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Employment Law

Office of Continuing Legal Education at the University of Kentucky College of Law

Matthew R. Westfall
Westfall, Talbott & Woods

Alvin L. Goldman
University of Kentucky College of Law, algold00@uky.edu

Jon L. Fleishaker
Wyatt, Tarrant and Combs

Carl B. Boyd Jr.
Sheffer, Hoffman, Neel, Wilson and Thomason

See next page for additional authors

Authors
Office of Continuing Legal Education at the University of Kentucky College of Law, Matthew R. Westfall, Alvin L. Goldman, Jon L. Fleishaker, Carl B. Boyd Jr., Marvin L. Coan, Carolyn S. Bratt, Michael W. Hawkins, Richard C. Stephenson, Dorothy M. Pitt, Paul H. Tobias, and Judith B. Hoge

UK CLE

EMPLOYMENT LAW

JANUARY 22-23, 1988

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Presented by the
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Suite 260 Law Building
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(606) 257-2921

The University of Kentucky, College of Law, Office of Continuing Legal Education, was organized in Fall of 1973, as the first permanently staffed, full-time continuing legal education program in the Commonwealth of Kentucky. It endures with the threefold purpose of assisting Kentucky lawyers: to keep abreast of changes in the law resulting from statutory enactments, court decisions and administrative rulings; to develop and sustain practical lawyering and litigation skills; and to maintain a high degree of professional competence in the various areas of the practice of law.

An enormous debt of gratitude is owed to those who contribute their time, expertise and practical insight for the advance planning, the instructional presentations, and the written materials that make our seminars possible.

The Office of Continuing Legal Education welcomes correspondence and comment regarding our overall curriculum, as well as our individual seminars and publications. We hope the seminars and the materials distributed in conjunction with them provide attorneys with the invaluable substantive and practical information necessary to resolve society's increasingly complex legal problems in an efficient and effective manner. To the extent that we accomplish this, we accomplish our goal.

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PROGRAM

PROGRAM PLANNING CHAIR AND MODERATOR: Richard C. Stephenson
Stoll, Keenon and Park, Lexington, Kentucky

FRIDAY, JANUARY 22, 1988

8:00 a.m. **Late Registration,** Courtroom, College of Law — Coffee and Donuts

8:55 a.m. **Welcome,** Todd B. Eberle, Associate Dean and Director of Continuing Legal Education, University of Kentucky College of Law

9:00 a.m. **COLLECTIVE BARGAINING/NLRB REVIEW AND UPDATE**
Alvin L. Goldman
Professor of Law
University of Kentucky College of Law
Lexington, KY

9:50 a.m. **HANDLING STATE AND FEDERAL WAGE AND HOUR CLAIMS**
Matthew R. Westfall
Westfall, Talbott & Woods
Louisville, KY

10:40 a.m BREAK

10:55 a.m. **WRONGFUL DISCHARGE/UNJUST DISMISSAL/EMPLOYMENT AT WILL: Developments in National and Kentucky Law**
Jon L. Fleischaker
Wyatt, Tarrant & Combs
Louisville, KY

12:00 noon LUNCH

1:30 p.m. **EMPLOYMENT DISCRIMINATION PROCEEDINGS BEFORE STATE AND LOCAL HUMAN RIGHTS COMMISSIONS IN KENTUCKY**
Carl B. Boyd, Jr.
Sheffer, Hoffman, Neel, Wilson & Thomason
Henderson, KY

2:20 p.m. **TITLE VII UPDATE — SUBSTANTIVE AND PROCEDURAL**
Carolyn Schmoll Bratt
Professor of Law
University of Kentucky College of Law
Lexington, KY

3:10 p.m. BREAK

3:25 p.m. **AGE BASED DISCRIMINATION**
Marvin L. Coan
Hummel & Coan
Louisville, KY

4:10 p.m. **THE IMMIGRATION REFORM AND CONTROL ACT OF 1986: Impact on Kentucky Employers**
Michael W. Hawkins
Dinsmore and Shohl
Cincinnati, OH

5:00 p.m. RECESS

5:30- 7:00 p.m. RECEPTION
Drinks, Hors D'Oeuvres, Conversation and War Stories

Sponsored by: Stoll, Keenon & Park and Wyatt, Tarrant & Combs
University of Kentucky Faculty Club
510 Rose Street
Lexington, KY

SATURDAY, JANUARY 23, 1988

9:00 a.m. **DRUGS AND ALCOHOL IN THE WORKPLACE: Policies and Testing Aspects**
Richard C. Stephenson
Stoll, Keenon and Park
Lexington, KY

9:50 a.m. **INTER-EMPLOYEE PROBLEMS OF THE WORKPLACE: AIDS, Communicable Diseases, Smoking, and Other Environmental Concerns**
Dorothy M. Pitt
Louisville, KY

10:40 a.m. BREAK

10:50 a.m. **LITIGATING THE EMPLOYMENT CASE**
Paul H. Tobias
Tobias & Kraus
Cincinnati, OH

12:00 noon ADJOURN

COLLECTIVE BARGAINING AND THE NLRA

Review and Update

Alvin L. Goldman
Professor of Law
University of Kentucky College of Law
Lexington, Kentucky

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COLLECTIVE BARGAINING AND THE NLRA
Review and Up-date

ALVIN L. GOLDMAN
Professor, U.K. College of Law

I. Statutory Backdrop

A. Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act (NLRA) respectively require employers and unions to negotiate in good faith. Breach of this duty is an unfair labor practice subject to injunctive and restitutional type remedies.

B. The duty to bargain in good faith as defined in NLRA §8(d) has procedural and substantive dimensions.

II. Procedural Requirements of Good Faith Bargaining

A. Notice requirements

1. Sixty day written notice to other side of proposed termination or modification. (90 day period in health care industry.) Time period is based on the time of the proposal or the expiration of the collective agreement, whichever is later.

2. Within thirty days thereafter notice to FMCS and State mediation agency. (60 day period in health care industry.)

3. Notice requirements do not apply to first contracts except for health care institutions where 30 day notice must be given to FMCS and state mediation agency regarding such contracts.

4. Cannot resort to unilateral changes or work stoppage until notice requirements are satisfied. (In health care industry, per §8(g), cannot resort to picketing or strike unless at least 10 dys written notice is also given to the employer and FMCS stating the date and time such action will begin.) In essence this is a statutory no work stoppage provision.

The duty to notify the FMCS and any state agency is upon the party that gave the sixty day notice. Failure of the initiating party to notify the FMCS does not preclude the other side from proceeding as though the statutory notice has been satisfied. United Artists Commun., 274 NLRB 75 (1985)(Upon

impasse, not a ulp for employer to implement its most recent proposal where union had failed to notify the FMCS that the cba was being renegotiated.)

5. Special rules for those construction industry contracts that were negotiated when the union did not represent a majority of bargaining unit workers.

A construction industry employer that enters into a prehire agreement with a union has a duty to bargain respecting the administration of that agreement unless the majority of employees, in an NLRB election, vote against continued representation by that union. John Deklewa & Sons, 282 NLRB No. 184 (1987).

B. Must meet with the other side at reasonable times.

However, duty is not violated if one leaves a meeting, in response to abusive language, or if one insists on a recess in order to deliberate and put proposals into writing. Embossing Printers, 268 NLRB 710 (1984).

C. Cannot by-pass or denigrate other side's bargaining agent.

J.P. Stevens & Co. v. NLRB, 623 F.2d 322 (4th Cir. 1980).

D. Must be reasonably prompt in responding to demands for relevant information; any delays must be justified.

Financial Inst. Employees of America v. NLRB, 738 F.2d 1038 (9th Cir. 1984).

E. Must commit the agreement to writing upon other side's request.

III. Substantive Requirement of Good Faith Bargaining

A. Not required to make concessions.

Seattle-First Nat'l Bank v. NLRB, 638 F.2d 1221, 1226 n.7 (9th Cir. 1981) (bad faith cannot be inferred solely from the content of lawful proposals). Compare, J.P. Stevens & Co. v. NLRB, 623 F.2d 322 (4th Cir. 1980) ("adament adherence" to unreasonable positions can be used as corroborative evidence to show bad faith). See, also, part E(1), p. 5.

B. Mandatory subjects of bargaining (notice requirements apply; can insist on position to impasse; cannot unilaterally change until bargain to impasse).

1. Can waive the duty to bargain by expressly dealing with the subject in a collective agreement or by foreclosing further bargaining by means of a Management Rights provision and a Zipper provision.

   Emery Indus., 268 NLRB 824 (1984)(union waived right to bargain about new absentee policy where employer frequently changed policies in past without union objection and where collective agreement reserved employer's right to discipline for neglect of duty)

   American Oil Co. v. NLRB, 602 F.2d 184 (8th Cir. 1979)(provision calling for posting of work schedules did not waive union's right to bargain over employer's authority to modify those schedules, especially where there was a history of such consultation).

2. Questions arising under collectively bargained agreements. (Grievance-arbitration process)

3. Questions concerning wages, hours and other terms and conditions of employment.

   a. Decisions that result in the loss of bargaining unit work--or, the new runaway shop cases.

      First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

      "[B]argaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."

      NLRB requires bargaining if the employer's decision turns on labor costs. [Known as the Otis II standard, based on the Board's plurality decision in Otis Elevator Co., 269 NLRB 891 (1984).] See also, Arrow Automotive Indus., Inc., 284 NLRB No. 57 (1987); Litton Microwave Prods., 283 NLRB No. 144 (1987) (waiver of duty not inferred from general management's prerogatives and zipper provisions); Kroger Co., 273 NLRB No. 70 (1984)(no duty to bargain about decision to buy eggs from processors rather than continue own processing where the decision was based on lack of adequate egg supply)

      Steelworkers Local 2179 v. NLRB, 822 F.2d 559

(5th Cir. 1987) approved the Board's Otis II test.

b. Must bargain about the impact of losses of bargaining unit work even if the decision was not bargainable.

First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) ("bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaning time"); Signal Commun., Inc., 284 NLRB No. 54 (1987) (must give union advance notice of decision to shut down so that it will have a meaningful opportunity to bargain over effects)

c. Other subjects

Duty to bargain violated by employer's unilateral elimination of Christmas bonus given customarily and based on formula for determining amount. Woonsocket Spinning Co., 252 NLRB 1232 (1980)

Expiration of collective agreement does not excuse unilateral termination of medical insurance, retirement contributions or severence payments. Taurus Waste Disposal, Inc., 263 NLRB 309 (1982)

Hiring hall arrangement is mandatory subject of bargaining. NLRB v. Southwest Security Equip. Corp., 736 F.2d 1332 (9th Cir. 1984), cert. denied 470 U.S. 1087 (1985)

Reimbursement of employees for wages and expenses while serving on bargaining committee is a mandatory bargaining topic. Midstate Tel. Corp. v. NLRB, 706 F.2d 401 (2d Cir. 1983)

Although a "most favored nation provision" (contract will be modified to give employer any advantages later negotiated with competitors) is a mandatory subject of bargaining [Dolly Madison Indus., Inc., 182 NLRB 1037 (1970)], it was an unfair labor practice for a company to insist on a provision prohibiting the union from negotiating with other employers terms that conflict with the parties' collective agreement. Associated General Contractors v. NLRB, 637 F.2d 556 (8th Cir. 1980).

Decision to layoff is a mandatory bargaining topic. NLRB v. Sandpiper Conv. Ctr., 107 CCH Lab. 10,107 (4th Cir. 1987)

Although cafeteria prices are a mandatory bargaining topic, an employer may put a price change into

effect prior to negotiating regarding the change. Dupont, 269 NLRB 24 (1984)

Mere rejection of proposals does not constitute bargaining impasse. Impasse is when further bargaining would be futile. Good GMC, Inc., 267 NLRB 583 (1983)

C. Permissive subjects of bargaining (notice requirements don't apply; cannot insist on position to point of impasse; can unilaterally change at any time).

A provision for resolving future bargaining impasses through interest arbitration is a permissive subject. Sheet Metal Workers v. Aldrich Air Cond., Inc., 717 F.2d 456 (8th Cir. 1983)

Contributions to industry promotion fund is permissive subject. McDonald v. Hamilton Elec., Inc., 666 F.2d 509 (11th Cir. 1982)

D. Unfair labor practice to demand unlawful provision (e.g., provision that violates NLRA or other federal law).

E. Bargaining table conduct.

1. Must make a bona fide effort to reach agreement.

Duty to bargain arises beginning on the date of the NLRB election. NLRB v. Sandpiper Conv. Ctr., 107 CCH LC 10,107 (4th Cir. 1987)

Employer violated duty of good faith bargaining where it insisted on provisions that would leave it with unilateral control over virtually all terms and conditions of employment. NLRB v. A-1 King Size Sandwiches, 101 CCH LC 11,050 (11th Cir. 1984)

Failure to make counter-proposals can be used as evidence of lack of good faith. Taurus Waste Disposal, Inc., 263 NLRB 309 (1982)

Insisting on rollbacks in benefits during negotiations for first contract is evidence of bad faith bargaining. Palestine Bottling Co., 269 NLRB 639 (1984)

Withdrawal of pre-strike offer does not violate duty to bargain in good faith where strike altered the bargaining strength. Times-Herald, Inc., 249 NLRB 13 (1980); Barry-Wehmiller Co., 271 NLRB 471 (1984)

2. Verbatum records.

Cannot insist to impasse upon recording negotiating sessions NLRB v. Bartlett-Collins Co., 639 F.2d 652 (10th Cir. 1981), cert. denied 452 U.S. 961. Accord re verbatim tape recording of grievance meetings. NLRB v. Pennsylvania Tel. Guild, 104 CCH LC 11,940 (3d Cir. 1986).

3. Requests for information.

Parties must comply with requests for information that is relevant and useful to carrying out the representational function. Probable or potential relevance is sufficient to require production of the information. Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979); NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).

Information must be supplied if needed for "intelligent representation". This includes employee medical histories and lists of chemicals to which employees are exposed. The Board may require reasonable efforts to protect trade secrets respecting such information. Moreover, the division of cost of providing information a subject of bargaining. Oil, Chem. & Atomic Workers v. NLRB, 711 F.2d 348 (D.C. Cir. 1983); Kelly-Springfield Tire Co., 266 NLRB 587 (1983).

Union is entitled to wage information regarding non-bargaining unit workers if their skills are similar to those of bargaining unit members. NLRB v. Brazos Elec. Power Co-op., 615 F.2d 1100 (5th Cir. 1980)

When an employer pleads inability to pay, it must supply requested corroborating financial information. Mashkin Freight Lines, inc., 272 NLRB 427 (1984)

Employer cannot condition providing wage rate information upon receiving employee authorization. Keco Indus., 271 NLRB 634 (1984)

Fact that union has alternative sources for obtaining information does not excuse employer's duty to comply with request. Jolie Belts Co., 265 NLRB 1130 (1982)

PRACTICING A WAGE-HOUR CLAIM

Matthew R. Westfall
Westfall, Talbott and Woods
Louisville, Kentucky

PRACTICING A WAGE-HOUR CLAIM

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PRACTICING A WAGE-HOUR CLAIM

Matthew R. Westfall
Westfall, Talbott & Woods*

I. FEDERAL LAW

A. Fair Labor Standards Act. The FLSA is the major federal wage hour law. In general, it regulates four areas: minimum wages, equal pay, overtime and child labor standards.

1. Coverage. Employees covered by the FLSA, other than those specifically exempted, include those:

a. engaged in interstate commerce;

b. engaged in the production of goods for commerce;

c. employed in "an enterprise engaged in commerce or the production of goods for commerce."

2. Requirements Of FLSA

a. Minimum Wages: As of January 1, 1981, the minimum wage is $3.35 per hour. Under the Minimum Wage Restoration Act, House Bill No. 1834, the minimum wage will be raised to $4.65 an hour over a three year period. The bill will not go to the House Floor for a vote until late Spring, 1988.

b. Minors: If minors are employed, they must be above 18 years in age in hazardous occupations and above 16 or 14 in all others.

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* Tony C. Coleman assisted in the preparation of this outline. He is an associate at Westfall, Talbott & Woods.

c. Overtime: An employee is entitled to be paid 1 1/2 times his regular rate for all hours worked in excess of 40 in a week. There are certain exemptions provided by the Act from the overtime pay requirements. They are discussed below.

d. Equal Pay: The Act requires that male and female workers receive equal pay for work requiring equal skill, effort, and responsibility, and performed under similar working conditions.

3. Enforcement. Two entities of the Department of Labor share responsibility for administering and enforcing the FLSA. The Wage and Hour Division of the Employment Standards Administration is responsible for investigations of alleged violations. If the Wage and Hour Division finds a violation, the Solicitor of Labor is the branch responsible for initiating legal action against the employer. The following are the possible means by which the FLSA can be enforced:

a. A suit in Federal Court by the Secretary of Labor to collect unpaid minimum wages and overtime pay due employees and an equal amount in liquidated damages. 29 U.S.C. Sec. 216(c).

b. A suit by the Secretary of Labor for an injunction to restrain an employer from violating the Act. Back wages due employees may be sought by the Secretary at the same time. 29 U.S.C. Sec. 217.

c. An action for criminal penalties brought by the Department of Justice is available. The action can be brought against any person who willfully violates any of the provisions in 29 U.S.C. Sec. 215. If convicted, the person is subject to a fine of not more than $10,000, imprisonment for not more than six months, or both. 29 U.S.C. Sec. 216(a). Imprisonment is reserved for persons twice convicted of willful violations.

d. Employees, either individually or as a class, may bring suit to recover any back wages due them under the Act, an equal additional amount as liquidated damages, and attorney fees and costs.

B. Davis-Bacon Act

1. Coverage: Covers mechanics and laborers engaged in construction of public buildings or public works whose specifications require an expenditure of more than $2,000.00. The Act also applies to certain other federal laws, such as the Federal Aid Highway Act and the Area Redevelopment Act.

2. Requirements: Payment of minimum wages as established by the Secretary of Labor.

3. Enforcement: The Comptroller General is authorized to withhold payments to the contractor if necessary to make good any underpayments to employees. In addition, if the amount withheld is insufficient to cover the back pay owing, the employee may bring an individual action against the contractor.

4. Penalties: The names of contractors who do not observe the requirements of the Act are placed on a list of contractors who are barred from receiving federal contracts, which is distributed to all departments of the government for a period of three years.

C. Walsh-Healy Public Contracts Act

1. Coverage: Employers who have contracted with a government agency to manufacture or supply articles in any amount exceeding $10,000. Only those employees engaged in producing or furnishing the contract articles are covered.

2. Requirements: The Walsh-Healy Act requires:

a. The payment of minimum wages as set by the Secretary of Labor;

b. The payment of 1 1/2 times the basic rate for hours worked in excess of eight a day or 40 a week, whichever provides the greater sum;

c. The maintenance of sanitary and non-hazardous working conditions and complete payroll records;

d. That any minors who are employed be over 16 years old.

3. Enforcement: The Secretary of Labor is authorized to investigate and decide cases involving alleged violations of the Act. Liquidated damages found due by the Secretary may be sued for by the government or withheld from the contractor's payments due under the contract with the government.

4. Penalties:

a. Employers are liable for any underpayments;

b. Violations of the child labor requirements may result in a fine of $10 for each day such a minor is employed; and,

c. Blacklisting for three years if the violations are found to be serious and willful.

II. STATE LAW

A. KRS Chapter 337. To an extent the provisions of KRS Chapter 337 are duplicative of federal laws and, thus, provide a cumulative remedy. There are, however, several requirements imposed by KRS 337 which have no federal parallel.

1. Payment of Wages:

a. Employers must pay its employees as often as semi-monthly all wages or salary earned. KRS 337.020.

b. If an employee works seven days in any one work week, he shall be paid at the rate of time and a half for the time worked on the seventh day. However, if the employee has not worked 40 hours during the work week, the premium payment is not applicable. KRS 337.050.

c. Employers cannot withhold from any employee any part of the wages agreed upon. This prohibition includes deductions for fines, cash shortages, breakage, losses from bad checks, or losses due to poor workmanship. There is an exemption from the statute for deductions authorized by federal or state law or if authorized by the employee in writing or by a collective bargaining agreement. KRS 337.060.

d. Employers cannot require an employee to remit to the employer any gratuity (i.e. any voluntary payment received by the employee from a customer), except for the purpose of withholding amounts required by federal or state law. KRS 337.065.

e. Any employer who has ten or more employees must provide employees with a statement specifying the amount and purpose of each deduction.

2. Minimum Wages:

a. In 1986, the minimum wage in Kentucky was raised to $3.35 an hour.

b. Any employee who works longer than 40 hours in any one week must be paid at a rate of not less than one and one-half the hourly wage rate at which he is employed. This provision provides certain exemptions and incorporates the exemptions provided by the FLSA. KRS 337.285.

c. KRS 337.320 requires employers to keep records of the amount paid each period to each employee and the hours worked each day and week by each employee. The records must be retained for at least one year. KRS 337.320.

d. KRS 337.340 gives the Commissioner of Labor authority to enter any place of employment and question employees as to wages paid or hours worked.

e. Under KRS 337.355, employers are required to grant their employees a reasonable period for lunch. In addition, the lunch period cannot be scheduled sooner than 3 hours after the work shift commences or more than 5 hours after the work shift commences. The statute, however, provides that any provision of a collective bargaining agreement to the contrary prevails.

f. KRS 337.365 imposes a requirement that employees be given at least a 10 minute rest period during each four hours worked.

g. KRS 337.405 provides that nothing in KRS 337.275 to .325, 337.345 or 337.385 to .405 shall interfere, impede, or in any way diminish employees' rights to bargain collectively in order to establish minimum wages in excess of the applicable minimum or to establish hours of work shorter than the minimum.

h. KRS 337.385 gives employees and the Commissioner of Labor the right to bring an action to recover any wages or overtime compensation due by virtue of KRS Chapter 337. However, in Early v. Campbell County Fiscal Court, Ky.App., 690 S.W.2d 398 (1985) the Kentucky Court of Appeals held that an employee must file a complaint with the Kentucky Department of Labor and receive a determination on his claim, before he can file suit in state circuit court. After Early, any action by an employee under KRS 337.385 would, in effect, be an appeal of the Department of Labor's decision.

i. KRS 337.415 prohibits an employer from discharging an employee for taking time off from his job to appear in court or other hearing provided the employee gives notice to the employer by producing a copy of the "court or administrative certificate" demonstrating his need to be in court. The remedy provided is reinstatement, back pay, court costs and attorney fees.

3. Wage Discrimination Because Of Sex:

   a. The provisions of KRS 337.423 parallel those of the Equal Pay Act. An employer cannot discriminate between employees in the same establishment on the basis of sex by paying any employee at a rate less than the rate at which he pays employees of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort, and responsibility. Differentials paid pursuant to an established seniority system or merit system are specifically exempted from the statute.

   b. Violations of the Wage Discrimination provisions may be remedied by a suit by the affected employees or by the Commissioner of Labor. Unpaid wages as well as an equal amount in liquidated damages (if a willful violation is established) can be recovered. The statute also provides for other affirmative relief such as reinstatement and injunctive relief. KRS 337.427.

   c. Any court action under this section must be commenced within six months after the cause of action accrues. KRS 337.430.

4. Public Works: KRS 337.505 to .550 gives the Commissioner of Labor power to set "prevailing wages" for employees who are engaged by an employer to perform work under a contract with the state to construct public works.

5. Penalties: KRS 337.990 to .993 provides a criminal penalty for violations of the substantive rights and obligations set forth in KRS 337. The only part of Kentucky's Wage and Hour law for which no criminal penalty is provided is that concerning the prohibition against wage discrimination because of sex. All of the criminal penalties are fines (ranging from $10 to $500), except one. KRS 337.992 prohibits the discharge or discrimination against any employee because of his making a complaint, initiating an action, or testifying under the Wage and Hour laws, and provides as a penalty a $500 fine or imprisonment for six months.

III. PRACTICING A WAGE HOUR CLAIM

A. Investigatory Stage. The Wage-Hour law gives the Administrator and his inspectors the power to investigate and collect facts on wages, hours and working conditions in any industry which comes under the FLSA. All Wage and Hour claims begin at this stage. Such inspections are most commonly prompted by a complaint to the Wage and Hour Division that an employer has violated the Act.

1. Right Of Inspection. Sec. 11(a) of the FLSA gives the Administrator and his inspectors almost plenary power to enter onto employers' premises, inspect records, and question employees in order to determine if any person has violated the Act. There are, however, several defensive steps an employer can take at this stage.

   a. Subpoena: Although the Wage and Hour Division is given the right to inspect records under the Act, an employer can refuse to allow such an inspection. The inspector is then forced to secure a subpoena from the Wage and Hour Administrator. The subpoena can still be ignored, forcing the Division to seek enforcement of the subpoena through a federal district court. The district court will, as a matter of course, enforce the subpoena even though the Division has not even demonstrated that the employer is covered by the Act. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). The subpoena may be completely ignored if it is signed by any official other than the Administrator of the Wage and Hour Division. E.g., a Regional Director has no authority to issue a subpoena. Minnesota Mines, Inc. v. Holland, 126 F.2d 824 (10th Cir., 1942).

   b. Withholding of Records: The Wage and Hour Division's authority to inspect records is not without limitations. An employer is not obligated to produce general business records for examination if they are not relevant to a determination of wages paid, hours worked, or tasks performed by employees. See, McComb v. Hunsaker Trucking Contractor, Inc., 171 F.2d 523

(1948), where the First Circuit upheld the company's refusal to provide records of customer transactions, interstate purchases, and transportation of goods.

c. Discovery of Investigatory Materials: Employers do not have the right to review statements or other information gathered by the Wage and Hour Division during the course of an investigation. Frequently, courts have required that the Division at least furnish the employer with "some particular instances of misconduct." E.g., Fleming v. Stillwell, 37 F.Supp. 236 (D.C. Tenn., 1941). An employer's right to information obtained by the Division is substantially greater once a wage suit has actually been initiated.

B. Settlement: After the Wage and Hour Division has completed its investigation, the employer is in its best position to settle any claimed violations of the Act. After investigation every compliance officer theoretically has the option of either litigating or settling a violation of the FLSA. However, as a practical matter, internal pressures normally force the officer to pursue a settlement. Some of the considerations prompting the Division to pursue settlement are:

(a) A decision to recommend litigation to the Solicitor of Labor is time consuming. It often takes as long as a year from the date litigation is recommended to a decision by the Solicitor of Labor to file suit. In the meantime, the two year statute of limitations continues to run cutting off back wages for the affected employees, and

(b) Once the Compliance Officer recommends litigation, he effectively loses control over the case to the Area Director or the Solicitor of Labor, who may settle the case on their own terms.

Whatever the reason, recent statistics indicate that settlements of Wage and Hour claims at this stage, on the average, result in only 53.5% of the employees being found underpaid. The settlement also usually results in an agreement by the employer not to violate the Act in the future. Minimum Wage Study Commission, Minimum Wage Study Report, (1981), at p. 90. Those statistics

demonstrate, however, that an employer can escape a significant portion of its statutory obligation through an advantageous settlement at an early stage. Especially in cases where the violation is clear, settlement of the case at an early stage is often the best resolution.

C. Civil Actions

1. Employee Wage Suit: The most important method of enforcing the Wage-Hour laws is an action by an employee in "any federal or state court of competent jurisdiction."

a. Jurisdiction: Federal and state courts have concurrent jurisdiction to adjudicate claims under the FLSA. The majority view is that an action under FLSA filed in state court may be removed as a matter of right to federal court. Anthony v. West Coast Drug Co., 331 F.Supp. 1279 (D.C. Wash., 1971, and Hill v. Moss-America, Inc., 62 LC Para. 32,303 (D.C. Miss., 1970). Several district courts have held, however, that an FLSA action filed in state court cannot be removed to federal court since Sec. 216 of the Act provides that an action may be "maintained...in any federal or state court." Neal v. Record Data, Inc., 26 WH Cases 853 (N.D. Ala., 1983), and Carter v. Hill & Hill Trucklines, Inc., 259 F.Supp. 429 (D.C. Tx., 1966).

b. Employee's Burden: An employee who brings a suit for unpaid minimum wages or overtime under the FLSA must be able to prove that he was doing work connected with interstate commerce; the number of hours he worked; and the amount of wages or overtime which the Company owes and has failed to pay him. Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88 (1942).

(i) The first requirement of the employee's proof does not often enable an employer to escape liability. The 1961 amendments to the Act provides for coverage of all employees in a business, if the business or two or more of the employees are engaged in interstate commerce or production of interstate commerce.

(ii) As to the second and third requirements, an employee must definitely prove how much work he did for which he was not paid and how much is due him. However, if an employer's wage records are inaccurate or incomplete (which the employee is entitled to inspect), the Supreme Court has held that the employee only needs to produce enough evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to disprove the claim. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

2. Injunctive Action: In addition to an employee's wage suit the Secretary of Labor is also empowered to bring an action on behalf of the employee. In such an action, the Secretary can recover back wages and liquidated damages and can seek an injunction. A suit by the Secretary precludes an action by the individual employee. As in an employee suit, the Secretary has the burden of proving coverage and entitlement to back wages. The employer has the burden of proving exemptions.

a. Requirements of an Injunction: To show entitlement to an injunction, the Secretary must prove that the company has employees covered by the law; that it has been violating the law with respect to those employees; and, that without an injunction there is a good chance the violations will continue. Holland v. U.S. Bedding Co., 2 WH Cases 331 (W.D. Tenn., 1942).

(i) An employer can effectively avoid the issuance of an injunction by correcting the violations before the Secretary requests an injunction before the Court. The purpose of an injunction is to prevent future violations, not to punish past violations. If present violations have ceased, an injunction will be issued only upon a showing that the Company has had a long record of past violations. Holland v. Amoskeag Machine Co., 44 F.Supp. 884 (D.C. N.H., 1942).

(ii) An injunction should be avoided if at all possible since once entered the injunction technically continues indefinitely. Accordingly, if future violations occur, the employer has not only violated the law but also the injunction, subjecting itself to civil contempt. Tobin v. Barreda, 9 WH Cases 534 (D.C. P.R., 1950).

(iii) Some courts have, however, dissolved the injunction after a lengthy period of time and no further violations by the employer. Brennan v. Thor, Inc., 22 WH Cases 259 (4th Cir., 1975).

b. "Hot Goods" Provision: Section 15(a) of the FLSA gives the Secretary of Labor the authority to seek an injunction banning the shipment across state lines any goods which have been produced or worked on by employees whose employment conditions violate the law. An injunction against the movement of the goods can be granted against the violating employer or any other person who receives the goods. The threat of a ban against the shipment of such goods, in order to pressure the employer to settle, is more likely than an actual attempt to receive such an injunction.

(i) "Hot Goods" Insurance: A company can protect itself against the innocent purchase of "hot goods" by obtaining written assurances from the seller that the goods were obtained in compliance with the law. If such written assurance is obtained and the buyer has no reason to believe that the supplier was not complying with the law, it cannot be enjoined from shipping its goods in commerce if it is later established that the supplier was violating the law.

3. Defenses To A Wage-Hour Claim:

(a) Industry Exemptions: A complete defense to any claim for unpaid wages or overtime compensation is that the affected employees are not covered by the FLSA. The FLSA provides certain statutory exemptions to employees in certain

industries. The industrial exemptions provided are partial and complete depending upon the industry. For example, under the FLSA, employees engaged in agricultural operations are exempted from the Act's minimum wages and overtime pay requirements. Agriculture is broadly defined by the Wage and Hour Regulations. It includes "farming in all its branches" as long as the work is performed by a "farmer or on a farm as an incident to or in conjunction with such farming operations." See Sec. 780.103. Section 780.122 of the Regulations specifically exempt employees "engaged in the breeding, racing, training, and care of horses on farms for racing purposes." On the other hand, employees engaged in "racing, training, and care of horses...off the farm" are not exempted. A racetrack is not a farm. Kentucky has a similar definition of agricultural employees but does not specifically exempt employees involved in activities relating to race horses. See, KRS 337.010(2)(b).

(b) Exemption by Type of Employee: There are three major so-called "white collar" exemptions which if proven preclude an employee's recovery of any unpaid minimum wages or overtime compensation. The three classes of employees exempted from coverage of the FLSA are executive, administrative, and professional employees.

(i) Executive Employee: To prove this exemption the employer must demonstrate that the employee's primary duty (50% or more of his time) is to manage an enterprise or department thereof; that he customarily and regularly exercises discretionary power; that his non-exempt work does not exceed 20% of his weekly hours; and, that his salary is more than $155 a week. The regulations provide a shorter test for employees who make more than $250 a week. In the latter case, the employer only has to prove supervision and the primary duty test.

(ii) Administrative Employees: An employee falls within this exemption if it is

shown that his primary duty (50% or more of his time) involves performing office or non-manual work relating to management policies or general business operations of employer or employer's customers; that he regularly and directly assists a proprietor, or an executive or administrative employee, or works under only general supervision along specialized or technical lines, requiring training, experience or knowledge, or executes under only general supervision special assignments and tasks; that he customarily and regularly exercises discretion and independent judgment; that he spends no more than 20% of his weekly hours performing non-exempt work; and, that he receives more than $155 a week in salary. Again, there is a shorter test for employees who receive more than $250 per week. In the latter case, it only has to be shown that the employee's primary duty is as described above and that he exercises discretion and independent judgment.

(iii) Professional Employees: To establish that an employee is exempt as a professional employee, it must be proven that his primary duty (50% or more of his time) is spent performing work requiring specific or specialized study, as distinguished from apprentice training and training for routine work, or performing original and creative work in a recognized artistic endeavor depending primarily on the invention, imagination or talent of the employee, or performing the work of a teacher, tutor, instructor, or lecturer in the activity of imparting knowledge; that he performs work predominantly intellectual and varied which cannot be standardized in point of time; that he consistently exercises discretion and judgment; that he does not spend more than 20% of his weekly hours performing non-exempt work; and, that he receives more than $170 a week in salary. The short test requires a showing of the primary duty described above; the consistent

exercise of discretion and judgment with respect to scientific, specialized or academic work, but not with respect to artistic endeavors, and a salary of at least $250 a week.

All of the exemptions under the Act are subject to a rule of "strict construction." Any doubt must be resolved in favor of the employee. Calaf v. Gonalez, 127 F.2d 934 (1st Cir., 1942).

(c) Statute of Limitations: The FLSA provides a two year statute of limitations on the recovery of unpaid minimum wages or overtime compensation. The statute of limitations continues to run until a complaint based on the alleged violations is filed in court. Thus, liability can be substantially reduced by correcting the violations at the time of investigation and delaying the Division's filing of an action for as long as possible. There is a three year statute of limitations for proven willful violations of the Act.

(d) Good Faith Defenses

(i) Reliance on Wage-Hour Ruling: Liability for unpaid minimum wages, overtime compensation, and liquidated damages can be avoided by a showing that the employer relied in good faith on written rulings by the Wage and Hour Administrator, even if the ruling is later found to be invalid. Marshall v. Baptist Hospital, 25 WH Cases 232 (6th Cir., 1981). An employer must prove that he relied on the written interpretation, and that the reliance and conformance were in good faith. This defense applies only to past violations. It cannot be used to defend against a request for injunctive relief.

(ii) Liquidated Damages: Liquidated damages can be recovered by employees or by the Secretary of Labor on behalf of the employees. The Act provides for a recovery of liquidated damages in an amount equal to the amount of unpaid wages and overtime compensation

recovered. However, courts have been given the discretion to not award any or only a part of the damages if the employer shows to the satisfaction of the court that the act or omission was in good faith and was based upon reasonable grounds for believing that he was not violating the FLSA. What constitutes good faith and reasonable grounds is largely dependent upon the facts of the particular case, since the ultimate decision rests in the discretion of the court. Some particular factual situations found to establish "good faith" and "reasonable grounds" are violations stemming from:

(A) Reliance on advice by Wage-Hour Inspector as to compliance with the Act. Burke v. Mesta Machine Co., 79 F.Supp. 588 (D.C. Pa., 1948).

(B) Failure of Wage and Hour Division to take enforcement action with respect to certain employees of dredging companies treated by employer as being excluded from coverage by seamen exemption. Brown v. Dunbar & Sullivan Dredging Co., 189 F.2d 871 (2nd Cir., 1951).

(C) Employer in good faith belived that employee was exempt under the FLSA's definition of executive employee, employee never worked overtime except at her own request, and employer consulted accountant who stated that employee was exempt. Lane v. M's Pub, Inc., 435 F.Supp. 917 (D.C. Neb., 1977).

Mere ignorance of the law is not sufficient to establish a "good faith" defense. Barcellona v. Tiffany English Pub., Inc., 24 WH Cases 201 (5th Cir., 1979). Likewise, reliance on the erroneous advice of counsel is not a

"good faith" defense. Gustofson v. Fred Wolferman, 73 F.Supp. 186 (D.C. Mo., 1947).

4. "Regular Rate" Problems: Section 207(a)(1) of the FLSA provides that no employee shall work more than 40 hours in a week "unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed...." (Emphasis added). This provision requires employers to average certain payments into an employees' hourly rate for purposes of determining an employee's "regular rate" for overtime purposes. The majority of employer's overtime problems concern the proper determination of an employee's regular rate.

   (a) Pay normally included in "regular rate" computation:

      (i) Pay for time worked-wages, salary, commissions or piece rates;

      (ii) incentive bonuses;

      (iii) cost-of-living allowances;

      (iv) premiums for "dirty" work; and

      (v) other payments considered by the employee as part of his regular compensation.

   (b) Pay normally excluded from "regular rate" computation:

      (i) premium pay under collective bargaining agreement, for work on Saturday, Sunday, or Holidays;

      (ii) pay for time not worked - e.g. vacation, holidays, and sick leave;

      (iii) pension or health insurance contributions;

      (iv) outright gifts;

(v) bonuses completely within discretion of employer;

(vi) distribution from profit-sharing plans which satisfy regulations of Wage-Hour Administrator; and

(vii) contributions to bona fide thrift or savings plan which satisfy the Wage-Hour regulations.

(c) Bonus Payments Under a Collective Bargaining Agreement

A recent development in this area concerns the Wage and Hour Division's treatment of "signing" or "ratification" bonuses that companies often use as an incentive to ratify a collective bargaining agreement. Annual bonuses during the life of the contract are also common in order to keep employees' base wage rates lower. The issue is whether the bonuses should be averaged into an employee's normal hourly rate for determining the employee's regular rate.

(i) One-Time, Lump-Sum Payment Upon Ratification

Such payments are not counted as compensation for overtime purposes provided that the bonus is given to all employees on the payroll at the time of ratification and is unrelated to the quality or quantity of the employee's past or future service. Under these circumstances, the bonus falls within Section 7(e)2 of the FLSA which excludes from the "regular rate" any "payments to an employee which are not made as compensation for his hours of employment."

(ii) Annual Bonuses: If the contract provides that employees will receive an annual bonus during each year of the contract payable to employees on his payroll at the time the bonus is due, then, the bonus has to be included in the employees' "regular rate."

