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Employment Law in a Changing Workplace

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Employment Law in a
Changing Workplace

First Yudowitz Lecture
by James Garbarino

Lucie White on Race,
Memory, and Emancipation

Cornell Law Forum



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**Employment Law
in a Changing Workplace** 1
Katherine V. W. Stone

**Paul Szasz: A Life in
International Law** 7
Jim Benning

News 11

- Garbarino on "Lost Boys" 11
- White Gives Stevens Lecture 11
- Symposium on the Regulatory State 12
- The U.N.'s Global Compact 14
- New Youth Law Clinic 17
- Alumni/ae Shadow Program 18
- "Women on the Walls" Project 21
- Dean Forrester, 1911–2001 21

Faculty 25

Profiles 36

- Michael R. Galligan '01 36
- Gitanjali S. Gutierrez '01 37
- Jack Lewis '69 38
- Diana C. Liu '86 39

Alumni 41

- Lee '76 Addresses Alumni in NYC 41
- Class Notes 42



Law school degree candidates entering Schoellkopf field for the graduation ceremonies

Cover: *Professor Martin in May at a Tokyo alumni reception hosted by Shinya Watanabe, LL.M. '84, a member of the Law School Advisory Council (standing, far right). Almost a third of the law school's alumni living in Japan attended. Professor Martin spoke at a symposium on the social importance of public access to legal information.*

Employment Law in a Changing Workplace

Katherine V. W. Stone

Editor's note: This article is an abbreviated version of an article titled "The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law" that appeared in the UCLA Law Review (2001). For present purposes, most footnotes have been omitted.

In January 2000 the London underground trains carried an advertisement that captured the ambiguity in the employment contract at the turn of the millennium. The ad, for a leading employment agency, pictured a rumpled T-shirt on which appeared "I'm only here for the beer money." Next to the shirt was the following text:

Are you putting in effort or just hours? There's nothing wrong with being in it for the money so long as there's something in it for your employer. Commitment has nothing to do with the hours you work and everything to do with your attitude. Want to work 3 days a week? Go ahead. Fancy 6 months off? It's your life. It ain't what you do, it's the way that you do it. . . . Whatever you want to do, we'll help you make a career of it.

While the ad gives its blessing to the what-me-worry, airhead type of worker, it also speaks of mutual obligations between employer and employee. It says there's nothing wrong with remaining uninvolved *so long as there's something in it for your employer*. Therein

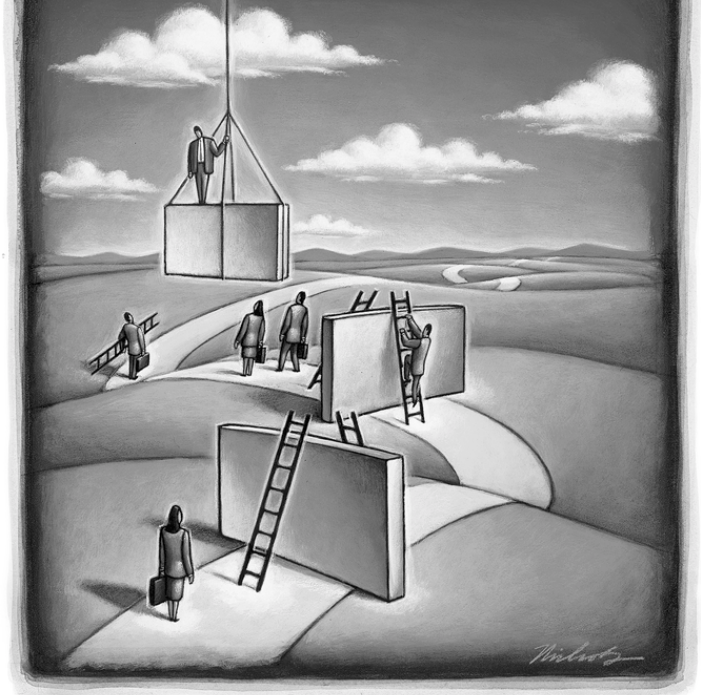
lies the irony. How can this three-days-a-week, six-months-off-at-a-time, beer-drinking, daydreaming employee have something to offer an employer? Clearly, the mutual expectations of the employment relationship have changed profoundly.

