little to accomplish the goal of deterrence). The concerns expressed by the Court are not unique to maritime law. Indeed, absent from the opinion is any discussion of punitive damages awards reached in other maritime cases. Moreover, the 1:1 ceiling set by the Court relies on studies that collected data from state court cases in the areas of torts, contracts, and property—not maritime law.

In addition, the Court justified its decision to impose a bright-line standard by referring to the punitive damages award in *Exxon* as a “common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.” Numerous federal statutes, including several within the employment law realm,<sup>34</sup> do not specifically provide for punitive damages, or do not set limits on punitive damages that a plaintiff may recover. Punitive damages in those situations are thus a matter of “judge-made law,” and may well justify an extension of the Court’s decision in *Exxon*.

While it left untouched its relatively

recent due process jurisprudence, the Court's opinion may nonetheless portend a tightening of the due process standards governing state court awards. The Court twice quoted from its decision in *Campbell* that "[w]hen compensatory damages are substantial, . . . a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee,"<sup>35</sup> and again cited to this part of its opinion in *Campbell* when stating that "adopting an admiralty-law ratio is no less judicial than picking one as an outer limit of constitutionality for punitive damages awards."<sup>36</sup> The Court thus seems to have signaled its withering patience with unpredictable and arbitrary punitive damages awards, regardless of the substantive law involved.

To date, however, the few employment law cases to consider *Exxon* have not applied the opinion to limit awards of punitive damages,<sup>37</sup> and at least one court has suggested that a rigid application of even a single-digit multiplier would lead to "absurd" results in cases involving awards of nominal compensatory damages.<sup>38</sup> Nonetheless, given the Court's interest in eradicating arbitrary awards of punitive damages, and the broad principles announced by the Court in *Exxon*, it may be just a matter of time before courts extend the holding of *Exxon* beyond the limited realm of maritime law.

## Endnotes

1. See, e.g., *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66–67 (1919) (award of punitive damages may not be "wholly disproportionate to the offense").
2. 512 U.S. 415, 432 (1994).
3. 128 S. Ct. 2605 (2008).
4. 492 U.S. 257 (1989).
5. *Id.* at 279.
6. *Id.* at 276–77.
7. *Id.* at 277.
8. 499 U.S. 1 (1991).
9. *Id.* at 18.
10. *Id.* at 23–24.
11. 517 U.S. 559 (1996).
12. *Id.* at 575.
13. *Id.* at 576–77.
14. *Id.* at 580.
15. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).
16. 517 U.S. at 580.
17. *Id.* at 582.
18. *Id.* at 583.
19. *Id.* (internal citation and quotation omitted).
20. *Id.* at 585–86.
21. 538 U.S. 408 (2003).
22. *Id.* at 425.
23. *Id.*
24. *Id.* at 426–29.
25. 128 S. Ct. at 2623.
26. *Id.* at 2624–25 & nn. 13 & 14.
27. *Id.* at 2625.
28. *Id.* at 2625–26.

29. *Id.* at 2626.
30. *Id.* at 2627 (citing Justice Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897)).
31. *Id.* at 2626–27.
32. *Id.* at 2628.
33. *Id.* at 2633.
34. See, e.g., 42 U.S.C. § 1981; the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634; Fair Labor Standards Act, 29 U.S.C. §§ 201–219.
35. 128 S. Ct. at 2626, 2634.
36. *Id.* at 2630.
37. See *Paul v. Asbury Auto. Group, LLC*, Case No. 06-1603-KI, 2009 WL 188592 (D. Or. Jan. 23, 2009) (declining to reach argument that *Exxon* required a 1:1 ratio in hostile work environment case brought pursuant to Title VII and 42 U.S.C. § 1981 but concluding that 1:1 ratio was appropriate under due process principles); *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 484 n.6 (W.D. Pa. 2008) (stating, in action brought by city employee for interference with FMLA rights, "this Court is confident that *Exxon* does not automatically limit an award of punitive damages under § 1983 to an amount equal to compensatory damages").
38. *Bjornson v. Dave Smith Motors/Frontier Leasing and Sales*, 578 F. Supp. 2d 1269 (D. Id. 2008) (refusing to apply single-digit multiplier to reduce \$100,000 punitive damages award in Title VII harassment case where plaintiff was awarded \$1 in compensatory damages).