According to the Wage and Hour Division if an employee has to be on the payroll in order to receive the annual bonuses, then, the bonuses are an inducement for the employee to continue in his employment and is considered compensation for his hours of employment. Accordingly, such bonuses do not fall within Section 7(e)(2) of the FLSA.

Annual bonuses under a collective bargaining agreement are not compensable only if the contract provides that all employees on the payroll at the time of ratification receive the bonuses each year, regardless of whether they are still employed.

5. Arbitration v. Wage Suit Under FLSA: Another affirmative defense to be raised in any action under the FLSA by an employee covered by a collective bargaining agreement is that any claim for unpaid wages or overtime is a proper subject for arbitration. The Ninth Circuit has held that an action under the FLSA should be stayed pending the outcome of arbitration. Beckley v. Teyssier, 332 F.2d 495 (9th Cir., 1964). The Supreme Court has held, however, that an employee's submission of a wage claim to arbitration does not preclude a subsequent suit under the FLSA. Barrantine v. Arkansas-Best Freight System, ___ U.S. ___, 24 WH Cases 1273 (1981).

6. Neglect By Employee: A further possible defense is that the employee is estopped from claiming either unpaid wages or overtime compensation on the ground that the employee by his action or inaction misled the employer into not paying the proper wages. For example, in Brumbelow v. Quality Mills, Inc., 69 LC Para. 32, 766 (D.C. Ga., 1971), an employee was held not entitled to recover overtime where he falsified his time records to indicate no overtime work due to an unjustified fear of discharge.

WRONGFUL DISCHARGE, UNJUST DISMISSAL, AND EMPLOYMENT AT WILL:

Development of National and Kentucky Law

Jon L. Fleischaker
Wyatt, Tarrant and Combs
Louisville, Kentucky

SECTION C

WRONGFUL DISCHARGE, UNJUST DISMISSAL, AND EMPLOYMENT AT WILL:

Development of National and Kentucky Law

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1988 EMPLOYMENT DISCRIMINATION SEMINAR

Wrongful Discharge/Unjust Dismissal/Employment-at-Will Development of National and Kentucky Law

Jon L. Fleischaker
Stephen R. Price
WYATT, TARRANT & COMBS
2700 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

A. EMPLOYMENT AT WILL. Kentucky is an employment-at-will state. Production Oil Co. v. Johnson, Ky., 313 S.W.2d 411, 413 (1958); Scroghan v. Kraftco Corp., Ky. App., 551 S.W.2d 811 (1977); Louisville & N.R. Co. v. Marshall, Ky. App., 586 S.W.2d 274, 281 (1979). An at-will employee may be discharged "for good cause, for no cause, or for a cause that some might view as morally indefensible." Firestone Textile Co. Div. v. Meadows, Ky., 666 S.W.2d 730, 731 (1984).

B. TERMINABLE FOR CAUSE ONLY. Where parties clearly state their intention to enter into a contract of employment terminable only pursuant to its express terms, e.g., "for cause," a definite term of employment is created and the employee is not terminable at will. Shah v. American Synthetic Rubber Corporation, Ky., 655 S.W.2d 489, 492 (1983).

1. The duration of an employment contract must be determined by the circumstances of each particular case.

   a. Understanding of the parties as inferred from written or oral negotiations and agreements.

   b. Usage of business.

   c. Situation and objective of the parties.

   d. Nature of the employment.

   e. All circumstances surrounding the transaction.

   Id. at 490; Putnam Producers' Livestock Marketing Ass'n, 256 Ky. 196, 75 S.W.2d 1075, 1076 (1934).

2. Specification of a salary for a certain period of time raises a rebuttable presumption of fact that the contract of employment was for the time specified. Id. at 1077. For example, a letter confirming oral negotiations and stating the salary to be paid as a specific amount per annum, combined with the fact that the employee had rejected another offer, was sufficient to establish a contract for a fixed term of one year. Humana, Inc. v. Fairchild, Ky. App., 603 S.W.2d 918, 920 (1980).

3. Labelling the employment as "permanent" or "employment as long as the employee does honest and faithful work" or "employment as long as he performs his duties in a successful or satisfactory manner" without additional consideration will not give rise to more than an at-will contract of employment. Shah, 655 S.W.2d at 491.

   a. But a contract for employment "so long as the employer is 'satisfied' with the work of the employee" was sufficient, at least when coupled with third party beneficiary status to a coal land lease agreement, to create a contract of employment for a definite term in Crest Coal Company, Inc. v. Bailey, Ky., 602 S.W.2d 425, 426 (1980).

   b. Where the duration of the employment contract is defined in this manner a subjective test applies which allows the employer's evaluation of employee's work to control as long as the employer acts in "good faith." Id.

4. EMPLOYEE HANDBOOKS. Whether policies and procedures contained in an employee handbook establishing due process procedures for the termination of employees can serve to alter the at-will status of an employee's employment is not clear.

   a. Disclaimers in employee handbooks are valid and binding. Nork v. Fetter Printing Co., Ky. App., 738 S.W.2d 824, 827 (1987); see also Dell v. Montgomery Ward & Co., 811 F.2d 970, 972-74 (6th Cir. 1987); Reid v. Sears, Roebuck & Co., 790 F.2d 453, 460-62 (6th Cir. 1986).

b. Many jurisdictions have recognized that employee manuals are mere unilateral expressions of the employer that can be altered at any time. Particularly where the handbook in question was issued to the employee after the start of employment. Heideck v. Kent General Hospital, Inc., 446 A.2d 1095, 1097 (Del. Super. Ct. 1982); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779, 782 (1976); White v. Chelsea Industries, Inc., 425 So.2d 1090 (Ala. 1983); Muller v. Stromberg Carlson Corp., 427 So.2d 266 (Fla. Dist. Ct. App. 1983); Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668, 671 (Ind. App. 1984); Gates v. Life of Montana Insurance Co., 196 Mont. 178, 638 P.2d 1063, 1066 (1982); Mau v. Omaha National Bank, 207 Neb. 308, 299 N.W.2d 147 (1980); Walker v. Westinghouse Electric Corp., 77 N.C. App. 253, 335 S.E.2d 79, 83-84 (1985); Martin v. Capital Cities Media, Inc., 354 Pa. Super. 199, 511 A.2d 830 (1986); Darlington v. General Electric, 350 Pa. Super. 183, 504 A.2d 306 (1986); Richardson v. Charles Cole Memorial Hospital, 320 Pa. Super. 106, 466 A.2d 1084, 1085 (1983); Reynolds Manufacturing Co. v. Mendoza, 644 S.W.2d 536 (Tex. Ct. App. 1982).

c. Statements in employee manual that "the employment would become permanent after ninety days, or conditioning the employment's duration upon continued successful performance" are insufficient to alter the at-will status of the employee. Nork, 738 S.W.2d at 827.

5. Implied duty of good faith dealing.

a. Long tenure with the employer does not create an implied duty of good faith dealing. Wyant v. SCM Corporation, Ky. App, 692 S.W.2d 814, 816 (1985); Harvey v. ITW, Inc., 2 IER Cases 597, 599 (W.D. Ky. 1987).

b. Concept of at-will employment is "antithetical to the concept of an implied covenant of good faith and fair dealing." Satterfield v. Lockheed Missiles & Space Co., Inc., 617 F. Supp. 1359, 1363-64 (S.C. 1985), and should not be allowed to circumvent the law

on at-will employment. Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822, 824 (Mo. App. 1985); see also Comerio v. Beatrice Foods Co., 600 F. Supp. 765, 769 (E.D. Mo. 1985).

C. OUTRAGEOUS CONDUCT. Kentucky has recognized the tort of outrageous conduct causing severe emotional distress. Craft v. Rice, Ky., 671 S.W.2d 247 (1984). Where the employee is terminable-at-will and the employer is merely exercising this right, there is no claim for outrageous conduct. Reid, 790 F.2d at 462; Harvey, 2 IER Cases at 600.

D. WRONGFUL DISCHARGE - A TORT. An exception to terminable at-will doctrine exists where employee is discharged contrary to a fundamental and well-defined public policy as evidenced by existing law. Firestone Textile Co. Div. v. Meadows, Ky., 666 S.W.2d 730, 732-33 (1984); Pari-Mutuel Clerks' Union v. Kentucky Jockey Club, Ky., 551 S.W.2d 801 (1977).

1. This exception is narrowly defined. The concept of an employment-related nexus is critical. Grzyb v. Evans, Ky., 700 S.W.2d 399, 402 (1985).

2. This exception, and the court's power to provide a remedy, appears to have its origins in KRS 446.070. See Pari-Mutuel, 551 S.W.2d at 803; Firestone, 666 S.W.2d at 732; Grzyb, 700 S.W.2d at 401. Therefore, statute in which the public policy is enunciated must be either penal in nature, or must not by its terms prescribe a civil remedy for its violation. Otherwise the civil remedy prescribed by the statute will be preempt the field of its application. Id.; Pike v. Harold (Chubby) Baird Gate Co., Inc., Ky. App., 705 S.W.2d 947, 948 (1986).

3. An employer cannot discharge an employee for refusing to violate the law in the course of his employment. Grzyb, 700 S.W.2d at 402. The employee must show the employer directed him to violate the law, not just that the employee acted consistent with the law. Bushko v. Miller Brewing Co., 134 Wis.2d 136, 396 N.W.2d 167, 170-72 (1986).

4. The Kentucky courts have found this public policy exception to exist [i] where an employee was discharged for pursing a worker's compensation claim, Firestone, supra, and [ii] for authorizing a labor union to represent him for purposes of collective bargaining where the NRLB has declined jurisdiction. Pari-Mutuel Clerks', supra; but see Section F., infra.

5. In Grzyb, supra, the court specifically considered and rejected the result reached in Brown v. Physicians Mutual Insurance Co., Ky. App., 679 S.W.2d 836 (1984), making it apparent that the public policy exception does not apply to corporate whistleblowers, or at least internal ones. The Fourth Circuit, applying Maryland law, refused to extend this public policy exception to protect an external whistleblower in the absence of a state statute obligating people to disclose knowledge of criminal acts under the peril of a criminal penalty. Adler v. Standard Corporation, 830 F.2d 1303, 1307 (4th Cir. 1987); see also Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (Ind. App. 1980).

6. Can federal law be a source of the public policy exception? The remedy provided in Pari-Mutuel, Firestone and Grzyb for wrongful discharge depends in large part on KRS 446.070 which provides:

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

In Cincinnati N.O. & T.P.R.R. v. Gregg, 25 Ky. L.R. 329, 80 S.W. 512 (1904) (not an employment case) the court allowed an individual to recover under the forerunner of KRS 446.070 [worded substantially the same], for damages caused by the violation of federal statutes dealing with the interstate shipment of livestock. Therefore, applying Gregg through KRS 446.020 to the doctrine of wrongful discharge would supply the precedent needed to tap into federal law as a source of public policy. This would be particularly persuasive in areas where federal law has preempted state law. But see, Pratt v.

Caterpillar Tractor Co., 149 Ill. App. 3d 588, 500 N.E.2d 1001, 1003 (1986), where the Indiana courts refused to find public policy of the state in the Foreign Corrupt Practices Act and the Export Administration Act, since these statutes involved exclusively Federal concerns. See also Rachford v. Evergreen International Airlines, Inc., 596 F. Supp. 384 (N.D. Ill. 1984) (state has no interest in enforcing federal air safety laws).

7. Five year statute of limitation contained in KRS 413.120(2) is applicable to wrongful discharge actions. Pike v. Harold (Chubby) Baird Gate Company, Inc., 705 S.W.2d 947 (1986).

E. DISCHARGE UNDER CONTRACT FOR DEFINITE DURATION.

1. An employee employed under a contract for a definite period of time can still be discharged before the end of the contractual period if he is "guilty of acts or conduct which manifest negligence, unskillfullness, inefficiency or unfaithfulness to the employer's interest, or anything which is contrary to a faithful and diligent performance of the services for which he was employed." Davies v. Mansbach, Ky. 338 S.W.2d 210, 211-12 (1960); see also Watkins v. Cochran, 292 Ky. 846, 168 S.W.2d 351 (1943); Robertson v. Wolfe, 292 Ky. 846, 283 S.W. 428, 429 (1926). Whether the termination was justified is a question of fact. The burden is on the employer to justify the termination of the contract. Davies, 338 S.W.2d at 212.

2. Where the employment contract is "for cause," the discharge of the employee will not be wrongful if the discharge is precipitated by the elimination of the employee's position due to legitimate economic business reasons, and not as a bad faith pretext to discharge the worker. Nork, 738 S.W.2d at 827; Louisville & N.R. Co. v. Cox, 145 Ky. 667, 141 S.W. 389, 393 (1911) (implied that employment would continue only as long as the company was in business at that location). Generally, legitimate economic business reasons are found to exist where the employee's job is eliminated as a general reduction in staff due to deteriorating business conditions. Malmstrom v. Kaiser Aluminum & Chemical, 187 Cal. App. 3d 299, 2 IER Cases 180, 189 (1986); Burdette v. Mepco/Electra Inc., 2 IER Cases 214, 218 (U.S. D. Ct. Cal. 1987).

3. While the language used in Nork is quite broad, it should only be applied to a "for cause" contract and not a contract for a specified period of time. Where a contract is for a term of years and the employee was discharged when his position was eliminated due to the merger of the employer with another company, then damages for the remainder of the contract period will be recoverable. Chipman v. Turner, Day & Woolworth Mfg. Co., 32 Ky. L.R. 680, 106 S.W. 852 (1908).

F. DEFAMATION IN THE WORKPLACE

1. Four elements necessary for defamation:

   a. defamatory language

   b. about the plaintiff

   c. which is published and

   d. which causes injury to reputation

   Columbia Sussex Corp., Inc. v. Hay, Ky. App., 627 S.W.2d 270, 273 (1981).

2. Privileged communications.

   a. Good faith, without malice.

   b. Not voluntarily made, but in answer to an inquiry.

   c. To protect publisher's own interest or in performance of a duty to society.

   Baskett v. Crossfield, 190 Ky. 751, 228 S.W. 673, 675 (1920); see also Conner v. Taylor, 233 Ky. 706, 26 S.W.2d 561, 562 (1930); Baker v. Clarke, 186 Ky. 816, 218 S.W. 280, 285 (1920).

3. Intra-corporate communications necessary to proper functioning of company are privileged. Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843, 846 (1970); see also Caslin v. General Electric Co., Ky. App., 608 S.W.2d 69 (1980), Restatement (Second) Torts §§594-596. Intra-corporate defamation is possible. Brewer v. American National Insurance Co., 636 F.2d 150, 154 (6th Cir. 1980) (extrapolating Kentucky law). The

privilege can be abused by excessive publication. Benassi v. Georgia-Pacific, 62 Or. App. 698, 662 P.2d 760, 764 (1983) (publication to 120 lower level employees found not privileged).

4. The existence of a qualified privilege is to be decided by the court. Baker, 218 S.W. at 285. Common law malice will operate to destroy the qualified privilege. Holdaway Drugs, Inc. v. Braden, Ky., 582 S.W.2d 646, 650 (1979); Shah, 655 S.W.2d at 492-93.

5. Some jurisdictions have begun to recognize what has been called the doctrine of compelled self-publication. Where an employee is compelled to repeat the reason given for his discharge by a former employer in a reasonably forseeable manner, e.g., to a prospective employer, then the publication of the statement is attributed to the former employer for purposes of determining whether there has been defamation. Lewis v. Equitable Life Assurance Society of the United States, 389 N.W.2d 876 (Minn. 1986).

G. PREEMPTION.

1. When the resolution of a state-law claim is substantially dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a §301 claim or dismissed as preempted by federal labor-contract law. Allis-Chalmers Corporation v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); Michigan Mutual Insurance Co. v. United Steelworkers of America, 774 F.2d 104 (6th Cir. 1985). If the claim is a §301 claim then the six month statute of limitations of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), will apply.

2. Even if it is not clear whether federal law preempts a state law claim, if the federal law provides a remedy to the aggrieved employee, then the field will be deemed preempted under Grzyb by the Kentucky courts. Harvey v. ITW, Inc., 2 IER Cases 597, 599 (W.D. Ky. 1987) (employee's claim that he was discharged to prevent his pension rights from fully vesting dismissed since ERISA provided a remedy); see Section D.2 infra.

H. PENDANT JURISDICTION. If state law claims predominate or cause jury confusion they should be dismissed. United Mineworkers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); see also Pascoe v. Hoyle Lowdermilk, Inc., 614 F. Supp. 546, 548 (D. Colo. 1985); Shirley v. Brown & Williamson Tobacco Co., 608 F. Supp. 78, 80 (E.D. Tenn. 1984); Marquez Velez v. David M. Puerto Rico Graphic Supplies, Inc., 622 F. Supp. 568, 571-72 (D.P.R. 1985).

I. SUMMARY JUDGMENT. Standards revitalized in Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986), recognized and applied by the Kentucky Court of Appeals in Nork, 738 S.W.2d at 827.

EMPLOYMENT DISCRIMINATION PROCEEDINGS BEFORE STATE AND LOCAL HUMAN RIGHTS COMMISSIONS IN KENTUCKY

Carl B. Boyd, Jr.
Sheffer, Hoffman, Neel, Wilson and Thomason
Henderson, Kentucky

EMPLOYMENT DISCRIMINATION PROCEEDINGS BEFORE STATE AND LOCAL HUMAN RIGHTS COMMISSIONS IN KENTUCKY

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SHEFFER, HOFFMAN, NEEL, WILSON & THOMASON

I. Kentucky Commission on Human Rights - Introduction

A. Chapter 344 of the Kentucky Revised Statutes provides for the establishment of the Kentucky Commission on Human Rights (KCHR), for its powers, scope and procedure, and authorizes the establishment of local commissions. The basic constitutionality of the statutory scheme was upheld in Whispering Hills Country Club, Inc. v. Kentucky Commission on Human Rights, Ky., 475 S.W.2d 645 (1972).

B. Coverage - Employment.

1. What.

(a) KRS 344.040 directly mirrors Federal Law, combining the provisions of 42 USC 2000e-2(a) with the age provisions found in the ADEA (Kentucky's law still states the age coverage as "between 40 and 70").

(b) The Kentucky Act in KRS 344.100 includes the exemption for acts pursuant to a "bona fide seniority or merit system" and bona fide ability test found in 42 USC 2000e-2(h) and (in KRS 344.110) includes the provision in 42 USC 2000e-2(j) disavowing any requirement that preferential treatment be granted because of racial, etc. imbalance between percentages employed and the percentage in the population.

2. Who.

(a) The act is limited to "individuals", and a class action may not be brought under the act, at least not before the Commission. Pyro Mining Company v. Kentucky Commission on Human Rights, Ky., 678 S.W.2d 393 (1984).

(b) "Employer" is defined as a person who has eight or more employees in each of 20 calendar weeks in the instant or preceding year. KRS 344.030. There are a few religious organizations or bona fide

occupational qualification (BFOQ) exemptions. KRS 344.090 (See Section 2000e-2(e)).

3. When.

(a) Complaints must be filed within 180 days after the discriminatory practice occurred. KRS 344.200(1). This compares to 300 days for Title VII and 90 days with the Louisville and Jefferson County Commission.

C. The Agency.

1. The governor appoints 11 members for staggered three year terms. KRS 344.150. The membership is supposed to be bipartisan and broadly representative of business, union and civil rights groups. KRS 344.160.

2. Powers.

KRS 344.180 and .190 set forth various "powers and duties," but the essential powers concern the enforcement of Chapter 344. The agency is given investigatory and subpoena powers in KRS 344.250 and .260.

D. Agency Interrelationships.

1. KCHR/EEOC.

KCHR is a "deferral agency" under which the agency is offered - but is not required to accept- Kentucky complaints (outside of Jefferson and Fayette Counties) filed with the EEOC. Roughly one-half of EEOC complaints from Jefferson County are deferred to the KCHR.

2. Local Agencies/EEOC.

EEOC defers roughly half of Jefferson County complaints to the Louisville/Jefferson County Human Rights Commission (L/JHRC) and all Fayette County complaints to the Lexington-Fayette County Urban Human Rights Commission (L-FHRC).

3. Local Agencies/KCHR.

While there is cooperation between the KCHR and the local agencies, the KCHR will not necessarily defer or refer cases to the local agency as opposed to handling them itself.

II. Kentucky Commission on Human Rights Procedure.

A. Initial Steps.

1. Intake.

The Commission initially classifies all potential complaints as inquiries, conducting an initial screening before accepting complaints. Only approximately 10% of "inquiries" become formal complaints.

2. Complaints.

Complaints must be sworn and are served by the Commission on the respondent. KRS 344.200. Present Commission practice is to serve the complaints personally.

3. Investigation.

(a) The KCHR investigation staff includes both attorney/investigators and non-attorneys.

(b) Information requests normally are made shortly after the service of a complaint, usually seeking the complainant's personnel file, an employee roster, and documents relevant to the particular charge. The request letter also normally invites respondent to set forth a response or a "position" on the charge.

(c) The Commission has "discovery powers" applicable during the predetermination period, KRS 344.250(1) and .260, but these are sparingly used at this stage. The Commission investigator will, on occasion, request the opportunity to conduct an on-site interview with company personnel and may ask to look at certain documents at that point.

(d) There is no statutory or regulatory prohibition against a pre-determination settlement on a no-fault basis.

4. Initial Determination.

The Statute KRS 344.200(2)) requires a determination of "probable cause" or dismissal within thirty days of filing, but in reality this

will not be done. Waivers may or may not be drafted, but no court is likely to hold a complaint invalid because of the KCHR's failure in this regard. See Kentucky Commission on Human Rights v. International Brotherhood of Electrical Workers, Local 1102, Ky., 578 S.W.2d 247. (1979)

B. The Determination.

1. Dismissal.

If the investigation finds no probable cause for believing discrimination has occurred, a dismissal will be issued. In recent years, a majority of the complaints filed with the KCHR have been so dismissed. The claimant may seek reconsideration within ten days (KRS 344.200(3)) or seek, within thirty days, judicial review by a circuit court under KRS 344.240(1).

2. Probable Cause.

If probable cause is found, the respondent will receive a detailed letter setting forth the investigator's finding and the legal conclusions based on these findings.

3. Conciliation.

The Commission is required by KRS 344.200(4) to attempt to reach a conciliation agreement eliminating the practice and providing relief for the claimant. The great majority of the complaints reaching the "probable cause stage" are conciliated before a hearing is held. (See the attached table.)

4. Setting of a Public Hearing.

(a) If conciliation efforts fail or are protracted a hearing date will be set (supposedly within 60 days of filing - KRS 344.200(1)-but much later, in reality). Notice of the hearing, with an attached copy of the complaint, will be served on respondent, opening a more "formal" stage of proceedings.

(b) An answer to the complaint must be filed, by certified mail, no later than twenty days before the hearing date. KRS 344.210(3).

Beware of the "five days" stated in 104 KAR 1:020 Section 6(1).

(c) Conciliation efforts may proceed during the pre-hearing period, with the Commission being generally receptive to continuing a hearing date where a possibility of settlement exists.

(d) Discovery.

(1) KRS 344.260 and 104 KAR 1:020 Section 8 provide for discovery by either party. Either party may take depositions or secure subpoenas. Only the Commission is explicitly given the power to order the answering of interrogatories, but the general deference to the Kentucky Rules of Civil Procedure would suggest that respondents may pose interrogatories as well, and Commission practice has been consistent with this interpretation.

(2) The Commission must look to the Circuit Court where the party to whom a subpoena is addressed resides for enforcement. KRS 344.260(3).

C. Hearings.

1. KCHR hearings are conducted at area locations by a panel normally consisting of three commission members, with the presiding member always being one of the Commission's attorney members (presently five members are attorneys).

2. Hearing Procedure.

(a) Procedures are set forth in KRS 344.210 and (more specifically) in 104 KAR 1:020, Section 7. This is the only de novo "trial" on the merits granted the parties. The record from the hearing, with briefs and proposed findings of fact and conclusions of law are submitted to the full commission for a decision.

(b) Evidence.

The administrative standard of "the type normally relied on by reasonably prudent men

in the conduct of their affairs" is applied to questions concerning admissibility of evidence rather than the strict rules of evidence being applied. 104 KAR 1:020 Section 7(4)(b).

(c) The Commission staff attorney presents the case in support of the complaint, with the investigator normally appearing as a witness. Partly for this reason, it is normal practice when an investigator/attorney has worked a case during the predetermination stage, for that attorney to be replaced by another attorney for the presentation of the case. The respondent may fully participate in calling and cross-examining witnesses if an answer has been timely filed or a default has been excused for good cause. KRS 344.210(5).

D. Remedies.

1. The Commission is given broad remedial powers in KRS 344.230(2) and (3).

(a) Remedial powers available include injunctive relief and affirmative action including hiring, reinstatement and back pay. KRS 344.330(3)(a) (based upon 42 USC 2000E-5(g)). How far "back" backpay awards may go is presently under consideration by the Kentucky Supreme Court in City of Owensboro v. Kentucky Commission on Human Rights, 34 K.L.S. 3 at 12 (Court of Appeals Opinion rendered February 27, 1987).

(b) In addition, the Commission has the unique grant of power in KRS 344.230(3)(h), allowing compensation for embarrassment and humiliation ("E & H"), which is not a recognized element of damages under Title VII. The constitutionality of the granting of E & H damages without a jury was upheld in Kentucky Commission on Human Rights v. Fraser, Ky. 625 S.W.2d 852 (1981). The Court there held that "there must be evidence of actual humiliation and embarrassment," and that evidence of discrimination alone is not enough to justify an award for E&H. Id. at 856.

(c) Quotas.

While the imposition of a "quota" remedy was approved in Middlesboro Housing Authority v. Kentucky Commission on Human Rights, Ky. App., 553 S.W.2d 57 (1977), it is problematical whether such a remedy would be granted in an employment context. The Commission's present view is apparently that "race conscious remedies" are permitted by the recent decisions in Local Number 93, International Association of Firefighters, AFL-CIO v. City of Cleveland, 92 LEd.2d 405 (1986) and Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission, 92 LEd.2d 344 (1986).

(d) Size of Awards.

The small number of cases in which Commission orders are issued following a public hearing means that very few awards are available in the published opinions for comparison purposes. Because the Commission does insist on the right to publicize conciliation agreements, the press releases issued by the Commission provide some idea of potential awards or settlements. Recent Commission releases concerning employment cases show the following:

Commission Order

Sexual Harassment (3 employees of one employer)

(a)	lost wages	$ 800	E&H $15,000
(b)	lost wages	$1,600	E&H $ 9,000
(c)	lost wages	$1,340	E&H $ 6,000

Conciliation Settlements

(1)	Sex discrimination	$15,000
(2)	Age discrimination	$ 6,000
(3)	Race discrimination	$ 5,000
(4)	Religious discrimination	$ 1,800
(5)	Sex discrimination	$ 4,250
(6)	Race discrimination	$ 2,000
(7)	Sex discrimination (10 bank employees)	$20,000 total reinstatement
(8)	Race discrimination	$ 1,500
(9)	Age discrimination	$ 3,750
(10)	Sex discrimination	

(11) Sex discrimination $ 1,500

(e) Publicity.

The statute explicitly provides that the Commission may publish the names of persons who have been determined to have been engaged in an unlawful practice, KRS 344.230(4) and the Commission staff insists that conciliation agreements may not include any provision concerning the confidentiality of the agreement reached. The Commission issues publicity releases to the news media in the state, and a party settling should expect to find an account of the settlement agreement appeared in the local newspaper, at least in smaller communities.

(f) Judicial Review.

(1) KRS 344.240 provides for review of Commission orders, including a dismissal, by the Circuit Court in which the event occurred or where the respondent resides. The complaint appealing a Commission order must be filed within thirty days after the Commission order is received. KRS 344.240(6).

(2) The Circuit Court proceeding is <u>not</u> a de novo action, as the statute (KRS 344.240(2)) provides that:

> The findings of fact of the commission shall be conclusive unless clearly erroneous in view of the probative and substantial evidence on the whole record.

(3) Further appeal is to the Court of Appeals in the fashion prescribed by the Rules of Civil Procedure. KRS 344.240(5).

E. Exclusiveness of Remedy.

1. Independent Court Action.

(a) KRS 344.450 creates a civil cause of action in Circuit Court for injunctive relief or to recover the "actual damages sustained." The

statute also provides for a reasonable attorney's fee.

(b) The statute of limitations for these actions is probably five years, Clifton v. Midway College, Ky., 702 S.W.2d 835 (1985), but City of Owensboro v. Kentucky Commission on Human Rights, 34 K.L.S. 3 at 12, in which the Court of Appeals held that the statute of limitations was one year, is presently before the Supreme Court on discretionary review.

2. Abstention.

(a) The statute - KRS 344.270 - prohibits the Commission or Circuit Court from taking jurisdiction while a claim is pending before the other. It further provides that "a final determination" by a Court or the Commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other action by the same person on the same grievance.

(b) While a Kentucky court action may not ban an EEOC claim, an EEOC claim prevents the filing of a Kentucky court action under KRS 344.450 while the claim is before the federal body. After a "right-to-sue" letter is received, a claimant may proceed in federal or state court. McNeal v. Armour & Co., Ky. App., 660 S.W.2d 957, 958 (1983).

(c) If the KCHR makes a determination on a claim deferred to it by EEOC, then KRS 344.270 prevents any original court action in the Kentucky Court. There must be an actual order by the Commission to preclude the court action or to activate the thirty day limit on appeal time found in KRS 344.240(6). Canamore v. Tube Turns Division of Chemetron Corp., Ky. App. 676 S.W.2d 800 (1984).

3. Remedies in Court Actions.

(a) The Western District of Kentucky, in dealing with a pendent state claim under Chapter 344, has ruled that "E & H" damages are delegated solely to the KCHR by the statute and may not be awarded by a circuit court (and therefore may not be awarded on a pendent state claim

by a federal court). Ellis v. Logan Co., 543 F.Supp. 586 (W.D.Ky. 1982); Berry v. General Electric Co., 541 F.Supp. 800 (W.D.Ky. 1982).

(b) There have been no Kentucky appellate decisions on whether the phrase "actual damages" used in KRS 344.450 includes "E & H" damages.

III. Local Agencies.

A. Louisville/Jefferson County Human Rights Commission.

1. Local commissions are authorized by KRS 344.300-.350. Louisville (by ordinance) and Jefferson County (by resolution) have created a joint commission (L/JHRC).

2. Coverage.

(a) Both the Louisville and Jefferson County Acts include a prohibition against discrimination on the basis of handicap (not included in the Kentucky statute) but the Louisville Ordinance does not mention age and the Jefferson County Resolution uses 40-65 as the covered range.

(b) Only two employees in any four calendar weeks in the instant or preceding year are required for coverage.

(c) Neither enabling act mentions E&H damages as an affirmative action open to the Commission, (Ordinance 116/139, Section Five(H); Resolution 15, Section Six(D). Such damages are awarded, however, by the Commission. e.g. Mason and Colemen v. Wing Construction Co. (Public Hearing November 12, 1985).

(d) The complaint brought directly to the L/J Commission must be brought within 90 days (Section Six(A) of both acts) but this would not affect a deferred complaint.

3. The Agency.

(a) There are 21 members appointed by the Mayor and the County Judge of, which five members sit on a "Fair Employment Division" with five additional appointees. This Division is a key part in the enforcement process in the

Jefferson County scheme.

(b) The Agency has investigatory powers and the power to request access to records and premises, with the Jefferson Circuit Court looked to for compliance orders. KRS 344.320.

4. Procedure.

(a) There are separate Rules of Procedure adopted for matters brought under the Louisville Ordinance and under the County Resolution. The rules are almost identical, except that the County Rules contain two rules (9 and 10) related to "defaults", and provide that:

> Default as used in these rules means
>
> [b] any act, counsel, deliberate omission, communication, signal, or the like, direct or indirect, made or done by a respondent or any of his agents or attorneys on his behalf, which
>
> (1) induces or helps to induce a person other than the respondent to refrain from testifying before the Commission, to refrain from discussing the matter with the Commission staff, to frustrate adjustments, or to misrepresent any fact to the Commission; or
>
> (2) frustrates or attempts to frustrate adjustments, or cause the misrepresentation of a fact to the Commission.

The resultant default allows the Panel to reach findings without resorting to testimony, and these findings "need only recite that the averments of the complaint are true because of the default." (County Rule 11).

(b) A three member panel from the Fair Employment Division makes an initial determination, supposedly within 21 days after receiving a complaint. If the complaint is neither dismissed or conciliated, a hearing date is

set and a formal complaint served, which must be answered to avoid a presumption of guilt.

(c) Hearings.

Hearings are conducted before another three member Panel of the Fair Employment Division, at least one of whom shall be a Commissioner. The case for the complainant is presented by a member of the City Law Department or the County Attorney's office.

(d) Appeal.

(1) Initial appeals from the Panel decision may be made within ten days to the whole Commission. The Commission may affirm the Panel decision or may conduct a hearing limited to evidence before the original panel.

(2) Further appeal from a Commission order is to Jefferson Circuit Court in the manner provided by KRS 344.240.

B. Lexington - Fayette County Urban County Human Rights Commission.

1. Lexington/Fayette Urban County Government by ordinance No. 190-83 established the Lexington-Fayette Urban County Human Rights Commission (L-FHRC).

2. Coverage.

Section 2-31 of the ordinance adopts most provisions of KRS Chapter 344 as they were in effect on October 6, 1983. Because of this adoption, the coverage is essentially that of the state (See I B above):

(a) Discrimination based on race, age (40-70), religion or sex;

(b) Individuals and not classes;

(c) Employers with eight or more employees.

(d) 180 day filing period.

3. The Agency.

(a) Fourteen members who are supposed to be representative of the "social, economic, cultural, ethnic and racial groups" making up the population of Fayette County.

(b) Staff of the agency consists of five investigators and one attorney.

(c) The agency has the investigatory powers granted by KRS 344.320(1)(2) which include the power to subpoena witnesses and documents via the Fayette Circuit Court.

(d) In Fiscal year 1986-87 the Commission received 252 charges of which 233 involved employment.

4. Procedure.

(a) The rules of Practice and Procedure adopted by the L-FHRC parallel and in some places copy the regulations in 104 KAR 1:020 adopted for the KCHR. A major difference is that there is no equivalent of Section 8 of the KCHR regulations which provide for discovery. The L-FHRC rules therefore appear to limit the power of discovery to subpoena powers of the Commission.

(b) Section 2.040 of the L-F procedural rules allow predetermination resolutions which, if approved by the Commission Director, would lead to a withdrawal of the Complaint. The agreement is enforceable as a contract between the parties and not by the Commission.

(c) In the event of a "no cause" determination, Section 2.050 provides for a twenty day period during which the complainant may seek reconsideration under Section 2.060.

(d) In the event of a probable cause determination, the procedural regulations provide in Section 2.080 for attempts to be made at conciliation.

(e) After the determination of probable cause, the respondent must file an answer to the complaint at any time not later than ten days before the date set for hearing.

(f) Hearings.

(1) In the event conciliation efforts fail, a public hearing is set for a date not later than sixty days after the Notice of Failure of Conciliation.

(2) Section 2.091 provides that a prehearing conference may be held for the simplification of issues, for making of stipulations, for identifying witnesses, etc.

(3) Hearings are held before one or more appointed hearing commissioners, with the commission attorney representing the complainant. The respondent, if he has answered, is entitled to put on and cross-examine witnesses. Section 2.110 4 d uses the "commonly relied upon by the reasonably prudent person in the conduct of daily business" standard of evidence.

(4) The hearing commissioner may receive proposed findings of fact and conclusions of law from the parties, and submits a report to the commission with recommended findings of fact and conclusions of law. The parties have ten days in which to file objections to this report with the Commission issuing a final order adopting the hearing commissioner's report or making its own findings of fact and conclusions of law.

(g) Section 2.130 of the Rules of Practice and Procedure provides for appeal via KRS 344.240 and .340. As with the KCHR, this means that the Commission's Findings of Fact are "conclusive unless clearly erroneous in view of the probative and substantial evidence on the whole record."

5. Remedies.

The L-FHRC incorporates KRS 344.230 and therefore grants E & H damages along with other affirmative remedies. In fiscal year 1986-87 the eleven public hearings held by the Commission resulted in total benefits being granted of $236,000. Two of the hearings resulted in benefits to claimants in

excess of $50,000.