The Way It Used to Be

Roughly a hundred years ago the employment relationship underwent a transformation that persisted throughout most of the twentieth century. On the basis of the scientific management theories of Frederick Winslow Taylor, most large corporations organized their workforces into job structures now termed internal labor markets. Jobs were arranged in hierarchical ladders, each job providing the training for the job on the next rung up. Employers hired only

Clearly, the mutual expectations of the employment relationship have changed profoundly.

at the entry level and filled higher rungs by promoting internally. Pursuant to Taylorism, management reduced the skill level of jobs—"de-skilling"—while encouraging employee loyalty through promotion and retention policies, seniority arrangements, elaborate welfare schemes, and longevity-linked benefits. To encourage employees to stay a long time, employers implicitly promised long-term employment and predictable patterns of promotion.



Sometime in the 1970s employment practices began to change. Some employers began to use contingent workers and subcontractors to perform basic tasks such as maintenance and repairs. Many large corporations began to repudiate implicit contracts for lifetime employment. Thus work has become contingent, not only for short-term employees but for regular employees as well.

The New Psychological Contract

The new employment relationship is often described by management theorists and scholars as a new psychological contract. The term *psychological contract* refers to a person's *beliefs* about the terms of the employment contract. It is a subjective concept, expressing a belief in the existence of a bilateral relationship. The belief in the contract's reciprocity, its mutual obligation, distinguishes a psychological contract from mere expectations, which reflect the employee's hopes. When expectations are not met, an employee is disappointed; when a psychological contract is breached, the employee feels wronged.

In recent years scholars and practitioners have reported profound changes in the terms of the psychological contract from both the employer's and the employee's perspective. For example, Peter Drucker writes, "There is no such thing as 'lifetime employment' anymore—such as was the rule in big U.S. or European companies only a few years ago."¹

In the new employment relationship careers do not proceed along a hierarchical progression. Instead they are "boundaryless." A boundaryless career is one that does not depend on advancement within a single hierarchical organization. It has been defined as "a career that unfolds unconstrained by clear boundaries around job activities, by fixed sequences of such activities, or by attachment to one organization."²

People with such careers include employees who move frequently across the borders of different employers, such as Silicon Valley technicians, and those

whose careers draw their validation and marketability from sources outside the present employer, like professional and extraorganizational networks. The term also refers to changes within organizations, in which employees are expected to move laterally, without constraint of the traditional hierarchy.

The advent of boundaryless careers reflects the change in job structures away from internal labor markets. Instead of job ladders in long-term employment settings, there are possibilities for lateral mobility between and within firms, with no set path, no established expectations, and no tacit promises of job security.

The new employment relationship raises problems of motivation, commitment, and morale. In the past, internal labor markets provided motivation, encouraged skill acquisition, and discouraged resistance. Today management's concern for motivation and commitment is more acute than ever. Firms can no longer succeed with merely predictable and excellent

A boundaryless career is one that does not depend on advancement within a single hierarchical organization.

performance; instead they need a commitment of the employee's imagination, energies, and intelligence on behalf of the firm. They want employees to innovate, pitch in, have an entrepreneurial attitude toward their jobs, and behave like owners. They want to elicit what researchers call organizational citizenship behavior—behavior that goes beyond the requirements of specific role definitions.

Researchers have found that the presence of organizational citizenship behavior is highly correlated with profitability and organizational effectiveness. Much of current human resource policy is designed to encourage that type of commitment without promising job security. The goal of today's management is, in the words of one management consultant, to engender "commitment without loyalty."

Converting Theory into Practice

The new psychological contract embodies a new set of expectations that managers impart to their employees—expectations not of job security and continuous promotion but of something else (see sidebar). Rosabeth Moss Kanter, for example, advocates that firms offer employees “employability security” instead of employment security. She says firms should provide training and retraining opportunities. This expresses one aspect of the new employment relationship, that employers should enable employees to develop their human capital. In return, employees will see themselves as entrepreneurs marketing their own human capital in a marketplace.

The new employment relationship involves compensation systems that peg salaries and wages to market rates rather than internal institutional factors. Differential pay reflects differential talents and contributions. Thus the consulting firm Towers Perrin urges its clients to “reward results, not tenure, even at the hourly level.” It also advocates “significantly disproportionate share of all pay programs for high-performing employees,” and “differen[t] deals based on employee contribution.”

Another feature of the new psychological contract is the flattening of hierarchy. Janice Klein, a former General Electric executive, now MIT Sloan School professor, urges employers to find means to “convince employees that they are in the same boat.” She advocates eliminating executive dining rooms, manager parking spaces, and other status-linked perks.

Implications for Labor and Employment Regulation

The new employment relationship has many implications for labor and employment law. The present law assumes stable workforces, a strong attachment between firm and worker, long-term jobs, and promotion ladders. For example, the collective-bargaining laws were designed to promote the self-organization of workers as a countervailing power that could bargain with employers about the operation of

internal labor markets. Negotiated agreements contained seniority and just-cause-for-discharge clauses that enabled unions to enforce promises of lifetime employment security.