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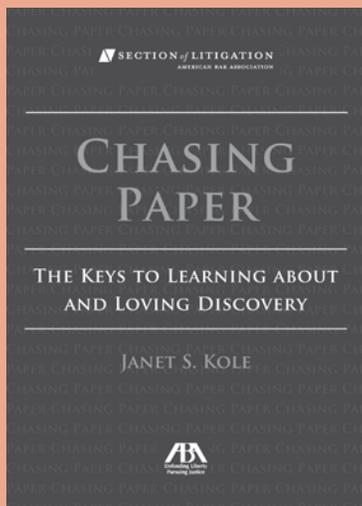
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Section of Litigation

## Employment Investigations

*continued from front cover*

Fair Credit Reporting Act of 1970 (FCRA) and the Fair and Accurate Credit Transactions (FACT) Act must be considered. Although either an internal or external investigation team may be appropriate in various circumstances, the employer should weigh all relevant factors before deciding whether to proceed with an in-house investigation or use an outside investigator.

### Selecting an Experienced Investigator

Selecting an investigator who is qualified to conduct the type of investigation at issue is critical. An inexperienced or untrained investigator can make mistakes, which could yield an inadequate or improper investigation. Further, an inexperienced investigator may share information or engage in commentary that could compromise employee confidence in management and/or affect the results of the investigation.

If the employer does not use a qualified investigator and therefore fails to take appropriate remedial measures following an investigation, the company may be faced with significant legal consequences.<sup>1</sup> Under the *Faragher/Ellerth* doctrine, a company may be shielded from liability in a claim for harassment if it can establish that it exercised reasonable care to prevent and correct any sexually harassing behavior.<sup>2</sup> However, even if the employer promptly conducts an investigation in good faith, a court may still determine that the investigation was inadequate, thereby eliminating the availability of this affirmative defense. For example, in *Ogden v. Wax Works, Inc.*, the court found that the employer did not conduct a thorough investigation because it focused on an individual's performance issues rather than thoroughly exploring the underlying harassment claims.<sup>3</sup> Similarly, in *Endres v. Techneglas, Inc.*, the court denied summary judgment on the plaintiff's hostile work environment claims after the

plaintiff submitted evidence that the investigation was limited to one interview of the alleged harasser.<sup>4</sup>

On the other hand, a qualified and experienced investigator is more likely to handle sensitive issues properly, identify necessary information, and focus on the relevant facts. Employers can help themselves by assuring that there are competent individuals available in house who have received sufficient training in conducting investigations. This means that sufficient training is required not only of human resources personnel, but also of any managers or other individuals who may be called upon to assist with investigations. If an employer does not have a qualified individual in house who is available to conduct an investigation in a timely manner, the employer should select an outside investigator rather than an untrained company employee. While the cost of using a third party to conduct an investigation is a factor that employers should consider, the risk of using an inexperienced internal investigator in an effort to reduce costs could end up costing substantially more if the investigation is not done properly.

### Choosing an Investigator with Actual and Perceived Objectivity

An investigator's capability does not rest solely upon that person's experience or training. When an employer uses an internal investigator to conduct an investigation, the employer must closely examine the perception of the investigator's credibility. This is especially true when a general perception exists that the investigator is biased, or if there are certain individuals involved who might appear to influence the investigations.

If the employer uses an apparently biased investigator, the judge or jury may conclude that the investigation was unfair and therefore insufficient. This decision might affect the employer's ability to successfully assert a *Faragher/Ellerth* affirmative defense, because a proper investigation must be a legitimate fact-finding mission, not just an exercise in evidence gathering to confirm a preconceived conclusion. The investigator(s) must not only be impartial, but also should be perceived

by those affected to be competent, objective, and fair.

If an interviewee doubts the neutrality of the investigation, he or she may be guarded with the investigator, which may prevent the investigator from determining the accuracy of information he or she collects. One possible method for assessing the perceived neutrality of an investigator at the beginning of an investigation is to have the investigator ask both the com-

**Even if the employer conducts an investigation in good faith, a court may still determine that it was inadequate.**

plaining party and the alleged harasser whether they doubt his or her objectivity in the investigation. The company should promptly address any issues concerning an investigator's perceived neutrality on the part of either the complaining party or the alleged harasser, which may inevitably require that the company select a different person to conduct the investigation.

Similarly, where a senior manager or company executive is the alleged harasser, a company should consider the retention of an external investigator. This choice will not only add more credence to the investigation, but also it may eliminate an awkward situation, even though an employee of the company would otherwise be qualified to conduct the investigation.