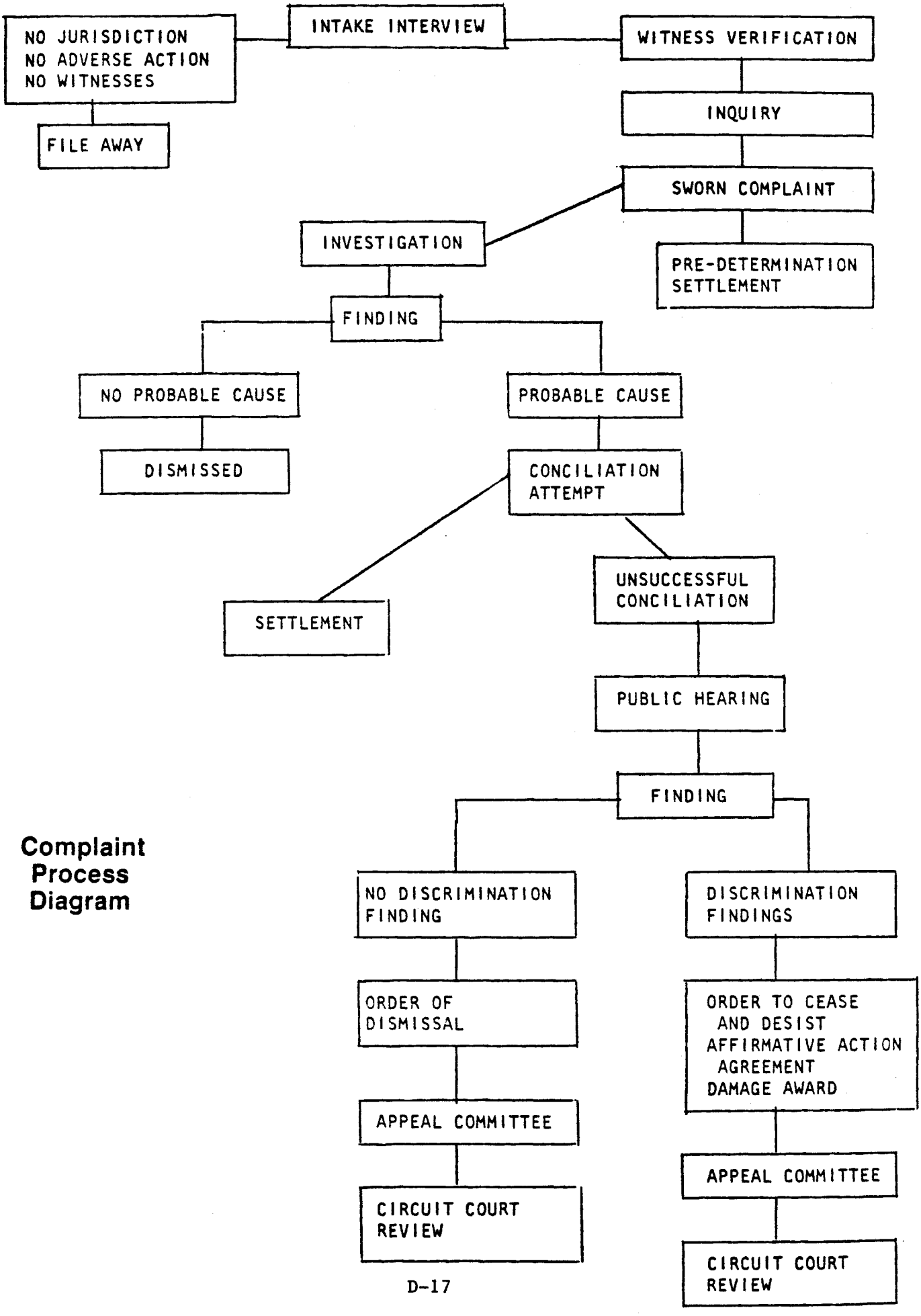
KENTUCKY COMMISSION ON HUMAN RIGHTS

EMPLOYMENT COMPLAINTS

	1984-1985	1985-1986	1986-1987
Conciliated	49	21	33
Dismissed	81	122	94
Withdrawn	14	16	10
Public hearing	1	4	4
Pending	229	163	133
	350	326	274

ALL COMPLAINTS

Inquiries	1246	1214	1250
New Complaints Filed	227	128	129
Employment		84	105
Housing		39	18
Public Accomodation		5	6
Cases Closed	167	211	174

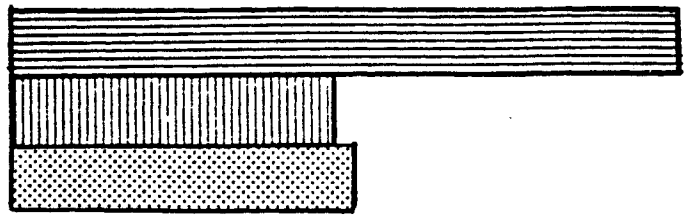


Complaint Process Diagram

LOUISVILLE/JEFFERSON COUNTY

HRC

Complaint History

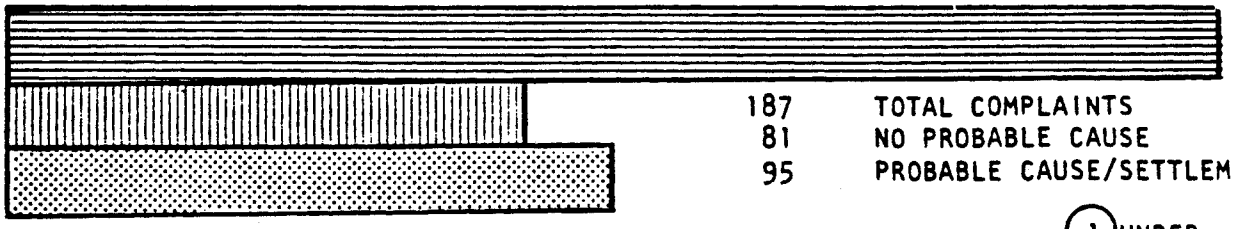


1983

106 TOTAL COMPLAINTS

51 NO PROBABLE CAUSE

55 PROBABLE CAUSE/SETTLEMENTS



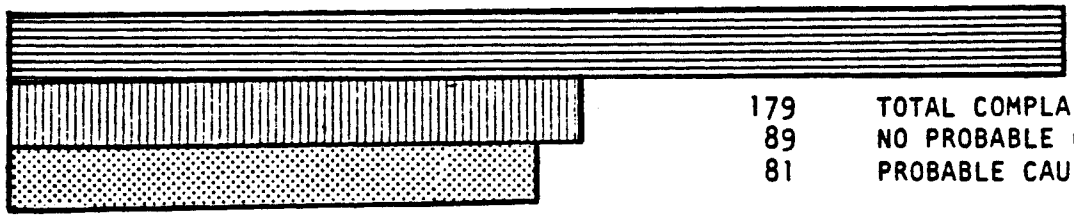
1984

187 TOTAL COMPLAINTS

81 NO PROBABLE CAUSE

95 PROBABLE CAUSE/SETTLEMENTS

(1) UNDER INVESTIGATION



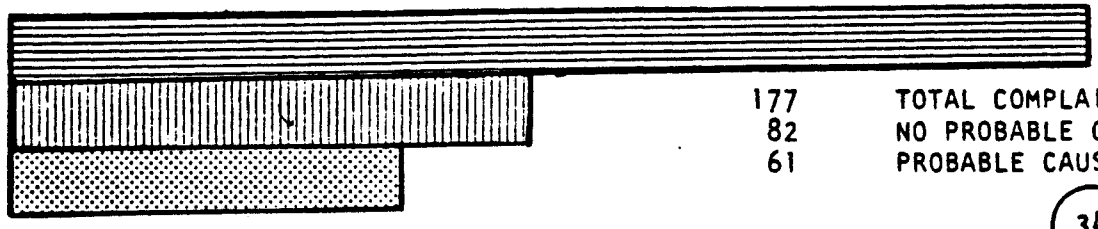
1985

179 TOTAL COMPLAINTS

89 NO PROBABLE CAUSE

81 PROBABLE CAUSE/SETTLEMENTS

(4) UNDER INVESTIGATION



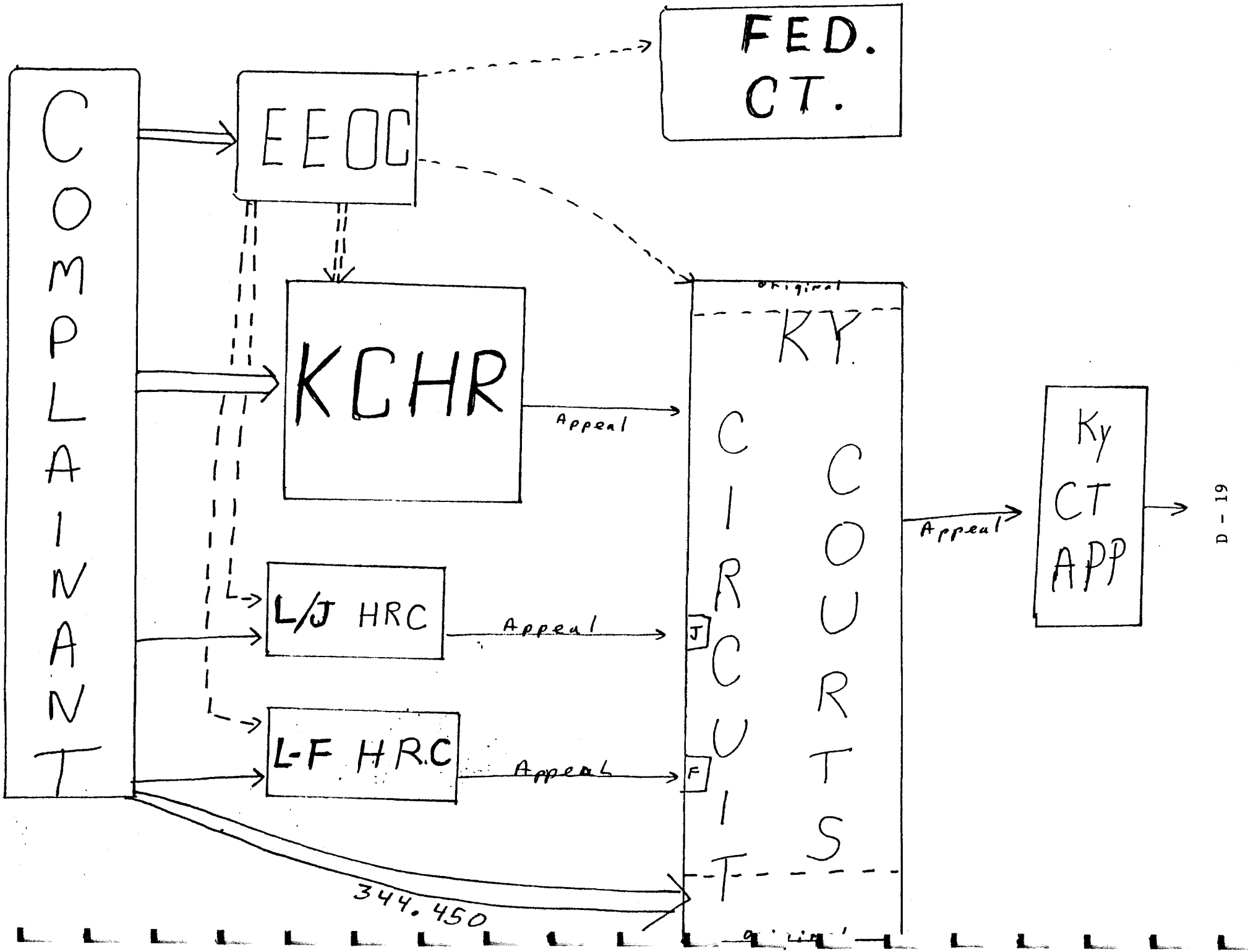
1986

177 TOTAL COMPLAINTS

82 NO PROBABLE CAUSE

61 PROBABLE CAUSE/SETTLEMENTS

(34) UNDER INVESTIGATION


COMPLAINANT
EEOC
FED. CT.
KCHR
Appeal
Original
KY CIRCUIT COURTS
Ky CT APP
Appeal
L/J HRC
Appeal
J
L-F HRC
Appeal
F
344.450
Original

TITLE VII UPDATE
SUBSTANTIVE AND PROCEDURAL

By

Carolyn S. Bratt
Alumni Professor of Law
University of Kentucky College of Law
Lexington, Kentucky

TITLE VII UPDATE
SUBSTANTIVE AND PROCEDURAL

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TITLE VII UPDATE - SUBSTANTIVE AND PROCEDURAL

Carolyn S. Bratt
Alumni Professor of Law
University of Kentucky College of Law

I. INTRODUCTION

A. The passage of the 1964 Civil Rights Act along with the adoption of the Equal Pay Act in 1963 signaled the beginning of a dramatic change from "industrial self-government" to the deprivatization of labor relations. Today, employment relations are heavily regulated by public law. See, Horowitz, "The Deprivativazation of Labor Relations Law," 49 Law and Contemporary Problems 1 (1986).

B. The Civil Rights Act of 1964 was the first comprehensive federal legislation to address the multifaceted problem of race discrimination in this country. As originally introduced, Title VII was intended to remedy the practices and effects of only race discrimination in employment.

C. Sex, as a protected classification, was added by an amendment from the floor of the House of Representatives. However, since the adoption of Title VII, more complaints alleging gender discrimination in employment have been filed with the EEOC [Equal Employment Opportunity Commission], the federal agency charged with enforcing Title VII, than have complaints alleging race discrimination in employment.

D. It is worth remembering that the 1964 Civil Rights Act was intended to be a grand remedial act to resolve the national disgrace of pervasive race discrimination in every part of our society. Hyper-technical interpretations of the statute defeat the accomplishment of that purpose. See, Chambers and Goldstein, "Title VII: The Continuing Challenge of Establishing Fair

Employment Practices," 49 Law and Contemporary Problems 9 (1986).

II. DEFINING DISCRIMINATION

A. Statutory Definition of Employer Discrimination

1. Section 703(a) of Title VII provides that it shall be an unlawful for an employer:

> "to fail or refuse to hire or to discharce any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

2. It would be difficult to conceive of a broader definition of discrimination.

B. Sexual Harassment

1. Is sexual harassment employment discrimination?

In Meritor Savings Bank v. Vinson, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) the United States Supreme Court held that sexual harassment may constitute impermissible employment discrimination as defined in Section 703 (a)(2) of Title VII of the 1964 Civil Rights Act.

2. What constitutes impermissible sexual harassment?

a. EEOC Guidelines [29 C.F.R. §1604.11.] state:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

b. Hostile Work Environment

In the Meritor case, 475 U.S. 1043, the Court recognized that in addition to the quid pro quo type of sexual harassment the hostile work environment type also may violate Title VII even though there are no direct adverse economic consequences to the employee. See, also C. MacKinnon, Sexual Harassment of Working Women (1979).

c. Unwelcome Advances

If the sexual advances are welcomed, a claim of sex discrimination is defeated.

In the Meritor case, 475 U.S. 1043, the plaintiff had acquiesced in the supervisor's advances on a number of occasions. The Court, however, rejected the idea that voluntary acquiescence always defeats the plaintiff's

claim. The issue, it held, was not voluntariness, but whether the sexual advances were unwelcomed. The Court acknowledged the difficulty of proof on the issue of "unwelcomeness." It concluded that evidence of the plaintiff's sexually provocative speech and dress was relevant to the issue of unwelcomeness.

d. Favorable treatment

EEOC guidelines provide that: "where employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity."

The developing case law is inconsistent. Compare, e.g., King v. Palmer, 778 F.2d 878 (D.C.Cir. 1985), reh'g en banc denied, 782 F.2d 274 (D.C.Cir. 1986) (promotion of one female nurse who was sexually involved with the supervisor over another better qualified female nurse who was not sexually involved with the supervisor was a violation of Title VII) and DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2dCir. 1986)(hiring of a female assistant chief of respiratory therapy who was registered with the National Board of Respiratory Therapists instead of an unregistered male respiratory therapist was not a violation of Title VII even though the registration requirement was initiated so as to secure the position for the employer's woman friend).

3. When is an employer responsible for the sexual harassment of an employee by others?

a. Supervisory employees

The Supreme Court did not resolve this question in Meritor Savings Bank v. Vinson, supra. although the Court agreed with the EEOC position that Congress intended traditional agency principles to guide the courts in determining employer responsibility. However, the Court stated that employers were not automatically liable for sexual harassment by their supervisors. There must be an examination of all of the circumstances of the particular employment relationship.

Nonetheless, the Court did hold that neither the absence of notice to the employer nor an employee's failure to exhaust grievance procedures automatically insulates the employer from liability.

Harassment by a same-sex supervisor is actionable if the acts complained of would be actionable if committed by an opposite-sex supervisor. See, Joyner v. AAA Cooper Transp., 597 F.Supp. 537 (M.D.Ala. 1983), aff'd. 749 F.2d 732 (11th Cir. 1984).

b. Non-supervisory employees [co-workers]

Employers who have actual knowledge of sexual harassment by co-workers and who fail to take remedial action have been found liable under Title VII. See, e.g., Katz v. Dole, 709 F.2d 251 (4th Cir. 1983). Whereas, an employer who takes prompt remedial action reasonably calculated to end the harassment by a co-worker has been held not to be liable under Title VII. See, e.g., Barret v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984).

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

A nonsupervisory co-worker is not liable under Title VII for his acts of sexual harassment because he is neither an employer nor an agent of the employer. See, e.g., Guyette v. Stauffer Chemical Co., 538 F.Supp. 857 (N.D. Ohio 1982). However, the co-worker may be liable to the victim in tort or under some other state law theory.

c. Non-employees

EEOC guidelines provide that: "An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." 29 C.F.R. 1604.11(e).

This position is consistent with the Supreme Court's decision in Meritor Savings Bank v. Vinson, 475 U.S. 1043, imposing liability on employers for hostile work environment type of sexual harassment. It should not matter if the hostile work environment is created by an employee or non-employee if the employer is or should

be aware of the conditions, has the power to correct the conditions, and does not do so.

C. Pregnancy and Pregnancy Related Issues

1. Pregnancy Discrimination Generally

a. In General Elec. Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401 (1976) the Supreme Court held that that no sex-based discrimination could be found in an employer-sponsored disability plan which did not provide any benefits for pregnancy or pregnancy related disabilities because "pregnancy-based classifications are not in themselves sex-based."

b. Congress thereafter passed the Pregnancy Discrimination Act which amended definition of discrimination in Title VII. It reads in part as follows:

"The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ." Public Law 95-555, 95th Congress, 92 Stat. 2076, amending section 701 of the Civil Rights Act of 1964.

2. Mandatory Maternity Leave

a. General mandatory maternity leave of a specified duration unrelated to the individual woman's actual ability to work is a violation of Title VII as amended. See, e.g., Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1129 (1981).

It is also unlawful under the due process clause of the Fourteenth Amendment. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974).

b. However, in Langley v. State Farm Fire & Cas. Co., 644 F.2d 1124 (5th Cir. 1981) the court upheld the employer's maternity leave policies of requiring its employees to report pregnancies immediately upon discovery, to discontinue work on the date suggested by the employees' personal physician and to return to work within 60 days following delivery if certified by their physician as capable to do so.

3. Maternity Benefits

a. Employer-provided disability plan

The PDA requires that pregnancy must be treated as the employer treats any other temporary disability for purposes of sick leave or temporary disability benefits.

In Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) the Supreme Court said that the PDA made it unlawful under Title VII for an employer to provide less medical coverage for a male employee's spouse who was hospitalized for pregnancy than for a female employee's spouse who was hospitalized for some other medical reason.

b. No employer-provided disability plan

Failure to provided any disability leave for any medical reasons is not a prima facie violation of Title

VII as it applies to a pregnant employee.

However, the EEOC guidelines provide that: "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity. 29 C.F.R. §1604.10(c).

In California Fed. Sav. & Loan Ass'n v. Guerra, 107 S.Ct. 683 (1987) the Supreme Court held that the PDA does not require employers to give preferential treatment to pregnant employees, but Congress did not intend to prohibit preferential treatment. Therefore, California could require by statute that employers provide female employees with an unpaid pregnancy disability leave of up to four months with reinstatement to the job the employee previously held unless the job was no longer available due to business necessity.

4. Unemployment Benefits

a. In Turner v. Dep't. of Employment Sec., 423 U.S. 44, 96 S.Ct. 249, 46 L.Ed.2d 181 (1975) the Supreme Court in a per curiam opinion invalidated a provision of Utah law that made pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until a date six weeks after birth.

b. In Wimberly v. Labor and Industrical Relations Commission of Missouri, 107 S.Ct. 821, 93 L.Ed.2d 909 (1987) the Supreme Court adopted the view that the Federal Unemployment Tax Act [FUTA] merely requires pregnancy to be treated like all other disabilities and

not be singled out for unfavorable treatment. Therefore, the Court upheld Missouri's denial of unemployment compensation benefits to a pregnant woman who left work pursuant to the employer's "leave without guarantee of reinstatement" policy. When the employee wished to return to work, the employer told her there were no positions open. She filed a claim for unemployment benefits, but was denied because of a Missouri statute that disqualifies any individual who "has left his work voluntarily without good cause attributable to his work or to his employer."

5. Non-pregnancy BFOQ

a. Although Title VII embodies a federal guarantee of nondiscrimination in employment by prohibiting hiring and other employment practicers that discriminate on the basis of sex, the Act does contain an exception to this general rule of nondiscrimination. This exception is called the BFOQ exception.

b. "Notwithstanding any other provisions of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. §2000e-2(e).

c. There are now a number of cases in which the court has had to address the question of whether pregnancy or childbearing capacity is a "bona fide occupational <u>disqualification</u>" for a particular job. The lower court results are inconsistent. See, e.g.:

Condit v. United Air Lines, Inc., 12 E.P.D. par. 11,195 (E.D. Va. 1976), aff'd, 558 F.2d 1176 (4th Cir. 1977): upheld airline rule requiring female cabin attendants to quit flying as soon as their pregnancy is known because because they are responsible for the evacuation of passengers during an emergency. The court said that because it could be shown that pregnant cabin attendants are more likely than non-pregnant cabin attendants to have cramps, nausea, and dizziness and that these disorders could affect the attendants ability to perform her safety functions, nonpregnancy was a BFOQ for the position.

Compare, United Airlines, Inc. v. State Human Rights Appeal Bd., 402 N.Y.S.2d 630, 61 A.D.2d 1010, U.S. cert. denied (#78-414, 27 Nov. 1978): the ability of pregnant cabin attendants to erform airline safety functions must be independently determined by a doctor.

d. Variations on the theme.

Chambers v. Omaha Girls Club, 629 F.Supp. 925 (D.Neb. 1986), 56 L.Week 2339 (8th Cir. Dec. 3, 1987): a girls club that included pregnancy prevention programs among its activities for girls between the ages of eight and 18 may lawfully enforce its "role model rule" banning single parent pregnancies among its staff members under the BFOQ defense.

Hays v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984), rehr'g denied, 732 F.2d 944 (11th Cir. 1984): a hospital violated Ttile VII by firing a pregnant x-ray technician to protect her fetus from potentially harmful radiation. PDA mandates that an employer treat its workers equally when it seeks to protect their

offspring. No nonfertile female BFOQ.

D. Affirmative Action Programs

1. Voluntary Affirmative Action Plans - private employer

United Steelworkers of America v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) clearly establishes that it is not a violation of Title VII for an employer to voluntarily adopt an affirmative action plan which is designed to elminate conspicuous racial imbalance in traditionally segregated job categories.

The Court reached this holding despite the provisions of Section 703(j) which states that: "Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

The Court held that §703(j) was merely a product of a legislative compromise that racial imbalance of a work force standing alone would not give rise to liability under Title VII. It was not intended to proscribe voluntary affirmative action.

Although Weber dealt with an affirmative action plan which

provided special on-the-job training for craft jobs to minority employees, its logic would seem to apply equally to voluntary affirmative action plans of private employers which contained special provisions about lay-offs of minority employees.

2. Voluntary Affirmative Action Plans - Public Employees

a. Hiring and Promotional Goals

In Johnson v. Transp. Agency, Santa Clara, Cal., 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), the Supreme Court held that a country did not violate Title VII when it considered gender among other factors in promoting a woman under a voluntary affirmative action plan. The Court used Weber-type analysis and upheld the plan as a step designed to elminate a manifest imbalance in a traditionally segregated job category.

b. Protections Against Layoffs

In an earlier decision in Wygant v. Jackson Board of Education, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) the Supreme Court held that a school board could not extend preferential protection against layoffs to minority employees in a collective bargaining agreement. A plurality of the Court found that this layoff policy violated the Equal Protection Clause of the Fourteenth Amendment.

3. Court-ordered Affirmative Action

a. Hiring and Promotional Goals

In Local 28 of Sheet Metal Workers International Asc. v. EEOC, 106 S.Ct 3019, 92 L.Ed.2d 344 (1986) the

Supreme Court held that a court has the power under Title VII to order a union which has been found guilty of the widespread practice of race discrimination to engage in race conscious affirmative action programs which benefit nonvictims of the discrimination.

Local No. 93, Int. Asc. of Firefighters v. Cleveland, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986) involved the question of whether Section 706(j) of Title VII precludes a court from entering a consent degree without a finding of discrimination which provides for affirmative action in promotions that may benefit individiduals who were not actual victims of the defendant's discriminatory practices.

Section 706(j) provides that: "Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist . . . ."

The Court said that Section 706(j) does not bar a court from entering such a consent decree because the section was not intended to be a limitation on the type of relief the courts may granted, but a limitation on what constitutes proof of discrimination.

In United States v. Paradise, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) the Supreme Court upheld a court order which required the Alabama Department of Safety to award 50% of the promotions of state troopers to corporal to minorities until 25% of the rank was composed of minority troopers. The Court held that the requirement was permissible under the Equal Protection Clause of the Fourteenth Amendment as it was justified

by the compelling governmental interest in eradicating discriminatory exclusion of minorities from the position and was narrowly tailored to serve that purpose.

c. Protection Against Layoffs

In Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) the Supreme Court held that a court which entered a consent degree providing for certain minority hiring goals lacked the power under Title VII to later order a modification of that decree to protect minority positions during a layoff unless there was a finding that the seniority system under which the layoffs were conducted was adopted with the purpose or intent to discriminate. The demotions and layoff provisions of the collective bargaining agreement took precedent over the affirmative relief ordered by the court because there was no finding that this was not a bona fide seniority system.

Section 703(g) provides that: "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system." This has been interpreted to immune seniority systems and the effects of seniority systems from attack under Title VII unless the seniority system was adopted with the intent to discriminate.

E. Continuing Violations v. Continuing Effects of Past Violations

1. In United Airlines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) the plaintiff had been discharged because of an employer rule that female flight attendants could not be married. The plaintiff did not bring a timely action under Title VII for reinstatement. In a lawsuit brought by other flight attendants United's no-marriage rule was found to be violative of Title VII. When the plaintiff was rehired by the defendant a number of years later without seniority credit for the time she had been employed prior to her termination, the plaintiff brought suit alleging that the employer was guilty of a continuing violation of Title VII by giving present effect to its past discrimination.

   The Court rejected her argument because her termination pursuant to the "no-marriage" rule was an immediate and complete violation which was subject to the 180-day limitation rule for filing under Title VII. The past event had no present legal significance because it is a time-barred act of discrimination. Therefore, the seniority system which gave present effect to a complete act of discrimination no longer subject to timely Title VII charge is immune from attack presently.

2. In Bazemore v. Friday, 106 S.Ct. 3006, 92 L.Ed.2d 315 (1986) the North Carolina Agricultural Extension Service argued that it had not violated Title VII when it paid Black employees who worked for the service prior to the adoption of Title VII less than white employees who worked for the service prior to the adoption of Title VII. Prior to the adoption of Title VII the extension service maintained an all black and an all white branch. The employees in the black branch were paid less than the employees in the white branch. After the adoption of Title VII, the two branches were merged. Thereafter, the service paid equal raises, but they were added to the unequal base pay of black and white

employees who had worked in the previously segregated branches.

The Supreme Court held that the Circuit Court had erred in holding that under Title VII the Extension Service had no duty to eradicate salary disparities between black and white employees that had their origin prior to the date when Title VII was made applicable to public employees. Discrimination in pay is a continuing violation which reoccurs each time the employer pays a black employee less than a similarly situated white employee. It is not a single, complete act of discrimination which is of no legal significance after it is barred by failure to make a timely complaint. The two year back pay period established in Title VII merely means that Congress intended a cumulative recovery rule for continuing violations subject to an absolute limit of two years. See, C. Sullivan, M. Zimmer & R. Richards, Federal Statutory Law of Employment Discrimination §3.5, at 276 (1980).

III. PROCEDURE

A. Preclusion

1. Preclusive Effect of Final State Court Decision

a. In Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) an employee filed a Title VII discrimination charge with the EEOC. The EEOC referred the case to the New York State Division of Human Rights, the agency charged with administering the State's employment discrimination laws. The state agency rejected the employees discrimination claim, a judgment that was affirmed both at the agency appellate level and by a reviewing state court. The employee then brought a

Title VII acation in which the employer raised a res judicata defense.

b. The Supreme Court held that the state court's judgment affirming the state agency's finding of no discrimination was entitled to preclusive effect in the employee's Title VII action.

2. Preclusive Effect of an Unreviewed State Administrative Determination

a. In University of Tennessee v. Elliott, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) a black employee of the university, informed that he was to be discharged for misconduct and inadequate work performance, filed an administrative appeal under state law and a federal suit alleging that the charges were racially motivated in violation of Title VII and other civil rights statutes. The federal court allowed the administrative proceedings to go forward. It resulted in a ruling by an ALJ and affirmed by a University vice president that the respondent's proposed discharge was not racially motivated. Instead of seeking state court review of the administrative proceeding, the employee returned to district court which granted summary judgment for the University on the ground that the ALJ's ruling was entitled to preclusive effect.

b. The Supreme Court held that Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims. They found support for this result by pointing out that it is settled that decisions by the EEOC do not preclude a trial de novo in federal court. Therefore, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if

such a decision were to be afforded preclusive effect in a state's own court.

c. The Court specifically noted that the fact that the plaintiff requested the administrative hearing rather than being compelled to participate in it does weigh in favor of preclusion. This is because the legislative history of Title VII manifests a congressional intention to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. Alexander v. Gardner-Denver Co., 415 U.S. 36 , 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

B. Pendent Jurisdiction

1. The doctrine of pendent jurisdiction is invoked in federal court by the plaintiff in a Title VII action to justify the inclusion of state law claims in the complaint [e.g., claims for intentional infliction of emotional distress or claims based on exceptions to the employment-at-will rule].

2. The principles set forth in United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) determine whether the state claims may be appended to the Title VII claim. Those principles for determining whether the federal court has subject-matter jurisdiction are:

a. Whether the plaintiff has stated a substantial federal claim;

b. Whether the state and federal claims "derive from a common nucleus of operative fact;" and,

c. Whether the plaintiff's claims are "such that he would

be expected to try them all in one judicial proceeding."

3. Federal courts trying Title VII cases usually determine that they have the power to hear pendent state law claims. However, as the power to hear such claims is discretionary, the focus is usually whether the court will exercises its discretion to hear the pendent claims.

4. Factors which have been relevant to a federal court's determination of whether to exercise its discretion to hear the pendent claims include:

   a. Whether judicial economy, fairness and convenience will be served by hearing the state claims. See, e.g., Sardigal v. St.Louis Nat'l Stockyards Co., 42 F.E.P. 495 (S.D. Ill. 1985).

   b. Whether the pendent claims involve unsettled matters of state law. See, EEOC v. West Co., 40 F.E.P. 1024 (E.D. Pa. 1986).

   c. Whether the state issues will predominate during the trial. See, St. Cyr v. Merrill Lynch, 540 F.Supp. 889 (S.D. Tex. 1982).

   d. Whether the combination of state and federal issues will create jury confusion. See, Cap v. Lehigh Univ., 433 F.Supp. 1275 (E.D. Pa. 1977).

   e. Whether the plaintiff has failed to pursue state administrative remedies. See, Upshur v. Love, 474 F.Supp. 332 (N.D. Cal. 1979).

   f. Whether the plaintiff's state claims are superfluous in light of the remedies available under Title VII. See,

Gordon v. National R.R. Passenger Corp., 564 F.Supp. 199 (E.D. Pa. 1983).

g. Whether the state law claims are legal rather than equitable. See, Kelley v. United Mine Workers of Am., 42 F.E.P. 769 (S.D. Ohio 1986).

5. If the federal claim is later dismissed, that usually dictates a dismissal of the pendent state claim. See, Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975). Also, the court has the power to continuously reevaluate its decision to hear the pendent claim and change its decision. See, National Org. for Women v. Sperry Rand Corp., 457 F.Supp. 1338 (D. Conn. 1978).

6. The application of Gibbs to state claims in Title VII actions is difficult to predict because the decision to accept pendent jurisdiction is discretionary.

a. Compare, McPartland v. American Broadcasting Co., 623 F.Supp. 133 (S.D. N.Y. 1985): in addition to her Title VII charges the plaintiff alleged that the defendant had blacklisted her which kept her from obtaining another job. The court refused to exercise pendent jurisdiction over the state claim because it found that post-employment blacklisting claims and Title VII claims do not derive from a common nucleus of operative fact.

b. And, Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir. 1986): plaintiff appended state law claims for tortious interference with employment contract and breach of an employment contract with his Title VII claims. The court held that the district court properly exercised pendent jurisdiction even though the state claims required a jury.

7. In Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976) the Supreme Court did not rule out the possibility of pendent party jurisdiction. In that case the Court said that "the addition of a completely new party would run counter to the well established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress." The Court directed federal courts which contemplated accepting pendent party jurisdiction to determine whether Congress expressly or impliedly negated the existence of jurisdiction over "pendent parties." The Court went on to say that when "the grant of jurisdiction to the the federal court is exclusive . . . the argument of judicial economy and convenience can be couple with the additional argument that only in federal court may all of the claims be tried together."

a. In Kiss v. Tamarac Utilities, Inc., 463 F.Supp. 951 (S.D. Fla. 1978) the plaintiff alleged certain Title VII violations against his former employer and certain tort claims against several of his former co-workers. The court refused to exercise pendent party jurisdiction over the co-workers with respect to the tort claims. See, also Meyer v. California & Hawaiian Sugar Co., 27 F.E.P. 549 (N.D. Cal. 1979), aff'd, 662 F.2d 637 (9th Cir. 1981)(Ninth Circuit consistently rejects the doctrine of pendent party jurisdiction).

b. Compare, Kyriazi v. Western Electric Co., 476 F.Supp. 335 (D. N.J. 1981). The court accepted pendent party jurisdiction in a Title VII case over the state law claims against the plaintiff's co-workers. The court reasoned that there was pendent party jurisdiction because the federal courts have exclusive jurisdiction over Title VII claims and the claims satisfied the "common nucleus" requirement.

C. State Law Preemption of State Common Law Claims

1. An argument has been put forwarded recently by those who represent employers in employment litigation cases that state common law claims arising out of the same common nucleus of facts which gives rise to Title VII and/or Kentucky Civil Rights Act [KRS Chapter 344] claim are preempted by those federal and state statutory actions once the plaintiff elects a statutory remedy and states a proper cause of action under the statute.

2. In Kentucky Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985) is cited for support for this position that the common law claims are "merged" into the statutory cause of action.

3. The complaint in Grzyb did not allege a cause of action for sex discrimination under the Kentucky Civil Rights Act which forbids discrimination in employment on account of sex. The gravaman of the complaint was that the termination of the plaintiff because of his fraternization with a female employee was impermissible because it was an impermissible discharge within the wrongful discharge exception to Kentucky's terminable at will doctrine.

4. Kentucky law recognizes that the wrongful discharge exception to the terminable-at-will doctrine is applicable if the plaintiff establishes that:

a. the discharge was contrary to a fundamental and well-defined public policy as evidenced by existing law;and,

b. the policy is evidenced by a constitutional or statutory provision. See, Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730 (Ky. 1984).

5. In Grzyb the plaintiff sought to meet this burden by characterizing his discharge as one based on sex discrimination which is contrary to the provisions of Kentucky's Civil Rights Act.

6. The Kentucky Supreme Court held that "the claim of sex discrimination would not qualify as providing the necessary under pinning for a wrongful discharge suit because the same statute that ennuciates the public policy prohibiting employment discrimination because of "sex" also provides the structure for pursuing a claim for discriminatory acts in contravention of its terms."

7. The Kentucky Supreme Court did NOT hold that the plaintiff's claim of wrongful discharge was preempted by Kentucky's Civil Rights Act. The Kentucky Supreme Court did NOT hold that Kentucky's Civil Rights Act preempts state common law claims. Nor did the Kentucky Supreme Court hold that Title VII preempts state common law claims. The Court merely held that the existence of the Kentucky Civil Rights Act forbidding gender discrimination did not satisfy the requirements for triggering the wrongful discharge exception to Kentucky's terminable-at-will doctrine.

8. Similarly, other cases cited for the proposition that state common law claims are preempted by Title VII and/or state fair employment acts do not support that proposition. For example, Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982) has been cited in support of this preemption argument.

   a. In the Bruffet case the plaintiff alleged four causes of action: (1) breach of contract; (2) intentional infliction of emotional distress; (3) discharge in violation of the policy of the Pennsylvania Human

Relations Act; and (4) violation of an implied contract covenant of good faith and fair dealing.

b. The first and fourth causes of action were dismissed by the court because Pennsylvania follows the terminable-at-will doctrine.

c. The cause of action for intentional infliction of emotional distress was dismissed as barred by Pennsylvania's two year statute of limitations for such causes of action NOT because it was barred by the existence of the Pennsylvania Human Relations Act.

d. The third cause of action for discharge in violation of the policies evidenced by the Pennsylvania Human Relations Act was also dismissed. The court held that the passage of the Pennsylvania Human Relations Act did not create "a separate common law claim where none had existed before and where that void had been filled by that very legislation."

AGE BASED DISCRIMINATION: LITIGATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

(ADEA) 29 U.S.C. §621 et. seq.

Marvin L. Coan
Hummel and Coan
Louisville, Kentucky

SECTION F

LITIGATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

29 U.S.C. §621 et. seq.

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LITIGATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 29 U.S.C. §621 et. seq. (ADEA)

I. BACKGROUND CONSIDERATIONS

A. Broad remedial legislation of the "Great Society" which has been narrowed somewhat by judicial interpretation over the last twenty years.

B. In 1967, people covered by the ADEA were those age 40-65 (protected age group or PAG); by 1978, the PAG included the ages 40-70; and, finally, in 1986, amendments to the ADEA by Congress abolished the upper age limit altogether so it now applies to all employees over 40 years of age.

C. The ADEA had as its genesis a combination of provisions mirroring Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act of 1938. Substantively, age discrimination is prohibited under language borrowed from Title VII, whereas the remedies and enforcement scheme of the ADEA borrows from the FLSA.

D. Civil actions may be brought by private individuals or by the EEOC.

E. Before a private action can be commenced, a charge must be filed and a period of

time waited to see if the matter can be conciliated, 29 U.S.C. §626(d).

F. Jury trials are available to private litigants, and any plaintiff's lawyer who practices ADEA cases and fails to seek a jury trial has abandoned the most powerful weapon in his/her arsenal.

G. The question of whether EEOC may have a jury trial is still an open question as far as the Supreme Court is concerned, despite several decisions from Courts of Appeals and District Courts indicating that the agency may have a jury trial. EEOC v. Ford Motor Company, 732 F.2d 120 (10th Cir. 1984); EEOC v. Chrysler Corp., 759 F.2d 1523 (11th Cir. 1985); and EEOC v. Colgate-Palmolive Company, 586 F.Supp. 1341 (S.D.N.Y. 1984).

H. EEOC may choose to commence an action, thus, in effect, "taking over" a private individual's action that has already been filed, although the frequency of this occurring is rare unless perhaps a large group of plaintiffs is affected. 29 U.S.C. §626(c)(1).

I. Beware of signing releases for ADEA claims prior to litigation because if it is found that the release was voluntarily and knowingly entered, then it may be valid even without EEOC supervision. Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039 (6th Circ. 1986) (en banc); and Lancaster v. Buerckle Honda Co., 809 F.2d 539 (8th Cir. 1987). See also EEOC regulations at 50 Fed.Reg. 40,870 (1985).

J. File your action in United States District Court, as opposed to the state courts under KRS 344, because the very restrictive language of the Kentucky Supreme Court in Harker v. Federal Land Bank of Louisville, 679 S.W.2d 226, 229 (1984), would make it difficult for a trial judge who does not handle these cases often to see how a plaintiff can avoid summary judgment in light of language requiring "cold, hard facts."

K. The statute of limitations for an ADEA action is two years unless the violation was "willful," in which case it is three years. 29 U.S.C. §626(e); see Transworld Airlines, Inc. v. Thurston, 469 U.S. 111

(1985), for an understanding of what "willful" means according to the Supreme Court.

II. CHOOSING THE "RIGHT" PLAINTIFF'S CASE

A. Through interviewing, make sure a potential plaintiff has a good employment record that will be well documented over the years so the employer will not be able to easily portray him/her as a person who was a troublemaker and a person for whom termination was inevitable.

B. Will your plaintiff be someone that a jury can easily understand in terms of relating their story, will he/she be the type of person with whom a jury can identify, and, most importantly, will the jury like him/her? Juries do not like to help a plaintiff whom they do not like, notwithstanding the fact that he/she may have been unlawfully terminated.

C. Has the plaintiff since termination attempted to mitigate his/her damages by seeking other alternative employment and does proof exist that he/she has done so?