The change in the workplace requires us to reassess many aspects of labor and employment law. For example, in the law of individual employment contracts, we must shift focus from the at-will contract and its exceptions to post-employment restrictions such as restrictive covenants.

Comparison of Employment Relationships

<i>Old employment relationship</i>	<i>New employment relationship</i>
Job security	Employability security
Firm-specific training	General training
De-skilling	Upskilling
Promotion opportunities	Networking opportunities
Command supervision	Microlevel job control
Longevity-linked pay and benefits	Market-based pay
Collective bargaining and arbitration for collective disputes	ADR procedures to resolve individual microdisputes

The new workplace has also changed the nature of employment discrimination. Whereas in the past discrimination often took the form of keeping women and minorities out of internal labor markets or confining them to the lower rungs of the job ladders, discrimination today has subtler forms of exclusion.

In addition, in the old regulatory system, employment-based social insurance provided health insurance, old-age assistance, workers’ compensation, and unemployment insurance to those employed in the primary sector. The new system threatens to undermine those features of the private welfare state. With boundaryless careers, each time workers move across the boundary from one employer to another, they will lose their health insurance, long-term disability insurance, and unvested pension benefits.

Moreover, the new workplace is arising at a time when income distribution is becoming ever more unequal. The impact of the new psychological contract and other new work practices on income distribution needs to be addressed.

Employment Discrimination in the New Workplace

Much of the civil rights legislation and enforcement efforts of the past three decades has been directed toward eliminating employment discrimination. Historically, employment discrimination has taken the form not merely of differential pay for men and women or blacks and whites who perform similar work but, more significantly, of job segregation along gender and race lines. The jobs filled primarily by women or minorities have had lower pay, fewer benefits, and lower status.

Title VII enforcement was initially directed at corporate hiring and compensation to provide equal pay and equal access to jobs for women and minority members. But it quickly became apparent that women and minority members needed not simply jobs but jobs in the primary sector that offered promotional opportunities, training, job security, and benefits—jobs organized as internal labor markets. Hence title VII remedies included affirmative action to help women and minority members advance.

As a result of title VII, in the 1970s and '80s employment patterns began to change. The equal employment opportunity laws forced many firms to hire women and blacks for previously all-male, all-white jobs. But women and minority members continued to be disadvantaged in major corporations. Because jobs were hierarchical, latecomers came in at the bottom and had the farthest to rise. Also, they were the first to be laid off in times of cutbacks.



The Dynamics of Discrimination in the Boundaryless Workplace

Because many aspects of employment discrimination were perpetuated by the old employment system, the new workplace, with its de-emphasis of long-term employment and rejection of job ladders, offers new opportunities for women and minority members. However, for women and minority members to enjoy equal opportunity in the new workplace, several issues must be addressed.

The problem of training. Success under the new psychological contract requires employees to manage their own careers and constantly develop new skills. Workers can succeed only if they have an opportunity to develop such skills. Yet recent studies indicate that women do not partake equally of employer-sponsored training programs.

When the training is offered after hours, the time squeeze resulting from family obligations can explain women's nonparticipation. But when training is offered during the workday, women are still not taking as much advantage as men. It is important to identify the gender differences in willingness to engage in training and the aspects of employer training that discourage female participation. It is also important to determine whether there are differences in the propensity of various minority groups to take advantage

of employer-sponsored training. Publicly funded programs in skill development and lifelong learning are necessary if traditionally excluded groups are to succeed in the workplace.

The problem of invisible authority. The diffuse authority in the new employment relationship makes it hard to isolate discrimination and assess blame. While all employees can ostensibly increase their responsibilities by making lateral movements, a hidden core of top managers, or decision makers, allocates responsibilities and rewards. As the decision makers have no clear designation or location on the organizational chart, their decisions are to a great extent unaccountable. It is difficult to know to whom to make appeals, with whom to lodge complaints, or how to get access to the centers of power.

Sociologists of organizations note that when there is no visible power structure, the invisible structures rule. The secret power structures in the new workplace may well turn out to be more impenetrable for women and minority members than the old ones. Decrees requiring employers to move women and minority members up job ladders are no longer possible, and new theories of liability and new remedies must be designed.

The problem of cliques. A related problem is the trend of delegating major employment decisions to peers. Sociologists have focused on the role of networks in perpetuating sex and race segregation in employment. They have observed that workplaces are social organizations; people interact with each other to learn the tricks of the trade, share information, assist in tasks, and coordinate performance. Resistance from incumbent white males makes it difficult for employers to incorporate women and minorities in cooperative activities.