### Implications of the FACT Act

If an employer retains an outside party to conduct an investigation instead of using its human resources personnel, the employer should be aware of another

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potential source of liability. The FCRA applies to all employers who obtain “consumer reports” from a consumer reporting agency that “regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information, or other information on consumers, for the purpose of furnishing consumer reports to third parties.”<sup>5</sup>

Under the FCRA, an employer must provide the accused employee with a

**In an abundance of caution, employers should have the interviews conducted with no expectation of privilege.**

proper disclosure and obtain the employee’s consent to use an investigative consumer report.<sup>6</sup> In the context of a harassment investigation, the employer is required to take the following steps:

- (1) inform the alleged harasser that it is requesting the investigation report
- (2) obtain the alleged harasser’s consent to obtain the report
- (3) If the employer decides to take an adverse employment action against the alleged harasser based on information contained in the report, the employer must provide a copy of the report to the employee before taking the action.
- (4) After the adverse employment action is taken, the employer must identify the third party who prepared the investigation report to give the employee an opportunity to rebut any information therein.

However, the FACT Act, which

amended the FCRA in 2004, provides that an employer who uses a third party to conduct a workplace investigation is not required to comply with the consent and disclosure requirements of the FCRA if the investigation involves suspected misconduct, a violation of law or regulations, or a violation of the employer’s preexisting written policies.<sup>7</sup> To be excluded from the disclosure requirement prior to disciplinary action, the report from the third party conducting the investigation may be communicated only to the employer or an agent of the employer.<sup>8</sup> In the event that the employer takes adverse action against an employee based on the third party’s investigation, the employer is still required to provide the employee a summary of the report. Nonetheless, the implications of the FCRA can be avoided altogether if the investigation is conducted by a company employee instead of outside third parties, because these requirements do not apply to internal investigations conducted by the company’s employees.

#### Preserving the Attorney-Client Privilege

A company’s outside investigator may be a consultant, an attorney, or another professional who is qualified to conduct a particular investigation. If an employer selects an attorney to conduct an investigation, the attorney-client privilege would ordinarily attach to the type of communications that occur during the course of the investigation.<sup>9</sup> However, employers must be aware that such discussions may become discoverable during a subsequent lawsuit.<sup>10</sup> This issue arises when the company directs its outside counsel to investigate allegations of impropriety, and then, based on the investigation, the company argues that it has taken appropriate remedial measures. When employers assert the *Faragher/Elleerth* affirmative defense and base their “reasonable response” argument on an attorney-directed internal investigation, the information underlying this investigation may require waiver of the attorney-client privilege, as the sufficiency of the employer’s investigation becomes critical in determining liability.<sup>11</sup> Indeed, the only way the employer can show that it properly investigated the allegations, considered the facts, and took proper

action to prevent a reoccurrence is to fully disclose the investigative report. The court adopted this position in *McGrath v. Nassau County Health Care Corp.*, where the court held that it was proper to require the investigating attorney to produce her unfinished report, notes, and any sections of her reports that were deleted or redacted, because the employer had put those materials at issue by claiming that its remedial response was sufficient in light of its investigation.<sup>12</sup>

Additionally, if the terminated perpetrator challenges his or her discharge, the defendant employer likewise will often find it necessary to waive the privilege to establish good cause or a legitimate nondiscriminatory reason for its decision. Accordingly, the employer may need to disclose the investigation process, the notes and investigative report, and possibly the legal advice rendered by counsel, even if such information would otherwise be privileged or protected as work product. In an abundance of caution, employers should have the interviews conducted with no expectation of privilege, although the interviewees should nonetheless be asked to maintain confidentiality.

In some cases, the attorney and the company may decide to try to keep the entire investigation privileged, but by doing so, the company may have to waive its *Faragher/Elleerth* defense. This is a heavy price to pay and should be given careful consideration in advance. The attorney and client should decide at the beginning of the investigation whether they will seek to protect the investigation, and some document should be generated stating the basis for such a privileged investigation. For the attorney-client privilege to apply to an investigation, whether conducted by an in-house attorney or outside counsel, the corporation must consult with an investigating attorney in his or her professional capacity. Additionally, the attorney must be authorized by management to inquire into the subject under investigation, and must seek information to assist in: 1) evaluating whether an employee’s conduct has bound or would bind the corporation; 2) assessing the legal consequences, if any, of an employee’s conduct; or 3) formulating appropriate responses to actions that

have been or may be taken by others with regard to that conduct.<sup>13</sup>

Another consideration is the possibility that an attorney conducting the investigation may be disqualified from later representing that employer in the course of the litigation. According to the ABA Model Rules of Professional Conduct, an attorney is prohibited from accepting employment in contemplated or pending litigation when it is obvious that he or she will be called as a witness in the case.<sup>14</sup> This requirement does not apply where the testimony will relate solely to an uncontested or formal matter, or where there is no reason to believe disqualification would work a “substantial hardship” on the client.