D. Are the circumstances surrounding the potential plaintiff's termination from employment peculiar to him/her or is he/she a member of a group of employees terminated by a reduction in force (RIF)? RIF cases are often most difficult because they supply the employer an obvious "economic" justification for the terminations which will be perceived as a reasonable business judgment rationale used to defend the action. (However, employers may attempt to weed out older employees during an RIF.)

III. DISCOVERY

A. The strongest evidence of age discrimination usually exists in the employer's documents, unless you are fortunate enough to get a high-level former manager involved in the decision to testify.

B. Always examine all documents filed by the employer with the EEOC or the state agency to see what position the employer took there. TIP: Sometimes a company does not have an attorney involved on its behalf before the state or federal admi-

nistrative agency and some helpful documents may be obtained that would not be allowed if first reviewed by company counsel. Moreover, the reason advanced for the adverse employee decision may change between the original agency position and the time of trial, which may help the plaintiff on the proof of pretext.

C. Interrogatories and Requests for Admissions are fine to help "flush out" areas of remaining questions after depositions, but prior to depositions, they are for the most part less valuable since company counsel plays such a large part in responding to them.

D. Depose all decision-making officials for the employer to understand clearly what the criteria were that were used for the termination decision. If possible, attempt to take all of them at one time to help eliminate undue coordination of how the adverse employment decision came about.

E. Try to take the depositions of the employer/decision makers before the employer's counsel takes your plaintiff's deposition, as this helps eliminate the education of the defendant about all of the details of your case before company decision makers testify.

F. It is difficult, if not impossible, to get present employees of a company to testify for your plaintiff based upon fear of job security, so you need to investigate and try to interview former managers/officers and employees with knowledge of plaintiff's adverse employment decision who have left the company. If they left the company with "bad feelings," although a question of bias may occur at trial, nevertheless, they may be willing, as Paul Harvey says, to tell "the rest of the story."

G. If part of a company's defense has to do with its poor economic condition and a termination based upon, for example, a reduction in force, make sure you review all relevant financial records for the period of time and, if necessary, have

your expert, i.e., accountant or economist, review the financial data with you.

H. As part of the deposition process, always try to determine if certain types of documents exist and, if so, in whose possession they can be found within the company.

I. If you are counsel for the defendant, try to take the plaintiff's deposition right away, make it a very long and arduous experience for him/her, and question the person about each and every aspect of the Complaint which is material. You may also go through the Complaint and find out about any witnesses or documentary evidence that supports any of the allegations.

IV. PROVING A PRIMA FACIE CASE

A. The proof will vary depending upon whether the adverse employment decision involves a failure to promote, a demotion, lay-off, individual termination, or termination as part of a reduction in force.

B. Three types of proof:

1. Use of direct evidence of age discrimination where a company policy may allocate less benefits based upon an employee's age;

2. Circumstancial evidence, which makes a difference in the individual's treatment; and

3. Evidence of disproportionate impact on older employees flowing from a neutral policy or practice.

C. Plaintiff's proof must show:

1. He/She was over 40 years of age at the time of the adverse decision;

2. He/She was qualified for the position held at the time of termination or the position that was being sought;

3. He/She was rejected or discharged;

4. Age was a determinative/motivating factor in the decision of the employer. Coker v. Aamco

Oil Co., 709 F.2d 1433 (11th Cir. 1983); Williams v. General MotorsCorp., 565 F.2d 120, 129 (5th Cir. 1981), for cases showing the elements in a reduction in force situation.

TIP: Be prepared throughout trial to note for the Court where each of the elements of the prima facie case were proved, i.e., which witnesses and/or exhibits, so you can easily respond when the defendant's counsel makes a motion for a directed verdict at the close of your evidence.

5. Usually the fourth element involving age as a motivating/-determinative factor is the most difficult to prove and you may need to resort to age bias comments made by high-level decision makers. Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525, 1530 (11th Cir. 1985), where the hospital administrator referred to the need for "new blood" and the fact that he was going to

recruit younger doctors and nurses; Rose v. National Cash Register Corp., 703 F.2d 225, 227 (6th Cir. 1983), where Mr. Rose was deemed to be the victim of a new "younger image" company policy; and Mistretta v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980).

6. Even something which appears innocuous, such as a supervisor delivering a termination paper and telling the plaintiff to get a lawyer has been held to give rise to an inference of age discrimination. Graham v. F. B. Leopold Co., Inc., 779 F.2d 170 (3rd Cir. 1986); Contra: Chappell v. G. T. E. Products Corp., 803 F.2d 261 (6th Cir. 196); Mitroff v. Xomox Corp., 797 F.2d 271 (6th Cir. 1986), where allegedly age-related statements which were made by people outside the scope of their jobs or made

without specific authority did not allow for an inference of age discrimination.

7. The other possible means of proving age was a factor involves looking at the age of the person or persons retained when the plaintiff is not, as that may give rise to an inference of age discrimination. It always helps the plaintiff if the person retained is under 40, but it is not completely fatal if the person retained is, for example, in his or her early 40s and the person terminated is considerably older. See Grubb v. W. A. Foote Memorial Hosp., Inc., 741 F.2d 1486 (6th Cir. 1984).

D. Defendant will then be required to prove: There was a legitimate, non-discriminatory reason for the adverse employee decision. This will inevitably involve the employer showing business necessity for the decision, i.e., downturn in

business, unsatisfactory performance by the terminated individual, a bona fide occupational qualification, or possibly compliance with some type of agreement such as a union contract where seniority may be an appropriate factor in such employment decisions.

E. If successful in meeting its burden of production, the burden then shifts to the plaintiff to prove that the reasons proffered by the employer for the adverse employment determination were merely a pretext for discrimination. LaMontagne v. American Convenient Prods., Inc., 750 F.2d 1405, 1409 (7th Cir. 1984).

F. Plaintiff then must prove:

1. The articulated reason of the employer for the adverse employment decision is untrue or, if it is true, it is a pretext for age as the motivating factor. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

2. This general approach to proof in an age discrimination case

essentially follows the format set forth by the Supreme Court in the Title VII context for establishing a prima facie case of employment discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, the Sixth Circuit does not strictly adhere to this approach because it has been deemed to be somewhat inflexible and, therefore, the Sixth Circuit considers itself to use a case-by-case analysis depending on the type of adverse employment decision involved.

3. At all stages the burden lies with the plaintiff to show age was the "but for" factor in the employee's adverse treatment and it is not up to the employer to prove the absence of age discrimination at any point.

G. If you overcome the prima facie case hurdle, proving pretext is also extremely difficult.

1. Use of statistics to prove pretext is often unsuccessful because employers are very smart after having worked with the ADEA for 20 years. Employers understand that they need to balance out the work force and, in fact, you may find that there is an older work force than there was before, even though some selected older employees have been terminated.

2. You may be successful in comparing the records of employees who were not terminated to the plaintiff's record who has been terminated in hopes that you can find legitimate reasons why the plaintiff should have been retained, as opposed to one of those other individuals.

3. You may also again be in a position to consider the use of

statements which reflect bias favoring "younger employees," however, do not depend on the plaintiff's own testify for this unless it can be shown it is based upon personal knowledge or written evidence. Slaughter v. Allstate Insurance Company, 803 F.2d 857 (5th Cir. 1986).

4. Even a radical change in the evaluation of a long-term employee by the employer won't overcome clear evidence justifying the change in performance. Jang v. Biltmore Tire Co., 797 F.2d 486 (7th Cir. 1986).

V. REMEDIES

A. The Courts have over the last 20 years refined what remedies are available under the ADEA by expanding some and narrowing others.

B. Clearly, compensatory damages for emotional distress/suffering are not avail-

able since liquidated damages, i.e., a doubling mechanism where willfulness is involved, takes care of this element. Johnson v. Al Tech Specialties, Steel Corp., 731 F.2d 143 (2nd Cir. 1984). The Eighth and Tenth Circuits hold similarly.

C. The factor of emotional distress/suffering also causes serious problems for the Court when a plaintiff attempts to assert pendent state law claim for the tort of wrongful discharge along with an ADEA claim. Haskell v. Kamen Corp., 743 F.2d 113 (2nd Cir. 1984); Hill v. Spiegel, Inc., 708 F.2d 233 (6th Cir. 1983). In fact, this may lead to the Court bifurcating the two claims or denying the pendent state claim altogether because of the potential prejudice to the employer when the jury considers both claims together.

D. The majority of Circuit Courts of Appeal say "No" to punitive damages under the ADEA for the same reasons above, i.e., the role of liquidated damages. Frith v. Eastern Airlines, 611 F.2d 950 (4th Cir. 1979).

E. Attorney's fees are available to a prevailing plaintiff under 29 U.S.C. §626(b). TIP: Even if you do not customarily keep time records, it is essential to keep contemporaneous time records from the moment you sign a contract to represent a plaintiff in an ADEA action. These should be attached and filed with the Court to support your attorney fee request if you prevail. Also, if the case was taken on a contingent fee basis and had a degree of risk and difficulty, a lodestar increase may be appropriately sought and possibly awarded. Pennsylvania v. Delaware Valley Citizen's Council, ____ U.S. _____ (June 26, 1987).

F. If you need an expert to help prove your case and expect to attempt to try to tax the costs of the expert to the other side as the loser, you must seek advance Court approval prior to hiring the expert and explain to the Court why the person is essential to put on the plaintiff's case if you are going to have any chance to prevail. Even with this, you may not get the costs reimbursed because of the

specific prohibition set forth in 28 U.S.C. §1920 concerning original costs.

G. Back pay - 29 U.S.C. §626(b) authorizes this and defines it as unpaid minimum wages or unpaid overtime compensation thereby incorporating the language of the FLSA. This has been deemed to be wages and benefits lost due to the unlawful termination minus any monies earned in the interim by the plaintiff, including severance pay from the company. A bona fide offer of reinstatement by the employer, if rejected by the employee, will toll plaintiff's back pay claim. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).

H. Public assistance, such as Social Security benefits, VA benefits, food stamps, and AFDC payments are not subtracted because they are collateral benefits, however, unemployment compensation payments may be argued to be an offset by the employer. Compare the cases of Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743 (7th Cir. 1983), with McDowell v. Avtex Fibers, 740 F.2d 214

(3rd Cir. 1984). Lost benefits plaintiff may seek include the value of employer-paid life insurance premiums, health insurance premiums, vacation and holiday pay, and pension contribution payments.

I. Front pay - This is defined as money paid for wages and benefits that are lost to the plaintiff as a result of the unlawful discrimination, but covering the period subsequent to the Judgment. This is usually awarded to a plaintiff who is in his/her late 50s or 60s when the likelihood is they will not ever get reemployed by another company or, if reemployed, their wages and benefits will be much less. This remedy is not specifically authorized by the ADEA, but the Courts have allowed it to evolve through the broad remedial language set forth in 29 U.S.C. §626(b). See Blum v. Witco Chemical Corp., Civil Action No. 86-5310, _____ F.2d _____ (3rd Cir., Sept. 27, 1987), where $58,000 of lost pension benefits were awarded as front pay, even though no back pay was given since a higher paying job was attained after the

unlawful termination. See also, for a good discussion of the subject of front pay, Davis v. Combustion Engineering, Inc., 742 F.2d 916 (6th Cir. 1984).

J. Counsel for the defendant employer should argue against front pay if the plaintiff has failed to request reinstatement originally in the Complaint or has refused such an offer, if made. Wehr v. Burroughs Corp., 619 F.2d 276 (3rd Cir. 1980). A District Court, in its discretion, may compel employment if the person discriminated against due to age was not hired; may compel promotion, if the person discriminated against was held back unlawfully; or may compel reinstatement if fired due to unlawful age considerations. 29 U.S.C. §626(b). If reinstatement is ordered, then it obviates the requirement of the employer paying future benefits since, presumably, the employee will be back at work earning wages and benefits. Plaintiff has the burden of persuasion to overcome the Court's choice of reinstatement and may only succeed by proving that there is a

high degree of ill will between the employer and employee or that there is no available position comparable to what the plaintiff enjoyed in terms of pay and responsibilities.

VI. JURY INSTRUCTIONS

A. Plaintiff's counsel should attempt to make the jury instructions as short and easily understood as possible, with each instruction being framed to require a "Yes" or "No" answer.

B. The defendant employer's counsel should try to make the instructions longer, more complete, and should attempt to make the jury focus on each and every element which the plaintiff must prove to make out a prima facie violation of the act, as well as to prove that the employer's defense really constitutes pretext.

C. Make sure if you are the plaintiff that the instruction on liquidated damages, if allowed by the Court meets the test of the Supreme Court in TransWorld Airlines, Inc. v. Thurston, ____ U.S. ____, 83 L.Ed.2d 523 (1985). This instruction

will require that "willful discrimination" means that the plaintiff was terminated in "reckless disregard" of his/her rights under the ADEA. The employer must have been "indifferent" to the plaintiff's rights under the ADEA and must have failed to make any reasonable efforts to determine whether the ADEA was violated when the plaintiff was unlawfully affected, be it by termination, demotion, denial of promotion, or by not being hired.

D. If you are counsel for the defendant, you will want to prove during trial that the company discussed termination with counsel and received advice the ADEA would not be violated by the plaintiff's termination, as this may suffice to negate the finding of liquidated damages under TWA, Inc. v. Thurston, supra. The defendant may request an instruction along these lines as follows: "In the consideration of whether the termination was willful, if you find that the defendant made reasonable and good faith efforts to determine whether the plaintiff's rights

may be violated under the ADEA when he/she was terminated, then you should find that the violation was non-willful, and the plaintiff would not be entitled to liquidated damages.

E. Attached are instructions which were approved by the United States Court of Appeals for the Tenth Circuit in Equal Employment Opportunity Commission v. Prudential Federal Savings & Loan Ass'n, 763 F.2d 1166 (10th Cir. 1985). The only exception to the instructions had to do with willfulness which was remanded back to the District Court for reconsideration in light of the Supreme Court's decision in TWA, Inc. v. Thurston, supra.

VII. HELPFUL ADEA REFERENCES

A. Litigating Age Discrimination Cases, by Ruzicho & Jacobs, Callaghan & Co., Willmette, Illinois.

B. Employment Discrimination Law, 2d Ed., by Schlei & Grossman.

C. The Labor Lawyer, Vol. 2, No. 2, Spring 1986, by American Bar Association Section of Labor & Employment Law.

D. The Employee Advocate, by Plaintiff Employment Lawyers Association, 414 Walnut Street, Cincinnati, Ohio, (513) 241-8137.

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2261

WAYNE R. METZ,

Plaintiff-Appellant,

v.

TRANSIT MIX, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 85 C 354—Robert Miller, *Judge.*

ARGUED JANUARY 16, 1987—DECIDED AUGUST 28, 1987

Before BAUER, *Chief Judge*, CUDAHY and EASTERBROOK, *Circuit Judges.*

CUDAHY, *Circuit Judge.* The plaintiff Wayne Metz, age fifty-four, was discharged by his employer, defendant Transit Mix, Inc., after twenty-seven years of employment with the company. He alleges that he was fired in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1987). Following a bench trial, the district court entered judgment for Transit Mix. 646 F. Supp. 286 (N.D. Ind. 1986). For the reasons that follow, we reverse.

I.

Transit Mix is in the business of selling concrete to construction contractors. Metz worked for Transit Mix as manager of its plant in Knox, Indiana, a satellite of Transit Mix's principal office and larger plant in Plymouth, Indiana. During the three years prior to Metz's discharge, Transit Mix experienced financial problems which the district court attributed to the decline in the local construction business. In November 1983, Will Lawrence, the president of Transit Mix, notified Metz that due to Transit Mix's poor sales, the Knox plant would be closed for the winter starting in December and Metz would be laid off. At that time, Lawrence had not decided whether he would close the Knox facility permanently or only for the winter.

In February 1984, Lawrence sent the assistant manager of the Plymouth plant, Donald Burzloff, to Knox to inspect the plant and make any necessary repairs. Burzloff obtained permission to take orders from the plant's regular customers while he was there. Burzloff later requested that he be allowed to manage the Knox facility. Lawrence approved this request and in April 1984 discharged Metz.

At the time of his layoff in December 1983, Metz had an annual salary of $26,000, or about $15.75 an hour. He was among the highest paid of Transit Mix employees and, having worked for Transit Mix for twenty-seven years, was the second most senior employee there.[1] Metz's relatively high salary was a direct result of his many years of employment by Transit Mix; Lawrence testified at trial that Metz was given a raise each year, including years when Transit Mix was losing money.[2] Burzloff was forty-three and had worked for Transit Mix for seventeen years when he replaced the fifty-four-year-old Metz as manager. Burzloff's salary as manager was about $8.05 an hour.

II.

The ADEA prohibits employers from discriminating against employees on the basis of age. 29 U.S.C. § 623(a).[3] Its objective in part is to promote employment of older workers on the basis of their abilities rather than their age. 29 U.S.C. § 621. The statute does not, however, prevent an employer from terminating an older worker based on reasonable factors other than age. 29 U.S.C. § 623(f)(1). When, as in the present case, a plaintiff is proceeding on a disparate treatment analysis, the plaintiff may recover only if the defendant in discharging the plaintiff was motivated by a discriminatory animus; that is, the plaintiff may recover only if his or her age was a determining factor in the employer's decision.[4]

Proving intentional discrimination is often difficult, so a plaintiff may do so by presenting either direct or indirect evidence of discrimination. *Graefenhain v. Pabst Brewing Co.*, No. 85-3094, slip op. at 7 (7th Cir. June 26, 1987); *Bechold v. IGW Sys., Inc.*, 817 F.2d 1282, 1284 (7th

[1] The most senior employee was Lawrence's mother.

[2] In response to questioning by the defendant's attorney, Jere Humphrey, Lawrence testified at trial as follows:

> Q. Mr. Lawrence, you testified that in '83 that you had given Mr. Metz a raise of a thousand dollars, yet Mr. Metz testified that you had been losing money that year or, at least, sales were down. Why under those circumstances did you give Mr. Metz a $1,000.00 increase?
>
> A. Well, it was usual for me to give a raise every year. I gave the manager at the Plymouth plant, the general manager, a raise also. I gave Mr. Metz a raise also. I really can't say that I pointed a finger of blame at Mr. Metz for business being as it was. But, that the area—the Knox area business was bad, it was very poor and it was getting worse and worse and worse. But, the previous year it was normal for me to give somebody—give both Jim and Wayne a raise each year, and I followed suit.
>
> Q. So, you have been doing it for a long time; you kept doing it?
>
> A. Yes, I have.

Trial Transcript at 31 (June 23, 1986).

[3] The statute protects employees who are at least forty years old. 29 U.S.C.A. § 631(a). Transit Mix qualifies as an "employer" within the meaning of the ADEA. 29 U.S.C. § 630(b).

[4] The present claim is one of disparate treatment rather than disparate impact. The disparate impact mode of analysis, first applied in Title VII cases, permits a plaintiff to recover for "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (finding as violative those employment practices that are "fair in form, but discriminatory in operation"). Unlike a disparate treatment claim, proof of motive is not required to sustain a claim of disparate impact. *Teamsters*, 431 U.S. at 335 n.15.

Cir. 1987); *LaMontagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). In order to permit recovery for an ADEA claim through indirect means, this circuit has adopted a variation of the burden-shifting analysis set forth by the Supreme Court in the Title VII context for establishing a prima facie case of employment discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As applied to an ADEA claim, this analysis requires that a plaintiff show that he or she: 1) belongs to the protected class (age forty or older); 2) was qualified for his or her position; 3) was terminated; and 4) was replaced by a younger person. After the plaintiff has established a prima facie case, the defendant employer then has the burden of presenting evidence that the plaintiff's discharge was a result of "some legitimate, nondiscriminatory reason." If the defendant meets this burden of production, the burden shifts to the plaintiff to prove that the reasons proffered by the employer for the discharge were merely a pretext for discrimination. *Id.* at 802-05; *Graefenhain*, slip op. at 7-9; *Bechold*, slip op. at 3-4; *LaMontagne*, 750 F.2d at 1409. Throughout the trial, the burden remains with the plaintiff to prove there was discrimination, rather than with the employer to prove the absence of discrimination. *LaMontagne*, 750 F.2d at 1409.

The district court found that Metz had established a prima facie case of age discrimination. The court further found that a determining factor in Transit Mix's decision to replace Metz with Burzloff was a desire to save the higher cost of Metz's salary and that this factor "bore a relationship to Mr. Metz's age." 646 F. Supp. at 293.[5] The court held, however, that this was not age discrimination in violation of the ADEA because it was based on an assessment of the cost of employing an individual employee, namely, Metz, rather than an impermissible assessment of the costs of employing Transit Mix's older employees as a group. The sole issue on appeal is whether the salary savings that can be realized by replacing a single employee in the ADEA age-protected range with a younger, lower-salaried employee constitutes a permissible, nondiscriminatory justification for the replacement.

III.

Congress enacted the ADEA in response to the problems that the older worker faces in the job market, including the obstacles that the long-term employee encounters when he or she is suddenly without work. *See generally* Report of Secretary of Labor to Congress, *The Older American Worker: Age Discrimination in Employment* 11-17 (1965), *reprinted in EEOC, Legislative History of the Age Discrimination in Employment Act*, at 16, 28-34 (1981). These difficulties have been attributed in large part to the worker's development of firm-specific skills not easily transferable to a different job setting. National Commission for Employment Policy, 9th Annual Report, Rep. No. 17, *Older Workers: Prospects, Problems and Policies* 4 (1985). Therefore, while the older employee's higher salary reflects the value of improved skills and the increased productivity that results, it is also indicative of one of the very problems the ADEA was intended to address: the likelihood that the employee will be less employable in other settings.[6]

The ADEA has consistently been interpreted by the administrative agencies charged with its enforcement and the courts to prohibit an employer from replacing higher paid employees with lower paid employees in order to save money. The Equal Employment Opportunity Commission guidelines expressly provide that "A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act." 29 C.F.R. § 1625.7(f) (1986). This position is consistent with that adopted by the Department of Labor when it administered the ADEA:

> It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. *Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.*

29 C.F.R. § 860.103(h) (1979) (emphasis added). Courts have also emphatically rejected business practices in which "the plain intent and effect . . . was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts." *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 691 (8th Cir. 1983); *see also EEOC v. Chrysler Corp.*, 733 F.2d 1183 (6th Cir. 1984); *Dace v. ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1983), *aff'd on rehearing*, 728 F.2d 976 (1984); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). *See generally* 1 H. Eglit, *Age Discrimination* § 16.32 (1985).

Neither the district court nor Transit Mix on appeal takes issue with this interpretation of the ADEA in the context of policies that eliminate older employees as a group based on their higher salaries. Rather, they argue for a distinction based on whether the employer's employment action, motivated by a desire to save costs, affects

[5] The district court found that the decision to terminate Metz was also motivated by the "greater flexibility afforded by Mr. Burzloff," 646 F. Supp. at 289, who, in contrast to Metz, was able to return to the Plymouth plant provided the operations at the Knox satellite plant did not improve. The court characterized this consideration (as well as the salary/cost concern) as a "determining factor" in the firing decision. *Id.* at 290. The dissent argues that this finding is sufficient to support the court's verdict independent of the issue presented by the defendant's stated salary concerns. We disagree. The district court did *not* find that absent the desire to save the higher cost of Metz's salary, Transit Mix nevertheless would have replaced Metz because of the flexibility motivation. The more reasonable interpretation is that the court found that both factors combined to provide a nondiscriminatory reason for the dismissal. That is, in the absence of salary concern, Metz would not have been replaced by Burzloff. For example, the court states that the salary issue "permeated the eventual decision" to replace Metz. *Id.* at 289. Indeed, this is the only interpretation which adequately explains the extended discussion of the salary issue by the district court.

[6] As Willie Loman, of Arthur Miller's *Death of a Salesman*, exclaimed to his boss upon being suddenly fired after thirty-four years of employment, "You can't eat the orange and throw the peel away—a man is not a piece of fruit!" A. Miller, *Death of a Salesman* 82 (1949).

a group of employees or an individual employee. The district court held that while the former would be impermissible age discrimination, the latter is a legitimate, nondiscriminatory reason for replacing an employee. The court cited a treatise for support as follows:[7]

> "The relatively higher cost of employing older workers as a group is generally rejected as an RFOA [reasonable factor other than age]. The cost of employing an older worker when considered on an individual basis, however, may constitute an RFOA." B. Schlei & P. Grossman, Employment Discrimination Law 506 (2d ed. 1983).

646 F. Supp. at 294. We find that this statement of the law, as interpreted by the district court, is inaccurate. Neither the policies behind the ADEA nor the relevant case law supports making this distinction and we find it to be an inappropriate distinction as applied to Metz's claim.

The ADEA is aimed at protecting the individual employee. Section 623(a)(1) prohibits practices that "discriminate against *any individual* . . . because of such individuals's age." (Emphasis added). The statute's language indicates that it shares the same focus as Title VII legislation: "fairness to individuals rather than fairness to classes." *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978); *see also Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982) ("The principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee."). The same ADEA policy concern that forms the basis for rejecting cost-based employer practices that have an adverse impact upon older workers as a group is present in the case of Metz's discharge: Given the correlation between Metz's higher salary and his years of satisfactory service, allowing Transit Mix to replace Metz based on the higher cost of employing him would defeat the intent of the statute.[8]

This position is consistent with past decisions that have found in favor of employees' ADEA claims as well as those that have found for the employer. In *Leftwich*, 702 F.2d 686, an employer defending an ADEA claim argued that although its employment selection plan had a detrimental disparate impact on older employees, the plan was justified because it was adopted as a cost-saving measure. The Eighth Circuit found that this cost justification did not establish a business necessity defense:

> Here, the defendants' selection plan was based on tenure status rather than explicitly on age. Nonetheless, because of the close relationship between tenure status and age, the plain intent and effect of the defendants' practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.

Id. at 691.

Although *Leftwich* involved a disparate impact claim, the reasoning behind its holding can apply equally to a discriminatory treatment claim brought by an individual employee where, because of the high correlation between age and salary, it would undermine the goals of the ADEA to recognize cost-cutting as a nondiscriminatory justification for an employment decision. The Eighth Circuit itself applied the reasoning in *Leftwich* to an ADEA claim of discriminatory treatment brought by a single employee. *Dace v. ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1983), *aff'd on rehearing*, 728 F.2d 976 (1984). In upholding a jury verdict in favor of the plaintiff, the court quoted the portion of *Leftwich* that we have reprinted above and characterized *Leftwich* as holding "that discrimination on the basis of factors, like seniority, that invariably would have a disparate impact on older employees is improper under the ADEA." *Id.* at 378. In a third case, the Eighth Circuit found that although an employer has the right to abolish a position held by an older worker and combine that position's responsibilities with the duties of a younger person, it distinguished such a situation from one in which "*the position remained the same*" and the employer knew the replacement would save money. *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1168 (8th Cir. 1985) (emphasis added). The court stated that there would be a much stronger claim for recovery in the latter case. *Id.*

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[7] The treatise cites two district court cases for support, *Donnelly v. Exxon Research & Eng'g Co.*, 12 Fair Empl. Prac. Cas. (BNA) 417 (D.N.J. 1974), *aff'd mem.*, 521 F.2d 1398 (3d Cir. 1975), and *Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299 (E.D. Mich. 1976).

Although the court in *Donnelly* held that an employer may replace an older worker whose less-than-satisfactory services do not justify his salary, the court continued as follows:

> It would be unlawful and worse if an employer were to fire an older worker doing satisfactory work who, because of his seniority, received a certain salary because the employer wished to replace him with someone else who would do no better work but who, as a younger man with less seniority, would do the work for less.

12 Fair Empl. Prac. Cas. at 421-22. *Donnelly* therefore does not support the distinction urged by Transit Mix; rather it supports a finding that Transit Mix violated the ADEA by replacing Metz, a satisfactory employee, with Burzloff, a younger man who would work for less.

The court in *Mastie* did state that it "interprets the ADEA as permitting an employer to consider employment costs where such consideration is predicated upon an individual as opposed to a general assessment that the older worker's cost of employment is greater than for other workers." 424 F. Supp. at 1319. The court, however, acknowledged that this statement was dicta and "unnecessary in light of its other findings." *Id.* One commentator has stated, "*Mastie* is both aberrational and, in any event, does not appear to be good law in light of the ruling in [*EEOC v. Chrysler Corp.*, 733 F.2d 1183 (6th Cir. 1984)]." 1 H. Eglit, *Age Discrimination* § 16.32, at 16-82.42 (1985). *See* discussion of *Chrysler*, *infra* p. 12. For the reasons discussed in this opinion, we do not find the quoted statement in *Mastie* to be persuasive and therefore decline to follow it here.

[8] In the context of reviewing claims requiring a showing of intentional discrimination, such as equal protection claims, courts have closely scrutinized the use of seemingly neutral criteria to justify practices which have a discriminatory effect. For example, a three-judge court in *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109-11 (N.D. Ill. 1982), found that an Illinois redistricting plan violated the equal protection clause of the Fourteenth Amendment because it diluted minority voting strength. The court found the requisite intentional discrimination despite the offered "neutral" justification that the plan served to protect the ability of incumbents to be elected. The court stated: "[T]he requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district . . . is virtually coterminous with a purpose to practice racial discrimination." *Id.* at 1109; *see also Ketchum v. Byrne*, 740 F.2d 1398, 1406-10 (7th Cir. 1984).

A district court for the Eastern District of New York similarly held that cost-cutting is not a legitimate, nondiscriminatory reason for discharging an older employee while retaining younger, lower-paid employees. *Marshall v. Arlene Knitwear, Inc.*, 454 F. Supp. 715 (E.D.N.Y. 1978), *aff'd in part, rev'd and remanded in part without opinion*, 608 F.2d 1369 (2d Cir. 1979). The court stated that, although in the absence of the ADEA this might have been a valid business justification, "Congress has decreed in the ADEA that an employee may not be discharged because of her age. Where economic savings and expectation of longer future service are directly related to an employee's age, it is a violation of the ADEA to discharge the employee for those reasons." *Id.* at 728. The court found that the plaintiff had proven her ADEA discriminatory treatment claim:

> The evidence compels the conclusion that the savings in salary and the unpaid pension benefits accruing to defendants as a result of [the plaintiff's] discharge were the controlling economic factors behind her termination. Since such economic factors are directly related to age, [the defendant's] reliance on them to discharge [the plaintiff] constitutes age discrimination.

Id. at 730.

In *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), the Second Circuit held that a school board policy that limited teacher hiring to persons with less than five years' experience violated the ADEA. The court further found that the plaintiff, an older teacher replaced under the school board's policy, could recover on theories of both disparate impact, based on the plaintiff's membership in a group unfairly affected by the policy, and disparate treatment, based on her individual replacement by a younger teacher. The court, citing *Marshall* approvingly, rejected the defendants' defense that the policy "was supportable as a necessary cost-cutting gesture in the face of tight budgetary constraints." *Id.* at 1034.

The Sixth Circuit has held that "the prospect of imminent bankruptcy" may qualify as a "reasonable factor other than age" and thus justify, for example, a forced retirement policy. *EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984). The court described two tests that the employer must meet to establish a reasonable-factor-other-than-age defense based on the economic needs of a failing company. "First, the necessity for drastic cost reduction obviously must be real . . . . Second, the forced early retirements must be the least-detrimental-alternative means available to reduce costs." *Id.* Even if we were to adopt a similar economic necessity exception in the present case, Transit Mix would not satisfy this two-part test. We are not convinced that Transit Mix's financial solvency was sufficiently in jeopardy to meet *Chrysler*'s first requirement. More important, Transit Mix clearly has not satisfied the second requirement. Transit Mix did not pursue obvious less-detrimental alternatives to replacing Metz, such as offering Metz continued employment at a lower salary or in a different position. The district court expressly found that Transit Mix "did not ask Mr. Metz to take a pay cut or to take a different job within the company." 646 F. Supp. at 290.

IV.

The dissent presents a number of interesting insights into the nature of age discrimination and the role of productivity as a legitimate factor in employment decisions. But, while sweeping in its approach, the dissent fails to come to grips with the specific facts of this case.

Metz's relatively high salary was the result of annual raises that were given to him by Transit Mix regardless of how the company was doing financially. *See supra* note 2. Metz's salary therefore reflected his twenty-seven years of service to Transit Mix. When Lawrence, the president of Transit Mix, decided that the company's poor performance no longer justified the salary that the company had given Metz, Lawrence replaced Metz because of that salary without first asking Metz to take a pay cut. Given these facts, Lawrence's desire to save costs was not a permissible, nondiscriminatory reason for replacing Metz with the younger, less-costly Burzloff; by thus replacing Metz, Transit Mix violated Metz's rights under the ADEA.

We, of course, recognize that our use of pay as a "proxy" for age, although inescapable in this particular case, is of limited application and may be employed only on a case-by-case basis where the facts support its use. We do not agree with the dissent that cross-sectional studies of pay in relation to age have much value here. There are any number of reasons why the average fifty-five-year-old might be earning less than the average forty-year-old. For example, as the dissent suggests, *see infra* p. 31, younger employees as a group may be better educated and therefore better qualified when entering the workforce than are older employees. Employees may also invest more time and resources in improving their skills through training and education during their early years of employment. Employees may choose less demanding, and therefore lower paying, work as they grow older. In addition, many high-paying jobs require strength, speed, dexterity, endurance and other physical attributes and may even be compensated on a piece-work basis. At fifty-five many employees may be physically disqualified from or limited in high-speed, physically demanding tasks in such places as automobile plants or packinghouses. They may by that age have been down-graded to janitors. And there are not many fifty-five-year-olds playing major league baseball. By age fifty-five many people may have been laid-off or discharged from formerly high-paying factory or transportation jobs and may find work as security guards. Finally, age discrimination on the part of employers may account for some of the decline in the average salary of older workers. In any event, no matter what the facts, only federal judges under the Constitution have guaranteed earnings regardless of productivity until they die.

In the case of Metz, however, the facts are much narrower. He and Burzloff were both plant managers—apparently of equivalent competence. Their work is of the sort where declining physical effectiveness through aging is not apparently of consequence and may be more than offset by growth in experience. The facts suggest, as is usual with this type of work, that seniority is a factor in compensation and age and seniority are, of course, strongly correlated. Metz is paid more—as are most middle managers—because he has been there longer. There may be other reasons for the pay disparity but certainly seniority is an important one.

The dissent postulates output or productivity per wage dollar as a legitimate factor in discharge decisions. The dissent is then able to equate high pay with low productivity per wage dollar and thereby legitimate high pay as a reason for lay-off. The dissent maintains that since Metz, who is senior, is paid more because of his seniority

(age), he may be fired for that reason alone. Because of his higher pay, awarded for seniority, he is automatically less productive per wage dollar and therefore becomes subject to termination. By this way of thinking, seniority (and hence age) is translated into a perfectly acceptable excuse for firing everyone who receives seniority pay raises.

Thus, if a company has twenty foremen, all of exactly equal ability, and the oldest ten make more money than the others because their average seniority is much higher, according to the dissent the employer would have a complete defense to an age discrimination charge when it fires the ten graybeards. In middle management jobs we would expect pay to reflect seniority and hence to be something of a proxy for age. This is how the civil service works and private industry usually is not much different.[9] To accept the approach of the dissent is to make totally vulnerable the employees who are paid a little more because they have been with the company a little longer. All this has nothing to do with whether older employees across the economy make more or less on average than younger ones (which would presumably be revealed by cross-sectional analysis).

Nor do we accept the view of the dissent that discharge and reduction in pay must be regarded as equivalents under the ADEA for the purposes of this case. After all, discharge is "the industrial equivalent of capital punishment." *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 421 (1981) (Powell, J., concurring in part and concurring in judgment) (quoting Whitman, *Wild Cat Strikes: The Union's Narrowing Path to Rectitude?*, 50 Ind. L. J. 472, 481 (1975)). And, as the dissent makes clear, economic imperatives must be continually balanced against the requirements of the age discrimination law. At least two things are clear: most older employees (who have difficulty getting new jobs) would prefer a wage reduction to being fired. And many employers, knowing of the morale problems created by wage cuts, would prefer to terminate older employees rather than have them remain at work with their morale in serious disarray because their pay was reduced. For this reason, we think general pay reductions are less a threat to senior employees than terminations would be (in part because employers are less likely to cut pay unless economic circumstances absolutely require it). Certainly, however, in the case before us, we lay down no general rules about what circumstances might justify pay cuts for older employees. We only suggest that the language of the statute does not require that in this case we regard discharge or reduction in pay as the same thing (although they may have economic similarities and, under proper circumstances, they can both result in a successful ADEA claim). It is common knowledge that older employees tend to protect their jobs at all costs—even at the cost of a reduction in pay.[10]

The essential problem with the dissent's approach is that pay for middle management jobs is, at least in the short run and within the broad limits of competition, under the control of the employer. The logic of the dissent's position is that an employer may reward years of service for middle management employees with raises in the paycheck. If this is the practice, as it frequently is, when the middle managers reach age fifty or sixty, they may all be terminated since all will be making more money than younger managers with equivalent jobs. If we assume that all managers at a given level are of equivalent proficiency, as we must for purposes of analysis in the instant case, under the dissent's analysis the managers who are paid the most are by definition the least productive per wage dollar. Through its control over productivity per wage dollar, the management would effectively decide who could be terminated as its employees reach a relatively advanced age.

The dissent's approach to "productivity" as a rationale for discharge is inconsistent with the policies chosen by Congress in enacting the ADEA. As this circuit has previously recognized, the ADEA imposes some costs on employers and deprives employers of some decisionmaking autonomy in order to treat our nation's older employees fairly:

> [A]lthough the ADEA does not hand federal courts a roving commission to review business judgments, the ADEA *does* create a cause of action against business decisions that merge with age discrimination. Congress enacted the ADEA precisely because many employers or younger business executives act as if they believe that there are good business reasons for discriminating against older employees. Retention of senior employees who can be replaced by younger, lower-paid persons frequently competes with other values, such as profits or conceptions of economic efficiency. The ADEA represents a choice among these values. It stands for the proposition that this is a better country for its willingness to pay the costs for treating older employees fairly.

Graefenhain, slip op. at 14 n.8 (emphasis in original).

The dissent mentions the higher cost of some fringe benefits for older employees, which is noted in the legislative history of the ADEA. The cost of some fringe benefits does increase with age and it might be said that the cost of these benefits reduces the productivity per fringe dollar of older employees. For example, after fifty, employees may incur higher costs for the provision of health insurance and health care and, under most benefit plans, more senior employees are entitled to longer vacations. But it has not been argued that these higher costs, and by hypothesis lower productivity per dollar, should be reason for exposing older employees to discharge in the face of the age discrimination law. There is even less reason for firing because of higher salaries than because of higher fringes. Salaries are, within a substantial range, in the control of the employer, while fringes—medical costs, for example—may not be. Hence, as a basis for discharge we believe these cost factors must be evaluated critically.