Many first-person accounts attest to the power of workplace cliques to exclude, disempower, demoralize, and otherwise disable those targeted for exclusion. Cliques use ostracism, belittlement, verbal harassment, innuendo, nefarious gossip, and shunning—tools that defy efforts to identify or remedy. And

often the targets are newcomers, atypical employees, and those who are not part of the old crowd; that is, women and minority members.

The new workplace exacerbates the age-old problem of cliques because it empowers peer-based decision making. Organizational theorists have advocated the use of peers to decide important issues such as hiring, evaluation, job allocation, and pay and to resolve disputes. While peer-based decision making may work well in some situations, it can also promote cliquishness and lead to patronage systems, bigotry, and corruption. In such a workplace women and minority members can again find themselves excluded.

Proposals for Redressing Discrimination

The types of employment discrimination that appear in the new workplace are not easily treated with the existing title VII framework. Currently title VII is directed at harm caused by employers or their agents and assumes a hierarchical authority structure. But one of the most serious forms of discrimination in the new workplace is the result of *co-worker* conduct, not supervisor conduct. Title VII only reaches co-worker harassment when the employer knew or should have known of the harassing conduct and failed to take

The diffuse authority in the new psychological contract makes it hard to isolate discrimination and assess blame.

adequate remedial measures. That is because the law prohibits those who have authority in the employment relationship from exercising their power in a discriminatory fashion. It is not a generalized code of workplace civility.

I propose that we combine new concepts of substantive liability with new procedures and remedies. For example, Vicki Schultz has focused on workplace cliques and harassing supervisors that sabotage

the efforts of female and minority workers. She advocates that sexual harassment be reconceived as “conduct designed to undermine a woman’s competence.” She proposes that any action by an employer or its agent that deliberately undermines the competency of a person because of gender be actionable under title VII.³

I propose that courts promote a system of workplace-specific alternative dispute resolution that would use neutral outsiders to scrutinize workplace conduct and apply equal-opportunity norms to worker-co-worker as well as worker-supervisor complaints. Such a system would have to use external decision makers in order to inject an external standard of fairness that could transcend the rule of the clique. If properly structured, internal dispute resolution systems could help counteract the development of workplace fiefdoms and cliques, redress abuses of hidden authority, and bring external norms to the workplace.

The Supreme Court recently gave an impetus to the development of such systems in *Farragher v. City of Boca Raton*⁴ and *Burlington Industries v. Ellreth*.⁵ The Court held that employers can avoid liability for sexual harassment if they have internal procedures to deal with harassment claims and if employees unreasonably fail to use them. Those decisions encourage employers to develop meaningful procedures to address harassment complaints against supervisors. The Court could extend the reasoning to co-worker claims, thereby giving employers a powerful incentive to develop neutral dispute resolution mechanisms for those new types of discrimination claims.

While the use of internal dispute resolution procedures for employment discrimination complaints is growing, the systems are often biased toward employers and serve to evade external norms. Under current interpretations of the Federal Arbitration Act, arbitral awards receive virtually no judicial review.

However, properly structured internal dispute resolution systems could address the subtle but powerful forms of discrimination in today’s boundaryless

If properly structured, internal dispute resolution systems could help counteract the development of workplace fiefdoms and cliques and bring external norms to the workplace.

workplaces. The legal framework governing employment arbitration would have to be revised to permit de novo judicial review of issues of law, to require neutral arbitrators, and to impose minimal standards of due process in the arbitrations themselves.⁶

The foregoing proposal provides a new mechanism for resolving discrimination disputes. It would enable the new workplace to thrive without the sabotage, bullying, shunning, harassing, and other forms of conduct that undermine the employment prospects of women and minority members.

Conclusion

The new boundaryless workplace renders many features of current labor and employment laws obsolete. I hope that the preceding analysis and proposals will make it possible to begin to imagine a new legal framework that can promote justice, equality, dignity, and fairness in the emerging workplace. Once such a framework exists in the imagination, it can be constructed in the real world.

1. Peter F. Drucker, *Managing in a Time of Great Change* 71 (1995).

2. Anne S. Miner and David F. Robinson, “Organizational and Population Level Learning as Engines for Career Transitions,” 15 *J. Org. Behav.* 345, 347 (1994).

3. Vicki Schultz, “Reconceptualizing Sexual Harassment,” 107 *Yale L.J.* 1683 (1998).

4. 524 U.S. 775 (1998).

5. 524 U.S. 742 (1998).

6. Katherine V. W. Stone, “Rustic Justice: Community and Coercion under the Federal Arbitration Act,” 77 *N. Carolina L. Rev.* 931 (1999).



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