### Conducting a Prompt Investigation

Regardless of who is chosen to conduct an investigation, an investigation is effective only if performed promptly.<sup>15</sup> The time between the first reported incident of harassment and the time it takes the employer to respond is critical, and failing to promptly address an employee complaint may create the very lawsuit an investigation is designed to prevent. This is particularly true in harassment cases where an essential element of the case is whether and when the employer investigated the complaint. Indeed, courts have acknowledged that employers who have immediately taken effective remedial action when confronted with a problem should not be liable. For example, in *Walton v. Johnson & Johnson Services, Inc.*,<sup>16</sup> an employee first contacted human resources regarding a complaint on September 3. By September 13, the employer’s investigators had met with the complainant and had also met with and suspended the accused. The court held that such remedial measures were timely and reasonably designed to

stop the harassment as required to assert the *Faragher/Elleerth* affirmative defense.

Timeliness involves not only making sure the investigation begins promptly after the issues were made known, but also the time it takes to complete an investigation from start to finish.<sup>17</sup> Timeliness is essential to obtain accurate and relevant data while memories are fresh and information is most likely to be available. While start times can be affected by practical considerations that will vary from one case to the next, it is safe to assume that an employer should be able to show a legitimate reason for any delay.

With respect to the duration of an investigation, lengthy investigations may raise questions about an employer’s priority in addressing its employees’ complaints and immediately stopping any harassment. On the other hand, very brief investigations may imply that the employer has more interest in placating the complainant and limiting liability than adequate fact-finding and resolution. Either implication could lead to a determination that the employer’s efforts were inadequate. Therefore, the employer must keep this in mind and select an investigator who is available to begin the investigation within a reasonable amount of time. If an internal investigator is preoccupied with other company-related matters, it may be beneficial to use a third party to complete the investigation in a timely manner.

### Conclusion

Although some employers may have a practice of automatically selecting either outside investigators or in-house personnel to conduct their investigations, several factors illustrate that this should be a calculated decision made on a case-by-case basis. Planning in advance may help

an employer avoid some of the possible issues, such as compliance with the FACT Act and issues of attorney disqualification. Ultimately, while there are many scenarios in which an investigation may be completed as effectively by an in-house investigator or an external investigator, the employer should weigh all relevant factors before making a selection for this important decision.

### Endnotes

1. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Part V(C)(i)(e).
2. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).
3. 214 F.3d 999, 1007 (8th Cir. 2000).
4. 139 F.Supp.2d 624, 632 (M.D. Pa. 2001).
5. 15 U.S.C. § 1681(a).
6. A consumer report includes any communication of any information by a consumer reporting agency bearing on a consumer’s character, reputation, or personal characteristics. 15 U.S.C. § 1681(a)(d)(1).
7. 15 U.S.C. § 1681(a).
8. 15 U.S.C. § 1681(a)(x)(1).
9. *Upjohn Co. v. U. S.*, 449 U.S. 383 (1981); *In re Copper Mkt. Antitrust Litig.*, 200 FR.D. 213, 217 (S.D.N.Y. 2001).
10. *See Pray v. N.Y. City Ballet Co.*, 1998 WL 558796 (S.D.N.Y. Feb. 13, 1998).
11. *Brownell v. Roadway Package Sys., Inc.*, 185 FR.D. 19, 25 (N.D.N.Y. 1999).
12. 204 FR.D. 240, 248 (E.D.N.Y. 2001).
13. *NXIVM Corp. v. O’Hara*, 241 FR.D. 109, 126 (N.D.N.Y. 2007).
14. MODEL RULES OF PROF’L CONDUCT R. 3.7.
15. *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 954 (7th Cir. 2005).
16. 347 F.3d 1272, 1288 (11th Cir. 2003), cert. denied, 541 U.S. 959 (2004).
17. *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993).

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