We are, of course, aware that employers must control costs if they are to remain competitive and that this imperative of survival will inevitably create tensions with the legal prohibitions against age discrimination. We think it would be unwise, however, to translate this imperative into a rule that an older employee can be fired and replaced by an equally proficient younger employee merely because the older employee happens to be earning more money at the moment. There are a number of less burdensome measures that can be introduced if necessary before "industrial capital punishment" is brought into play. We therefore reverse the judgment of the district court and remand for a determination of the appropriate relief.

REVERSED AND REMANDED

[9] Our dissenting colleague is perhaps not acquainted with the old Army saying that, "There are two methods of promotion: seniority and favoritism."

[10] We assume (and we do not understand the dissent to disagree) that what aging middle managers would receive from their long-time employers is not necessarily what they could expect to command on the street.

In the United States District Court for the District of ———
——— Division

The Honorable ———

———, Plaintiff
v.
———, Defendant

Case No. ——— (Civil)

Reporter's Transcript of Instructions To Jury

——— City, ———, ———, 19—, ——— a.m.

The Court: The jury is in the box. Counsel are present.

Members of the jury: Now that you have heard the evidence and the arguments of counsel, I have the responsibility to instruct you as to the law applicable to the case.

As jurors it is your duty to follow the law as stated in these instructions, and you must apply these rules of law I give you to the facts as you find them from the evidence in the case.

You should not single out one instruction as stating the whole law, but rather, you should consider the instructions as an interrelated whole and regard each instruction in the light of the others.

You should not be concerned with the wisdom of any rule of law given to you in these instructions, regardless of your opinion of what the law is. It would be a violation of your duty not to follow the law as given you.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a verdict by applying the same rules of law as given to them by the court.

While the court is the sole judge of the law, you are the sole judges of the facts. And notwithstanding any supposition you may make—if any at all—as to the views of the court as

to the facts, it is your responsibility and not the court's to determine the facts of the case.

You are to perform your duty without bias or prejudice to any party, for our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion, and both the parties and the public expect you to carefully and impartially consider all of the evidence in this case, and follow the law as stated by the court in these instructions.

You are to consider the real meaning and substance of my instructions, rather than concerning yourself with specific technical words or fragmentary expressions, because when I get through I'll try to explain all of the governing law, both in broad concept and in separate instructions which fit into that broad concept.

You must consider the basic concepts to which these expressions relate and consider the total explanation or definition these expressions are meant to convey and explain.

I have told you that you decide the case wholly upon the evidence received in open court. Now, what do we mean by "evidence"? Well, you know, but I'll formulate it and just summarize it.

The evidence of the case consists of the sworn testimony of the witnesses received in open court, all exhibits received in evidence, all facts which have been admitted or stipulated to, and facts which may be judicially noticed, which the court would tell you, we have no judicially noticed facts apart from the evidence in this particular case which the court needs to submit to you. But I've summarized the general nature of the evidence, testimonial from the lips of witnesses and documentary represented by exhibits.

Statements and arguments of counsel are not evidence in this case except as there may be a stipulation of fact; in some case we've had counsel agree, but other than that, the statements of counsel by way of argument are not evidence.

But again I remind you that, examine the evidence in view of the contending contentions of counsel, because those views will help you understand the issues and permit you better to select between them and come to your own judgment as to the meaning of the evidence.

Any evidence to which an objection was made and sustained by the court and any evidence ordered stricken by the court must be entirely disregarded by you.

In consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear expressly as the witnesses testify. You are permitted to draw reasonable inferences from the facts testified to or shown by the exhibits.

You don't lose your common sense by entering the jury box. We depend upon your exercise of common sense, and you can draw inferences from the evidence which reasonable people would draw under the circumstances from either documentary evidence or testimonial evidence. And those inferences may be drawn in the light of your generalized human experience in life, because your common sense is affected by your general experiences in life, so long as you limit your consideration of evidence to that which is received in open court and draw reasonable or common-sense inferences therefrom.

Inferences are deductions or conclusions which reason and common sense leave a jury to draw from facts which have been established by the evidence in the case.

Now, there is another classification of evidence that you can consider. You can classify evidence into direct evidence and circumstantial evidence. Direct evidence is evidence from the testimony of witnesses or documentary testimony in the sense of using the term "direct evidence" generally which tends to directly prove a fact in issue.

Circumstantial evidence or indirect evidence is a proof of a chain of circumstances pointing to the existence or nonexistence of a fact in issue. And you folks aren't limited in your consideration of the effective evidence only to direct evidence. You can consider the surrounding circumstances to the extent that a chain of circumstances through reasonable inference or deduction may establish in your mind a fact in issue.

In appraising or determining the weight of testimony, you are called upon to judge the credibility of witnesses, whether the witnesses are telling the truth or not, or intentionally prevaricating, if there be any such instances in the case.

But this judging their credibility, the credit and effect you attach to their testimony, is broader than simply determining whether they're attempting to truthfully testify or not. Because credibility and the effect of the testimony of any witness may depend also—as I think I pointed out to you in my preliminary instructions—on the opportunity of observation of the witness, his or her memory, the accuracy of memory, the ability to express what was observed, and all other factors which reasonable people, which you are, bring to bear in determining what effect they're going to give to a particular statement or statements, realizing that here the statements of witnesses are under oath. And you are the sole judge of the credibility of the witnesses. You can believe one witness against many, or several, or you can believe several witnesses against one—depending upon where you think the ultimate truth lies.

You may take into consideration the appearance and conduct of the witness, the manner in which he testifies, his or her interest or lack of interest in the outcome of the case, the character of his testimony, its reasonableness or unreasonableness, any conflict with testimony you do believe or accept, and all other circumstances which you as reasonable people believe should be taken into consideration in determining the effect of given testimony, but relying upon the testimony and evidence received in open court.

You may consider each witness' intelligence, motive, state of mind and demeanor and manner while on the stand. Two or more persons witnessing an incident or transaction may see or hear it differently and be perfectly honest about it. Innocent mistakes in recollection, like a failure to remember something at all, is not an uncommon experience for all of us. And so just because a person doesn't remember everything isn't any proof in and of itself that he or she is prevaricating.

On the other hand, you may consider whether any discrepancy results from intentional falsehood rather than innocent error or other circumstances or motives.

And after making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

A witness may be discredited by contradictory evidence, or by evidence that at some other time the witness said or did something which is inconsistent with what the witness said during the trial. If you believe any witness has been discredited, you are free to give the testimony of that witness as much or as little credibility if any as you think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars, and you may reject some or all of the testimony of the witness to the extent you believe that appropriate.

The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, necessarily, but which witness and what evidence, and what combination appeals to your minds as being most accurate and otherwise trustworthy.

In connection with the case of a particular side or the contentions, you should consider all of the evidence, whether the evidence is produced by one side or the other, because all of the evidence is before you.

You may consider, too, and should consider all of the evidence bearing upon the situation of a particular claimant. And just because the evidence isn't testified to by that particular claimant doesn't mean that you don't consider all of the evidence received in open court including documentary evidence to the extent you think it bears upon the claim of the particular claimant is true, that you have to weigh the claim of each particular claimant one by one, as we have on the form of verdict.

And that doesn't mean that you can't consider all of the evidence to the extent it bears upon his particular situation and irrespective of which side the evidence comes from.

The rules of evidence ordinarily do not permit witnesses to testify simply as to their opinions as distinguished from facts. An exception to this rule exists with respect to those who we refer to as expert witnesses; witnesses who have been shown by education and experience to have become expert in some art, science, profession or calling, may state an opinion

as to relevant and material matters. These expert witnesses are allowed also to state reasons for their opinion.

As with all other witnesses, you may give the expert's testimony such weight as you believe it deserves. You are entitled to consider his appearance, the manner in which he testifies, the character of his testimony and the evidence, if any, in conflict with his conclusions.

You should consider such expert opinion received in evidence in this case and give it such weight as you think it deserves. If you decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the expert witness has not sufficiently considered things that he should have considered, you may disregard the opinion entirely, or you may accept it in part.

In other words, you give the expert opinion such weight as you believe it entitled to in view of these instructions.

During the course of the trial I occasionally have asked questions of a witness in order to bring out facts which I thought might not have been fully covered in the testimony. Do not assume that I have held any opinion on the matters to which my questions may have related.

Remember at all times that you as jurors are at liberty to disregard any comments of the court as to the facts in arriving at your own findings of fact, because as I've indicated, you are the sole judges of the facts. Any comments the court may have made are not intended to affect the significance of the testimony of expert witnesses or others or express an opinion concerning their qualifications as experts and the effect of their testimony, because those matters are for your judgment and not the court's.

The court has ruled with regard to the two experts who testified that it was proper for you to consider their testimony, and as I've indicated, the weight you attach to it is a matter for your determination.

In conducting a trial, it becomes the duty of the court at times, in the interest of expedition or good order, to sometimes make a comment to counsel, or maybe to a witness, to keep

parties or counsel within the court's idea of the rules. And that's just a common matter in any litigation; it has no bearing on what the facts of the case are for your determination. And you are to draw no inference against the side to whom any admonition of the court may have been addressed during the trial of the case.

In connection with the testimony of witnesses, charts or summaries have been admitted into evidence for the purpose of illustrating facts that are claimed to have been disclosed by books, records and other documents. The weight which you choose to give to such charts or summaries should reflect how accurately the charts or summaries portray the material they purport to illustrate or explain. If such charts or summaries do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard them to the extent that they are not borne out by the evidence, and again give them such weight as you think they are entitled to in view of the instructions of the court.

Now let's proceed from these general matters of the nature of evidence and the rules with regard to credibility and the evaluation of evidence, and come more directly into the law pertaining to this particular type of case.

The generalized rules are very important, should be considered in connection with everything else. There has been an act of Congress passed, which I will refer to specifically a little later and give you the requirements, in which act Congress found and declared that in the face of rising productivity and affluent older workers find themselves disadvantaged in their efforts to retain employment, and especially to retain employment when displaced from jobs; that the setting of arbitrary age limits, regardless of potential for job performance, had become a common practice, and certain other undesirable practices that might work to the disadvantage of older persons.

And it was therefore the purpose of the legislation to promote employment of older persons based on their ability rather than their age, and to prohibit arbitrary age discrimination in employment, among other things.

And so Congress passed a statute or act in view of those general considerations which provided specifically as follows,

to the extent pertinent here and with exceptions which don't apply:

> "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age, or (2) to limit, segregate or classify his employees in any manner which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age."

Thus, the law applicable to this case prohibits an employer from discharging or otherwise discriminating against an employee because of that employee's age.

In this case, the plaintiff represents seven complaining employees, six of whom were terminated by the defendant and one of whom was reassigned.

And thus the plaintiff, to sustain its burden of proof, must establish certain elements to prove a violation of the Age Discrimination Act separately for each of these employees.

In line with what I have already said, this does not mean that evidence presented with respect to one employee cannot be considered with respect to other employees if you believe the evidence is relevant and material for that purpose.

You may consider all of the evidence as you decide whether discrimination occurred. However, you must be satisfied by a preponderance of the evidence that discrimination occurred with respect to a particular employee before you would be authorized to find in his favor.

If you find that the evidence shows age discrimination against one or more of the complaining employees, therefore you need not find necessarily age discrimination against all of the others unless the evidence supports that finding also. Rather, you must consider each of the complaining employees individually in deciding whether a case of age discrimination has been established.

Now proceeding more directly into the issues here, and your form of verdict which is before you, I am going to take

sufficient time and do it methodically, so that you will understand what the form of verdict means, what the rules of law are applicable to it. But I proceed from the general into the more specific now, all of which you should consider as we go along, and as you consider this case.

The purpose of this case then in general is to determine—and by the way, I'll get back specifically to the form of verdict, so I'll relate these instructions to the form of verdict a little later. This is to orient you and give you prelude to that.

The purpose of this case in general is to determine whether the preponderance of the evidence has shown that the defendant violated this statute by discriminating against any of the complaining employees because of age, and if so, the amount of past damages up to the time of trial, any such employees are entitled to, and whether and in what amount if the discrimination was willful, any additional liquidated damages beyond the past actual damages should be awarded by the jury.

And you have before you a form of verdict which mentions all of these expressions, but in the particular context of questions.

I want now, before we go to the specific form itself, to define some of the expressions or terms used in the form and used in my statement of the general issues of the action, so that when we come to the form you can understand these expressions.

You'll be interested in the definition of "discrimination because of age." What is discrimination and what is discrimination because of age, because that's used in the form of verdict and used in my statement of the issues of the case.

You'll be interested in what are past damages, why do we say "past damages." And you'll be interested in how that is distinguished from future damages, if any, which aren't involved in this case, there being no question about them.

You'll be interested in what "liquidated damages" are which you're called upon to consider. If you award past damages, then you'll also consider whether liquidated damages should be awarded, and you'll be interested in a definition of those, and how you fix the amount of those.

And in that connection you will be interested in what "willful" means, because it's only if discrimination because of age is willful that liquidated damages can be awarded.

And I'll proceed now to explain these terms and the related law with respect to them.

You will be interested first in what preponderance of the evidence is, because you will notice in the form of verdict, every question is prefaced or conditioned by the expression, "Do you find by a preponderance of the evidence." What is the difference between finding and finding by a preponderance of the evidence? Well, we start out with no evidence at all, and in general—and it's not particularly applicable to this case—but in all of the affairs of life unless and until outweighed by evidence to the contrary, the law presumes that private transaction has been fair and regular, that ordinary course of business has been followed, and that the law has been obeyed. That is a general assumption where we have no evidence.

In any case where a party relies upon the establishment of a claim, the party having the affirmative of that has the burden of proof to show by a preponderance of the evidence that claim. That is why we have evidence, to see if the one seeking relief in court can establish a claim by a preponderance of the evidence. And thus the plaintiff carries the burden in this case of proving each and every essential element of its claim against defendant by a preponderance of the evidence.

If the plaintiff should fail to establish any one of the essential elements of a claim by preponderance of the evidence, it would have failed to establish that particular point because it requires the preponderance of the evidence.

Now I'll tell you what "preponderance of the evidence" doesn't mean, because some of you have heard the burden of proof beyond a reasonable doubt.

In a criminal case a defendant's guilt must be proved beyond a reasonable doubt. We are not talking about proof beyond a reasonable doubt. We are talking about proof by a preponderance of the evidence, which may be far short of proof beyond a reasonable doubt.

To establish by a preponderance of the evidence means simply to prove that something is more likely the case than not. That's all it means; something is more likely than not.

So when you are asked the question; Has it been established by a preponderance of the evidence, a certain fact you inquire, does the evidence show that that fact in dispute is more likely than not? Thus if there is a question, Was there discrimination because of age? if the plaintiff has shown that it's more likely than not that there has been such discrimination, they have fulfilled their burden of proof of showing it by preponderance of the evidence.

If they haven't fulfilled that burden of proof, then they fail on that particular point or question.

You might consider in connection with this concept of preponderance of the evidence, a set of scales. I don't know that this will help you at all, because the concept itself is quite simple, there's a fact shown to be more likely than not. But if you can visualize a set of scales and place on one side all of the evidence, not by way of number, favoring a given question or proposition, and on the other, all that disfavors it or goes against it, if the scale tips to a substantial degree ever so slightly in favor of the probability or likelihood of that being so, then the preponderance of the evidence shows that it is so, the greater weight, not in terms of number, or anything, but in terms of its convincing force.

If the scale remains balanced and doesn't tip in favor of the probability, or if it tips the other way, then the proposition hasn't been established by a preponderance of the evidence.

If after considering all of the evidence, regardless of which party produced it, and the reasonable inferences that may be drawn from it, you find that the evidence is equally balanced or tips against the claim or proposition in question, you must find that proposition or question has not been answered affirmatively by a preponderance of the evidence.

If, on the other hand, after considering all of the evidence, that imaginary scale, in terms of more convincing force, tips in favor of the proposition or an affirmative answer to the question, then the question can be answered affirmatively by a preponderance of the evidence.

Now we turn to this question of discrimination because of age, and there are a few general explanations that I will make, and then I will go directly to that point.

The law does not permit the court or the jury to sit in judgment of the business decisions made by the defendant. If they haven't, within the definition I'll later give you, discriminated because of age, the Age Discrimination Law is not intended to permit business decisions to be reviewed in court simply as such.

The question you must decide is not whether defendant made sound business judgment or whether its decisions to discharge or reassign the complaining witnesses were merely errors in business judgment. The question for you to decide is whether in making their business judgment the defendant discriminated against the complaining employees because of their age.

The law, by the same token, does not require an employer to make employment decisions on the basis of an employee's seniority as such, or to transfer or reassign a complaining employee to another position within the company, to a position already filled by another employee, whether or not that employee was younger than the complaining employee; or to rehire a particular employee, or to give preference of any kind to older employees over younger employees, or younger employees over older employees; or act with entire fairness in its employment decision regarding its employees, or to avoid terminating an employee for business reasons, no matter how convincing or unconvincing those business reasons are.

The law does not require those things unless the action taken is because of age. But the law does require that in making those business judgments the employer not take the action because of age, apart from other reasons.

In order to prove that the complaining employee in question was discriminated against because of age, the plaintiff must prove that age was not merely a factor, but it must prove that age was a determinative factor in the defendant's decision to discharge or reassign the complaining employees.

In other words, the plaintiff cannot prove merely that the defendant considered age as one of the factors in its decision

unless age was a determinative factor, without which the action would not have been taken; that is the bottom line.

In any of these decisions, would the action have been taken if it weren't for the fact that the employee in question was within the protected age, that is between 40 and 70 years of age?

Now I will state that in a little different way, but to the same effect: to satisfy the burden of proof in an age discrimination action, the plaintiff must show that the age of the employee in question was a determinative factor in defendant's decisions to discharge him. That is, must show that the age was in operation, because of his discharge or transfer, and that but for his age, he would not have been so treated.

Now, what about the situation where there are various reasons given for discharge, and that the reasons given by the employer are expressly for other than age, and yet the reason claimed by the employee being the claim that it was for age?

And suppose, well, if you find that there was not a discharge because of age, that is, that age wasn't a determinative factor, then that ends it.

But in order to prevail where you have possible multiple reasons for discharge, the plaintiff does not have to prove that age was the only reason for the termination or the demotion, if age is proved by a preponderance of the evidence to be a determinative cause of the discharge in question, and that the discharge would not have occurred if there had been no age discrimination. And that would be true no matter whether you think there are also financial reasons or reorganization reasons.

But again, the bottom line is if, despite other reasons and despite age being considered, if the preponderance of the evidence doesn't show that age was the determinative factor in the sense that apart from other reasons there would have been no discharge or demotion in question, if there had not been consideration of age as such, then of course age would not have been a determinative factor.

In making this judgment as to whether age was a determinative factor in the discharge, you will consider various matters, I'm sure, because they will appeal to you, as they would

to reasonable minds, in evaluating all of the evidence in terms of asking yourselves; Was age, irrespective of any other reasons, a determinative factor in bringing about the discharge or demotion?

You will ask yourselves whether there is some substantial evidence that age was a determinative factor or whether there wasn't substantial evidence to that effect. And before you come to a judgment as to whether the preponderance of the evidence so shows, you will inquire into the reasons given by the defendant as to why the discharges or demotions occurred, and inquire whether they have expressed some legitimate, reasonable reason apart from age in justification of the discharges or demotions.

And then you will ask yourselves if you think there have been some reasons expressed which are legitimate and reasonable, you'll ask yourself, Are those reasons merely a pretext, or were they reasons which tended to obscure the determinative, real reason, if any, apart from them; or were they reasons which did operate to bring about the acts complained of without control as a determinative cause of discrimination because of age?

And again you will ask yourself the overriding question in view of all of the reasons given, in view of all of the evidence, in view of your analysis of the reasons and the part they play in being responsible entirely for bringing about the discharges, or partially played; or whether there were other reasons or not, was age discrimination itself a determinative factor without which the discharges or demotions would not have occurred?

And in coming to that judgment as to what the preponderance of the evidence shows or fails to show, you will consider, among other things, the statistical data and opinions of the experts in question, any expression or language of management, if any there were, indicating an intent to discriminate because of age, or the absence of any such statements according to your findings, the circumstances of the discharge or demotion in question in view of the individual situations of the employee in question, and all other circumstances which reasonably throw light in your judgement so far as shown by the

evidence, upon whether the complaining employees, or any of them, were discharged because of their ages.

If you find that the plaintiff has met its burden of proving age discrimination involving any or all of the charging employees, then you must decide whether the complaining employees are entitled to recover damages, and if so, the amounts of such damages.

I will instruct you now concerning the rules of law applicable to the determination of damages, and particularly define "past damages," and then afterwards "liquidated damages," as referred to in the special verdict.

The fact that you receive from me instructions regarding damages does not mean that you must award damages because I give you instructions concerning damages, simply in the event you decide that damages are proper to award. That is up to you.

But if they are, then these instructions will direct you as to the law with respect to the matter of damages. You should not understand anything that I say with respect to damages to be any reflection one way or another of any opinion on the question of whether age discrimination has occurred or whether damage should be awarded.

If you find the complaining employees should be awarded damages of some amount—I hesitate to mention this because you won't do it anyway—but it is unlawful to use the so-called "quotient system" in fixing the amount. It would be improper for you to use that quotient method.

In other words, each of you are not to submit what you think is a proper award, add up those figures, and then divide the total by the number of jurors. That is not the way jurors reach their judgment.

You won't do that anyway, but that doesn't mean that you can't consider the viewpoints of each of you, and in the light of the opinions of the others, review your own judgment.

And if you can arrive at a figure which represents, after full discussion, the unanimous judgment as to the amount, and you think that's established by a preponderance of the evidence after full discussion, why, that's perfectly proper. In fact, that's the only way a jury can operate, because the test

of a jury's verdict isn't what the individual member's ideas are as they commence their deliberations; it's what, after full discussion and consideration of views of others, they arrive at unanimously in the course of jury deliberations.

Now all of the complaining employees who were terminated have claimed damages for lost pay. The burden of proving such damages is on the plaintiffs. Unless the plaintiff established damages based upon a reasonable appraisal of the evidence, you should not award such damages.

If you find that damages should be awarded, you should begin by determining for each of these employees the amount of salary which you find that such employee would have received except for his termination, beginning at the date of his termination.

You must also determine the value of any benefits that each of the complaining employees would have received if this employment had continued. And when I say "you must determine that," you must consider that in the process of determination.

You won't be asked in the verdict to break those down, but these are the things that you must consider in arriving at the net amount. In making these determinations of lost salary and benefits, you must make your findings on the basis of the evidence that has been presented. The law does not expect you to have a specific amount to the dollar. Reasonable estimates are permitted, so long as those estimates represent your combined judgment, and you can say that by a preponderance of the evidence that amount represents past damages within the rules of law here.

Sometimes jurors think that they have to arrive at a precise amount that is reflected in some document or by some particular testimony, and they may spend literally hours sometimes in determining whether an amount on a rather substantial verdict should be a particular cents or a particular amount of dollars, rather than a few dollars off or otherwise.

I am simply saying that your judgment of the amount, if you find damages, should be based upon the evidence in your judgment, and such an amount as you can say by fair determination to represent the collective view as to the amount shown

by the preponderance of the evidence, the particular defendants suffered in loss of back wages.

Pursuing the amount in this determination for those individuals who were terminated unlawfully, if you so find, the appropriate measure of past damages or the amount of lost salary from the date of their termination until today, increased by the value of pension benefits and other fringe benefits that would have accrued but for the unlawful termination, and decreased by any severance pay, because if they have received pay after termination, it wouldn't be right to give them judgment for pay that they had actually received in severance pay, decreased by any severance pay and the salary and fringe benefits actually received by other employment.

Fringe benefits include but are not limited to the following items: any insurance payments by an employer, any vacation pay, any sick pay, and finally any stock bonuses, to the extent that you find those considerations should affect the amount by a preponderance of the evidence.

Any damages sustained by Mr. Smith, the individual who was demoted, would include an appropriate measure of past damages, the amount of lost salary from the date of his demotion until today, increased by the value of pension benefits and other fringe benefits that would have accrued but for the unlawful demotion, if any, and decreased by salary and fringe benefits he actually received from the defendant.

Bear in mind that we are talking about past damages—that is, damages sustained from the time of termination or demotion up to the present time. We don't have before us any claim for future damages. You disregard that entirely. That is why I referred to past damages in the inquiry to distinguish it from any speculation concerning future damages.

Now in two instances at least the defendant claims that the claimants could have obtained or received other employment, and therefore they shouldn't be entitled to the full amount or any amount of their claim by reason of that fact, because the employment income that they could have received would reduce or offset damages to which they might otherwise become entitled.

And I say in that connection that the law imposes upon every injured person a duty to mitigate or attempt to reduce his damage by reasonably seeking and maintaining other employment. That doesn't mean that he has to seek or maintain the type of employment or under circumstance of employment which would be unreasonable and which would not have been pursued or accepted and maintained by a reasonable man.

But it does mean that a claimant is obliged to reasonably mitigate or reduce his loss by seeking and maintaining other employment, and that any reduction that should have been reasonably achieved by that effort should be deducted from or offset against any award that might otherwise have been proper.

In the present case, you must determine whether the employees in question could, through reasonable effort, have obtained other employment and maintained it, the acceptance of which would have been reasonable under the circumstances, and you must reduce any damages that you may award by the amount, if any, that such employees might have reasonably reduced their damages in that way.

On that latter matter, however, you must note this: Apart from the usual burden of proof which is built into your form of verdict on the question of reduction of damages in mitigations, it's not the plaintiff's burden, the employee's burden, to show that they reasonably sought employment; it's the burden of the defendant to show, by preponderance of the evidence, that the damage otherwise recoverable should be reduced by the failure of the particular employees to mitigate or reduce those damages.

Unless the defendant has shown by a preponderance of the evidence the failure to reasonably mitigate or reduce the damages, then you shouldn't deduct anything for failure to reduce or mitigate.

If you find that back pay is awardable, you must also find what period such damages should be awarded. I have already stated that the back pay period should begin as of the date the employee was terminated, but considering any additional severance payment that would have been received, it was re-

ceived so that in those cases where it was received you are really considering the date that the pay was terminated.

And I've instructed you that the back period cannot extend beyond the date upon which your verdict is rendered. Now, we pass this question of back pay or past damages which is based upon the actual damages you find, and we come to the question of liquidated damages.

[Liquidated damages instruction deleted.]

Now let's turn to your form of verdict, because that's the thing you will take into the jury room.

You will have the original. Use your copies as references, but your judgment will become meaningful only as it permits you to answer the particular questions here:

> "We the jury, duly impaneled in the above entitled case unanimously make the following answers to the questions submitted to us: (1) Do you find by a preponderance of the evidence—"

and I have defined "preponderance"—

> "—do you find by a greater weight and convincing force, that the defendant discharged John Jones because of his age?"

And I have defined that term now. I am sure the thing is beginning to fall into place now as you look at this.

These terms used, when you first looked at it, were more or less mysterious and undefined. But now we have defined that, because of his age, that is just by way of summary and without intending to repeat my instructions, was he discharged because age was the determinative factor without which the discharge wouldn't have been accomplished independent of any other reasons.

All right. After discussion of that with regard to him, if you think it's established by a preponderance of the evidence that that was so, say so by your answer, the answer is "yes."

Then if you think that hasn't been established by a preponderance of the evidence in that the evidence is evenly balanced and you can't tell which is more likely or if the evidence

preponderates or weighs the other way, then your answer is "no."

Then going to the next question: If your answer to question number one is "yes," what do you find from a preponderance of the evidence in the amount of past damage John Jones sustained by reason of such discrimination? And if you have answered "yes," that there was age discrimination in the sense contemplated by question one, then you fix the amount of past damages in accordance with the rules I have given you.

Now, if your answer is "no," there was no age discrimination within the contemplation of that question, or no preponderant proof of that, then you say "no." Then there is nothing further to decide about John Jones' claim, because if there was no age discrimination, he's entitled neither to past damages nor liquidated damages. That is responsive to his claim. And that is why it says, "If your answer to question number one is 'yes,' what do you find from preponderance," and then finally if you answered "yes" to question number three above—

Well, let's look at number three first.

> "Do you find from a preponderance of the evidence that the defendant willfully discriminated against John Jones?"

If you've already answered in one that they discriminated, yes, then we want to know, and you have awarded past damages because of that discrimination, then we want to know, was discrimination willful, so that we can determine whether liquidated damages should also be awarded. And I have defined what "willful" means, and you will answer that "yes" or "no" if you've answered question one "yes."

And then if you've answered question three, "yes, it was willful," then you fix the amount of liquidated damages in accordance with the rules I have given you in response to question four.

I can run over, similarly, all of this other series of questions, but you are way ahead of me on that. You have already done in your own mind and you know the same series of questions, except for the numbers of the previous inquiries apply to the other sequences, inquiries concerning the remaining claim amounts.

It is proper to add the caution, as I have reviewed the form of verdict given you, the instructions, that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner an intimation as to what verdict I think you should find. I am leaving that up to you in view of the instruction of the law which I have given you.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will execute the form of verdict on your behalf after you have reached a unanimous verdict with regard to each inquiry.

Your foreperson has the same voice or vote as each of the others in deciding the case, but will preside over your deliberations and execute the verdicts I have explained for the sake of order and expedition.

When you have reached a unanimous agreement as your special verdict, you will have your foreperson fill in, date and sign the form, and you will knock on the door then and notify the marshal who will be attending you that you have reached a verdict, and we will all be standing by to receive your verdict.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing or by recalling you here in open court.

I hesitate to even mention that, because I have tried to be careful in thoroughly explaining the law to you. Sometimes jurors—it's an agonizing time to decide questions of fact—like to lean on the court and see if they can get a little suggestion or not. And it's entirely proper to ask questions if the court hasn't sufficiently taken care and hasn't had the ability to explain the rules of law, but just because there are factual problems that bother you, don't bother the court with that.

And I don't anticipate that there will be a necessity in view of the time and care I have tried to take in explaining the law to you and going over the form of verdict to communicate with the court, but I have explained how it can be done if deemed essential.

In no event should you indicate until you have reached a unanimous verdict, any difference in opinion or any numerical division of the jury, if there should be such, and the communication should be sent directly in to the court without mentioning the state of your deliberations.

Unless specific inquiry is made by the court, the verdict which you return must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror concur in the response to each question.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. However, after an impartial consideration of the evidence in the case with your fellow jurors, each of you must decide the case for yourself.

In the course of your deliberations, do not hesitate to reexamine your views and change your opinion if convinced that it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of fellow jurors for the mere purpose of returning a verdict unless you are convinced by a full consideration of the facts and consideration of the views of your fellow jurors that your judgment can concur with the judgment of others.

Remember at all times, you are not partisans. You are not mere debators. You're judges, judges of the fact. Your sole interest is to ascertain the truth from the evidence in this case and hopefully to return a meaningful and proper verdict in accordance with the instructions of the court and based upon the evidence received in open court.

There will be sent to you to the jury room, the form of verdict, the original form, which is unmarked, and which will be completed in accordance with the instructions, together with the exhibits.

THE IMMIGRATION REFORM AND CONTROL ACT OF 1986: IMPACT ON KENTUCKY EMPLOYERS

By

Michael W. Hawkins
Dinsmore & Shohl
Cincinnati, Ohio

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THE IMMIGRATION REFORM AND CONTROL ACT OF 1986: IMPACT ON KENTUCKY EMPLOYERS

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A. INTRODUCTION

1. On November 6, 1986, the President signed the Immigration Reform and Control Act of 1986 (IRCA). This new law decrees broad reforms in the immigration law of the United States. Among these reforms is a requirement, for the first time, that employers refrain from hiring aliens not authorized to be employed in the United States and that all employers examine certain documents with respect to each new hire to verify employment authorization and retain records of such verification process.

2. On March 6, 1987, the Commissioner of the Immigration and Naturalization Service (INS) proposed regulations implementing the employer verification requirements. These proposed regulations were published in the Federal Register on March 19, 1987.

3. On May 1, 1987, the final INS regulations were issued. NOTE WELL: This new law is quite complex and the specifics of its implementation are not yet fully settled. This outline, prepared in a question and answer format, is a summary of certain provisions of the law and is not exhaustive.

B. QUESTIONS WHICH MAY ARISE

1. TO WHAT EMPLOYERS DOES THE ACT PERTAIN? To virtually all employers. An "employer" is any person or entity who hires anyone to render services for remuneration where the work is to be done in whole or in part in the United States.

   a. It includes employees working on any U.S. vessel or aircraft "which touches at a port in the United States . . . ."

   b. "Employees" do not include:

      (1) Persons engaged for "casual employment of a sporadic, irregular or incidental nature" as domestic servants in a private home or

(2) "Independent contractors." The term "independent contractor" means a person or entity who carries on an independent business, and who contracts to do a piece of work according to its own means and methods and is subject to control only as to the results it is to achieve. Remember, however, that, though an independent contractor is not an employee, he, she, or it may easily be an employer.

2. ARE EMPLOYERS THE ONLY PEOPLE REQUIRED TO DO ANYTHING UNDER THE ACT? No. Anybody who recruits or refers anyone for employment for a fee is also required to comply with the requirements of the Act for persons actually hired on or after June 1, 1987.

3. ARE UNION HALLS CONSIDERED TO BE PAID REFERRAL AGENCIES? No.

4. WHAT GENERALLY DOES THE ACT REQUIRE OF EMPLOYERS?

   a. It requires them to refrain from hiring anyone whom they know to be an alien unauthorized to accept that employment.

   b. It also requires them to obtain a sworn statement from each new hire as to that person's eligibility for employment.

   c. It requires the employer to check and keep records of certain personal documents pertaining to the new hire which show his employment authorization and identity. It forbids certain forms of discrimination based on national origin or citizenship.

5. DOES THIS LAW PERTAIN ONLY TO THE HIRING OF FOREIGNERS? No. The requirements are the same for all persons who are hired or referred or recruited for a fee. This includes native born American citizens named Smith, Jones or Reagan.

6. DOES THIS MEAN THAT IF I HIRE A PERSON WHOM I KNOW TO BE A U.S. CITIZEN WITHOUT THEN CHECKING THE RECORDS TO VERIFY WHAT I ALREADY KNOW TO BE TRUE, I AM BREAKING THE LAW? Absolutely.

7. SUPPOSE I ONLY EMPLOY ONE OR TWO PEOPLE. DO I STILL HAVE TO GO THROUGH ALL THIS RED TAPE? Absolutely.

8. HOW SOON AFTER I HIRE SOMEBODY DO I HAVE TO HAVE ALL OF THIS PAPERWORK TOGETHER?

   a. If hiring somebody for a duration of less than three business days, you have to complete the paperwork by the end of his first work day.

   b. If the period of employment is to be three days or longer, you must comply within three business days of hiring.

   c. Recruiting agencies must comply within three business days of the hiring of the person recruited or referred.

9. WHAT DOES "HIRING" MEAN? The regulations are a little vague on this. The INS definition calls it: "actual commencement of employment . . . for wages or other remuneration." Once the new hire is actually accruing pay, the three business days are running. You may perform the verification as soon as you tell the employee: "You're hired."

10. MAY I, AS AN EMPLOYER, HIRE SOMEBODY TO DO THE VERIFICATION FOR ME? Yes, but you are still responsible for compliance. Recruiters can also use the employer as an "agent" to perform verification. In that case, the employer would send a photocopy of the I-9 (see Item 12, below) to the recruiter who would keep it for the required time.

11. HOW LONG MUST I KEEP THESE RECORDS?

   a. The employer has to keep the record for three years after the date of hiring or one year after the date of termination whichever is later.

   b. Referral or recruiting agents have to keep the paperwork for three years after the date of recruitment or referral (but only for persons who are hired pursuant to that recruitment or referral).

12. WHAT, EXACTLY, DO I HAVE TO DO?

   a. You, and the person whom you hire or refer or recruit for a fee, must jointly complete a form titled "Employment Eligibility Verification" or "Form I-9." (A copy of Form I-9 (March 19, 1987, draft version) is attached. The final version will not differ materially from this

draft.) The employee has to provide his name, address, date of birth and social security number. The employee must attest, under penalty of perjury, that he or she is either:

(1) A citizen or national of the United States, or

(2) An alien lawfully admitted for permanent residence in the United States, or

(3) An alien who was otherwise authorized by the Immigration and Naturalization Service to work in the U.S.

Once the employee or recruit signs off on this information, he must present documents which show his identity and his employment eligibility.

b. Form I-9 lists various documents which can be used to prove these facts. Form I-9 is fairly self-explanatory. The new hire must produce either one document from "List A" or one each from both List B and List C. The simplest and most common way to prove identity and employment authorization will probably be to produce a state-issued driver's license and a social security card. Lists A, B and C have been expanded a bit since the regulations were first proposed and it would be logical if the full lists were to be printed on the back of the final version of Form I-9. Documents currently usable for verification are listed on attachments to this outline. Note that there are special provisions to cover minors who lack the customary documents.

c. The employer is required to sign off on Form I-9, again under penalty of perjury, attesting that he has examined the documents noted on the form, that the documents appear to be genuine and to belong to the individual hired.

13. MAY THE EMPLOYER SPECIFY WHAT DOCUMENTS IT WANTS THE NEW HIRE TO PRODUCE FROM LISTS A, or B and C? No. The employee makes the choice. However, new employees may welcome non-mandatory advice as to which documents are easiest to obtain and produce.

14. WHAT IF I HAVE ALREADY PERFORMED VERIFICATION FOR MY EMPLOYEES HIRED SINCE NOVEMBER 6, 1986, USING THE

PROPOSED FORM I-9? For employees hired before June 1, 1987, the INS will accept the draft Form I-9 which was published in the Federal Register on March 19, 1987. The final version of the form should be used for verification on or after June 1, 1987.

15. MUST AN EMPLOYER KEEP COPIES OF THE PERSONAL DOCUMENTS WHICH THE EMPLOYEE PRODUCES? No, the employer is not required to keep the copies of the documents produced, but he may do so, and this is recommended. However, it is recommended that the I-9's and document copies be kept separate from the employees' other records. The only legally permissible use of these papers is to comply with IRCA. Since information from the documents could be used to discriminate unlawfully against employees by reason of age, national origin, etc., it is safer to isolate these documents from routine handling by persons making personnel decisions. Let them gather dust in a separate file. This will also make it easier to produce them for inspection (see Item 16, below).

16. DO I HAVE TO SEND THESE FORMS TO ANYONE AFTER THEY ARE COMPLETED? No. You have to keep them for the required period and produce them, upon request, to an authorized officer of the Immigration and Naturalization Service or the Department of Labor. Such officers need only show their credentials and orally request the forms. However, you are entitled to at least three business days advance notice of an inspection by the INS or Labor Department. If you do not produce them after the three days, you are in violation of the Act.

17. WHERE MUST I KEEP THESE RECORDS? Bearing in mind the recommendation under Item 15, above, anywhere you want.

18. SUPPOSE THE EMPLOYER DOES NOT KEEP THE I-9's AT THE WORK PLACE WHERE THE INSPECTION WILL TAKE PLACE? Then the employer has the option of producing the records at the work place or at the INS office nearest the place where the records are normally kept.

19. WHAT IF THE EMPLOYEE PRODUCES COUNTERFEIT DOCUMENTS? As long as you do not know that they are counterfeit and believe them to be genuine and as long as they "reasonably appear to be genuine" you are not breaking the law. Of course, if you know

from any source that the employment is unauthorized, you may not hire the alien.

20. WHAT HAPPENS TO ME IF I DO NOT FOLLOW THESE REQUIREMENTS? That depends on the manner of the violation, how many violations occur and when they occur. (See the discussion of the "grace period" in Item 21, below.)

    a. There are provisions for civil penalties for violations. The penalties are different for knowingly hiring, recruiting or referring unauthorized aliens than for mere paperwork violations.

        (1) For knowingly hiring, recruiting or referring unauthorized workers, the first civil penalty is a fine from $250 to $2,000 for each unauthorized alien. A second violation authorizes a fine of $2,000 to $5,000 for each unauthorized alien. Subsequent penalties for unlawful hiring, recruitment or referral range from $3,000 to $10,000 for each unauthorized alien.

        (2) Paperwork violations carry civil penalties from $100 to $1,000 for each hire made in violation of the paperwork regulations.

    b. There are also criminal penalties for persons engaging in a "pattern or practice" of knowingly hiring or referring or recruiting for a fee unauthorized aliens or of continuing to employ someone who is discovered to be unauthorized. If convicted of such a charge, a defendant can be fined $3,000 for each unauthorized alien and imprisoned for up to six months for the entire pattern or practice of violations.

21. WHEN DO I HAVE TO START COMPLYING WITH THIS LAW? The law provides for a six-month "public information period" which ends on June 1, 1987. No prosecutions or civil penalty proceeding will be instituted during this grace period. Although the law is not absolutely explicit, it appears that no one will be prosecuted or have penalties imposed after June 1, for events which occurred before June 1, in violation of the unlawful hiring or recordkeeping requirements. During the 12-month period beginning June 1, 1987, and ending May 31, 1988, any employer

suspected of having violated the unlawful hiring provisions will, at first, get what amounts to a warning citation without penalty. If any other violations come to light which occurred after June 1, 1987, however, penalty proceedings may be instituted. While no warning is technically required for paperwork violations, it is expected the INS will first issue warnings for this type of violation as well. On or after June 1, 1988, anybody can be penalized for any violation without a warning citation.

22. WHAT ABOUT PEOPLE WHOM I HIRED AFTER THE PASSAGE OF THE NEW LAW WHO ARE STILL WORKING FOR ME ON JUNE 1, 1987?

a. If you knew that they were unauthorized to accept employment when you hired them, you were technically in violation of the statute at the time you hired them. You won't be penalized for the actual hiring, because this occurred during the grace period. However, the law also forbids an employer to "continue to employ the alien in the United States" once the employer knows that the alien is or has become unauthorized to work in that position. If you knowingly continue to employ, after June 1, 1987, such an unauthorized alien, you break the law as of June, 1987, and will be subject to penalty for that violation. Continuing to employ an unauthorized alien hired before the Act passed is not unlawful. However, bear in mind that the alien may be subject to deportation if the INS discovers him. An attempted deception of the INS regarding such an employee's status would be unlawful.

b. Employers who hired people after November 6, 1986, but before June 1, 1987, will have to inspect the necessary documents and complete Forms I-9 for such employees who are still employed as of June 1. Such "grace period" hires must complete I-9's by September 1, 1987. No verification is necessary for "grace period" hires who are gone by June 1.

23. WHAT IF I HIRED SOMEONE WHO WAS AN ILLEGAL ALIEN AT THE TIME BUT WHO STANDS TO BE "LEGALIZED" UNDER THE OTHER PROVISIONS OF THE 1986 IMMIGRATION LAW? This seems to be an exception to the general prohibition against hiring illegal aliens. If you want to hire an alien who says that he is illegal but expects to

be legalized under the new Act, you are strongly urged to consult counsel regarding the specific case. Under the new law, so-called "illegal aliens" may be authorized to work!

24. CAN'T I JUST AVOID PROBLEMS BY STEERING CLEAR OF PROSPECTIVE EMPLOYEES WHO APPEAR TO BE FOREIGNERS? No. That is a good way to create problems. The Congress was concerned that employers would shy away from hiring persons who appeared to be foreigners or of foreign origin in order to avoid problems under the unlawful employment provisions of the Act. Accordingly, the Congress made it illegal to discriminate in hiring or discharge, against prospective or current employees who are authorized to work, because of their national origin or, in some circumstances, because of their citizenship. There are a lot of qualifications and exceptions to this rule, as well as other civil rights laws which forbid discrimination based on national origin. All the preexisting laws are still in place and any discrimination that was unlawful before is still unlawful. Any policy of turning away prospective employees because they look or sound like foreigners or because you suspect that they may not have been born in the United States is likely to violate one law or the other. If any employer finds himself in a dilemma where he is uncertain whether he can comply with the unlawful hiring provisions and the unlawful discrimination provisions, he should consult counsel. NOTE WELL: There is no "grace period" for violation of the antidiscrimination provisions of the new law. Violations occurring since November 7, 1986, will be actionable.

25. CAN'T I GIVE PREFERENCE TO U.S. CITIZENS OVER NON-CITIZENS? This is a difficult question. The new antidiscrimination law only covers employers of four or more persons. Obviously, you must exclude aliens who are not authorized to work (however, see Item 23). As between a U.S. citizen and an authorized alien who are equally qualified, the U.S citizen may be given preference, so long as the discrimination is based on citizenship and not national origin (a distinction which may be unrealistic). There are other exceptions to the antidiscrimination provisions. If you face a choice between a similarly qualified native U.S. citizen and an alien or foreign-born U.S. citizen, it would be wise to consult counsel. For most employers, a "citizens only" policy will not be justifiable.

26. IF I, MYSELF, AM NOT A U.S. CITIZEN, MAY I GIVE PREFERENCE TO MY ALIEN COUNTRYMEN? No. The law is written to also forbid discrimination against a U.S. citizen on the basis of citizenship or U.S. national origin.

27. MAY I ASK A PROSPECTIVE EMPLOYEE WHETHER HE OR SHE IS A U.S. CITIZEN?

a. That's a bad idea. You want to avoid the implication that you prefer U.S. citizens over qualified and authorized aliens. Ask a prospective employee only to confirm that he or she falls into one of the three permissible categories listed at the top of Form I-9. Don't ask which category pertains to the applicant unless and until that individual is hired. Don't inspect the personal documents until after you have decided to hire and told the successful applicant of your decision. This avoids the suggestion that forbidden criteria such as age or national origin were factors in your decision. It is all right to advise all applicants in advance of the documentary requirements and of the need to provide personal documents upon hiring. You may also provide a copy of Form I-9 to applicants (but be consistent in this). Don't get into specifics about Form I-9 until after hiring. A uniform advisory of the type hereto attached might be incorporated in the employer's standard job application forms.

b. A Warning: You may read or hear conflicting advice on this point. One reason may be that enforcement of the antidiscrimination provisions will be handled by the Civil Rights Division of the Justice Department while employment verification will go to a new division of the INS. The INS has informally recommended inquiry by employers as to U.S. citizenship. We question whether those officials enforcing the antidiscrimination rules will find this procedure innocuous. Hence the above recommendation.

28. HOW ABOUT ASKING THE APPLICANT WHETHER HE OR SHE IS LEGALLY PRESENT IN THE U.S.? Still a bad idea. "Illegal" aliens may be authorized to work in the U.S., because of the legalization or so-called "amnesty" provisions of IRCA. Furthermore, the question would only be prompted by the applicant's

foreign appearance or name. You might be setting yourself up for a claim of unlawful discrimination.

29. DOES THIS LAW MEAN THAT I REALLY CAN'T HIRE SOMEONE BECAUSE HE LOST HIS SOCIAL SECURITY CARD AND CAN'T GET A NEW ONE WITHIN THREE DAYS OF THE HIRING DECISION?

    a. No, even assuming that the Social Security card is the only means he has to prove work authorization. He can submit a receipt for his application for a new card (or any other supporting document). If he does so within the three business days, he then may produce the new document within twenty-one days of the hiring. What if the employee still does not have it? You would then be in technical violation of the law. Don't assume, however, that the INS would ignore your good faith efforts to comply.

    b. The objective of the new law and regulations is to stop people from hiring unauthorized aliens. The paperwork requirements are designed to effectuate that goal. The INS and Labor Department are unlikely to visit every employer on a routine basis to spot-check their paperwork compliance. The civil penalties for paperwork violations are relatively modest and it seems unlikely that an employer would be routinely penalized because he hired an authorized worker but was slightly dilatory in inspecting the employee's social security card. It would be surprising if the INS used IRCA as an instrument of harassment of U.S. citizens, authorized aliens or their employers. However, it should certainly be the objective of each employer to comply with the requirements of the Act in a timely fashion and as rapidly as humanly possible. If an employer has complied with the paperwork requirements by the time his records are inspected, the inspector may overlook the fact that compliance took longer than three days after hiring. The INS will be much more concerned with the employer who ignores the new law than with one who is obviously doing its best to comply.

30. IS THIS NEW LAW GOING TO BE THE CONTINUOUS AND ONGOING HEADACHE THAT EVERYBODY TALKS ABOUT? Probably only in the beginning. Once employers establish a routine and employees learn to expect

the necessity of compliance with the statute, the Form I-9 is likely to become just a minor addition to government red tape.

31. WHAT IF I GET NOTICE OF A PENALTY PROCEEDING AGAINST ME FOR AN ALLEGED VIOLATION OF THE NEW LAW? Call your lawyer before you do anything.

32. IS THE FOREGOING LIST OF QUESTIONS AND ANSWERS A COMPLETE EXPLANATION OF ALL AN EMPLOYER NEEDS TO KNOW TO COMPLY WITH THE NEW LAW? No. The forms (and some of the regulations) are not yet final. The INS will be distributing instructional materials nationwide in the near future. Specific questions always come up and counsel should be consulted when the forms or the regulations are not clear.

ADVISORY TO ALL APPLICANTS FOR EMPLOYMENT

If you are hired by ___[NAME OF COMPANY]___, you will be required by federal law to provide certain personal information including your name, address, date of birth and social security number. You must, upon hiring, attest, under penalty of perjury, that you are one of the following

1. a citizen or national of the United States, or
2. an alien who has been lawfully admitted for permanent residence in the United States, or
3. an alien who is authorized by the U.S. Immigration and Naturalization Service to work in the United States.

If you are described by category 2 or 3, you will, upon hiring, be obliged to disclose your alien number or admission number issued by the Immigration and Naturalization Service and the date of expiration (if any) of your employment authorization. All persons hired will be required to produce for the inspection and copying of the employer one or more documents listed on the attached Form I-9 "Employment Eligibility Verification." Upon hiring, you must, within three business days, produce either one document from List A or one each from Lists B and C. Do not submit a completed Form I-9 or produce any listed documents until you are told that you have been hired. If you do not have the necessary documents upon hiring and need extra time to obtain a new or replacement document, tell the personnel manager of this fact immediately upon your hiring. An extension of the three day limit can be arranged.

EMPLOYMENT ELIGIBILITY VERIFICATION

1 EMPLOYEE INFORMATION AND VERIFICATION: (To be completed and signed by employee.)

Name: (Print or Type) Last	First	Middle	Maiden
Address: Street Name and Number	City	State	ZIP Code
Date of Birth (Month/Day/Year)		Social Security Number	

I attest, under penalty of perjury, that I am (check a box):

- ☐ A citizen or national of the United States.
- ☐ An alien lawfully admitted for permanent residence. (Alien Number A _____).
- ☐ An alien authorized by the Immigration and Naturalization Service to work in the United States. (Alien Number A _____ or Admission Number _____ expiration of employment authorization, if any _____)

I attest, under penalty of perjury, the documents that I have presented as evidence of identity and employment eligibility are genuine and relate to me. I am aware that federal law provides for imprisonment and/or fine for any false statements or use of false documents in connection with this certificate.

Signature	Date (Month/Day/Year)

PREPARER/TRANSLATOR CERTIFICATION (If prepared by other than the individual, I attest, under penalty of perjury, that the above was prepared by me at the request of the named individual and is based on all information of which I have any knowledge.

Signature	Name (Print or Type)	
Address (Street Name and Number)	City State	Zip Code

2 EMPLOYER REVIEW AND VERIFICATION: (To be completed and signed by employer.)

Examine one document from those in List A and check the correct box, *or* examine one document from List B *and* one from List C and check the correct boxes. Provide the *Document Identification Number* and *Expiration Date*, for the document checked in that column.

List A Identity and Employment Eligibility		List B Identity	and	List C Employment Eligibility
☐ United States Passport		☐ A State issued driver's license or I.D. card with a photograph, or information, including name, sex, date of birth, height, weight, and color of eyes. (Specify State)_____		☐ Original Social Security Number Card (other than a card stating it is not valid for employment)
☐ Certificate of United States Citizenship		☐ U.S. Military Card		☐ A birth certificate issued by State, county, or municipal authority bearing a seal or other certification
☐ Certificate of Naturalization		☐ Other (Specify document and issuing authority)		☐ Unexpired INS Employment Authorization Specify form # _____
☐ Unexpired foreign passport with attached Employment Authorization				
☐ Alien Registration Card with photograph				
Document Identification # _____		*Document Identification* # _____		*Document Identification* # _____
Expiration Date (if any) _____		*Expiration Date (if any)* _____		*Expiration Date (if any)* _____

CERTIFICATION: I attest, under penalty of perjury, that I have examined the documents presented by the above individual, that they appear to be genuine, relate to the individual named, and that the individual, to the best of my knowledge, is authorized to work in the United States.

Signature	Name (Print or Type)	Title
Employer Name	Address	Date

Form I-9 (03/06/87)
OMB No. 1115-0000
[FR Doc. 87-5839 Filed 3-17-87; 10:08 am]
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U.S. Department of Justice
Immigration and Naturalization Service

Employment Eligibility Verification

NOTICE: Authority for collecting the information on this form is in Title 8, United States Code, Section 1324A. It will be used to verify the individual's eligibility for employment in the United States. Failure to present this form for inspection to officers of the Immigration and Nationality Service or Department of Labor within the time period specified by regulation, or improper completion or retention of this form may be a violation of 8 USC §1324A and may result in a civil money penalty.

Section 1. Employee's/Preparer's instructions for completing this form.

Instructions for the employee.

All employees, upon being hired, must complete Section 1 of this form. Any person hired after November 6, 1986 must complete this form. (For the purpose of completion of this form the term "hired" applies to those employed, recruited or referred for a fee.)

All employees must print or type their complete name, address, date of birth, and Social Security Number. The block which correctly indicates the employee's immigration status must be checked. If the second block is checked, the employee's Alien Registration Number must be provided. If the third block is checked, the employee's Alien Registration Number *or* Admission Number must be provided, as well as the date of expiration of that status, if it expires.

All employees must sign and date the form.

Instructions for the preparer of the form, if not the employee.

If the employee is assisted with completing this form, the person assisting must certify the form by signing it, and printing or typing their complete name and address.

Section 2. Employer's instructions for completing this form.

(For the purpose of completion of this form, the term "employer" applies to employers and those who recruit or refer for a fee.)

Employers must complete this section by examining evidence of identity and employment authorization, and:

- checking the appropriate box in List A *or* boxes in both Lists B and C;
- recording the document identification number and expiration date (if any);
- recording the type of form if not specifically identified in the list;
- signing the certification section.

NOTE: Employers are responsible for reverifying employment eligibility of aliens upon expiration of any employment authorization documents, should they desire to continue the alien's employment.

Copies of documentation presented by an individual for the purpose of establishing identity and employment eligibility may be copied and retained for the purpose of complying with the requirements of this form and no other purpose. Any copies of documentation made for this purpose should be maintained with this form.

Employers may photocopy or reprint this form, as necessary, for their use.

RETENTION OF RECORDS.

After completion of this form, it must be retained by the employer during the period beginning on the date of hiring and ending:

- three years after the date of such hiring, or;
- one year after the date the individual's employment is terminated, whichever is later.

U.S. Department of Justice
Immigration and Naturalization Service

OMB #1115-0000
Form I-9 (03/06/87)

LIST A - DOCUMENTS ACCEPTABLE TO SHOW IDENTITY AND EMPLOYMENT ELIGIBILITY

1. United States Passport.

2. Certificate of U.S. citizenship (INS Form N-560 or N-561).

3. U.S. Certificate of Naturalization (INS Form N-550 or N-570).

4. Unexpired foreign passport which either:

   a. Bears an unexpired stamp which reads "processed for I-551. Temporary evidence of lawful admission for permanent residence. Valid until [future date]. Employment authorized." or

   b. Has attached an INS form I-94 (a small white slip of paper) bearing an unexpired employment authorization stamp. (This I-94 constitutes authorization only for employment consistent with the limitations and restrictions appearing on the form).

5. Alien registration receipt card (INS Form I-151) or resident alien card (INS Form I-551) if it contains a photograph of the person presenting it.

6. Temporary resident card, (INS Form I-688).

7. Employment authorization card (INS Form I-688A).

LIST B - DOCUMENTS ACCEPTABLE TO ESTABLISH IDENTITY ONLY

1. For individuals at least 16 years old:

   a. A driver's license or identification card issued by the state containing either a photograph of the bearer or a physical description consistent with the bearer's appearance.

   b. A school identification card bearing a photograph of the bearer.

   c. A voter's registration card.

   d. A U.S. military ID (which will have a photograph of the bearer) or a draft record.

   e. An ID card issued by a federal, state or local government agency.

   f. A military dependant's ID card.

   g. A Native American tribal document.

   h. A U.S. Coast Guard merchant mariner card.

   i. A driver's license issued by a Canadian government authority.

2. For individuals under age 16 who are unable to produce another identity document:

   a. A school record or report card.

   b. A clinic, doctor or hospital record.

   c. A daycare or nursery school record.

Note: If a minor under 16 is unable to produce one of the foregoing documents to prove identity, his parent or legal guardian may complete the "preparer/translator certification" appearing on the Form I-9, signing that portion of the form. In the place for the minor's signature, the parent or legal guardian must write "minor under age 16". In this case the employer writes, in the space marked "document identification #, under List B on the Form I-9, the words "minor under age 16".

LIST C - DOCUMENTS ACCEPTABLE TO ESTABLISH EMPLOYMENT AUTHORIZATION ONLY

1. A Social Security card, unless there appears on its face the words "not valid for employment purposes".

2. An unexpired re-entry permit (INS Form I-327).

3. An unexpired Refugee Travel Document (INS Form I-571).

4. A certificate of birth issued by the Department of State (Form FS-545).

5. A Certification of Birth Abroad issued by the Department of State (Form DS-1350).

6. An original or certified copy of a birth certificate issued by a state, county or municipal authority bearing a seal.

7. An employment authorization document issued by the Immigration and Naturalization Service.

8. An Native American tribal document.

9. A United States citizen identification card, (INS Form I-197).

10. Identification card for use of resident citizen in the United States, INS form I-179.

DRUGS AND ALCOHOL IN THE WORKPLACE:
Policies and Testing Aspects

By

Richard C. Stephenson
Stoll, Keenon & Park
Lexington, Kentucky

DRUGS AND ALCOHOL IN THE WORKPLACE:
Policies and Testing Aspects

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Drugs and Alcohol in the Workplace: Policies and Testing Aspects

Richard C. Stephenson
Stoll, Keenon & Park

I. The Problem.

A. Extensive use of drugs and alcohol - the most common health hazard in the workplace.

B. Work-related problems directly caused by drug and alcohol abuse are translated into economic losses to employers:

1. Decrease of job safety caused by inability to operate equipment in a safe manner and inattention to detail.

2. Increase in on-the-job accidents resulting in increased injuries and workers' compensation claims.

3. Productivity decreases due to drug and alcohol abusers being more likely not to complete assignments in a timely and quality manner and being more likely to be absent or tardy.

4. Low morale of drug and alcohol abusing employees and their co-workers.

5. Greater use of health care programs and insurance.

6. Greater theft in the workplace.

II. Developing a Drug and Alcohol Abuse Policy.

A. Components of the Policy:

1. Education of employees concerning the consequences of drug and alcohol abuse;

2. Supervisor training;

3. Drug testing; and

4. Rehabilitation referrals.

B. Considerations in Developing Policy:

1. Whether and to what extent substance abuse is a problem for the specific employer.

2. Reduction of policy to an easily understood written document.

3. Dissemination of the policy as widely as possible.

4. Differentiation between applicants and incumbent employees.

5. Description of prohibited substances very broadly.

6. Description of prohibited conduct specifically and completely.

7. Differentiation between alcohol and drugs as necessary and rationalization for the differentiation.

8. Written consents to testing to be executed by applicants and employees if testing is part of the policy.

9. Supervisory training on the policy and on recognition of symptoms of drug and alcohol abuse.

III. Testing

A. The significant difference between alcohol and drug tests: drug tests cannot measure impairment or determine with any accuracy the elapsed time since the use of a drug.

B. Alcohol tests - alcohol intoxication is normally measured as Blood Alcohol Concentration (BAC) expressed as a percentage.

1. .05 to .10 is the range of commonly accepted presumption of impairment.

2. May be measured from blood, urine or breath samples.

C. Drug tests.

1. Screening tests:

a. Enzyme Multiplied Immunoassay Technique (EMIT),

b. Radio Immunoassay (RIA),

c. Fleuroscence Polarization Immunoassay (FPIA), and

d. Thin-layer Chromatography (TLC).

2. Confirmation test: Gas Chromatography/Mass Spectrometry (GCMS).

Taylor v. O'Grady, 669 F.Supp. 1422, 1430 (N.D. Ill. 1987) (approved the EMIT/GCMS chemical analysis as highly accurate and reliable).

However, in Jones v. McKenzie, 628 F.Supp. 1500, 1503 (D.D.C. 1986), the Court noted that the EMIT test does not indicate when marijuana was ingested or whether it was ingested by active use or as a result of passive inhalation.

D. Testing Procedures.

1. Opportunity prior to testing for employees to list in writing all drugs taken in the preceding thirty days with an explanation of their use.

2. Vigorous chain of custody protocol for test samples with appropriate steps taken to prevent adulteration or exchange of test samples.

3. Testing to be performed by a reputable independent laboratory.

4. Information regarding test results should be restricted on a "need to know" basis unless the express written consent of the tested employee has been obtained to make broader dissemination.

IV. Legal Aspects of Drug and Alcohol Testing.

A. Significant Factors in Determining the Outcome of Drug and Alcohol Testing Litigation:

1. Whether employer is a private or public employer;

2. Whether the individual is an employee or only an applicant for employment; and

3. The criticality of the job in question in terms of the potential harm that could result from the assignment of a substance abuser to the position.

4. Whether testing policy and procedures recognize and preserve, to the extent possible, the privacy interests of employees.

B. Public vs. Private Employer.

1. Due to the implication of state action and consequent constitutional limitations (right of privacy and the right to be free from unreasonable searches and seizures), public employers are much more constrained than private employers.

2. Public employers.

a. Public employers may test applicants for critical positions where safety is very important or where zero tolerance for drugs or alcohol is implicitly job-related.

b. Until recently it appeared that public employers could only test incumbent employees:

(1) In critical positions and

(2) Under circumstances indicating a reasonable suspicion of substance abuse.

McDonnell v. Hunter, 612 F.Supp. 1122 (S.D. Iowa 1985), aff'd, 809 F.2d 1302 (8th Cir. 1987) (state prison could legitimately require drug testing of prison applicants but could only legitimately require the testing of incumbent employees upon reasonable suspicion of drug use).

c. However, some very recent cases suggest that under appropriate circumstances public employees in critical positions may be subjected to even random tests without reasonable suspicion of substance abuse.

American Federation of Government Employees v. Dole, 670 F.Supp. 445 (D.C. 1987) (government's random drug testing of even incumbent employees in critical positions was approved where the Court found that the testing plan reflected a high degree of concern for employee privacy interests).

Taylor v. O'Grady, 669 F.Supp. 1422 (N.D. Ill. 1987) (while the Court enjoined the Cook County Department of Corrections from implementing its compulsory drug testing program under which every employee was tested annually without notice or reasonable suspicion, it noted that the government in a proper circumstance could avoid the requirement of probable cause by a

showing that "a careful balancing of governmental and private interests suggest that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause").

Jones v. McKenzie, 2 IER Cases 1121 (D.C. Cir. 1987) (held a public school system drug testing program to be valid without a requirement of reasonable suspicion where the employee's duties have a direct impact on the physical safety of children, testing is part of a routine employment-related medical examination, and the test used has a nexus to the employer's safety concern).

O'Connor v. Ortega, 107 S.Ct. 1492, 1504 (1987) (In this case, which did not involve drug or alcohol testing, the Court in a footnote expressly left open the issue of "the proper Fourth Amendment analysis for drug and alcohol testing of employees").

3. Private employers.

   a. No definitive reported cases on the issue of testing of applicants or incumbent employees by private employers.

   b. Since state action is not normally involved in such testing, it would appear that, in the absence of contractual rights to the contrary or circumstances which give rise to a cause of action for violation of the common law right of privacy, private employers should be able to test either applicants or incumbent employees on even a random basis regardless of the criticality of the position.

      American Federation of Government Employees v. Weinberger, 651 F.Supp. 726, 737 (S.D. Ga. 1986). (in dictum, the court gratuitously expressed its opinion concerning the legality of private employer testing on even a random basis without the necessity of individualized suspicion).

   c. However, the non-approving language used by the court in Weinberger and language used in dictum in International Brotherhood of Electrical Workers, Local 1900 v. Potomac Electric Power Co., 121 LRRM 3071 (D.D.C. 1986) (referring to proposed measures by a private employer, including urine and blood drug tests, as "draconian", "drastic" and "hysterical") suggest that while courts cannot articulate a legal reason why private employers should not be free to conduct random drug testing of even non-critical jobs without individualized suspicion, courts are disturbed by the concept.

C. The Common Law Right of Privacy.

1. Kentucky has recognized a common law right of privacy for about sixty years.

Brents v. Morgan, Ky., 299 S.W.2d 967, 970 (1927) ("the right to be let alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without interference by the public about matters with which the public is not necessarily concerned").

a. The right is not subject to concrete definition but instead depends upon the facts in each case.

Gregory v. Bryan-Hunt Co., Ky., 174 S.W.2d 510 (1943).

b. In determining whether the right has been violated, it is necessary to balance the interests of the two parties.

Perry v. Moskins Stores, Inc., Ky., 249 S.W.2d 812 (1952).

2. Kentucky has adopted the Restatement (Second) of Torts (1976) definition of invasion of privacy.

McCall v. Courier-Journal and Louisville Times, Ky., 623 S.W.2d 882 (1981).

a. The portion of the restatement definition most applicable to drug and alcohol testing is Section 652B:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts, Section 652B (1976).

b. There are no Kentucky cases involving the "intrusion into seclusion" type of invasion of privacy but there is little question that alcohol and drug testing could, under certain circumstances, be so offensive as to constitute an invasion of the privacy of an employee.

3. Because both private and public employers are potentially at risk from common law tort actions for invasion of privacy, prudence suggests that employers restrict drug and alcohol testing as follows:

   A. Public Employers.

      (1) Applicants - test only for critical positions where safety is very important or where zero tolerance for drugs or alcohol is implicitly job-related.

      (2) Incumbent employees - test only for critical positions and under circumstances indicating a reasonable suspicion of substance abuse.

   B. Private Employers.

      (1) Applicants - test as desired without regard to criticality of position or individualized suspicion of substance abuse.

      (2) Incumbent employees - test only employees who occupy critical positions or as to whom reasonable grounds exist to suspect work-related substance abuse.

   C. Public and Private Employers - insure that testing procedures for applicants and incumbents are the least intrusive and least offensive that can be devised and recognize to the maximum extent possible the privacy rights of individual employees.

INTER-EMPLOYEE PROBLEMS OF THE WORKPLACE: Aids, Communicable Diseases, Smoking, And Other Environmental Concerns

By

Dorothy M. Pitt
- and -
Judith B. Hoge
Louisville, Kentucky

Section I

I would like to express my gratitude to Phyllis Florman, Esq., of Gillim & Florman, for her invaluable assistance in formulating this outline.

INTER-EMPLOYEE PROBLEMS OF THE WORKPLACE: AIDS, Communicable Diseases, Smoking, and Other Environmental Concerns

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INTER-EMPLOYEE PROBLEMS OF THE WORKPLACE: AIDS, COMMUNICABLE DISEASES, SMOKING, AND OTHER ENVIRONMENTAL CONCERNS

Dorothy M. Pitt
Judith B. Hoge

I. Introduction

A. Generally, an employer has a duty to provide its employees with a safe place to work. This duty is imposed by the common law, and more recently by state and federal statutes, which have codified and grown out of the common law.

B. A current major concern to employees and employers alike relates to the harmful nature of the working environment itself: specifically, the threat to an employee's health which is posed by the health and habits of his fellow employees.

1. Communicable diseases pose one such threat, as employees come in contact during the working day and typically spend large amounts of time together.

   a. Chief among fear of contagion is the present HIV virus, responsible for AIDS.

   b. Tuberculosis has in the past been a concern, although modern diagnostic measures and treatment have abated this problem to a large extent.

2. Pollution of the very air breathed by employees with tobacco smoke generated by co-workers poses another serious threat to the health and well-being of employees and the harm is not confined to the employees themselves:

   a. Employers face problems which impact unfavorably on the balance sheet.

      i. Rising health insurance costs.

      ii. Increased employee absenteeism.

      iii. Higher maintenance cost on equipment.

      iv. The threat of litigation.

3. The problem of workplace safety and health has been regulated to some extent by federal and state legislation (e.g., OSHA).

SMOKING IN THE WORKPLACE

I. Cause for Employer Concern

Concerns over smoking in the workplace are threefold: health, safety, and economics.

A. Health

Aside from the not inconsiderable harm smokers do to themselves, the current focus is on the harm done to non-smokers.

1. They are forced to breathe smoke emanating directly from burning tobacco ("sidestream" smoke).

2. They are forced to breathe smoke exhaled into the environment by tobacco users ("mainstream" smoke).

   a. Both contain high concentrations of many known toxic and carcinogenic agents.[1]

3. December 1986 Surgeon General Report[2] stated unequivocally that the inhalation of smoke from other people's cigarettes causes lung cancer and other diseases in healthy non-smokers.

   a. Exposure to tobacco smoke in the workplace poses the most serious and pervasive threat of harm to non-smokers because they spend relatively large amounts of time at work.

4. Physical harm to non-smokers

   a. About 5000 non-smokers die each year from lung cancer caused by involuntary smoking.[3]

   b. Also adversely affects people with heart diseases.

   c. May affect fetuses in pregnant women.

   d. Evidence suggests there may not be a "safe" level for such exposure.[4]

5. Physical discomforts

   a. Large percentages of non-smokers have difficulty working near smokers.

   b. Irritating and noxious effects of involuntary smoking affect eyes, nasal passages, lungs.

B. Economy

1. Disease and lost productivity due to smoking cost the nation $65 billion a year, $43 billion in lost productivity, and $22 billion in health care expense.[5]

   a. Employers incur significantly increased costs when they permit smoking in the workplace.

   b. A smoking employee:

      i. wastes 6% of his working hours with the smoking ritual;

      ii. takes 50% more sick leave;

      iii. uses health care system 50% more;

      iv. imposes greater maintenance cost on the employer to meet air standards[6]; and

      v. costs the employer $5,000 per year per smoker in additional costs.[7]

   c. Employers incur increased costs of maintaining and repairing equipment damaged by smoke.[8]

C. Safety

1. Bans on smoking altogether are not unusual in industries where combustible substances or other hazardous materials are present.[9]

   a. Protection of employees from fire or other safety hazards.

   b. It is relatively easy for an employer to unilaterally impose a smoking ban or restrictions on smoking in hazardous areas.

2. A high rate of accidents among smokers is attributed to smokers' preoccupation with the smoking ritual, and consequent inattention to the job.[10]

II. Legislation

A. States

1. Public Places

a. Most states have enacted legislation to restrict smoking in "public places", (taxis, supermarkets, theaters, elevators).

b. Kentucky has no restriction for public places.

c. A state-by-state analysis chart is attached as Exhibit A.

2. Workplace

a. State laws may cover either both private and public employers, only private or public, or specific groups, such as retailers, educational institutions.

i. Kentucky only restricts smoking in elementary and secondary schools (KRS 438.050), and prisons (KRS 196.245).

b. Typical workplace smoking laws:

i. Laws that require employers to adopt, implement and post written smoking policy but don't spell out the specifics.

ii. Laws that provide some guidelines but give employers discretion in determining how controls are implemented.

iii. Laws that designate specific no-smoking areas or give non-smoking employees specific rights.

B. Federal

1. Non-smokers employed by the federal government are protected against involuntary exposure to tobacco smoke in the workplace.

a. However, recognizing smokers exist in the workplace, agencies have the right to designate areas for smoking.

b. Regulations controlling smoking in government service administration controlled buildings are contained in 41 CFR Part 101-20.109-10.

III. Legal Remedies

A. Judicial Relief Sought

1. Where legislation fails to address an important health issue such as smoking in the workplace, people naturally turn to the courts for relief.

a. Challenges of smokers and smoking in the workplace have enjoyed considerable success in obtaining judicial relief under a variety of legal theories.

b. Litigation by non-smokers against employers will most likely become increasing common in the future.

B. Legal Theories Available

1. Common Law Claims

a. Employers have a common law duty to provide a safe and healthful workplace and therefore might be expected to protect the rights of non-smokers to breathe smoke free air.

i. The landmark case involving non-smokers' rights to a smoke-free workplace is Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 368 A.2d 408 (1976). In this case, plaintiff was allergic to cigarette smoke, and suffered severe throat, nasal and eye irritation caused by employees smoking at desks situated in her work area. Plaintiff filed suit claiming her employer had a common law duty to maintain a safe and healthful and workplace and that the presence of tobacco smoke was a breach of this duty. The court held that employees have a common law right to a safe and healthful work environment, and employers have a concomitant affirmative duty to provide a safe work environment.

aa. The court also took note of the fact that the company had a rule that cigarettes could not be smoked

around the equipment. The court felt that a company which had shown such concern for its equipment should have at least as much concern for its human beings.

ii. In order to prevail under a common law theory, plaintiff-employee must demonstrate clearly through scientific evidence that tobacco smoke has a deleterious effect on non-smokers in general.

b. The Missouri Court of Appeals has also held that an injunction is appropriate to prevent harm to an employee from tobacco smoke in the workplace.

i. Smith v. Western Electric Co., 643 S.W.2d 10 (Mo. Ct. App. 1982), recognized the well-settled duty of an employer "to use all reasonable care to provide a reasonably safe workplace" for its employees. The court also held that "smoking in the work area is hazardous to the health of employees in general and plaintiff in particular." Id. at 23.

c. But see Gordon v. Raven Systems & Research, Inc., 462 A.2d 10 (D.C. 1983). Plaintiff was terminated when she refused to work in an area containing tobacco smoke. While the court recognized the common law duty of an employer to provide a reasonably safe workplace, this did not impose upon the employer the duty to conform his workplace "to the particular needs or sensitivities of an individual employee." Id. at 15.

i. The court distinguished this case from Shimp because Gordon failed to present evidence on the harmful effect of tobacco smoke on non-smokers in general, whereas the plaintiff in Shimp had presented voluminous evidence on the general harmful effect to non-smokers from tobacco smoke.

ii. To prevail on a common law theory, a non-smoking plaintiff must demonstrate that tobacco smoke is harmful to both himself, and to non-smokers generally.

d. Smith v. Blue Cross & Blue Shield of New Jersey, No. C-3617-81 E (N.J. Super. Ct. 1983). Following similar reasoning, the New Jersey Superior Court denied the request of an employee hypersensitive to smoke to force an employer to implement broad smoking restrictions, stressing the needs of both smokers and non-smokers must be balanced. The court criticized Shimp as "too sweeping" and "well beyond what is necessary to insure a safe working place."

2. Common Law Negligence Theories

a. McCarthy v. State of Washington, Dept. of Social and Health Services, 1 IER Cases 1233 (Wash. Ct. App. 1986). A non-smoking employee who developed pulmonary disease after being exposed to her co-workers' smoking sued her employer for negligence. Holding for the employee, the court found the employer "negligently failed to provide the worker with a safe and healthful place of employment."

3. Worker's Compensation Claims

a. Employee's Perspective

i. Employees exposed to smoking in the workplace and suffering harm therefrom have successfully won worker's compensation benefits as "employment related injury."

ii. KRS 342.620(1) defines "injury" as:

> any work related harmful change in the human organism, arising out of and in the course of employment including damage to or loss of a prosthetic appliance, but does not include any communicable disease unless the risks of contracting such disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease.

iii. KRS 342.620(2) defines "occupational disease" as:

a disease arising out of and in the course of the employment.

b. Employers' Perspective

i. Employer immunity from common law suits.

aa. The exclusive remedy provisions of a workers' comp act may immunize employers by barring employees by bringing a civil action against an employer for personal injuries sustained in the course of employment.

- The employee's sole remedy is administrative compensation.

bb. Is the immunity absolute or qualified?

cc. In McCarthy v. Dept. of Social & Health Services, 46 Wash. App. 125, 730 P.2d 681 (1986), plaintiff's worker's comp claim and subsequent appeal were denied by the workers' comp board. She then filed suit under the negligence theory, and the trial court dismissed her action based on immunity conferred by the Workers' Compensation Act. The Appeals Board reversed, stating private actions are barred only when the harm sustained is within coverage of the Act. Since the claim was denied, and therefore not compensable under the Act, McCarthy could sue her employer under the negligence theory.

- But note: Equitable relief is still available to the employee because exclusive remedy provisions apply only by their terms to common law actions.

4. Disability Claims

a. Allergy to tobacco smoke entitled a federal worker to disability payments.

i. In Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982), a

smoke sensitive employee developed asthmatic bronchitis following transfer to an office occupied mainly by tobacco smokers. She began missing work. Her doctor advised a leave of absence, and the employee requested disability retirement. The court held the employee disabled by a "disease which limits the environment in which she can work" and ruled the employer must either provide the workers with "suitable employment in a safe environment" (i.e., in a smoke-free workplace), or consider her disabled and entitled to disability pay.

5. Unemployment Compensation Claims

   a. Employees who claimed they were forced to quit due to cigarette smoke in the workplace have had varied levels of success.

      i. Alexander v. Unemployment Insurance Appeals Board, 163 Cal. Rptr. 411, 104 Cal. App. 3d 97, a court allowed benefits where claimant said allergy to cigarette smoke in the workplace forced her to quit.

      ii. McCracklin v. Employment Development Dept. and Butler Service Group, Inc., 205 Cal. Rptr. 156, 156 Cal. App. 3d 1067 (1984). An employee not allergic to cigarette smoke who quit only as he found it unpleasant and offensive, was awarded benefits. The court stated the employee need only fear for his health and safety to recover unemployment benefits.

      iii. But see, Rotenberg v. Industrial Commission, 590 P.2d 521, 42 Colo. App. 161 (1979), and Rockstuhl v. Commonwealth of Pennsylvania, Unemployment Compensation Board of Review, 426 A.2d 719, 57 Pa. Cmwlth. 302 (1981), where unemployment benefits were denied employees who claimed they were forced to quit due to cigarette smoke in the workplace.

6. Constitutional Rights

   a. Although the United States Supreme Court has never directly ruled on this issue, federal

courts have held there is no constitutionally protected right to breathe air free from tobacco smoke.

i. In Gasper v. Louisiana Stadium & Exposition District, 418 F.Supp. 716 (E.D. La. 1976), aff'd, 577 F.2d 897 (5th Cir. 1978), cert. denied, 439 U.S. 1073 (1979), plaintiffs claimed a constitutional right to smoke-free air based on the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution. The court held that there were no such constitutional rights.

ii. In Kensell v. State of Oklahoma, 716 F.2d 1350 (CA 10, 1983), the court rejected the employee's claims that the employer's failure to provide a smoke-free work area "assaulted him," interfered his ability to think, and violated his rights under the First, Fifth, Ninth and Fourteenth Amendments.

iii. Rossie v. State of Wisconsin/Dept. of Revenue, 1 IER Cases, 1028 (Wis. Ct. App. 1986), a state court of appeals held that a Wisconsin statute prohibiting smoking in all but certain designated areas had a reasonable basis and did not deny equal protection of the law in violation of the Fourteenth Amendment.

7. Handicap Claims

a. The Federal Rehabilitation Act of 1973, and similar state statutes require that certain employers accommodate "handicapped persons."

i. A non-smoking employee sensitive to smoke may qualify as a "handicapped person." If so, he may be able to invoke the statute to obtain a smoke-free workplace, as the statute entitles him to "reasonable accommodation" for his handicap.

ii. However, the statute only protects students and employees of federal grant recipients, employees of federal contractors, and employees of the federal government. However, even indirect

federal funding may trigger the application of this statute.

iii. The definition of "handicapped individual": "any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having an impairment."

iv. Two cases have considered whether a non-smoker can qualify as a handicapped person under the act.

aa. Vickers v. Veterans' Administration, 549 F.Supp. 85 (W.D. Wash. 1982). The court held that a smoke sensitive employee of the VA was a "handicapped person" within the contemplation of the statute, as he was "unusually sensitive to tobacco smoke" and that this hypersensitivity did in fact limit a major life activity -- plaintiff's capacity to work in an environment not completely smoke-free. However, the court denied the relief sought as the evidence showed the VA made successful attempts to significantly reduce tobacco smoke in this plaintiff's workplace.

bb. But see Gasp v. Mecklenberg County, 42 N.C. App. 226, 256 S.E.2d 477 (1979), where an unincorporated association brought an action against the county on behalf of a class of all persons harmed by tobacco smoke present in the public facilities. They sought handicapped status for the entire class under both the Federal Rehabiliation Act of 1973 and a North Carolina statute protecting handicapped persons. The court denied handicapped status to the class as it was too broad a class of persons.

b. Kentucky

i. KRS 207.130, the Equal Opportunities Act, defines a physical handicap as "The

physical condition of a person whether congenital or acquired, which constitutes a substantial disability to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques."

ii. KRS 207.150, while affording protection for a handicapped person, specifically states that a handicapped person is not entitled to accommodation for his handicap.

aa. "This subsection shall not be construed to require any employer to modify his physical facility or grounds in any way, or exercise a higher degree of caution for a handicapped individual than for any person who is not a handicapped individual."

8. Breach of Implied Employment Contract

a. The employee irritated by tobacco smoke may claim that his implied contract of employment includes healthy working conditions.

i. Hentzel v. Singer Co., 188 Cal. Rptr. 159, 138 Cal. App.3d 290 (1982). The court upheld the employee's claim that he was terminated because he could not tolerate cigarette smoke in his workplace as employer's violation of an implied contract of employment.

ii. But see, Bernard v. Cameron & Colby Co., Inc. 2 IER Cases 78 (Mass. Sup. Jud. Ct. 1986), where the court dismissed the employee's allegations that there was an implied term of contract requiring the employer to provide her a smoke-free work environment, as the employee failed to provide sufficient evidence that the implied term she sought was "fixedly desired" by both parties.

IV. Unionized Workplace

A. No Duty to Bargain

1. Where well-established safety or health principles are involved, management can control or ban

smoking altogether without negotiating with the union.[11]

a. For example, refineries, chemical plants, or other facilities where serious property damage or loss of life could result from smoking.

b. Also food preparation areas and plants that produce processed food.

B. Duty to Bargain

1. However, in less hazardous areas, such as offices and non-production facilities, the NLRB has consistently held that a change in smoking rules constitutes a change in working conditions.

a. Johns-Mansfield Sales Corp. v. International Ass'n of Machinists, Local Lodge 1609, 621 F.2d 756 (CA. 5 1980), the court held the collective bargaining agreement denied the employer, a manufacturer of asbestos products, the right to adopt a rule prohibiting all smoking on company property and providing for disciplinary sanctions for violation of the rule, even where the employer acted in recognition of the significantly increased danger of lung cancer to its employees who smoke.

b. Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, No. 2167 C.D. (Pa. Cmwlth. Ct. 1980, 1983). A county work rule banning smoking by public employees at work stations was struck down, affirming a Pennsylvania Labor Relations Board ruling that a no-smoking policy could not be imposed without first bargaining with the employees' union.

C. Arbitration

1. In unionized workplaces, disputes over the creation and enforcement of smoking rules often are resolved through arbitration.

a. Generally, arbiters uphold the employer's right to impose and enforce "reasonable" smoking restrictions to safeguard both life and property.

2. Safety

a. Gladieux Food Services, Inc., 70 La. 544. The discharge of an employee for smoking in a restricted area was just, an arbitrator decided, as he was smoking in a critical area (aircraft fueling site).

b. Olin Corp. 81 La. 644. A chemical manufacturer's discharge of an employee for a single act of smoking in an unauthorized area was held proper, where no smoking area was clearly marked.

c. But see, Converters, Ink and Ink Workers, 68 La. 593. Discharge was held to be too severe a penalty for an employee who worked in an area containing explosives, where the employee was an inveterate smoker, whose lighting of a cigarette was an "unconscious" action.

3. Extension of Existing Restrictions

a. Schien Body & Equipment Co., Inc., 69 La. 930. Extending its no-smoking rule, an employer posted a notice prohibiting on the job smoking by employees in nearly all areas of the workplace. A group of employees, both smokers and non-smokers, protested the employer's unilateral imposition of the rule. The arbitrator decided the employer's action could not be justified on grounds of either health or business needs.

b. But see, Sherwood Medical Industries, 72 La. 258, where an employer's revision of a smoking rule that eliminated smoking in locker rooms, rest rooms and hallways, and restricted smoking to the lunchroom during rest and lunch periods, was upheld as a reasonable exercise of management's reserved right and was done for a "legitimate business interest and purpose."

3. Test of Reasonableness

a. Morelite Equipment Co., 88 La. 777. Following a fire caused by a discarded cigarette, the employer issued new regulations severely restricting smoking, stating the need to prevent fire hazards and maintain workers' safety. The union questioned whether the regulations were reasonable. The arbiter held unilaterally banning smoking at work

stations for safety reasons was "not unreasonable".

i. Most arbiters agree that employers have the right to establish "reasonable" rules and regulations, with or without union concurrence, so long as the rules are not discriminatory in application and do not conflict with the collective bargaining agreement.[12]

V. Company Policy

A. Adopting a Smoking Policy

1. During the last five years there has been a significant increase in the number of companies adopting a smoking policy.

2. Survey of the case law indicates that non-smokers wishing to clear the air have effective legal remedies at their disposal.

3. There is no recognized basis in law that one has a right to smoke in the workplace.

4. This has serious ramifications for employers that fail to protect their employees from involuntary smoking in the workplace.

5. In addition to incurring significantly increased operating costs for permitting such smoking, these employers will pay a substantial price if an employee is harmed and begins litigation against the employer.

B. Recommendations

1. Employers should develop a company policy regarding smoking in the workplace.

2. The following guidelines should be followed:[13]

a. Get a commitment from top management to the policy development and enforcement.

b. If there are relevant industry standards or state or local laws, insure that any policy developed complies with them.

c. Where there are unions, get them involved at an early stage.

d. Smoking policies may need to be tailored to specific facilities and even parts of facilities.

e. Involve a cross-section of the community's work force in formulating the policy.

f. A survey of employees' attitudes and smoking habits should be taken.

g. Any policy developed should be circulated throughout the company.

h. The policy should be enforced consistently.

AIDS IN THE WORKPLACE

I. Introduction

A. Acquired Immune Deficiency Syndrome ("AIDS"):

1. AIDS poses a serious threat to the economic and social well-being of the entire country, and is a serious health hazard of national proportions.

2. However, its impact on the workplace is especially severe.

a. An employee with AIDS can cause fear and panic among fellow employees.

b. An employee with AIDS can expose his employer to liability for discrimination.

II. Medical Background

A. AIDS is a syndrome caused by the Human Immunodeficiency Virus ("HIV").

1. HIV enters bloodstream, attacks body's immune system, and destroys body's ability to ward off otherwise non-life threatening diseases.

a. Transmitted through exchange of blood or semen from one infected to one who is not.[14]

b. No evidence AIDS can be spread by non-sexual social contact.[15]

c. Cannot be spread by breathing, sneezing, coughing, shaking hands, hugging, or sharing toilets, food, or utensils.[16]

2. Death occurs in 85% of patients within two years of diagnosis.[17]

   a. Victims are divided into three categories.

      i. Those who test positive for anti-bodies but show no symptoms.

      ii. Those with AIDS.

      iii. Those with ARC (AIDS Related Complex).

         aa. Those with ARC have some symptoms of AIDS, but don't meet the definition, as they don't have one of the secondary diseases associated with AIDS.

3. The Center for Disease Control ("CDC") reports 1.5 to 2 million in the USA are currently infected with HIV.

   a. One million test positive for antibodies.

   b. 178,000 to 370,000 have ARC.

   c. 38,000 cases of AIDS have been reported.

   d. Average AIDS patient is hospitalized 168 days at a cost of $147,000 per patient.[18]

4. In Kentucky, as of July 1987, there were:

   a. 900 - 1000 people infected with the HIV virus.[19]

   b. 82 cases of AIDS reported.[20] Total has reached 110 on January 12, 1988, as reported by ABC News.

5. Victims of AIDS

   a. 73% are homosexual and bi-sexual men.

   b. 17% are intravenous drug users.

   c. The remainder are hemophiliacs, blood transfusion recipients, infants of infected mothers, prostitutes, sex partners of those at risk.[21]

III. Labor and Employment Law Issues

A. Employment Discrimination

1. Adverse employment decisions affecting persons with AIDS may be actionable under federal and/or state law.

2. The Rehabilitation Act of 1973 (29 U.S.C. Sec. 701, et seq.)

   a. Forbids discrimination against handicapped individuals in employment decisions.

   b. Applies to federal contractors and employers who receive federal financial assistance.

3. The Rehabilitation Act defines a handicapped individual as a person who (1) has a physical or mental impairment which substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

   a. Because the breakdown of an AIDS' victims immune system may be considered a physical impairment that limits a major life activity (employment), AIDS may be a handicap under the Rehabilitation Act.

      i. Note: Even those who do not have AIDS, but who are "regarded" as having the disease, may be protected under this statute.

   b. In Arline v. School Board of Nassau County, 772 F.2d 759, ___ U.S. ____ (1986), the Supreme Court ruled that the plaintiff, who suffered from the contagious disease of tuberculosis, was a handicapped person as defined by the Act.

   c. New York State Ass'n for Retarded Children, Inc. v. Carrie, 466 F.Supp. 478 (E.D.N.Y. 1978), aff'd, 612 F.2d 644 (2d Cir. 1979), held that children with Hepatitis B (an infectious disease generally transmitted only through blood to blood contact) were handicapped persons within the meaning of the Act, and that their removal from their regular classroom was a violation of the Act.

   c. In Thomas v. Atascadero Unified School District, No. 886-609 AHS, Slip Op. (D.C.

Cal. Nov. 17, 1986), a child with AIDS was barred from attending kindergarten after he bit a classmate. The court ruled that AIDS is a protected handicap under the Rehabilitation Act and that the child must be allowed to return to school absent any showing that he posed a risk of transmission.

d. Shuttleworth v. Broward Co. Office of the Budget and Management Policy, Florida Commission on Human Relations, FCHR No. 85-0624 (Dec. 11, 1985), AIDS was held to be a handicap under the Florida Human Rights Act. The county's justification for discharging an employee who had AIDS was rejected on the grounds that no evidence exists to show that AIDS is transmitted by normal, casual workplace contact.

d. People v. 49 West 12th Street Tenants Corp., No. 43604/83 (N.Y.S.Ct.), a New York trial court held AIDS to be a protected "disability" under New York's human rights law, where tenants of an apartment cooperative attempted to evict a physician because he treated AIDS patients in the building.

e. In Chrysler Outboard Corp. v. Dept. of Industry, Labor and Human Relations, 14 FEP Cases (BNA) 344 (Wis. Cir. Ct. 1976), the court held the employer's refusal to hire a job applicant who had acute lymphocytic leukemia was a violation of the Wisconsin Fair Employment Act. The court held that the employer failed to prove the applicant was presently unable to perform, and that the risk of future absenteeism and/or higher insurance costs are not legal basis on which to discriminate.

4. KRS 207.150 prohibits handicap discrimination in employment.

a. Kentucky statute explicitly excludes persons with communicable diseases such as AIDS from protection.

b. No cases to date have challenged this statute.

B. Testing of Applicants and Employees

1. ELISA (Enzyme-Linked Immunosorbent Assay) test is used first, followed by confirmatory western blot test.

2. Voluntary or mandatory testing is strongly discouraged.

   a. CDC says it's unnecessary and unwarranted as AIDS cannot be transmitted by casual contact.

   b. The Surgeon General says it is not necessary, it's unreliable, and cost-prohibitive.

   c. Neither of the two blood tests used are capable of detecting infection by the HIV virus.

      i. They can only detect the presence of AIDS antibodies.

      ii. The presence of antibodies may mean the person will develop ARC or AIDS, or successfully repel the virus.[22]

   d. AIDS may be a protected handicap under the Rehabilitation Act of 1973, and therefore any tests, screening out handicapped individuals is banned as discriminatory.[23]

3. Kentucky statues are silent on testing.

   a. No case law regarding the legality of testing job applicants or employees for AIDS antibodies.

5. Duty to Bargain

   a. Where there is a collective bargaining agreement there may be a duty to bargain over implementing an AIDS testing policy.

      i. Section 8(d) of the Labor Management Relations Act prohibits an employer from making unilateral changes with respect to "wages, hours, and other terms and conditions of employment."

      ii. The NLRB has held plant rules governing discipline, safety and health may be "mandatory subjects" of bargaining.

aa. See, California Cedar Products, 123 LRRM 1355; See, Electri-Flex Co., 2138 NLRB 713 (1978), enf'd. 624 F.2d 1103 (7th Cir. 1979), cert. denied, 447 U.S. 924 (1980 held: unilateral requirement that employees wear safety glasses violates the Act. Medicenter, Mid-South Hospital, 221 NLRB 670 (1975) requiring all applicants and employees to submit to polygraph tests is a mandatory subject since it is a change in the employer investigatory methods, substantially varying the mode and character of proof on which job security may hinge.

6. Constitutional Restrictions on Testing

a. The right of privacy and the freedom to be free from unreasonable searches and seizures may be impacted in the case of public sector employees.

i. In Caruso v. Ward, 506 N.Y.S.2d 789 (1986), random standardless drug testing of tenured police officers was struck down as violative of the Fourteenth Amendment, in the absence of "reasonable suspicion".

ii. But see, Patchoque-Medford Congress v. Board of Education, 1 IER Cases (BNA) 1315 (N.Y. 1986), and McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987), where the public welfare was held to outweigh the individual's expectation of privacy.

C. Pre-Employment Inquiries

1. As testing for AIDS may be prohibited, an employer may want to ask a prospective employee whether he has ARC or AIDS.

a. However, if AIDS victims are protected under anti-discrimination laws, employers probably cannot directly ask this question.

b. Under EEOC Guidelines, it is prohibited to inquire into the nature or severity of a handicap.[24]

2. Permissible Questions

a. Inquiries as to any reasons, medical, physical, or psychological, as to why the job applicant could not perform the job for which he is applying.

b. Inquiries as to reasons for previous terminations from employment.

c. Inquiries as to any prolonged absence from a job.

3. Physical Examinations

a. Employers may condition job offers on the results of physical examinations as long as:

i. all entering employees must do so;

ii. specific job related conditions require it;

iii. the results are not used to discriminate against an otherwise qualified individual.

iv. But Note: The use of the ELISA test for AIDS, since it is used only to screen for AIDS, would be a violation if AIDS is found to be a protected handicap.

D. Invasion of Privacy Issue

1. Kentucky Sexually Transmitted Disease Control Confidentiality Act of 1986, KRS 214.400 et seq., specifically includes AIDS.

a. All information, records and reports of test results are held to be strictly confidential and will not be released, except to treating physician without written consent of the patient.

b. However, medical personnel are concerned because they are prevented from informing the spouse or family of one testing positive for AIDS.

2. Defamation

a. It would appear prudent for employers to restrict access and disclosure of medical information concerning AIDS in the work force to avoid defamation suits.

E. Sexual Preference

1. Whether an employer may discriminate on the basis of sexual preference has impact on the AIDS issue.

   a. As a majority of AIDS sufferers are homosexual or bi-sexual men, discriminating against that category may have the effect of discriminating against AIDS victims.

2. Sexual preference or sexual orientation is not a protected category under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq.

   a. Although Title VII does protect from discrimination on the basis of "sex", it has been held that "sex" does not include "sexual preference" as an impermissible classification.

      i. See, Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (5th Cir. 1978); and Sonner v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982).

F. OSHA and AIDS

1. Private employers whose business affects interstate commerce are obligated under the Occupational Safety and Health Act to provide a safe and healthful workplace.

   a. OSHA's protection applies to occupational injury or illness, which is defined as a "personal injury or illness arising from work situations."

2. Regulations under OSHA provide protection for employees who refuse to work because of a reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available. Marshall v. Whirlpool, 445 U.S. 1 (1980), upholding 29 CFR 1977.12(b)(2)(1979).

   a. However, one who refuses to perform his task for fear of contracting AIDS from a co-employee or customer would probably not be protected.

      i. Although such individuals could not be disciplined for refusing to work, they

would still be subject to replacement.[25]

ii. An employee may have the right to demand that the employer supply him with protective equipment.[26]

3. There are at the present time no OSHA standards which have been promulgated concerning AIDS.

a. However, it appears that an employer does not violate the general duty clause under OSHA when it allows an employee with AIDS to work.[27]

G. Union Considerations

1. A group of employees who refuses to work with an AIDS victim co-employee, or who seeks his removal, may be engaged in a "protected activity" within the meaning of Section 7 and 8(a)(1) of the Labor Management Relations Act, 29 U.S.C. Sec. 157, 158(a)(1).

a. Resulting discipline may constitute an unfair labor practice.

b. However, if fears of contagion are unreasonable, and workers petitioning constitutes prohibitive discrimination, it is not a protected activity.[28]

2. Section 507 of the LMRA, 29 U.S.C. Sec. 143, requires a union to have an "ascertainable objective basis" for a health or safety related job action (i.e., strike).

a. Difficult to prove, as no evidence AIDS is transmitted casually.

3. Collective bargaining agreements may afford protection from discrimination or discharge on the basis of AIDS.

a. Grievance and arbitration procedures must be observed.

b. See, State of Delaware Dept. of Corrections, 86 LA 849 (Gill., 1986), where the arbitrator balanced the prison guards' need to know which inmates tested positive for AIDS against the assurances of confidentiality given the prisoners. The Department was

directed to seek an inmate's consent to waive confidentiality, or administer a new test without promising it.

c. In Re: Nursing Home, 88 LA 681 (Sedwick, 1987), concerned an employee in a nursing home who was discharged because he had AIDS. Discharge was improper in view of the employer's policy to suspend employees who have communicable diseases until such time as they no longer have the disease.

d. See, State of Minnesota, Dept. of Corrections, 85 LA 1185 (Gallagher, 1985), where the grievant, a prison guard, was discharged for disobeying a direct order to conduct "pat searches" of inmates because he feared he would contract AIDS. Several inmates were known to have AIDS. He was suspended and later discharged. The arbitrator ordered grievant reinstated, where the evidence showed educational material on AIDS provided grievant by employer actually enhanced the fear of casual contact with AIDS victims.

H. Personal Service Workers

1. Several employer groups face unique problems, including personal service workers such as hairdressers, food service workers, health care workers, teachers, and prison guards.

a. AIDS guidelines for the health care industry have been developed by the CDC, OSHA, and AMA.

i. Requirements for wearing protective gear.

ii. Take care when handling needles, sharp instruments.

iii. Strict adherence to infection control guidelines.

2. KRS 217.370 prohibits any person with "any contagious or venereal disease" to work in or near the preparation, manufacture, sale, or distribution of food.

3. School employees may face similar problems with children who are AIDS victims.

I. AIDS and Worker's Comp

1. There have been no reported cases of AIDS to the Kentucky Workers' Compensation Board to date.

J. Termination

1. An employer terminating an employee solely on the basis that he has AIDS or has tested positive for AIDS may be held to have violated state and federal handicap discrimination statutes.

   a. The probability that the disease will make the employee unable to perform his duties in the future is not a valid cause for dismissal.[29]

   b. However, if the employee's work performance has deteriorated and his ill health interferes with his ability to do the job, then termination or a leave of absence may be permissible.

2. Insubordination

   a. Employees who refuse to work with an AIDS afflicted fellow employee may be terminated for insubordination. (See, Sec. G, Union Considerations, infra.)

   b. However, the employer should give the employee a chance to become educated on AIDS prior to termination.

3. Application of ERISA

   a. The Employment Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 et seq., may protect employees with AIDS against discharge.

      i. Sec. 510 prohibits an employer from discharging an employee "for purposes of interfering with the attainment of any right to which he may become entitled" pursuant to an employee benefit plan.

         aa. However, since the employee's attainment of rights may mean vesting of benefits, once the benefits are vested the employer's actions in terminating cannot be

said to interfere with the employee's attainment of those rights.

K. Employer Defenses

1. Fear of Contagion

a. Employers have sought to justify actions against employees with AIDS by asserting the fear of contagion defense (See, Shuttleworth v. Broward County Office of Budget and Management Policy, supra, where the employer justified its discharge of an AIDS victim by asserting this defense).

b. If AIDS is indeed considered a handicap and no evidence of casual transmission is discovered, the contagion defense will fail.

i. See, Shuttleworth, supra.

ii. However if AIDS is found in the future to present a significant threat of infection to co-workers, then the contagion defense would prevail.

2. Health Care Coverage Costs

a. An employer may try to justify its action of discharge or refusal to hire an AIDS victim based on economic reasons.

i. However, if AIDS is considered a handicap, this defense will not prevail as increased insurance costs have been rejected as legal reasons to refuse to hire the handicapped. Sterling Transit Co. v. FEPC, 28 FEP Cases 1351 (Cal. Ct. App., 4th District, Div. 1, 1981).

3. Employee Attendance

a. An employee with AIDS may be expected to miss more days of work.

b. Extremely poor attendance may justify medical leave.

4. Non-Acceptance by Co-Workers or Customers

a. In Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), the court held exceptions to the Rehabilitation Act's non-discrimination rule

are narrowly construed. The handicapped individual must present more than merely an "elevated risk" to the other employees or customers to justify discrimination based on a handicap. The employer must demonstrate that the employment creates a "reasonable probability of substantial harm."

i. The non-acceptance defense would fail under the same theory that the contagion defense is rejected. See, Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971), where this type of defense rejected in a sex discrimination case.

ii. Until evidence is discovered which supports transmission by casual contact the non-acceptance defense will fail.

5. Futility to Invest Training Time

a. Where significant time and money is involved in training an employee, some employers contend AIDS victims will not live long enough to justify the investment.

i. This argument may be attacked on the grounds that a significant portion of individuals who test positive for AIDS will not develop the disease.

6. Risk of Future Injury (Safety)

a. Lewis v. Ford Motor Co., 29 FEP Cases 570 (Min. Super. Ct. 1979). If the evidence shows the applicant has the present ability to physically accomplish the job duties, the employer must establish to a reasonable probability that because of the complainant's physical condition, employment in the position sought would be hazardous to the health or safety of the complainant or others. If this cannot be established, then the defense fails and the employer is not justified in discriminating against the applicant.

IV. Management Guidelines[30]

A. Be familiar with applicable state and federal statutes regarding discrimination on the basis of physical

handicap, as well as any statutes or regulations concerning communicable diseases in general.

B. Establish a corporate policy on AIDS, taking those statutes and regulations into consideration. In Kentucky, that policy might include:

1. A decision not to screen applicants or current employees for AIDS.

2. A decision as to what specific pre-employment inquiries should be made; this may depend on the job requirements and/or what industry is involved (e.g., health care).

3. A decision whether a physical examination should be required of job applications; if implemented, then must take in <u>all</u> applicants, and results must not be used in a discriminatory manner.

4. Establish a policy regarding termination or any adverse employment actions with respect to AIDS victims. Any such action should not be taken unless the employer cannot reasonably accommodate the individual and if the individual can no longer perform his or her job duties. The employer's inability to conform should be well documented.

5. In a unionized setting, employers should discuss any AIDS policy with the employees' collective bargaining representative.

C. Once a policy is established, employers should implement by educating and training managers and supervisors. Appropriate personnel actions and employment discrimination should be discussed.

D. As fear of contagion may lead to improvident employee behavior, management should consider adopting an AIDS education program for all employees.

E. Employers should keep all employee medical records concerning AIDS strictly confidential. These records should be be disclosed outside the company, and only within the company to employees with a "need to know" such information.

FOOTNOTES

[1] Public Health Services, U.S. Department of Health and Human Services, The Health Consequences of Involuntary Smoking, A Report of The Surgeon General 7 (1986).

[2] Id. at 21.

[3] Repace & Lowrey, A Quantitative Estimate of Nonsmokers' Lung Cancer Risk From Passive Smoking, 11 Env't Int'l 3 (1985).

[4] Collishaw, Kirkbride & Wigle, Tobacco Smoke in The Workplace: An Occupational Health Hazard, 131 Can. Med. A. J. 1199 (1984).

[5] Office of Technology Assessment, U.S. Congress, Smoking-Related Deaths & Financial Costs, Staff Memorandum 4 (Sept. 1985).

[6] Berkman, Warning: Smoking Cigarettes May Reduce Your Chances For a Job, 40 Cancer News 14 (Winter 1986).

[7] Weis, Can You Afford to Hire Smokers?, 26 Personnel Ad. 71 (1981).

[8] BNA, Individual Employment Rights Manual (IERM), Smoking in the Workplace, at 11.

[9] Id. at 11.

[10] Id. at 11.

[11] Schein, Should Employers Restrict Smoking in The Workplace?, Labor Law Journal (March 1987)

[12] BNA, IERM at 21.

[13] Schein, supra, at 178.

[14] Singer, "AIDS in The Workplace", Nation's Business, Aug. 1987, p. 37, HIV may be transmitted from mothers to babies in utero or through breastfeeding. Krim, Mathilde, "AIDS: The Challenge to Science & Medicine", ORB, Aug. 1986, p. 278.

[15] U.S. Public Health Services' CDC Guidelines (1:169-172); AIDS: 100 Questions & Answers, New York State Department of Health, Nov. 1, 1986.

[16] Id.

[17] National Institute of Mental Health, Coping With AIDS 1 (1986).

[18] Florman, AIDS in The Workplace: An Overview, Louisville Lawyer, Vol. 8, No. 4 (Winter 1987) at 14.

[19] Kentucky AIDS Task Force Report, The Courier Journal, Sept. 10, 1987, Sec. B, p. 2.

[20] Id.

[21] Florman, supra at 14.

[22] Id.

[23] Rousseau, The AIDS Epidemic & The Issues in The Workplace, 54 Mass. L. Rev., Summer 1987, at 59.

[24] 29 CFR Sec. 1613.706(a), (c)

[25] Leonard & Tannenbaum, "AIDS & Employment Law", Employment Problems in The Workplace, PLI C. 1986 at 159.

[26] 29 CFR Sec. 1910.132(a)

[27] Bureau of National Affairs Daily Labor Report, 3-17-86 at A-5.

[28] NLRA, Sec. 7.

[29] Rousseau, supra, at 68.

[30] Ritter & Turner, AIDS: Employer Concerns & Options, Labor Law Journal (Feb. 1987)

SMOKING CONTROLS AT A GLANCE: WORKPLACE PROVISIONS

(State Laws, Regulations, and Executive Orders)

Provisions	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS
Coverage																	
Public Employers		x	x	x	x	x	x		x	x		x	x		x	x	x
Private Employers							x			x						x	
Type of Control																	
State Law		x	x	x	x		x		x	x		x	x		x	x	x
Regulation																	
Executive Order					x	x						x					
Provisions/Requirements																	
Written/Posted Smoking Policy/Rules			x	x	x					x		x					
Sign Posting		x				x	x		x	x		x	x		x	x	x
Smoking-Permitted Areas		x	x	x	x	x	x		x	x		x	x		x	x	x
Smoke-Free Areas Specified*		x				x				x						x	x
Control Smoke with Existing Physical Barriers/ Ventilation Systems							x			x		x				x	x
Must Reasonably Accommodate Smokers		x	x	x								x			x		
Non-Smokers' Rights Prevail in Disputes			x														
No Employee Discipline/Discharge/ Discrimination for Smoking Complaint			x														
Penalties/Civil Remedies for Noncompliance		x							x	x		x	x		x	x	x

[Smoking Controls, Workplace Provisions]

Provisions	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NB	NV	NH	NJ	NM	NY	NC
Coverage																	
Public Employers			x	x	x	x	x			x	x	x	x	x	x		
Private Employers			x				x			x	x		x	x			
Type of Control																	
State Law			x			x	x			x	x	x	x	x	x		
Regulation																#	
Executive Order				x	x												
Provisions/Requirements																	
Written/Posted Smoking Policy/Rules			x	x	x	x							x	x	x		
Sign Posting						x	x			x	x	x	x	x	x		
Smoking-Permitted Areas			x	x	x	x	x			x	x	x	x	x	x		
Smoke-Free Areas Specified*				x	x		x			x	x	x			x		
Control Smoke with Existing Physical Barriers/ Ventilation Systems						x	x				x				x		
Must Reasonably Accommodate Smokers				x										x			
Non-Smokers' Rights Prevail in Disputes																	
No Employee Discipline/Discharge/ Discrimination for Smoking Complaint			x														
Penalties/Civil Remedies for Noncompliance			x			x	x			x	x	x			x		

[Smoking Controls, Workplace Provisions]

Provisions	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
Coverage																	
Public Employers	x	x	x	x		x					x	x		x		x	
Private Employers						x					x	x		x			
Type of Control																	
State Law	x	x	x	x		x					x	x		x		x	
Regulation																	
Executive Order																	
Provisions/Requirements																	
Written/Posted Smoking Policy/Rules						x						x					
Sign Posting		x	x	x		x					x			x		x	
Smoking-Permitted Areas	x	x	x	x		x					x	x		x		x	
Smoke-Free Areas Specified*	x			x								x		x			
Control Smoke with Existing Physical Barriers/ Ventilation Systems			x			x					x			x		x	
Must Reasonably Accommodate Smokers						x											
Non-Smokers' Rights Prevail in Disputes											x						
No Employee Discipline/Discharge/ Discrimination for Smoking Complaint						x					x	x					
Penalties/Civil Remedies for Noncompliance	x	x	x	x		x					x	x		x		x	

Notes:

* May include required no-smoking sections in employee cafeterias, lunch rooms, or lounges; elevators; classrooms, conference rooms, duplicating rooms, or other rooms used by employees in common, such as auditoriums, indoor cultural facilities, or health facilities; employee medical facilities; halls and stairs; rest rooms; and storage areas.

\# Implementation of New York smoking regulations is pending. See Chart 3.

LITIGATING THE EMPLOYMENT CASE

By

Paul H. Tobias
Tobias & Kraus
Cincinnati, Ohio

The following materials are excerpts from Litigating Wrongful Discharge Claims, by Paul H. Tobias, and reprinted with permission of the publisher, Callagham & Co., 155 Pfingsten Road, Deerfield, Illinois 60015-4998.

LITIGATING THE EMPLOYMENT CASE

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I. PREFACE

The trial of a wrongful discharge case has been called a David-Goliath struggle, a "little guy" vs "the establishment" encounter. There is plenty of emotion and "theatre" in the trial. Defense counsel has much ammunition by way of documents, well coached witnesses, large staff, and is usually well prepared. Plaintiff's counsel may have a just and righteous cause. But to prevail there is plenty of hard work and preparation, which needs to be done to prevail. Having "gotten to the jury" the plaintiff has a chance to tell his story to a sympathetic audience, made up for the most part of employees or former employees. Counsel for the plaintiff needs to be skillful in the presentation of the case in chief, in handling cross examination, experts, documents, and demonstrative evidence. If counsel does his homework chances are there will be a favorable verdict.

§ 12:06. Jury Selection (Voir Dire).

The plaintiff wants jurors who are sympathetic to employees, tolerant of human frailty, and free of a proemployer bias.

Although the formal purpose of voir dire is to find out whether the potential jurors have any relevant prejudices, voir dire also provides an exceptional opportunity to educate the jury about the decisions the juror will face during the upcoming trial.[1] The attorney should try to focus the juror's thinking on the issues of fairness and the dilemmas faced by your client e.g., "passively" accepting arbitrary reprimands without challenge in order to keep the job, being forced to choose between obeying a

superior and disobeying the law. If there are negative facts in your client's case, you may use the voir dire to create a favorable climate so that the jury will not prematurely reject your client's claims.

Ask questions which relate to the major theme of your case, e.g.:

1. Have you ever worked for an employer that had a handbook setting forth the rules and regulations which governed how terminations should be made?
2. Did the employer use progressive discipline and warn people before firing?
3. Have you or any family member ever been fired without cause, without the employer stating a reason for the dismissal?
4. Have you ever filed a written grievance or complaint at work? Please explain. Were you ever punished in any way by the Company or any supervisor for complaining?

One goal of the advocate is to obtain a jury which is both sensitive and sympathetic to the type of issues which are being presented. For example, if the case involves an older employee or a long service employee, it is often advantageous to have older jurors. They are more empathetic with the concerns of job security and employability. Younger jurors sometimes have a more cavalier attitude towards employment, i.e., they are more confident about their future.

On the other hand, if an underlying issue is fairness, younger jurors may have a heightened sense of fairness. Many young persons expect that employers ought to give notice, ought to give employees a chance to improve their performance, and that fair play is required in the workplace. Older jurors sometimes have accepted a deference to authority and are often accustomed to following orders and accepting injustice.

Members of any group that is a minority subjected to employment discrimination, such as Blacks, Jews, or Hispanics, are likely to be sympathetic to a victim of arbitrary treatment by a corporation.[1] Uneducated persons, laborers, intellectuals and upper class housewives tend to side with the underdog. Jurors

who can identify with defendant's principal witnesses by similar age, experience, or ethnic group, should be avoided.

If information exists about the jury panel, plaintiff's counsel should study the list of potential jurors prior to the day of jury selection. Executives, supervisors, persons identified with management, owners of businesses and others with the authority to hire and fire should be excluded. People who work for law enforcement agencies, accounting firms, and other institutions which tend to be "law and order" minded should be excluded where plaintiff is accused of an act of alleged dishonesty or violation of a rule. Women, union members, and government workers tend to favor an employee in a dismissal case.

Caution must be exercised in inferring values from occupations. A person's life experience or lifestyle may be a more accurate indicator about that person's inclinations than where the individual works or what job he or she does.

All things being equal, jurors tend to vote in accordance with their biases, predilections, views and feelings formed over a lifetime.

The voir dire examination gives counsel an opportunity to size up the potential jurors. Counsel should ask open-ended questions which permit the jurors to talk freely and reveal their personality and biases.[2] When counsel inquires about their prior employment experiences and their relatives' jobs, prospective jurors will often give clues about their attitudes towards plaintiff's case. Watch body movement and facial expression. Listen carefully to voice inflection. The body language of a prospective juror and nonverbal clues can provide immediate information about a juror's reaction to your client, your theory of the case and the authority of the court. Use your observations of nonverbal communication as just one more source of input. Generalizations may be useful in many instances, but they can also be misleading. Do not be rigid or inflexible in your analysis.

The decision about which prospective jurors to strike must be based not only on a combination of all the inputs about them but also on anticipation of which jurors the employer will want to eliminate.[3] Usually each side alternates in exercising its peremptory strikes. You must constantly keep in mind who will be left on the jury. Also be sure to weigh who will be the next

potential juror to be seated in place of the one challenged. You are forced to gamble based on the best information available. It is wise for counsel to consult with the client and to have at least one associate in the courtroom to confer with regarding which juror(s) to challenge.

Be sure when challenging for cause or when making peremptory challenges to be polite and diplomatic so as not to offend any of the other jurors.

Voir dire is the first time the juror will hear any information about the case. Voir dire is also when the jury will have its first look at the parties and counsel. Both plaintiff and plaintiff's counsel should strive to make a good first impression.

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[1] See generally Blue & Saginaw, Jury Selection/Strategy and Science.

[2] For a detailed discussion on conducting the voir dire see Blue & Saginaw, Jury Selection/Strategy and Science, ch 4.

[3] For a detailed discussion of challenges, see Blue & Saginaw, Jury Selection/Strategy and Science, ch 2.

II. PLAINTIFF'S CASE IN CHIEF

§ 12:07. Opening Statement.

Numerous studies show that many jurors make up their minds about a case right after opening statements.[1] Thus, it is essential that you immediately create in the jury a desire to find for the plaintiff employee. To reach this stage of the case, the "law" has been the focus. Now, the "facts" become dominant. The human dimension—the feelings, the incidents, the unfairness—becomes the pivotal issue. While the facts will usually determine the outcome, they must not remain cold and dry. They must come alive for the jury and make the jury want to find for the employee.

The jury looks to the lawyer to provide an overview—to present a picture which makes sense and provides a plausible explanation for the wrongs which occurred. Such a picture will allow the jury to develop a feel for the case, to sort out the evidence, to fill in the gaps. This will bring order to the massive amount of evidence the jury is about to hear. If the opening statement has performed its real function, then the jury will

listen selectively and remember those facts which fit the theory of the case that it wants to accept.

Development of Image

A very effective method to use for your opening statement is to develop an image, a concept of the case which packages the essential facts into a meaningful metaphor. This concept is most easily developed by brainstorming methods—immerse yourself in the facts, then sit quietly and let images emerge without censorship or criticism. The various images should then be submitted to colleagues or friends to test whether the image is too superficial, too complex, too patronizing or too incredible.

Once you have adopted a case concept or image, you must select three or at most four major points to emphasize to the jury. No human can absorb a great deal of detail upon first hearing.

Although jurors bring their own predispositions to the courtroom, their mental slates are blank as far as the facts of the case are concerned. You therefore need to paint the outline of a picture, giving the jury certain themes to which they can anchor the facts as they are introduced. Your themes should be simple so that they are easily understood and remembered. Your themes should also enable each juror to answer the question: How does this witness' testimony fit into plaintiff's theory and image of the case?

The plaintiff's counsel should be sure to emphasize those issues on which he or she is sure of winning. Common themes include:

1. It is unfair to fire employees who have devoted their entire adult lives to a company;
2. It is unfair to fire employees who are performing the duties of their positions; and
3. It is an assault on human dignity to summarily deprive individuals of their livelihoods.

Since the plaintiff has the burden of proof, plaintiff's counsel speaks first. The opening must be well organized and be stated in positive terms. Although technically the opening

statement is not an argument to the jury and is supposed to be a statement of what one expects to prove, the opening statement should be forceful and spoken with a controlled intensity.

Counsel should try to set the tone of the entire case in the opening statement. If there were key employer comments in depositions or documents, counsel may refer to these "smoking guns" which convey the employer's callous and cruel attitude towards either this particular employee or employees in general.

If the termination was handled in a particularly shabby or insensitive manner, counsel should make the jury aware of it during the opening statement. If the employee was fired abruptly, or escorted out of the plant by the security guard, or given notice of termination without any severance pay shortly before Christmas, or the discharge involved termination of medical insurance, these circumstances should be set forth because they add color to the facts.

Plaintiff's counsel must exercise caution not to state facts the plaintiff will not be able to prove. If counsel overstates plaintiff's case, both counsel and plaintiff will lose credibility with the jury. The defendant may also become entitled to a curative instruction that no evidence was introduced on a particular fact initially set forth by counsel. Thus, there is a continuing tension which is confronted by all plaintiff's counsel: Counsel wants to use the opportunity to influence the jury as to why the plaintiff should prevail but at the same time counsel does not want to claim more than will actually be delivered by the evidence.

Mechanics of Opening Statement

The opening statement should appear extemporaneous. The best way to make it appear extemporaneous is preparation and practice. It must not be memorized. It should not be read. If you have rehearsed the opening statement several times, you will know the essence and you will feel the case. The three major points and the few essential details will fit naturally into place. A note card containing an outline of the key points should suffice as a prop for your memory.

To increase your comfort level, rehearse before a mirror or try it out in front of a live audience consisting of office associates or family. Another tool is to videotape your opening argument. It will enable you to see yourself and adapt accordingly.

Communicate with the jury. Let them know that you understand your case, that you care about your case. It may help you relax if you free yourself from the podium. Show the jury that you can open up to them. This can convey to the jury that your case can also open itself and withstand scrutiny. You can discreetly approach your client when discussing the plaintiff's case and approach the jury when discussing its decisions and responsibilities. Although you must be cautious about emotionalism, you should humanize the situation facing the jury. The employer's attorney will usually follow an "analytical" approach. You want to personalize this dispute. This will enable the jury to feel the outcome.

It is often appropriate, and in some courts necessary, to preface statements of facts with "the evidence will show . . ." Usually it is better not to qualify, and thereby weaken your version of the facts. Find out the latitude which the particular judge will afford to counsel by checking with colleagues.

Counsel's credibility will be at stake throughout the trial. Be sure that you are somewhat conservative as to what you expect to show. If you do not "deliver" what you promise in the opening statement, your case may be in trouble. Do not ignore the weak portions of your case, which you know defendant will stress. Raise them yourself and at the same time rebut, explain and answer the arguments which they suggest. You can usually explain the context. Anticipating and rebutting defendant's arguments will take the sting away and dilute any damage defendant can inflict upon your principal claims.

It is important that counsel show respect for the judge, the opposing counsel, and for all persons in the courtroom. Nonetheless, do not hesitate to tell the jury that the defendant is a scoundrel, if in fact you can prove it.

Lawyers often neglect the subject of damages. The opening statement provides you a good opportunity to develop plaintiff's theory of damage calculation. It is not necessary to give an

amount, but counsel should stimulate the jury to listen to the evidence of suffering, and loss of income which you will show.

In summary, counsel should show the jury sincerity and belief in the plaintiff's case from the very beginning. Use opening statement as the vehicle to make the juror trust you and your version of the case.

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[1] One study reports that in 80% of cases, jurors decide issue of liability at end of the opening argument. H. Kalven & H. Zeisel, The American Jury (1966). A more recent survey disagrees, stating that only a minority reached their final decision after the opening statement and a large part of that group were probably influenced more by their own biases. Hughes & Hsiao, Does the Opening Determine the Verdict, Not in Most Cases It Appears, Trial Magazine (ATLA 1986).

See generally Julien Opening Statements.

§ 12:08. Witness Preparation.

Few attorneys will enter a courtroom without being fully prepared. The same principle must be applied to your client and other witnesses.

In some situations witness over-preparation has a negative connotation. It is referred to as "sandpapering" witnesses so that they alter their testimony by lying, becoming vague, failing to remember key facts or "misremembering." These characterizations describe extremes and conduct that professionals should avoid. It is, nevertheless, essential that a witness be properly prepared for the courtroom setting. To reduce the witness' anxiety, counsel should describe the physical aspects of the courtroom and explain the mechanics of taking the oath and talking to the jury.

During preparation for direct examination, counsel must insure that he or she has learned everything important which the witness knows about the case. Counsel should clarify that witnesses understand both the questions as well as the limitations on the type of questions counsel can ask on direct examination. For example, attorneys are not permitted to ask leading questions on direct examination—except for preliminary areas of inquiry. In addition, counsel should educate the witnesses about ambiguity. Pre-testimony preparation affords witnesses an opportunity to articulate answers, and while

maintaining truthful responses, to experiment with phrasing responses differently, outside the pressures of the courtroom.

Much of the testimony provided by a witness is peripheral to the key issues in the case. Let the witness know those portions of his or her testimony which matter and those which do not. Explain to the witness that you are trying to recreate a picture for the jury. The jury knows very little about the facts of the case, and many facts which the witness takes for granted are not part of the jury's experience. It is particularly valuable if the witness has a mental picture of the situation to which he or she is testifying. Sense impressions will bring an immediacy, accuracy and credibility to the testimony. It is particularly important that you explain to the witness the difference between an observation and a conclusion. The witness may nonetheless be entitled to express his or her opinion about certain observations.

Witnesses often become confused because they cannot remember all of the details of an incident. Be sure to explain to witnesses that it is not necessary to remember the exact details, but that the substance of the conversation or of the incident is usually sufficient. Remind the witness that it is perfectly appropriate to delay before responding to a particularly difficult question. The delay will be understood and will not appear significant.

If the court asks questions, the witness should be sure to answer the questions fully because the jury usually has a greater interest in questions asked by the court and will be impressed with a solid answer.

An unprepared witness will sometimes leave an unintended or false impression with the jury. The unprepared witness often becomes involved with the personality of the cross-examining attorney and may attempt to placate or even argue with the cross-examiner.

Cross Examination

Witnesses are usually extremely nervous concerning the questions they will be expected to answer on cross-examination. The fear of cross-examination can often be neutralized by

simulating cross-examination. If cross-examination is done aggressively, the actual examination will often seem easy by comparison. If you are a particularly aggressive cross-examiner, and you need to maintain rapport with the witness, you may want to consider having a colleague conduct the mock cross-examination. This will minimize any transference of hostility that might be generated by an aggressive simulated cross-examination.

As a general rule, witnesses should be advised against trying to discern the context of the cross-examiner's questions and the purpose or motive behind the questions. It often interferes with concentration and a long delay in answering might appear suspicious.

Counsel should prepare the witness for defense questions which are intended to cause the witness to become angry or confused. The best advice to witnesses is to stand firm on what they know is the truth. Although the court will control questioning to some extent, the witness must recognize that courts will give a significant amount of latitude before deeming the line of questioning too heavy-handed.

The witness should be prepared to give sufficient responses. Counsel should explain to the witness that there will be an opportunity on redirect examination to supplement answers.

It is often important to remind witnesses that certain words mean different things to different people. The cross-examiner will often deliberately exploit the ambiguity of words to create a false impression. If there are certain key words like "contract", inform the witness that a contract can be oral or written or implied. Similarly, if the witness is asked whether the contract was for a definite time period, the unprepared answer might be "no" because there was no promise of employment for six months or a year or two years. With preparation, however, the witness will appreciate that the duration could be described by explaining that the employee would not be terminated unless and until he had received oral and written warnings as well as a probationary period thereafter. Although a particular time was not set forth, the specific conditions remove the sense of indefiniteness.

Another way of coping with ambiguous words is to have the witness contemplate what he or she means by certain words. Then if the cross-examiner asks whether the witness has reported all of his or her "income," the witness may feel free to respond with "Not as I define income." While the differences can be elaborated on in redirect examination, clarity is improved if the witness can adopt definitions which are commonly accepted by jurors.

It is particularly important in preparing expert witnesses, that you recognize and discuss any potential defects in their analysis and or presentation of data. Experts are often scholars or academics with habits of qualifying their words, or who emphasize the limitations caused by the assumptions they had to make. It is common for experts to overlook the virtues and justification of their appraisals and emphasize what they did not do. It is usually necessary to remind the expert that in speaking to lay persons, he or she should emphasize the strengths, not the limitations of their approach.

It is not necessary for you to review with the witness all the testimony that will be presented, but you should thoroughly explore the key facts so as to be aware of all the information upon which the witness may testify.

§ 12:09. Order of Witnesses; Examination Tactics.

The general rule is to start with a strong witness and to end with a strong witness. The images presented at the beginning and end of your case are most readily remembered. This is true for your case in chief as well as for each witness. Usually the first witness should be the plaintiff. You are trying to promptly convey to the jury the impact of the decision upon him or her and to present to them the reality confronting your client at the onset. However, there are some occasions when plaintiff should testify last so he can listen to all the prior testimony. He then can clarify any inconsistencies, inaccuracies and any confusion caused by prior witnesses. These are cases where there are many eye witnesses who will corroborate plaintiff's observations or recollections.

Sometimes the plaintiff is neither an articulate, nor an intelligent person. He is simply unable to give the jury

important background evidence. The jury may need this basic information at the start before it can absorb detailed testimony about the incidents and episodes in question. If background information is essential to understanding subsequent testimony and you want to save your client for the last witness, make your first witness a coworker or former employee who can fairly present the background evidence. You can use this witness to introduce basic documents and explain the company's mode of operation and personnel practices.

Extreme caution must be exercised in calling a witness favorable to the employer at the beginning of the case. If at all possible, do not start with such a witness. It can set the wrong tone for your case. The witness favorable to management may be well prepared and can create a momentum adverse to your client. You want a witness who starts the story with evidence and feelings that are supportive of your client.

Counsel should instruct plaintiff's witnesses to talk to the jury, not to you, not to the judge, not to the audience and certainly not to the other attorney. Let your witnesses know that the jurors are the only persons who matter. If it becomes necessary to remind the witness of the real audience, preface some of your questions with "please tell the jury what your supervisor said to you."

The plaintiff's testimony is the most important part of the case. He should be knowledgeable and forceful, without being argumentative and angry. Counsel should give him some latitude so he can tell his own story in his own way. However, Counsel should control the stream of testimony by frequent questions. If necessary counsel should interrupt plaintiff if he is going too far afield. Plaintiff's testimony usually breaks down into major components: (1) background; (2) job history and achievements; (3) the incidents in question, his version of the facts concerning the allegations of poor work performance and/or misconduct; (4) evidence of misconduct and negligence on the part of the company, e.g., failure to investigate, discrimination, or mismanagement; and (5) damages.

Concerning other witnesses, if there is any doubt as to how coworkers, former employees, and other possible corroborative witnesses will testify, do not call them as witnesses. Do not risk

having a witness who may look bad on cross examination. It is better to present a few strong witnesses than a larger number of weaker witnesses.

Avoid overtrying the case. Put on your testimony with dispatch and efficiency. Keep a moderately fast pace which continues to build momentum, and then rest.

§12:10. Sequestration of Witnesses.

Plaintiff's counsel should be vigorous in invoking the evidentiary rule that witnesses be excluded from the courtroom when they are not testifying. Under the Federal Rules of Evidence the court shall order witnesses excluded so they cannot hear the testimony of other witnesses.[1] This rule was based upon the well known phenomenon that a witness who hears prior testimony may modify his or her testimony to avoid inconsistencies.

The plaintiff and any party to the case are specifically permitted by rule to be present. In addition, a corporation is entitled to have present a designated officer or employee as a representative of the company. Although the language of the rule appears to be mandatory, and is commonly granted by the court, many judges view the sequestration of witnesses as a matter within the court's discretion. Counsel should be prepared to cite authority in his or her jurisdiction to support invocation of the rule.

As with other rules, there are exceptions here too. Of prime importance is an exception for expert witnesses whose presence is essential.[2] These experts may base their expert testimony on facts presented by the other witnesses in the courtroom. Plaintiff's expert witness can also listen to the opposing expert called by defendant.

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[1] Fed Rules Evid 615.

[2] 33 Federal Procedure Lawyer's Edition pp 418–419.

§12:11. Hostile Witnesses.

Usually you will have to call one or more of defendant's key personnel as witnesses in your case in chief. You should not call a defense witness as your own unless you have deposed him previously and can lead him into the answers you want.

Reasons for Calling Hostile Witnesses

There are several reasons why you require company witnesses:

1. Often only they can supply essential elements of the case needed to avoid a directed verdict.
2. They may have made statements damaging to defendant in depositions which will help your case. They may be able to identify and clarify "smoking gun" documents upon which you are counting to win the case. You can not rely on cross examination when they appear as defense witnesses, because you cannot be sure defendant will call them.
3. Occasionally the plaintiff is too uneducated and inarticulate to give certain vital background information concerning the company's operations and facilities which the jury needs to know at the start of the trial.

Examples of information only an employer representative can supply are:

1. The company's policy of uniform adherence to its employee handbook and regarding the handbook as binding upon employer as well as employees.
2. The policy and practice of discipline, e.g., utilization of progressive discipline and a "just cause" standard in similar cases.
3. The employer's decision making process concerning the plaintiff's discharge and the extent of the employer's investigation of the matter.
4. Statistics concerning the employer workforce.
5. Information regarding current wages and fringe benefits.

In some cases plaintiff wants to show a pattern and practice of discrimination against a class, e.g., Blacks, employees over 55, or women. In discrimination cases, plaintiff often will have to rely on a company official to identify statistical information about the make up of the current workforce compared to those laid off, average ages, a comparison of the percentage of minorities hired and terminated, etc. This information will have been previously produced in answers to interrogatories but will have to be identified and explained by a live witness.

Also it may be necessary to compare plaintiff's job evaluations and appraisals with other employees' records which are worse. In addition, in age discrimination cases, a company witness is needed to identify the preferential treatment given to young people who were given the transfer opportunities in lieu of layoff denied to the plaintiff.

Since the date of termination, the employer may have given across the board salary increases, or awarded overtime regularly or instituted new pension or insurance benefits. In order to prove damages, it is necessary to place this data, including average annual earnings of employees doing comparable work, before the jury via a company representative.

In "lure-away" cases plaintiff attempts to prove fraud by showing the employer deceived him at the time of recruitment as to the truth concerning the company's intentions and the company's financial condition. It will be necessary to call company witnesses to give evidence on these points.

The personnel director is one obvious choice as a witness. He is familiar with plaintiff's employment history. He has knowledge concerning the discharge decision. He is custodian of the personnel files and earnings records of other similarly situated employees. Plaintiff's direct supervisor is another possibility.

Rule 611(c) of the Federal Rules of Evidence provides that "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions". Be sure your choice qualifies, by virtue of his position or hostility, as a witness you can call "as on" cross-examination and ask leading questions. If you have a choice, select the least attractive and least personable of the possible witnesses.

There can be great advantages in calling defense witnesses as your own. You, rather than defense counsel control their first appearance before the jury. If you have taken their depositions and are well prepared, you can control and structure the testimony so they and the employer will look very bad, so bad that when they reappear much later as defense witnesses, it will be too late for defense counsel to rehabilitate its case. Occasionally you can surprise the defense team by calling the employer

representative who is sitting at counsel table as your first witness. He will not have the advantage of having listened to the entire case. Hopefully defense counsel will not have had time to prepare him for testimony.

§ 12:12. —Subject Matter of Testimony.

Handbook Case

In a "handbook" case, plaintiff's claim for wrongful discharge arises from written representations of job security set forth in a policy manual. There may be a written statement that employees shall not be fired without just cause. Usually there are written rules setting forth serious offenses punishable by discharge. There are other rules which list reprimand as the most appropriate penalty and require corrective and progressive discipline prior to discharge. Plaintiff must establish that these rules are more than mere guidelines, but are binding statements of employer policy. Plaintiff must prove that the employer meant to outlaw arbitrary dismissals and establish standards of fairness governing discipline cases. In sum, plaintiff must show the existence of an employment contract and that the agreement forbids unjust discharge. The employer witness should be able to help.

The personnel director should be called to answer a series of precise questions establishing the agreement as follows:

1. The company has always tried to be fair and reasonable in the handling disciplinary matters.
2. The company does not condone arbitrary and capricious discharges.
3. The handbook sets forth rules and regulations binding on employees, supervisors, and top management.
4. The company's policy is to utilize progressive discipline.
5. The company's policies are designed to rehabilitate and correct.
6. The handbook establishes corrective progressive discipline.
7. Verbal and written warnings are required.
8. Discharge is used only as a last resort.

In some jurisdictions "consideration" must be shown as a basis for enforcement of promises in a handbook. It may be necessary to establish that the purpose of the handbook is to improve employee productivity and the morale of the workforce, thus producing a benefit for the employer.

Past Practice

In most discharge cases the plaintiff will attempt to show discrimination. Counsel will show that other similarly situated employees were not disciplined or were given a lesser penalty. An employee witness usually will have to be called to reveal this information. A typical question would be: Isn't it true that Bill Smith had sales totally only $200,000 in 1983? He was not fired? He was not even issued a letter of reprimand?

Investigation and Decision Making

Often the employer did not conduct a careful and thorough investigation of the facts. Sometimes key witnesses were not questioned. Very little time may have been spent in decision making. There may have been no consideration of a lesser penalty or of a transfer to another position. Only an employer representative can provide the testimony on these matters.

In public policy and other cases where the plaintiff is showing the stated reason is pretextual, it may be important to freeze the employer's witnesses' version of the facts early on, particularly when you can show them to be obvious liars. Therefore, it may be important to call an employer witness first to force him to state the reasons for the discharge as set forth in documents and depositions, which you can show to be fabrications or at least at variance from the real reasons.

§ 12:13. —Examination Tactics.

Usually the "as-on cross-examination" testimony should not be lengthy. Keep in mind that defendant will probably recall the witness as part of its defense. You do not want to waste all your ammunition. Only ask what is necessary to establish your case. Proceed in a rapid fire manner, eliciting a series of "yes" answers.

You must be careful to confine the questions to narrow areas which cannot possibly hurt the plaintiff. After you have finished your examination of the employer's witness, defendant's counsel has several options: (1) he may choose not to ask any questions, saving all the questioning of his witness until the defense case in chief; (2) he may only ask a few questions designed to clarify any major misunderstandings or admissions, saving the bulk of his testimony for the time when the witness is recalled as part of defendant's case; (3) he can ask many detailed questions and introduce evidence in areas usually covered as part of defendant's case; or (4) he may ask permission to ask questions beyond the scope of cross-examination, requesting that for expediency the witness should testify only once. If defense counsel conducts a lengthy examination, you must recross. You must use many of the questions you had reserved for the cross-examination of the witness when he appears as part of the defense case. You do not dare call a key defense witness as part of your case unless you are well prepared for such a possible scenario.

§ 12:14. Visual Evidence.

Most people recall evidence presented in a visual manner. Thus, if any portion of the employee's case can be presented in a visual fashion, its effect on the jury will be substantially increased. In personal injury cases, the damage awards were very small until Melvin Belli and others introduced demonstrative evidence. The same principle is true in employment cases. For example, if the case involves a large number of employees of a protected group who were terminated, prepare a chart identifying all the employees or list them on a blackboard. Place their ages or race alongside their names, draw lines through the older or Black employees indicating that they were "hit" or struck from the work force. Leave untouched the list of white or younger employees with their corresponding ages. Illustrate the contrast of the group which gets the privilege of retention. If the plaintiff was "put out to pasture," demonstrate visually the office where the plaintiff had been located and to where he or she was transferred as part of the demotion process. If the plaintiff's staff was reduced, identify and list the employees who

were on the plaintiff's staff and draw a line illustrating their departures.

Invariably the presentation of damages should be set forth in a visual manner. Through either expert or lay witnesses counsel should develop charts that can be used as exhibits and may be taken to the jury room for deliberations. At a minimum, counsel should use a blackboard to set forth the figures by categories which illustrate the damages suffered by the plaintiff.

If the employer's personnel rules provide for progressive disciplinary procedures, this information should be photographically enlarged and used as an exhibit. As cross-examination proceeds, counsel can ask management to identify these progressive disciplinary procedures as a policy of the corporation, and to illustrate which procedures were given and which were not given to the plaintiff. Similarly, if there are memoranda containing truths or words which depict stereotyped attitudes, enlarge the documents, so that the objectionable words or truths—the smoking guns—can be "burned" into the minds of the jurors. Consider asking the management witnesses to identify and physically initial the statements they were responsible for making. If none of the managers is willing to take responsibility for the exact statements, counsel might dramatize this absence of responsibility by identifying those portions which were not the words of a particular manager but were attributable to management. This will show the lack of personal accountability and illustrate the headless corporate "beast."

Most expert witnesses will be prepared to articulate verbally the methods of their analysis and the data underlying it. Counsel must insist that this verbal analysis be supplemented by a visual display, e.g., a chart that exemplifies the wage differential between the income the employee would have earned had he remained at his present job and the income he actually earned. A few graphs which illustrate the disparity will be easily remembered by the jurors. If the case involves complex statistical analysis, the expert must be made to portray the complicated analysis in a visual manner that is simple and readily understood. Counsel must be careful not to overdo visual evidence and to keep in mind the principle that "less is more."

Generally, charts cannot be shown to the jury until the information thereon has been admitted into evidence. Sometimes charts and graphs may be used in questioning witnesses or closing argument, even if they have not been previously identified as exhibits. If they contain summaries of evidence or conclusions which can be reasonably drawn from the evidence, they can be exhibited to the jury, even if they do not go to the jury as trial exhibits.

III. CROSS-EXAMINATION

§12:15. Purpose of Cross-Examination.

The purposes of cross examination are threefold:

1. discredit the witness, so the jury will disbelieve and dislike him;
2. limit and minimize the harm and adverse impact of his testimony; and
3. improve your own case.

In direct examination the witness is the "star." Cross examination is an opportunity for the lawyer to "star." By leading questions, counsel can dominate the scene. Counsel can show his or her sincere belief that there has been an injustice. The leading questions give an opportunity to articulate and hammer away at the themes, images, and theory of the plaintiff's case.

Cross-examination should be planned in advance. At a minimum counsel should list in writing several general areas of questioning that must be covered in all events. Some lawyers have each and every question planned in advance with precision. There, of course, should be some flexibility.

Plaintiff's case will generally be damaged by defense testimony. Every case has imperfections. Remember, to prevail, Plaintiff only has to produce a preponderance of the evidence. Much of the evidence is bound to favor the employer. Do not expect miracles on cross-examination. At best you should attempt to neutralize and soften any blows received.

§12:16. Cross-Examination Strategy.

Cross-examination of employer witnesses can be difficult. First of all, they are generally likable, attractive, intelligent,

shrewd, articulate and resourceful. Successful managers and personnel directors appear to be open, sincere, and truthful. The jury will generally like them as people.

In addition, they will be well coached by defense counsel. Prior to trial there have been numerous meetings among company personnel to review and orchestrate the company's case. Company witnesses will have carefully read their depositions and the important documents of the case. Company executives depend on the company for their livelihood. They are extremely loyal to the company. Emotions and bitterness run high in a hotly contested discharge case. Company personnel want to win. It is unlikely they will voluntarily say anything to hurt the company or help the plaintiff. Because of their intimate knowledge of the company's business, its practices, and the details of the case, they start with a great advantage.

Thorough Preparation

Successful examination of employer witnesses requires complete mastery of the facts. Plaintiff's counsel must have all the names, dates and events at his finger tips. You must spend much time going over and over the depositions, documents, and other evidence. Thorough preparation will give counsel the confidence and ability to control the cross-examination, extract favorable answers, and defuse the witness.

Control of the Witness

The time honored rule for cross examination is "never ask a question unless you know what the answer will be or it makes no difference." This rule should be followed in wrongful discharge litigation. The best way to ensure you will know the answer, is to find it in depositions or documents. The safest approach is to cross examine pursuant to a previous deposition, documents, and answers to interrogatories. Any variation by the witness will enable you to impeach as follows:

1. Isn't it a fact that on ———, 19— you were deposed in my office?
2. There, you were asked a series of questions about this case?

3. You answered these questions under oath before a court reporter and notary public?
4. You were asked the following question?
5. You gave the following answer?
6. Your answer today was different, was it not?
7. Your memory was better then, was it not?

Prior to trial you should file the original signed deposition with the court so that it is available for the witness to examine while he is on the witness stand. You should have the important pages and line numbers of the deposition at your fingertips so there will be no wasting of time.

All questions should be asked in such a manner as to require a "yes" answer. Do not give the witness any room for hostile elaboration. If the answer is unresponsive, ask the judge to require the witness to answer yes or no.

From the start, establish control over the witness by pointing out immediately, inconsistencies between his trial and deposition testimony. Then, he will be reluctant to answer incorrectly since he knows you can impeach him. He will soon respect your knowiedge of the case and his prior deposition. He will be forced to answer "yes" because any other answer will be a lie or unresponsive. The jury will then accept your version of the events.

Short, crisp questions which go directly to the point are the best. Your goal is limited: to elicit only that information which helps your case. Do not ask open-ended questions that allow management witness to be unresponsive and obfuscate the important facts.

Invariably, the worst question to ask is, "why?" If the answer is obvious, let the question remain unasked. If it's not obvious, let the question haunt the jury, rather than risk the damaging explanation.

When you obtain an admission helpful to your case, let the answer linger. Do not hurry on. If appropriate, repeat the answer. Sometimes, if you merely continue looking at the witness, the silence will make his answer echo in the jury's mind. If you didn't hear the answer clearly, repeat it to ensure that you (and the jury) hear it right.

There is great temptation to ask "one more question" to seal the case shut. Typically, it backfires. A classic story involves an attorney who succeeds in making a witness admit that he did not actually see the defendant bite off the plaintiff's nose. Giving in to the temptation not to leave well enough alone, the attorney asks, "Then just how do you know that he bit the nose." The witness's reply was succinct, "Because I saw him spit it out."

§12:17. Sample Lines of Questioning.

Typically, good evaluations and appraisals can be used:

1. Isn't it true that plaintiff was rated as an "excellent" overall employee on ———, 19—?
2. He was rated "excellent" in 5 different categories and "good" in 3 other categories?
3. His excellent rating was only six months prior to his discharge?
4. The evaluation was true when it was written?
5. The signatures on the evaluation attest that it was reviewed and approved by various supervisors?

Where the documents and depositions make certain facts absolutely clear, they should be emphasized and stretched out so as to embarrass defendant. For example:

1. At the time of his layoff plaintiff was never once considered for any other job?
2. There was not one bit of discussion concerning the possibility of a transfer or demotion?
3. There was no discussion among top management concerning any lesser penalty other than dismissal?
4. Prior to this case it was the company's practice to always consider employees who are subject to layoff or dismissal, for other positions or penalties?
5. For example, Smith was transferred in layoff in 19—?
6. Jones was penalized by a written warning in ——— 19—?
7. Neither Smith nor Jones were fired?
8. There was no attempt to get plaintiff's side of the story by interviewing him concerning the alleged misconduct.

9. The company never interviewed the following potential witnesses? (List the employees by name and ask a separate question for each.)

Other typical lines of cross-examination are:

1. Review of plaintiff's accomplishments:
   (a) "Isn't it true that he never missed a day in the last two years of his employment?"
   (b) Isn't it true plaintiff got a merit bonus of 5% in ——— 19—?
2. Comparison of plaintiff's record with others: Isn't it correct that in the Smith case, there was a written warning given for the same offense for which plaintiff was fired?"
3. Appeal to principles of fairness:

   "Isn't it correct that plaintiff was
   (a) never given any written warnings that she would be fired?
   (b) never given oral warnings that her work was unsatisfactory?"
4. Elaboration of company policy: "Isn't it true that the company policy as expressed in the employee handbook states that employees will be fired only as a last resort?"

Cross-examination of the employer decision-maker who determined to discharge plaintiff should stress the following areas:

1. The witness has no personal knowledge concerning misconduct or performance and is relying on hearsay from others.
2. Company rules were not followed.
3. The investigation was limited and short in time and scope, i.e., various witnesses were not questioned and various documents were not examined.
4. Other employees similarly situated were treated differently.
5. There were conflicting reasons given for dismissal of plaintiff.
6. There are conflicts in the version of events testified to by other witnesses.

7. There was a personal impermissible motive unrelated to the merits.
8. The manner of dismissal was humiliating and degrading.

§12:18. Tips for Questioning Employer Witnesses.

It is important to prepare two or three "zingers" carefully, well in advance of trial so you are sure that you can inflict some damage upon an adverse witness.

If the defendant's witness is an attractive personality, it is wise not to keep him on the witness stand too long. The more he talks, the more the jury may grow to like him and trust him. Conversely, if defendant's witness is making a bad impression, then you can take your time in the examination. Do not risk going over again and repeating testimony that damages your case, for fear of further damage, unless you are hurt so badly that further harm will not really matter.

Be careful with female employer officials. No one likes to see an aggressive, "smart," male lawyer browbeat a woman. Most people have a lot of respect for female supervisors and executives who have risen to important jobs.

Also be careful in cross-examination of chief executive officers. Often they are not familiar with the details of the case and sometimes you can obtain damaging admissions from them. However, these technical triumphs may be Pyrrhic victories. CEOs are usually articulate people. They are charmers. They are smart. They know how to be evasive. They will exude an attitude of fairness. Usually, it is best to try to hurt them by pointing out some clear lies they have told and get them off the witness stand before they have time to recover.

Avoid unnecessary intimidation and browbeating of the witness. Let him finish his answer. Do not berate him. Do not attempt to belittle him. Do not use rough tones of voice. Do not adopt a "smart aleck" attitude towards the witness. Avoid making the witness look like the underdog. Do not conduct the examination so the jury will sympathize with the witness. A skillful technical impeachment of the witness by use of depositions may impress your fellow lawyers but it may go over the head of the jury or even offend the jury if they feel you have taken advantage of him by use of "lawyer tricks."

On the other hand when you catch the witness in a big lie over an important point or when his answer reveals an immoral, or cruel attitude, do not hesitate to show your own righteous indignation. Be respectful to the witness, but when he says things that deserve the disrespect of the jury, you can show your own displeasure. When the witness is evasive and by his voice and answers reveals himself to be a liar and a bad person, there is no reason for the lawyer to maintain an overly respectful posture.

There are some lawyers who feel that the most effective cross-examination is not through the use of leading questions, but by letting the witness reveal the truth on his own, by the use of skillful questions. Some jurors do not like lawyers who always "put words in the mouth of the witness" and who appear to be testifying themselves.

The seeds for successful cross-examination are sown during discovery. If you keep pressing to obtain all relevant documents, you will obtain the tools to impeach at trial. Plan your depositions with trial in mind. Conduct a lengthy and thorough deposition. You can obtain the answers which will help control and demolish the witness, when you cross-examine him.

Although discovery enables you to be prepared, your prior discovery will not anticipate every development during trial. You must know your case so thoroughly that you can adapt spontaneously to these surprises. In criminal cases, parties do not have formal discovery. Counsel relies on investigation and the "rule of probabilities," i.e., they assume that what probably happened did in fact happen, and ask their questions accordingly.

If defendant's witness does not hurt plaintiff's case in direct examination, then plaintiff's counsel should ask no questions, or only a very few. There may be other occasions where the better tactic is to decide against any cross-examination. For example, if your opponent's witness has a story that is blatantly implausible, quietly gaze at the witness, look to the jury with slight sarcasm and say to the judge "Your Honor, we have no questions for this witness." If the witness has so confused and complicated the testimony that he has befuddled the jury, cross-examination may bring clarity to the situation. Sometimes the

jury will disregard confusing testimony, rather than expend the energy to sort it out. Another benefit of foregoing cross-examination is that it limits your adversary's opportunity to clean up or clarify the testimony on redirect.

Remember the plaintiff generally cannot expect to win the case through brilliant cross-examination. Cases are usually won on the strength of the testimony of your own witnesses. Cross-examination at best should be used to neutralize adverse testimony.

IV. REBUTTAL AND CLOSING ARGUMENT

§12:19. Rebuttal.

Rebuttal testimony rarely is necessary. Where there has been full discovery, plaintiff will have anticipated the major defenses and presented his rebuttal as part of his case in chief.

Assuming that plaintiff has held up well on cross-examination, it is risky to put him back on the stand on rebuttal. There is little time for preparing plaintiff. He may not be ready for defense counsel's inevitable cross. Defense counsel probably will have lots of ammunition stored up by now, and will be ready with questions he forgot to ask when plaintiff testified on direct-examination. This will be the jury's last look at the plaintiff. If there is an uncertainty on how he will perform, it is best not to display him on rebuttal. On the other hand, where there is new, surprising, and damaging testimony on points not covered by plaintiff in the case in chief, it is absolutely vital that plaintiff be called to rebut and contradict this new evidence.

§12:20. Closing Argument.

Content

The closing argument is advocacy at its best.[1] Jurors look forward to closing arguments. There is not only an indication that the end is near, but also an anticipation of impassioned advocacy. Although the content of the summation will vary with the particulars of each case, it is critical that the closing arguments include the following focus:

1. connect the key facts with the organizing theory;
2. connect the jury instructions with the plaintiff's theory of the case;
3. simplify the complexity of the factual testimony into the major themes first set forth in the opening argument; and
4. present a summary of the damages, visually if at all possible.

In closing argument, the advocate must communicate a firm belief in his or her client's cause. There is no room for ambivalence or academic qualification. As the employee's attorney, right and fairness will often be on your side. Do not be afraid to articulate these principles. It is not necessary to become excessively emotional in order to convey an impassioned feeling or conviction—tell the jury why your client should win—why your theory of the case makes more sense then the employer's theory.

The advocate must also convey credibility. Even though no single jury member will remember all of the testimony, it is critical that trial counsel stay close to the record. Collectively, the jury will remember the critical testimony. The task of plaintiff's counsel is to revive the memory and connect it up to the theory of the case. Counsel must not elaborate on facts which have not been the subject of testimony. The jury will frequently receive instructions from the court that what counsel says is not testimony. If counsel brings up new facts, the jury will often disregard the substance of his theory. Believability is also enhanced if counsel has all of the key exhibits organized and readily available for use during the closing argument.

A closing argument should offer a summary of the facts and should enable the jury to visualize what happened. The closing argument should fill in the final gaps of the picture created during the opening argument. Since the juror may have had a positive experience with his or her employer, it is important to emphasize that these are the facts of a specific case without expressly asking the jury to stand in the shoes of the plaintiff. This is, however, the real purpose of the closing argument: to enable the jury to feel or to step into the experience of the plaintiff.

Mechanics

The closing argument should have a beginning, a middle and an end. The opening line should be addressed to grabbing the jury's attention, not to apologizing about the case or in expressing appreciation. Although it is appropriate to express appreciation to the jury for its patience and impartiality, there is no need to detract from your power by the routine thank-you at the beginning. Work displays of appreciation into your argument. Express confidence in their impartiality during a discussion of direct fact disputes or weak points in your case.

As with the opening argument, the central metaphor and principles of the major theme(s) should be emphasized. The theme is the thread which connects the opening argument, the testimony, and now the summation. The theme must be a concept which is acceptable to the jury and which motivates the jury to find for the employee. The theme might be the community's interest in fair play, or the need for the jury to send a message that discriminatory conduct will not be tolerated, or the importance of human dignity and the humiliation of stripping a person of his employment without good cause, or the dedicated loyal service of the employee.

Counsel should not be afraid to use silence and pauses to emphasize the key themes as well as the evidence which supports those themes.

In closing argument counsel should be forceful and positive. Counsel should state "The evidence clearly demonstrated that . . ." rather than "I believe the evidence showed", or "In my opinion." This is the occasion to reason with the jury and show them what is significant about the facts and the existence or absence of evidence.

It is rarely desirable to restate the testimony, entire details and all, of each and every witness. The duty of plaintiff's counsel is to simplify the case, to boil it down to its major themes: simplify, simplify, simplify. Rather than reiterate the testimony, the focus should be on the strength of facts which have already been proven from the witness stand. Remind them of the source of the key facts.

A common defense tactic is to trap plaintiff's counsel into addressing each and every argument raised during summation.

There is little virtue in trying to address each and every argument the defense counsel will make. Make it your case by expressing your strengths.

Arguing Damages

A clear, concise and visual communication of the damages claimed is critical during the closing argument. Counsel should identify the psychological effects of the discharge, discussing the changes in the employee's life, family and other relationships, and reputation in the community. Many times understatement is as effective as a dramatic portrayal.

In the absence of a stipulation to the amount of damages, you must justify the demand for money damages. To supplement your verbal declarations use exhibits which identify the lost wages and benefits, both present and future, as well as any liquidated or punitive damages if available. At a minimum, use a blackboard to project the figures into the jury's visual memory.

If mitigation of damages is an important issue, counsel must sympathetically describe the plaintiff's efforts to find employment as well as the inherent problems faced by the plaintiff in securing employment. For example, elderly job applicants in the labor market often experience discrimination. No matter how great their efforts to find employment, it remains difficult. Similarly, employees who are terminated after providing long-term service to one employer often face suspicion and doubt. Abrupt termination often implies serious or egregious misconduct. Counsel must try to create the image of few openings, very few interviews, and no job offers.

Integration with Jury Instructions

Counsel can gain further credibility during the closing argument by integrating his or her arguments with the key jury instructions. While explaining the decisions which face the jury, it will give added force to counsel's arguments when the judge gives the promised instruction. For example, you could state "As the court will instruct you later, you must decide credibility; you must decide whether to believe the plaintiff or the management

witness; you must decide whether age made a difference in the employer's decision." Finally, counsel should clearly communicate to the jury what the juror's response should be on each and every interrogatory to insure that the jurors who want to rule for the plaintiff will make the correct entries.

Summary

Closing argument is the final opportunity to persuade the jury. You've already given them the reasons and enough facts. It should end on a note which makes the jury *want* to rule for your client.

Then leave it up to the jury and put your trust in them.

[1] See generally Stein Closing Argument.